



THE LAW SOCIETY
OF NEW SOUTH WALES

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18 February 2015

The Hon Senator George Brandis QC
Attorney-General
PO Box 6100
Senate, Parliament House
Canberra ACT 2600

By email: senator.brandis@aph.gov.au

Dear Attorney-General,

Commonwealth Legal Assistance Funding

I am writing to you on behalf of the Indigenous Issues Committee of the Law Society of NSW ("Committee"). The Committee represents the Law Society on Indigenous issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The Committee writes to you to express its serious concerns about the under-resourcing of the legal assistance sector, particularly as it affects Indigenous people. For the reasons set out in more detail in this letter, the Committee writes to you prior to the funding rollover date for the Community Legal Services Program ("CLSP"), National Partnership Agreement for Legal Assistance Services and the Indigenous Legal Assistance program to urge the Government to:

- (1) Reverse the funding cuts to the legal assistance sector, particularly in relation to the Aboriginal and Torres Strait Islander Legal Services ("ATSILS") and to the Family Violence Prevention Legal Services ("FVPLS"), announced under the 2013-14 Mid-Year Economic and Fiscal Outlook ("MYEFO") and the May 2014 Federal Budget; and
- (2) Provide priority funding through the Legal Aid Commissions for private practitioners in the care and protection jurisdiction.

1. Legal assistance funding program cuts

The Committee understands that legal assistance funding is provided by the Commonwealth through a number of different streams, namely:

- The community legal sector receives funding through the CLSP;
- Legal Aid Commissions are funded through the National Partnership Agreement on Legal Assistance Services; and
- ATSILS receive funding through the Indigenous Legal Assistance program.

The Committee understands that the FVPLS is now part of the portfolio of the Department of the Prime Minister and Cabinet, and funding for the FVPLS is no longer assured.¹

The Committee understands further that these four legal assistance providers received approximately \$730 million in combined intergovernmental funding in 2012-13 (for both criminal and civil matters) which represented around only 0.14 percent of all government spending.² The majority of this funding has been provided by State Governments and Public Purpose Fund grants.

However, Federal funding cuts announced in the December 2013 MYEFO affected all of these services, with \$43.1 million to be cut over 4 years. The Committee notes that ATSILS will lose \$13.4 million, with NATSILS totally defunded. Cuts of \$15 million to Legal Aid were announced as part of the Federal Budget in May 2014, and the FVPLS will no longer be funded after June 2015.³

Prior to the recent Government announcements, the National Congress of Australia's First Peoples ("National Congress") had already identified that the total level of funding provided to ATSILS continues to be grossly inadequate. This includes funding for prevention, early intervention and diversion services and for community education, which all have a flow on impact on incarceration rates.⁴

The Committee notes that, from an access to civil justice perspective alone, without commenting on access to the criminal justice system, the Productivity Commission recently recommended that an additional \$200 million in funding is needed from the Commonwealth and State and Territory governments for legal assistance provision.⁵

Further, the Committee notes the views of the Human Rights Committee of the Law Society of NSW ("HRC"). The HRC observes that international attention has been drawn to this issue. In its recent Concluding Observations in relation to Australia, the UN Committee Against Torture ("UNCAT"), while welcoming information concerning the availability of legal assistance services for Aboriginal and Torres Strait Islander people, expressed its concerns at reports that ATSILS are not adequately resourced. Among other recommendations addressing the issue of Indigenous people in the criminal justice system, the UNCAT recommended that Australia should "guarantee that adequately funded, specific, qualified and free-of-charge legal and interpretation services are provided from the outset of deprivation of liberty."⁶ The HRC also notes that Article 14(3) of the *International Covenant on Civil and Political Rights* provides that, in the determination of criminal charges, it is a minimum guarantee that defendants have a right to legal assistance of their own choosing without payment if they do not have sufficient means to pay for it.

¹ Pursuant to the Indigenous Advancement Strategy, all organisations seeking Commonwealth funding for programs for the advancement of Indigenous peoples must enter into a competitive tender process and ongoing funding will be subject to demonstrating results.

² Productivity Commission, *Report on Access to Justice Arrangements: Overview*, No. 72, 5 September 2014, at 26, available online: http://www.pc.gov.au/data/assets/pdf_file/0016/145402/access-justice-overview.pdf (accessed 9 February 2015) (referred to as the "Access to Justice report overview")

³ Marie Sansom, "Closing the funding gap? Aboriginal services fear cutbacks," *Government News*, 1 December 2014, available online: <http://www.governmentnews.com.au/2014/12/closing-funding-gap-aboriginal-services-fear-cutbacks/> (accessed 9 February 2015)

⁴ National Congress of Australia's First Peoples, *National Justice Policy*, February 2013 at p 20, available online <<http://nationalcongress.com.au/wp-content/uploads/2013/02/CongressJusticePolicy.pdf>> (accessed 3 December 2013) (referred to as the "National Justice Policy") at 20-28.

⁵ Access to Justice report overview, Note 1 at 30 and Recommendation 21.4

⁶ UN Committee Against Torture (CAT), *Concluding observations of the Committee against Torture: Australia*, 23 December 2014, CAT/C/AUS/CO/4-5 at [12].

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2. Ongoing unmet legal need

The Committee considers that the availability of legal assistance is critical for Aboriginal and Torres Strait Islander people, who are overrepresented in the criminal justice and care and protection jurisdictions. The adverse outcomes that result from this over-representation are well documented in the literature, including in the findings of the *Royal Commission into Aboriginal Deaths in Custody* ("RCIADIC").

The Committee notes that the 2012 *Legal Australia-Wide Survey: Legal Needs in Australia* found that Aboriginal and Torres Strait Islander peoples are still among the worst affected groups experiencing unmet legal needs. These include family law (particularly care and protection), housing, discrimination, employment and credit/debt problems.⁷ The National Congress noted in its *National Justice Policy* the impact of civil law problems such as family law, debts, tenancy, employment, discrimination, stolen wages and victims compensation which can escalate and contribute to the risk of offending. The Congress noted also that the social determinants of criminal justice outcomes include a person's social and economic position in society, early life experiences, exposure to stress, educational attainment, employment status and past exclusion from participation in society throughout life. Victims and offenders are often closely related and many offenders have themselves been victims of crime, such as family violence.⁸

The Committee notes that the Productivity Commission found that there is a growing "justice gap" for the disadvantaged, and that:

the nature of matters that fall in the gap is particularly concerning. Assistance with family law matters, including domestic violence and care and protection of children, is not comprehensive in its coverage.⁹

These findings are particularly concerning given that the rates of removal of Indigenous children have reached the point where they exceed previously recorded numbers at any time in the 20th century, including under previous government policies of removal of Indigenous children from their families – children now generally referred to as the Stolen Generations.¹⁰ As at 2012-2013, in NSW, Aboriginal and Torres Strait Islander children are 11.8 times more likely to be removed than non-Indigenous children (at a rate of 68.3 per 1,000 children for Indigenous children, compared to a rate of 7.2 per 1,000 children for non-Indigenous children).¹¹

While the Committee acknowledges that the issue of child care and protection is a State issue, the Committee notes that the RCIADIC found that 43 of the 99 Aboriginal deaths in custody involved a person who had been separated by welfare policies from their families when they were young.¹² Funding for the provision of legal assistance in this jurisdiction would assist with appropriate placement of children (for example, it would better facilitate

⁷ National Justice Policy, Note 2.

⁸ Ibid.

⁹ Access to Justice report overview, note 1 at 30. Further, the Committee understands that as a result of cuts announced in the 2013 MYEFO, Legal Aid NSW is no longer able to fund divorce, contravention or enforcement in family law matters. In NSW, legal aid is also only available for Hague Convention Matters in exceptional circumstances.

¹⁰ See Australian Human Rights Commission, "Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families" August 1995, available online (https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf) (accessed 16 February 2015)

¹¹ Australian Institute of Family Studies, "Child protection and Aboriginal and Torres Strait Islander children," fact sheet available online: <https://www3.aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-c> (accessed 16 February 2015)

¹² The Hon Geoff Eames QC, "The Royal Commission into Aboriginal Deaths in Custody – 20 years on", *Exchanging Ideas II – conference sponsored by the Ngara Yura Committee, Judicial Commission of NSW* (September 2011) 14.

the making of joinder applications by grandparents in the Children's Court) and would better assist with creating realistic pathways for restoration where appropriate.

Further, family violence is an issue that particularly affects Indigenous people.¹³ The Committee understands that nationally, Indigenous women are hospitalised for non-fatal family violence assaults at 31.4 times the rate of other women. In addition, family violence is the key contributor to the over-representation of Indigenous children in the child protection system, and to homelessness among Aboriginal and Torres Strait Islander women.¹⁴ The incidence of family violence involves many complex interacting factors, can have many very adverse outcomes in the justice and care and protection areas and requires a suite of integrated responses in order to be effective.¹⁵ Culturally appropriate, integrated legal and therapeutic support services are necessary in order to address this issue, and the Committee considers it critical that the FVPLS continue to be funded.

Finally on this point, the Committee notes that the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs ("House Committee") in its 2011 *Doing Time – Time for Doing* report acknowledged that ATSILS play a critical role in providing culturally appropriate services to victims, offenders and their families.¹⁶ The House Committee noted that "ATSILS have been found to be more effective than mainstream legal services; the latter often avoided by Indigenous people".¹⁷

The Productivity Commission has recently recommended that:

The Australian, State and Territory Governments should implement cost-effective strategies to proactively engage with at-risk Aboriginal and Torres Strait Islander Australians to reduce their likelihood of needing legal assistance to resolve disputes with government agencies, especially in areas such as child protection, housing and tenancy, and social security.¹⁸

Given this recommendation, the Committee submits that specialised Aboriginal and Torres Strait Islander legal assistance services remain justified.

The Committee notes also that the Productivity Commission said at recommendation 22.4:

Given that the policies of State and Territory Governments have a significant impact on the demand for Aboriginal and Torres Strait Islander legal services and family violence prevention legal services, especially in relation to criminal matters, State and Territory Governments should contribute to the funding of these services as part of any future legal assistance funding agreement with the Australian Government.¹⁹

The Committee sees value in establishing a national intergovernmental agreement in relation to funding for ATSILS and FVPLS, which would include in its national objectives

¹³ Mick Gooda, "Social Justice – better outcomes for family violence prevention," speech delivered at the *Closing the Gap on Family Violence National Conference*, 4 May 2010, available online: <https://www.humanrights.gov.au/news/speeches/family-violence-prevention-legal-services> (accessed 27 January 2015)

¹⁴ Australian Legal Assistance Forum, "ALAF statement of support — Continuation of direct funding for the National Family Violence Prevention Legal Services (FVPLS) program", media release, 21 August 2014, available online: http://www.nalc.org.au/cb_pages/files/Media%20Releases/ALAFMR-FVPLS-08-14.pdf (accessed 27 January 2015)

¹⁵ Note 9.

¹⁶ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, [7.63] at p 210, available online:

http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=at_sja/sentencing/report.htm (accessed 23 May 2014)

¹⁷ Note 11, [7.68] at p 211

¹⁸ Recommendation 22.1, Access to Justice report overview, note 1 at 65.

¹⁹ Access to Justice report overview, note 1 at 66.

addressing the rate of Indigenous incarceration. In this regard, the Committee notes the Law Society of NSW has consistently maintained that in the case of NSW, NSW Treasury should fund legal aid as a core priority of government.²⁰

The Committee submits that reversing the funding cuts is consistent with the principles of evidence-based policy making and would be a first step in addressing the high levels of unmet legal need.

3. Advocacy as an extension of case work

The Committee notes the view of the Productivity Commission, which recommended that:

Frontline service delivery should be prioritised, along with advocacy work where it efficiently and effectively solves systemic issues which would otherwise necessitate more extensive individualised service provision.²¹

The National Congress noted in its *National Justice Policy* that law reform and policy work is proven to act as a preventative measure and can contribute to reducing the rate of incarceration. The Committee echoes these views and submits that policy and advocacy should be considered an extension of case work, and is an efficient means by which unmet legal needs can be resolved. In the Committee's view, restricting the ability of legal assistance providers to undertake advocacy work informed by valuable case work experience fails to capture the full value of case work.

On a related issue, the Committee notes that in announcing the funding cuts, the Government's view was that only the law reform and advocacy work undertaken by ATSILS would be affected, and not frontline legal services.²² Despite this assurance, the Committee understands that a cut of \$13.4 million represents approximately 20% of the ATSILS budget. Given this, the Committee respectfully submits that it seems unlikely that such a cut would have no effect on frontline services, particularly as the Committee understands that there was no consultation undertaken with any ATSILS about the quantum it spends on policy work and advocacy. Further, and by way of example, the Committee notes that the Prisoner ThroughCare program run by ALS (NSW/ACT) (a recommendation of the RCIADIC and in its eighth year of operation) has also lost its funding.²³

4. Systematic allocation of funding

Finally, the Committee notes the view of the Productivity Commission that there should be a more systematic approach for allocating funding to the four legal assistance service providers. The Committee agrees with the Productivity Commission's view that that allocation should reflect the relative costs of service provision and indicators of need given their priority clients and areas of law. Funding allocation models currently used to determine funding for Legal Aid Commissions and ATSILS should be updated to reflect more contemporary measures of legal need.²⁴ The Committee echoes the Productivity Commission's view that in order to maximise the efficiency and effectiveness of services, Australian, state and territory governments should agree on priorities for legal assistance

²⁰ See for example, Law Society of NSW, *2015 NSW State Election Policy Platform* at 9, available online: <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/909505.pdf>

²¹ Access to Justice report overview, note 1 at 31

²² NATSILS, "Funding Cuts to Aboriginal and Torres Strait Islander Legal Services," Fact sheet, available online: <http://www.natsils.org.au/portals/natsils/submission/Funding%20Cuts%20Factsheet%202%20April%202013.pdf> (accessed 13 February 2015)

²³ Aboriginal Legal Service (NSW/ACT), "ALS loses funding for frontline program despite Government assurances", 16 June 2014, available online: http://www.alsnswact.org.au/media_releases/33 (accessed 10 July 2014)

²⁴ Access to Justice report overview, note 1 at 28

services and should provide adequate funding so that priorities can be fully realised, and that such funding should be stable enough to enable longer term planning.²⁵

5. Committee's submissions

The services provided by the stakeholders in the legal assistance sector are crucial for Aboriginal and Torres Strait Islander people. The funding restrictions experienced by this sector already severely curtail the services, leaving high levels of unmet legal need for Aboriginal and Torres Strait Islander communities. The Committee is concerned that further funding restrictions will render the legal assistance sector unable to properly carry out their functions.


Given the above, the Committee reiterates its submissions to the Government to:

- (1) Reverse the funding cuts to the legal assistance providers, particularly in relation to ATSILS and to the FVPLS.
- (2) Provide priority funding through the Legal Aid Commissions for private practitioners in the care and protection jurisdiction.

While the Committee understands that the need to review these decisions is urgent, particularly in relation to the question of how the funding cuts will affect frontline services provided by ATSILS,²⁶ the Committee strongly urges that the Government take these significant issues into account when allocating funding in July 2015.

The Committee thanks you for your consideration of this submission. Questions may be directed to Vicky Kuek, policy lawyer for the Committee, at (02) 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,



John F Eades
President

²⁵ Access to Justice report overview, note 1 at 29

²⁶ National Congress of Australia's First Peoples, "Plea for PM to step in and fix Indigenous Affairs policy and funding chaos," media release, 2 September 2014, available online: <http://nationalcongress.com.au/plea-for-pm-to-step-in-and-fix-indigenous-affairs-policy-and-funding-chaos/> (accessed 27 January 2015)