Law Council
OF AUSTRALIA

Office of the President

4 March 2020

[redacted]

By email: [redacted]

Dear [redacted]

Official Draft of the National Legal Assistance Partnership

1. The Law Council of Australia (**Law Council**) appreciates the opportunity to provide a further submission to the Attorney-General's Department in response to the release of the Official Draft of the National Legal Assistance Partnership (**NLAP**).

2. It is noted that the draft text has incorporated several amendments based on feedback provided, and the Law Council welcomes the willingness of the Australian Government to listen and respond to matters raised by the legal assistance sector throughout the consultation process.

Ongoing policy concerns

3. While it is understood that consultation is to be limited to the draft text of the NLAP, the Law Council again takes the opportunity to express the concerns of its members in relation to two key policy matters.

4. Firstly, the quantum of funding for the legal assistance sector remains a significant concern for the Law Council. While additional funds in the Mid-Year Economic and Fiscal Outlook are welcome, this does little to address the successive years of chronic underfunding of the sector by the Australian Government.

5. In particular, the Law Council again calls on the Australian Government to return the Australian Government's share of funding for Legal Aid Commissions to at least fifty per cent to adequately reflect the draft text's recognition at proposed clause 2 that the Australian Government and states and territory governments 'have a mutual interest and responsibility in the provision of legal assistance services'.

6. Secondly, the decision to discontinue the Indigenous Legal Assistance Partnership (**ILAP**) continues to be a key concern for the Law Council and its members. The Law Council continues to endorse the position that funding for Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) should not be administered under the NLAP, and should instead be retained as a separate and independent funding stream under an agreement with the Australian Government.

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Advocacy and lobbying

7. The Law Council appreciates that the Australian Government's policy rationale for limiting some lobbying activities of legal assistance providers is to ensure that funding is not directed away from frontline services. Indeed, the primary focus on the delivery of legal services is common across all stakeholders, and remains a key consideration when balancing the desire to address systemic issues. However, there are innumerable examples of lobbying by the legal assistance sector to remove systemic injustices which in turn dramatically reduce the demand on frontline services. Some of these are described in the Justice Project.[1]

8. The Law Council acknowledges that the amendments to the previous restrictions on lobbying and advocacy are an improvement from the previous draft. However, the Law Council continues to oppose the attempts to limit the advocacy role of the legal assistance sector which would undermine the ability for these entities to undertake law reform campaigns on policy matters that have systemic impact on their work and are undertaken for a public benefit. The Law Council's position is that that same provisions that apply to ATSILS should be applied across the legal assistance sector.

9. The Law Council is particularly concerned that under the current provisions related to lobbying activities (clauses A17-A22) and the current definition of 'lobbying' (subclause 90(i)), the ability for legal assistance services to undertake some legitimate and critical forms of lobbying may be minimised.

10. The Law Council is concerned that the wording 'undertaking political campaigns or campaigns designed to garner public support for or against an administrative, legislative or policy decision' under the definition of 'lobbying' would limit frontline services from engaging in campaigns that are in the interests of their clients and the broader public. For example, the provision may prevent a specialist consumer or financial services legal centre from participating in a public-facing campaign to change a law or policy decision which is having, or is likely to have, a disproportionate effect on their clients.

11. While the Law Council opposes the clauses which seek to limit the ability of legal assistance providers from undertaking law reform campaigns, if the provision is to remain, the Law Council submits that the term 'unduly influence' at proposed subclause A20(b) may require clarification as this is likely to be a key threshold. In this regard, the Law Council submits that supporting material should be developed in close collaboration with the legal assistance sector, which sets out pragmatic guidance (including examples) for legal assistance services to have regard to when interpreting the lobbying restrictions within the NLAP.

12. The Law Council notes that the Official Draft recognises the vital advocacy role played by the legal assistance peak bodies. As noted already, while the Law Council considers that undertaking advocacy campaigns should not be a limited to the peak bodies. Additional funding for these bodies is required to ensure that they can undertake their valuable work. This is particularly the case in the event that these peak bodies are expected to solely undertake public campaigns, as envisaged by proposed clause A19. The Law Council submits that there should be adequate resourcing to these organisations to perform this role. In this regard, the Law Council views the ongoing, sustainable and sufficient funding and support of these peak legal

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

assistance bodies as a key element to ensure 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.

Data requirements

13. Schedule D of the NLAP draft text contains fields for disaggregated data to be reported on in the first year of the agreement, however data requirements beyond this period have not yet been determined. Given the uncertainty in data requirements beyond the first year, it is submitted that additional time should be afforded to the legal assistance sector to implement the new data requirements. This additional time, to be negotiated with the funded services, would allow for systems changes where necessary and ensure that adequate resourcing can be dedicated to meeting the reporting demands.

14. The Law Council notes that the Australian Government's intention is to ensure that data collected is consistent across jurisdictions and is sufficient to be able to:

- provide analytical tools, resources and research to support frontline service delivery; and
- facilitate a greater understanding of the delivery of legal assistance services.[2]

15. However, the Law Council refers to its previous submissions regarding to the proposed data requirements, in particular concerns that have been raised in relation to the:

(a) practical effect of onerous unit-level data collection requirements, and the potential administrative burden placed on legal services and private lawyers undertaking legal aid work in order to comply with any new or additional requirements; and

(b) potential for a client, their legal issue, and other personal information to be identified from unit level data requirements, as opposed to data being provided on an aggregated basis.[3]

16. Regarding the concerns at (a) above, the Law Council has been made aware of the practical impact that an overly onerous data collection requirement can have on frontline services. For example, practitioners acting as duty lawyers in courts of summary jurisdiction have reported that the need to record data impacts significantly on the time they have to interview, triage, and properly represent clients.

17. Indeed, in regional courts, the amount of precious time spent on data collection by practitioners is, at a minimum, 6 minutes per client. In this example, one hour of lawyer time is lost by collecting and recording data.

18. To address these concerns the Law Council urges the Australian Government to continue to work with the legal assistance sector to ensure that the level of data required under the proposal is no more than necessary to achieve the policy intentions

[2] Attorney-General's Department, *National Legal Assistance Partnership - Legal Assistance Service Data Requirements* (Discussion Paper, January 2020) 4-5.
[3] Law Council of Australia, Submission to the Attorney-General's Department, *Legal Assistance Service Data Requirements* (5 February 2020).

outlined above and that legal assistance providers are adequately funded to undertaken these heightened data collection requirements.

19. In relation to the client confidentiality concerns noted at (b) above, the Law Council highlights Rule 9 of the *Australian Solicitors' Conduct Rules* which reflects the core principle that a solicitor must not disclose client confidential information to anyone outside of the law practice, apart from a barrister or other entity involved in delivering the legal service to the client.[4] Exceptions to the basic rule include where the client has expressly or impliedly authorised disclosure, or where the solicitor is permitted or is compelled by law to disclose.[5]

20. The disclosure of any client confidential information under the NLAP would require either the informed consent of the client, or a clear statutory basis. The funding agreement itself cannot contractually oblige a funded service to disclose client confidential information, because the confidentiality belongs to the client, and thus only the client can consent to waiving this confidentiality.

21. While it is conceded that, in many instances, unit-level data can be adequately de-identified, there may be some circumstances under the proposed arrangements where an individual is identifiable under the proposed reporting framework. Should a legal service form the view that under the NLAP data requirements, it would be prudent to seek consent to the use of de-identified information at the engagement stage, this again raises issues of additional administrative steps and a question of how to report on client data where consent has not been obtained.

<u>Reallocation of funding for ATSILS</u>

22. Proposed clause 69 allows states and territories to reallocate Australian Government baseline funding for ATSILS to another Aboriginal community controlled entity if there:

    (a) are serious and objective issues relating to performance of the currently funded ATSILS that are detrimental to their present and/or potential clients which have not been rectified following the States working with the relevant ATSILS to address these issues over a reasonable period of time; and/or

    (b) is a more appropriate Aboriginal community controlled entity operating within a State which can clearly demonstrate it has the capability and capacity to provide more effective, culturally appropriate legal assistance services to Aboriginal and Torres Strait Islander people or better address legal need within a State, which results in better outcomes for current and/or potential clients.

23. Due to the risk that their funding may be moved to a 'more appropriate' entity, this decision may restrict ATSILS ability to freely advocate on these issues due to a new dependence on state and territory governments for funding. While proposed clause 70 acts as a safeguard in that a state or territory must first consult with the Australian Government, National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**) and the relevant ATSILS, the nature of this consultation should be further clarified in the agreement.

24. Specifically, the Law Council is of the view that proposed clause 70 should set out a process of consultation that allows for transparency and procedural fairness in the

[4] Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 r 9.1.
[5] Ibid r 9.2.1, 9.2.2.

decision-making process, including the explicit ability for a potentially de-funded service to respond to any claims of serious and objective issues relating to performance.

25. The Law Council also suggests that the use of 'and/or' at proposed clause 69 should be replaced with 'and', to create a situation that reallocation of resources is limited to circumstances where there are identifiable serious issues *and* a more appropriate entity.

26. Finally, the Law Council is unclear as to why proposed clause 69 refers to an 'Aboriginal community controlled entity', as opposed to explicitly limiting any reallocation of resources to another ATSILS. It is submitted that restricting reallocation to ATSILS will provide some level assurance that appropriate standards of service delivery ad expertise are maintained.

Self determination

27. The Law Council understand that NATSILS has raised a concern with the definition of 'self-determination' at proposed clause 90(n). The Law Council supports the views of NATSILS in this regard and endorses a rewording that is based on the principles underpinning the *United Nations Declaration on the Rights of Indigenous Peoples*.[6]

The Law Council looks forward to continuing to work with the Australian Government throughout the negotiation process as a member of the Advisory Group. 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

Pauline Wright
President

[6] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007).