

# NATIONAL REPORT – AUSTRALIA'S LEGAL ASSISTANCE SYSTEM

## **Australia's federal system**

In Australia's federal system, state and territory governments and the Commonwealth government have different law responsibilities under the constitution. The six states and two territories are responsible for laws and administration relating to the criminal justice system. For domestic law, the Commonwealth government is responsible for family law and national criminal matters, migration matters and some civil law such as discrimination, national credit and employment law.

With the exception of legal aid in criminal justice for Indigenous people through Aboriginal and Torres Strait Islander Legal Services, states and territories are therefore mostly responsible for the funding and administering of the legal aid system for criminal justice matters, and also fund community legal centres.

Legal assistance funding in Australia is a joint Commonwealth/state responsibility.

## **Access to justice framework**

The Commonwealth Attorney-General launched the government's Access to Justice Report and the 'Strategic Framework for Access to Justice' on 23 September 2009, to guide future policy and reforms in Australia's civil justice system.

The Strategic Framework is based on five key principles of accessibility, appropriateness, equity, efficiency and effectiveness and supports a justice system that aims to:

- allocate resources more efficiently,
- promote fair outcomes,
- encourage the early resolution of problems and disputes,
- enable matters to be directed to the most appropriate method for resolution,
- identify broader issues which may cause specific legal problems, and
- empower individuals, where possible, to resolve their own disputes.

There were several recommendations relevant to legal assistance in the Access to Justice Report. It recommended that the Attorney-General establish an integrated national approach to the provision of legal assistance services through a national coordination group to drive legal assistance reforms and initiatives.

The report further recommended that the Commonwealth should develop a new National Partnership for legal aid. It further noted that the Commonwealth should ensure that legal assistance programs give greater priority to prevention and early intervention services, expand alternative dispute resolution services and services to self-represented litigants, and address issues affecting access to services for people living in regional, rural and remote Australia.

## **National Partnership Agreement on Legal Assistance Services**

The subsequent National Partnership Agreement on Legal Assistance Services that commenced on 1 July 2010 represented a significant vehicle of reform for the legal assistance sector (see Appendix 1). The Agreement is between the Commonwealth government and each state and territory government for the delivery of Commonwealth legal aid service priorities through legal aid commissions. However, the objective of the Agreement is a national system of legal assistance across all four legal assistance programs that is integrated, efficient and cost-effective and focused on providing services in accordance with the five access to justice principles. The four legal assistance programs are legal aid, community legal services, Aboriginal and Torres Strait Islander Legal Services, and Family Violence Prevention Legal Services.

The Agreement facilitates reform to legal assistance service delivery through:

- earlier resolution of legal problems that, where possible, avoids the need for litigation,
- more appropriate targeting of legal assistance services to people who experience, or at risk of experiencing, social exclusion,
- increased collaboration and cooperation between legal assistance providers themselves and with other services providers to ensure clients receive 'joined up' service provision to address legal and other problems, and
- strategic national response to critical challenges and pressures affecting the legal assistance sector.

The key initiatives under the agreement are the establishment of legal assistance jurisdictional forums; the requirement for referrals between service providers; strengthening linkages between legal assistance services and other services; and the establishment of a National Legal Assistance Advisory Body to advise the Attorney-General in line with the Access to Justice report recommendation. One of the most significant elements of the Agreement is the focus on early intervention and prevention services which avoid the need for costly litigation.

The emphasis on the need for collaboration between legal assistance service providers and non-legal service providers is realised through forums set up in each state and territory. These forums represent the first time that representatives from the Commonwealth, state and territories and all four legal assistance providers have collectively discussed local solutions to national issues. One key project has been encouraging closer relationships and greater collaboration between legal assistance services and the social service sector. The initiative recognises the strong crossover between clients who use social services and who also require legal assistance. Increasing collaboration and the efficiency of referrals will lead to better outcomes for a vulnerable client group and improve processes for both legal assistance and social services.

In 2012, the Commonwealth Attorney-General's Department began discussions with the Commonwealth Department of Human Services (DHS) to build connections and encourage communication with legal assistance services. DHS funds and coordinates all Commonwealth social services, including welfare, benefits and employment services. DHS staff now attends legal assistance forums. Future work will strengthen these ties, focusing on collaborative legal education and information services for people accessing legal assistance and social services.

## **Legal assistance services**

### **Commonwealth funding**

The Commonwealth funded four legal assistance programs provide disadvantaged people with access to a range of legal services including information, community legal education, minor advice and assistance, advocacy, dispute resolution, duty lawyer services and representation. Legal assistance is a vital component of the government's commitment to access to justice. Services provide the major safety net for the most disadvantaged Australians with legal problems. The client group consists of vulnerable people with

complex legal issues. Typically, clients have clusters of problems and needs that require high levels of case management and intervention. Legal assistance services also target a broader group through information and community legal education services.

Total Commonwealth funding for legal assistance services over the four years from 2013-14 to 2016-17 will be \$1.413 billion.

For the eight legal aid commissions, Commonwealth funding for 2013-14 is \$226.332 million. The Commonwealth almost entirely funds the Aboriginal and Torres Strait Islander Legal Services (ATSILS). Funding for ATSILS in 2013-14 is \$73.84 million. Of nearly 200 community legal centres (CLCs) across Australia, the Commonwealth funds 138. Recurrent Commonwealth funding for 2013-14 for CLCs is \$39.36 million. In 2013-14, the Commonwealth will provide funding of \$19.597 million to 14 Family Violence Prevention Legal Service (FVPLS) organisations that are located in all states and territories except Tasmania and the Australian Capital Territory.

### **Legal aid commissions**

There are eight legal aid commissions, one in each state and territory, with a head office in the capital cities and metropolitan and regional offices. Since 2010, legal aid commissions have been funded by the Commonwealth under the National Partnership Agreement on Legal Assistance Services. Commonwealth funding for 2013-14 is \$226.332 million.

Commissions are also funded by state and territory governments, largely for assistance in state criminal law matters. Commonwealth legal aid service priorities under the Agreement relate mostly to Commonwealth law matters including family law, Commonwealth criminal law and a range of civil law matters such as migration, social security, employment cases and consumer law matters. Under the Agreement, commissions must increase the delivery of preventative, early intervention and dispute resolution services. The funding of these services is not restricted to Commonwealth law matters. Similarly, a grant of aid for a person whose legal problems include Commonwealth family law issues and state and territory law family violence and child protection issues can be funded under the Agreement. Most of the Commonwealth funding for legal aid commissions goes to family law matters (more than 80%).

Legal aid commissions are independent statutory authorities set up under state and territory legislation. Within service priorities, they set their own eligibility criteria such as means and merits tests and guidelines for grants of aid. Commissions provide the full range of services including early intervention and prevention services, alternative dispute resolution, duty lawyers, minor advice and assistance, and representation. Legal aid commissions use a mix of salaried lawyers and private lawyers engaged through grants of aid to provide legal representation to eligible clients. Commissions also undertake law reform activities, training activities and the maintenance of lawyer panels, collaboration with other services both legal and non-legal, and outreach to remote areas.

## **Aboriginal and Torres Strait Islander Legal Services**

### **Program overview**

The Australian Government is committed to ensuring that all Australians, including Indigenous Australians, have access to justice. Accordingly, the government provides funding to eight Aboriginal and Torres Strait Islander Legal Services (ATSILS) across Australia. The Commonwealth has funded legal assistance for Indigenous Australians since 1971 and is the primary funder of ATSILS. Funding was substantially increased as a result of the Royal Commission into Deaths in Custody. In 2013-14, ATSILS will receive \$73.84 million in recurrent funding through the Indigenous Legal Assistance and Policy Reform Program. Indigenous Australians continue to be significantly overrepresented in Australia's criminal justice system in comparison to non-Indigenous Australians.

Unlike legal aid commissions which receive funding from Commonwealth and state governments, ATSILS rely almost exclusively on Commonwealth funding to meet their service delivery costs.

ATSILS are funded to deliver high-quality, culturally sensitive and accessible legal assistance services to Indigenous Australians, to ensure that they can fully exercise their rights as Australian citizens.

Specific funding for Indigenous legal services reflects:

- historical and continuing awareness by government of the level of disadvantage faced by Indigenous Australians relative to non-Indigenous Australians across all significant social and economic indicators,

- continuing poor indicators in relation to law and justice issues such as imprisonment rates, child protection notifications and victims of crime rates, and
- difficulties Indigenous Australians face in accessing culturally appropriate, accessible and high-quality legal services through mainstream legal services and legal aid providers.

ATSILS provide legal assistance, advice and representation in criminal, civil and family law matters. They are also engaged in community legal education, law reform and advocacy activities. The majority of assistance provided by ATSILS is in state criminal law matters (approximately 85%) because priority clients are defined as those detained, or at risk of being detained, in custody. ATSILS also provide assistance in family law matters (approximately 5%) and civil law matters (approximately 10%) if there is capacity after assisting priority clients. Unmet need for Indigenous-specific family law services is an issue confronting ATSILS. In response, in early 2013 the government provided \$2.56 million in additional one-off funding across the ATSILS to enable them to increase services in family law.

ATSILS deliver services from 82 permanent locations as well as at court circuits, regional/bush courts and outreach locations in metropolitan, regional and remote areas throughout all states and territories. Services are also delivered at Indigenous specific courts including Koori Courts, Nunga Courts and Aboriginal Courts, for which some state funding is received. Seventy three of the 82 outlets are in regional, rural and remote locations.

ATSILS work collaboratively with other Indigenous and non-Indigenous legal assistance providers in undertaking their work. Indigenous people are also able to access other legal assistance services, such as community legal services, legal aid commissions and Family Violence Prevention Legal Services.

### **Differences between mainstream legal assistance and ATSILS**

There are significant differences between Indigenous legal assistance and mainstream legal assistance funding.

The major focus of Indigenous legal assistance services is state criminal law. Mainstream legal aid commissions are Commonwealth-funded largely for Commonwealth law matters, and focus that effort on family law matters. This difference is attributable to the ways in which eligibility and priority clients are defined and the different funding arrangements

between the Commonwealth, legal aid commissions and Indigenous legal assistance services. For Indigenous legal assistance, priority clients are those detained, or at risk of being detained, in custody. This means that the majority of Commonwealth funds (over 85%) are used to assist in state criminal law matters.

The organisations also operate under different governance and organisational structures, funding arrangements, working conditions and salary awards, geographical environments and community expectations. For instance, the majority of legal aid commission outlets are in metropolitan and regional centres, whilst Indigenous legal assistance outlets are in regional, rural and remote centres.

## **Community legal centres**

### **Program overview**

Services delivered by community based organisations form a vital part of the Australian Government's multi-layered approach to addressing the legal needs of disadvantaged members of the community. Addressing legal needs early and effectively plays a critical role in enhancing social inclusion, a key priority of the Australian Government.

Community legal centres (CLCs) are a key component of Australia's legal assistance system, providing a distinctive form of service that uniquely complements services provided by legal aid commissions, Indigenous legal assistance service providers and the private legal profession. CLCs have a strong history of community centred legal support across Australia over the last 30 years and attract significant volunteer and pro bono support both for client service delivery and administrative functions.

CLCs are community-based, independent not-for-profit organisations that provide a range of legal and related assistance services. These services are delivered largely face to face and over the phone with some CLCs also providing services via video conferencing, Skype and more broadly through on-line portals.

The Australian Government provides funding to 138 CLCs across Australia. In 2013-14 these Commonwealth funded centres receive \$39.36 million in recurrent funding through the Community Legal Services Program. The program's intended outcome is to provide equitable access to legal assistance services for disadvantaged members of the Australian

community and those with special needs and/or those whose interests should be protected as a matter of public interest.

Community legal centres undertake a range of advocacy activities on behalf of their clients. This includes law reform and legal policy work where projects are undertaken which have the potential to influence and effect changes to the law, legal processes and ultimately service delivery. These endeavours enable the community's active participation in the legal system. A Not for Profit Sector Freedom to Advocate Bill is currently before the Commonwealth Parliament. The bill, if enacted, will apply to all Commonwealth agreements with the not-for-profit sector, regardless of whether they were entered into prior to the commencement of the legislation. It specifically addresses circumstances where, despite current Commonwealth government policy to the contrary, there may still be 'gag clauses' in existing Commonwealth agreements with the not-for-profit sector. The bill, if enacted, will invalidate any such clauses in existing agreements. It will also prevent any clauses in future Commonwealth agreements that purport to 'gag' the not-for-profit sector.

Most CLCs are generalist centres that service specific geographic regions, while others are specialist organisations servicing communities by specific interest or areas of law; for example, women; youth, disability discrimination matters, welfare rights, and consumer credit. One centre, the National Children's and Youth Law Centre, specialises in the rights and interests of children and young people. The centre primarily provides its services through its Lawstuff website, which provides legal information on a range of topics relevant to young people and Lawmail, its free email advice service. Some CLCs are funded to conduct clinical legal education programs, to work in partnership with a law school to provide practical experience for law students, exposing them to a range of experiences including dispute resolution and opportunities to assist clients in rural, regional and remote areas.

CLCs provide assistance primarily in family law and civil law matters. Specific services provided include legal information, advice and casework services and community legal education. CLCs also assist people who do not meet the guidelines for accessing legal aid and who cannot afford a private solicitor. Legal assistance provided by CLCs is generally free, although most have eligibility criteria for ongoing (rather than one-off) assistance, including consideration of a client's capacity to pay for private legal representation. CLCs

may seek client contributions for certain services. However, clients are not to be excluded from assistance on the basis of their inability to make a financial contribution. It is fundamental that services are accessible to economically disadvantaged members of the community and those with special needs.

Each CLC has its own network of contacts and referral partners depending on their focus. CLCs also build and maintain professional links with other organisations and agencies in their local area or area of specialisation, with many CLCs also attracting pro bono assistance from large law firms. Collaboration and cooperation between all legal assistance providers and other relevant service providers helps to ensure that clients receive “joined up” service provision to address legal and other problems at an early stage, consistent with the Australian Government’s social inclusion agenda.

CLCs adopt a predominantly preventative, early interventionist and non-litigious approach to solving legal and related problems. The services provided by CLCs are aimed at intervening early to prevent legal and related problems from escalating and leading to entrenched disadvantage. Services offered by community legal centres are particularly appropriate for clients experiencing a cluster of legal and related problems which, if left unresolved, increase the likelihood or duration of homelessness or broader social exclusion.

### **Family Violence Prevention Legal Services (FVPLS)**

The Family Violence Prevention Legal Services program assists Indigenous adults and children who are survivors of family violence or who are at immediate risk of such violence. FVPLS provide culturally sensitive assistance to Indigenous clients through legal assistance, court support, casework and counselling in regional and remote areas of Australia. In 2013-14, the Commonwealth will provide funding of \$19.597 million to the 14 FVPLS organisations that are located in all states and territories except Tasmania and the Australian Capital Territory.

The FVPLS program was piloted in 1998 following a process of reforms to legal services, including women’s access to legal services. In 2004, the Crime Research Centre of the University of Western Australia identified 31 high need areas of family violence and sexual assault across Australia. The policy decision to provide FVPLS services only in rural and

remote areas was based on these geographical locations being identified as the highest need areas, and that metropolitan areas were serviced by other Commonwealth, state and private legal services.

In 2009, the Attorney-General's Department explored options to improve funding and service delivery models that demonstrated greater economies of scale together with more effective professional services being delivered to Indigenous victims of violence and sexual assault. This resulted in a regionalised funding model that has successfully been rolled out across Western Australia, Queensland, South Australia and the Northern Territory.

The FVPLS program complements other Commonwealth, state and private legal and family violence services. The Australian Government's view has been that the states and territories should be the primary provider of FVPLS services in urban areas. This approach has been adopted by the Victorian FVPLS unit which has successfully lobbied the Victorian Government to supplement Australian Government funding to service the Melbourne metropolitan area. Also, the Western Australian Government has commenced a tender process to establish an Indigenous family violence prevention legal service in the Perth metropolitan region. However, the Commonwealth remains the major funder of FVPLS.

## **National review of legal assistance**

The National Partnership Agreement on Legal Assistance Services is being reviewed. This Review is required under one of the clauses of the Agreement and is due to be completed by the end of July 2013. It presented an opportunity to undertake the first comprehensive national review of legal assistance in Australia. The independent review is being conducted in two parts:

- Part A reviews legal aid commissions only against the performance indicators and benchmarks of the NPA.
- Part B involves a broader evaluation of the efficiency, effectiveness and quality of all four Commonwealth-funded legal assistance programs and their contribution to a national legal assistance system which is holistic, client based and encourages 'joined up' service delivery.

Consultation with the legal assistance sector and other stakeholders has been comprehensive and is ongoing. The review will clarify the appropriateness of the existing indicators and benchmarks, and current service priorities and eligibility criteria for grants of legal aid set out in the Agreement. In addition, it will evaluate the appropriateness of the Agreement as a mechanism for funding legal assistance into the future. A framework for evaluating and reporting on the quality, efficiency and cost-effectiveness of services provided under the four programs will also be developed as part of the review. This framework will contain evaluation questions, performance measures, data definitions and data sources. It will be used to develop an evidence base for the legal assistance sector into the future.

## **Current challenges for legal assistance services in Australia**

### **Funding and demand**

The challenges for Australian legal assistance are familiar to all countries that provide a legal aid system. While Australia fared better than many OECD countries in the global financial crisis, there continues to be growing demand for government funded legal assistance at the same time that governments face fiscal constraints. Consumer credit, people at risk of homelessness and employment law are growing areas of service demand. Community legal centres, for example, report increasing demands for services, including from clients who may not previously have sourced assistance, such as those on mid-level incomes who are now struggling to pay rent increases or suffering mortgage distress.

The challenge for the legal assistance sector when large increases in funding are unlikely is to continually improve its efficiency. The major focus in Australia is to increase the level and efficacy of early intervention and prevention services to vulnerable people before legal and other problems escalate. Hand in hand with this is the requirement for services to collaborate and cooperate with other government and community services to ensure seamless delivery, case management of clients with complex problems, and to avoid overlap and duplication.

An important source of funding for legal assistance services is public purpose funding; that is, income derived from the interest on solicitors' trust funds, distributed by state and territory governments. Smaller services in particular may derive a large percentage of base funding from this source. This income fluctuates, and state governments from time to time impose

new conditions on the use of this funding. These changes have had significant effects on services. Where legal assistance providers are co-funded by the Commonwealth and state and territory governments, it is increasingly important that governments collaborate to determine priorities and to communicate change.

The findings of the review into legal assistance will inform continuing innovation and improvement in the provision of legal assistance to meet the challenges of the future. Other challenges for government funding include improving access to legal problem solving and legal service for those ineligible to receive legal assistance.

### **The continuing tyranny of distance**

Providing services in remote areas is a long-standing challenge in Australia and is not confined to legal assistance. Challenges include the cost of delivering services to, and the recruitment and retention of staff in, regional and remote communities.

Limited communication facilities in very remote regions of Australia, high paying employment opportunities in mining and gas boom areas of Australia and the associated high cost of commercial and private accommodation have impacted on the recruitment and the operational capacity of many ATSILS, CLC and FVPLS organisations.

Legal assistance services display flexibility and innovation in delivering services in remote areas and the use of technology will be of increasing importance.

### **The increasing gap between those who can afford legal services and those who cannot**

An ongoing and increasing challenge for governments is the growing numbers of people who do not have the resources to meet their own legal costs, but earn incomes which are above the means test for a grant of legal aid. Alternative sources of assistance such as legal expense insurance, interest free loan arrangements, or access to low cost early intervention services are possible solutions.