Law Council
OF AUSTRALIA

Office of the President

19 January 207

The Hon Michael McCormack MP
Minister for Small Business
c/o The Treasury
Langton Crescent
PARKES ACT 2600
AUSTRALIA

By online submission.

Dear Minister

2017-18 Federal Budget

Thank you for the opportunity to make a submission in relation to the 2017-18 Federal Budget. Please find attached the Law Council of Australia's submission.

The Law Council has liaised with its Constituent Bodies in the drafting of this submission, and is grateful for the input from the Law Society of Western Australia; the Law Institute of Victoria; the Law Council's Access to Justice Committee, Family Law Section, Federal Court Liaison Committee and Federal Circuit Court Liaison Committee; the National Association of Community Legal Centres; National Aboriginal and Torres Strait Islander Legal Services; and the Australian Human Rights Commission.

Please contact Ms Emma Hlubucek, Senior Policy Lawyer, Policy Division on (02) 6246 3754 or emma.hlubucek@lawcouncil.asn.au in the first instance should you require further information or clarification.

Yours sincerely,

Fiona McLeod SC
President

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2017-18 Federal Budget

The Treasury

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About the Law Council of Australia

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

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

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

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

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

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

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member

- Mr Geoff Bowyer, Executive Member

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

Introduction

1. The Law Council provides this submission in order to assist the Government in determining the direction of Commonwealth expenditure in the federal justice system under the 2017-18 Budget.

2. As outlined above, the Law Council is the national peak body for the Australian legal profession.

3. The Law Council's submission primarily concerns access to justice, including funding for legal assistance services and for the federal courts and tribunals.

4. The cost of under-resourcing the justice sector is considerable and presents a compelling case for the Commonwealth to address continued under-investment in legal assistance services. There are long-term economic benefits and savings that can be made by investing in legal assistance services and the federal courts and tribunals.

5. Conversely, cuts to legal assistance services have major down-stream costs in terms of the administration of justice and increased reliance on government services.

6. The Law Council has liaised with its Constituent Bodies in the drafting of this submission, and is grateful for the input from the Law Society of Western Australia; the Law Institute of Victoria; the Law Council's Access to Justice Committee, Family Law Section, Federal Court Liaison Committee , Federal Circuit Court Liaison Committee; the National Association of Community Legal Centres (NACLC); National Aboriginal and Torres Strait Islander Legal Services; and the Australian Human Rights Commission.

7. The Law Council would be pleased to engage further with the Department on these matters.

Recommendations

That the Commonwealth:

- *Return the Commonwealth's share of legal aid commission funding to 50 per cent with the States and Territories, i.e. an additional $147.3 million in the 2017 Commonwealth Budget*

- *Provide a further $120 million to cover civil legal assistance, with the States and Territories contributing $80 million per annum, comprising a total of $200 million per annum, as recommended by*

the Productivity Commission in its 2014 Report on Access to Justice Arrangements; (which found investing in legal assistance services would save Government and the community money in the long term)

- *Immediately reverse further Commonwealth funding cuts to legal assistance services announced in 2014, due to take effect from July 2017. These include:*
  - *$12.1 million in cuts to Community Legal Centres (CLCs);*
  - *$4.5 million in cuts to Aboriginal and Torres Strait Islander Legal Services (ATSILS); and*
  - *all cuts directed at policy and advocacy work conducted by legal assistance bodies, as recommended by the Productivity Commission*

Funding for legal assistance services

8. There is now a funding crisis in the legal assistance sector, which is resulting in tens of thousands of people seeking legal help who are turned away each year. With no other recourse, these people often end up facing court unrepresented, burning through court resources and adding to delays in court hearings, which are now up to 2 years in the federal courts.

9. The legal assistance sector is comprised of state and territory Legal Aid Commissions (LACs), Family Violence Prevention Legal Services (FVPLSs), CLCs and ATSILS.

10. The Law Council submits that:

    (a) funding for legal assistance services is grossly inadequate to meet demand; and

    (b) unmet demand for legal assistance services has significant impacts on Commonwealth and State/Territory Government expenditure across a broad range of programs.

11. The government has taken some recent initiatives in recognition of the serious unmet legal need in family violence cases, through small allocations to legal assistance under successive Women's Safety Packages.

12. This unmet legal need recognised in the context of family and domestic violence is prevalent throughout the community. 25% of Australians experience legal problems every year which are serious enough to require legal assistance. Often, all that is required to prevent these problems ballooning into more serious matters requiring regulatory response, law enforcement or court intervention is early legal advice and assistance of the kind

provided by legal aid, ATSILS, CLCs and FVPLSs. The cost of this kind of early intervention is a fraction of the cost of administering justice and the down-stream costs of reliance on other government services that may result from health problems, family breakdown, unemployment and anti-social or criminal behaviour, that are often a consequence of an initially-minor unresolved legal issue.

13. Notwithstanding the low cost of avoiding these much more expensive interventions in individuals' lives further down the track, federal funding for legal aid has declined to such an extent that just 8% of all Australians now qualify for legal aid. Given the hundreds of millions of dollars in cuts made by successive Governments, ultimately much more is needed to end the crisis in legal assistance.

Productivity Commission recommendations

14. In its 2014 Report into Access to Justice Arrangements, the Productivity Commission recommended that Australian, State and Territory Governments should provide additional funding for civil legal assistance services [of around] $200 million to address the more pressing gaps in services.[1]

15. The Federal Government has thus far failed to respond to this urgent recommendation from its chief public policy advisory body.

16. The Productivity Commission further noted that:

> *(a) Given the dearth of data, and having regard to the pressing nature of service gaps, the Commission considers that an interim funding injection in the order of $200 million – from the Australian, state and territory governments – is required per year. The Commonwealth's contribution would be in the order of 60 per cent. This funding injection would enable legal assistance services providers to address the most pressing needs, including to:*
>
> *(b) maintain existing frontline services of the LACs, CLCs and ATSILS that have a demonstrated benefit to the community and that have been affected by the recent funding decisions described above*
>
> *(c) relax the means test applied by the LACs and so allow more households to be eligible to receive grants of legal aid*

[1] Productivity Commission, *Access to Justice Arrangements*, Final Report, September 2014, Commonwealth of Australia, Recommendation 21.4.

(d) provide grants of legal aid in areas of law where there is little assistance being currently provided, either by LACs or other legal assistance services.[2]

17. The Productivity Commission's Inquiry did not consider unmet legal need in the criminal law area. While Commonwealth funding is not allocated to matters arising under State and Territory criminal statutes, there has been a significant increase in demand for legal assistance arising from Federal prosecutions in respect of terrorism-related offences, drug law enforcement and Centrelink fraud. This has largely arisen from increased federal enforcement activities, without any compensating increase in federal funding for legal assistance services. The Productivity Commission recognised that failure to adequately fund the defence in criminal trials seriously impacts on the pool available for civil matters, given the rule of law and criminal justice principles require that people facing indictment and likelihood of imprisonment have legal representation.

Legal Aid Commission funding

18. The Commonwealth's contribution to LAC funding has reduced dramatically since 1997, from around $10.88 per capita in 1996-97 to around $8.01 per capita (in real terms, adjusted for inflation and population increases), remaining largely static ever since.

19. Prior to 1996-97, the Federal Government's funding contributions to LACs accounted for 55 per cent of total funding, with the remaining 45 per cent covered by State grants and interest from public purpose funds. Following the introduction of the "Commonwealth-State divide" in 1997, the Commonwealth's share of funding fell to around 35 per cent of total funding.

20. A substantial further decline in Commonwealth funding for LACs is projected over the foreword estimates, as illustrated in Figure 1, prepared by PricewaterhouseCoopers (PwC) following the May 2016 Budget.

21. This funding decline will have serious consequences for the already-dwindling availability of legal aid, the functioning and cost of the justice system as a whole and the corresponding demand for and cost of government services in a range of other essential areas, including health, social security and other community services.

22. Actuarial analysis demonstrates that investment in legal aid can yield significant downstream savings in terms of the cost and efficiency of delivering justice.

[2] Ibid, 738-739.

23. For example, PwC has estimated that each dollar spent on legal aid returns between $1.60 and $2.25 in downstream savings to the justice system.[3]

24. Table 1 sets out PwC's actuarial estimate of the additional Federal funding required over the forward estimates to return the Commonwealth's share of legal aid commission funding to 50 per cent with the States and Territories. This would amount to an additional $147.3 million in the 2017 Commonwealth Budget.

25. Underfunding legal aid commissions directly contributes to increases in unrepresented parties before the courts, resulting in significant economic costs, in terms of reduced efficiency of the federal justice system. These costs are compounded by extensive additional costs of providing other government services, including through increased reliance on health and community services, increased unemployment, reduced productivity, social isolation, homelessness and problems associated with child welfare, increased criminal activity and higher rates of imprisonment.[4]

26. The Law Council submits that the Commonwealth should:

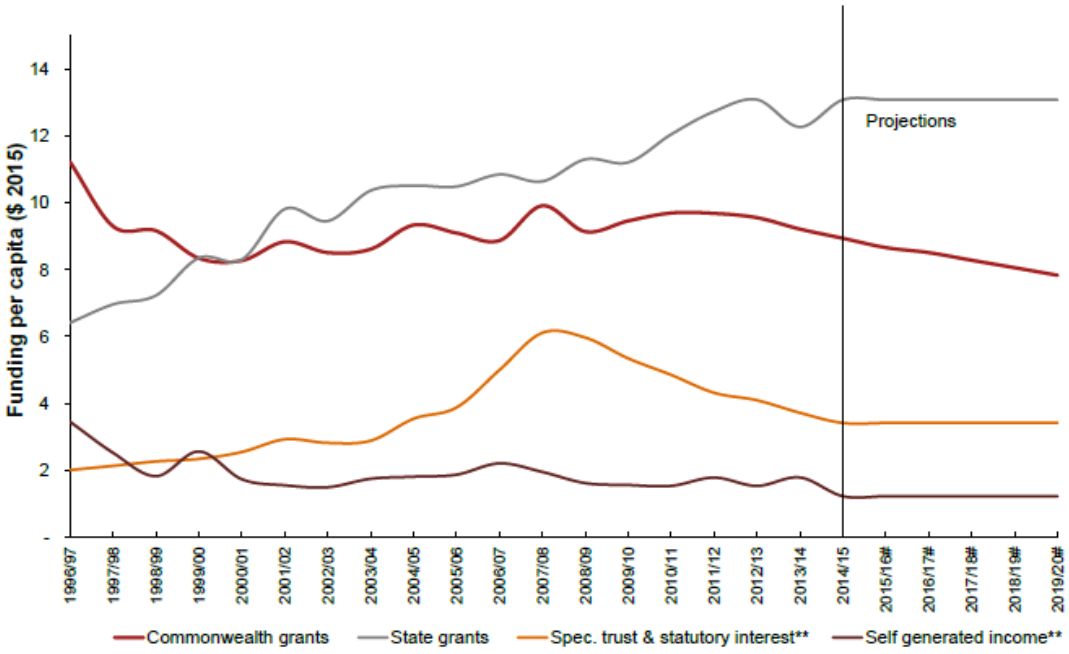
    (a) *return the Commonwealth's share of legal aid commission funding to 50 per cent with the States and Territories; and*

    (b) *contribute its share of the $200 million in additional funding recommended by the Productivity Commission to meet current shortfall in the availability of legal assistance in civil law matters.*

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

[4] Productivity Commission *Access to Justice Arrangements* (Report No. 72) September 2014, Appendix K.

Figure 1 – Real funding of legal aid commissions per capita by source (excluding Commonwealth funding for Community Legal Centres ($, 2015)



Source: NLA statistics, ABS catalogues 6401.0, 3101.0 and cat 3202.0, RBA Statement on Monetary Policy May 2016, 2016-1; Federal Budget, National Partnership Agreement on Legal Assistance Services, and 2016-17 Attorney General's Department Portfolio Budget Statement

1. 2015-16 budgeted estimates are sourced from National Legal Aid statistics.

2. 2016-17 to 2019-20 estimates of Commonwealth funding is sourced from the National Partnership Agreement on Legal Assistance Services (consistent with the 2016-17 Federal Budget) and the 2016-17 Attorney General's Department Portfolio Budget Statement

3. Commonwealth input grants includes NPA grants and funding for the Expensive Commonwealth Criminal Cases Fund

*** These are considered state sources of funding*

Table 1 - Level of nominal Commonwealth funding required for 50% share of total funding

Financial Year	Cth Input Grants*	State Input Grants	Level of additional funding required
2015-16	$211.7 million	$339.6 million	$127.8 million
2016-17	$215.9 million	$352.2 million	$136.4 million
2017-18	$217.9 million	$365.3 million	$147.3 million
2018-19	$221 million	$380.5 million	$159.5 million
2019-20	$223.7 million	$396.2 million	$172.4 million
Total			**$743.5 million**

Source: NLA statistics, ABS catalogues 6401.0, 3101.0 and cat 3202.0, RBA Statement on Monetary Policy May 2016, 2016-17 Federal Budget, 2015 National Partnership Agreement on Legal Assistance Services, and the 2016-17 Attorney General's Department Portfolio Budget Statement

*Note: *Includes NPA and non-NPA input grants. Numbers may not add due to rounding*

Aboriginal and Torres Strait Islander Legal Services

27. The reduction in Commonwealth funding to ATSILS of $17.502 million over the period 2017-18 to 2019-2020 will critically reduce the provision of services.

28. Following the 2016-17 Federal Budget, ATSILS will continue to face substantial funding cuts, commencing 1 July 2017.[5] We are advised by the National Aboriginal & Torres Strait Islander Legal Services that over the forward estimates, Commonwealth expenditure on Indigenous legal assistance services decreases by almost $18 million (when compared to the previous funding agreement in 2014-15) while Indigenous incarceration rates are at catastrophic levels and continue to increase.

29. There has been an 88 per cent increase over the past 10 years in the number of Aboriginal and Torres Strait Islander people imprisoned, [6] with Aboriginal and Torres Strait Islander adults now 13 times more likely to be imprisoned than non-Indigenous people.[7]

30. The impact of being in prison can be severe, with much higher rates of deaths in custody for Indigenous peoples[8] and the impacts of imprisonment generally affecting not only individuals but also their families and communities.[9]

31. Moreover, the financial cost of high imprisonment rates would be better spent supporting healthy and productive communities. Nationally, in 2014-15, the cost of imprisoning a young person each day was $1391.[10]

32. As noted in the submissions of National Aboriginal and Torres Strait Islander Legal Services and National Family Violence Prevention Legal Services, the legal needs of Aboriginal and Torres Strait Islander peoples are not able to be met under existing resource constraints. The consequences of this inadequate Commonwealth funding are that:

    (a) *Aboriginal and Torres Strait Islander people experience extremely high levels of unmet legal need, contributing substantially to the overrepresentation of Indigenous men, women and children in prison and youth justice systems;*

    (b) *Aboriginal and Torres Strait Islander victims of violence are often unrepresented, or unable to obtain*

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[5] Attorney-General's Portfolio Budget Papers 2016-17, p 20. https://www.ag.gov.au/Publications/Budgets/Budget2016-17/Documents/Portfolio-budget-statements/Attorney-Generals-portfolio-2016-17-PBS-full-report.pdf

[6] See Change the Record campaign, overseen by a coalition of leading Aboriginal and Torres Strait Islander, human rights and community organisations including the Human Rights Law Centre, the Law Council of Australia, Oxfam, the Secretariat of National Aboriginal and Islander Child Care and others: https://changetherecord.org.au.

[7] Productivity Commission: Overcoming Indigenous Disadvantage 2016, Chapter 4 COAG targets and headline indicators, section 4.13 Imprisonment and juvenile detention, Box 4.13.1 Key messages. URL: http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2016/report-documents/oid-2016-chapter4-coag-targets-and-headline-indicators.pdf.

[8] Ibid.

[9] Ibid.

[10] Productivity Commission: Report on Government Services 2016, at 16.30.

adequate representation, which increases their likelihood of further victimisation, homelessness and sustained disadvantage;

(c) the justice system continues to be ineffective in arresting high rates of crime, imprisonment and recidivism, perpetuating policy failures at all levels with respect to the Federal Government's 'Closing the Gap' initiatives, undermining in particular education attainment, employment targets and health outcomes; and

(d) ATSILS face enormous challenges in service provision. This includes ATSILS being:

i. generally forced to offer substantially lower salaries to lawyers (compared, for example, to LACs), undermining efforts to retain staff, often in difficult working conditions and with very high caseloads; and

ii. obliged to make staff members redundant, close offices and place a freeze on helping clients with new matters, reduce front line service delivery to urban, regional and remote areas, reduce critical afterhours help to those with emergencies and to turn away Aboriginal and Torres Strait Islander people.

33. The Law Council submits that:

(a) as a first step, it is imperative that the Government reverse funding cuts to be imposed from 2017-18; and

(b) the Government should engage with Aboriginal and Torres Strait Islander Legal Services to develop a sustainable funding model going forward, as a matter of urgency.

Community legal centres

34. Community legal centres provide direct assistance to over 200,000 clients each year. CLCs are efficient and innovative providers of free legal assistance to vulnerable and disadvantaged members of the community and the work of CLCs generates savings to governments and the community as a whole. CLCs are also able to draw upon significant pro bono and volunteer contributions.

35. As with ATSILS and LACs, government funding for CLCs has not kept pace with increasing levels of legal need, nor the cost of services. CLCs are not funded adequately to meet existing and increasing demand for services and are facing funding cuts.

36. In 2015, NACLC ran a census of its member organisations, revealing that over 150,000 people were turned away in that year because the CLCs did not have the capacity to deal with demand.[11]

37. The reduction in Commonwealth funding to CLCs of $34.83 million over the period 2017-18 to 2019-2020[12] will reduce the Commonwealth's existing funding contribution by 30 per cent and this will critically reduce the provision of services.

38. Economic analysis demonstrates that investment in CLCs and other legal assistance bodies can result in substantial long-term dividends, in some cases yielding returns of many times the level of funding provided.[13]

39. In addition, the Legal aid services have been inundated with requests for assistance from welfare recipients related to letters they have received from Centrelink, many of whom have been wrongly pursued due to inaccurate assumptions from the automated data matching system. The Commonwealth Ombudsman has been asked to investigate faults with the new automated data matching system.[14]

Family Violence

40. CLCs also play a key role in the legal framework in responding to and addressing family violence,[15] the flow-on effects of which impact credit and debt, tenancy, homelessness and access to social security.[16]

41. A number of Australian and overseas studies have highlighted the prevention of family violence as a benefit arising from legal assistance. Legal assistance providers can provide assistance to people seeking an apprehended violence order (AVO), including preparing and assisting with documentation and representation in court proceedings.[17]

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[11] 'Brandis, Tudge spearhead legal war on poor', Canberra Times, Jenna Price, 17 January 2017, URL: . http://readnow.isentia.com/Temp/91786/714253606.pdf.
[12] National Association of Community Legal Centres Media Release: One year until crippling cuts to legal assistance sector, 1 July 2016, http://www.naclc.org.au/cb_pages/news/MediaReleaseOneYearUntilCripplingCutsToLegalAssistanceSector.php.
[13] See for example Judith Stubbs & Associates, *Economic Cost-Benefit Analysis of Community Legal Centres*, June 2012, National Association of Community Legal Centres. See http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload0463.pdf.
[14] 'Calls for Centrelink debt bungle probe: claims welfare recipients are being wrongly hounded', News.com.au, 4 January 2017, URL: http://www.news.com.au/finance/work/calls-for-centrelink-debt-bungle-probe-claims-welfare-recipients-are-being-wrongly-hounded/news-story/23f7e122610ef7be4217f09ed6c882a3.
[15] National Association of Community Legal Centres: Submission to Australian Government Federal Budget 2016-2017, published 9/2/16, http://www.naclc.org.au/resources/NACLC_Federal_Budget_Sub_2016_17_Final_PDF.pdf.
[16] Ibid.
[17] Productivity Commission: Access to Justice Arrangements Report, Appendix K Measuring the benefits of legal assistance services, 3 December 2014, URL:

42. The costs of family violence should also be considered. Analysis by Access Economics in 2004 estimated that the annual costs to government from family violence exceeded $1.3 billion in 2002-03, with broader costs to society of approximately $8.1 billion. This amounted to more than $3000 per victim in annual costs to government, and almost $20 000 per victim in annual costs to society when averaged across the estimated number of victims.[18]

43. In 2009, KPMG updated these estimates to project the costs of violence against women in the year 2021-22. They estimated the annual costs to government will be $7640 per victim, with broader social costs of more than $40 000 per victim each year in 2021-22.[19]

44. On 28 October 2016, the Prime Minister, the Hon Malcolm Turnbull MP, launched the Third Action Plan of the *National Plan to Reduce Violence against Women and their Children 2010-2022* (the National Plan) at the Council of Australian Governments (COAG) National Summit on Reducing Violence against Women and their Children in Brisbane. The Australian Government committed $100 million over three years to support the Third Action Plan to reduce violence against women and their children. Of the $100 million, the Attorney-General announced the allocation of $30 million in family violence funding over three years for front-line legal assistance and family law services on 28 October 2016.[20]

45. The $100 million the Commonwealth is providing for the Third Action Plan is in addition to the $100 million Women's Safety Package announced by the Coalition Government in September 2015.[21]

46. The NACLC welcomed the Government's announcement in October 2016 that $15 million of the Women's Safety Package would be used to establish 12 new specialist domestic violence units and fund five health justice partnerships within existing legal assistance services located in domestic violence 'hot spots',[22] and the $5 million provided subsequently for an extra year of the legal assistance pilots under the Women's Safety Package.

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http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-appendixk.pdf, p. 6.

[18] Id, p 9.

[19] Id, p 10.

[20] Media Release: Third Action Plan to reduce family violence, 28 October 2016, URL: https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/FourthQuarter/Third-action-plan-to-reduce-family-violence.aspx.

[21] Prime Minister of Australia, the Hon Malcolm Turnbull MP, 28 October 2016, Government Strengthens Investment to reduce Violence against Women and Children, URL: https://www.pm.gov.au/media/2016-10-28/government-strengthens-investment-reduce-violence-against-women-and-children.

[22] Media Release: NACLC acknowledges limited additional family violence funding for Community Legal Centres, 28 October 2016, http://www.naclc.org.au/cb_pages/news/NACLCacknowledgeslimitedfamilyviolencefunding.php.

47. However, NACLC notes that funding for the family violence work of CLCs is insufficient to meet rising demand for assistance and the additional funding provided to a small number of CLCs under the Women's Safety Package does not offset the broader funding cuts CLCs face from 2017. Following the cuts planned for July 2017, CLCs will be in a worse position than they were in prior to the first Women's Safety Package, with less capacity to meet the critical needs of women and families affected by domestic violence.

Immigration Advice and Application Assistance Scheme

48. The Law Council continues to be concerned about withdrawal of funding of the Immigration Advice and Application Assistance Scheme (IAAAS) in March 2014, which has left up to 30,000 asylum seekers without access to funded legal representation.

49. The IAAAS was an important measure to promote the rule of law by providing for some limited funding for Australian lawyers and migration agents to provide limited assistance to asylum seekers to enable them to prepare their claims for refugee status or other protection.

50. The withdrawal of this funding undermines the Government's stated objective with the passage of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) – to create a fast-track model for processing protection assessments more efficiently. Withdrawal of legal assistance reduces efficiency and ultimately leads to increased costs and poorer outcomes.

51. While the Law Council welcomed the introduction of the Primary Application Information Service (PAIS) scheme to process the post-13 August 2012 cohort of the "illegal maritime arrival" legacy caseload, it remains concerned that the PAIS scheme is limited to the "most vulnerable" applicants, leaving the large majority without funded legal assistance.

52. The Law Institute of Victoria has advised the Law Council of substantial delays in listing legacy caseload judicial review cases in the Federal Circuit Court, and that the caseload for this cohort is likely to increase over the next few years. Increased funding and resources are required to enable the Federal Circuit Court to process this caseload and to provide support to asylum seekers going through this process (many of whom may be unrepresented).

53. While the legal profession has always prioritised providing pro bono assistance to vulnerable individuals, the withdrawal of this funding has led to an unreasonable burden on the Australian legal community and the levels of need in this area far outweigh the resources available. This funding withdrawal has placed immense pressure on immigration lawyers to undertake more pro bono work, conscious that clients cannot afford the fees and will otherwise be left with no legal assistance. It is

the government's responsibility to provide this basic level of assistance to these vulnerable persons in our community

Federal courts and tribunals

Family courts

54. The family courts comprise the Family Court of Australia and the family law jurisdiction of the Federal Circuit Court, which undertakes the majority of the family law workload of the federal courts. There is a separate Family Court of Western Australia, and appeals from that court lie to the Full Court of the Family Court of Australia. It has been the position of the Law Council for many years that the family courts are inadequately resourced.

55. A range of social costs result from the failure of governments to resource the family courts, which compound daily. The cases in family courts (involving families in crisis, children at risk, and growing numbers of cases involving substance abuse, child neglect and domestic violence) are more likely to require judicial determination and less likely to resolve outside the court system. Delays perpetuated by insufficient funding increase risks and uncertainty for children and victims of family violence, and discourage victims from seeking protection through the justice system. The Law Council supports calls by the family courts for additional funding to help them better respond to victims of family violence.

56. The Government commissioned KPMG in 2014 to report on the structure and funding of the federal courts. Although not publicly released by the Government, media reports suggest the Report confirms that the federal courts are under-resourced and that urgent steps are required to maintain, let alone improve, court services. Despite ongoing calls for public release of the KPMG report, this has still not occurred.

57. The workloads of the courts are ever-increasing, and the failure by government to replace retiring judges in a timely manner, and increase the numbers of judicial officers necessary to meet existing case requirements exacerbates the problem.

58. The Courts Administration Legislation Amendment Bill 2015, which was passed in March 2016, merges the corporate services functions of the Federal Court with those of the Family Court and Federal Circuit Court. When the Bill was introduced, the Government committed to reinvest any savings gained through this legislation back into the courts to support their core functions. While the Law Council supports this reinvestment, it still falls well short of what is required to enable the family courts to deliver timely services to the community.

Federal Circuit Court

Expanding General Jurisdiction

59. The Federal Circuit Court has an increasingly broad general law jurisdiction in addition to its considerable family law jurisdiction. There is a significant cumulative impact of the continued conferral of additional jurisdiction on the Court as Commonwealth legislation provides for recourse to it in a diverse range of commercial and other general federal areas for which the Commonwealth has responsibility,[23] without the appointment of additional Judges to manage the cases that are commenced in reliance on and pursuant to that additional jurisdiction. For example, the Court is (or will shortly be) accruing further jurisdiction as a result of the passage of legislation to re-establish the Australian Building and Construction Commission (ABCC) and it will have some further limited jurisdiction under the amendments to the Registered Organisation (RO) provisions.

60. The Court's workload in particular aspects of its existing jurisdiction is continuing to increase without the conferral of additional jurisdiction for ABCC and ROs, particularly in industrial law and migration matters. Chief Judge John Pascoe AC CVO of the Federal Circuit Court wrote in the Court's *Annual Report* 2014/15 that over the previous five years the number of migration filings had grown four-fold. Projected filing figures for migration and industrial applications for 2016-2017 (based on filings to 31 October 2016) show a further marked upward trend with the possibility of overall filings nearing 100,000. The increasing migration workload is clearly impacting on judicial resources and there is little that the Court can do other than list matters out for a hearing. Unlike family law, where the majority of matters filed do not proceed to a final hearing (and are resolved before final hearing), most migration matters do require a hearing and the allocation of judgment writing time. The processing of the approximately 30,000 persons who comprise the migration legacy caseload will stretch the Court's already limited judicial resources even further.

61. The additional conferral of appropriate general federal jurisdiction on the Court is not inappropriate: the Court in its general federal jurisdiction is intended to operate as the intermediate federal court across Australia and dispose of matters that are brought to it cost effectively and efficiently and in accordance with the law. This is of particular benefit to small–and-medium–sized enterprises (SMEs) and family

[23] In 2015, for example, jurisdiction in relation to Commonwealth tenancy disputes was conferred on the Court under the *Federal Courts Legislation Amendment Act 2015* (Cth). See also: Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015.

businesses more generally. It is also of particular benefit where the extension of jurisdiction fills a jurisdictional vacuum that is inconsistent with the conferral of other related jurisdiction. That is why, for example, the Law Council has advocated for a limited conferral of corporations law jurisdiction on the Court, with the result that in December 2015 the Senate Economic References Committee recommended the Australian Government give serious consideration to extending the jurisdiction of the Federal Circuit Court to include corporate insolvencies under the *Corporations Act 2001* (Cth). [24]

62. However, there are still only a limited number of judges of the Court with appropriate general law expertise and the workload of the Court is such that all judges have very full dockets and there are limited opportunities for cross-jurisdictional support. The lack of funding to support the appointment of additional Judges to deal with the Court's increasing workload threatens the Court's capacity to properly perform its intended function as the intermediate federal court and undermines the confidence of the public and SMEs in its capacity to resolve cases in a timely, cost effective and just manner.

63. While the Law Council has consistently supported the expansion of the Federal Circuit Court's general law jurisdiction as appropriate to its intended functions and necessary to relieve pressure on higher courts, increased funding and the timely appointment of additional judges in each of its jurisdictions is critical to enable the Federal Circuit Court to process its existing workload and any additional work arising from its expanding general jurisdiction.

Intellectual Property

64. The Productivity Commission released an Intellectual Property Arrangements Inquiry report on 20 December 2016 which examines Australia's Intellectual Property (IP) system and makes recommendations to improve its operation.

65. The Productivity Commission argues that reform is required to improve access for SMEs to enforcement and justice. Large, well-resourced firms are able to adequately resolve their IP disputes, however SMEs are often deterred from doing so due to the high costs and risks involved.

66. The Productivity Commission recommended that the Australian Government should introduce a specialist IP list in the Federal Circuit Court, with procedural rules similar to the United Kingdom Intellectual Property Enterprise Court (IPEC), including limiting trials to two days, caps on claimable costs and damages, and a small claims procedure for low-value cases. The Productivity Commission considers that expanding the jurisdiction of the Federal Circuit Court to hear all

[24] Senate Standing Committee on Economics, *Insolvency in the Australian construction industry Report* (2015), Recommendation 44 [12.68], p 193.

IP matters as such would provide a timely and low cost option for resolving IP disputes.[25]

67. It is further argued that this would complement current reforms by the Federal Court for IP case management within the National Court Framework, which are likely to benefit parties involved in high value IP disputes, and that the Australian Government should assess the costs and benefits of these reforms five years after implementation.[26]

68. As it is anticipated that these reforms would result in additional demands on the Court, the Productivity Commission argues that the Court should be adequately resourced to ensure that a greater workload arising from these reforms does not result in longer resolution times.[27]

69. The Court has responded to the Productivity Commission's recommendations by working with the Law Council to pilot improved procedures for the management of IP disputes of the kind that concern SMEs, but its capacity to respond adequately to the Productivity Commission recommendations is again hampered by the lack of judicial resources available.

Administrative Appeals Tribunal (AAT)

70. There are currently significant backlogs in the recently amalgamated AAT's case load, particularly in the migration law jurisdiction.

71. The Law Council submits that substantial additional funding is required to alleviate pressure on the AAT and reduce this backlog, particularly given the considerable number of members whose appointments were discontinued following the amalgamation of the Commonwealth tribunals in the AAT.

72. Considerable delays in the listing of matters for hearing exceed 12 months in many cases. This is impeding the ability of the Tribunal to fulfil its statutory functions, undermining Section 2A of the Administrative Appeals Tribunal Act 1975, which states:

> *In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:*
>
> *(a) is accessible; and*
>
> *(b) is fair, just, economical, informal and quick; and*

[25] Productivity Commission: Intellectual Property Arrangements Inquiry, Intellectual Property Overview, December 2016, p 2., URL: http://www.pc.gov.au/inquiries/completed/intellectual-property/report.
[26] Productivity Commission: Intellectual Property Arrangements Inquiry, Intellectual Property Arrangements report, December 2016, p 41., URL http://www.pc.gov.au/inquiries/completed/intellectual-property/report#contents.
[27] Productivity Commission: Intellectual Property Arrangements Inquiry, Intellectual Property Arrangements report, December 2016, p 24., URL http://www.pc.gov.au/inquiries/completed/intellectual-property/report#contents.

(c) is proportionate to the importance and complexity of the matter; and

(d) promotes public trust and confidence in the decision-making of the Tribunal.

Funding for statutory and government bodies

Australian Human Rights Commission

73. The Law Council is concerned by the reduction of the Australian Human Rights Commission's revenue from government, decreasing from $15.515m for 2015-16 to $14.953 for 2016-17. The Budget Papers note that this is the net result of new measures, cumulative parameter adjustments, the application of the efficiency dividend and additional one-off savings measures. These reductions are in addition to the government measures taken since the 2014-15 Budget, redirecting significant funding of $1.7m from the Commission to the Royal Commission into Institutional Responses to Child Sexual Abuse.

74. The Law Council is informed by the Commission that its main expenditure is employee related, so in order to absorb budget reductions such as these, cost savings are predominantly made through staffing reductions. Other impacts include a reduction in the operational hours of the national information service complaints handling hotline. The Law Council is concerned about the impact of the funding reduction to the capacity of the Commission to carry out its statutory functions and undertake its statutory complaints-handling role.

Parliamentary Joint Committee on Human Rights

75. The Parliamentary Joint Committee on Human Rights (PJCHR) has one part-time legal adviser to conduct human rights assessments of hundreds of Bills (and thousands of pages of legislation) per year. Over the 2015-2016 financial year, the PJCHR examined 192 Bills and 1948 legislative instruments, requesting further information in relation to 31 Bills and 77 legislative instruments. The committee further provided comments not requiring a response from the legislation proponent in relation to 17 bills and Acts and 21 legislative instruments.

76. The Law Council considers that a full-time legal adviser or, alternatively, a panel of external lawyers should be appointed to share the workload of the PJCHR to scrutinise the human rights implications of this volume of Bills. The Law Council recommends that sufficient funding is allocated to the Committee Office in the Department of the Senate for additional personnel to fulfil this scrutiny task.

Australia's engagement with United Nations human rights bodies

77. The Law Council supports the recent establishment of a Standing National Human Rights Mechanism (the Standing Mechanism) by the Attorney-General's Department to strengthen Australia's overall engagement with the United Nations (UN) on human rights. The Law Council considers it necessary for the Government to allocate sufficient funding to this initiative, in particular to ensure that non-government organisations can provide expert advice where required. The Law Council supports funding being allocated to develop a stand alone non-government advisory committee to support the inter-departmental committee established under the Standing Mechanism.

78. The Law Council also supports the provision of stand alone funding to non-government organisations to participate in engaging with UN agencies during Australia's review under international human rights treaties. Funding is particularly relevant given Australia's appearance before the Committee on the Elimination of Racial Discrimination, Committee on Economic, Social and Cultural Rights, and the Human Rights Committee all in 2017. Funding should cover the production of independent shadow reports and appearances before UN Committees. The Australian Government has previously provided financial support to prepare independent shadow reports, for example in 2008 responding to the Government's 6th/7th Convention on the Elimination of All Forms of Discrimination against Women report.

Office of the Australian Information Commissioner (OAIC)

79. The Law Council is advised that there have been operational problems and delays resulting from the under-resourcing of the OAIC, predominantly regarding reviews of decisions under the *Freedom of Information Act 1982* (Cth).

80. The Law Council notes that on 28 September 2016 the Government recommended the appointment of Timothy Pilgrim PSM as Australian Information Commissioner and his reappointment as Australian Privacy Commissioner.

81. While the Law Council welcomes the increase in funding that was announced in the 2016 budget,[28] it remains concerned that the funding has not returned to pre-2014 levels,[29] given the important role that the OAIC plays through its privacy and freedom of information functions.

[28] Office of the Australian Information Commissioner, 'OAIC forward funding in 2016-17 Federal Budget' (4 May 2016) <https://www.oaic.gov.au/media-and-speeches/statements/oaic-forward-funding-in-2016-17-federal-budget>.
[29] See, e.g. Crikey, 'Turnbull delivers on transparency promise, with Information Commissioner saved' (3 May 2016) < https://www.crikey.com.au/2016/05/03/turnbull-delivers-transparency-promise/>.

82. The Law Council recommends provision of additional funding to ensure the OAIC is able to effectively perform its legislative functions.