

# 2017-18 Pre-Budget submission



## 1. Purpose

1.1. To discuss the critical need for the services provided by Aboriginal and Torres Strait Islander Legal Services (ATSILS) and the necessary injection of funds required to effectively deliver culturally appropriate front line services to Aboriginal and Torres Strait Islander peoples.

## 2. Introduction

2.1. ATSILS face enormous challenges in service provision as a result of inadequate funding, including that they are forced to:

- offer substantially lower salaries to lawyers (compared, for example, to Legal Aid Commissions), undermining efforts to retain staff, often in difficult working conditions and with very high caseloads;
- make staff members redundant;
- close offices and place a freeze on providing assistance to clients with new matters;
- reduce front line service delivery to urban, regional and remote areas;
- reduce critical afterhours help to those with emergencies; and
- turn away vulnerable Aboriginal and Torres Strait Islander people seeking legal assistance.

2.2. Currently the ATSILS face funding cuts of almost \$18million over the forward estimates. These cuts will have a major impact on highly vulnerable Aboriginal and Torres Strait Islander peoples and undermine the current Government's commitment to Closing the Gap. Furthermore, funding cuts to the ATSILS will be a false saving for the government due to significant downstream costs caused by the necessary withdrawal of frontline services.

2.3. NATSILS **recommends** that the Government:

- 1) Reverse the funding reductions to the ATSILS of \$18 million from 2017-18 to 2019-20 (\$6.062 million in 2017-18, \$6.169 million in 2018-19, and \$5.271 million in 2019-20).
- 2) Implement the Productivity Commission's Recommendation from its Access to Justice Arrangements Inquiry Report to provide an additional \$120 million of Commonwealth funding to the Legal Assistance Sector, which includes an amount of at least \$24.3 million<sup>1</sup> (20.26% of \$120 million) p.a. to the ATSILS to provide critical civil and family law services (see para 4.1-4.3), meet rising costs (see para 4.3-4.4.), engage early intervention models, and continue to provide quality legal services in the face of overwhelming increases in demand (see paras 4.1–4.10).
- 3) Develop in consultation with the ATSILS a funding mechanism that recognises increasing legal needs and the additional complexity of providing services to Aboriginal and Torres Strait Islander peoples which necessarily incurs additional

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<sup>1</sup> ATSILS share of total Commonwealth funding for legal assistance sector in 2012-13 was approximately 20.26%.

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costs.<sup>2</sup> This funding model should be implemented for subsequent budgets. While the exact amount of funding needed should be determined by a robust funding model based on legal need and disadvantage, NATSILS view is that additional funding should be in line with the Productivity Commission's recommendations that the quantum of additional funding required to meet unmet legal need is in the vicinity of \$200 million, and that Indigenous specific services (ATSILS and Family Violence Prevention Legal Services (FVPLS)) should have priority funding.<sup>3</sup>

- 4) Provide annual increases of 3% to ATSILS funding to cover the necessary and ongoing costs of delivering services, which will allow ATSILS to pay adequate increases in staff remuneration and take into account market forces and significant fluctuations of prices in the sector.
- 5) Increase NATSILS funding from \$295, 000 p.a. to \$750, 000 p.a. This funding increase would allow NATSILS to operate more effectively as the peak representative national body and enable sufficient resources for needed:
  - Key personnel and skills to support the ATSILS including: Fundraising and Sector Sustainability, Community Engagement and Media Relations, Human Rights Projects and Government Engagement, Program Design and Implementation, Corporate and Pro bono Partnerships, Volunteer Coordination, Administrative support.
  - Staff training and development.
  - Motor vehicle and travel expenses.
  - Supplies expenses.
  - Employee entitlements.
- 6) Provide contracts of a minimum of five years to the ATSILS and NATSILS to provide greater certainty for ATSILS and the community.

2.4. NATSILS would like to note support for the submissions of Family Violence Prevention Legal Services (FVPLS) and the National Association of Community Legal Centres (NACLC) noting requests to reinstate the Family Violence Prevention Legal Services as a stand-alone national programme and to overturn the \$34.83 million cut to the Community Legal Centres over the period 2017-18 to 2019-2020.

### 3. About NATSILS

3.1. National Aboriginal and Torres Strait Islander Legal Services (NATSILS) is the peak national body for Aboriginal and Torres Strait Islander Legal Services (ATSILS). The ATSILS have over 40 years of experience and are the experts on the delivery of effective and culturally competent legal assistance services to Aboriginal and Torres Strait Islander peoples collectively providing on average 200,000 legal assistances per year.<sup>4</sup>

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<sup>2</sup> National Weighted Activity Units (NWAUs)

<sup>3</sup> Productivity Commission, *Report on Access to Justice Arrangements: Overview*, No. 72, 5 September 2014, Note 1 at 30 and Recommendation 21.4.

<sup>4</sup> Australian National Audit Office, *Administration of the Indigenous Legal Assistance Programme* (17 Feb 2015) at 16.

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3.2. NATSILS represents the following ATSILS:

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld);
- Aboriginal Legal Rights Movement Inc. (ALRM);
- Aboriginal Legal Service (NSW/ACT) (ALS NSW/ACT);
- Aboriginal Legal Service of Western Australia (Inc.) (ALSWA);
- Central Australian Aboriginal Legal Aid Service (CAALAS);
- North Australian Aboriginal Justice Agency (NAAJA);
- Tasmanian Aboriginal Community Legal Services (TACLS) and;
- Victorian Aboriginal Legal Service Co-operative Limited (VALS)

### 4. Legal Needs of Aboriginal and Torres Strait Islander Peoples:

4.1. The higher levels at which Aboriginal and Torres Strait Islander peoples experience legal issues across all areas of the justice system is well documented.<sup>5</sup> From significantly higher rates of imprisonment and involvement with child protection systems<sup>6</sup>, to vast unmet need for civil and family law services, access to justice directly impacts upon Aboriginal and Torres Strait Islander people's physical, emotional and social wellbeing.

4.2. Well-functioning civil and family law systems can increase the wellbeing and quality of life of individuals, families and communities. More broadly, access to legal assistance can promote social order, and communicates and reinforces civic values and norms. A well-functioning system also gives people the confidence to enter into business relationships, to enter into contracts, and to invest. This, in turn, contributes to Australia's economic performance.

4.3. Further, Aboriginal and Torres Strait Islander victims of violence are often unrepresented, or unable to obtain adequate representation, which increases their likelihood of further victimisation, homelessness and sustained disadvantage.

4.4. Of particular concern is the increasing overrepresentation of Aboriginal and Torres Strait Islander peoples, including women and children, in the criminal justice system and as victims of crime. Aboriginal and Torres Strait Islander people are now nearly 18 times more likely to be imprisoned than non-Indigenous Australians<sup>7</sup> while the overall number of Aboriginal and Torres Strait Islander people in prison rose 88% from 2004-2014.<sup>8</sup>

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<sup>5</sup> For more on this issue see the publications of the Indigenous Legal Needs Project: <https://www.jcu.edu.au/indigenous-legal-needs-project>

<sup>6</sup> In 2014, Aboriginal and Torres Strait Islander children were 9.2 times more likely to be in out of home care than their non-Indigenous peers. Child Family Community Australia, *CFCA Resource Sheet: Child protection and Aboriginal and Torres Strait Islander children* (Australian Institute of Family Studies, September 2015).

<sup>7</sup> Don Weatherburn, *Arresting Incarceration: Pathways Out of Indigenous Imprisonment* (Aboriginal Press Studies, 2014) at 1.

<sup>8</sup> Australian Bureau of Statistics, *Prisoners in Australia 2014* (Cat no. 4517.0, 2014); Australian Bureau of Statistics, *Corrective Services Australia*, December Quarter 2014 (Cat no. 4512.0, 2014).

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This extraordinary rate of imprisonment is extremely costly,<sup>9</sup> creates less safe communities through recidivism<sup>10</sup>, and limits opportunities for gaining employment and continuing education. On current estimates it is costing tax-payers over \$795 million per annum just to maintain current levels of Aboriginal and Torres Strait Islander imprisonment.<sup>11</sup>

4.5. The availability of culturally competent legal assistance services, including prevention and early intervention programs such as community legal education, as well as advice and representation is critical to addressing this overrepresentation. This has been acknowledged by both the Productivity Commission<sup>12</sup> and the Commonwealth Attorney General's Department which has stated:

Resources need to be directed to the most efficient and effective means of resolving legal problems and disputes....Failing to intervene early to prevent legal problems and disputes from escalating is not only costly in terms of resource usage, but affects individual and community well-being by embedding disadvantage and limiting capacity to participate fully in the economy and society.<sup>13</sup>

4.6. According to the Report from the Inquiry into Aboriginal and Torres Strait Islander experience of law enforcement and justice services<sup>14</sup>, the Inquiry committee heard evidence 'emphasising the inadequacy of funding legal assistance services for Aboriginal and Torres Strait Islander people'<sup>15</sup> and 'overwhelming evidence about the legal needs of Aboriginal and Torres Strait Islander people which are not being met'<sup>16</sup>.

4.7. In addition, the Commonwealth Government announced an Australian Law Reform Inquiry into the incarceration of Aboriginal and Torres Strait Islander people late in 2016,

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<sup>9</sup> According to the Report on Government Services in 2013 the total real recurrent expenditure (less revenue from own sources) on criminal justice in 2013-14 was \$13.4 billion. Since 2002-03, expenditure on criminal justice has increased by 49 percent overall and by an average of 10 percent each year. Australian Institute of Criminology, *Australian Crime: Facts and Figures 2013* (Australian Institute of Criminology, 2014) at 129.

<sup>10</sup> Just over three out of four Aboriginal and Torres Strait Islander prisoners (77% or 7,628 prisoners) had been imprisoned under sentence previously, compared to one in two non-Indigenous prisoners (50% or 13,220 prisoners). Australian Bureau of Statistics, *Prisoners in Australia 2015* (Cat no. 45170, 2015).

<sup>11</sup> Don Weatherburn, *Arresting Incarceration: Pathways Out of Indigenous Imprisonment* (Aboriginal Press Studies, 2014) at 9.

<sup>12</sup> The Productivity Commission has stated, "If left unresolved, civil problems can have a big impact on the lives of the most disadvantaged. The Commission was given many examples of simple problems spiralling into complex problems when legal assistance was not provided. Unmet civil problems can also escalate into criminal matters." Productivity Commission, *Access to Justice Arrangements, Inquiry Report Overview* (September 2014) at 24.

<sup>13</sup> Access to Justice Taskforce Commonwealth Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) 146. The Productivity Commission which has stated, "If left unresolved, civil problems can have a big impact on the lives of the most disadvantaged. The Commission was given many examples of simple problems spiralling into complex problems when legal assistance was not provided. Unmet civil problems can also escalate into criminal matters." Productivity Commission, *Access to Justice Arrangements, Inquiry Report Overview* (September 2014) at 24.

<sup>14</sup> Senate Finance and Public Administration References Committee Inquiry into Aboriginal and Torres Strait Islander experience of law enforcement and justice services.

<sup>15</sup> *Ibid* at [2.43] pg 17.

<sup>16</sup> *Ibid* at [3.2] pg 25.

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acknowledging that the overrepresentation of Aboriginal and Torres Strait Islander people in the prison system is a 'national tragedy'.<sup>17</sup>

4.8. ATSILS are the experts in engaging efficiently and effectively with Aboriginal and Torres Strait Islander communities to prevent contact with the justice system and in assisting people who do come into contact with the justice system by connecting them with the necessary referral pathways to address underlying causes of offending.

4.9. NATSILS view is that additional funding for legal assistance should be in line with the recommendations of the Productivity Commission's Inquiry Report on Access to Justice Arrangements, 2014. This Report suggests that the quantum of additional funding required to meet unmet legal need is in the vicinity of \$200 million, and that Indigenous specific services (ATSILS and Family Violence Prevention Legal Services) should have priority funding.<sup>18</sup>

4.10. Based on 2012-13 data, the four categories of government funded legal assistance providers received total funding from Commonwealth, State and Territory governments of \$734 million. Of that figure the ATSILS receive \$68.2 million, 9.29 per cent of Government funding. Accordingly, the ATSILS should receive an immediate injection of at least \$18.58 million.

4.11. The Productivity Commission's finding that investment in legal aid yields inestimable savings, while diminishing joblessness and increasing productivity, suggest that failing to adequately fund legal assistance is another missed opportunity and a further blow to disadvantaged and middle Australians.

## 5. ATSILS Funding Overview:

5.1. Despite the overwhelming need for ATSILS services funding remains a major concern. After a period of considerable funding uncertainty<sup>19</sup>, in May and June 2015 the ATSILS received new contracts and funding agreements. In 2017 funding cuts come into effect for the ATSILS. Budget estimates show that **from 2017 ATSILS funding will decrease by close to \$18million in the forward estimates.**

5.2. The ATSILS are seriously concerned about the impending funding cuts because they will significantly affect ATSILS' operations. The inadequate Commonwealth funding and the pending cuts will:

5.2.1. require the ATSILS to reduce staffing numbers not only for 2017-2018, but also going forward into 2019-20;

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<sup>17</sup> ABC the World Today, Indigenous incarceration a 'national tragedy': George Brandis announces inquiry, 26 October 2016: <http://www.abc.net.au/news/2016-10-27/indigenous-incarceration-inquiry-announced/7970186>

<sup>18</sup> Productivity Commission, *Report on Access to Justice Arrangements: Overview*, No. 72, 5 September 2014, Note 1 at 30 and Recommendation 21.4.

<sup>19</sup> In late 2013 funding cuts to the ATSILS was announced to take effect on 30 June 2015. The funding cuts would have amounted to approximately \$14m in lost funding and would have resulted in NATSILS losing its funding completely (amounting to \$295, 000 p.a.). In late March 2015 the government reversed the cuts to the ATSILS and NATSILS.

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- 5.2.2. force the ATSILS to withdraw from frontline services resulting in Aboriginal and Torres Strait Islander people being unrepresented in courts and unable to access culturally competent legal services;
- 5.2.3. result in downstream costs to Government services and the courts. The number of legal matters with unrepresented litigants will snow ball, delays in court times will increase, imprisonment will rise and unemployment rates will surge; the combined will be ever increasing costs to government. In effect these cuts will deny many Aboriginal and Torres Strait Islander people the access to justice and procedural fairness that all Australian citizens deserve.
- 5.3. Funding totalling \$12 million (\$6 million p.a.) to deliver civil and family services which was provided to the ATSILS in June 2013- June 2015 has now expired. The lack of funding for these services has heavily compromised the ability of the ATSILS to deliver services in civil and family law, particularly given there is so much demand on their services for criminal matters.
- 5.4. Furthermore, funding and indexation provided by the Commonwealth is now significantly less than consumer price index movements and therefore ATSILS have very limited capacity to deal with cost pressures. Increasing operating costs including utilities, cars, fuel, technology and wage pressures all place considerable stress on the ATSILS in terms of maintaining quality service provision.
- 5.5. As noted, impending funding cuts and ATSILS underfunding arises in the context of growing need for legal services and crisis levels of Aboriginal and Torres Strait Islander imprisonment; there is a greater need for ATSILS services than ever before. Furthermore, ATSILS are also facing additional pressure due to the withdrawal of other legal service providers in remote areas.<sup>20</sup>
- 5.6. The burden that this places on the ATSILS was well articulated by the Law Council in their submission to the 2015-16 Budget when they noted that,
- “[T]he Law Council is particularly concerned that the increasing rate of offending and arrest of Indigenous people will overwhelm ATSILS. Seemingly, it is expected that these services will continue to meet substantially increasing demand for representation in criminal matters in spite of virtually static funding.”<sup>21</sup>
- 5.7. Because of this static funding, the ATSILS are more frequently facing the difficult position of having to choose how they will withdraw from services and not if. For example, the ATSILS may be required to withdraw from service areas (such as civil and family) or geographical locations.<sup>22</sup> The ATSILS are gravely concerned about the consequences of withdrawing

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<sup>20</sup> For example the Legal Services Commission withdrawal from physical attendance on the APY Lands court Circuits is placing an additional strain on our member organisation the Aboriginal Legal Rights Movement (ALRM).

<sup>21</sup> Law Council of Australia, *Submission to the 2015-16 Federal Budget* (17 November 2014) at para 24.

<sup>22</sup> In this regard it is noted that in remote communities, access to justice has been described as "so inadequate that remote Indigenous people cannot be said to have full civil rights". C. Cunneen and M. Schwartz, *The Family and Civil Law Needs of Aboriginal People in NSW* (2008) 31.

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services, particularly given that other legal assistance providers may be unavailable because they are also under funded or facing cuts themselves, like that of the community legal centres. Furthermore, NATSILS emphasises that the ATSILS are the experts in providing culturally competent legal services, and that Aboriginal and Torres Strait Islander people are less likely to reach out to non-Indigenous service providers.<sup>23</sup>

5.8. Funding of NATSILS is also a major issue. As the peak body for the ATSILS, NATSILS plays a critical role providing national coordination, strategic leadership, and capacity building to ensure that our members benefit from a nationally coordinated network of service providers. NATSILS provides a streamlined and efficient mechanism (where appropriate) for government engagement and coordination of the sector. Thus in return for a small level of investment, NATSILS builds on the more substantial investment by the Australian Government in the ATSILS. However, the ability of NATSILS to fulfil these functions is severely compromised by inadequate funding, currently set at \$295, 000 p.a. This amount must cover all expenses including staff salaries, technology requirements, flights and accommodation to participate in Government and various fixed and variable costs. NATSILS struggles to cover these basic expenses, severely curtailing NATSILS capacity to effectively engage with our members, the wider sector and other relevant government agencies and peak bodies.

5.9. A number of government reports share the above concerns and have recommended that ATSILS funding needs to be increased. For example, the Senate Inquiry into Youth Justice recommended that ATSILS funding be increased to at least that of Legal Aid Commission funding<sup>24</sup>, while the Productivity Commission report on Legal Access noted that:

[services are] vastly under-resourced in terms of capacity to address legal need in Aboriginal communities. Additional funding is urgently required for civil/family law work, with priority to be given to Indigenous legal services as primary providers of legal assistance to Indigenous people.<sup>25</sup>

5.10. In similar vein, the Commonwealth Attorney-General's Department has recommended that:

the Australian Government increase the level of funding for Indigenous legal services with a view to sufficiently resource this sector of the legal aid system to meet the needs of Indigenous peoples, including appropriate loading for extra service delivery costs.<sup>26</sup>

## 6. Recommendations:

6.1. As discussed funding levels to ATSILS are not keeping pace with significant growth in demand or rising costs. Consequently, the capacity of ATSILS to deliver equitable and culturally competent access to justice for Aboriginal and Torres Strait Islander peoples is increasingly being compromised.

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<sup>23</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing* (2011) para 68; Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth of Australia, *Access to Justice* (2009) at 137.

<sup>24</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing* (2011) at para 79. See also the Office of Evaluation and Audit Report 2003 which indicated that ATSILS required an additional \$25m to achieve funding levels similar to Legal Aid Commissions.

<sup>25</sup> Productivity Commission, *Access to Justice Arrangements, Inquiry Report Overview* (September 2014) at 24.

<sup>26</sup> Access to Justice Taskforce Commonwealth Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) 147, Recommendation 27.

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### 6.2. NATSILS **recommends** that the Government:

- 1) Reverse the funding reductions to the ATSILS of \$18 million from 2017-18 to 2019-20 (\$6.062 million in 2017-18, \$6.169 million in 2018-19, and \$5.271 million in 2019-20).
- 2) Implement the Productivity Commission's Recommendation from its Access to Justice Arrangements Inquiry Report to provide an additional \$120 million of Commonwealth funding to the Legal Assistance Sector, which includes an amount of at least \$24.3 million<sup>27</sup> (20.26% of \$120 million) p.a. to the ATSILS to provide critical civil and family law services, meet rising costs, engage early intervention models, and continue to provide quality legal services in the face of overwhelming increases in demand.
- 3) Develop in consultation with the ATSILS a funding mechanism that recognises increasing legal needs and the additional complexity of providing services to Aboriginal and Torres Strait Islander peoples which necessarily incurs additional costs.<sup>28</sup> This funding model should be implemented for subsequent budgets. While the exact amount of funding needed should be determined by a robust funding model based on legal need and disadvantage, NATSILS view is that additional funding should be in line with the Productivity Commission's recommendations that the quantum of additional funding required to meet unmet legal need is in the vicinity of \$200 million, and that Indigenous specific services (ATSILS and Family Violence Prevention Legal Services (FVPLS)) should have priority funding.<sup>29</sup>
- 4) Provide annual increases of 3% to ATSILS funding to cover the necessary and ongoing costs of delivering services, which will allow ATSILS to pay adequate increases in staff remuneration and take into account market forces and significant fluctuations of prices in the sector.
- 5) Increase NATSILS funding from \$295, 000 p.a. to \$750, 000 p.a. This funding increase would allow NATSILS to operate more effectively as the peak representative national body and enable sufficient resources for needed:
  - Key personnel and skills to support the ATSILS including: Fundraising and Sector Sustainability, Community Engagement and Media Relations, Human Rights Projects and Government Engagement, Program Design and Implementation, Corporate and Pro bono Partnerships, Volunteer Coordination, Administrative support.
  - Staff training and development.
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  - Employee entitlements.
- 6) Provide contracts of a minimum of five years to the ATSILS and NATSILS to provide greater certainty for ATSILS and the community.

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<sup>27</sup> ATSILS share of total Commonwealth funding for legal assistance sector in 2012-13 was approximately 20.26%.

<sup>28</sup> National Weighted Activity Units (NWAUs)

<sup>29</sup> Productivity Commission, *Report on Access to Justice Arrangements: Overview*, No. 72, 5 September 2014, Note 1 at 30 and Recommendation 21.4.



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6.3. As noted, in the absence of additional funding the ability of the ATSILS to deliver legal services will become increasingly constrained which will come at a major cost for vulnerable Aboriginal and Torres Strait Islander communities. Equitable investment in ATSILS not only addresses the fundamental principle of equity before the law, it makes good economic sense.

6.4. NATSILS appreciates the opportunity to make this submission and looks forward to the opportunity for further discussion with the government so that the sustainable provision of legal services for Aboriginal and Torres Strait Islander people can be guaranteed in the future.

6.5. For further information please contact NATSILS Executive Officer, Karly Warner via phone on 0423 610 597 or email at [kwarn@vals.org.au](mailto:kwarn@vals.org.au).

Yours sincerely,



Mr Wayne Muir

Co-Chair

National Aboriginal and  
Torres Strait Islander Legal  
Services



Ms Cheryl Axleby

Co-Chair

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