



Law Council
OF AUSTRALIA

2022-23 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 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 90,000¹ 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 2022 Executive as at 1 January 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, 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.

¹ Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

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:

- Law Society of New South Wales;
- Law Institute of Victoria;
- Queensland Law Society;
- Access to Justice Committee;
- Family Law Section; and
- International Law Section.

Executive Summary

1. The Law Council is grateful for the opportunity to provide this submission to the Treasury for consideration in preparing the 2022-23 Federal Budget.
2. Key recommendations from the Law Council contained in this submission are as follows:
 - 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.
 - The Australian Government should increase baseline ongoing funding by least \$400 million per annum to Legal Aid Commissions (**LAC**), Community Legal Centres (**CLC**), 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.
 - The Australian Government, in consultation with state and territory governments, the judiciary and the legal profession, should commission a full review of the resourcing needs of the judicial system with a commitment to then addressing those needs.
 - The Australian Government should increase the resources of federal courts, tribunals and commissions by:
 - appointing additional judges and members;
 - promptly filling judicial vacancies;
 - providing adequate resources for registries;
 - improving relevant technology and infrastructure, including:
 - comprehensive electronic case management systems;
 - audio video capabilities in all courtrooms and other areas such as interview and break out rooms to allow parties to appear and access legal advice remotely; and
 - hearing and interview rooms, and separate waiting areas for matters involving children and domestic and family violence; and
 - improving court services in rural, regional and remote (**RRR**) areas.
 - The Australian Government should substantially increase resources for the Administrative Appeals Tribunal (**AAT**) including the appointment of new members in the Migration and Refugee Division (**MRD**) with the aim to meaningfully reduce case backlogs in that Division.
 - The Australian Government should ensure adequate funding and resourcing of the Federal Circuit and Family Court of Australia (**FCFCA**) to address critical backlogs and delays in family law proceedings.
 - The Australian Government should ensure an improved family law system by implementing the remaining Australian Law Reform Commission's (**ALRC**) recommendations which are supported by the Law Council, including:
 - continued funding to sustain judicial resourcing, particularly to ensure the replacement of judges promptly after retirement;
 - sustained funding of Court-based initiatives that aim to facilitate early dispute resolution, such as the Lighthouse Project, the Priority Property Pools under \$500 000 (**PPP500**) program and the Court-based Family Dispute Resolution program; and
 - increased funding for family law services provided by legal aid commissions and community legal centres.

- The Australian Government should urgently increase funding to LACs to enable them to improve the availability and quality of Independent Children’s Lawyers (**ICL**), including to fund the return of senior, experienced private practitioners to this work.
- The Australian Government should provide adequate, ongoing funding which meets demand for the Commonwealth Family Violence and Cross-Examination of Parties Scheme.
- The Australian Government should implement the new National Plan to Reduce Violence Against Women and their Children. This will require sustainable and appropriately funded and targeted specialist legal assistance services and court-based measures supported by social and economic measures.
- The Australian Government should allocate adequate, long-term funding for legal assistance services in RRR communities and investigate funding for the development of incentive programs that encourage solicitors to take up employment in these communities.
- Working with state and territory governments, commission a full review of the resourcing needs of RRR communities (including in relation to interactions with the justice system), with a commitment to then addressing those needs. This should include consideration of increased resourcing to fund adequate technology for internet reliability so that RRR communities have equal access to and opportunities for education and participation.
- Any review of resourcing should include nuanced and evidence-based considerations of the needs of vulnerable and digitally excluded Australians, to ensure that their legal needs are addressed and accommodated.
- The Australian Government should provide funding for a referendum regarding the establishment of a First Nations Voice to Parliament as a matter of priority.
- The Australian Government should:
 - implement the recommendations of the ALRC’s *Pathways to Justice* Report, informed by Aboriginal and Torres Strait Islander communities and their representatives, to meet or exceed the justice targets in the National Agreement on Closing the Gap;
 - 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; and
 - establish and properly resource a national justice reinvestment body and expanded justice reinvestment trials, to redirect spending to long-term solutions that work (for example, early intervention, diversion, rehabilitation, therapeutic, and exit programs and strategies).
- The Australian Government should provide appropriate, sustained and increased funding for specialist legal assistance and aged care advocacy services, government agencies, and relevant tribunals that work towards reducing elder abuse.
- The Australian Government should:
 - re-instate full Commonwealth funding for the Immigration Advice and Application Assistance Scheme for all asylum seekers in need; and
 - provide additional resources to LACs and CLCs to address gaps in migration legal assistance.

- The Australian Government should reduce the filing fees for migration-related matters in the FCFCA.
- The Australian Government should set a target for the Humanitarian Program above the ceiling of 13,750 places allocated for the 2021-22 financial year so that its commitment to allocate 13,000 places to Afghans over the next four years amounts to a total increase to the Program, rather than a shuffling of allocation within it.
- The Australian Government aim to return to 20,000 places in the Humanitarian Program over the forward estimates.
- In consultation with, and in a manner endorsed by, the federal judiciary, the Australian Government should establish and adequately resource a Federal Judicial Commission to deal with any allegation of lack of competency, serious misconduct or corruption in the High Court, federal courts and AAT.
- The Australian Government must ensure that when established, the proposed Commonwealth Integrity Commission (**CIC**) is adequately funded to achieve its purpose.
- The Australian Government should provide appropriate resourcing to review and implement the remaining Respect@Work recommendations by the end of 2022.
- 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.
- The Australian Government should review the funding of the Fair Work Ombudsman (**FWO**) to ensure that it is appropriately funded to meet the additional demand created by the impacts of the COVID-19 pandemic.
- The Australian Government should review the funding of the Australian Competition and Consumer Commission (**ACCC**) to enable its enforcement program to be carried out effectively, which includes the ability to take action against Australian Consumer Law and other consumer law breaches.
- The Australian Government provide additional funding available to the legal assistance sector targeted at meeting the ongoing and increasing legal need of climate-impacted vulnerable and disadvantaged communities.
- The Australian Government should review current federal domestic legal frameworks regarding adaptation and mitigation to climate change, to ensure that they:
 - fully implement Australia's international law obligations with respect to climate change;
 - respect, protect and fulfil Australia's international human rights law obligations;
 - give effect to rule of law principles; and
 - are fair and equitable, promote public confidence and provide a just transition for affected communities.
- The Australian Government should provide funding to support the Law Council's activity in promoting the rule of law in the South Pacific region.

Introductory comments

3. The ongoing impacts of the COVID-19 pandemic have resulted in significant disruptions to the legal profession and the delivery of legal services. The Law Council has received feedback from members of the profession indicating that the impacts of COVID-19 have exceeded what was previously expected.
4. While many state and federal border restrictions have eased, legal service providers and their clients continue to be impacted. This has been exacerbated by recent widespread community transmission of the Omicron variant of COVID-19. The Law Council is aware that some legal service providers are struggling to maintain necessary staffing levels as employees are unwell and/or required to isolate due to the virus' spread in the community.
5. The pandemic has also created significant additional overhead burdens which lawyers have been forced to bear, including technology updates, service interruptions and providing infrastructure to clients who lack it in criminal and family law matters. While this is felt across the profession, it has particularly impacted on smaller practices – many of which specialise in assisting some of the most vulnerable Australians.

Legal Assistance Sector

6. Legal problems are a common occurrence in society and most Australians will experience several interactions with the legal system throughout their lifetime. 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).
7. 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. In particular, the Law Council understands that there is an increasing demand for consumer and credit related services. Access to these services is especially important in the current economic circumstances.
8. 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

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.

9. The Final Report of the Law Council’s Justice Project also highlighted the costs (personal, community, social and economic) that arise and/or grow when people cannot access justice.⁴ These include, for example:
- unresolved problems escalating from civil or family matters, to criminal matters;
 - an inability to resolve mounting debts, fines or payments, resulting in poverty and/or eviction and homelessness; or
 - women and children remaining at risk of harm, violence and exploitation.

These scenarios have broader cost implications across a wide range of government portfolios – such as to health, housing, social services and welfare, child protection, families, corrections, policing and justice.⁵

10. The Law Council recognises that the Australian Government in recent Budgets has provided additional funds to the sector through initiatives such as the 2021-22 Budget funding to support victims of family violence and people experiencing mental health concerns, and the 2020-21 Budget COVID-19 pandemic and bushfire relief/recovery packages. While these initiatives are welcome, they are impermanent and fail to address the significant and ongoing shortfall in baseline funding for the legal assistance sector.

What level of additional Commonwealth funding is required?

11. Despite the clear economic and social benefits of investment in the legal assistance sector, the sector remains critically underfunded. The Law Council considers current Commonwealth funding levels under the National Legal Assistance Partnership (NLAP) to be approximately half of the level required to meet demand on the sector.
12. 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.⁶ 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;⁷ and
 - (b) PwC’s estimate that to return the Commonwealth’s share of LAC funding to at least 50 per cent, the Commonwealth would need to provide an additional \$190 million per annum.
13. The Law Council estimates that this shortfall is now more than \$400 million (even factoring in the additional money provided under the NLAP and other initiatives). Given that the Productivity Commission’s recommendation was made in 2014 and

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

⁵ 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.

⁶ Law Council of Australia, *The Justice Project: Final Report – Legal Services* (August 2018) 11, rec 2.1.

⁷ Productivity Commission, *Access to Justice Arrangements*, 741, rec 21.4.

was suggested merely as an interim funding solution to ‘address the most pressing needs’, the Law Council suggests that the \$200 million per annum figure is now likely to be a significant underestimate.⁸ Further, updated estimates from PwC indicate that for the Commonwealth to return to a 50 per cent share of total baseline funding for LACs under the NLAP, the level of additional funding required has increased significantly from \$190 million per annum.⁹

14. 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.¹⁰
15. Additionally, 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.¹¹

Recommendations:

- **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.**
- **The Australian Government should increase baseline ongoing funding by least \$400 million per annum 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.**

Courts and Tribunals

16. The Law Council considers that the federal courts and tribunals have been chronically under-funded and under-resourced for a substantial period of time. 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.
17. Key indicators of the current under-resourcing of courts and tribunals at the federal level include:
 - long delays in commencing and finalising matters through the courts;
 - increases in the number of matters dealt with by the courts without corresponding increases in resources, including judges and court staff;
 - large judicial caseloads and delays in judicial appointments; and
 - large numbers of self-represented litigants.

⁸ Ibid 703, 738-9.

⁹ Advice from PwC to the Law Council of Australia, October 2021.

¹⁰ 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.

¹¹ Law Council of Australia, *The Justice Project: Final Report – Governments and Policymakers* (August 2018) 14-26.

18. Extensive delays can exacerbate legal issues and create additional frustration and conflict between parties. Extensive delays also add to the costs incurred by the users of the courts.
19. Efficiency and administrative savings (including through the increased use of technology to undertake court and tribunal functions) 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.

Recommendations:

- **The Australian Government, in consultation with state and territory governments, the judiciary and the legal profession, should commission a full review of the resourcing needs of the judicial system with a commitment to then addressing those needs.**
- **The Australian Government should increase the resources of federal courts, tribunals and commissions (such as the Fair Work Commission) by:**
 - **appointing additional judges and members;**
 - **promptly filling judicial vacancies;**
 - **providing adequate resources for registries;**
 - **improving relevant technology and infrastructure, including:**
 - **comprehensive electronic case management systems;**
 - **audio video capabilities in all courtrooms and other areas such as interview and break out rooms to allow parties to appear and access legal advice remotely; and**
 - **hearing and interview rooms, and separate waiting areas for matters involving children and domestic and family violence; and**
 - **improving court services in rural, regional and remote areas.**

Administrative Appeals Tribunal

20. The Law Council has received feedback from members of the legal profession indicating that the AAT is significantly under-resourced, which has resulted in substantial case backlogs and lengthy delays in finalising applications before the Tribunal. This is supported by the AAT's own data and statements.
21. Recent data from the AAT indicates that the Tribunal has a backlog of 67,752 cases, with only 55 per cent of cases finalised within 12 months.¹² This is well short of the AAT's performance target of 75 per cent.¹³
22. The majority of the backlog can be attributed to the MRD, which finalised 18 per cent of cases within 12 months.¹⁴ Further, the median time to finalise a case in the

¹² Administrative Appeals Tribunal, *AAT Caseload Report: For the period 1 July 2021 to 31 December 2021* <<https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2021-22.pdf>>.

¹³ Ibid.

¹⁴ Ibid.

MRD is over two years (109 weeks). The lengthy delays in finalising an application in the MRD are coming at considerable human cost, especially considering the complex and highly sensitive nature of refugee matters.¹⁵

23. The significant delays associated with the MRD was identified in the Report on the Statutory Review of the *Tribunals Amalgamation Act 2015* (Cth), where it was recommended that there 'be an immediate enlargement of the membership of the Migration and Refugee Division' to resolve the substantial backlog of cases before the Tribunal.¹⁶ At the time this recommendation was made, there were 53,282 applications on hand. As noted above, on hand applications have increased to 67,752 (with 57,201 in the MRD), which emphasises the need for further funding and resourcing for the AAT to manage the increasing caseload demand.
24. The Law Council notes that the 2021-22 Budget included a measure to provide \$54.8 million over four years from 2021-22 to address the backlog of cases in the MRD (**AAT Budget funding measure**).¹⁷ However, in a 27 May 2021 Senate Estimates hearing, the AAT indicated that funding is 'not just for the AAT but for a range of the federal courts as well' and that the AAT Budget funding measure would allocate funding to enable an increase from 18,000 finalisations to 20,000 finalisations in the MRD, which is well below the current backlog.¹⁸
25. The AAT's 2020-21 Annual Report, also published after the AAT Budget funding measure, suggests that the AAT is 'not sufficiently resourced to substantially reduce' its caseload,¹⁹ and that 'unless there is a significant and sustained decline in lodgements, an increase in membership and staffing and legislative changes to give the Division the power to enforce directions, it is anticipated that the backlog and delay in finalising cases will continue'.²⁰

Recommendation:

- **The Australian Government should substantially increase resources for the Administrative Appeals Tribunal including the appointment of new members in the Migration and Refugee Division with the aim to meaningfully reduce case backlogs in that Division.**

¹⁵ Ibid.

¹⁶ Hon Ian Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015* (Report, July 2019) 6 <<https://www.ag.gov.au/sites/default/files/2020-03/report-statutory-review-aat.pdf>>.

¹⁷ Commonwealth of Australia, 'Budget Measures – Budget Paper No.2 2021-22', 131.

¹⁸ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, 27 May 2021, 20 (Ms Sian Leathem, Registrar).

¹⁹ Administrative Appeals Tribunal, *Annual Report 2020-21* (24 September 2021), 9.

²⁰ Ibid 54.

Family law system

26. Where parties cannot resolve matters themselves following relationship breakdown, the Australian family law system must deliver justice in the form of multiple avenues by which a timely, efficient and cost-effective resolution of disputes can occur and which provide protection for the vulnerable and for victims of family violence.
27. However, there will always be a need for a properly resourced and functioning court system to provide both a forum within which disputes can be resolved and a just means by which those not otherwise able to be resolved, can be determined.
28. Parties to family law proceedings continue to experience unacceptable delays in progressing their matters to resolution. The ALRC's Final Report on its *Inquiry into the Family Law System* identified multiple causes, including laws and procedures which can prolong or exacerbate conflict between the parties, under-resourcing of the courts and court-based services, and under-resourcing of legal assistance services.²¹ While progress has been made in each of these areas, a backlog of cases remains.
29. Despite recent administrative changes and the appointment of additional judicial officers, the proper resourcing of the FCFCFA remains a critical issue requiring urgent consideration. Additionally, these measures have not been accompanied by a corresponding increase in the budgets of LACs to fund practitioners to conduct cases within rules and case management guidelines which mandate more frequent appearances, a greater number of forms to be filed, and generally more work per case.
30. The Law Council acknowledges that the Australian Government has provided increased funding to support survivors of family violence in recent years. However, the Law Council is concerned that sufficient additional funding has not been provided for robust legal representation for survivors in critical areas of family law including periodic maintenance, property division, and child protection.

Recommendations:

- **The Australian Government should ensure adequate funding and resourcing the Federal Circuit and Family Court of Australia to address critical backlogs and delays in family law proceedings.**
- **The Australian Government should ensure an improved family law system by implementing the remaining ALRC recommendations which are supported by the Law Council, including:**
 - **continued funding to sustain judicial resourcing, particularly to ensure the replacement of judges promptly after retirement;**
 - **sustained funding of Court-based initiatives that aim to facilitate early dispute resolution, such as the Lighthouse Project, the Priority Property Pools under \$500 000 (PPP500) program and the Court-based Family Dispute Resolution program; and**
 - **increased funding for family law services provided by legal aid commissions and community legal centres.**

²¹ Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (Report No 135, March 2019) <<https://www.alrc.gov.au/inquiry/review-of-the-family-law-system/>>.

Critical services

31. The Law Council notes the importance of hearing and considering the views of children as part of family law court proceedings. This invariably and appropriately requires the involvement of experts, such as ICLs and Court Child Experts, to explore and communicate these views.
32. 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).²² This is highly beneficial to the court in determining parenting matters and ultimately leads to better outcomes for many children. 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.
33. Further, the Law Council considers that appropriately skilled family report writers are essential elements of a properly functioning family law system. However, the Law Council is aware that in some registries, final hearings have been delayed as family report writers have not been available to prepare a report prior to the hearing.
34. 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.

Recommendation:

- **The Australian Government should urgently increase funding to legal aid commissions to enable them to improve the availability and quality of Independent Children’s Lawyers, including to fund the return of senior, experienced private practitioners to this work.**

Section 102NA Matters

35. Section 102NA of the *Family Law Act 1975* (Cth) provides mandatory protections for parties being cross-examined in certain cases, including where one of the parties has been convicted of, or is charged with, an offence involving violence or a threat of violence.²³ Section 102NA provides that cross-examination must be conducted by

²² The 2020-21 Annual Report of the Family Court of Australia noted that in 2020-21, 15 per cent of matters involved one or both parties not having representation at any time during their proceedings: Family Court of Australia, *Annual Report 2020-21* (13 September 2021), 25. The 2020-21 Annual report of the Federal Circuit Court of Australia noted that in 2020-21, 23 per cent of family law matters involved one or both parties not having representation at any time during their proceedings: Federal Circuit Court of Australia, *Annual Report 2020-21* (8 September 2021), 27.

²³ *Family Law Act 1975* (Cth) s 102NA.

a legal practitioner to prevent personal cross-examination of victims by their alleged perpetrators.²⁴

36. The Commonwealth Family Violence and Cross-Examination of Parties Scheme was established to ensure that the requirement of this section could be met in circumstances where an alleged perpetrator of family violence has not been able to access legal assistance for the substance of the matter.
37. This is a critically important scheme in protecting victims of family violence and adequate, ongoing funding which is reflective of the significant volume of matters which rely on section 102NA is required.²⁵

Recommendation:

- **The Australian Government should provide adequate, ongoing funding which meets demand for the Commonwealth Family Violence and Cross-Examination of Parties Scheme.**

Family violence

38. The Law Council remains concerned with the prevalence of family, domestic and sexual violence in Australia. Violence against women and their children in Australia should be considered a national emergency which requires decisive and immediate action.
39. The House of Representatives Standing Committee on Social Policy and Legal Affairs in its report on *Family, Domestic and Sexual Violence* recommended a sustained, national and multi-pronged approach to preventing domestic and family violence which encompasses law reform, social and cultural change, and the provision of specialised services that support victims as well as services that address underlying issues experienced by perpetrators.²⁶
40. At the time of this submission, the Draft National Plan to End Violence against Women and Children 2022-2032 (**National Plan**) is available for consultation.²⁷ When finalised, the National Plan will represent an important framework for how Australia will respond to this national emergency over the coming decade. Implementing the National Plan will require a raft of legal responses including sustainably funded and appropriately targeted specialist legal assistance services, and court-based measures such as the Lighthouse Project.
41. Legal responses must necessarily be supported by social and economic measures, in particular:
 - community education to address the cultural norms of gender inequality at its foundation;

²⁴ Ibid s 102NA; Explanatory Memorandum, *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018* (Cth) 2.

²⁵ Explanatory Memorandum, *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018* (Cth).

²⁶ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into family, domestic and sexual violence* (Report, March 2021) rec 2 <https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Family_violence/Report>.

²⁷ Department of Social Services, *Draft National Plan to End Violence against Women and Children 2022-2032* (14 January 2021) <<https://engage.dss.gov.au/draft-national-plan-to-end-violence-against-women-and-children-2022-2032/>>.

- economic measures that target gender-based socio-economic inequality; and
- integrated, sustainably resourced programs and services in areas such as police services, school and university-based services, crisis health and accommodation services, financial assistance services, and perpetrator behaviour change programs.

Recommendation:

- **The Australian Government should implement the new National Plan to Reduce Violence Against Women and their Children. This will require sustainable and appropriately funded and targeted specialist legal assistance services and court-based measures supported by social and economic measures.**

Access to justice in rural, regional and remote communities

42. It is critically important that Australians living in RRR communities are able to access justice in the way that best suits their needs. Australians in RRR communities who face critical financial, logistical and infrastructure barriers, are amongst those whose access to justice needs are most often overlooked.
43. The Law Council is advised that there is a shortage of private and public practitioners in RRR areas. Even in Queensland, where there is a higher rate of solicitors practising in RRR areas when compared to other jurisdictions,²⁸ there remains a shortage. Consequently, unmet legal need in RRR communities is significant. To address this, the Australian Government should allocate adequate, long-term funding for legal assistance services in these regions and investigate funding for the development of incentive programs that encourage solicitors to take up employment in RRR communities.
44. Technological problems can create barriers to accessing justice in RRR areas, particularly more remote areas, for individuals seeking information or advice, lawyers in obtaining information, mentoring and support, and courts and tribunals using virtual technology.²⁹
45. Increased remote-access court appearances following the outbreak of the COVID-19 pandemic has highlighted this issue, with access to remote-access court appearances and legal services limited by unstable or unavailable internet and mobile coverage.³⁰ This is further exacerbated when some regionally based courts lack the funding for the necessary audio-visual and remote access technologies, as well as the training and administrative support required to support these arrangements.³¹

²⁸ Law Council of Australia, *Rural, Regional and Remote Australians* (Final Report, August 2018) 26.

²⁹ Karras et al, Law and Justice Foundation of New South Wales, *On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW* (2006) 104; Forell, Cain and Gray, *Recruitment and retention of lawyers*. The findings of this research paper, together with those of Cain, Macourt and Mulherin in *Lawyer availability and population change*, are summarised in Michael Cain, Deborah Macourt, Geoff Mulherin and Suzie Forell, Law and Justice Foundation of New South Wales, *Availability of lawyers in RRR locations: what we have learnt*, Updating Justice No 42 (2014) 123; Coverdale, 'Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law' (2011) 16 *Deakin Law Review* 49.

³⁰ Law Council of Australia, Rural, Regional and Remote Lawyers and Communities National Strategic Plan (November 2020), 18 <https://www.lawcouncil.asn.au/files/pdf/policy-statement/RRR_NSP.pdf>.

³¹ Law Council of Australia, *The Justice Project: Final Report – Rural, Regional and Remote (RRR) Australians* (August 2018) ch 21.

46. Poor internet and mobile coverage further impact how RRR communities experience justice in their communities. The Law Council has been advised of bail being unavailable on the basis of insufficient mobile networks to support ankle monitors, as well as mobile network-supported 'geofences' being unavailable for domestic violence victims in some RRR areas.
47. It should also be noted that improved digital inclusion for RRR communities can play an important role in preventing interactions with the justice system. In particular, education is widely recognised as one of the most important protective factors that will help keep young people out of the youth and adult criminal justice systems. Bridging the digital divide, both in physical access to technology and the resources and skills needed to accrue benefits from use, has the potential to support far-reaching change in communities, including in education, youth justice, social inclusion, economic participation and access to information.
48. The Law Council considers that in an increasingly online world, it is imperative that access to the necessary technologies in RRR areas and in RRR courts be a priority. However, vulnerable and digitally excluded Australians may not in practice be able to use these technologies and must be considered and supported in the context of these remote access arrangements.

Recommendations:

- **The Australian Government should allocate adequate, long-term funding for legal assistance services in rural regional and remote communities and investigate funding for the development of incentive programs that encourage solicitors to take up employment in these communities.**
- **Working with state and territory governments, commission a full review of the resourcing needs of rural regional and remote communities (including in relation to interactions with the justice system), with a commitment to then addressing those needs. This should include consideration of increased resourcing to fund adequate technology for internet reliability so that rural and remote communities have equal access to and opportunities for education and participation.**
- **Any review of resourcing should include nuanced and evidence-based considerations of the needs of vulnerable and digitally excluded Australians, to ensure that their legal needs are addressed and accommodated.**

Aboriginal and Torres Strait Islander peoples

Constitutional recognition

49. A commitment to the principle of self-determination and evidence-based, culturally-safe solutions is critical to addressing the inequality faced by Aboriginal and Torres Strait Islander peoples across Australia, including within the justice system. This is a national shift in perspective that requires national leadership.
50. The Law Council has previously articulated its full and unqualified support for the Uluru Statement from the Heart and the recommendations of the Referendum Council.³² It has now been more than four years since the call for a First Nations Voice enshrined in the Constitution, a process of agreement-making between governments and First Nations, and truth-telling about history. Respecting the principle of self-determination and its manifestation in practice means listening to First Nations and recognising their independent leadership and Voice on the political, economic, social and cultural matters that affect them.
51. Constitutional entrenchment would guarantee the recognition, independence and security of a First Nations Voice to Parliament and is the only form of constitutional recognition endorsed by First Nations People via the historic dialogue processes leading to the Uluru Statement.

Recommendation:

- **The Australian Government should provide funding for a referendum regarding the establishment of a First Nations Voice to Parliament as a matter of priority.**

Improving justice outcomes

52. The impact of the criminal justice system on Aboriginal and Torres Strait Islander peoples is a national tragedy, as is the disproportionately large number of Aboriginal and Torres Strait Islander children in the care and protection system. These issues should be the subject of national leadership.
53. The National Agreement on Closing the Gap now includes targets to reduce adult and juvenile incarceration, child removals and family violence rates for Aboriginal and Torres Strait Islander peoples.³³ The recently established Justice Policy Partnership, which aims to bring together Commonwealth, state and territory governments and Aboriginal and Torres Strait Islander representatives to progress this framework, is an important beginning – but will need governments to commit to proactive, sweeping and tangible actions to achieve these justice outcomes.
54. The Australian Government must implement meaningful and evidence-based strategies to address the disparate imprisonment rates and the rates of violence

³² Referendum Council, *Final Report* (30 June 2017) <<https://www.referendumcouncil.org.au/final-report.html>>.

³³ National Agreement on Closing the Gap (July 2020) <<https://www.closingthegap.gov.au/national-agreement>>.

against Aboriginal and Torres Strait Islander peoples, particularly having regard to the key recommendations of the ALRC's *Pathways to Justice Report*.³⁴

55. The Law Council urges the Australian Government to commit to working with peak First Nations bodies, including the Coalition of Peaks, to progress and lead all priority reforms, including increased and sustained funding for ATSILS and FVPLS and to increase the number of First Nations mental health support services and practitioners.

Recommendation:

- **The Australian Government should:**
 - **implement the recommendations of the Australian Law Reform Commission's *Pathways to Justice Report*, informed by Aboriginal and Torres Strait Islander communities and their representatives, to meet or exceed the justice targets in the National Agreement on Closing the Gap;**
 - **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; and**
 - **establish and properly resource a national justice reinvestment body and expanded justice reinvestment trials, to redirect spending to long-term solutions that work (for example, early intervention, diversion, rehabilitation, therapeutic, and exit programs and strategies).**

Elder law and elder abuse

56. There is a need to address the incidence of elder abuse in Australia, particularly financial elder abuse, but also physical, sexual and psychological abuse and neglect. The ALRC report *Elder Abuse – a National Legal Response* and the Final Report of the Royal Commission into Aged Care Quality and Safety recommend, and the National Plan to Respond to the Abuse of Older Australians 2019-2023 incorporates, a number of measures responding to this need.³⁵
57. The Law Council welcomes the Australian Government's recent announcement of an additional \$44 million in funding to implement the National Plan, which includes \$18.4 million over three years for specialist elder abuse units (such as specialist legal assistance services), health-justice partnerships and case management and

³⁴ Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>>.

³⁵ Australian Law Reform Commission, *Elder Abuse—A National Legal Response* (Report No 131, June 2017) <<https://www.alrc.gov.au/publication/elder-abuse-a-national-legal-response-alrc-report-131/>>; Royal Commission into Aged Care Quality and Safety, *Care, Dignity and Respect* (Final Report, 1 March 2021) <<https://agedcare.royalcommission.gov.au/publications/final-report/>>; Council of Attorneys-General, *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019-2023* (July 2019) <<https://www.ag.gov.au/rights-and-protections/publications/national-plan-respond-abuse-older-australians-elder-abuse-2019-2023/>>.

mediation services.³⁶ Also welcome is the inclusion of funding for response services such as the 1800ELDERHelp line, elder abuse research programs and elder abuse awareness initiatives.

58. However, the Law Council remains concerned that funding of specialist legal assistance and aged care advocacy services 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.
59. 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 were provided to assist persons aged 65 years and over,³⁷ despite this group constituting 16 per cent of the population.³⁸ 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.³⁹
60. Given that effective implementation of the National Plan requires a coordinated approach across all service providers, it is important that the upcoming Budget provide appropriate and sustained funding to ensure government agencies, tribunals and publicly funded services are properly resourced to implement the National Plan in a consistent manner.

Recommendation:

- **The Australian Government should provide appropriate, sustained and increased funding for specialist legal assistance and aged care advocacy services, government agencies, and relevant tribunals that work towards reducing elder abuse.**

Migration and humanitarian visa issues

Legal assistance to asylum seekers and other visa applicants

61. 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.⁴⁰ 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

³⁶ Senator the Hon Michaelia Cash, Attorney-General, 'Funding to protect the rights of older Australians' (Media Release, 20 December 2021), <<https://ministers.ag.gov.au/media-centre/funding-protect-rights-older-australians-20-12-2021>>.

³⁷ National Legal Aid Statistics Report, 'Age' (for Financial Year 2020-2021) <<https://nla.legalaid.nsw.gov.au/nlareports/Default.aspx>>.

³⁸ Australian Bureau of Statistics, Australian Demographic Statistics (Catalogue No. 3101.0, June 2019).

³⁹ National Legal Aid Statistics Report, 'Age' (for Financial Year 2020-2021) <<https://nla.legalaid.nsw.gov.au/nlareports/Default.aspx>>.

⁴⁰ Law Council of Australia, *The Justice Project: Final Report – Asylum Seekers* (August 2018) 3, 23-4.

additional resources in LACs and CLCs to address gaps in migration legal assistance.

Recommendation:

- **The Australian Government should:**
 - **re-instate full Commonwealth funding for the Immigration Advice and Application Assistance Scheme for all asylum seekers in need; and**
 - **provide additional resources to Legal Aid Commissions and Community Legal Centres to address gaps in migration legal assistance.**

Court and tribunal application fees in migration matters

62. The Law Council further calls on the Australian Government to reconsider the recent increases to the fees for applications to the AAT for review of non-protection related migration decisions⁴¹ and to the FCFCA for judicial review in migration cases.⁴²
63. The increase from \$690 to \$3,365⁴³ for migration-related applications to the FCFCA poses a severe threat to access to justice for migrants and a fundamental rule of law issue.⁴⁴ Currently, applicants who demonstrate financial hardship can access a fee waiver but vulnerable applicants may still be required to pay a fee of \$1,680,⁴⁵ which is more than double the current filing fee for other matters (\$700).⁴⁶ The Law Council also considers the \$3,000 (for migration applications) and \$1,846 (for refugee applications) fees charged by the AAT's MRD for a hearing, to be unjustifiably high, compared with other divisions of the AAT, which are mostly set at \$962 or in some cases, have no fee at all.⁴⁷
64. In the Law Council's view, increasing fees is not the way to deal with the backlog of cases before the FCFCA or the MRD of the AAT. 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 FCFCA and produce further delays. Rather, to deal with existing delays, the Law Council calls for an increase in funding to the FCFCA with a particular focus on the appointment of more judges well-qualified to determine migration law cases.

⁴¹ Following the commencement of the Migration Amendment (Merits Review) Regulations 2021 (Cth).

⁴² Following the commencement of the Federal Court and Federal Circuit Court Amendment (Fees) Regulations 2020 (Cth).

⁴³ After taking into account the automatic increases to the fee made by operation of the indexation provisions in the subregulation 2.20(1A) of the Federal Court and Federal Circuit and Family Court Regulations 2012 (Cth).

⁴⁴ Federal Circuit and Family Court of Australia, 'General federal law fees' (Web Page, 1 July 2021) <<https://www.fcftoa.gov.au/gfl/gfl-fees>>.

⁴⁵ Federal Court and Federal Circuit and Family Court Regulations 2012 (Cth), reg 2.06A.

⁴⁶ Federal Circuit and Family Court of Australia, 'General federal law fees' (Web Page, 1 July 2021) <<https://www.fcftoa.gov.au/gfl/gfl-fees>>.

⁴⁷ See Administrative Appeals Tribunal, 'Fees', *Migration and refugee: Migration* (Web Page) <<https://www.aat.gov.au/apply-for-a-review/migration-and-refugee/migration/fees>>; Administrative Appeals Tribunal, 'Fees', *Migration and refugee: Refugee* (Web Page) <<https://www.aat.gov.au/apply-for-a-review/migration-and-refugee/refugee/fees>>; Administrative Appeals Tribunal, 'Fees', *Other decisions* (Web Page) <<https://www.aat.gov.au/apply-for-a-review/other-decisions/fees>>.

Recommendation:

- **The Australian Government should reduce the filing fees for migration-related matters in the Federal Circuit and Family Court of Australia.**

Humanitarian Program

65. The Law Council calls on the Australian Government to increase the target for the Humanitarian Program above the ceiling of 13,750 places allocated for the 2021-22 financial year⁴⁸ to ensure that its commitment to allocate 13,000 places to Afghans over the next four years⁴⁹ does not come at the expense of persons of other nationalities who have been assessed, for example, by the United Nations High Commissioner of Refugees (**UNHCR**), as highly vulnerable and in need of protection.
66. The Law Council has indicated that the allocation set aside for Afghans will likely need to be revised upward going forward to ensure that Australia responds adequately and proportionately to the crisis in Afghanistan.⁵⁰ This should be considered in planning the Humanitarian Program going forward.
67. An increase to the target for the Humanitarian Program is also necessary in light of the significant fall in Humanitarian visas granted in recent years. According to the Department of Home Affairs' 2020-21 Annual Report, only 5,947 visas were granted within the Humanitarian Program in that financial year, down from 13,171 in 2019-20, 18,762 in 2018-19 and 21,698 in 2016-17.⁵¹
68. The Law Council acknowledges that the challenges of bringing people into Australia during the COVID-19 pandemic are significant. The Department of Home Affairs' 2020-21 Annual Report records that the granting of offshore Humanitarian visas had been de-prioritised for a period during 2020-21 and that COVID-19 border measures prevented travel to Australia for offshore Humanitarian visa holders unless they hold a travel exemption throughout that year.⁵²
69. However, a travel exemption is no longer required by fully vaccinated offshore Humanitarian visa holders to enter Australia.⁵³ Further, the Department of Home Affairs' 2020-21 Annual Report records that '[d]espite the impacts of COVID-19, the Department delivered 160,052 places in the [Migration] Program' in 2020-21, which filled an Annual Migration Program number set at 160,000 places.⁵⁴
70. The Law Council considers that the impact of the COVID-19 pandemic increases the onus on countries like Australia to receive persons recognised to be owed protection and who have satisfied any relevant security-related criteria, when they have

⁴⁸ Commonwealth of Australia, 'Budget Measures – Budget Paper No.2 2021-22', 11.

⁴⁹ Hon Alex Hawke MP, Minister for Immigration, Citizenship, Migrant services and Multicultural Affairs, 'Commitment of Afghanistan Increased' (Media Release, 21 January 2022), <<https://minister.homeaffairs.gov.au/AlexHawke/Pages/commitment-to-afghanistan-increased.aspx>>.

⁵⁰ Law Council of Australia, 'Australian Government's increased commitment to Afghan nationals a good start' (Media Release, 24 January 2022), <<https://www.lawcouncil.asn.au/media/media-releases/australian-governments-increased-commitment-to-afghan-nationals-a-good-start>>.

⁵¹ Department of Home Affairs, *Annual Report 2020-21*, 82.

⁵² *Ibid* 102.

⁵³ Department of Home Affairs, 'COVID-19 and the border – Vaccinated travellers' (Web Page), <<https://covid19.homeaffairs.gov.au/vaccinated-travellers>>.

⁵⁴ *Ibid* 83.

capacity to do so safely in light of the challenges presented by the pandemic. According to the UNHCR, the number of refugees resettled last year is the lowest over the last 20 years, with the COVID-19 pandemic exacerbating an existing downturn.⁵⁵

71. In the longer term, the Law Council strongly encourages the Australian Government to ensure that a temporary dip in the Humanitarian Program is not an entrenched step down. The suggestion in the 2021-22 Budget papers that the 'ceiling' of 13,750 places will be maintained 'over the forward estimates' suggests the possibility of this.⁵⁶ For this reason, the number should be a 'target' rather than a ceiling.
72. The Law Council considers that the intake should ultimately be increased to at least the 20,000 places per annum recommended by the Report of the Expert Panel on Asylum Seekers in 2012.⁵⁷

Recommendations:

- **The Australian Government should set a target for the Humanitarian Program above the ceiling of 13,750 places allocated for the 2021-22 financial year so that its commitment to allocate 13,000 places to Afghans over the next four years amounts to a total increase to the Program, rather than a shuffling of allocation within it.**
- **The Australian Government aim to return to 20,000 places in the Humanitarian Program over the forward estimates.**

Oversight and integrity

Federal Judicial Commission

73. It is essential to the promotion of the rule of law and the Australian constitutional system that there be a strong, independent, and transparent judiciary. Consistent with this aspiration, a means of fairly and punctually addressing complaints directed to the judiciary in an independent, structured manner is necessary.
74. A Federal Judicial Commission, underpinned by four key features, namely independence, coherence, accessibility and transparency, would assist to provide a clear and structured framework for responding to such complaints, and if established appropriately, will serve to promote public trust and integrity in the complaint-handling process.⁵⁸ The Federal Judicial Commission would also support the provision of education, training and support, including pastoral care, for judicial officers.
75. This issue is particularly relevant at the present time while the Australian Government considers the scope and model of the proposed CIC (discussed further below). In the Law Council's view, the Federal Judicial Commission should be established at arm's length from the executive government and separate from any

⁵⁵ United Nations High Commissioner for Refugees, Global Compact on Refugees – Indicator Report 2021 (16 November 2021) <https://www.unhcr.org/global-compact-refugees-indicator-report/wp-content/uploads/sites/143/2021/11/2021_GCR-Indicator-Report_spread_web.pdf>.

⁵⁶ Commonwealth, 'Budget Measures Budget Paper No. 2 2021-22' (11 May 2021), 11.

⁵⁷ Air Chief Marshal Angus Houston AC, AFC (Ret'd), Paris Aristotle AM, Professor Michael L'Estrange AO, *Report of the Expert Panel on Asylum Seekers* (August 2012), [3.3]-[3.8].

⁵⁸ Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, 5 December 2020) <<https://www.lawcouncil.asn.au/resources/policies-and-guidelines/policy-statement-principles-underpinning-a-federal-judicial-commission>>.

CIC, to ensure the independence of the judiciary and the separation of powers. The federal judiciary should be thoroughly consulted on any model proposed.⁵⁹

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 to deal with any allegation of lack of competency, serious misconduct or corruption in the High Court, federal courts and Administrative Appeals Tribunal.**

Commonwealth Integrity Commission

76. The administrative and executive powers of the Commonwealth have continued to be expanded significantly during the current Parliament, and in particular, throughout the COVID-19 pandemic. This is especially evident through extensive delegations of legislative powers to the executive and exercise of those powers without adequate oversight, including specific non-disallowable determinations directed at controlling cross-border travel during the COVID-19 pandemic,⁶⁰ as well as regular expansions of highly intrusive national security and law enforcement powers.
77. In this context, it has never been more critical that the Australian Government create an effective CIC, with appropriate powers and resources, to strengthen our systems of integrity and independent oversight.
78. 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,⁶¹ and the Commonwealth Integrity Commission Bill Exposure Draft was released in November 2020. However, no CIC has yet been established in Australia.
79. Furthermore, by reference to the scope of role and funding of similar bodies (such as the New South Wales Independent Commission Against Corruption and Law Enforcement Conduct Commission), the Law Council considers that the 2020-21 Budget did not contain sufficient resources to support the establishment and operation of the CIC. This should be addressed in the 2022-23 Budget.

Recommendation:

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

⁵⁹ Ibid.

⁶⁰ For example, the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 (Cth) – see subsection 475(2) of the *Biosecurity Act* 2015 (Cth) (**Biosecurity Act**) and the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 (Cth) – see subsection 477(2) of the *Biosecurity Act*.

⁶¹ Australian Government, Budget 2019-20, Budget Paper No 2: Expense Measures, 50.

Addressing gender inequality and unsafe workplaces

80. The Law Council notes the Federal Government's Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (**Roadmap**)⁶² and, pursuant to that Roadmap, the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth), passed in September 2021. The Law Council reiterates that this Act was a positive step forward in realising the recommendations of the AHRC's Respect@Work report and notes the Australian Government's planned continued roll-out of the Roadmap. Nonetheless, the Law Council maintains its position that further amendments are required to give effect to the recommendations of the Respect@Work report.
81. The Law Council also supports the implementation of other measures aimed at addressing unsafe workplaces, gender inequality, sexual harassment and discrimination. In particular, the continued resourcing of the roll-out of campaigns aimed at challenging the drivers of gender inequality, such as the Stop it at the Start Campaign⁶³ and Our Watch's whole of-school respectful relationships program.⁶⁴

Recommendation:

- **The Australian Government should provide appropriate resourcing to review and implement the remaining Respect@Work recommendations by the end of 2022.**

Adequate Resourcing for Relevant Federal Agencies and Organisations

Funding for the Australian Human Rights Commission

82. The AHRC remains significantly under resourced. The AHRC Corporate Plan for 2021-22 identified the constrained funding environment as a key strategic risk.⁶⁵ It noted that the AHRC is facing 'long term structural problems' and that its budget appropriation has not risen to account for the appointment of new commissioners and rising case numbers.⁶⁶ The AHRC has been forced to rely on external partnerships and fund-raising to undertake its program of work.

⁶² Australian Government, A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (8 April 2021) <<https://www.ag.gov.au/rights-and-protections/publications/roadmap-for-respect>>. The Roadmap represents the Australian Government's formal response to Australian Human Rights Commission's Respect@Work report: Australian Human Rights Commission, Respect@Work: Sexual Harassment National Inquiry Report (2020) <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>.

⁶³ See, eg, Australian Government, *Violence Against Women - Let's Stop It At The Start* (Web Page) <<https://www.respect.gov.au/>>.

⁶⁴ See, eg, Our Watch, Respectful Relationships Education (Web Page) <<https://education.ourwatch.org.au/>>.

⁶⁵ Australian Human Rights Commission, *Corporate Plan 2021 – 2022* (2021), 17 <<https://humanrights.gov.au/our-work/commission-general/publications/corporate-plan-2021-2022>>.

⁶⁶ Australian Human Rights Commission, *Operating environment analysis and Risk oversight and management* (2021), 7 <<https://humanrights.gov.au/our-work/commission-general/publications/corporate-plan-2021-2022>>.

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.**

Fair Work Ombudsman

83. Protecting the rights of workers and employees must involve appropriate funding of courts, commissions and other bodies such as the FWO. The FWO's annual report 2020-2021 sets out the impact of the COVID-19 pandemic on the work it undertakes.⁶⁷ The Law Council notes that the FWO was allocated an additional \$46.3 million in funding from the Government over 3 years, from 2019-20 to 30 June 2022. However, the Australian Government should review any additional need for funding as the effects of the COVID-19 pandemic continue to change.

Recommendation:

- **The Australian Government should review the funding of the Fair Work Ombudsman to ensure that it is appropriately funded to meet the additional demand created by the impacts of the COVID-19 pandemic.**

Australian Competition and Consumer Commission

84. As noted at paragraph 7 above, the Law Council understands that there is an increasing demand for consumer and credit related services. In addition to supporting consumers to bring their own actions (through the provision of dedicated additional legal assistance sector funding) the Australian Government should provide adequate resourcing of public regulators, particularly the ACCC, to enable its enforcement program to be carried out, which includes the ability to take action against Australian Consumer Law and other consumer law breaches.

Recommendation:

- **The Australian Government should review the funding of the Australian Competition and Consumer Commission to enable its enforcement program to be carried out effectively, which includes the ability to take action against Australian Consumer Law and other consumer law breaches.**

⁶⁷ Fair Work Ombudsman and Registered Organisations Commission Entity, *Annual Report 2020–21* (20 September 2021) <<https://www.fairwork.gov.au/sites/default/files/2021-10/fwo-roce-annual-report-2020-2021.pdf>>.

Climate Change

85. The impacts of climate change and its far-reaching consequences will continue to shape domestic and international legal frameworks into the future. There is a short timeframe within which to enact mitigation and adaptation strategies to minimise to the greatest extent possible the harm caused by climate change and adapt to its effects.
86. In its recent research paper entitled 'Addressing the legal needs of the missing middle', the Law Council identified emergencies, including natural and human-generated disasters, as a factor that can exacerbate existing legal problems and result in increased legal need.⁶⁸ In recognition of the ongoing and increasing legal need of climate-impacted vulnerable and disadvantaged communities, additional, targeted funding available to the legal assistance sector is required.
87. The legal implications of climate change are increasingly being tested before Australian courts. Australia will also increasingly be required to consider the risks that climate change poses to the enjoyment of human rights, as well as the role of human rights obligations in informing measures taken to mitigate and adapt to the changing climate and its impacts.
88. The next phase of development of Australia's domestic regulatory response to the physical and transition risks posed by climate change must offer long-term, evidence-based, solutions with higher levels of ambition and predictability. Australia's international law obligations and rule of law principles must be paramount in driving this domestic legislative response.

Recommendations:

- **The Australian Government provide additional funding available to the legal assistance sector targeted at meeting the ongoing and increasing legal need of climate-impacted vulnerable and disadvantaged communities.**
- **The Australian Government review current federal domestic legal frameworks regarding adaptation and mitigation to climate change, to ensure that they:**
 - **fully implement Australia's international law obligations with respect to climate change;**
 - **respect, protect and fulfil Australia's international human rights law obligations;**
 - **give effect to rule of law principles; and**
 - **are fair and equitable, promotes public confidence and provide a just transition for affected communities.**

⁶⁸ Law Council of Australia, Addressing the legal needs of the missing middle (Research Paper, November 2021) 13 <<https://www.lawcouncil.asn.au/resources/policies-and-guidelines/position-paper-addressing-the-legal-needs-of-the-missing-middle>>.

Developing and strengthening the legal profession in the South Pacific region

89. The Law Council requests that funds be allocated to support its activity in promoting the rule of law in the South Pacific region.
90. This submission is based on the premise that adequate funding of legal infrastructure in developing nations can contribute to social and economic stability, enhance law and order, promote democratic practices, reduce political unrest, ensure access to justice and help negate other foreign influences. Underpinning this premise is the assumption that it is in Australia's interests to ensure political stability and adherence to the rule of law in small Pacific Island nations.
91. The proposals below are consistent with the Government's Pacific Regional COVID-19 Development Response Plan, which acknowledges that Australia's engagement in security remains critical to the region's recovery from COVID-19 and which promotes inclusive skills development through the adaptation of training to ensure future offerings reflect the new needs of Pacific employers and those industries hardest hit by COVID-19.⁶⁹
92. Based on research carried out by the Law Council's International Law Section (**ILS**), in conjunction with the South Pacific Lawyers Association (**SPLA**), the specific areas to which the Law Council requests assistance from the Australian Government are:
 - **Telecommunications.** Improved telecommunications facilities for Pacific Island countries are vital in ensuring the viability of the legal profession in developing countries, particularly bearing in mind the increasing importance of online meetings. The ILS regularly engages in online dialogue with colleagues in the South Pacific, and poor telecommunications is a constant source of concern. It is likely that even after the pandemic, videoconference meetings will be largely preferred to face-to-face meetings, and lawyers in the Pacific will be severely disadvantaged if they are unable to communicate effectively in this manner.
 - **Capacity building.** It would be extremely beneficial to the South Pacific region if funding were made available to enable the Law Council to participate in capacity-building exercises in the region, principally relating to the establishment of law associations in Timor Leste, Tuvalu, Niue and the Federated States of Micronesia. Independent law associations are fundamental to the rule of law, and promote stability, good governance and functioning justice systems in the South Pacific. Enquiries initiated by the ILS in conjunction with the SPLA have consistently led to requests from developing countries for assistance in this regard. Law associations enable the profession to address contentious issues in a coordinated and coherent manner, as well as exercising a degree of self-regulation, and are accordingly of fundamental importance to the rule of law.
 - **Dialogue between Pacific Island nations.** The ILS considers that it would be in Australia's interests for the government to contribute funding that would facilitate videoconference meetings between leaders of the profession in the various South Pacific countries. Not only would this enable law societies and professional representatives to better communicate on issues of common importance, it would facilitate the involvement of the Law Council and enable

⁶⁹ Department of Foreign Affairs and Trade, *Pacific Regional COVID-19 Development Response Plan* (October 2020) <<https://www.dfat.gov.au/sites/default/files/covid-response-plan-pacific-regional.pdf>>.

the Australian profession to influence the manner in which law evolves in the Region. This is particularly important at a time when foreign influences are seeking to exert influence over the various arms of government in the South Pacific region (often according to values which may not accord with an Australian understanding of the rule of law and human rights);

- **Continuing professional development.** The Law Council encourages the Government to allocate funding for participation by South Pacific lawyers in online continuing professional development (**CPD**), particularly in the areas of legal practice management and business skills, professional ethics, and core legal practice skills including advocacy, drafting and negotiation (these all being areas highlighted by South Pacific legal professional bodies in a SPLA survey conducted in November 2019). By lifting the standards of the profession, this will enhance the authority and credibility of lawyers and contribute to greater stability within the region. This funding could enable CPD conferences and events in Australia or elsewhere to be filmed and made available to South Pacific lawyers.
- **Enhanced online dispute resolution capacity.** It is in the interests of Australian to invest in the enhancement of the technological and skills capacity of South Pacific lawyers to engage in online dispute resolution, including mediation and arbitration. Online alternative dispute resolution (**Online ADR**) is a fundamental component of modern legal practice, yet the ability of lawyers in the South Pacific to engage in this form of activity is hampered in a number of jurisdictions, not only by unreliable telecommunications, but also a lack of training. Online ADR contributes to the efficient disposition of civil disputes, relieving the pressure on under-resourced courts. By reducing the pressure on the court system, public confidence in the legal process is enhanced and greater stability is introduced into local business communities.

Recommendation:

- **The Australian Government should provide funding to support the Law Council's activity in promoting the rule of law in the South Pacific region.**