

# 2023-24 Pre-Budget Submission

## Summary

### Submission to The Treasury

13 December 2022

National Legal Aid (NLA) represents the Chief Executive Officers of the eight Australian State and Territory Legal Aid Commissions (LACs).

LACs are independent statutory authorities funded by the Commonwealth and respective State and Territory governments to provide legal assistance to people experiencing financial disadvantage. LAC services focus on prevention, timely intervention, and the appropriate resolution of disputes. Litigation is a response of last resort. The LACs are an integral part of the legal assistance sector and the justice system and generate net benefits to the community including the avoided costs to individuals and the community of unresolved legal issues. This includes the significant costs associated with systems responses to family violence, child protection, health and mental health, housing, social security, as well as the costs associated with the justice system and self-representation.

## Our ask

In recognition of the nature of legal assistance across all federal and state jurisdictions and the historical shared responsibility for funding, we ask for:

1. Increased Federal investment in Legal Aid Commissions of **\$382 million** per annum **by 2025** to match State and Territory investment and ensure shared Federal-State responsibility for legal assistance.

That this investment is developed as part of the National Legal Assistance Partnership (NLAP) review that also invests in Community Legal Centres (CLCs), Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Prevention Legal Services (FVPLS) and includes:

- a) an evidence-based assessment of legal assistance need and demand for people experiencing disadvantage with a view to positive adjustment of NLAP funding formulas to better meet this demand, and commitment to a shared responsibility arrangement for Federal, State and Territory governments.
  - b) a commitment to embedding resourcing of legal assistance services (across Legal Aid Commissions, CLCs, ATSILS and FVPLS) in planning for any legislative reform, court reform or other drivers of increased legal assistance need to help ensure people experiencing disadvantage have access to justice.
  - c) a commitment to focus on the issue of rural and remote legal assistance service delivery with a view to increased investment across the legal assistance sector. It is proposed that this is undertaken in partnership with the States and Territories to look at service delivery issues, legal assistance need and funding responsibility in the context of commitment to First Nations Justice and the Closing the Gap targets.
  - d) a commitment to embedding CPI increases into all Federal funding for legal assistance (across Legal Aid Commissions, CLCs, ATSILS and FVPLS) and to review legal assistance investment every three years to ensure appropriate resourcing to meet legal assistance need for people experiencing disadvantage.
2. Immediate investment in Legal Aid Commissions of **\$168.3 million** which includes

**\$54.1 million** of continued funding to:

- Maintain legally aided support for people experiencing disadvantage to have their family law issues resolved through the Federal Circuit and Family Court of Australia (FCFCOA)'s case management pathway (\$16.6 million);
- Maintain legally assisted support in property mediation proceedings for vulnerable people including women who have experienced domestic and family violence (\$6.6 million);
- Maintain and expand the quality oversight of independent children's lawyers in contested parenting proceedings (\$4.4 million);
- Deliver a National Disability Legal Service based on the Your Story Disability Legal Support Service (\$6.5 million); and
- Maintain legal assistance for communities impacted by disaster (\$20 million).

And new funding of **\$114.2 million** per annum to:

- Expand the means test for approximately 7,500 more matters per year, with a focus on family law access for women and children escaping domestic and family violence (\$64.2 million);
- Expand the independent children's lawyer program to provide best interests representation to 3,000 more matters per year or 65% of children in contested parent proceedings (\$27 million);
- Support and enhance the number of legal practitioners available in rural and remote areas of Australia (\$8 million); and
- Assist in preventing cybersecurity incidents across Legal Aid Commissions, with a focus on safety and protection of data of our most vulnerable clients, including women and children escaping domestic and family violence (\$15 million).

## **Legal Aid Commissions provide efficient, effective and responsive legal assistance for people experiencing disadvantage**

Legal Aid services are a critical component of the legal assistance and broader social justice system. Nationally, Legal Aid Commissions provide over 1.5 million instances of legal assistance a year and are the main providers of legal representation for people experiencing disadvantage in Australia – in 2021/2022 this included 412,000 duty lawyer services and 150,000 legal representations. Legal Aid Commissions also aim to assist clients to resolve their legal issues as early as possible and in 2021/2022 provided 682,000 instances of legal information and referral and 8,500 dispute resolution conferences with an 86% settlement rate.<sup>1</sup>

Legal Aid services are provided to the most disadvantaged people in Australia – in 2021/2022 for clients of the 150,000 legal aid approved matters, 100% were financially disadvantaged, 20% were Aboriginal or Torres Strait Islander (61% Northern Territory Legal Aid and 32% Legal Aid Western Australia) and a significant proportion of those accessing family and civil law services were women and children.<sup>2</sup> 25% of clients receiving intensive legal assistance self-identified as a person with a disability.<sup>3</sup>

Over 86% of all family law legally aided matters included a risk of domestic and family violence.<sup>4</sup>

Legal Aid Commissions provide high quality legal assistance at scale that is value for money. A 2022 PWC cost benefit analysis of federally funded legal aid family and civil law service delivery estimates that legal aid services deliver \$601 million in benefit each year, representing a Benefit Cost Ratio of 2.25. This includes costs saved within the legal system from legal representation, dispute resolution services and efficiencies from duty lawyer services, as well as avoided costs to individuals and government through addressing domestic and family violence, minimising out of home care costs and reducing pain and suffering experienced as a result of legal issues.<sup>5</sup>

Legal Aid Commissions also develop their services to respond to emerging need and in the past 5 years have implemented specialist services for at risk families, women and children who have experienced domestic and family violence, people with disability, older people, veterans and communities impacted by disaster.

Legal Aid Commissions are committed to Closing the Gap and First Nations self-determination, work collaboratively with ATSILS and have undertaken initiatives to improve cultural safety within their organisations, increase First Nations employment and address the over-representation of First Nations people in the juvenile and adult justice systems and in out of home care.

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<sup>1</sup> [National Legal Aid Statistics Reports](#)

<sup>2</sup> [National Legal Aid Statistics Reports](#)

<sup>3</sup> NLA, *Legal Aid Commissions' Disability and Intersectional Service Data 2018-19 to 2020-21* (15 October 2021). The data is an underrepresentation due to limitations in data collection and reliance on self-reporting.

<sup>4</sup> National Legal Aid internal review of 100 family law files in each Legal Aid Commission. Over 800 files were reviewed.

<sup>5</sup> PricewaterhouseCoopers Consulting (Australia) Pty Ltd, *The benefits of providing access to justice*, report for National Legal Aid December 2022.

## **Legal Aid Commissions face significant challenges in delivering legal assistance for people experiencing disadvantage – limited access, increased demand, limited supply**

Legal Aid Commissions across the country are facing a range of challenges in meeting the legal assistance needs of people experiencing disadvantage. These challenges have in part arisen due to the erosion of Federal funding of legal aid.

When Legal Aid Commissions were established in Australia and until 1996 the Federal Government contribution was 55%. By 2012 the Federal Government contribution had been eroded to 33%. In 2021/2022 the Federal Government provided \$268 million representing just 27% of the total legal aid funding contributed by state, territory and federal governments of \$938 million.<sup>6</sup>

### ***Limited access***

In response, Legal Aid Commissions have had to restrict their income and assets tests to maximise service delivery in a tight fiscal and demand environment, limiting eligibility to Australians living well below the poverty line. In 2014 the Productivity Commission estimated that only 8% of Australian households were eligible for legal aid with more than 13% of households living below the poverty line.<sup>7</sup> Despite the income levels for calculating the poverty line increasing by 27% since that time,<sup>8</sup> Legal Aid Commissions have not had the resources to increase their means tests in line with this. In fact, since 2014 some Legal Aid Commissions have not been able to increase their means tests at all.<sup>9</sup> It is estimated that significantly less than 8% of Australian households would meet the income and assets test in 2022, with approximately 660,000 households eligible in 2014, to now less than 500,000 households in 2021.<sup>10</sup>

### ***Increased demand***

Alongside a restricted income and assets test, Legal Aid Commissions have seen an increase in legal assistance need and in the complexity of support and advice required in the family and civil law areas without a comparable increase in resources. This has occurred alongside legislative and court reform that has not considered the impact of the reforms on legal aid service delivery and the resultant increased costs in delivering legal assistance to people experiencing disadvantage.

Legal Aid assistance is critical in family law with 40-50% of family law parenting matters having at least one party who is legally aided, approximately 5,000 children provided with independent best interests representation via legal aid and over 8,000 dispute resolution conferences per year being supported by Legal Aid Commissions. Over 86% of legally aided family law matters include the risk of domestic and family violence.<sup>11</sup>

Despite this, Legal Aid Commissions have not been resourced to meet the increasing family law demand with a 14% increase in total family law court applications from 2013/14 to 2020/2021<sup>12</sup>

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<sup>6</sup> [Finance - Income and Expenses - National Legal Aid](#) This is budgeted amounts so excludes Expensive Criminal Cases.

<sup>7</sup> [Inquiry Report - Access to Justice Arrangements - Productivity Commission \(pc.gov.au\)](#)

<sup>8</sup> [Poverty – Poverty and Inequality \(acoss.org.au\)](#)

<sup>9</sup> [Legal Aid Commission means test and contributions tables.](#)

<sup>10</sup> 8% of 8.29 million households versus 5% of 9.28 million households

<sup>11</sup> National Legal Aid internal review of 100 family law files in each Legal Aid Commission. Over 800 files were reviewed.

<sup>12</sup> [Family Court Annual Reports | Federal Circuit and Family Court of Australia \(fcfcoa.gov.au\)](#) 2013/14, 2020/21

and a nearly 25% increase in independent children's lawyer appointments during the same period.<sup>13</sup>

In the civil law area, Legal Aid Commissions have responded to changing and increased legal assistance needs, including building expertise in the disability and disaster areas. Legal Aid Commissions have utilised one off, time limited resources to meet these needs and since 2019 have provided over 10,000 services to assist clients to participate in the Disability Royal Commission process.<sup>14</sup> Legal Aid Commissions have also been integral in supporting disaster affected communities. For example, since 2020 in NSW approximately 7,200 legal assistance services have been provided to people impacted by disaster.<sup>15</sup>

However, the resourcing to provide legal assistance to people experiencing disadvantage has not kept pace with demand. For example, the Administrative Appeals Tribunal (AAT) has experienced an approximately 400% increase in the number of NDIS review cases in 2021/2022 and, as at January 2022, had a backlog of approximately 4,000 cases.<sup>16</sup> In addition, the disaster recovery funding is due to cease in June 2023 despite the increase in the number of affected communities and the ongoing long term legal issues experienced by these communities as a consequence of disaster.

Legal Aid Commissions are an integral component of the legal system and need to be funded and considered alongside the resourcing of courts and other areas of the law as part of legislative or court process reform or in response to other drivers of increased legal assistance need. Without additional investment, Legal Aid Commissions will need to look at further managing costs by reducing assistance such as closing services, further implementation of waitlists and making changes to eligibility guidelines.

### ***Limited supply***

Legal Aid Commissions are also facing challenges in retaining private practitioners to deliver legal aid services. In 2021/2022 78% of legal aid approved matters were assigned to private practitioners.<sup>17</sup> Private practitioners are particularly essential in delivering legal aid services in regional and remote areas of Australia. However, the fees provided to undertake these matters have been limited and not kept pace with increased costs or the 27% increase in CPI.<sup>18</sup> Again, due to limited resources, some Legal Aid Commissions have not been able to increase their fees at all with some providing the same amount per hour to private practitioners as they were in 2007.<sup>19</sup> There is also a lack of parity between the fees paid to criminal law practitioners and family law practitioners with this being up to \$30 an hour less for family law practitioners in some jurisdictions.

This is impacting on the legal aid supply model with all Legal Aid Commissions experiencing a significant decline in the number of private family law practitioners willing to undertake legal aid work due to the low level of fees. In Victoria, the number of firms undertaking legal aided family

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<sup>13</sup> [NLA Statistics Reports \(nsw.gov.au\)](https://www.nsw.gov.au/nla-statistics-reports)

<sup>14</sup> [Your Story turns three: Our impact - Your Story Disability Legal Support](#)

<sup>15</sup> NSW Disaster Legal Service

<sup>16</sup> [NDIS cases going unheard following 400% surge in dispute applications \(crikey.com.au\)](https://www.crikey.com.au)

<sup>17</sup> [National Legal Aid Statistics Reports](#)

<sup>18</sup> [National Legal Aid Statistics Reports](#)

<sup>19</sup> [Law Society of NSW submission](#)

law work has reduced by more than 50% in nine years. This loss of private practitioners has accelerated in recent years, for example, in Queensland there has been a 32% reduction in available family law private practitioners since June 2021.<sup>20</sup>

The loss of private practitioners has been particularly impacted by the Federal Circuit and Family Court of Australia's case management pathway, introduced in September 2021. Legal Aid Commissions are supportive of these reforms, particularly around aiming to settle matters quickly and earlier. However, the increased workload, including preparation of additional documents and additional appearances required at early stages of proceedings, without additional resources, has negatively impacted on private practitioners' acceptance of legally aided clients. In regional, rural and remote communities there are also impacts around the extra time and resources required to consult with clients and travel to communities. For example, practitioners involved in the independent children's lawyer service in regional, rural and remote areas often need to take significant time out of their practice to travel and meet the children.

In order to manage this Tasmania, Queensland, South Australia and NSW have utilised one off funding to increase their family law fees to retain practitioners, with the other jurisdictions currently reviewing their fee structures. This funding ends in June 2023 and, without additional funding, this will mean that Legal Aid Commissions may have to further restrict access to family law support.

The limited availability of private practitioners impacts on access to justice for people experiencing disadvantage, particularly in regional and remote areas of Australia and creates delays in legal and court processes leading to additional stress for vulnerable and disadvantaged people and increased costs to the legal system.

### **Our ask**

For Legal Aid Commissions to appropriately provide legal assistance to people experiencing disadvantage there needs to be a return to shared responsibility between the Federal and State and Territory governments and matched funding from the Federal Government to meet legal assistance demand for people experiencing disadvantage. This would mean an increase of **\$382 million per annum** to increase the 2021/2022 contribution of \$268 million to \$650 million to match the current States and Territory contribution.

The National Legal Assistance Partnership (NLAP) is the mechanism under which funding is provided to Legal Aid Commissions and it is due to be reviewed during 2023. It is proposed that the review includes assessment of legal assistance need and demand, collaboration between the Federal and State and Territory governments and planning between all NLAP partners to understand roles, specialisations and collaboration points but with a view to redressing the current legal assistance funding gap.

It is proposed that the review:

1. include an evidence-based assessment of legal assistance need and demand for people experiencing disadvantage with a view to positive adjustment of NLAP funding formula to better meet this demand, and commitment to a shared responsibility arrangement for Federal, State and Territory governments.

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<sup>20</sup> [National Legal Aid Statistics Reports](#)

2. Commit to embedding resourcing of legal assistance services (across Legal Aids, CLCs, ATSILS and FVPLS) in planning for any legislative reform, court reform or other drivers of increased legal assistance need to help ensure people experiencing disadvantage have access to justice.
3. Commit to focus on the issue of rural and remote legal assistance service delivery with a view to increased investment across the legal assistance sector. It is proposed that this is undertaken in partnership with the States and Territories to look at service delivery issues, legal assistance need and funding responsibility in the context of commitment to First Nations Justice and the Closing the Gap targets.
4. Commit to embedding CPI increases into all Federal funding for legal assistance and to review legal assistance investment every three years to ensure appropriate resourcing to meet legal assistance need for people experiencing disadvantage.

In the meantime, Legal Aid Commissions need an immediate injection of **\$168.3 million** per annum to continue to address critical service gaps:

**\$54.1 million** of continued funding to:

- Maintain legally aided support for people experiencing disadvantage to have their family law issues resolved through the Federal Circuit and Family Court of Australia's case management pathway (\$16.6 million);
- Maintain legally assisted support in property mediation proceedings for vulnerable people including women who have experienced domestic and family violence (\$6.6 million);
- Maintain and expand the quality oversight of independent children's lawyers in contested parenting proceedings (\$4.4 million);
- Deliver a National Disability Legal Service that includes support for NDIS reviews based on the Your Story Disability Legal Support Service (\$6.5 million);
- Maintain legal assistance for communities impacted by disaster (\$20 million).

And new funding of **\$114.2 million** per annum to:

- Expand the means test for approximately 7,500 more matters per year, with a focus on family law access for women and children escaping domestic and family violence (\$64.2 million);
- Expand the independent children's lawyer program to provide best interests representation to 3,000 more matters per year or 65% of children in contested parent proceedings (\$27 million);
- Support and enhance the number of legal practitioners available in rural and remote areas of Australia (\$8 million);
- Assist in preventing cybersecurity incidents across Legal Aid Commissions, with a focus on safety and protection of data of our most vulnerable clients, including women and children escaping domestic and family violence. (\$15 million).