



Law Council
OF AUSTRALIA

Statutory Review of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

Department of Agriculture, Water and the Environment

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About the Law Council of Australia

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

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

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

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

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

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

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

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

Acknowledgement

The Law Council is particularly grateful for the expertise of its Australian Environment and Planning Law Group (**AEPLG**) of the Legal Practice Section in leading a specially convened working group to develop this submission.

The working group comprised representatives from the AEPLG, the Law Council's National Human Rights Committee, the Law Society of New South Wales and the Law Institute of Victoria. Formal written input was also received from the Law Council's Access to Justice Committee, Indigenous Legal Issues Committee, the Queensland Law Society, the Law Society of South Australia, Law Society of New South Wales and the Law Institute of Victoria.

The Law Council acknowledges each of these valuable contributions to this submission.

Executive Summary

1. The Law Council of Australia welcomes the opportunity to make a submission to the second statutory review (**the Review**) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**the EPBC Act or Act**), including the Review discussion paper¹ (**the Discussion Paper**).
2. The Law Council hopes to see real and meaningful change as a result of this Review. It strongly supports bipartisan commitments at the federal level to working through the Review recommendations and progressing legislative amendments through Parliament. Similarly, there must be a long term commitment to developing any policy and procedural improvements recommended by the Review. The Law Council further calls upon the Commonwealth to maintain its essential leadership role in the legislative framework for environmental protection and biodiversity conservation in Australia.
3. The Law Council does not support the repeal or replacement of the EPBC Act at this time. It is concerned that none of the options available to remake or replace the EPBC Act is guaranteed to produce legislation that is less complex or lengthy. Moreover, efforts to do so may detract from existing opportunities to make immediate legislative improvements and arrest the continued decline in biodiversity and ecosystem health. Instead of developing a new legislative regime, the Law Council supports improving the EPBC Act's implementation, including greater transparency of decision-making, and more rigorous enforcement of its provisions.
4. While the EPBC Act's objects clauses address the concept of ecologically sustainable development, important developments in its meaning and scope should be reflected in the legislation going forward. The objects of the Act should also be updated to reflect broader core principles underpinning international and domestic reform, including those of non-regression and progression, and the interdependence between sustainable development and human rights. Amendments should also be adopted to ensure more collaborative, decision-making processes which are designed to achieve integrated, balanced outcomes.
5. Beyond the EPBC Act, there is a need to address a lack of clarity and inconsistency regarding the application of economically sustainable development principles across different Australian jurisdictions. A revised Intergovernmental Agreement on the Environment (**IGAE**) should provide the starting point for multi-jurisdictional reform in this area.
6. There is a need for a clear national policy approach to the regulation of greenhouse gas emissions to ensure that Australia can meet its international commitments. If the EPBC Act were to include a greenhouse gas 'trigger' as a Matter of National Environmental Significance (**MNES**), this submission identifies that certain policy, monitoring and enforcement elements would be critical to its success. However, the Law Council queries whether a greenhouse gas 'trigger' is the most efficient way to regulate greenhouse gas emissions at this point in light of other policy tools that exist. Nonetheless, the Law Council believes there should be a greater, more explicit consideration of the impact of climate change and climate change adaptation principles in the EPBC Act's decision-making processes and management tools.
7. There have been repeated calls to introduce approval bilateral agreements which would provide State and Territory governments with delegated authority to issue

¹ *Independent review of the EPBC Act - discussion paper*, Commonwealth of Australia 2019.

approvals under Part 9 of the EPBC Act instead of the Commonwealth. The Law Council has reservations regarding any further delegation of Commonwealth responsibility in this area. It may lead to multiple regimes and inconsistency across different jurisdictions, and reduced efficiency for national and multinational corporations. The Law Council supports the retention of robust, comprehensive Commonwealth oversight of these agreements, to ensure that best practice regulation is achieved, Australia's international obligations are met and public confidence is maintained.

8. Despite the tangible environmental benefits that strategic impact assessment can deliver, as well as the potential benefits from an approval streamlining perspective, Part 10 of the EPBC Act has not been widely used for reasons including its uncertain drafting. The Law Council recommends that this Part be redrafted.
9. Judicial review is an essential element of the rule of law and aids executive accountability. The Law Council supports the continuation of an applicant's right to seek judicial review of administrative decisions made under the EPBC Act, and that of third parties. It considers that section 487, which provides extended standing for judicial review, has operated effectively and has not opened litigation floodgates.
10. The EPBC Act currently provides limited scope for external merits review. The Law Council supports the merits review of controlled action and assessment approach decisions as a modest improvement in this area. It also supports introducing legislative criteria to guide such decisions. While the Law Council would ordinarily support full merits review of such decisions, if this is not adopted as a matter of policy, consideration could be instead be given to a limited form of merits review. Merits review is an essential tool to improve the rigour and transparency of upfront administrative decision-making and drives overall system efficiency.
11. Having regard to their intimate traditional ecological knowledge and cultural and spiritual connection to land and waters, the importance of full and proper engagement with Aboriginal and Torres Islander peoples on environmental matters cannot be overstated. The Law Council recommends that the EPBC Act be amended to require such consultation with Traditional Owners and the incorporation of Indigenous knowledge to help protect and manage biodiversity.
12. The Law Council is concerned that while environmental impacts are often most acutely experienced by regional, rural and remote (**RRR**) Australians, whose livelihoods may depend on sound environmental decision-making, they experience significant barriers in obtaining advice on legal issues. Support should be expanded to ensure access to justice in these areas.
13. Finally, the Law Council recognises that private property rights can sometimes conflict with the EPBC Act's important protections. It considers that it is timely to consider a compensatory regime to private landowners where, for the good of all Australians, their land is dedicated to the protection of our biodiversity.

Recommendations

Recommendation 1

- The Commonwealth must maintain its role in the legislative framework for environmental protection and biodiversity conservation in Australia.

Recommendation 2

- The Law Council does not support the complete repeal and replacement of the EPBC Act at this time.

Recommendation 3

- To maximise the benefits of limited public resources, the focus should be on critical amendments to the EPBC Act supported by a greater emphasis on improving its implementation and enforcement.

Recommendation 4

- The principles of ecologically sustainable development set out in section 3A of the EPBC Act should be updated to acknowledge and reflect the global dimension of sustainable development; the interdependence between sustainable development and human rights and the principles of non-regression and progression.

Recommendation 5

- The integrated, equitable and balanced outcomes in decision-making, as stated in paragraph 3A(a) of the EPBC Act, should also provide opportunities for collaborative decision-making being facilitated under EPBC Act processes.

Recommendation 6

- Commonwealth, State and Territory governments should revise and update the IGAE to reflect the current scope of ecologically sustainable development principles, and commit to a consistent exposition of the principles in State and Territory legislation and a consistent application of those principles in their own jurisdictions.

Recommendation 7

- The various decision-making processes in the EPBC Act and the management tools used to protect and manage Australia's biodiversity should explicitly have regard to the impacts of climate change and climate change adaptation measures.

Recommendation 8

- Consistent with Recommendation 1, any development of approval bilateral agreements must maintain a role for the Commonwealth in issuing approvals and must be robustly overseen by the Commonwealth.

Recommendation 9

- There are substantial environmental benefits in the strategic assessment of impacts at a landscape scale and over a substantial time period. Part 10,

Division 1 of the Act should be redrafted to remove the uncertainty of its application and draw upon the lessons learned from its implementation over the last 20 years.

Recommendation 10

- The Law Council recommends the continuation of judicial review of administrative decisions by applicants, and also by third parties, on the basis that section 487 of the EPBC Act (extended standing for judicial review) has operated effectively and has not opened the floodgates to litigations.

Recommendation 11

- The Law Council recommends:
 - the introduction of specific legislative criteria on which controlled action and assessment approach decisions are made and the availability of merits review of those decisions;
 - a merits review process for controlled action and assessment approach decisions which is conducted in a similar manner to an appeal from a decision made by a judge at first instance;
 - the extension of legal standing for the purposes of merits review to those persons who made a formal submission during the relevant public consultation process in terms similar to section 8.8 of the *Environmental Planning and Assessment Act 1979* (NSW); and
 - the availability of merits review in respect of decisions made by the Minister as well as decisions made by a delegate.

Recommendation 12

- Irrespective of any decision by the Australian Government following the Review in relation to merits review, the Law Council recommends that there be a concerted effort by the administering department, and supported by the Commonwealth Environment Minister, to improve the quality and coverage of guidance materials that support the public understanding of the EPBC Act.

Recommendation 13

- Considering Australia's obligations under United Nations Declaration on the Rights of Indigenous People² (**UNDRIP**), the Law Council recommends:
 - amendment of section 3 of the EPBC Act objects to include references to the UNDRIP and the 2030 Agenda for Sustainable Goals as international agreements to which the EPBC Act seeks to give effect;
 - that the *Akwé: Kon Guidelines* be incorporated into the EPBC Act in accordance with the recommendations of the CBD Conference of the Parties 7 recommendation; and

² GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) annex.

- the EPBC Act should be reviewed against the UNDRIP to ensure that the processes and mechanisms contained in the Act itself and the implementation of those mechanisms are harmonious with the UNDRIP.

Recommendation 14

- The Commonwealth should consider introducing a compensatory regime to private landholders where, for the good of all Australians, their land is dedicated to the protection of Australia's biodiversity.

Recommendation 15

- The Law Council recommends support for specialist legal assistance services to expand their reach in RRR areas, particularly to overcome geographic and jurisdictional inequity of access, and including through outreach and referral networks and the increased use of technology.

Recommendation 16

- The Law Council considers that there should be the development of RRR access to justice strategies to ensure an appropriate and tailored mix of services and additional legal services, publicly funded and private, in areas of critical need – including through rural placement, targeted mentoring and incentive schemes.

Introduction and context

1. Approach to this submission

14. The Law Council's objectives, as set out in its Constitution,³ include:
 - the promotion of the rule of law in the public interest – one of the key principles of the rule of law (as explained in the Law Council's Rule of Law Policy⁴) is that 'the law must be both readily known and available, and certain and clear';⁵
 - the promotion of the administration of justice;
 - the development and improvement of law throughout the Commonwealth; and
 - the advancement of the science of jurisprudence.
15. The Law Council's assessment of the EPBC Act are underpinned by these objectives. The suggestions for reform set out in this submission are also based on the national and international legal principles that underpin the Act, or principles that should underpin the Act going forward, the quality of the drafting of the Act and practical experience drawn from applying the Act.
16. The Law Council's approach has also been based on a desire to see real and meaningful change come about as a result of this Review. It is widely acknowledged that the first statutory review of the EPBC Act conducted by Dr Allan Hawke in 2009⁶ (**the Hawke Review**) yielded many worthwhile recommendations,

³ Law Council of Australia, [Constitution of Law Council of Australia Limited](#), 16 April 2003.

⁴ Law Council of Australia, [Policy Statement: Rule of Law Principles](#), March 2011.

⁵ Ibid, Principle 1.

⁶ Australian Government, Department of the Environment, Water, Heritage and the Arts, *The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999* (Dr Allan Hawke AC: Chair) (2009) (**Hawke Review**).

many of which were accepted by the federal government of the day. However, only a very small number of those recommendations have been implemented in the last 10 years.

17. It is the Law Council's strong view that the recommendations from this Review should not be 'left on the shelf'. All political parties at the federal level must commit to working with each other and with key stakeholders to implement the recommendations made as a result of this Review and develop the legislative amendments for passage through the Commonwealth Parliament. Similarly, there must be a long term commitment to the development of any necessary policy and procedural improvements recommended by the Review. Put simply, the Australian environment cannot afford another decade of inaction.

2. The Hawke Review

18. The Hawke Review yielded 71 recommendations for reform of the EPBC Act. Only a handful of these recommendations have been implemented in the intervening decade. For example, recommendation 66 stated that the Australian Government consider streamlining the relationship between the EPBC Act and the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth). This was partially achieved with the 2014 endorsement and approval under Part 10 of the EPBC Act of the environmental assessment procedures undertaken by the National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**).
19. However, the vast majority of the recommendations from the Hawke Review, while accepted in whole or in part by the government of the day have never been translated into legislative or policy change. Unfortunately, many of these recommendations remain relevant today.
20. **Appendix 1** of this submission is a table of the recommendations from the Hawke Review, grouped according to subject matter, with the then-government response to each recommendation. The Law Council's comments on each recommendation, and in particular the Law Council's view on the ongoing relevance of each recommendation, are set out in the final column of the table.

Key issues

3. Role of the Commonwealth in environmental protection

21. The Law Council's longstanding view is that the Commonwealth should be demonstrating leadership in biodiversity conservation and environmental protection having regard to its unique role sitting at the apex of government in Australia and being independent of particular State or Territory interests. The Australian Government is responsible for giving effect to Australia's international commitments in domestic law through the exercise of the external affairs power under the Constitution. Australia is a signatory to some 33 key treaties and protocols in relation to the environment⁷ and it is the Australian Government that must meet the State obligations in those treaties and protocols and ensure that the State and Territory governments work together with the Australian Government to meet and uphold those obligations.

⁷ See the list at <<https://www.dfat.gov.au/international-relations/themes/environment-sea-law/Pages/environment-and-sea-law>>.

22. Furthermore, the Australian Government's own social licence to regulate requires the Commonwealth to remain actively involved in environmental protection matters, including the assessment and approval of impacts and potential impacts on MNES.
23. In its October 1998 submission to the Senate Environment Recreation Communications and the Arts Legislation Committee in relation to the Environment Protection and Biodiversity Conservation Bill, the Law Council noted that the 'Commonwealth has a critical role to play in the broad environmental issues facing Australia, and the legal and legislative processes through which those issues are ultimately addressed.'⁸
24. In its 2014 submission to the House of Representatives Standing Committee on the Environment inquiry into streamlining environmental regulation,⁹ the Law Council again stressed the importance of the Commonwealth's role in protecting the environment. The Law Council made the following statements in that submission:

9. The Law Council cautions against the removal of legitimate environmental protections which have been imposed for reasons of fundamental importance to ecologically sustainable development. The Australian Government's integrated national law for the environment, the Environment Protection and Biodiversity Conservation Act 1999 was designed to put on a more co-operative footing federal-state environmental relations, after a series of High Court decisions overturned state government approvals granted to extractive industries in area of high conservation value. Those court challenges included:

- *Stopping sand mining on Fraser Island in Queensland (by refusing export approval);*
- *Prohibiting the construction of a state authorised dam in Tasmania; and*
- *Stopping rainforest logging of the wet tropics of Queensland (by nominating the area for World Heritage listing as a precursor to prohibiting logging as incompatible with the World Heritage values of the area).*

10. The Law Council's previous submission on the need to retain Commonwealth power in the environmental field noted that the EPBC Act is the principal piece of national legislation directed at protecting Australia's environment. The Act was developed following recognition in both the 1992 and 1997 Intergovernmental Agreements for the Environment of the important role for the Australian Government in matters of international and national environmental significance. Those agreements in turn emerged after environmental concern had taken hold globally, during the 1970s-90s as manifested in the Brundtland Report, the Rio Earth Summit and the negotiations for an array of new multilateral environmental instruments.

...

⁸ Law Council of Australia, *Environment Protection and Biodiversity Conservation Bill*, Submission to the Senate Environment Recreation Communications and the Arts Legislation Committee, 6 October 1998.

⁹ Law Council of Australia, *Inquiry into streamlining environmental regulation, 'green tape', and one stop shops*, Submission to the House of Representatives Standing Committee on the Environment, 29 April 2014.

14...Government needs to resist pressure to conclude, without further examination, that reduction of regulation will necessarily stimulate the economy.¹⁰

Recommendation 1

- **The Commonwealth must maintain its role in the legislative framework for environmental protection and biodiversity conservation in Australia.**

4. Operation of the EPBC Act – should it be replaced?

25. Since the EPBC Act commenced, there has been repeated criticism that it is too long and too complex.
26. The EPBC Act and its associated regulations combine to comprise over 1000 pages of legislation. This is an inevitable consequence of what the Act is being asked to regulate. The EPBC Act covers:
- the assessment and approval of individual proposals;
 - regional and strategic assessment;
 - the establishment and maintenance of threatened species and communities lists;
 - protection of whales and cetaceans and other marine species;
 - development of management plans and tools to protect and improve biodiversity;
 - regulation of international movement of wildlife;
 - protection of World and National heritage areas and values in compliance with international obligations;
 - management of Commonwealth reserves; and
 - management of fishing.
27. The Act also sets out the extensive range of offences and penalties for non-compliance, the establishment and administration of the various bodies that perform functions under the Act and the usual technical administrative and supporting provisions associated with legislation of this nature.
28. However, the Law Council cautions against a focus on the length of a piece of legislation. What is more important is whether the legislation is operating effectively and achieving its objectives. This is explored in more detail in section 4 of this submission.

4.1 Options for ‘remaking’ the EPBC Act

29. There are several options available to the Australian Government in terms of remaking or replacing the EPBC Act:
- (a) repealing the Act and replacing it with a fundamental shift in its objectives and its approach to regulation – the work undertaken by the Australian Panel of Experts on Environmental Law provides a possible blueprint for this option;¹¹

¹⁰ Ibid.

¹¹ The Overview and suite of Technical Papers prepared by the Panel are available at www.apeel.org.au.

- (b) repealing the Act and replacing it along the lines suggested by the Hawke Review; or
 - (c) repealing the Act and replacing it with an ‘enabling’ Act supported by regulations and policy documents that provide the detailed rules, obligations and procedures.
30. None of these options is guaranteed to produce legislation that is less complex or shorter in length than the EPBC Act.
31. As an example, in Queensland development is regulated by the *Planning Act 2016* (Qld) (**Planning Act**) and if an environmental impact statement is required to assess the impacts of undertaking a project, that process may occur under the *Environmental Protection Act 1994* (Qld) or the *State Development and Public Works Organisation Act 1971* (Qld).
32. In 2017, the Planning Act commenced and repealed the *Sustainable Planning Act 2009* (Qld). At that time, the Department responsible for the administration of the planning legislation stated:

The Planning Act will create a contemporary legislative framework for delivering planning and development in Queensland. ... The new planning laws will provide for various elements of this system, including the development assessment. ... The Planning Act will not set out the development assessment process but rather establish the process to be set out in a separate statutory instrument called the Development Assessment rules (DA Rules).¹² This is one of the key changes to the new development assessment system. Removing the process from the principal legislation will create a development assessment system that can be more responsive to contemporary or emerging circumstances.¹³

33. Since the introduction of performance-based planning, Queensland’s planning law framework has been repeatedly amended in response to complaints of complexity.¹⁴ The Planning Act is the latest iteration in that process. The tables below summaries the legislation and statutory instruments (and their respective page size as one measure of ‘complexity’) which were in force prior to and after the Planning Act took effect in July 2017:

Legislation and statutory instruments: pre-Planning Act reforms

Legislation	Date	Pages
<i>Sustainable Planning Act 2009</i>	Version as at 19 May 2017 (repealed on 3 July 2017)	718
<i>Sustainable Planning Regulation 2009</i>	Version as at 14 April 2017 (repealed on 3 July 2017)	264
<i>Planning and Environment Court Rules 2010</i>	Version effective from 20 May 2011 (until repealed on 27 July 2018)	35
TOTAL NUMBER OF PAGES		1,017

¹² Being one of the changes resulting in the Planning Act reforms.

¹³ Department of Infrastructure, Local Government and Planning (Qld), *An overview of key changes to the development assessment system*, July 2016, 3.

¹⁴ Amy McInerney, ‘Planning – A Risky Business?’ (2017) 48 VUWLR, 283 onwards.

Legislation and statutory instruments: post-Planning Act reforms

Legislation	Date	Pages
<i>Planning Act 2016</i>	Version as at 19 March 2020	352
<i>Planning Regulation 2017</i>	Version as at 27 March 2020	468
<i>Planning and Environment Court Act 2016</i> (the Court was previously created under the Sustainable Planning Act 2009)	Version as at 13 May 2019	43
<i>Planning and Environment Court Rules 2018</i>	Version as at 13 May 2019 to date	34
Minister's Guidelines and Rules under the Planning Act 2016	July 2017	90
Development Assessment Rules (version 1.2)	11 November 2019 (commenced on 6 December 2019)	38
State Development Assessment Provisions (version 2.6)	7 February 2020 (commenced on 7 February 2020)	290
TOTAL NUMBER OF PAGES		1,315

34. If a decision is made to replace the EPBC Act with new legislation (regardless of what new model is adopted and new legislation might look like), the Law Council expects that any draft replacement Act would take at least two years to produce and will likely take a year to make its way through the Commonwealth parliamentary process. The Law Council is concerned that shifting the focus to development of a new Act (with no guarantee of delivering the simplicity sought or better achieving the objects of the EPBC Act in terms of environmental protection or biodiversity conservation) provides an excuse to leave the EPBC Act 'as is' – meaning the opportunity to make more immediate improvements to the drafting and operation of the Act is lost and there is no incentive to improve the administration of the Act.
35. It is the Law Council's view that maintaining the status quo is not acceptable and will:
- lead to the continued decline in biodiversity and ecosystem health, with an increasing decline in Australia's native species, and
 - not allow the Commonwealth to comply with its international obligations to *inter alia* manage and reduce threats to the environment.

Recommendation 2

- **The Law Council does not support the complete repeal and replacement of the EPBC Act at this time.**

4.2 Improving what we have

36. None of the feedback provided to the Law Council in the course of its own consultations for this submission commented on the length or the complexity of the EPBC Act being a material issue.
37. Rather, a strong view was expressed that the day-to-day administration of the EPBC Act has been the most significant issue experienced and that in more recent years, the Act's administration has been marked by inconsistency, delay and expense.
38. There have been increasing complaints in recent years from proponents of inconsistency in the administration of the EPBC Act. In particular, proponents operating across various State and Territory jurisdictions have highlighted significantly different approaches between assessing officers and offices.
39. Many proponents of larger projects, which are generally subject to longer application and assessment pathways, also complain of inconsistency of contact within the administering department. A frequent concern is that the officer responsible for delivering the assessment of a project can change five or more times during the assessment process, which leads to a significant waste of resources as each new officer familiarises themselves with the project, only to depart before the assessment is concluded. Proponents also expend significant resources in engaging with each new officer, feeling as though they are starting from scratch, and report sometimes receiving different feedback and approaches when responsibility changes. In addition, there are often inconsistencies in condition drafting between approvals, which can lead to difficulties in interpreting conditions which may be intended to require the same outcome but are differently worded.
40. Dated guidance materials and information databases are also cause for concern. The Protected Matters Search Tool (**PMST**) developed to enable the public to identify potential MNES located in an area of interest and inform whether a referral under the EPBC Act for assessment has been neglected. While this could be a valuable tool to inform regulators, proponents and third parties and updated with information from individual referrals, the PMST was last updated in 2010 and has now impaired functionality and provides very limited assistance in providing reliable information about MNES.
41. There has also been concern expressed by some proponents that the administering department acts contrary to robust scientific advice during assessment processes, both in terms of (formally or informally) requiring information and frequently in drafting and imposing conditions on approvals. Such an approach is concerning given the objectives of the EPBC Act and the high environmental standards the Commonwealth, and indeed this Review, are plainly keen to achieve and maintain.
42. Each of the inconsistencies described above creates inherent uncertainty and, often, leads to unfavourable views on the legislation and its administration, which is entirely separate from whether it is in fact achieving its intended outcomes. Inconsistent treatment of different individuals and entities engaged with the EPBC Act, for reasons unrelated to the legislation and its objectives, would also appear to be inherently unfair.
43. The view was also expressed during the Law Council's consultation process for this submission that section 518 of the Act may also be a relevant factor contributing to delays. Section 518 provides that anything done by the Commonwealth, the Minister or the Secretary under the Act or the regulations is not invalid merely because it was not done within the period specified. The intent of the section is

reasonably clear, given the EPBC Act provides expanded standing for judicial review. In the absence of this section, the Commonwealth would be exposed to greater numbers of Court challenges if timeframes are inadvertently missed.

44. Arguably, in practice this provision has effectively allowed the administering department to not be accountable to, or disregard, timeframes for decision-making placed upon it under the EPBC Act. This has been a recurring problem over several years. Failure to meet statutory deadlines and timeframes causes uncertainty and expense for proponents across a wide range of industries and leaves them powerless under the Act. It can also be problematic where a state or territory assessment process is attempting to run concurrently when timeframes under the EPBC Act are not achieved with any regularity.
45. Another view expressed during the Law Council's consultation was the inadequate financial resources allocated to the administration and enforcement of the Act. A failure to adequately resource the administration of the Act does not support or uphold the Commonwealth's social licence to regulate.
46. In the Law Council's view, the Australian Government should be using the reform opportunity given by this Review to focus on the operation and implementation of the EPBC Act on the achievement of tangible biodiversity conservation outcomes, backed by solid scientific data and rigorous and visible enforcement of the Act, rather than development of an entirely new legislative regime.
47. Some amendments to the Act are required. The submission of the Law Council's Legal Practice Section to the Parliamentary Senate Standing Committees on Environment and Communications inquiry on Australia's faunal extinction crisis in 2018,¹⁵ included the following comments:

ToR (d) – Adequacy of Commonwealth environment laws and policies in protecting threatened fauna and against key threatening processes

13. *Australia's most recent report on CBD implementation stated:*

Recent reports on the state of Australia's environment have found that, in general, population size, geographic range and genetic diversity are decreasing in a wide range of species across all groups of plants, animals and other forms of life. Case studies include reports of a major decline in mammals in northern Australia, changes in species composition and loss of ecological integrity across a range of threatened ecological communities, and degradation in native vegetation.

14. *The [State of the Environment] 2016 report confirmed that biodiversity indicators show continuing decline across the country.*
15. *The Committee is concerned that the design and implementation of the current regulatory framework is inadequate to meet Australia's international obligations to manage and reduce threats to biodiversity. The [Law Council's] submission on the Draft Revision of Australia's Biodiversity Conservation Strategy – Australia's Strategy for Nature 2018–30 outlined some of these concerns.*

¹⁵ Legal Practice Section of the Law Council of Australia, *Australia's Faunal Extinction Crisis*, Submission to the Parliamentary Senate Standing Committees on Environment and Communications, 10 September 2018.

16. Key areas for reform include:

- *Better alignment of federal and state impact assessment processes to ensure that state approvals, particularly relating to forestry and planning and development, do not undermine protections offered under the EPBC Act.*

At a minimum, the Commonwealth should use forums such as the Council of Australian Governments (COAG) and the Meetings of Environment Ministers to progress the adoption of best practice laws to protect threatened species and ensure that these are adequately reflected in planning instruments.

- *Requiring consideration of both indirect and cumulative impacts when assessing likely impacts of a proposal on threatened species.*
- *Ensuring industries currently regulated outside the EPBC Act, such as offshore petroleum activities and forestry operations, are subject to equivalent assessment of impacts on threatened species.*
- *Increasing the use of strategic and regional planning tools to more proactively assess and manage impacts on threatened species.*

The SoE 2016 Report confirms that Australia's biodiversity decline is largely due to the cumulative impacts of multiple pressures. Well-implemented bioregional planning would protect ecological integrity at a landscape scale, whilst ensuring that economic uses are located in the most appropriate places.

Consistent with the recommendations of the Hawke Review, comprehensive regional and multi-species recovery plans for ecological communities can be an effective use of resources, recognising the clear link between habitat protection and improved prospects of survival for threatened species.

- *Stricter regulation of biodiversity offsets to secure 'net gains' and critically analyse the performance of offset projects.*
- *More rigorous identification, protection and restoration of critical habitat, including climate refugia.*
- *Strengthening obligations to implement recovery plans and threat abatement plans, and to embed adaptive management practices to respond to the changing needs of, and risks to, threatened species.*
- *More rigorous requirements for baseline data, monitoring, reporting and evaluation of management and recovery actions. For example, recovery plans should include measurable recovery actions and outcomes, and the Minister required to regularly report against those outcomes.¹⁶*

¹⁶ Ibid, 7.

48. These key areas of reform remain relevant today. Other specific areas for legislative reform are set out in the balance of this submission.
49. The Law Council takes the view that rather than diverting scarce resources to draft and consult about a new piece of legislation, there must be a greater focus on improving the implementation of the Act by the administering department; including greater transparency to stakeholders (both proponents and the general public) as to how decisions are made under the Act, and more rigorous enforcement of its provisions.¹⁷
50. The administration of the environment and safety aspects of the offshore petroleum industry by the NOPSEMA and the carbon farming initiative by the Clean Energy Regulator are two examples of complex legislation (the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) and the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) respectively) being administered in a transparent fashion, supported by guidelines, guidance documents and explanatory material developed by the regulators.

Recommendation 3

- **To maximise the benefits of limited public resources, the focus should be on critical amendments to the EPBC Act supported by a greater emphasis on improving its implementation and enforcement.**

5. Principles of Ecologically Sustainable Development and the objects of the EPBC Act

5.1 Ecologically sustainable development

51. 'Sustainable Development' or 'ecologically sustainable development' is broadly understood as socially responsible economic development that protects the environment and natural resource base for the benefit of future generations. It can be achieved by promoting integrated and sustainable management of ecosystems and natural resources that support economic, social and human development, while facilitating ecosystem conservation, regeneration, restoration and resilience in the face of new and emerging challenges.
52. There is longstanding statutory and other recognition within Australian jurisdictions of 'sustainable development'. In May 1992, all Australian governments acknowledged the benefits of sustainable development in the IGAE, which was included as a schedule to the *National Environment Protection Council Act 1994* (Cth).
53. One of the objects of the EPBC Act is to 'promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources'.¹⁸
54. Section 3A of the EPBC Act sets out the principles of ecologically sustainable development as follows:

¹⁷ To this end, the Law Council notes the observations made by the Productivity Commission in its *Resources Sector Regulation*, Draft Report (2020), Canberra, and Chapter 6 of the draft report in relation to the environmental approval processes.

¹⁸ EPBC Act, s 3(1)(b).

- (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
- (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation [being the precautionary principle];
- (c) the principle of intergenerational equity – that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
- (e) improved valuation, pricing and incentive mechanisms should be promoted.

5.2 Ecologically sustainable development principles

55. In 2006, Chief Justice Preston of the Land and Environment Court of New South Wales had an opportunity to consider the meaning of ‘ecologically sustainable development’ in *Telstra Corporation Limited v Hornsby Shire Council*.¹⁹ His Honour relied on the 1987 United Nations Commission on Environmental Development (UNCED) definition, being ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’²⁰

56. His Honour continued his definition by saying:

[m]ore particularly, ecologically sustainable development involves a cluster of elements or principles. Six of these are worth highlighting:

First, from the very name itself comes the principle of sustainable use - the aim of exploiting natural resources in a manner which is ‘sustainable’ or ‘prudent’ or ‘rational’ or ‘wise’ or ‘appropriate’ ... The concept of sustainability applies not merely to development but to the environment.

...

*Secondly, ecologically sustainable development requires the effective integration of economic and environmental considerations in the decision-making process ... This is the principle of integration. It was the philosophical underpinning of the report *Our Common Future*. That report recognised that the ecologically harmful cycle caused by economic development without regard to and at the cost of the environment could only be broken by integrating environmental concerns with economic goals.*

...

The principle has been refined in recent times to add social development to economic development and environmental protection. ...

Thirdly, there is the precautionary principle. There are numerous formulations of the precautionary principle but the most widely employed formulation adopted in Australia is that stated in s 6(2)(a) of the

¹⁹ [2006] NSWLEC 133 (*Telstra v Hornsby*).

²⁰ *Telstra v Hornsby*, [108] (Preston CJ), citing World Commission on Environment and Development, *Our Common Future*, 1987, 44.

Protection of the Environment Administration Act 1991 (NSW). This provides:

'...If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by:

(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and

(ii) an assessment of the risk-weighted consequence of various options.'

...

Fourthly, there are principles of equity. There is a need for intergenerational equity - the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations ...

There is also a need for intra-generational equity. This involves considerations of equity within the present generation, such as use of natural resources by one nation-state (or sector or class within a nation-state) needing to take account of the needs of other nation-states (or sectors or classes within a nation-state) ... It involves people within the present generation having equal rights to benefit from the exploitation of resources and from the enjoyment of a clean and healthy environment

...

Fifthly, there is the principle that conservation of biological diversity and ecological integrity should be a fundamental consideration ...

Sixthly, ecologically sustainable development involves the internalization of environmental costs into decision-making for economic and other development plans, programmes and projects likely to affect the environment. This is the principle of the internalisation of environmental costs. The principle requires accounting for both the short-term and the long-term external environmental costs. ...

These principles do not exhaustively describe the full ambit of the concept of ecologically sustainable development, but they do afford guidance in most situations. These principles, if adequately implemented, may ultimately realise a paradigm shift from a world in which the development of the environment takes place without regard to environmental consequences, to one where a culture of sustainability extends to institutions, private development interests, communities and individuals.²¹

57. Section 3A of the EPBC Act incorporates these principles at paragraphs (a), (b) and (d) and, as far as intergenerational equity is concerned, at paragraph (c).
58. Chief Justice Preston's description of the principles that fall under the ecologically sustainable development 'umbrella' has been quoted and relied on in the majority of

²¹ *Telstra v Hornsby*, [108]-[120] (Preston CJ).

cases concerning sustainable development since 2006. It has been applied in the Victorian Supreme Court,²² cited or approved in the New South Wales Court of Appeal²³ and in the Supreme Court of South Australia,²⁴ the Supreme Court of Queensland²⁵ and the State Administrative Tribunal of Western Australia.²⁶ It has also been cited in the Federal Court of Australia.²⁷

5.3 Ecologically sustainable development policy opportunities

59. While section 3A of the EPBC Act has remained relatively robust, there have been developments in the meaning and scope of the ecologically sustainable development concept in the last 20 years which must be reflected in the EPBC Act going forward.
60. The Law Council endorses the formulation set out by Preston CJ above and suggests that it be used as the starting point for a recrafting of the objects of the EPBC Act and a foundation for new public guidance explaining the application of ecologically sustainable development principles to the implementation of the Act.
61. There are other opportunities for review of the ecologically sustainable development objectives which are discussed below.

Global dimension of ecologically sustainable development

62. The current definition of ecologically sustainable development in the EPBC Act fails to have regard to the global dimension of the ecologically sustainable development concepts as described above and the environmental impacts of actions and policies.
63. The principles that comprise ecologically sustainable development are the product of international discussion and agreement. It is appropriate that the legislation reflecting Australia's international environmental obligations and policy leads this implementation consistently across all States and Territories. It is noted that the principle of global impacts is among the 'guiding principles' of ecologically sustainable development that is used in the *Commissioner for Sustainability Act 2003 (Vic)*.²⁸
64. It is important that when applying global principles in Australia, the international dimension is not lost and the principles are applied in a context that reflects the evolution of the ecologically sustainable development concept at a global level.

Environmental protection and human rights

65. The Law Council also recognises that ecologically sustainable development and the exercise of human rights are interdependent and interrelated. The International Bar

²² *MyEnvironment Inc v VicForests* [2012] VSC 91, *Rozen v Macedon Ranges Shire Council* [2010] VSC 583, *Environment East Gippsland Inc v VicForests* [2010] VSC 335, *Hoskin v Greater Bendigo City Council* [2015] VSCA 350.

²³ *Precision Products (NSW) Pty Ltd v Hawkesbury City Council* (2008) 74 NSWLR 102, *Minister for Planning v Walker* [2008] NSWCA 224, *Davis v Gosford Council* [2014] NSWCA 343.

²⁴ *Rowe and Lindner (No 2)* [2007] SASC 189.

²⁵ *New Acland Coal Pty Ltd v Paul Anthony Smith, Member for the Land Court of Queensland* (2018) 230 LGERA 88.

²⁶ *Moore River Company Pty Ltd v Western Australian Planning Commission* [2007] WASAT 98, *WA Developments Pty Ltd v Western Australian Planning Commission* [2008] WASAT 260.

²⁷ *Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042, *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2009] FCA 330, *Wyong-Gosford Progressive Community Radio Inc v Australian Communications Media Authority* [2006] FCA 1691.

²⁸ *Commissioner for Sustainability Act 2003 (Vic)*, s 4(3)(c).

Association acknowledged this interdependence in its 2014 Report on Climate Change and Human Rights.²⁹ The protection and promotion of human rights is expressly included in paragraph 3 of the resolution of the 2030 Agenda for Sustainable Development and Sustainable Development Goals³⁰ and are apparent in the drafting of many of the sustainable development goals themselves. The work done by the UN Special Rapporteur on Human Rights and the Environment culminated in the 'Framework Principles on Human Rights and the Environment' released in 2018.³¹ The first two principles demonstrate this interdependence:

- States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights; and
- States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.³²

66. The 2016 Paris Agreement³³ (**Paris Agreement**) makes the explicit link between human rights and climate change and human rights principles are being used as the foundation for recent litigation in this area around the globe. While Australian courts might be more cautious about recognising this link,³⁴ this does not mean the EPBC Act should not recognise these issues. Rather, as the key piece of Commonwealth legislation, the EPBC Act and framework should be reflective, aspirational, forward looking and capable of responding to international issues at a domestic level.
67. Decision-making under the EPBC Act about actions that affect or may affect the environment, or involve the exploitation of natural resources, should respect, protect and fulfil human rights. This should be made explicit in the EPBC Act itself.

The non-regression principle

68. The non-regression principle is a principle that prohibits the revision of established environmental legislation if the effect of the revision will diminish the existing level of environmental protection.³⁵ The principle has its origins in international human rights law, which requires the progressive realisation of economic, social and cultural rights.³⁶ Non-regression has also been applied in other areas such as investment law, where countries were seen to be rolling back domestic environmental protections to lure investors.³⁷

²⁹ *Achieving Justice and Human Rights in an Era of Climate Disruption*, International Bar Association Climate Change Justice and Human Rights Task Force Report, July 2014.

³⁰ A key outcome from the 2012 UNCED World Summit was the adoption of the 2015 and 2030 Agenda for Sustainable Development and Sustainable Development Goals: *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, UN GAOR, 70th sess.

³¹ John E. Knox, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/37/59 (24 January 2018), 5-6, Principles 1 and 2.

³² *Ibid*, Annex, 7.

³³ Paris Agreement, opened for signature 22 April 2016 [2016] ATS 24 (entered into force 4 November 2016).

³⁴ See Kent Blore, 'Climate change and human rights under the Australian Charters', AUSPUBLAW (3 April 2020) <https://auspublaw.org/2020/04/climate-change-and-human-rights-under-the-australian-charters>.

³⁵ See discussion of this principle in Law Council of Australia, *Inquiry into streamlining environmental regulation, 'green tape', and one stop shops*, Submission to the House of Representatives Standing Committee on the Environment, 29 April 2014, 17.

³⁶ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS (entered into force 3 January 1976), art 2(1), and Committee on Economic, Social and Cultural Rights, General Comment 3 (14 December 1990).

³⁷ A Mitchell and J Monro, *No Retreat: An Emerging Principle of Non-Regression from Environmental Protections in International Investment Law*, (2019) 50 *Georgetown Journal of International Law*.

69. While the principle of non-regression seeks to ensure that the level of environmental protection is not diminished, it has been suggested that another principle of 'progression' should be added which aims at improving environmental legislation by incorporating the use of current scientific knowledge.³⁸ An example of such inclusion is the Paris Agreement which provides that each successive nationally determined contribution 'will represent progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition'.³⁹
70. In the United Kingdom, the principle has been echoed in the context of Brexit negotiations with both the UK and the European Union affirming the need for the 'agreement on the future relationship to include robust non-regression provisions on issues including environmental legislation'.⁴⁰
71. The Law Council suggests that consideration be given to the principles of non-regression and progression in reviewing and reframing the underlying principles of the EPBC Act going forward.

Decision-making for ecologically sustainable development outcomes

72. Paragraph 3A(a) of the EPBC Act states that decision-making processes should effectively integrate long-term and short-term economic, environmental, social and equitable outcomes. However, the principles of ecologically sustainable development only allude to, but are not explicit about, the role of good governance in achieving integrated, equitable and balanced outcomes in decision-making.
73. While governance literature in this area is emerging,⁴¹ it appears the firming view is that collaboration and collaborative action can lead to better decision-making and is essential to addressing complexity, achieving integration and creating the conditions for the implementation of ecologically sustainable development. Collaborative action can take a number of forms: collaboration between governments through bilateral assessments; information sharing by proponents and the administering department; collaboration with Traditional Owners. Social capital and trusting relationships are critical to collaboration and the innovative opportunities that can arise therefrom.⁴² This Review provides an opportunity for the EPBC Act to articulate and implement transparent decision-making processes which the Law Council expects will lead to consistent and confident decision-making.

Recommendation 4

- **The principles of ecologically sustainable development set out in section 3A of the EPBC Act should be updated to acknowledge and reflect the global dimension of sustainable development; the interdependence between sustainable development and human rights and the principles of non-regression and progression.**

³⁸ Report of the UN Secretary General, *Towards a Global Pact for the Environment: Gaps in international environmental law and environment related instruments*, 30 November 2018, 13.

³⁹ Paris Agreement, art 4 (3).

⁴⁰ Martin Nesbit and David Baldock, *Non-regression and environmental legislation in the future EU-UK relationship*, Institute for European Environmental Policy paper, 1 October 2018.

⁴¹ U Baresi, K Vella and N Sipe, *Sustainability at the Australian local government level: Is there room for Strategic Environmental Assessment (SEA)?*, 2015 SOAC National Conference, Gold Coast.

K Vella, N Sipe, A Dale and B Taylor, *Not learning from the past: Adaptive governance challenges for Australian natural resource management*, *Geographic Research*, 53(4), 379-392.

⁴² See for example F Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (1995); D Gambetta 'Can We Trust Trust?' in D Gambetta (ed), *Trust Making and Breaking Cooperative Relationships* (1998).

Recommendation 5

- **The integrated, equitable and balanced outcomes in decision-making, as stated in paragraph 3A(a) of the EPBC Act should also provide opportunities for collaborative decision-making being facilitated under EPBC Act processes.**

5.4 Intergovernmental Agreement on the Environment

74. The IGAE⁴³ is an agreement between the Commonwealth and all State and Territories of Australia. Section 3 of the IGAE sets out the principles of environmental policy. Particularly, section 3.2 states:

3.2 The parties consider that the adoption of sound environmental practices and procedures, as a basis for ecologically sustainable development, will benefit both the Australian people and environment, and the international community and environment. This requires the effective integration of economic and environmental considerations in decision-making processes, in order to improve community well-being and to benefit future generations.

75. Further, section 3.5 of the IGAE sets out the following principles of ecologically sustainable development:

3.5 The parties further agree that, in order to promote the above approach, the principles set out below should inform policy making and program implementation.

3.5.1 precautionary principle -

Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:

careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and

an assessment of the risk-weighted consequences of various options.

3.5.2 intergenerational equity -

the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

3.5.3 conservation of biological diversity and ecological integrity -

conservation of biological diversity and ecological integrity should be a fundamental consideration.

3.5.4 improved valuation, pricing and incentive mechanisms -

⁴³ Intergovernmental Agreement on the Environment, May 1992, available at <https://www.environment.gov.au/about-us/esd/publications/intergovernmental-agreement>.

environmental factors should be included in the valuation of assets and services;

polluter pays i.e. those who generate pollution and waste should bear the cost of containment, avoidance, or abatement;

the users of goods and services should pay prices based on the full life cycle costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any wastes;

environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, which enable those best placed to maximise benefits and/or minimise costs to develop their own solutions and responses to environmental problems.

Implementation by Australian States and Territories

76. In addition to the EPBC Act, the ecologically sustainable development concept has been incorporated with varying degrees of specificity and a wide variety of formulations into all principal pieces of environment protection legislation in each Australian jurisdiction, in accordance with obligations in the IGAE.
77. The IGAE is included as a schedule to the *National Environmental Protection Council Act 1994* (Cth) and mirrored in all State and Territory legislation.
78. However, decision makers within Australian States and Territories have sought, from time to time, to progress the concept of ecologically sustainable development independently from Commonwealth government policy.⁴⁴

Commonwealth leadership

79. As a basic tenet of the rule of law, States must comply with their international legal obligations whether created by treaty or arising under customary international law.⁴⁵
80. It is therefore critical to have a clear set of ecologically sustainable development principles that can be applied in and across all Australian jurisdictions to avoid 'vague and inconsistent notions of sustainability in decision-making'.⁴⁶
81. States and individuals are entitled to expect that other State parties to international treaties and agreements will comply with and honour their international legal obligations, including obligations relating to the promotion and protection of human rights. States must avoid inconsistencies between their international legal obligations and their domestic laws and policies.
82. It remains the case post-Hawke Review and as highlighted by the more recent decisions of the New South Wales Independent Planning Commission about climate change impacts that:
 - in relation to implementing international environmental obligations, the Australian Government needs to ensure ecologically sustainable development

⁴⁴ Such as the 2018 New South Wales Independent Planning Commission decision in relation to the Rix's Creek Continuation Project in considering scope 3 greenhouse gas emissions and the March 2019 guidelines released by the Western Australian Environmental Protection Authority about certain resource projects being required to entirely offset carbon dioxide emissions.

⁴⁵ Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011, Principle 8.

⁴⁶ Serge Killingbeck, 'Sustainable Development – A Review', (2018) 35 EPLJ 102, 116.

principles meet international standards so that the Australian States and Territories can avoid inconsistencies between their international obligations and their laws and policies;

- clear and consistent criteria for action assessment is required to provide certainty for proponents and the community more broadly; and
- the independent application of ecologically sustainable development principles must be addressed by the Commonwealth if there is to be a streamlining of processes across all Australian jurisdictions.

Recommendation 6

- **Commonwealth, State and Territory governments should revise and update the IGAE to reflect the current scope of ecologically sustainable development principles, and commit to a consistent exposition of the principles in State and Territory legislation and a consistent application of those principles in their own jurisdictions.**

6. Matters of National Environmental Significance - Inclusion of a Greenhouse Gas emissions trigger

83. The Hawke Review recommended that the EPBC Act be amended to define the emission of more than 500,000 tonnes of CO₂-e of greenhouse gases as a MNES as a short term measure until a carbon price was in place.⁴⁷ While this amendment was not implemented, a carbon price was implemented in Australia for a short period of time before being repealed.
84. There is a need for a clear national policy approach to the regulation of greenhouse gas emissions to ensure that Australia can meet its international commitments to greenhouse gas reductions under the United Nations Framework Convention on Climate Change⁴⁸ and related agreements, including the Paris Agreement. It is also important that State and Territory governments demonstrate a commitment to the reduction of greenhouse gas emissions using the legislative and policy tools at their disposal as part of their contribution to Australia's national targets.
85. There have been a number of recent instances where a perceived failure of national policy or lack of clear guidance for State decision makers has led to inconsistent decisions or regulatory guidance that has been poorly received by those being regulated.⁴⁹ These sorts of developments are not helpful.
86. The emission of greenhouse gases from some sectors of the economy is already regulated through the safeguard mechanism and other regulatory instruments. Many large emitters, conscious of their social licence to operate, are also taking voluntary steps to reduce emissions and use non-fossil fuel based sources of electricity. Opportunities to sequester carbon and offset emissions is generated through the Carbon Farming Initiative, as set out in the *Carbon Credits (Carbon*

⁴⁷ Hawke Review, Rec 10.

⁴⁸ United Nations *Framework Convention on Climate*, opened for signature 20 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).

⁴⁹ For example, in March 2019 the independent Environmental Protection Authority in Western Australia released new guidance on the assessment of greenhouse gas emissions by the Authority. After a considerable backlash, the guidance was withdrawn. After a further period of consultation, a new draft guidance document was released at the end of 2019 and will be finalised shortly. In New South Wales, a number of inconsistent decisions from the Land and Environment Court and the Independent Planning Commission about the treatment of scope 3 emissions ultimately led to legislative amendments being quickly introduced and passed in the New South Wales Parliament.

Farming Initiative) Act 2011 (Cth), and the reverse auctions conducted by the Clean Energy Regulator and the voluntary carbon market.

87. If the EPBC Act were to include a greenhouse gas 'trigger' as a MNES as recommended by the Hawke Review, the operation of the trigger must be considered in light of the operation of policy tools which have developed since the Hawke Review was conducted.
88. For a greenhouse gas trigger to be successful in actually reducing emissions, the Law Council believes that the following elements are essential:
 - there must be a clear policy and principles for the application of the trigger and how it would translate to conditions applied to approved projects (particularly in relation to offsetting greenhouse gas emissions);
 - there must be robust compliance monitoring and enforcement of those conditions; and
 - State and Territory governments must adjust their own policy settings with respect to regulating greenhouse gas emissions to ensure there is no regulatory inconsistency or duplication.
89. The Law Council queries whether a greenhouse gas 'trigger' is the most efficient way to regulate greenhouse gas emissions at this point in time. A more expansive application of the safeguard mechanism in combination with other economic tools may be more efficient.
90. However, not having a greenhouse gas 'trigger' does not mean climate change should not be addressed by the EPBC Act. The principles of ecologically sustainable development in section 3A of the Act, particularly the precautionary principle, require the risks posed by climate change to be considered. The Intergovernmental Panel on Climate Change recently found that reductions in greenhouse gas emissions are required to reduce the impact on biodiversity.⁵⁰ It recommended that climate resilience depends 'critically in urgent and ambitious emissions reductions coupled with coordinated sustained and increasingly ambitious adaptation actions'.⁵¹
91. The Law Council believes there should be a greater and more publicly explicit consideration of the impact of climate change and climate change adaptation principles in the decision-making processes under the Act, including project by project approvals under Part 9, decisions relating to the listing or up-listing of species and communities, and the development of recovery plans and other management tools. More extensive use of cumulative impact assessment and strategic impact assessment under Part 10 of the EPBC Act will also allow for better consideration of climate change impacts over time.
92. Community confidence that the EPBC Act is managing the impact of climate change on biodiversity conservation will be enhanced by the development and publication of clear policy and decision-making principles, consistent with recommendations elsewhere in this submission.

⁵⁰ Intergovernmental Panel on Climate Change, *The Ocean and Cryosphere in a changing climate: Summary for Policy Makers*, (2019).

⁵¹ *Ibid*, 31.

Recommendation 7

- **The various decision-making processes in the EPBC Act and the management tools used to protect and manage Australia’s biodiversity should explicitly have regard to the impacts of climate change and climate change adaptation measures.**

7. Bilateral Agreements

93. Chapter 3 of the EPBC Act facilitates the making of bilateral agreements between the Commonwealth and State and Territory governments to provide (amongst other things) for an efficient environmental impact assessment process and minimised duplication between Commonwealth, State and Territory processes.⁵²
94. At the moment, there are agreements between the Commonwealth and each State and Territory government that allow those governments to incorporate the assessment of potential impacts of proposals against the requirements of the EPBC Act and relevant Commonwealth policy into State and Territory impact assessment regimes. While these assessment bilateral agreements do not cover the assessment of every proposal that triggers the assessment requirements of the EPBC Act, they do cover most proposals that trigger an environmental impact assessment process at State, Territory and Commonwealth levels. Since the first suite of bilateral agreements was made, they have been reviewed, amended, updated and remade on several occasions.
95. While assessment bilateral agreements remove some degree of duplication and overlap in the environmental impact assessment process, there have been repeated calls over the years to have approval bilateral agreements between the State and Territory governments and the Commonwealth.
96. Approval bilateral agreements would allow State and Territory governments to be given delegated authority to issue approvals under Part 9 of the EPBC Act instead of the Commonwealth. A project would only need to interact with the state regulator to proceed. The push for approval bilateral agreements reached its peak in 2013 and 2014 with a COAG agreement in December 2013 and the development of draft approval bilateral agreements with all State and Territory governments in 2014.⁵³
97. In 2014, the House of Representatives Standing Committee on the Environment conducted an inquiry into streamlining environmental regulation, green tape and ‘one stop shops’. The Law Council made a submission to that inquiry and made the following observations in relation to green tape and regulatory duplication:

6 The Law Council understands that the term green tape is being used to refer to excessive formalism in public administration, or official procedures marked by excessive complexity resulting in delay or inaction. At the same time, it must be recognised that not all environmental regulation falls into that category. Not all costs associated with the regulation are caused by inefficiency, or the unintended consequences of poor quality regulation. Some costs are necessary and deliberately imposed in the public interest.

⁵² EPBC Act, s 44.

⁵³ For a convenient summary of the one stop shop policy, see Chris McGrath, ‘One stop shop for environmental approvals a messy backward step for Australia’ 31 EPLJ 164.

7 The industries subject to environmental regulation have expressed concerns about delay, the complexity of legislation, inconsistent and numerous regulations, uncertainty about information and processes, multiple agencies being involved with assessments and none accepting primary responsibility, changing goal posts and the like. These issues are amenable to resolution by a careful approach to identify which regulations serve the legitimate public purpose of protecting the environment and which are just green tape, in the sense of being unnecessary regulatory hurdles.

8 Care should be taken not to apply the term green tape (which is not well defined and could be criticised as being an emotive term) in a way which encourages the view that environmental regulation has only a negative impact.

...

13 The consultation process should take into account the potential for environmental regulation to deliver important economic and social benefits, and not just burdens. The Law Council notes that regulatory change is an event from which economic activity and new business opportunities emerge. The work of economic thinkers, including Nobel laureates, confirms that regulation impacts the distribution of productive commercial activity across locations and away from unproductive and destructive activity. Regulation reduces uncertainty and serves to effectively direct human action according to government policy. It stimulates innovation and competitiveness and is a source of information about the use of resources to enhance wealth.

...

31 The Law Council notes that it is possible to create a sound regulatory scheme, that reduces bureaucratic intrusion and delay, and which does not confuse excessive bureaucracy with regulatory burden.

32 Regulation needs to be separated from the manner of its administration by the executive arm of government. The Law Council agrees that multiple government roles and extensive, unchecked bureaucratic discretion can have a deflating and demotivating impact upon entrepreneurial opportunity. **On the other hand, however, in some instances, having multiple agencies involved in the scrutiny of decisions can ensure better decision-making and reduce the risk of regulatory capture. Regulatory best practice articulates that better regulation, rather than simply removing regulation, should seek to reduce unnecessary bureaucratic regulatory burdens by, for example, reducing complex standards, while improving regulatory design and stakeholder input.**⁵⁴ [emphasis added]

98. Consistent with the comments made in part 4 above in relation to the role of the Commonwealth, the Law Council has reservations in relation to any further delegation of Commonwealth responsibility under Parts 7 to 9 of the EPBC Act.

⁵⁴ Law Council of Australia, *Inquiry into streamlining environmental regulation, 'green tape', and one stop shops*, Submission to the House of Representatives Standing Committee on the Environment, 29 April 2014, 5-12.

Again, aspects of the Law Council submission to the streamlining inquiry remain relevant:

37 The Law Council is concerned that the proposal for state-based one stop shops will actually create multiple regimes in nine different jurisdictions. This may not be welcomed by national and multinational corporations seeking to operate more efficiently and cost effectively across state borders in Australia. Multiple potential state policy settings, which might not ultimately conflict, are likely to considerably add to the cost of doing business nationally ...

38 The Law Council, as a national body, supports nationally harmonised, uniform laws rather than legislative diversity, and notes the industry is likely to prefer more rather than less regulatory consistency. The Law Council agrees with the Wentworth Group of Concerned Scientists that one national set of environmental assessment standards is preferable, which is as currently being negotiated with the bilateral assessment agreements, but that the Commonwealth should retain approval power. The Wentworth Group suggests the Commonwealth Environment minister would still retain the final EPBC Act approval powers, but there would be one process, one set of documentation and common public participation periods.

...

41 The EPBC Act is designed in part to secure compliance with Australia's international environmental obligations. Giving assessment and approval power to the Australian government was intended to overcome shortcomings in State and Territory assessment and development processes, with a view to providing more comprehensive and consistent protection of MNES.

42 Under international law and the Australian constitution, it is the Australian government that has international legal personality and responsibility for external affairs, and while states can assist in treaty implementation, it is national governments who are primarily accountable to multilateral institutions for full compliance with international treaty obligations. To ensure that compliance, the Australian government needs to ensure that state, territory and local governments have appropriate monitoring, compliance and enforcement mechanisms in place.

...

44 Most of these MNES are the subject of international commitments and their protection and management are of national concern, extending beyond the interests of any one state. As a consequence, the Law Council's view has been that the Australian government's role in approving actions that impact on such matters should be retained.

...

47 The Law Council is concerned to ensure that the streamlining of environmental law does not reduce the capacity of Australia to comply with its international commitments.⁵⁵

99. If approval bilateral agreements are to be implemented, and the non-regression principle is to be met,⁵⁶ the agreements cannot operate and should not operate without robust and comprehensive Commonwealth oversight. This oversight, which must be properly resourced in both financial and human terms, is necessary to ensure that Commonwealth standards of assessment and approval are maintained, the Commonwealth's international obligations under the international treaties to which it is a signatory are met and public confidence and trust is maintained.
100. In the absence of Commonwealth oversight, the Law Council is concerned that over time, the standards of assessment and approval will not be maintained by State and Territory regulators and that each State and Territory may implement the EPBC Act requirements in a different way leading to inconsistency and unfairness for proponents and third parties. This slip in standards is unlikely to be intentional, but is more likely to be as a result of the increased workload shouldered by those regulators as a result of assuming both assessment and approval roles for themselves and on behalf of the Commonwealth and stressors particular to each State or Territory.
101. On balance, the Law Council does not favour the expansion of bilateral agreements to cover approvals in a broad brush way. The Commonwealth must retain its role upholding Australia's international obligations to protect our biodiversity, world heritage, Ramsar wetlands and other MNES, to consistently apply those obligations nationally and to ensure public confidence that Australia's environment will be protected.

Recommendation 8

- **Consistent with Recommendation 1, any development of approval bilateral agreements must maintain a role for the Commonwealth in issuing approvals and must be robustly overseen by the Commonwealth.**

8. Strategic impact assessment

102. Part 10 Division 1 of the EPBC Act provides for the undertaking of strategic impact assessment. Strategic impact assessment is different to the environmental impact assessment process conducted under Parts 7 to 9 of the EPBC Act in that it allows for the assessment of environmental impacts on a different and potentially much larger physical and temporal scale. Whereas environmental impact assessment under Parts 7 to 9 focuses on the potential impacts from a single project, assessment under Part 10 allows for the assessment of impacts from multiple activities of a similar nature within an area, such as multiple mine sites in close proximity, or the impacts of broader development activities of different types within a metropolitan area, such as large scale residential development including provision of roads and other linear infrastructure.
103. A benefit of undertaking strategic assessment in this way is that the cumulative impact of development can be directly considered and assessed, and the

⁵⁵ Ibid, 13-15.

⁵⁶ See section 5.3 of this submission.

assessment can be conducted on a broader landscape or ecosystem scale. In other words, the impact of planned or proposed development can be considered over a much larger area.

104. By contrast, project by project assessment under Parts 7 to 9 focuses on the impacts on a much smaller scale. This leads to fragmentation and, potentially, eventual elimination of landscapes and ecosystems over time - a result that is not consistent with the stated objects of the EPBC Act.
105. In considering the assessment of cumulative impacts under the EPBC Act and the *Water Act 2007* (Cth), Dr Rebecca Nelson stated:

it should be noted that many scholars criticise project-based EIA - the EPBC Act dominant approach - as being inherently unsuited to responding to cumulative effects. They urge a calculated shift to strategic environmental assessment, which involves environmental assessment of higher order decision-making such as policies plans and programs. This approach inherently seeks to assess cumulative effects on a regional, rather than by project by project, basis to ensure an alignment of objectives at all levels of government decision-making.⁵⁷

106. While Part 10 of the EPBC Act has provided for strategic impact assessment since inception, it has not been widely used. Of the 26 strategic impact assessments listed on the Department of Agriculture, Water and the Environment website, there are 12 approvals in place, meaning an assessment has been completed and activity is occurring pursuant to the approval.⁵⁸ Of those 12, one is for the activities of a private company and the rest relate to government or government agency activity. This contrasts to the over 6000 project based referrals made under Part 7 and over 1000 approvals issued under Part 9.⁵⁹
107. Given the tangible environmental benefits that strategic assessment can deliver, as well as the potential benefits from an approval streamlining perspective, the question is why has it not been more widely used.
108. One reason may be the complexity and associated cost of undertaking a strategic impact assessment. There is very little guidance available for companies or governments on how to conduct strategic impact assessment which would assist in providing a basis for estimations of cost and time. As Dr Nelson notes, 'compared to other global examples, Australian legislation requiring consideration of cumulative effects is relatively recent, uncommon, comparatively poorly developed, and usually lacking in detail of policy guidance'.⁶⁰
109. In the Law Council's view, another reason for the lack of uptake of strategic environmental impact assessments is the drafting of certain aspects of Part 10 Division 1 of the EPBC Act which creates uncertainty.
110. Section 146 sets out the basis upon which strategic assessment is to be conducted. In essence, each strategic assessment is a bespoke assessment process carried out pursuant to an agreement (**a section 146 agreement**) between the proponent

⁵⁷ Rebecca Nelson, 'Breaking Backs and Boiling Frogs: Warnings from a Dialogue between Federal Water Law and Environmental Law' (2019) 42(4) UNSW Law Journal 1179.

⁵⁸ Website accessed 12 April 2020.

⁵⁹ Commonwealth of Australia, *Department of the Environment and Energy Annual Report 2018/2019* (2019), Appendix 4A.

⁶⁰ Rebecca Nelson, 'Breaking Backs and Boiling Frogs: Warnings from a Dialogue between Federal Water Law and Environmental Law' (2019) 42(4) UNSW Law Journal 1179.

(described as the person 'responsible for the adoption of the policy, plan or program') and the Commonwealth Environment Minister.

111. This 'bespokeness' makes sense when one considers that there are no boundaries around what the policy, plan or program to be assessed is to cover. The approach to the strategic assessment of a 100 year mine plan for one company is very different to the assessment of Commonwealth legislation regulating the entire offshore oil and gas industry.
112. The content of a section 146 agreement is only barely described in that section and focuses on the mechanics of conducting the assessment of the policy, plan or program in accordance with agreed terms of reference, the publication of an assessment report and the endorsement of the policy, plan or program by the Commonwealth Environment Minister - which represents the first part of an 'approval' under Part 10.⁶¹ There is no other guidance in the Act itself on how to approach a strategic impact assessment and the official guidance material issued by the departmental administrator is dated between 2008 and 2013. However, the administering department has developed a body of understanding and interpretation on the conduct of strategic impact assessment over the last 20 years. Consistent with the comments made by Dr Nelson referred to in paragraph 108 above, this body of understanding should be made publically available in updated guidance material, preferably accompanied by a template section 146 agreement.
113. The second part of the strategic impact assessment process under Part 10 Division 1 is an approval under section 146B of the taking of an action or class(es) of actions in accordance with the endorsed policy, plan or program. While this approval must include certain information⁶², the approval does not have to specify who can take the approved action. This aspect of the approval is at the discretion of the Environment Minister.⁶³ Moreover, the person who may take the action, if any is specified, does not have to be the 'person responsible' for the endorsed policy, plan or program.
114. Under paragraph 146D(1)(b), if an approval under section 146B is in effect, the Commonwealth Environment Minister is taken to have approved the taking of actions by persons specified in subsection 146B(2A) and 'any other person who may take the action in accordance with the endorsed policy, plan or program'.
115. Again, such flexibility is desirable in theory given the breadth and scope of a strategic impact assessment. However, it becomes problematic when considering how activities may be undertaken under an endorsed policy, plan or program.
116. Subsection 146D(3) of the EPBC Act draws in section 134 and Divisions 2, 3 and 4 of Part 9, dealing with conditions in relation to project-based approvals, and applies them to an endorsed policy plan or program and approval for actions issued under sections 146 and 146B.⁶⁴
117. Some of these provisions apply easily to the approval of actions under a policy, plan or program under section 146B. For example, subsection 134(1) empowers the Minister to impose a condition if satisfied that the condition is necessary or consistent for protecting a MNES. However, other provisions do not translate to

⁶¹ EPBC Act, s 146(1B)(2).

⁶² For example, the type of action approved and the conditions attaching to that approval – EPBC Act, s 146B(2).

⁶³ EPBC Act, s 146B(2A).

⁶⁴ Section 134 of the EPBC Act deals with the imposition of conditions attaching to approvals. Division 2 addresses compliance. Division 3 addresses variations of conditions, suspensions and revocation of approvals and Division 4 deals with the transfer of approvals.

approval under Part 10 because they refer to ‘the holder of the approval’ – a phrase which is not defined in Part 10. For example:

- (a) while subsection 134(1) empowers the Minister to attach conditions to an approval, the Minister can only impose certain types of conditions if the holder of the approval has consented;⁶⁵
- (b) subsection 142(1) says a person whose taking of an action has been approved must not contravene a condition. But subsection 142(1A) states that this does not apply to a person who is not the holder of the approval (if certain conditions are met);
- (c) conditions can be revoked or varied if the holder of the approval agrees⁶⁶ and it is the holder of the approval who may request the Minister to vary a condition;⁶⁷ and
- (d) an approval can only be transferred by the holder of the approval with the Minister's consent.⁶⁸

118. Neither the ‘person responsible for the policy, plan or program’ nor the person who may be authorised to take action or a class of action under an endorsed policy, plan or program is necessarily the ‘holder of the approval’. While it might be reasonable to interpret Part 10 as intending that the person responsible for the policy, plan or program who enters into the section 146 agreement as the ‘holder of the approval’, the Act is not explicit which creates uncertainty.
119. However, once the holder of the approval for the purposes of Part 10 is specified, consideration also has to be given to the potential liability of that holder for third parties who take actions under the endorsed policy, plan or program.
120. In project-based assessment and approval under Parts 7 to 9 of the EPBC Act, there is a single entity who is responsible for the project (and holds the approval under Part 9) and who controls the actions of third parties involved in the project via direct contractual relationships (for example, a mining project with the mining company as the approval holder entering into a series of contracts with third parties to deliver the construction and operation of the mine).
121. This is not always the case with the strategic impact assessment. For example, a strategic assessment and approval of large scale urban development may involve a range of different activities, from residential and industrial lot development to the provision of linear infrastructure like roads to the provision of open space, which may be undertaken by different parties, both public and private. Often those parties will not have a direct relationship (of any type) with the approval holder. There is considerable disincentive for a government to be the holder of an approval under Part 10 if it remains potentially liable to the Commonwealth for the actions of third party bad actors who undertake actions pursuant to the endorsed policy, plan or program but do not adhere to the conditions that apply to those actions.
122. To facilitate the adoption of strategic impact assessment for large scale, multi-actor development, which has the potential to deliver better outcomes for the environment and better outcomes for the humans who live in that environment, Part 10 should

⁶⁵ EPBC Act, s 134(3A).

⁶⁶ EPBC Act, s 143(1)(c).

⁶⁷ EPBC Act, s 143(1B).

⁶⁸ EPBC Act, s 145B(1).

provide clear rules for the allocation of liability between the holder of the approval and the actions taken pursuant to that approval by third parties.

123. Another aspect of Part 10 that may discourage its adoption is the inability of the endorsed policy, plan or program to be amended over time to adjust to materially different circumstances or to amend its outcomes or objectives to better reflect the objectives of the EPBC Act in protecting MNES.⁶⁹ To justify the substantial time and financial investment in undertaking strategic impact assessment process, the policy, plan or program to be endorsed will often have a time span in the order of multiple decades. If an endorsed policy, plan or program cannot be adjusted or amended over its lifetime, there is a disincentive to go down the path of obtaining an approval to a process will be 'carved in stone' and cannot be adjusted to respond to changes in desired outcomes (for example, delivering a better outcome for a MNES affected by the policy, plan or program; or adjusting an outcome to mitigate the impact of climate change).
124. While the drafting of section 146D is economical, it has created a number of difficulties in the interpretation of Part 10, thus diminishing its attractiveness as an effective assessment and management tool.

Recommendation 9

- **There are substantial environmental benefits in the strategic assessment of impacts at a landscape scale and over a substantial time period. Part 10, Division 1 of the Act should be redrafted to remove the uncertainty of its application and draw upon the lessons learned from its implementation over the last 20 years.**

9. Review mechanisms under the EPBC Act

9.1 The availability of judicial review to support the rule of law

125. Administrative decisions made under the EPBC Act are open to judicial review, a form of legal review conducted by a court in respect of the legality of a decision. Judicial review is an essential element of the rule of law and a significant aid to executive accountability.⁷⁰ The Law Council supports the continuation of an applicant's right to seek judicial review of administrative decisions made under the EPBC Act. Access to the judicial review of decisions made under Commonwealth statutes is guaranteed by paragraph 75(v) of the Australian Constitution by way of writs of mandamus, prohibition and injunctions, and is provided for more generally in the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* (**AD(JR) Act**).
126. As Chief Justice James Allsop AO of the Federal Court of Australia has relevantly observed:

Administrative law is an area in which legal theory and values play vital roles. The essence of Australian administrative law is the dominant political theory that underpins Australian society: the division of government into three arms or branches of Parliament, Executive and judicature. There is nothing inevitable about this. It is a governmental and legal organisation of power based on secular society, and suspicion of power and those who wield it drawn in its modern form from the

⁶⁹ Noting that a similar deficiency exists in relation to project-based approvals in Part 9.

⁷⁰ Law Council of Australia, [Policy Statement: Rule of Law Principles](#), March 2011, Principle 6(d).

European, English and American political and intellectual struggles of the 17th and 18th centuries. The grasp of that elemental tripartite framework is essential to understanding the approach by the High Court of Australia to administrative law. The place of s 75(v) of the Constitution guaranteeing the citizen (and most influentially, the non-citizen) the right to seek review in the original jurisdiction of the highest court in the country of the exercise of power by officers of the Commonwealth is central and pervasive in the structure and content of Australian administrative law (Commonwealth and State) and the structure of Australian constitutionalism.⁷¹

127. To maintain the rule of law (and good governance generally), third parties who satisfy the requisite standing requirements should have the opportunity to seek judicial review of administrative decisions. The Law Council observes, however, that courts apply the rules of standing quite narrowly for third parties, limiting the scope of public interest litigation.⁷² A more detailed consideration of standing principles and proposed restrictions on standing is included as **Appendix 2** to this submission.
128. In 2018, the Law Council's Legal Practice Section provided comment on Australia's Faunal Extinction Crisis to the Parliamentary Senate Standing Committees on Environment and Communications.⁷³ Consistent with the position expressed in that submission, the Law Council strongly supports the maintenance of third party judicial review provisions and extended standing under sections 475 and 487 of the EPBC Act.⁷⁴
129. The Hawke Review concluded that section 487 had operated effectively, had not opened the floodgates to litigation and should be maintained.⁷⁵ The case law on section 487 of the EPBC Act supports Dr Hawke's finding that the provision is not interpreted broadly by the courts, as it is aimed at protecting the public interest rather than private concerns. The relevant cases are summarised in a 2015 submission by the Law Council to the Senate Environment and Communications Legislation Committee on the Environment Protection Biodiversity Conservation Amendment (Standing) Bill 2015.⁷⁶
130. Since the repeal of section 478 of the EPBC Act in 2006, an applicant may be exposed to the payment of potential damages when seeking an interim or interlocutory injunction. This demonstrates the very real financial risk that any applicant for an injunction is placed at - not only is there a presumption that costs will be awarded against any applicant if unsuccessful, but they must bear the risk of damages. There would be very few potential applicants willing to take such risks, if any. The risk of an adverse costs order is already a substantial inducement not to take action. There can be no argument that the floodgates are open. On the

⁷¹ Allsop, Justice James. Values in public law [online], Selected Conference Papers: Journal of the Judicial Commission of New South Wales, Vol. 13, No. 1, Sep 2016: 53-77 at 68.

⁷² On the benefits of opening standing in public interest litigation, see Administrative Review Council, Report 50, *Federal Judicial Review in Australia*, September 2012 at [8.10]-[8.11].

⁷³ Legal Practice Section of the Law Council of Australia, *Australia's Faunal Extinction Crisis*, Submission to the Parliamentary Senate Standing Committees on Environment and Communications, 10 September 2018.

⁷⁴ *Ibid*, [33].

⁷⁵ Hawke Review, Ch 15, [15.81]-[15.84].

⁷⁶ Law Council of Australia, *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*, [Submission to the Senate Environment and Communications Legislation Committee, 10 September 2015](#), 6-7, [18]-[20].

contrary, there are substantial and effective barriers against accessing the courts to review decisions under the EPBC Act.⁷⁷

131. The Hawke Review encapsulates the role the law plays in public interest litigation in the following statement:

*Public interest litigation is one of the most significant means of enforcing environmental law and in enhancing the transparency, integrity and rigour of government decision-making about activities which impact on the environment. Often the cases are 'test cases', concerning questions of law that have not previously been considered judicially. Because public interest litigation plays this role, it is important that the law facilitate it.*⁷⁸

Recommendation 10

- **The Law Council recommends the continuation of judicial review of administrative decisions by applicant, and also by third parties, on the basis that section 487 of the EPBC Act (extended standing for judicial review) has operated effectively and has not opened the floodgates to litigation.**

9.2 The co-existence of judicial review and external merits review

132. Administrative decisions made under the EPBC Act are generally reviewable by way of judicial review by the Federal Court under the AD(JR) Act.⁷⁹ In contrast, external merits review, which encompasses review of all aspects of the challenged decision, will be available only where it is provided for in legislation. For example, review by the Administrative Appeals Tribunal (**AAT**) must be specifically provided for in legislation.⁸⁰
133. External merits review is to be contrasted with internal merits review. The EPBC Act, like other legislation, contains mechanisms for internal merits review of some administrative decisions. The two internal review mechanisms available to an applicant under the EPBC Act are reconsideration of clearly unacceptable referral decisions and reconsideration of controlled action decisions.⁸¹
134. The EPBC Act currently provides limited scope for external merits review by the AAT whether by an applicant or a third party who may have a special interest in the outcome of the decision. The types of decisions made under the EPBC Act that are currently subject to external merits review by the AAT are permits for activities

⁷⁷ The Hawke Review recommended that a provision be inserted in the Act like the repealed section 478, to the effect that the Federal Court is not to require an applicant to give an undertaking as to damages as a condition of granting an interim injunction: Rec 51. The Hawke Review also recommended that the Act be amended to prohibit the ordering of security for costs in public interest proceedings: Rec 52.

⁷⁸ Hawke Review, 261.

⁷⁹ The jurisdiction of the Federal Court to review decisions made under the EPBC Act is derived from section 39B of the *Judiciary Act 1903* (Cth) in respect decisions by officers of the Commonwealth for which an application under s 75(v) of the Australian Constitution could have been made to the High Court and from the AD(JR) Act.

⁸⁰ *Administrative Appeals Tribunal Act 1975* (Cth), s 25. Commentators have asked the question whether the AAT should have universal jurisdiction, subject to express exclusion, rather than the reverse: D Kerr, 'The Intersection of Merits and Judicial Review: Looking Forward' (2013) 32(1) *University of Queensland Law Journal* 9 at 15.

⁸¹ For a summary of the reconsideration mechanisms available under the EPBC Act, see, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: interim report*, Ch 20, Review Mechanisms under the EPBC Act and Access to Courts, at [20.20] – [20.28].

affecting protected species, permits for the international movement of wildlife, and advice about whether an action would contravene a conservation order.⁸² Merits review is confined to decisions by a delegate of the Minister following amendments to the EPBC Act in 2006.

135. Merits review enables a review of all aspects of the challenged administrative decision, including the finding of facts and the exercise of any discretion conferred upon the decision maker under the relevant statutory framework. A merits review body will 'stand in the shoes' of the primary decision maker and will make a fresh decision (generally, the correct and preferable decision)⁸³ based upon all the evidence available to it (including any new evidence not available to the original decision maker).⁸⁴
136. Unlike judicial review which deals with identifying and making findings in respect of jurisdictional error,⁸⁵ merits review can revisit findings of fact and the weight to be given to a particular aspect of the applicant's evidence. It is on this basis that review on the merits is generally considered more satisfactory than judicial review because it may achieve a more complete result for an applicant by the substitution of the correct or preferable decision. However, in some instances, external merits review may be more expensive because of the costs associated with marshalling and presenting relevant factual material.
137. It is possible for merits review and judicial review to be available as alternative remedies. Indeed, judicial review powers vested in the Federal Court are complementary to, but distinct from, external merits review. Their different realms of operation mean that they can, and often do, co-exist.⁸⁶ In most cases, merits review may obviate the need for judicial review to be undertaken. An example is where a merits review 'cures' a denial of natural justice by the primary decision-maker. However, the fact that an administrative decision is subject to merits review (no matter how comprehensive) is not a reason why the decision should not also be subject to judicial review.
138. The Law Council considers that if the scope for external merits review is expanded under the EPBC Act, there should be no circumstances in which the existence of comprehensive merits review automatically forecloses the availability of judicial review under the AD(JR) Act. This is because of the possibility that a legal error will survive merits review. For example, the merits review tribunal may adopt the same mistaken construction of a statutory provision as did the primary decision-maker. Similarly, the correct or preferable decision as perceived by the merits review tribunal may not accord with the legally correct decision.

⁸² See EPBC Act, ss 206A, 221A, 243A, 263A, 303GJ, and 473.

⁸³ 'Correct' refers to ensuring that the decision is made according to law; 'preferable' means that if there is a range of decisions that are correct in law the decision reached is the best that could have been made on the basis of the relevant facts: Administrative Review Council, *What decisions should be subject to merit review?*, Commonwealth of Australia, 1999.

⁸⁴ Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report 39 (1995), Commonwealth of Australia, Canberra, [2.2]-[2.3], [2.54]-[2.55]. See *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1).

⁸⁵ Jurisdictional error is an error of law that results in a decision-maker exceeding or failing to use their prescribed statutory jurisdiction or power.

⁸⁶ Administrative Review Council, *What decisions should be subject to merit review?*, Commonwealth of Australia, 1999.

9.3 Merits Review and transparency of decision-making processes

139. In 2019, the Australian Law Reform Commission (**ALRC**) hosted a conversation at the Federal Court in Brisbane about areas of Australian law that may benefit from reform. One of the speakers, Dr Justine Bell-James, considered the operation of the EPBC Act. The ALRC summarised her presentation as follows:

*Decisions are increasingly being made administratively, without public scrutiny, and before all relevant scientific information is known. She suggested laws could be amended to: include climate change as a 'matter of national environmental significance'; consider the cumulative impact of multiple projects; establish an independent body to advise government; and **provide for merits review of decisions** (our emphasis).⁸⁷*

140. One of the recognised advantages of merits review is that it can have a positive effect on the integrity of administrative decision-making. Merits review can improve the rigour, quality and consistency of the decisions of primary decision-makers and enhance the openness and accountability of decisions made by government. However, it is also recognised that there are other mechanisms that can be used to achieve improved transparency and accountability in decision-making, such as greater public consultation and publishing comprehensive reasons for administrative decisions.⁸⁸
141. Having too many layers of review – internal review, external merits review and judicial review – may reduce the efficiency of regulatory regimes. Merits review may not be appropriate in all situations, but it should be available where it is considered to benefit the public interest (and, therefore, maintain the rule of law) by ensuring decision-makers act in a consistent, fair and transparent manner.⁸⁹
142. The Hawke Review recommended amending the EPBC Act so that controlled action and/or assessment approach decisions are open to merits review.⁹⁰ It further recommended that legal standing for the purpose of merits review be extended to include those persons who made a formal public comment during the relevant decision-making process.⁹¹ The Law Council supports the availability of merits review of controlled action and assessment approach decisions. The Law Council further supports the inclusion of a provision in the EPBC Act similar to that contained in the *Environmental Planning and Assessment Act 1979* (NSW) which enables an individual or organisation who has made a submission during the decision-making process to be afforded standing to seek merits review.⁹²
143. The Law Council agrees with the following observations made by the Hawke Review in relation to its recommendation that controlled action and/or assessment approach decisions be made subject to merits review:

⁸⁷ Australian Law Reform Commission, *Future of Law Reform: A Suggested Program of Work 2020-25*, December 2019, Appendix E, 102, [3.32].

⁸⁸ Hawke Review, Ch 15, [15.43]-[15.44].

⁸⁹ Australian Law Reform Commission, *Principled Regulation, Federal Civil & Administrative Penalties in Australia*, Report 95, December 2002, [20.60].

⁹⁰ Hawke Review, 40, Rec 49. The Hawke Review did not recommend that project approval decisions made under s 133 of the EPBC Act be subject to external merits review.

⁹¹ *Ibid*, Ch 15, [15.37]-[15.61], Rec 49; [15.62]-[15.67], Rec 50.

⁹² Section 8.8 of the *Environmental Planning and Assessment Act 1979* (NSW) provides that a person who has made a submission by way of an objection during the public exhibition of the application for development consent for designated development (an 'objector') and who is dissatisfied with the determination of the consent authority to grant consent may appeal to the Land and Environment Court against the determination.

The EPBC Act would need to be amended to specify the criteria on which each of those decisions are to be made. For example, non-statutory 'significant impact guidelines' are currently relied upon in determining if a project is a controlled action;

The EPBC Act would need to be amended to provide that if there is a merits review of the controlled action decision, there cannot be a further review of the assessment approach (to prevent a single project being subject to two separate merits review applications and processes); and

The EPBC Act would need to be amended so that merits review would apply to decisions made by the Minister as well as decisions made by a delegate. Whether a decision is appropriate to be open to merits review should turn on the nature of the decision-making power and not on the identity of the person in whom the power is vested.

Extending merits review to the controlled action and/or assessment approach decisions would be a modest change as the bulk of decisions made under the EPBC Act would continue not to be open to merits review.⁹³

144. If a merits review process is introduced for controlled action and assessment approach decisions and, as a matter of policy, full external merits review is not adopted, it could be conducted in a manner similar to appeals from decisions made by a judge at first instance. The tribunal hearing the matter could not, except in special circumstances, consider any new evidence or information that was not available to the original decision-maker. The tribunal would have available the relevant documents submitted by the applicant and third parties and any legal submissions made but no witnesses would be called to give evidence. The tribunal would listen to legal argument from both parties in order to determine if the decision-maker incorrectly applied a principle of law or made a finding of fact or facts on an important issue which could not be supported by the evidence.
145. The forum for merits review is also an important consideration. The Law Council understands that there is divergent opinion about the suitability of the AAT for merits review under the EPBC Act. Some submissions provided to the Hawke Review considered the AAT too 'generalist' a jurisdiction and advocated for the creation of a specialist tribunal or the establishment of an Environmental Division of the Federal Court.⁹⁴ The advantage of a specialist forum with exclusive jurisdiction on environmental matters is that its members would have relevant qualifications and experience in administrative and environmental law.

Recommendation 11

- **The Law Council recommends:**
 - **the introduction of specific legislative criteria on which controlled action and assessment approach decisions are made and the availability of merits review of those decisions;**
 - **a merits review process for controlled action and assessment approach decisions which is conducted in a similar manner to an appeal from a decision made by a judge at first instance;**

⁹³ Hawke Review, Ch 15, [15.53]-[15.60].

⁹⁴ Ibid, Ch 20, [20.55].

- **the extension of legal standing for the purposes of merits review to those persons who made a formal submission during the relevant public consultation process in terms similar to section 8.8 of the *Environmental Planning and Assessment Act 1979* (NSW); and**
- **the availability of merits review in respect of decisions made by the Minister as well as decisions made by a delegate.**

146. A common feature of decisions that are currently open to merits review under the EPBC Act is that the decisions are not subject to a public consultation process. The assessment approach decision does not currently provide for any public participation in the decision-making process. Public comment is sought later in the assessment process but after the level of assessment is already determined. For this reason, the Hawke Review recommended that the assessment approach decision should be subject to merits review.⁹⁵ An alternative approach to expanding the range of merits review in the EPBC Act is to increase transparency in decision-making processes by engaging with stakeholders and providing for meaningful public comment.
147. In addition to making the necessary legislative amendments to facilitate such public engagement, there is considerable benefit in the administering department producing a cohesive suite of guidance materials to assist the public and stakeholders not only to participate in decision-making processes under the Act but also to understand how the decisions are made by the relevant decision-maker.
148. Another benefit of producing such a system of materials is that decision-makers have a public framework to guide their decision-making and to which they can be held accountable.
149. Ultimately, proponents, public and other stakeholders will be more engaged and more responsive if they have a clear understanding of what factors decision makers must or may take into account, both from a statutory perspective (such as listing things in legislation) and from an administrative perspective (how those listed factors in the legislation are interpreted and applied by the decision maker). In the Law Council's view, the production of such guidance materials will increase public confidence in the Act, especially when coupled with more visible enforcement of the Act's provisions.⁹⁶

Recommendation 12

- **Irrespective of any decision by the Australian Government following the Review in relation to merits review, the Law Council recommends that there be a concerted effort by the administering department, and supported by the Commonwealth Environment Minister, to improve the quality and coverage of guidance materials that support the public understanding of the EPBC Act.**

⁹⁵ Ibid, Ch 15, [15.57].

⁹⁶ Once again, the Law Council refers to NOPSEMA's approach to transparency of decision-making as a good example.

10. Engagement of Indigenous people and their knowledge throughout the EPBC Act

10.1 Appropriate Indigenous engagement – considering the international context

150. Indigenous People must be considered in matters relating to the protection and preservation of Australia's unique biodiversity. It is essential to engage and consult with the right Aboriginal and Torres Islander peoples, that is, those with authority and knowledge of country. There exists not only an intimate traditional ecological knowledge, but a cultural and spiritual obligation that Aboriginal and Torres Strait Islander peoples have to the land and waters to which they are connected. This cannot be emphasised sufficiently and necessarily requires appropriate levels of evidenced cultural due diligence to be undertaken.

151. Australia has accepted the UNDRIP as a framework for recognising and protecting the rights of Indigenous Australians. The Declaration is based on the four key principles of self-determination; participation in decision-making; respect for and protection of culture; and equality and non-discrimination. UNDRIP recognises that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.

152. Article 31 provides that:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

153. Australia is a signatory to the UNDRIP and Article 31 supports the position that knowledge must be construed in accordance with self-determined definitions of what is real and valuable to the Traditional Owners.

154. Engagement with Indigenous People as to their knowledge, interests and role in nature and biodiversity conservation, requires proper and effective consultation. In the case of *ALRM v State of South Australia No 2* (1995) 64 SASR at 562, Doyle CJ made the following comments with respect to the legal understanding of 'consultation':

- adequate time for the persons consulted to consider the matter, including time to consult with other Aboriginal persons whose opinions they consider should be considered;
- the opportunity to seek and obtain further information on the subject matter of the consultation and to have time to consider it and discuss details;
- proper meetings with the Minister and his officers; and
- ensuring that a wide range of Aboriginal persons are consulted, having regard to the significance and breadth of the matter that is the subject of the consultation.

155. It is essential that the EPBC Act incorporates mechanisms which require consultation with, and consideration of, the appropriately identified (that is, evidenced as appropriate and lawfully and/or culturally authorised) Indigenous knowledge. This is particularly so in relation to MNES comprising World and National Heritage places that contains indigenous cultural values.
156. It is also important to take into account that Australia is a signatory to the 2030 Agenda on Sustainable Development. This agreement provides for sustainable development goals, some of which speak to the need for protection and support for Indigenous Peoples rights.
157. At the *Convention on Biological Diversity*⁹⁷ (CBB) Conference of the Parties 7,⁹⁸ it was recommended that the State parties adopt the *Akwé: Kon Guidelines*.⁹⁹ The *Akwé: Kon Guidelines* set out a range of principles to be observed in the development of plans for the management of land and water resources.
158. It is important to engage the right people for country, which in most cases are the people with ongoing rights and interests. The federal native title regime can be utilised in this regard. The system of Representative Aboriginal and Torres Strait Islander Bodies and Prescribed Bodies Corporate where there are positive determinations of native title and native title claims, provides a reasonable indication as to who the right people are to consult with, although if no such organisations exist in particular area then other means of identifying the right people to speak for country will need to be engaged. It is important that there exists an infrastructure that could be utilised to harmonise the way in which Traditional Owners are appropriately engaged.
159. Traditional land management practices and caring for country will vary from place to place and across the various different kinds of environment. The incorporation of traditional land management practices needs to be cognisant of these variances across the Australian landscape and, in order to achieve this, appropriate engagement and consultation with Traditional Owners is necessary. Whilst many of the activities could be categorised in fire management and flora and fauna care, these need to be incorporated in any land management plans and strategies. The unique traditional ecological knowledge of Traditional Owners has been curated over many thousands of years.
160. Regard should also be had to:
- the CBD (ratified by Australia in 1993), and in particular articles 8 (In-situ Conservation) 17 (Exchange of Information) and 18 (Technical and Scientific Cooperation) relating to the use of Traditional Knowledges and the involvement of Indigenous Peoples;
 - the importance of ensuring that Indigenous intellectual property and traditional knowledges of biological diversity are not exploited and mechanisms need to be developed to ensure the protection of this; and
 - the necessity of adequate systems of culturally respectful consultation and remuneration Traditional Owners are going to be mobilised to engage and assist with matters arising under the EPBC Act. There are various pieces of

⁹⁷ Opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

⁹⁸ Meeting Documents, Seventh Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, 9 - 20 February 2004 - Kuala Lumpur, Malaysia.

⁹⁹ Convention on Biological Diversity, 'Akwé: Kon guidelines', <<https://www.cbd.int/traditional/guidelines.shtml>>.

legislation that trigger the need to consult, but many require consultation without any compensation and it becomes a large burden on the Traditional Owners having to engage across various regulatory regimes. This must be rectified. It is therefore essential that any engagement with Traditional Owners is supported by access to culturally appropriate, independent legal and other professional assistance, recognising that there is no entitlement or automatic right in the consulter to be given knowledge and that it must be earned through a mutually respectful and ongoing trusting relationship.

10.2 Case Study - The Mitchell River Traditional Custodians Advisory Group

161. In Queensland, the *Biodiscovery Act 2004* (Qld) (**Biodiscovery Act**) focuses on including and protecting traditional knowledge of Traditional Custodian groups. Queensland was the first state in Australia to introduce biodiscovery legislation, with the commencement of the Biodiscovery Act. The matter of traditional knowledge with respect to the regulation of biodiscovery was not covered by the Biodiscovery Act. However, much has happened internationally since the Biodiscovery Act commenced, particularly the advent of the Nagoya Protocol on Access and Benefit-Sharing¹⁰⁰ which Australia signed in 2012.¹⁰¹
162. In order to demonstrate an appropriate level of Indigenous engagement in accordance with International obligations, the following case study is provided.
163. The Mitchell River Traditional Custodians Advisory Group (**MRTCAG**) is entirely managed and driven by Traditional Custodians from clans from four tribal groups from the middle and upper Mitchell River catchment: Mbabaram; Wokomin; Kuku Djungan and Western Yalanji.
164. Traditional Owner Custodian Groups and the MRTCAG Aboriginal Corporation is an example of what might be best practice in this regard (although any consultation model must be worked through with the relevant group of Traditional Owners). They have aligned their strategy operations to comply with the Biodiscovery Act (including subsequent reforms of the Act) and the Nagoya Protocol. This ensures consistency with recognised International and National approaches such as: Indigenous Cultural and Intellectual Property recognition and protection; ensuring Free Prior and Informed Consent; Access and Benefit Sharing and Mutually Agreed Terms.
165. MRTCAG's research agreement making processes with institutions and individual researchers was developed ten years ago and they have been advocating for western research models to identify webs of relationships impacted and involved in community health protection. Bama Gala (Aboriginal way) recognises that the self and community are part of a natural collective or a web of relations with human, environmental and spiritual forces, all requiring balance and harmony. A Traditional Custodian model builds relationships with key community and external stakeholders to strengthen community capacities and creates beneficial interdependences among stakeholders for Bama community, the land, health, prosperity and wellbeing.
166. It is clear that under the Nagoya Protocol, which is being reflected by the Queensland government in state legislation, it is important to include Traditional Knowledge in consultation and negotiation with Aboriginal and Torres Strait Islander Peoples before making decisions.

¹⁰⁰ Opened for signature 2 February 2011, UN Doc UNEP/CBD/COP/DEC/X/1 (entry into force 12 October 2014).

¹⁰¹ But has not ratified.

167. There should be a recognition that this consultation may extend beyond the formal consultation periods for other matters. This reflects the complexity of the matter, and the need for a commitment to properly consult and negotiate in a manner which is truly reflective of the principles and obligations underpinning State and International laws and agreements.

Recommendation 13

- **Considering Australia’s obligations under UNDRIP, the Law Council recommends:**
 - **amendment of section 3 of the EPBC Act objects to include references to the UNDRIP and the 2030 Agenda for Sustainable Goals as international agreements to which the EPBC Act seeks to give effect;**
 - **that the *Akwé: Kon Guidelines* be incorporated into the EPBC Act in accordance with the recommendations of the CBD Conference of the Parties 7 recommendation; and**
 - **the EPBC Act should be reviewed against the UNDRIP to ensure that the processes and mechanisms contained in the Act itself and the implementation of those mechanisms are harmonious with the UNDRIP.**

11. Compensation to Private Landholders

168. In 2019, the Law Council’s Legal Practice Section, led by its AEPLG, made a submission to Standing Committee on Agriculture and Water Resources in relation to its ‘Inquiry into the impact on the agricultural sector of vegetation and land management policies, regulations and restrictions’.¹⁰² It submitted in paragraphs 13 to 19:

13. The AEPL Committee notes the economic costs associated with some vegetation and land management policies, but also notes the opportunities presented for farmers to gain benefits for stewardship of their native vegetation (such as those offered by carbon sequestration and vegetation / biodiversity offsetting programs).

One example is the Carbon Credits (Carbon Farming Initiative – Savanna Fire Management – Emissions Avoidance) Methodology Determination 2018, which recognises the co-benefits of regulated savanna burning practices for biodiversity and hazard reduction.

14. However, these opportunities are often poorly understood by landowners and perceived as unwelcome interventions. The Committee would welcome Commonwealth and State governments establishing and promoting advisory services to assist rural landowners (whether large, medium or small) to understand the benefits and responsibilities associated with sequestration and offsetting programs.

An example is recent efforts by the Western Australian Government to promote opportunities under the Carbon Credits (Carbon Farming

¹⁰² Law Council of Australia Legal Practice Section, Submission to the Standing Committee on Agriculture and Water Resources, 25 January 2019.

Initiative) Act 2011 (Cth) and to assist farmers to navigate the approvals process.

15. The National Farmers Federation has called for compensation to be paid in respect of vegetation clearing restrictions or requirements. The Committee notes the recommendation from the ALRC's Traditional Rights and Freedoms Inquiry (para 20.138):

The next scheduled independent review of the EPBC Act is to be completed by 2019. The Department of the Environment submitted that that review 'may provide a suitable opportunity for more detailed consideration of the EPBC Act's interaction with property rights'. The ALRC considers that the next review could reassess whether interferences with property rights are proportionate and could explore a range of compensatory mechanisms. This review may also afford an opportunity for consideration of the interrelationship of Commonwealth and state laws, as this ALRC Inquiry heard that Commonwealth and state environmental laws should be considered in an integrated way.

16. The AEPL Committee agrees that the upcoming review of the EPBC Act is a suitable opportunity to consider the appropriateness or otherwise of compensatory measures in relation to vegetation clearing, including when mandated for fire management purposes. This Inquiry ought not make any findings that would pre-empt a full consideration of the complex legal and policy issues this raises.

17. The Committee also notes the escalating costs of bushfire management and losses under climate change (including restoration and rehabilitation). These costs are borne across the community, including not just the agricultural sector but government, health services, tourism, emergency services, infrastructure and conservation organisations. For example, in a recent opinion piece, the CEO of the Tasmanian Tourism Council stated that:

The tourism industry across Australia is learning a hard truth; more frequent and unusual extreme weather events and changes in weather patterns will increasingly impact on our industry.

18. The Climate Council has estimated that the annual costs associated with bushfires in New South Wales is likely to double by 2050 to \$100 million.

19. The AEPL Committee recommends that the Committee consider any economic impacts of land management practices on individual landowners in that context.

169. The common law, and statute law in Australia, has long recognised and protected private property rights. These private property rights now regularly fall into conflict with the EPBC Act, and State and Territory legislation relating to the protection of flora, fauna and ecological communities. With the growing protection of our environment it is timely to consider compensating private land owners when parcels or tracts of their land are sterilised from farming practices, or development, so as to maintain Australia's biodiversity. If suitable compensatory provisions cannot be made via offsets, '*carbon sequestration and vegetation / biodiversity offsetting programs*', then private landowners should be compensated for the contribution they

are making to the preservation of biodiversity within Australia. Compensation is paid by the Commonwealth, and the States and Territories, via various legislation, for the compulsory acquisition of land for a public purpose.¹⁰³ It is time the Commonwealth considered introducing a compensatory regime to private landholders where, for the good of all Australians, their land is dedicated to the protection of our biodiversity.

Recommendation 14

- **The Commonwealth should consider introducing a compensatory regime to private landholders where, for the good of all Australians, their land is dedicated to the protection of Australia's biodiversity.**

12. Regional, Rural and Remote Australia

170. In August 2018, the Law Council released the Justice Project Final Report (**Justice Project**). The Justice Project comprehensively reviewed the state of access to justice in Australia as experienced by 13 groups which face significant social and economic disadvantage. One such group was non-metropolitan, or RRR Australians.
171. The Justice Project found that RRR Australians experience specific legal needs.¹⁰⁴ For the purposes of this submission, these include needs relating to a main source of income for many in the cohort: the land and natural environment.¹⁰⁵ Associated legal issues include water rights allocation, environment and planning restrictions, farm succession and planning, and laws with special relevance to Aboriginal and Torres Strait Islander peoples.¹⁰⁶
172. Existing legal needs for RRR communities in the environmental space are further complicated by environmental changes that have taken place in recent years, including drought and consequential water reforms, environmental degradation, climate change and, concurrently, declining local economies, populations and services.¹⁰⁷ Whilst RRR communities vary in their capacity to cope with these changes and challenges, they form a context of particular legal need which should be considered when developing significant environmental law reform.¹⁰⁸
173. To add to this, there have long been concerns regarding general shortages of both public and private legal practitioners in RRR locations. Community legal services have reported being stretched thin across RRR areas, with staff facing huge caseloads. One public legal assistance service in regional Western Australia, for example, has reported engaging a single solicitor to cover a geographical area more than twice the size of the United Kingdom.¹⁰⁹
174. Metropolitan areas are also typically serviced by a greater number of solicitors per capita than RRR areas. Whilst more nuanced and detailed information is needed, national data in 2016 indicated that only 10.5 per cent of practising solicitors

¹⁰³ Eg, Australian Constitution, s 51(xxxi).

¹⁰⁴ Law Council of Australia, *Justice Project* (Final Report, August 2018), Regional, Rural and Remote Chapter (**Justice Project RRR Chapter**) 10.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, 8.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, 19.

practised in a country or rural area.¹¹⁰ In NSW in 2011, the ratio of residents to solicitors in RRR regions was one third of the State-wide ratio.¹¹¹

175. The Justice Project found that insufficient regional engagement in law and policy development (perhaps partly linked to the shortage of solicitors in RRR areas) has frequently made laws and policies 'urban centric', drafted with little consideration to their application in RRR communities.¹¹² RRR communities located across state and/or territory borders have unique difficulties in negotiating complex cross-border legal issues.¹¹³ Further, as recognised by the Productivity Commission, increasingly complex laws across Australian jurisdictions pose particular problems for RRR communities, by increasing the burden on legal practitioners that have traditionally offered generalist services.¹¹⁴ Trends towards specialist service provision to respond to increasingly complex laws were raised during Justice Project consultations as posing difficulties for RRR practitioners.¹¹⁵
176. It has also been suggested that legal problems arising in fields such as the environment increasingly require the multi-national, multidisciplinary approaches and levels of expertise that are often only found in the city, even if their impacts may be felt more strongly in RRR areas.¹¹⁶ For example, during Justice Project consultations, Townsville Community Legal Centre staff noted the consequences of increasingly complex laws for residents without access to legal assistance. They commented that while people were more likely to self-represent, they were less able to do so due to the growing complexity of the legal system, which demanded increasingly higher legal capability.¹¹⁷ Whilst this was not stated in the context of environmental legal issues specifically, similar concerns are likely to apply across all areas of law.
177. Indeed, stakeholders consulted during the Justice Project noted pressures upon generalist legal services in RRR areas. Townsville Community Legal Service estimated that as a generalist RRR service, it dealt with at least 200 different legal problem types.¹¹⁸ It identified that Community Legal Centres were shifting to specialist, rather than generalist, services, in order to provide meaningful advice and useful services.¹¹⁹ However, finding specialist lawyers could be difficult in rural locations due to limitations in resources and expertise.¹²⁰ Similarly, the Townsville office of Legal Aid Queensland flagged that the need for more specialist service provision posed challenges for traditionally generalist RRR services.¹²¹
178. Finally, whilst data on self-representation in Australian courts and tribunals is patchy, commentators have drawn attention to the likelihood that in regional areas with a paucity of lawyers 'it can be expected that a greater proportion of [individuals] will be unrepresented in court'.¹²² This also highlights the importance of clear, straightforward environmental legal frameworks for RRR communities particularly.

¹¹⁰ Ibid, 26.

¹¹¹ Law Council of Australia, *The Justice Project, People in Regional, Rural and Remote Australia* [Infographic](#).

¹¹² Ibid, n1, 4.

¹¹³ Ibid.

¹¹⁴ *Justice Project RRR Chapter*, 24.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid, 37.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid, 40.

179. The picture of regional inequality as it relates to access to justice is complex and varies area-by-area. In order to achieve equitable outcomes between regions, strategies need to be tailored and localised. In many instances, further research and consultation is needed. Where communities understand that they are receiving second-rate services or facilities, or unfair outcomes, both individual and collective faith in the justice system is undermined.
180. The Law Council considers access to justice to be a crucial indicator of inequality, and inextricably linked to the broader Terms of Reference for this Review. Accordingly, it urges the Review Panel to consider the findings contained in the Justice Project, including by considering geographic and jurisdictional inequity in access to justice, when reviewing the EPBC Act.
181. The above matters are self-evidently fundamental to some of the key focus areas identified in the Discussion Paper, namely:
- A. *The role of the EPBC Act*
 - ...
 - B. *More efficient and effective regulation and administration[; and]*
 - ...
 - E. *Community inclusion, trust and transparency.*
182. It is particularly important, therefore, that RRR legal needs and concerns be factored into reform of the EPBC Act when addressing those three areas. However, this is not to say that the other three focus areas should be considered independently of RRR issues – clearly, aspects of ‘innovative approaches’, ‘Indigenous Australians’ knowledge and experience’ and ‘better environment and heritage outcomes’ may also be shaped by, and shape, the above factors.
183. The Justice Project, including the chapter and infographic on RRR Australians, is available on the Law Council’s website.¹²³ A copy of this chapter and infographic has also been attached as **Appendix 3** and **Appendix 4** respectively.

Recommendation 15

- **The Law Council recommends support for specialist legal assistance services to expand their reach in RRR areas, particularly to overcome geographic and jurisdictional inequity of access, and including through outreach and referral networks and the increased use of technology.**

Recommendation 16

- **The Law Council considers that there should be the development of RRR access to justice strategies to ensure an appropriate and tailored mix of services and additional legal services, publicly funded and private, in areas of critical need – including through rural placement, targeted mentoring and incentive schemes.**

¹²³ Law Council of Australia, *Justice Project – Final Report* (2018), available at <<https://www.lawcouncil.asn.au/justice-project/final-report>>.

13. Principles for Future Reform

184. In the section on 'Principles for Future Reform' in the Discussion Paper contains a comment that one such principle could be 'making decisions simpler'.¹²⁴ The Law Council regards this as a problematic phrase for a number of reasons:

- administrative complexity in processes is not the only reason for delay;
- increased development pressure means increased environmental impact which means decisions are harder to make; and
- such decisions are harder still in the absence of overarching policies and adequate regional and/or cumulative impact assessment and scientific data.

185. The Law Council suggests that the principle should refer to making **better** decisions; that is decisions that are made in a transparent framework, based on better science and better data (including through the use of technology sharing platforms) and with genuine engagement of Traditional Owners and regard for the incorporation of Indigenous knowledge.

¹²⁴ Discussion Paper, 26.

Appendix 1 – Hawke Review Recommendations

Hawke Review

Dr Allen Hawke conducted the first independent review of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) in 2009 (**Hawke Review**). The Hawke Review was undertaken in accordance with section 522A of the EPBC Act.

The aim of the report was to review the performance of the EPBC Act and recommend reforms that:

- promote the sustainability of Australia’s economic development;
- reduce and simplify the regulatory burden;
- ensure activities under the EPBC Act represent the most efficient and effective ways of achieving desired environmental outcomes; and
- are based on an effective federal arrangement.

On 30 October 2009, Dr Hawke presented his final report for the Hawke Review.

The report contained 71 recommendations, comprising of 9 core themes.

The recommendations are grouped according to these 9 core themes in the table below. The recommendations that do not neatly fall into one of the core themes are grouped together at the end of the table.

Government Response

On 24 August 2011, the then Minister released the Australian Government response to the Hawke Review.

Despite the support of the Government for a majority of the recommendations in the Hawke Review, there is still yet to be any significant changes made in accordance with the recommendations.

The Committees comment on the ongoing relevance of the Hawke Review recommendations

The table below also provides comment about the relevance of recommendations made in the Hawke Review in the context of the current EPBC Act Review.

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
<p>Redraft the Act to better reflect the Government's role, streamline its arrangements and rename it the Australian Environment Act</p>	<p>Recommendation 1 – New EPBC Act</p> <ul style="list-style-type: none"> • EPBC Act is replaced with a new Act – <i>Australian Environment Act</i> • Restructured to modernise, clarify, simplify and streamline language and process • Reduce process duplication • Increase focus on strategic approaches to environmental management 	<p>The Review emphasized that many people find the EPBC Act difficult to understand and navigate, with large sections of text repeated throughout the Act, making it repetitive, lengthy and unnecessarily complex</p> <p>Australian Environment Act would reflect the all-encompassing nature of the environment and indicate it is national legislation</p>	<p>Agreed in part</p> <p>The Government agrees with the recommendations, but will implement the recommendations through amendment of the EPBC Act rather than by drafting an entirely new act</p>	<p>While a new Act in itself may not be required (and amendments can be affected to the existing EPBC Act), there remains a need for:</p> <ul style="list-style-type: none"> • a modern, clear, simple and streamlined Act; • the reduction of duplication of process; and • an increase in the focus on strategic approaches to environmental management
	<p>Recommendation 2 – Emphasis and focus</p> <ul style="list-style-type: none"> • Confirm ecologically sustainable development principles as overarching principles for decision making • Emphasise environmental considerations are to be 	<p>The Act should make it clear that environmental considerations should be given primacy over social and economic considerations</p> <p>A key concern during public comments was the Act's perceived failure to adequately manage the cumulative environmental impacts at a landscape or ecosystem scale</p>	<p>Agreed in part</p> <p>The Government does not consider that it is necessary or desirable to emphasise that environmental considerations are to be considered first when making decisions</p>	<p>One of the existing objectives of the Act is to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources</p> <p>It remains a reasonable expectation that, for an Act that has an object of providing for the protection of the environment, the emphasis</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>considered first when making decisions</p> <ul style="list-style-type: none"> Emphasise conservation of biological diversity and ecological integrity 			and focus of Recommendation 2 remain relevant
	<p>Recommendation 3 – Revise the objects of the Act</p> <ul style="list-style-type: none"> Primary objective = protect the environment through conservation of ecological integrity and nationally important biological diversity and heritage Protects matters of NES and seeks to promote beneficial social and economic outcomes Primary object to be achieved by applying principles of ecologically sustainable development Minister and agencies must have regard to and seek to further, the primary object of the Act 	<p>Clarifies the Commonwealth's focus in protecting the environment as being primarily about protection of matters of NES</p> <p>Redrafting the objects would clarify its focus, increase efficiency and improve administration</p> <p>A primary object would give the Act a clearer sense of direction and highlight that the focus is on nationally important biodiversity and heritage</p>	<p>Not agreed</p> <p>The Government believes the objects of the EPBC Act are already clear and there is no need to change them as suggested by the review</p>	<p>The definition or explanation of ecologically sustainable development in the Act should be revised/updated to reflect the modern formulation of ecologically sustainable development principles</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<ul style="list-style-type: none"> Minister should encourage public participation in the making of decisions that impact upon the environment, promote cooperation with State/Territory and Local governments, implement Australia's international responsibilities, recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity, promote the use of Indigenous peoples' knowledge and promote fair and efficient decision making 			
	<p>Recommendation 63 – Alligator Rivers Region</p> <ul style="list-style-type: none"> Provision of the <i>Environment Protection (Alligator Rivers Region) Act 1978</i> be incorporated into the Act 	<p>The supervising Scientist plays an important role in monitoring environmental effects of uranium mines in the Alligator River region, however other uranium mines operate outside this region – therefore the role should be expanded</p>	<p>Agreed in part</p> <p>The Government considers there are no compelling reasons to incorporate the Alligator Rivers Region Act in to the EPBC Act</p>	<p>Remains relevant, for the reasons stated in the review explanation, and to streamline and have a consistent approach for assessment purposes</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<ul style="list-style-type: none"> Role of Supervising Scientist expanded to include all uranium mining activities 			
	<p>Recommendation 64 – incorporation of legislation</p> <ul style="list-style-type: none"> Following legislation incorporated to remove overlap and duplication in assessment and authorisation process: <i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i>, <i>Environment Protection (Alligator Rivers Region) Act 1978</i>, <i>Environment Protection (Sea Dumping) Act 1981</i>, <i>Historical Shipwrecks Act 1976</i> and <i>Protection of Movable Cultural Heritage Act 1986</i> Other than Part V of the <i>Sea Installations Act 1987</i>, the rest of that Act and the <i>Sea Installations Levy Act 1987</i> be repealed 	<p>These pieces of legislation also regulate aspects of environment protection</p> <p>There is a degree of regulatory overlap between the processes under these Acts and the assessment and approvals in the EPBC Act</p> <p>Incorporating these Acts will streamline the process and make it easier to navigate</p> <p>The fact that so few applications have resulted in declarations under the <i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i> have been made suggests it is not working efficiently or effectively</p>	<p>Agreed in part</p> <p>The Government does not agree to incorporate the <i>Environment Protection (Sea Dumping) Act 1981</i>, <i>Environment Protection (Sea Dumping) Act 1981</i>, <i>Historical Shipwrecks Act 1976</i> and <i>Protection of Movable Cultural Heritage Act 1986</i>, <i>Historic Shipwrecks Act 1976</i> or <i>Protection of Movable Cultural Heritage Act</i> into the EPBC Act</p>	<p>Remains relevant for the reasons stated in the review explanation</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<ul style="list-style-type: none"> Consider reviews of the <i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i>, <i>Historic Shipwrecks Act 1976</i>, <i>Protection of Movable Cultural Heritage Act 1986</i> and Commonwealth maritime enforcement 			
	<p>Recommendation 66 – streamlining relationship</p> <ul style="list-style-type: none"> Consider streamlining relationship between the <i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i>, <i>Petroleum (submerged Lands) (Management of Environment) Regulations 1999</i> and the Act Maximise regulatory efficiency while retaining strong environmental safeguards 	<p>There is duplication between the EPBC Act and the OPGGSA</p>	<p>Agreed</p>	<p>This has been partially addressed with the Part 10 approval of NOPSEMA's environmental approval processes in relation to non-greenhouse gas storage activity</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>Recommendation 70 – Australian Heritage Council functions merged</p> <ul style="list-style-type: none"> • Provisions of the EPBC Act and <i>Australian Heritage Council Act 2003</i> be merged and incorporated into the new Act • Functions of the Australian Heritage Council conferred under a single Act 	<p>There are calls for increased clarity about the Commonwealth’s role with respect to heritage – it would therefore be appropriate to consolidate the AHC’s functions within a single piece of legislation</p>	<p>Agreed</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>
<p>Establish an independent Environment Commission to advise the government on project approvals, strategic assessments, bioregional plans and other statutory decisions</p>	<p>Recommendation 71 – National Environment Commission</p> <ul style="list-style-type: none"> • Establish an independent National Environmental Commissioner and National Environment Commission 	<p>There is the potential for an independent Commissioner to take on advisory and audit and compliance functions of the Act</p> <p>This would improve transparency in the administration of the Act and the quality of decision making under the Act</p>	<p>Not agreed</p> <p>The government supports increased transparency and accountability but has agreed to various initiatives to improve this</p>	<p>Potentially remains relevant, subject to other reforms to achieve more streamlined advisory and audit functions under the Act</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
<p>Invest in the building blocks of a better regulatory system such as national environmental accounts, skills development, policy guidance, and acquisition of critical spatial information</p>	<p>Recommendation 4 – National approach</p> <ul style="list-style-type: none"> • Commonwealth should work with States/Territories to improve efficiency of Environmental Impact Assessment • Greater use of strategic assessments • Accreditation of States/Territories where standards are met • Creation of Commonwealth monitoring, performance audit and oversight power to ensure that accredited processes achieve outcomes • Streamlining assessment methods, including by combining assessment by preliminary documentation and assessment on referral information and 	<p>The overlap between Commonwealth and State/Territory governments has created inefficiency and duplication</p>	<p>Agreed</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>removal of assessment by Public Environment Report</p> <ul style="list-style-type: none"> Establishing joint State/Territory and Commonwealth assessment panels Use of joint assessment panels, greater use of public inquiries and joint assessment panels 			
	<p>Recommendation 5 – Single national list of threatened species</p> <ul style="list-style-type: none"> All State/Territory governments move to a single national list of threatened species Process should include agreed accreditation for listing, protocols, minimum procedural standards and consistent documentation standards 	<p>The separate lists of threatened species across Commonwealth, States and Territories creates regulatory inefficiency</p> <p>A single list would reduce assessment timeframes and reduce the potential for inconsistency in conditions</p>	<p>Agreed</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>
	<p>Recommendation 67 – environmental accounts</p>	<p>Comprehensive, accurate and consistent environmental information is needed to support decision-making and</p>	<p>Agreed in principle</p> <p>The government is already looking at how national</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<ul style="list-style-type: none"> • Develop a system of environmental accounts • Establish baseline national environmental information • Provide capacity to systematically monitor changes in the quality of the Australian environment • Provide information basis for improved regional planning and decision making • Secondary objective of strengthening capacity of local government land-use planning decision-making • Strengthen arrangements for continued State of the Environment reporting • Link information requirements for State of the Environment reporting to the development of the National Environmental Accounts 	<p>inform policy development for the government's investment in resources and management of programs</p> <p>The current system of environmental information management is ineffective</p> <p>A set of national environmental accounts should provide a consistent, standardised approach to data collection evaluation and reporting.</p>	<p>environmental accounts might be best development and maintained</p>	<p>This is also relevant (and potentially necessary) in circumstances where strategic assessment processes are, or encouraged to be, used more broadly</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
<p>Streamline approvals through earlier engagement in planning processes and provide for more effective use and greater reliance on strategic assessments, bioregional planning and approvals bilateral agreements</p>	<p>Recommendation 6 – strategic assessments and bioregional plans</p> <ul style="list-style-type: none"> • Expand role of strategic assessments and bioregional plans so that they are used more often • Strengthen the process for plans and assessments, so they are more substantial and robust • Amend terminology of “bioregional plans” to “regional plans” and allow the Commonwealth to unilaterally develop regional plans • Process for delineating a region is flexible • Strategic assessments to specify mandatory required information, enhance provision for public engagement and insert an improve or maintain test for class actions 	<p>Strategic assessments could harmonise environmental regulation across Australia</p> <p>A better focus on bioregional plans would create an integrated framework for Commonwealth interests at a reasonable scale</p> <p>The strategic assessment provisions should be amended to provide for greater safeguards</p>	<p>Agreed in substance</p> <p>Government does not agree to change the terminological for bioregional plans and does not agree to insert an improve or maintain test for approval for a class of actions</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<ul style="list-style-type: none"> • Create broad performance audit power to assess accredited systems 			
	<p>Recommendation 24 – Code of Conduct</p> <ul style="list-style-type: none"> • Develop an industry Code of Conduct for consultants supplying information for the purposes of environmental impact assessment and approval regime • Minister audit the information in referral documentation and/or assessment information and protected matters to test if assessment predictions were correct 	<p>The environment and planning consulting profession influences the nature of project approvals and environmental outcomes</p> <p>Existing codes do not have the capacity to enforce a minimum standard, consultants are not obliged to abide by the codes, and the range of sanctions are not strong enough to ensure compliance</p>	<p>Agreed in part</p> <p>The Government considers the recommendation that the Minister audits the information is not warranted</p>	<p>Auditing by the Minister against information or outcomes is required to ascertain whether actions are achieving the objects of the EPBC Act and/or performance outcomes (particularly in the absence of meaningful enforcement action being undertaken)</p>
	<p>Recommendation 25 – Approval decision</p> <ul style="list-style-type: none"> • Confer power on Minister to weigh a range of environmental considerations when 	<p>This method of assessment would improve the rigour of information used in assessment</p>	<p>Not agreed</p> <p>The Government does not consider that this recommendation would improve protection for matters of NES</p>	<p>The Law Council has no comment</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>making an approval decision</p> <ul style="list-style-type: none"> Options include: Minister must consider the whole of the environment; may call in the impacts on the whole of the environment for assessment if the action is considered to be of national importance; or may consider impacts on all affected protected matters, including impacts that are not significant 			
	<p>Recommendation 26 – request information on alternatives</p> <ul style="list-style-type: none"> Minister to have the power to request information on alternatives for projects referred for approval 	<p>Environmental impacts are often assessed through a narrowed lens because of the Act</p>	<p>Agreed</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>
	<p>Recommendation 40 – marine and fisheries</p> <ul style="list-style-type: none"> Fishery provisions to be streamlined into a single strategic assessment framework for fisheries to 	<p>Fishery provisions in the Act and separate management legislation duplicate regulation and creates uncertainty and financial costs for the industry</p> <p>Assessment process should be refined without</p>	<p>Agreed in principle</p> <p>The Government agrees with the intent of this recommendation but notes that the fisheries assessment</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>deliver a single assessment and approval process</p>	<p>compromising environmental outcomes</p>	<p>provisions under the EPBC Act serve different functions</p>	
<p>Set up an Environment Reparation Fund and national biobanking scheme</p>	<p>Recommendation 7 – national biodiversity banking</p> <ul style="list-style-type: none"> • COAG develop a national biobanking system and standards • Accredited State and Territory biobanking schemes, subject to standards • Facilitate and promote use of biobanking as part of project approvals and the operation of a national biobanking scheme 	<p>Lack of suitable pricing signals (i.e. placing low price on biodiversity) is a driver of species decline due to the lack of economic incentive to protect biodiversity</p> <p>Biobanking would establish a better market signal</p>	<p>Agreed in principle</p> <p>The Government supports the use of market-based incentives for biodiversity management, and recognises that biodiversity is one of many potential market-based incentives for environmental protection</p>	<p>The Law Council considers that there merit in continuing to explore the accreditation of schemes in developed by various States to achieve greater streamlining of State approval processes; however, having a national standard of biobanking may not provide the flexibility required for Australia-wide application (as evidenced by the EPBC Act offsets policy)</p>
	<p>Recommendation 60 – Environment Reparation Fund</p> <ul style="list-style-type: none"> • Establish an Environment Reparation Fund • Specify establishment of the fund, structure and function of the fund, and ongoing administration 	<p>Department has no administrative arrangements to manage payments other than bonds, guarantees and small cash deposits – this limits how funds can be spent and provides insufficient oversight to ensure that the funds are dispersed as negotiated</p>	<p>Not agreed</p> <p>The government considers that monies received as part of fines or court orders for breaches of the EPBC Act should be returned to consolidated revenue so that the government can make decisions about allocating this revenue between competing</p>	<p>It is agreed that there are other options available to the government to ensure environmental oversight</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
			priorities as part of its normal budget process	
Provide for environmental performance audits and inquiries	<p>Recommendation 54 – compliance and enforcement powers</p> <ul style="list-style-type: none"> Bring together and rationalise the range of compliance and enforcement powers and responses available to regulate actions likely to impact on protected matters 	Pulling together enforcement legislation will provide a unified and comprehensive suite of enforcement powers	Agreed	Remains relevant for the reasons stated in the review explanation column
	<p>Recommendation 55 – administrative, civil and criminal remedies</p> <ul style="list-style-type: none"> Full suite of administrative, civil and criminal remedies to be applied to any contravention of the Act 	<p>The Act fails to make consistent provision for civil, criminal and administrative remedies for contraventions</p> <p>This limits the use of compliance and enforcement responses</p> <p>The full suite of remedies would enhance administration and enforcement of the Act as efficiently, effectively and transparently as possible</p>	Agreed	Remains relevant for the reasons stated in the review explanation column

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>Recommendation 56 – compliance and regulatory activities</p> <ul style="list-style-type: none"> Act to allow for publication of documents relating to regulatory activities, issue of Warning Notices and sharing of information with State and Territory agencies Offence provisions to non-compliance with conditions set by the Department when specimens are released to owner/holder 	<p>Current provisions of the act have created a gap, resulting in owners or holder being able to continue breeding, selling or transferring seized specimens with little consequences</p>	<p>Agreed</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>
	<p>Recommendation 61 – compliance and performance audits</p> <ul style="list-style-type: none"> Give the Minister discretion to undertake compliance and performance audits 	<p>Monitoring and audit are important to ensure provisions of legislation are met</p> <p>Carrying out regular compliance audits demonstrate to the community that a system is in place for measuring and improving compliance and increasing confidence</p>	<p>Agreed</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
<p>Create a new matter of national environmental significance for ecosystems of national significance and introduce an interim greenhouse trigger</p>	<p>Recommendation 8 – Matters of NES</p> <ul style="list-style-type: none"> Act amended to include ‘ecosystems of national significance’ as a new matter of NES ‘Matter protected’ should be the ecological character of a listed ecosystem 	<p>A key criticism of the current matter of NES was that there were not enough matters for the Act to deal adequately with environmental challenges</p> <p>Protection of ecosystems should give the Commonwealth the best opportunity to preserve ecosystems</p>	<p>Agreed in substance</p> <p>The Government agrees in substance with the criteria suggested in the Review to identify ecosystems, with the exception of the criteria that ‘it is under severe and imminent threat’</p> <p>The Government agrees in principle that ecosystems are currently under-represented, but regards this as a policy matter and therefore will not include it in the criteria set by regulation</p>	<p>The Law Council has no comment</p>
	<p>Recommendation 9 – water plans</p> <ul style="list-style-type: none"> Water plans that authorise actions that will have a significant impact on a protected matter must undergo strategic assessments Basin Plan be strategically assessed to ensure compliance 	<p>Over-allocation and use of water resources are a significant driver of change in Australia’s biodiversity</p> <p>Merely including water extraction or use as a MNES is not the best mechanism for effectively managing water resources – recommendation 9 is a better way of addressing the adverse impacts of water extraction</p>	<p>Not agreed</p> <p>The Government considers that strategic assessments should not be mandatory and should instead be continued to be made on a case by case basis</p> <p>The Government does not consider that the content of the Basin Plan will contain enough detail for strategic assessment</p>	<p>While this issue has to some extent been achieved for coal seam gas and large coal mine actions via the “water trigger” for MNES, this recommendation remains relevant for the reasons stated in the review explanation column</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>Recommendation 10 – greenhouse trigger</p> <ul style="list-style-type: none"> Interim greenhouse trigger with threshold of at most 500,000 tonnes of carbon dioxide equivalent emissions introduced as soon as possible Insert requirement to consider cost-effective climate change mitigation opportunities as part of strategic assessments and bioregional planning processes 	<p>The issue of a greenhouse gas trigger was raised in a substantial number of submissions</p> <p>Adding a greenhouse gas trigger into the Act is the preferred method due to the need to act quickly</p>	<p>Not agreed</p> <p>The Government does not consider that an interim greenhouse trigger would influence emissions associated with decisions taken on projects</p>	<p>The EPBC Act remains one legislative tool to manage greenhouse gas emissions at a national level and help address climate change adaptation issues – however, the Law Council does not believe that a greenhouse gas trigger, as contemplated in the Hawke Review is appropriate in 2020</p>
	<p>Recommendation 11 – protection for non-forest native vegetation</p> <ul style="list-style-type: none"> Additional protection through eligibility requirements for reforestation projects under Carbon Pollution Reduction Scheme Monitoring of land clearance activities associated with CPRS and 	<p>Kyoto protection of forests does not extend to non-forest native vegetation</p> <p>Given the economic incentive to clear non-forest native vegetation, additional steps should be taken to limit the adverse impacts on biodiversity</p>	<p>Agreed</p>	<p>The intent of this recommendation remains relevant for the reasons stated in the review explanation column</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>the Act integrated into a single system</p> <p>Recommendation 14 – ecological communities</p> <ul style="list-style-type: none"> Vulnerable ecological communities to be included as a matter of NES 	<p>Actions that will have a significant impact on a vulnerable ecological community currently do not require approval under the Act</p>	<p>Agreed</p>	<p>The Law Council has no comment, and considers that this may be an issue for technical input</p>
<p>Improve transparency in decision-making and provide greater access to the courts for public interest litigation</p>	<p>Recommendation 44 – Public participation and transparency of process</p> <ul style="list-style-type: none"> Require publication of a greater range of information Ensure all information is made available in electronic form (where technologically feasible) Remove requirement for documentation to be republished where public comments are not received and no amendments are required 	<p>The public is more interested in environmental decision making</p> <p>Improving transparency will help alleviate the concern that discretion associated with decision making provides for the opportunity for erroneous decisions to be made</p>	<p>Agreed in part</p> <p>The Government considers that a significant amount of material is already made publicly available</p> <p>The Government agrees with the intent but notes a significant amount of material is already made publicly available, and notes that some information might be comprised of complex legal documents, which are resource intensive to prepare</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>Recommendation 45 – improving public participation</p> <ul style="list-style-type: none"> • Clarify periods and processes for public participation • Give Minister discretion to seek public comment on environmental management plans • Department develop principles and guidelines for best practice public consultation • Strengthen involvement of Indigenous peoples 	<p>Public participation is needed to inform high quality decision making</p> <p>Current mechanisms do not provide for meaningful public participation</p>	<p>Agreed in part</p> <p>The Government recognises the importance of an environmental decision-making framework that provides for effective community engagement</p> <p>The Government stated that the best way to engage with the relevant stakeholders will differ from plan to plan, and therefore the Minister requires flexibility on how public consultation will occur</p>	<p>Remains relevant for the reasons stated in the review explanation column</p> <p>The Government’s response is also noted and it appears can be achieved via Departmental guidelines to provide the flexibility sought</p>
	<p>Recommendation 46 – improving transparency</p> <ul style="list-style-type: none"> • Require user friendly and cost-effective email subscription service • Consider including a requirement that the Department report against KPIs for public awareness and engagement 	<p>The public should have a high level of awareness of their rights and responsibilities to ensure effective public participation and foster compliance culture</p>	<p>Agreed in principle</p> <p>The Government considers it unnecessary to legislate on the recommendation requiring the Department reports are compared against KPIs</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<ul style="list-style-type: none"> Department improve website to enhance accessibility to information, increasing specialist industry knowledge to ensure effective engagement and implement a comprehensive communications campaign 			
	<p>Recommendation 27 – operation of environmental impact assessment</p> <ul style="list-style-type: none"> Provisions governing EIA to be as efficient as possible while retaining transparency of decision-making Minister to be able to stipulate when actions will not have a significant impact Allow consideration of previously authorised conditions of approval 	<p>Development of better guidelines will provide increased certainty and efficiency</p> <p>Currently the Department is reluctant to advise whether a specific project is likely to have a significant impact or not - this results in a public perception of unhelpfulness</p> <p>Steps should therefore be taken to enable the Department to provide preliminary advice to alleviate uncertainties and costs associated</p>	<p>Agreed in substance</p> <p>The Government does not agree with the provision improving the capacity of the Minister to vary conditions attached to an approval conditions</p> <p>There is a need for greater clarity about actions that have been approved or determined to not be a controlled action under the EPBC Act and that change in nature or scope after the decision has been made</p>	<p>Remains relevant for the reasons stated in the review explanation column</p> <p>In terms of amending conditions, circumstances already exist to enable regulators of State environmental authorities to amend conditions in certain circumstances (for example, pursuant to ss. 213 and 215 of the <i>Environmental Protection Act 1994</i> (Qld)) which could also be replicated at the federal level</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<ul style="list-style-type: none"> • Controlled action decision remains strictly a jurisdiction question • Clarify threshold for making a particular manner decision • Compliance and audit functions available in respect of monitoring particular manner decisions • Improve capacity of the Minister to vary conditions attached to an approval decision • Department to develop policy advice to increase clarity on a significant impact, policy guidelines for bioregional plans and guidelines on continuing use and prior authorisation 			
	<p>Recommendation 39 – improve transparency and compliance with Regional Forest Agreements</p>	<p>There is public concern over the inadequacy of mechanisms for members of the public to bring forward complaints about RFA operations having</p>	<p>Agreed</p>	<p>From the information available, the Law Council has no comment</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<ul style="list-style-type: none"> • Improve independence of compliance monitoring • Develop processes to make information publicly available on nature of complaints about Regional Forest Agreement operations and results of investigations 	<p>environmental impacts – compiling information and making it public would improve this</p>		
	<p>Recommendation 43 – decision making</p> <ul style="list-style-type: none"> • Prescribed mandatory criteria that must be considered when making decision under the Act • Minister must have regard to best available information for making a decision • Decision must be consistent with principles of ecologically sustainable development, obligations under international agreements, management principles and plan prepared under the Act 	<p>Retaining broad discretion without guiding criteria would fuel the perception that the Minister makes decisions without balancing relevant criteria</p> <p>There is concern over lack of transparency in decision making processes and whether the Minister adequately considers public comments</p>	<p>Agreed in principle</p> <p>The Government agrees with the recommendation but states that it is already a requirement under the ADJR Act that all relevant factors are considered, and that mandatory criteria are already established in the Act</p>	<p>Notwithstanding the Government’s response, this issue remains relevant for the reasons stated in the review explanation column and the response and would assist in achieving transparency in the operation of the Act</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<ul style="list-style-type: none"> Minister should consider the ability of a protected matter to respond to threats and foreseeable impact of the decision on that ability, and level of uncertainty in scientific information provided 			
	<p>Recommendation 47 – reconsideration of decision</p> <ul style="list-style-type: none"> Requests for reconsideration of a controlled action decision to be made within 11 days of the decision unless the request for reconsideration is based on substantial new information or a substantial change in circumstances not foreseen at the time and the new information relates to the likely impact the action has on a protected matter 	<p>The Act does not specify time limits within which a request for reconsideration can be made – this should be added in the interests of certainty</p>	<p>Agreed in part</p> <p>The Government will amend the Act to extend the time period to 11 days for requests by state or territory ministers but does not support introducing an 11-business day limit for requests made by other persons</p>	<p>The Law Council notes that the Department released a policy paper which deals with the process for reconsideration decisions in July 2019, and therefore, the recommendation appears to have been superseded by that policy</p>

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	<p>Recommendation 48 – repeal of subsection 303GJ(2)</p> <ul style="list-style-type: none"> Decisions under section 303GJ(1) about whether to grant permits for activities affecting protected species and the international movement of wildlife and advice about whether an action would contravene a conservation order be subject to merits review 	<p>Merits review is a key means of achieving better decision-making</p>	<p>Not agreed</p> <p>The Government accepts that processes and decisions should be more transparent, but has agreed to recommendation 56 to achieve this</p>	<p>Remains relevant for the reasons stated in the review explanation column</p> <p>Merits review by the Administrative Appeals Tribunal (AAT) is confined to decisions by a delegate of the Minister following amendments to the EPBC Act in 2006. Availability of merits review of Minister’s decision should be reinstated</p>
	<p>Recommendation 49 – control action and assessment approach</p> <ul style="list-style-type: none"> Controlled action and assessment approach decisions to be open to merits review 	<p>Currently, a limited number of decisions made under the Act can be subject to merits review</p>	<p>Not agreed</p> <p>The Government considers controlled action and assessment approach decisions as inappropriate for merits review</p>	<p>Remains relevant for the reasons stated in the review explanation column</p> <p>Extending merits review to controlled action and assessment approach decisions would be a modest change</p> <p>The assessment approach decision does not currently provide for any public participation in the decision-making process</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>Recommendation 50 – extended definition of legal standing</p> <ul style="list-style-type: none"> Extended definition of legal standing for the purposes of merits review applications for decisions under the Act to include persons who made formal public comment during the decision-making process 	<p>Standing should be extended to people who have made a submission during public comment phase – these people should have the right to challenge decisions</p> <p>Increased standing can provide greater scrutiny by the public</p>	<p>Not agreed</p> <p>The government considers that the existing standing provisions are already broad and do not post an unreasonable barrier to third party litigants</p>	<p>Remains relevant for the reasons stated in the review explanation column</p> <p>An individual or organisation who has made a submission during the decision-making process should be afforded standing as is the case in NSW under <i>the Environmental Planning and Assessment Act 1979</i></p>
	<p>Recommendation 51 – undertakings</p> <ul style="list-style-type: none"> Provisions be inserted (like the repealed s. 478) to specify that the Federal Court is not to require an applicant to give an undertaking as to damages as a condition of granting an interim injunction 	<p>A requirement to provide an undertaking as to damages is an obstacle to public interest litigation</p> <p>A provision previously existed and was repealed in 2006 – prior to its repeal, the provision was not abused</p>	<p>Not agreed</p> <p>The Government's view is that the Court's discretion to not require undertaking as to damages when proceedings are commenced in the public interest is sufficient protection</p>	<p>Remains relevant for the reasons stated in the review explanation column</p> <p>Extended standing for judicial review should continue and the repealed provision re-instated</p>
	<p>Recommendation 52 – security for costs</p> <ul style="list-style-type: none"> Act amended to prohibit the ordering of security for 	<p>Providing security for costs is a major obstacle to public interest litigation</p>	<p>Not agreed</p> <p>The Government considers it would be inappropriate to prohibit the exercise of judicial</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	costs in public interest proceedings		discretion in connection with public interest matters	Extended standing for judicial review should continue and the repealed provision which prohibits ordering of security for costs re-instated
	<p>Recommendation 53 – public interest costs order</p> <ul style="list-style-type: none"> Federal Court empowered to decide whether a case is a public interest proceeding If so, Federal Court empowered to determine the appropriate form of public interest costs order 	<p>The Courts have previously been inconsistent in deciding whether to make ‘no order’ as to costs</p> <p>The threat of a costs order is a significant barrier to public interest litigation</p>	<p>Not agreed</p> <p>The Governments supports the existing discretion of courts to determine costs orders in relation to public interest matters</p>	<p>Remains relevant for the reasons stated in the review explanation column</p> <p>Barriers to public interest litigation should be removed including the potential for costs orders</p>
Mandate the development of foresight reports to help government manage emerging environmental threats	<p>Recommendation 23 – protocols and reports</p> <ul style="list-style-type: none"> COAG to develop criteria and management protocols for movement of potentially damaging exotic species between States and Territories Periodic preparation of mandatory outlook reports that identify emerging 	<p>Provisions in the Act to deal with emerging issues are limited</p> <p>Foresight reports would help target this</p>	<p>Agreed in part</p> <p>The Government agrees with the intent of the recommendation that mandatory outlook reports are included, but considers that the outlook reporting function should be included as a mandatory element of state of the environment reports</p>	<p>The intent of this recommendation remains relevant for the reasons stated in the review explanation and is increasingly urgent if we are to address climate change adaptation issues and recovery post-bushfires</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>threats and provide policy options</p> <ul style="list-style-type: none"> Establish a Unit or Taskforce to identify and guide management responses to emerging threats 			
	<p>Recommendation 18 – abatement plans</p> <ul style="list-style-type: none"> Allow greater flexibility in development of recovery and threat abatement plans Create opportunities for better linkages to funding initiatives 	<p>Greater integration will be a more strategic approach to biodiversity conservation</p> <p>It will allow targeted, better coordinated and effective recovery actions</p>	<p>Agreed in part</p> <p>The Government does not agree that better linkages to funding initiatives should be legislated</p>	<p>The intent of this recommendation remains relevant for the reasons stated in the review explanation column however, funding linkages do not need to be legislated to achieve this outcome</p>
	<p>Recommendation 19 – key threatening processes</p> <ul style="list-style-type: none"> Better define key threatening processes (KTP) Allow greater flexibility in criteria for listing a KTP 	<p>The current process does not lend itself to strategic identification or prioritisation of threats or their management</p> <p>The current criteria and definition do not recognise the potential for threatening processes to impact other matters protected under the Act</p>	<p>Agreed</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<ul style="list-style-type: none"> Allow strategic identification of KTPs at a range of scales 			
	<p>Recommendation 20 – threat abatement plans</p> <ul style="list-style-type: none"> Greater flexibility and implementation in the development of and implementation of threat abatement plans Allow transition to regional planning approaches and strategic threat management 	<p>TAP provisions could be utilised more effectively</p> <p>TAPs should be focused on where nationally significant assets are in urgent need of protection, intervention are likely to be cost effective and national strategies do not already exist</p>	Agreed	Remains relevant for the reasons stated in the review explanation column
	<p>Recommendation 21 – threat abatement advice</p> <ul style="list-style-type: none"> Require the development of a threat abatement advice at the time of listing a KTP 	<p>This will provide an important mechanism to inform recovery and regional planning and other decision making under the Act</p>	Agreed	Remains relevant for the reasons stated in the review explanation column
Other	<p>Recommendation 12 – critical habitat</p> <ul style="list-style-type: none"> Require the identification of critical habitat for listed 	<p>To date, critical habitat has been listed for only 5 listed threatened species</p>	Agreed	Remains relevant for the reasons stated in the review explanation column

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>threatened species at the time of listing</p> <ul style="list-style-type: none"> Discontinue Register of Critical Habitat once information about critical habitat is included in listing documentation 	<p>Listing critical habitat is important to protect against cumulative impacts</p>		
	<p>Recommendation 13 – Threatened Species Scientific Committee</p> <ul style="list-style-type: none"> Require the Threatened Species Scientific Committee indicate in the listing process the areas necessary for an ecological community to maintain its ecological function 	<p>Currently, listed ecological communities include only higher quality patches of vegetation</p> <p>This approach will simplify definition by reducing ambiguity on what is protected and removes the potential for protecting areas that may be impossible to remediate</p>	<p>Agreed</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>
	<p>Recommendation 15 – take into account ecologically sustainable development</p> <ul style="list-style-type: none"> Amend s. 186(2)(b) so that in deciding whether to list a threatened species or ecological community, Minister can only take the principles of ecologically 	<p>This limitation is aimed at decreasing risks attached to discretion given to the Minister</p>	<p>Not agreed</p> <p>The Government considers the Act has a clear framework for balancing factors and that the assessment by the Threatened Species Scientific Committee considers the conservation status of the</p>	<p>The Law Council has no comment</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>sustainable development into account in exceptional situations where social or economic costs are overwhelming and environment benefits are slight</p>		<p>species or ecological community</p>	
	<p>Recommendation 16 – emergency listings</p> <ul style="list-style-type: none"> Minister to be given power to make emergency listings of threatened species and ecological communities where the species or community meets the criteria for the listing category and a threat is severe and imminent 	<p>The current threatened species and ecological community listing process does not provide for circumstances where there is the potential for immediate significant threats to a species or ecological community</p>	<p>Agreed in principle</p> <p>The Government agrees with the intent of the recommendation and will amend the Act to include an emergency listing process for threatened species and ecological communities</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>
	<p>Recommendation 17 – Migratory species</p> <ul style="list-style-type: none"> Provisions relating to migratory species be reviewed and amended to allow the take of migratory species, subject to management 	<p>Australia’s approach under the Act should better reflect the Bonn Convention</p>	<p>Agreed</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>arrangements demonstrating that the take would not be detrimental to survival of the species</p> <ul style="list-style-type: none"> • Amendments should provide protection consistent with international obligations 			
	<p>Recommendation 22 – benefits</p> <ul style="list-style-type: none"> • Move Part 8A of the EPBC Regulations into the EPBC Act, which regulates access to biological resources in Commonwealth areas • Increase penalty provisions for non-compliance • Require benefit sharing agreements to refer to equitable sharing of benefits • Require informed consent where Indigenous 	<p>Each jurisdiction has different rules for accessing biological resources, which is a source of confusion</p> <p>The current regime and penalties do not appropriately value biological resources – remedies for breach are inadequate</p>	<p>Agreed</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>knowledge is accessed or used</p>			
	<p>Recommendation 28</p> <ul style="list-style-type: none"> • Regulation of World, National and Commonwealth Heritage matters be retained in the Act • The Department develop a guide to the heritage provisions of the Act to assist in applying and understanding the relevant provisions 	<p>The current system is an advance for heritage protection and management at the national level</p> <p>Separating heritage from the Act would be a retrograde step – heritage should not be seen as a marginal issue</p>	<p>Agreed</p>	<p>Remains relevant for the reasons stated in the review explanation column</p> <p>It is noted that in 2009 the Australian Heritage Council published the Guidelines for the Assessment of Places for the National Heritage list. This should also be reviewed and updated, as required</p>
	<p>Recommendation 29</p> <ul style="list-style-type: none"> • Nomination, prioritisation, assessment and listing processes for National and Commonwealth heritage should be simplified • Provide for greater transparency • Australian Heritage Council making strategic 	<p>The listing process is regarded as lengthy and complex</p> <p>Additional public consultation should be required to create greater transparency</p> <p>Allowing the AHC to make strategic nominations would better prioritise and better manage expectations</p>	<p>Agreed in part</p> <p>The Government does not consider it necessary for the AHC to make nominations as this is already provided for in the Act</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>nominations and determining its work plans</p> <ul style="list-style-type: none"> • Producing guidelines on the documentation requirements for heritage nomination • Notifying owners of places if a heritage nomination relating to that place is to be assessed • Inviting public comments when places are added to the Priority Assessment List and when potential heritage values are identified • Publishing AHC advice and recommendations at the time of a Minister's listing decision 	<p>A more transparent approach would help public understanding and acceptance</p>		
	<p>Recommendation 30 – heritage protection</p> <ul style="list-style-type: none"> • Greater leadership for heritage protection and management by engaging 	<p>The process for updating CHL listings is cumbersome</p> <p>Heritage listings in the Act currently fall in a gap between ACT and Commonwealth jurisdictions</p>	<p>Agreed</p>	<p>The Law Council has no comment</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>with the Australian Heritage Council</p> <ul style="list-style-type: none"> • Clarify requirements for Commonwealth agency heritage strategies • Airport environment strategies to include a heritage assessment • Comprehensive heritage protection in designated areas of the Act 			
	<p>Recommendation 31 – management arrangements</p> <ul style="list-style-type: none"> • Recognise a range of management arrangements that are outcome focussed • Flexible format and content requirements for management arranges to provide for efficiency in planning and management without compromising good heritage outcomes 	<p>Currently the Act does not provide sufficient flexibility or recognise alternative arrangements that achieve equivalent heritage outcomes</p> <p>Greater flexibility is required to ensure review and reporting activity corresponds to need</p>	<p>Agreed</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>Recommendation 32 – heritage management plans</p> <ul style="list-style-type: none"> • Management plans focus on outcomes • Format and process for developing management plans is flexible – guidelines should be revised to reflect flexibility • Single management plan can satisfy numerous planning requirements 	<p>The regulations for protected area management provide an inflexible prescriptive set of requirements for the content of plans</p> <p>The regulations are too inflexible</p> <p>Simplified guidelines are needed</p>	<p>Agreed</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>
	<p>Recommendation 33 – significant impact</p> <ul style="list-style-type: none"> • Require management plans to identify and provide guidance on what is likely to have a significant impact on areas protected by the EPBC Act • Allow accreditation of management plans that meet requirements of the Act – subject to performance auditing 	<p>Improved guidance would increase certainty</p> <p>This would greatly simplify regulation of activity in and around protected areas and create a significant incentive to prepare sound management plans</p>	<p>Agreed in part</p> <p>The Government stated it is not always possible to provide guidance on significant impacts at a particular point in time</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>Recommendation 34 – management plans</p> <ul style="list-style-type: none"> Preparation of management plans for World Heritage properties, National Heritage Places and Ramsar wetlands where collaborative processes have not produced effective plans Minister to consult with owner/manager of area when preparing the plans 	<p>Management plans should be mandatory and enforceable for all protected areas</p> <p>There are a number of ecological and management issues and challenges regarding the administration of Australian Ramsar sites</p>	<p>Not agreed</p> <p>The Government will continue to meet its obligations to use its best endeavours to ensure management plans are prepared and implemented</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>
	<p>Recommendation 35 – terrestrial and marine reserves</p> <ul style="list-style-type: none"> Provisions governing management plans and permitting activities in Commonwealth reserves apply to both terrestrial and marine reserves 	<p>Management of Commonwealth terrestrial and marine reserves should be consistent</p> <p>The provisions of the Act should be capable of managing both</p>	<p>Agreed</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>
	<p>Recommendation 36 – conservation zones</p> <ul style="list-style-type: none"> Biodiversity in conservation zones to be 	<p>Provisions are needed to ensure appropriate protection of biodiversity in conservation zones</p>	<p>Not agreed</p> <p>The Government regards current provisions as adequate</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	adequately protected while the conservation zones are being assessed for inclusion in a Commonwealth reserve	Consultation with stakeholders is important to minimise conflict		
	<p>Recommendation 37 – biosphere reserve</p> <ul style="list-style-type: none"> • Biosphere reserve provisions to be repealed 	<p>Biosphere reserve status does not attract any specific legislative protection or regulatory controls</p> <p>Commonwealth-mandated biosphere management plans only duplicate existing plans</p> <p>The presence of the provisions in the Act creates the impression of regulation and uncertainty about the role of the Government in relation to management of these areas</p>	Agreed	The Law Council has no comment
	<p>Recommendation 38 – Regional Forest Agreements</p> <ul style="list-style-type: none"> • Mechanisms for Regional Forest Agreement (RFA) forest management to be subject to performance auditing, reporting and sanctions 	<p>The absence of transparent mechanisms to test non-compliance with RFAs and assess governments' performance on RFA obligations causes community concern and mistrust</p> <p>Effective and timely completion of robust reviews is</p>	<p>Agreed in part</p> <p>The Government stated that the improvements to the RFAs would be negotiated with states during 2011 and 2012 renewal process</p>	The Law Council has no comment

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<ul style="list-style-type: none"> Commonwealth and States to agree on sustainability indicators by the end of 2010 RFA reviews to focus on performance 	critical to monitoring performance of RFAs		
	<p>Recommendation 41 – Fisheries Harvest Strategy Policy (HSP)</p> <ul style="list-style-type: none"> Fisheries HSP framework integrated with the threatened species listing process for marine fish HSP biological reference points reflect biology of the species and its role in ecosystem function 	Integrating the HSP would reduce uncertainty and regulatory burden while still delivering sustainable environmental outcomes	<p>Agreed in principle</p> <p>The Government agrees there should be a link between the framework, but considers this link should remain a policy matter and not be legislative</p>	The Law Council has no comment
	<p>Recommendation 42 – Wildlife trade</p> <ul style="list-style-type: none"> Wildlife trade provisions be amended to remove duplication Shift from individual permitting system to assessment and accreditation of 	<p>Duplication should be removed to streamline and simplify the Act</p> <p>A streamlined process would minimise costs to applicants whose proposals are unlikely to be approved</p> <p>The current provisions contained too many source</p>	Agreed	Remains relevant for the reasons stated in the review explanation column

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>management arrangements for whole sectors, complemented by record keeping and monitoring activities</p> <ul style="list-style-type: none"> Streamline different categories of approved sources for trading wildlife 	<p>categories, resulting in administrative complexity and uncertainty for industry</p>		
	<p>Recommendation 57 – whale and dolphin watching</p> <ul style="list-style-type: none"> Provisions of the Act relating to the whale and dolphin watching industry streamlined to ensure consistency across jurisdiction Provide greater certainty and protection 	<p>There is a lack of clarity in the definitions and terminology in the EPBC Regulations</p> <p>There is a lack of consistency in regulations between State, Territory and Australian government</p>	<p>Agreed in principle</p> <p>The Government agrees with the principle but stated it is not possible to enforce consistency across state legislation through a unilateral amendment to the Act</p>	<p>To the extent that the recommendation outcomes can be achieved by amendments to the EPBC Act, this remains relevant for the reasons stated in the review explanation column</p>
	<p>Recommendation 58 – Environment Protection Order (EPO)</p> <ul style="list-style-type: none"> Give the Department Secretary power to issue EPO Specify circumstances in which an EPO can be 	<p>The Act provides few mechanisms to assist where an immediate threat to a matter of NES has been identified by an offer or reported by the public</p> <p>This tool is available in other jurisdictions and has proven to</p>	<p>Agreed</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	issued, the content, circumstances for extensions and review and penalties for contravention	be a useful mechanism to respond to potential breaches		
	<p>Recommendation 59 – expert opinion evidence</p> <ul style="list-style-type: none"> • Confer power on Federal Court to specify process for management of expert opinion evidence and expert witnesses • Encourage the use of a single expert • Require parties to confer before the hearing to produce a joint report setting out the matters agreed, the matters disagreed and the reasons for the disagreement 	<p>The use of expert witnesses and evidence is cost and time effective, and streamlines court processes</p> <p>Greater efficiency could be achieved by specifying how such evidence and witnesses should be managed</p>	<p>Agreed in principle</p> <p>The Government agrees with the aim but notes that amendments to the <i>Federal Court of Australia Act 1976</i> support broad power of the court to give directions</p>	<p>Agree that this is appropriately dealt with by the Federal Court exercising its powers</p>
	<p>Recommendation 62 – cost recovery</p> <ul style="list-style-type: none"> • Introduce a fee for referring an action or applying for a permit 	<p>Cost recovery must be in accordance with the Australian Government Cost Recovery Guidelines</p> <p>Cost recovery is generally not appropriate for activities in which the public good</p>	<p>Agreed in principle</p> <p>The Government will explore opportunities and undertake a stocktake to inform the development of a cost recovery impact statement</p>	<p>The Law Council notes that cost recovery practices associated with environmental impact assessments under the EPBC Act commenced on 1 October 2014.</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<ul style="list-style-type: none"> • Cost recovery for environmental impact assessment of proposed actions levied on a sliding scale, charged at the time the method of assessment is set • Allow Government to recover costs associated with commissioning additional information required because of inadequacies in information supplied by a proponent • Options to allow proponents to opt in to a full cost recovery system for management of large, time critical projects • Review and modernise fees and charges under the Act to be adjusted according to CPI and other relevant factors 	<p>characteristics outweigh the private good characteristics</p> <p>Cost recovery should only be implemented where efficient and effective to do so</p>		

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>Recommendation 65 – Airport Minister</p> <ul style="list-style-type: none"> Amend s. 160 so that the Airports Minister be required to consult with the Environment Minister when considering whether to approve draft environment strategy under <i>Airports Act 1996</i> 	<p>This will elevate current consultation requirements in the Airports Regulations and the EPBC Act</p> <p>The issue of noise generated on airport land will often be the concern of both the Airports Minister and the Environment Minister</p>	<p>Agreed in principle</p> <p>The Government agrees with the intention but considers outcomes consistent with the recommendation can be delivered with the existing policy framework</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>
	<p>Recommendation 68 – disband Biological Diversity Advisory Committee</p> <ul style="list-style-type: none"> Disband the Biological Diversity Advisory Committee (BDAC) Functions to be transferred to the Threatened Species Scientific Committee (TSSC) Name of the TSSC be changed to the Biodiversity Scientific Advisory Committee (BSAC) 	<p>The lack of statutory role means the effectiveness is dependant on the enthusiasm of participants and the needs of the Minister</p>	<p>Agreed</p>	<p>Since the last review, the BDAC has been disbanded</p> <p>It is not publicly discernible whether the functions of the BDAC were transferred to the TSSC</p> <p>It is noted that the TSSC has not been re-named the BSAC</p>

Core element/theme	Recommendation Summary	Summary of the Review explanation	Government response/commentary	Law Council comment - April 2020
	<p>Recommendation 69 – links</p> <ul style="list-style-type: none"> • Establish formal link between the Indigenous Advisory Committee (IAC) and the new BSAC • Establish formal link between the IAC and the Australian Heritage Council 	<p>There is scope for greater Indigenous consultation and involvement under the Act – this consultation should not be left solely to the IAC</p>	<p>Agreed</p>	<p>Remains relevant for the reasons stated in the review explanation column</p>

Appendix 2 – Standing

1. Standing is the right to bring proceedings. Historically, the Attorney-General was the proper plaintiff where public rights were affected, either by commencing proceedings on his or her own or by granting that right to an individual, giving that individual permission to use the Attorney-General's name and standing to bring a public interest action as a 'relator'.
2. However, the historical model was recognised in the United Kingdom and elsewhere to contain flaws and the High Court of Australia clearly stated that it did not transpose well to Australia's model of government. Justices Gaudron, Gummow and Kirby noted in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49 (**Bateman's Bay**) at [38]:

..., the Attorney-General is a minister in charge of a department administering numerous statutes, is likely a member of cabinet and may or may not be legally trained. Accordingly, 'it may be 'somewhat visionary' for citizens of [Australia] to suppose that they may rely upon the grant of the Attorney General's fiat for protection against ultra vires action of statutory bodies for the administration of which a ministerial colleague is responsible.

3. The common law rules of standing developed to enable private citizens to protect public rights. However, as their Honours observed in *Bateman's Bay* at [34]:

The result is an unsatisfactory weighting of the scales in favour of defendant public bodies. Not only must the plaintiff show the abuse or threatened abuse of public administration which attracts equitable intervention, but the plaintiff must also show some special interest in the subject matter of the action in which it is sought to restrain that abuse.

4. The AD(JR) Act commenced in 1980 and provides that a 'person aggrieved' may seek judicial review of Commonwealth decisions. A body of jurisprudence has developed around the meaning of 'person aggrieved', but it suffers from the vice that a separate determination of the question of standing must often be made, causing delays and increasing legal costs for the parties.
5. In many jurisdictions in Australia, there are open standing provisions in environmental laws. The *Environmental Planning and Assessment Act 1979* (NSW) has provided open standing to challenge breaches of the planning and environmental law in NSW since its inception, and it has not resulted in abuse or halted development. Indeed section 253 of the *Protection of the Environment Operations Act 1997* (NSW) provides:

(1) Any person may bring proceedings in the Land and Environment Court for an order to restrain a breach (or a threatened or apprehended breach) of any other Act, or any statutory rule under any other Act, if the breach (or the threatened or apprehended breach) is causing or is likely to cause harm to the environment.

6. This provides standing to challenge any decision under any Act or Regulation if there is likely to be harm resulting to the environment. The 'floodgates' have not been opened.

7. The standing provisions in section 487 of the EPBC Act are a method of providing greater certainty to parties regarding standing than applies under the AD(JR) Act, reducing delays and legal costs.

Challenges to Standing

8. This part of the appendix seeks to explain the importance of retaining existing standing rules for the maintenance of the rule of law and the protection of the public interest.
9. Over the last five years there have been numerous challenges to the standing provisions under the EPBC Act. The draft report of the Productivity Commission into Resources Sector Regulation¹²⁵ (**Draft PC Report**) observes the following:

Legal standing arrangements are appropriate but there may be scope to reduce appeals on inconsequential procedural matters

'Lawfare' (or attempts by environmental advocates to derail projects via court action) was raised as a concern by some participants. Delays associated with review of environmental approval decisions in the court system are potentially costly but there is good reason to allow certain third parties standing to seek judicial review of environmental approvals.

In reality, there have not been many environmental citizens suits. That said, cases that have made it to court, at least in relation to Commonwealth environmental approvals under the EPBC Act, are often based on technical breaches that have no substantive impact on environmental outcomes. There would be merit in the EPBC Act review examining options for reducing opportunities for inconsequential technical breaches of procedures that lead to court action.¹²⁶

10. With respect, the above observations are misguided and miss the point of judicial review under the EPBC Act. Almost all environment protection under the EPBC Act is procedural. There are few substantive protections for the environment or biodiversity. The Minister has power to grant a consent which has the inevitable consequence that a species or even a number of species may become extinct. The only thing preventing that decision is procedure; for example, an obligation to examine relevant information regarding the likely impact on the environment and to have regard to submissions from the public which assist in providing that information.
11. The reference to 'inconsequential technical breaches' is therefore mistaken and demonstrates a failure to understand the scheme of protection under the Act and the fundamental role of compliance with the requirements of the Act in achieving that protection.
12. The Draft PC Report is correct in observing that 'there have not been many environmental citizen suits'. It is worth examining some recent cases involving the Adani coal mine, both to illustrate the circumstances surrounding the origins of the criticism by some sections of the media, taken up by the Australian Government, on standing under the EPBC Act; and to demonstrate the error in describing the breaches of the law which were the subject of those cases as 'technical breaches that have no substantive impact on environmental outcomes'.

¹²⁵ Productivity Commission, *Resources Sector Regulation*, Draft Report (2020), Canberra.

¹²⁶ *Ibid*, 24.

The origins of the move to tighten standing

13. The Mackay Conservation Group brought an application in the Federal Court in early 2015 challenging the decision of Commonwealth Environment Minister to approve the Carmichael mine. The Minister was obliged to have regard to approved conservation advices for threatened species when considering the impact on Commonwealth species listed as threatened under the EPBC Act. Approved conservation advices are documents, prepared in conjunction with advice from the Scientific Committee established under the EPBC Act, approved by the Minister, which list information about how to stop the decline of, or promote recovery of, the subject species.
14. The parties agreed, without the hearing proceeding to judgment, that the Environment Minister had failed to consider approved conservation advices for two listed threatened species, contrary to the requirements of subsection 139(2) of the EPBC Act.
15. This challenge drew a prompt response from the government when the then-Attorney-General George Brandis announced plans to change the national environmental legislation to stop green groups seeking judicial review of environmental approvals, arguing that this was necessary to protect Australian jobs from 'radical activists' who bring 'vigilante litigation' against the government.¹²⁷ The former Attorney-General planned to repeal subsection 487(2) of the EPBC Act and 'return (it) to the common law'.¹²⁸
16. The Law Council considers that there was no basis for such characterisation of the proceedings, which were in any event successful. This instance demonstrates that protection of the public interest cannot rely on the discretion of the Attorney-General to grant his or her fiat to a relator action under the Australian political system, where the Attorney-General does not perform an independent role as advocate for the public interest but is an advocate for the government of the day.
17. The Federal Court has power to control any proceedings brought within its jurisdiction which are vexatious but there is no evidence to suggest that vexatious proceedings are brought at all, let alone on a regular basis. Nor is there any evidence that environmental litigation is causing projects to be delayed for inordinate periods or for a period of time that is unwarranted to ensure that the requirements of the EPBC Act are met.
18. The Law Council repeats its submission of 2015 to the inquiry into the EPBC Amendment (Standing) Bill 2015, in short:
 - *The Law Council regards section 487 of the EPBC Act as an important standing provision that contributes to the realisation of the objects of the Act.*
 - *Section 487 has contributed to improving statutory compliance and ensuring the accountability of the Executive Government.*
 - *It has contributed to Australia's compliance with its multilateral human rights and environmental obligations and undertakings.*

¹²⁷ Samantha Hepburn, 'Brandis' changes to environmental laws will defang the watchdogs', *The Conversation* (online), 19 August 2015.

¹²⁸ Cristy Clark, 'The government vs the environment: lawfare in Australia', *The Conversation* (online) August 18, 2015.

- *Standing provisions have been reviewed in numerous research and inquiry reports in recent years. The report of the review of the EPBC Act chaired by Dr Alan Hawke AC (2009) noted that section 487 had operated effectively, had not opened the floodgates to litigation, and should be maintained. Other inquiry reports have suggested that the law of standing be harmonised across Australia and be extended to those who have shown a substantial interest in a development. The Law Council regards this as an overdue access to justice law reform. The Courts have mechanisms for managing frivolous and vexatious applications and there are numerous disincentives to litigate.*¹²⁹

19. Nor were concerns expressed at the time only by legal or conservation interests. The National Farmers Federation made a submission to the Senate Inquiry observing:

Limiting the test of legal standing to landholders who are subject to immediate impacts is also not sufficient as the effects of some major projects can be felt beyond the immediate vicinity of neighbouring farms, which implies that broader standing is warranted.

*The NFF, therefore, cannot support the proposed Amendment to remove (section) 487 from the EPBC Act due to the risk of denying farming groups and individual farmers the right to appeal against government decisions that they believe are going to adversely affect farming communities or individual operations.*¹³⁰

Current attempts to restrict standing

20. Section 24D of the EPBC Act relevantly provides that a person must not take an action that involves large coal mining development where the action is likely to have a significant impact on a water resource without the approval of the Minister for the Environment. It is offence to take that action without the necessary approval, punishable by a maximum penalty of \$1,050,000.
21. In December 2018, the Australian Conservation Foundation (**ACF**) brought proceedings in the Federal Court of Australia challenging the decision by the Commonwealth Environment Minister in September of that year that the ‘water trigger’ found in section 24D of the EPBC Act did not apply to Adani’s plans to take up to 12.5 billion litres of water from the Suttor River in outback Queensland to service its proposed mine. Under section 75 of the EPBC Act, the Minister must decide which provisions of Part 3 (if any) are controlling provisions for the action. In the Minister’s statement of reasons for the decision, the conclusion relied upon by the Minister was that because Adani’s pipeline is associated infrastructure, not the mine itself, the water trigger did not need to be applied.
22. This decision, which was the subject of the legal challenge, appears extraordinary on the face of it, given that the sole purpose of the pipeline is to service the Carmichael mine, but that will be decided ultimately by the Federal Court. These proceedings are an example of procedural challenge that goes to a substantive issue, ie whether the Commonwealth has properly applied the controlling provisions of the EPBC Act (namely, whether the water trigger is enlivened). If enlivened, it has

¹²⁹ Law Council of Australia, *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*, Submission to the Senate Environment and Communications Legislation Committee, 10 September 2015, 3.

¹³⁰ Lenore Taylor, ‘Farmers’ federation opposes changes to environmental laws, Senate hears’, *The Guardian* (online), 11 September 2015.

substantive consequences – namely, the Commonwealth will assess the take of water on the environment and the communities in regional Queensland. Such a case is of demonstrable importance and is engaging the Court in its constitutionally enshrined role of scrutiny and oversight of executive decision-making.

23. Section 131A of the EPBC Act permits the Environment Minister to invite submissions on whether or not to approve the taking of an action and the conditions to be attached to such an approval. Section 136 then requires the Environment Minister to have regard to any submissions received in response to the invitation.
24. The failure of the Environment Minister to consider thousands of public submissions was also pleaded as a breach of the EPBC Act. It was this failure that the Environment Minister conceded subsequently in June 2019. This has prompted renewed calls for removal of the standing provisions under the EPBC Act.¹³¹
25. When the only protection provided by the EPBC Act is procedural, it makes no sense to criticise a legal challenge on the basis that it is procedural in nature.¹³² It also makes no sense when the purposes of the procedural rules are to achieve substantively better decisions concerning development and the environment. Under a democratic system, the rule of law means that the government is constrained by law and can be held accountable by the people at the ballot box or through the courts by way of judicial review.¹³³ Access to the courts is a foundation of Australian democracy and guaranteed by the Constitution.

¹³¹ See , 'eg Denis Shanahan, 'Green 'lawfare' a \$65bn deal hit to projects', *The Australian*, 5 March 2020; Denis Shanahan, 'Green lawfare putting billions more at risk', *The Australian*, 7 March 2020.

¹³² And as noted above, the Commonwealth conceded but it had failed to comply with the requirements of the Act in this case.

¹³³ Law Council of Australia, [Policy Statement: Rule of Law Principles](#), March 2011, Principle 2.

Law Council of Australia

The Justice Project

Final Report – Part 1

Rural, Regional and Remote (RRR) Australians

August 2018



Law Council
OF AUSTRALIA

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Executive summary

Approximately seven million people, or around 29 per cent, live outside major cities in Australia. While rural, regional and remote (RRR) regions are ‘diverse, dynamic and heterogeneous’,¹ areas which have seen population decline tend to be inland, and levels of socio-economic disadvantage generally increase with remoteness. In certain RRR areas, population decline leaves pockets of concentrated disadvantage, with high numbers of residents having high vulnerability to multiple legal and non-legal problems. For people in RRR areas of declining populations, and in remote areas in particular, levels of financial disadvantage are particularly high. As well as cost, distance and lack of public transport, poor technological access and/or capability are also common access to justice barriers. Many RRR residents, such as farmers, small businesses and older people, can also be ‘income poor and asset rich’,² precluding their ability to afford private lawyers, or to meet legal aid means tests.

While more nuanced and detailed data is needed, national data on practising solicitors indicates that just 10.5 per cent nationally were practising in a country or rural area in 2016. Only 5.2 per cent of Western Australian solicitors practised in country and rural areas, while in South Australia, the figure was 7.1 per cent. In New South Wales (‘NSW’), research has found that perceptions of a progressive loss of lawyers from RRR NSW generally have not been supported by the evidence and that overall, the per capita rate of solicitors in NSW have remained stable. Notwithstanding this, it found that the ratio of residents to solicitors in RRR NSW was only one-third of that for NSW overall, and there were 19 Local Government Areas (‘LGAs’) with no practising solicitors at all. This research found that there were inter-regional variations, with some regions losing and others gaining solicitors.

Significant concerns have been expressed regarding levels of unmet legal need – civil, criminal and family – in RRR communities, particularly inland and more remote communities. Some regions are critically underserved. For example, one public legal assistance service in regional Western Australia covers a geographical area more than twice the size of the United Kingdom with a single solicitor. Meanwhile, as private practitioner services decline in the bush, the availability of legal aid,³ pro bono or volunteer assistance similarly declines. Their role in helping to sustain vibrant, healthy communities should be recognised.

Scarcities of locally available lawyers create conflict of interest problems, imposing additional cost and distance burdens on residents, who need to travel further to find help, or miss out altogether. There are also ongoing concerns that it is difficult to recruit and retain lawyers in many RRR areas. These concerns differ between regions, and are affected by different forces – market and policy – depending on the nature of lawyers’ employment. Strategies to overcome scarcity of RRR lawyers and conflict of interest issues which target areas of critical need are essential, and minimum servicing standards may inform future policy approaches. However, given their diversity, regionally based strategies are needed to determine appropriate and tailored mixes of services – public and private – based on local needs and priorities. Targeted rural placement, mentoring

¹ Graeme Hugo et al, Regional Australia Institute, *Population Dynamics in Regional Australia* (January 2015) 8 (*‘Population Dynamics in Regional Australia’*)

² National Rural Health Alliance Inc and Australian Council of Social Service, *A Snapshot of poverty in rural and regional Australia* (2013) 4.

³ Legal aid service delivery particularly relies upon the ‘mixed model’ of service delivery in many RRR contexts, particularly outreach, as further discussed below and in the Legal Services Chapter (Part 2).

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and incentive schemes, additional legal assistance services and increased legal aid rates are all relevant tools in this context. Specialist services and referral networks should be supported to expand their reach into RRR areas. Expanded adoption of RRR-focused curriculums in undergraduate law training may also attract RRR residents into legal practice, and better prepare lawyers for its realities and challenges.

While technology will play an increasingly important role in the future of RRR service delivery, RRR residents are more likely to be digitally excluded. Nuanced, evidence-based, and people-centred design approaches are therefore needed to avoid leaving these residents behind, giving due regard to their needs and preferences for ongoing face-to-face legal services.

A decline in local court circuit services in RRR communities has been observed, which significantly exacerbates distance, transport and cost barriers for residents. In some cases, this means they give up on attending court despite the personal costs. In certain contexts, the delay in having their matter heard effectively means that their case is already lost. Additional resources are required to maintain, and where required, expand RRR circuit courts, having regard to their important function in upholding the rule of law and fostering community engagement through a tangible local presence.

Specialist courts, and courts adopting therapeutic or problem-solving approaches (and the support services to underpin these latter approaches), should also be more readily available to RRR residents, particularly in smaller towns and more remote areas. Community-based sentencing options are lacking in many RRR areas, resulting in worse sentencing outcomes. These should be expanded, including through accessible, appropriate support services and diversionary programs. While needs vary regionally, interpreters, residential drug and alcohol rehabilitation, mental health, family violence, and safe, secure housing services (including bail accommodation and support) are needed to achieve stronger justice outcomes.

Alternative dispute resolution may offer many RRR residents, particularly with higher levels of legal capability, a more efficient, affordable solution to resolve legal issues. Research should be conducted into its availability and take-up in RRR communities, and how this might be increased in the future.

Insufficient regional engagement, in law and policy development has meant that laws and policies can be 'urban centric' and drafted with little consideration to their application in RRR communities. Some laws, such as a mandatory loss of licence for driving offences, can affect RRR communities disproportionately. Meanwhile, RRR communities located across state and/or territory borders have unique difficulties in negotiating complex cross-border legal issues. Measures are required to overcome an urban-centric focus and develop appropriate responses to these RRR-specific issues. In this context, greater support is needed for RRR law and justice research and advocacy bodies, commensurate with that provided to other sectors.

Key background information

Demographic characteristics and trends

In 2015, there were nearly seven million people living outside major cities in Australia, or 29 per cent of its total population of 23 777 777.⁴ Of these:

- 4.3 million people lived in inner regional areas;
- 2.1 million people lived in outer regional areas;
- 321 129 people lived in remote areas; and
- 204 017 people lived in very remote areas.⁵

Since 2010, population growth had occurred in all areas, but most strongly in major cities, where the average annual growth was 1.8 per cent. The average annual growth between 2010 and 2015 was:

- inner regional areas: 1.2 per cent;
- outer regional areas: 0.7 per cent;
- remote areas: 0.5 per cent; and
- very remote areas: 0.4 per cent.⁶

Within these broad trends, however, there was fluctuation, with some regions experiencing an overall population decline during this period. In Victoria, these included the North West and Warrnambool and the South West regions; in Queensland, the Outback-South region; and in the Northern Territory, the Alice Springs and East Arnhem regions.⁷

In their recent report regarding contemporary regional population dynamics, Hugo et al emphasised that there is great diversity between regions.⁸ Non-metropolitan regions 'are not static, homogenous and declining but are in fact diverse, dynamic and heterogeneous'.⁹ Browne has agreed that 'the issue of social and cultural diversity

⁴ 6 913 361 people living outside Major Cities. Figures are based on the estimated resident population, which refers to the number of usual residents in a region. The definition of usual residence in the Census is the location where a person spends more than six months out of the year: Department of Infrastructure and Regional Development (Cth), *Progress in Australian Regions – Yearbook 2016* (2016), 172 ('*Progress in Australian Regions*'), citing Australian Bureau of Statistics, *3218.0 - Regional Population Growth, Australia, 2014-15* (2016) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3218.02014-15?OpenDocument>>.

⁵ Department of Infrastructure and Regional Development, *Progress in Australian Regions*, 172. Remoteness Areas ('RAs') represent an aggregation of non-contiguous geographical areas which share common characteristics of remoteness. The delimitation criteria for RAs are based on the Accessibility/Remoteness Index of Australia (ARIA+), which measures the remoteness of a point based on the road distance to the nearest urban centre. The RA categories range from Major Cities to Very Remote. Each RA is created from a grouping of Statistical Area Level 1 (SA1s – the smallest geographical unit for the release of Census data) which have a particular degree of remoteness: Australian Bureau of Statistics, *3218.0 - Regional Population Growth, 2014-2015* (2016) 'Explanatory Notes' <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3218.0Explanatory%20Notes12014-15?OpenDocument>>.

⁶ Department of Infrastructure and Regional Development (Cth), *Progress in Australian Regions*, 172.

⁷ Ibid 173-178.

⁸ Hugo et al, *Population Dynamics in Regional Australia*.

⁹ Ibid 8. See also Robert French, 'Law and Justice outside the CBD' (2011) 16(1) *Deakin Law Review* 1, 3; Richard Coverdale, Centre for Rural Regional Law and Justice, *Postcode Justice – Rural and Regional Disadvantage in the Administration of the Law in Victoria* (2011) 21-22 ('*Postcode Justice*'); Simon Rice,

includes not only the difference between rural and urban areas, but also the difference between rural and remote areas'.¹⁰ Regional Alliance West highlighted that:

*... discussions around RRR service delivery can be very Eastern States focused and fail to understand the unique challenges that we face when dealing with the vast distances in the West... for us, outreach can mean driving up to 600 kilometres on one day, including on unsealed roads.*¹¹

Similarly, Ngaanyatjarra Pitjantjatjara Yankunytjatjara ('NPY') Women's Council highlighted that there are 'unique factors', some of which are discussed below, which are particular to Central Australia that have a direct impact on locals' experiences of legal issues and the justice system.¹²

Although there has been little change in the proportions of the national population living within metropolitan and non-metropolitan Australia, there have been substantial shifts within these sectors. There has been a gradual shift away from south-eastern areas, while Western Australia and Queensland have increased their national population share.¹³ There is a clear pattern of growth in coastal areas, areas around major regional cities, and in certain internal mining areas. Conversely, areas that have seen population decline tend to be inland.¹⁴ Longer term data demonstrate 'a systematic pattern with a decline in rates of population growth with increasing remoteness'.¹⁵ This has led to arguments that:

*There are two regional Australias – the coastal areas challenged by dynamism and growth, and inland Australia experiencing stability or decline. Certainly there is considerable variation across regional Australia in economic and demographic development.*¹⁶

However, Hugo et al have commented that 'while the coastal-inland dichotomy has some meaning, it is important to recognise that there are important exceptions to the pattern of internal decline'.¹⁷ They point towards significant growth in certain areas including: many remote mining communities, tourist resort destinations, key transport routes, and 'free change' areas surrounding major cities.¹⁸ The slowest growing regions between 2006 and 2011 were rural or remote areas in the wheat-sheep belt and more remote grazing areas, due to a prolonged drought during this period.¹⁹ Other slow growing regions included certain industrial regional centres. However, individual regions often included both growing and declining areas.²⁰ Cain, Macourt and Mulherin described a 'sponge city'

'Access to a lawyer in rural Australia: thoughts on the evidence we need' (2011) 16(1) *Deakin Law Review* 13, 19-20 ('Access to a lawyer in rural Australia').

¹⁰ Kim Browne, 'Rural Lawyers and Legal Education: Ruralising and Indigenising Australian Legal Curricula' (Paper presented at the 6th Annual International Conference on Education & E-Learning, 2016) 50, 52 ('Rural Lawyers and Legal Education').

¹¹ Regional Alliance West, *Submission No 94*.

¹² NPY Women's Council, *Submission No 129*.

¹³ Hugo et al, *Population Dynamics in Regional Australia*, 27; Department of Infrastructure and Regional Development (Cth), *Progress in Australian Regions*, 8.

¹⁴ Hugo et al, *Population Dynamics in Regional Australia*, 27.

¹⁵ *Ibid.*

¹⁶ *Ibid* citing J H Holmes, 'Coast Versus Inland: Two Different Queenslands' (1994) 32(2) *Australian Geographical Studies* 17.

¹⁷ *Ibid* 29.

¹⁸ *Ibid.*

¹⁹ *Ibid* 32.

²⁰ *Ibid.*

effect, in which regional centres absorb populations migrating from smaller rural communities.²¹

Regional Australians are generally older than capital city populations. This is both due to the migration of young adults from non-metropolitan to metropolitan areas, and the migration of the over 50s from metropolitan to non-metropolitan areas.²² Hugo et al have claimed that 'ubiquitous outmigration of young adults from regional areas is detrimental to regional development'.²³

Temporary migration is also considered to be of greater significance in regional Australia, including fly-in, fly-out ('FIFO') workers, and seasonal tourism influxes.²⁴ An unintended consequence of FIFO workers in some regional areas is the impact on housing/tenancy availability given consequential rent increases and shortage of rental property for local residents.²⁵ Temporary workers often come from wheat-sheep and pastoral areas, whose residents are supplementing their incomes by working in other regions.²⁶ Another key trend relates to international immigration. While most immigrants settle in Australia's largest cities, the numbers of overseas-born persons living outside of Sydney and Melbourne increased by 30 per cent between 2001 and 2011 (reaching just over one million).²⁷ Some inland and wheat-sheep belt areas have seen their dwindling Australia-born population 'propped up' by the increase of the immigrant population.²⁸ Hugo et al comment that the role of international migration in non-metropolitan Australia will become more significant into the future.²⁹

Aboriginal and Torres Strait Islander people make up relatively large proportions of the total population in remote (16 per cent) and very remote (45 per cent) areas.³⁰ In the Northern Territory, around 80 per cent of the Aboriginal population live in remote or very remote areas, the highest proportion of all the States and Territories.³¹

Economic, environmental and social changes

The Australian economy has experienced significant structural change over recent decades with declining overall employment in agriculture and manufacturing and increases in mining and services.³² In regional and remote areas, agriculture, forestry and fishing industries have declined.³³ However, within inner and outer regional areas,

²¹ Michael Cain, Deborah Macourt and Geoff Mulherin, Law and Justice Foundation of New South Wales, *Lawyer availability and population change in regional, rural and remote areas of NSW* (2014), xi ('*Lawyer availability and population change*').

²² Hugo et al, *Population Dynamics in Regional Australia*, 89-90.

²³ Ibid 76.

²⁴ Ibid 58-9.

²⁵ 'The dark side of fly-in fly-out work in remote Australia', *ABC News* (26 February 2013) <<http://www.abc.net.au/radionational/programs/religionandethicsreport/dark-side-of-fly-in-fly-out-mining/4534344>>.

²⁶ Hugo et al, *Population Dynamics in Regional Australia*, 62.

²⁷ Ibid 69.

²⁸ Ibid 9.

²⁹ Ibid.

³⁰ Productivity Commission, *Overcoming Indigenous Disadvantage 2016* (2016) 3.4.

³¹ Ibid.

³² Hugo et al, *Population Dynamics in Regional Australia*, 76.

³³ Department of Infrastructure and Regional Development (Cth), *Progress in Australian Regions*, 289, citing Australian Bureau of Statistics, *Census of Population and Housing* (2011), retrieved using Australian Bureau

health care and social assistance has been a key growth industry between 2006 and 2011, while in remote areas, mining has been a source of growth.³⁴

Multiple economic, environmental and social changes have challenged many RRR communities, including globalisation, economic rationalism, industrialisation of agriculture, drought and consequential water reforms, environmental degradation, climate change, declining local economies and populations, and loss of services.³⁵ Different RRR communities have shown different capacities and resilience to cope with these changes and challenges,³⁶ and regional areas vary considerably in their potential for sustained economic growth.³⁷

What are the key findings regarding the legal needs of RRR Australians?

The Productivity Commission recently noted that certain groups were under-represented, including people living in remote areas and Aboriginal and Torres Strait Islander people, in the Legal Australia-Wide ('LAW') Survey, which was a general legal needs survey conducted by telephone.³⁸

The LAW Survey did not reliably show higher levels of legal problems in remote areas.³⁹ However, noting that other studies have found that remoteness is a barrier to accessing justice, the Productivity Commission has recommended that specific research is needed into the legal needs of disadvantaged communities, including those in remote areas.⁴⁰ For example, the Indigenous Legal Needs Project has identified high levels of civil legal needs across a broad range of categories in remote areas of the Northern Territory,⁴¹ Western Australia,⁴² and Queensland.⁴³ As discussed, remote communities are often among the most disadvantaged, and there is an established link between socio-economic disadvantage and vulnerability to legal problems.⁴⁴

of Statistics, 2073.0 - *TableBuilder Pro, Third Release* (2011) and Australian Bureau of Statistics, 2065.0 - *TableBuilder* (2006).

³⁴ Ibid.

³⁵ Suzie Forell, Michael Cain and Abigail Gray, Law and Justice Foundation of New South Wales, *Recruitment and retention of lawyers in regional, rural and remote NSW* (2010) 17-8 ('*Recruitment and retention of lawyers*').

³⁶ Cain, Macourt and Mulherin, *Lawyer availability and population change*, 8.

³⁷ Ibid; Hugo et al, *Population Dynamics in Regional Australia*, 99, citing J Daley and A Lancy, Grattan Institute, *Investing Regions: Making a Difference* (2011).

³⁸ Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) 892 ('*Access to Justice Arrangements*').

³⁹ Christine Coumarelos et al, Law and Justice Foundation of New South Wales, *Collaborative Planning Resource – Service Planning* (2015) 56 ('*Collaborative Planning Resource*').

⁴⁰ Productivity Commission, *Access to Justice Arrangements*, 71, 108.

⁴¹ Chris Cunneen, Fiona Allison and Melanie Schwartz, 'Access to justice for Aboriginal People in the Northern Territory', 49(2) *Australian Journal of Social Issues* 219, 219-20 ('*Access to justice for Aboriginal People in the Northern Territory*').

⁴² Fiona Allison, Melanie Schwartz and Chris Cunneen, Cairns Institute, *The civil and family law needs of Indigenous people in WA: A report of the Australian Indigenous Legal Needs Project* (James Cook University, 2014) 17, 58, 69.

⁴³ Ibid.

⁴⁴ Cain, Macourt and Mulherin, *Lawyer availability and population change*, 17-18.

With respect to regional respondents, in the LAW Survey, the occurrence of legal problems was slightly lower than for respondents in major cities (47.3 per cent and 50.7 per cent respectively).⁴⁵ However, people living in regional areas had higher odds of experiencing multiple legal problems than those in major cities.⁴⁶ They had a lower prevalence of problems caused by accidents and housing problems, but were more likely to experience family problems.⁴⁷

The LAW Survey authors caution that area-level measures of disadvantage provide the *average* level of disadvantage of *all* people within a geographic area, but not all individuals within a 'disadvantaged' area are necessarily disadvantaged. More detailed local information is needed to determine 'pockets of high disadvantage and legal need'.⁴⁸ Pleasence et al have commented that 'some RRR areas are microcosms of legal need, embodying the "double whammy" of poor service infrastructure and populations with high vulnerability to legal problems'.⁴⁹ Cain, Macourt and Mulherin also highlighted that population decline in certain RRR areas leaves pockets of concentrated disadvantage, with high numbers of residents who are unemployed, elderly, sick, are people with disability, and Aboriginal and Torres Strait Islander people. These populations have high vulnerability to multiple legal and non-legal problems, and a lack of capacity to resolve legal problems on their own.⁵⁰

A 2015 legal needs analysis by the Hume Riverina Community Legal Service illustrated how pockets of people experiencing disadvantage within broader RRR communities can experience acute levels of legal need.⁵¹ The service surveyed 25 local community service organisations regarding the legal needs of their clients experiencing disadvantage. Overall, organisations reported that legal issues were generally experienced by their clients on a daily (24 per cent), weekly (27 per cent) and monthly (27 per cent) basis. Most organisations had clients with numerous legal problems, particularly family violence (73 per cent), housing (69 per cent), family law (65 per cent) and credit and debt issues (58 per cent).⁵²

While the above discussion focuses on legal needs among RRR people experiencing significant disadvantage, Rice has refocused attention on broader rural populations' legal needs, stating that:

A risk that attaches to framing the issue of rural legal services as one of 'access to justice' is that it may narrow the focus to the situation of people who are poor, and disadvantaged and marginalised in their access to services generally ... If access to justice is access to law, then the availability of private legal services for the general community, including business, is as much a concern as the availability of public legal services for the poor, disadvantaged and marginalised. Obtaining justice is about 'obtaining access to preventative or administrative

⁴⁵ Christine Coumarelos et al, Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey: Legal Need in Australia* (2012) 78 ('LAW Survey').

⁴⁶ *Ibid* 53.

⁴⁷ *Ibid*.

⁴⁸ *Ibid*.

⁴⁹ Pascoe Pleasence et al, Law and Justice Foundation of New South Wales, *Reshaping Legal Assistance Services: Building on the evidence base* (2014) 32 ('Reshaping Legal Assistance Services').

⁵⁰ Cain, Macourt and Mulherin, *Lawyer availability and population change*, 19.

⁵¹ Hume Riverina Community Legal Service, *Piecing together the puzzle: the perspective of community organisations about legal need* (June 2015) 8 <<https://humeriverinacommunitylegalservice.wordpress.com/2015/08/26/piecing-together-the-puzzle-the-perspective-of-community-organisations-about-legal-need/>> ('Piecing together the puzzle').

⁵² *Ibid* 9.

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support services, such as family law and estate advice, advice as to... general legal rights and obligations, or any of the other non-urgent and perhaps non-critical needs of people that are typically met through the use of legal advice', even if '[i]t is hard to be specific about what it costs a rural community to be unable to access ... [such services]'.⁵³

Given the heterogeneity of RRR communities, the kinds of legal needs experienced within, and between, different RRR communities vary. However, French, Coverdale and Browne highlighted that rural populations can experience specific legal needs. These can include water rights allocation, environment and planning restrictions, farm succession planning and laws which have special relevance to Aboriginal and Torres Strait Islander peoples.⁵⁴

Additionally, certain legal needs can be experienced more acutely in rural areas. For instance, there is evidence suggesting that family violence is particularly prevalent in RRR communities.⁵⁵ This was reflected, for example, in Justice Project consultations with Townsville Community Legal Service, which noted that Townsville had the second highest rate of domestic violence in Queensland.⁵⁶ The NSW Bureau of Crime Statistics and Research crime mapping tool indicates that certain outer RRR areas of NSW experience incidents of particular crimes at higher rates – for example, assault and sexual offences.⁵⁷ Meanwhile, Saunders' recent research into sexual harassment in the workplace in RRR locations has found that of 84 rural women interviewed, 73 per cent reported having experienced unwelcome, sexualised behaviour in the workplace.⁵⁸ As discussed in the People who are Trafficked and Exploited Chapter (Part 1), larger numbers of migrants on temporary visas are pursuing work opportunities in RRR areas. There are concerns that their precarious visa status leaves them more open to exploitation by unscrupulous employers, hidden from public purview and with insufficient access to employment legal advice, which is another emerging area of legal need.

Regional Alliance West remarked on findings that regional Australians experience slightly fewer legal problems that:

In saying that people in regional areas experience legal problems slightly less often than those in major cities we do wonder if perhaps they aren't actually experiencing them less often but their problems aren't being identified as legal in nature.⁵⁹

Its clients often present to the organisation, a hub of joined-up services, with problems that they have not themselves identified as legal.⁶⁰ Similarly, Hume Riverina Community Legal Service reinforced that it continues to experience high levels of legal need,⁶¹ while

⁵³ Rice, *Access to a lawyer in rural Australia*, 18-19, citing Paul Martin, Jacqueline Williams and Amanda Kennedy, 'Professional Services and Rural Services Poverty' (2011) 16(1) *Deakin Law Review* 57, 62.

⁵⁴ French, 'Law and Justice outside the CBD', 5; Coverdale, *Postcode Justice*, 87; Browne, 'Rural Lawyers and Legal Education', 51.

⁵⁵ Lucinda Jordan and Lydia Philips, Centre for Rural Regional Law and Justice, *Women's experiences of surviving family violence and accessing the Magistrates' Court in Geelong, Victoria* (2013) 9, citing, eg Council of Australian Governments, *National Implementation Plan to Reduce Violence against Women* (2012).

⁵⁶ Consultation, 29/08/2017, Townsville (Townsville Community Legal Service).

⁵⁷ NSW Bureau of Crime Statistics and Research, *NSW Crime Tool* (March 2018) <<http://crimetool.bocsar.nsw.gov.au/bocsar/>>.

⁵⁸ Skye Saunders, *Whispers from the Bush: The Workplace Sexual Harassment of Australian Rural Women* (Federation Press, 2015) 2-3.

⁵⁹ Regional Alliance West, *Submission No 94*.

⁶⁰ *Ibid.*

⁶¹ Hume Riverina Community Legal Service, *Submission No 122*.

Barwon Community Legal Service raised that across its catchment of area of the Geelong, Bellarine Peninsula, Surf Coast and Colac Otway regions in Victoria, there are 'many pockets of extreme disadvantage'.⁶² Knowmore commented that in smaller communities 'while the client numbers may not be high, the level of need and vulnerability is.'⁶³ During consultations, the South Australian Council of Community Legal Centres indicated that it had significant numbers of remote clients.⁶⁴

As further discussed below under the Legal Practitioners section, unmet legal need across a range of legal issues were identified by RRR respondents to the Justice Project.

Disadvantage

In 2013, a Productivity Commission working paper reported that:

- Deprivation was highest in large towns and rural areas and lowest in the inner city. Residents of rural areas reported the highest rates of service exclusion (eg lacking medical, dental, child care and financial services). People in small country towns and rural areas had higher rates of economic exclusion than residents of the inner city, for example, due to greater difficulty in raising \$500 in an emergency or \$200 within a week.⁶⁵
- The highest prevalence of persistent and deep exclusion was recorded by Australians living in outer regional areas, followed by those in inner regional areas and major cities. The prevalence was not assessed in remote areas,⁶⁶ however subsequent commentators have indicated that the prevalence in these areas would probably be higher again.⁶⁷ For example, some of the remote areas in the Northern Territory and Queensland have been found to be among the most disadvantaged areas in Australia,⁶⁸ and levels of socio-economic disadvantage generally increase with remoteness.⁶⁹

Also in 2013, National Rural Health Alliance Inc ('NRHAI') and Australian Council for Social Services ('ACOSS') emphasised that allowing for the costs of housing, poverty was slightly worse in RRR areas.⁷⁰ They also described poverty in rural and regional Australia

⁶² Barwon Community Legal Service, *Submission No 42*.

⁶³ Knowmore, *Submission No 102*.

⁶⁴ Consultation, 03/04/2017, Adelaide (South Australian Council of Community Legal Centres).

⁶⁵ Rosalie McLachlan, Geoff Gilfillan and Jenny Gordon, Productivity Commission, *Deep and Persistent Disadvantage in Australia: Productivity Commission Staff Working Paper* (July 2013) 13, 87 ('*Deep and Persistent Disadvantage in Australia*').

⁶⁶ *Ibid.*

⁶⁷ National Rural Health Alliance Inc and Australian Council of Social Service, *A Snapshot of poverty in rural and regional Australia*, 6.

⁶⁸ Christine Coumarelos et al, *LAW Survey*, 160-1, citing Australian Bureau of Statistics, *2039.0 – Information paper: an introduction to socio-economic indexes for areas (SEIFA)* (2006) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/2039.0>>.

⁶⁹ Forell, Cain and Gray, *Recruitment and retention of lawyers*, 18; McLachlan, Gilfillan and Gordon, *Deep and Persistent Disadvantage in Australia*, 55, citing Hielke Buddelmeyer and Sher Verick, 'Understanding the Drivers of Poverty Dynamics in Australian Households' (Discussion Paper Series No 2827, Institute for the Study of Labour, 2007); Productivity Commission, *Access to Justice Arrangements*, 764.

⁷⁰ 13.1 per cent outside capital cities, compared to 12.6 per cent in capital cities. The report's authors commented that when housing costs, which were higher in capital cities, were not taken into account, that divide became starker: National Rural Health Alliance Inc and Australian Council of Social Service, *Snapshot of poverty in rural and regional Australia*, 3.

as having a particular set of characteristics including generally lower incomes, reduced access to services, declining employment opportunities and distance and isolation.⁷¹

The NRHAI-ACOSS work also stated that 18 of the 20 electorates in Australia with the lowest household incomes were outside the capital cities.⁷² Particular concerns were raised regarding Aboriginal Torres Strait Islander peoples, who were especially vulnerable to poverty and comprised a significant proportion of the rural and remote population.⁷³

Vinson has confirmed that a small number of communities in Australia experience disproportionate, complex and entrenched disadvantage.⁷⁴ A common finding across Australian jurisdictions was the prominence of disadvantaged localities in rural areas, as well as on the fringes of metropolitan areas.⁷⁵ Communities with high Aboriginal and Torres Strait Islander populations were amongst the most disadvantaged.⁷⁶

Responding to the Justice Project, Community Legal Centres NSW ('CLCs NSW') concurred that individuals 'in remote and hard to access areas in Australia, predominantly in rural areas ... suffer from a number of hardships that are unique to them'.⁷⁷ It considers that RRR Australians are generally 'a group that has fallen victim to a notable amount of disadvantage'.⁷⁸

Legal Assistance Indicator

Mirrlees-Black and Randell have developed a 'need for legal assistance' ('NLAS') indicator which uses census and other data to identify priority clients experiencing disadvantage and the geographic locations in which people have the highest levels of legal need.⁷⁹ One of the indicators that they use provides a proxy measure of legal capability by identifying people aged 15 to 64 with a low personal income,⁸⁰ and a lower level of educational attainment ('NLAS(Capability P)').

Mirrlees-Black and Randell caution that several limitations mean that NLAS counts are likely minimum counts and that they may undercount those most in need of legal assistance services.⁸¹ This is just one source of information that can be utilised to plan legal assistance services Australia-wide.

⁷¹ Ibid.

⁷² Ibid citing Australian Bureau of Statistics, *2006 Census data* <<http://abs.gov.au/websitedbs/censushome.nsf/home/historicaldata2006>>.

⁷³ Ibid 6.

⁷⁴ Tony Vinson et al, Jesuit Social Services/Catholic Social Services Australia, *Dropping off the edge 2015: persistent communal disadvantage in Australia* (2015).

⁷⁵ Ibid 11.

⁷⁶ Ibid.

⁷⁷ Community Legal Centres NSW, *Submission No 106*.

⁷⁸ Ibid.

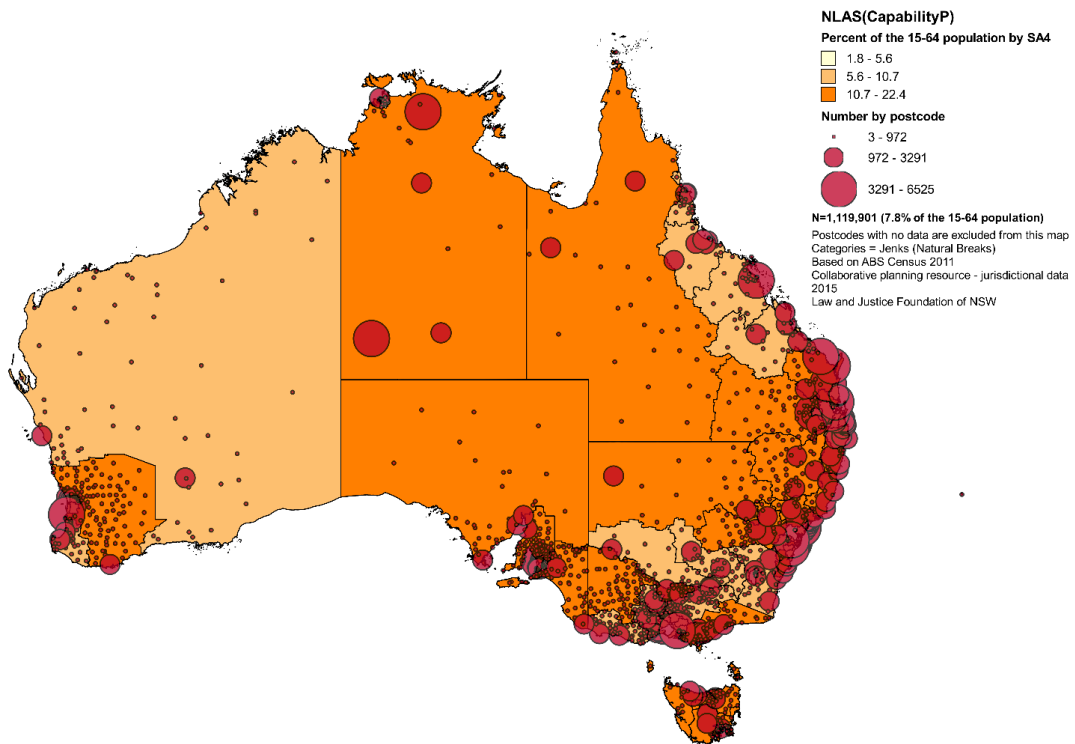
⁷⁹ Catriona Mirrlees-Black and Sarah Randell, Law and Justice Foundation of New South Wales, *Need for Legal Assistance Services: Developing a Measure for Australia*, Justice Issues Paper 26 (2017) 4 ('Need for Legal Assistance Services').

⁸⁰ Less than \$20 800 per year in 2011: Ibid 4. This amount was increased to \$26 000 in the latest data release: Law and Justice Foundation of New South Wales, *Collaborative Planning Resource: NLAS Indicators and Priority Groups - Explanatory Notes* (2017).

⁸¹ Ibid 4-5.

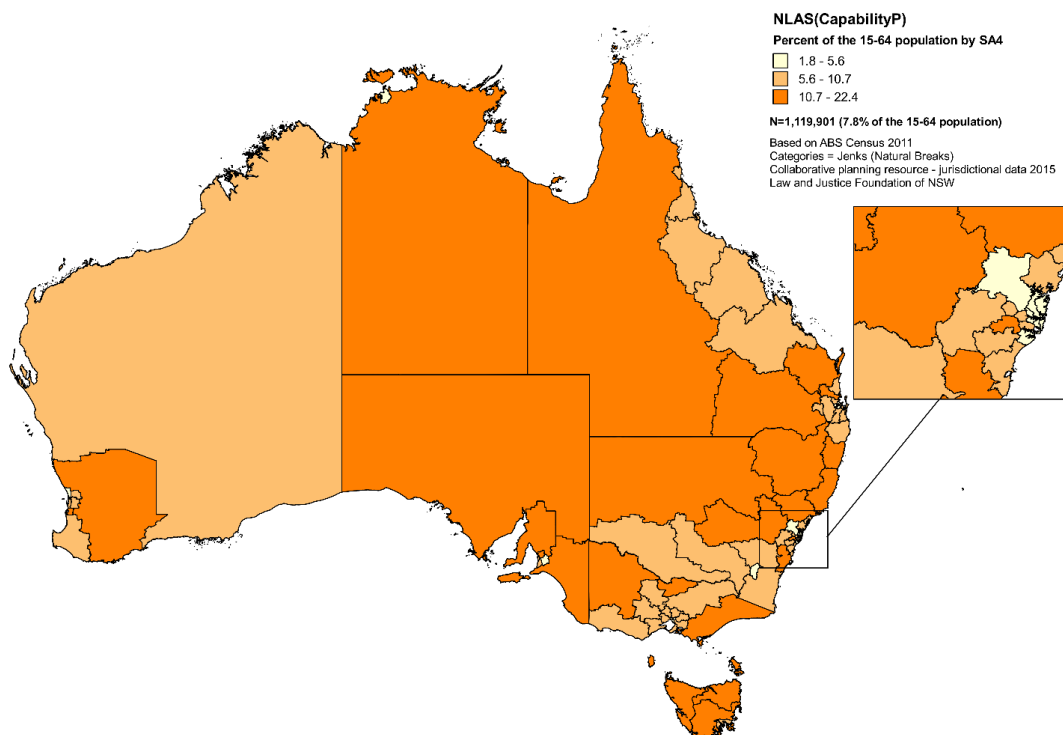
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Based on the NLAS(Capability P) indicator, the distribution of legal need in Australia is shown in the figures below. The larger the circle, the greater the number of people meeting the criteria.⁸² The colour of the regions across Australia indicates the percentage of the population of each region meeting the criteria: the darker the area, the higher the proportion.⁸³



⁸² Ibid 6.

⁸³ Ibid 6-7.



How do RRR Australians respond to their legal problems?

Iriana, Pleasence and Coumarelos, analysing the LAW Survey data, commented that significant differences existed in the strategies used in response to legal problems, according to remoteness.⁸⁴ With increasing remoteness, relatively fewer legal problems resulted in the use of legal advisers.⁸⁵ So while 17.7 per cent of problems resulted in the use of legal advisers in inner regional areas,⁸⁶ the figure was just 10.6 per cent in very remote areas. In addition, the percentage of problems resulting in no action increased as remoteness increased, from 17.6 per cent in inner regional areas to 23 per cent in very remote areas.⁸⁷

Further analysis indicated that in particular, Aboriginal and Torres Strait Islander respondents were less likely to take action and use legal professionals if they lived in more remote areas. In addition, lower levels of using legal advisers by people with low awareness of free legal service increased with living in more remote areas. Lawyer use was negligible among respondents who were living in very remote areas and had low awareness of legal services.⁸⁸ Drawing on these findings, Iriana, Pleasence and

⁸⁴ These figures did not take into account the sociodemographic characteristics or legal problem profiles of respondents in different areas: Reiny Iriana, Pascoe Pleasence and Christine Coumarelos, Law and Justice Foundation of New South Wales, *Disadvantage and responses to legal problems in remote Australia: A working paper*, Updating Justice Paper No 32 (2013) 3 (*'Disadvantage and responses to legal problems in remote Australia'*).

⁸⁵ Although the use of legal advisers was lower in major city than in inner regional areas: *ibid.*

⁸⁶ Pleasence et al, *Reshaping Legal Assistance Services*, 28-29.

⁸⁷ Again, with the exception of major city areas: Iriana, Pleasence and Coumarelos, *Disadvantage and responses to legal problems in remote Australia*, 3.

⁸⁸ Two per cent: Pleasence et al, *Reshaping Legal Assistance Services*, 28-29.

Coumarelos have raised questions about the level of coverage of legal services in more remote areas, particularly culturally appropriate legal services.⁸⁹

Regional and urban respondents also differed in their use of face-to-face communication. Face-to-face communication with the main adviser was higher in regional areas than in major city areas.⁹⁰ Regional respondents also had higher odds of favourable outcomes than respondents living in major city areas.⁹¹

Unsurprisingly, inaction in the face of legal problems is more probable in areas in which there are no lawyers. Noting the absence of a single solicitor (public or private) in 19 remote and less populated LGAs in NSW. Forell, Cain and Gray have suggested that some residents may not seek help at all. They may travel long distances to obtain legal assistance.⁹²

What are the barriers constraining RRR Australians from accessing justice?

Financial costs

As discussed above, people in small country towns and rural areas generally have higher rates of economic exclusion than inner city residents, while levels of socio-economic disadvantage generally increase with remoteness.

ACOSS and NRHAI have emphasised that reduced opportunities in many rural areas – as described earlier regarding demographic and economic context – result in unemployment, underemployment or insecure (eg seasonal) employment, leading to reduced income security.⁹³ Simultaneously, prices for basic goods such as food and petrol are higher in rural and remote areas, and residents are more likely to experience housing stress.⁹⁴

Depending on whether seasons are ‘good’ or ‘bad’, farming families are often ‘income poor and asset rich’.⁹⁵ Droughts can affect rural residents’ ability to afford a lawyer:

Through the drought, we had a lot of distressed farmers, at times in tears... so you are trying to provide almost a counselling service. (Private Solicitor, Central West NSW)

As a CLC we can give advice on virtually every area of law except migration law and commercial law. Usually tough, those sorts of people we can refer to a private solicitor, but sometimes, you know in that really bad drought period, there were business people and farmers coming to us with huge issues, and they didn't have the money. While they might be asset rich, they didn't have much cash and it was very difficult for them to afford a lawyer, so

⁸⁹ Ibid 1.

⁹⁰ 69.1 per cent in regional areas versus 63.6 per cent in city areas: Coumarelos et al, *LAW Survey*, 119.

⁹¹ 68.5 per cent of problems experienced by residents of regional areas versus 65.8 per cent of major city respondents: ibid 157.

⁹² Forell, Cain and Gray, *Recruitment and retention of lawyers*, 121.

⁹³ National Rural Health Alliance Inc and Australian Council of Social Service, *A Snapshot of poverty in rural and regional Australia*, 4.

⁹⁴ Ibid 9.

⁹⁵ Ibid 4.

Appendix 3

they were really stuck between 'a rock and a hard place'. (Public solicitor, South Western NSW)⁹⁶

Rice has previously described the important role played by rural private practitioners in minimising costs for their local communities, including during difficult periods:

As a professional, and a respected member of the civic community, a rural lawyer may be alert to cost as a barrier to their services, and be prepared to reduce, defer, waive or otherwise negotiate fees, to ensure that local people have access to a lawyer. This is not fanciful... the professional ethic of a rural lawyer was well expressed by solicitor Bill Thomson of Coolamon... [who] suggested that ... 'living and working in the community, practitioners understand the challenges faced by [their community] and accordingly adjust their fees; practitioners' families mix with a wide socio-economic group and realise how important it is that if you make a quid out of a community, you'd got to be prepared to put back in; and practitioners are accessible outside work hours, whether it be for advice to community meetings or general legal advice'.⁹⁷

As discussed, for people in remote areas and in areas of declining populations, levels of financial disadvantage are particularly high, as quoted below in Cain, Macourt and Mulherin's research:

Most of the people out here are people who fall under the poverty line. There is a definite core population of disadvantaged people and it's not going to get any less. We have about 33 per cent of people in our region who have Centrelink as their sole support. We have a high Aboriginal population. We have a high proportion of single mothers. We have a high proportion of young people who are on a benefit. All of those legal need indicators... exist here (Public solicitor, Far West).⁹⁸

Justice Project stakeholders similarly emphasised that many RRR residents experience financial barriers in accessing legal assistance, and the asset rich, cash poor phenomenon was noted. For example, Legal Aid Queensland Townsville's office noted during consultations that many RRR farmers and small businesses, do not meet the legal aid means test for this reason.⁹⁹ In its submission, NSW CLCs considered that:

Because many RRR Australians can be identified as 'asset rich, financially poor' individuals, they are often unqualified to accept pro bono legal assistance from initiatives due to the value of the property they might own, even if they do not have the finances to pay for private legal assistance'.¹⁰⁰

Hume Riverina Community Legal Service's submission highlighted that 'the geographic spread and diversity of our Shires means that many people we see are financially and socially disadvantaged'.¹⁰¹ NPY Women's Council highlighted the perpetual poverty among many of its clients in Alice Springs, and noted that 'families and individuals are living with large debts accrued through Centrelink fines, fines for minor criminal matters and debts owed to community organisations... the stress this places on families can be extreme'.¹⁰² Povey Stirk Lawyers, also operating from Alice Springs, added that for more

⁹⁶ Cain, Macourt and Mulherin, *Lawyer availability and population change*, 97-8.

⁹⁷ Rice, *Access to a lawyer in rural Australia*, 35.

⁹⁸ Cain, Macourt and Mulherin, *Lawyer availability and population change*, 100

⁹⁹ Consultation, 29/08/2017, Townsville (Legal Aid Queensland). See also Community Legal Centres NSW, *Submission No 106*.

¹⁰⁰ Community Legal Centres NSW, *Submission No 106*.

¹⁰¹ Hume Riverina Community Legal Service, *Submission No 122*.

¹⁰² NPY Women's Council, *Submission No 129*.

disadvantaged remote clients, the costs of remote litigation, combined with factors such as the solicitor-client costs gap, render many claims uneconomic for clients, particularly when they require additional assistance due to factors such as illiteracy and poor English.¹⁰³ Townsville Community Legal Service noted that economic disadvantage reduced the likelihood that residents could self-help regarding their legal problems. Not only did self-help require high legal capability, but also access to printing, the internet and transportation. These resources were all more difficult to access for people lacking financial means.¹⁰⁴

Distance and Transport

LAW Survey respondents in regional and remote areas travelled substantial distances to consult their main advisers in person. Those in remote areas travelled more than 80 kilometres in 19 per cent of cases, compared with eight per cent for regional areas, and two per cent for major city areas.¹⁰⁵

Coverdale's 2010 survey of Victorian RRR lawyers found that distance, and the associated cost of travel, was one of the most frequently cited barriers for clients accessing lawyers, courts and other justice system services, causing financial cost and personal hardship.¹⁰⁶ Clients of surveyed lawyers often travelled more than three hours to Melbourne for Federal Magistrates Court hearings, as these courts sat only four times a year locally. They might then wait all day and not have their matter heard, causing overnight accommodation costs and delays returning to work, while more vulnerable clients regularly slept rough or hitched home.¹⁰⁷ Coverdale cited distance and geographic isolation from available legal practitioners as another significant barrier. Coverdale argued that distance, when combined with a shortage of critical justice system services, fosters arbitrary and inequitable outcomes in the delivery of justice to regional communities.¹⁰⁸ These difficulties have been echoed by Harris, Jordan and Philips in relation to Magistrates' Courts in RRR locations across Australia more generally.¹⁰⁹

The Centre for Rural Regional Law and Justice ('CRRLJ') and National Rural Law and Justice Alliance ('NRLJA') have cited transport issues as consistently rated by RRR communities as one of the most significant access to justice barriers.¹¹⁰ 'Transport disadvantage' is common in rural and remote Australia, and amongst low income groups.¹¹¹ It concerns not only difficulty in accessing public and private transport, but difficulties with maintaining private transport, due to petrol or insurance costs.

¹⁰³ Povey Stirk Lawyers, *Submission No 51*.

¹⁰⁴ Consultation, 29/08/2017, Townsville (Townsville Community Legal Service).

¹⁰⁵ Coumarelos et al, *LAW Survey*, xix.

¹⁰⁶ Coverdale, *Postcode Justice*, 9, 13, 75.

¹⁰⁷ *Ibid* 75.

¹⁰⁸ *Ibid*.

¹⁰⁹ Bridget Harris, Lucinda Jordan and Lydia Philips, 'Courting justice beyond the cityscape: Access to justice and the rural, regional and remote magistrates' courts' (2014) 23 *Journal of Judicial Administration* 158 ('Courting justice beyond the cityscape').

¹¹⁰ Centre for Rural Regional Law and Justice and National Rural Law and Justice Alliance, *Submission No 20 to Productivity Commission, Inquiry into Access to Justice Arrangements*, 1 November 2013, 4 ('*Joint Access to Justice Arrangements Submission*').

¹¹¹ Kate Rosier and Myfanwy McDonald, Australian Institute of Family Studies, 'The relationship between transport and disadvantage in Australia' (Resource Sheet, Communities and Families Clearinghouse

For RRR low income families, young mothers, sole parents, people with disability and Aboriginal and Torres Strait Islander people,¹¹² transport difficulties can be especially problematic. Public transport is often unviable: only 1.7 per cent of Australians outside capital cities travel to work or study via public transport, compared to 19.1 per cent of capital city residents.¹¹³ A significant proportion of Aboriginal and Torres Strait Islander peoples living in remote areas have no access to public transport and one-third have no access to a car. Even outside remote areas, a significant proportion of Aboriginal and Torres Strait Islander people have no access to public transport.¹¹⁴ For women experiencing family violence, a lack of transport compounds barriers to safety.¹¹⁵ A lack of alternative transport can also mean that legal penalties, such as licence disqualifications (discussed further below), have a much greater impact upon people outside cities than those inside.

Rice has cautioned that distance barriers may be more or less problematic depending on clients' income, age and ability, as well as the nature of the legal matter to be resolved.¹¹⁶ However, Coverdale has emphasised that these distance barriers are also experienced by all people living in RRR areas in Australia.¹¹⁷ Cain, Macourt and Mulherin had stated that 'the 'tyranny of distance is very real for disadvantaged clients living in most RRR areas, but especially the more remote areas of NSW, particularly where public transport is inadequate or non-existent'.¹¹⁸ For some clients, this effectively prevents them from obtaining legal assistance. For example, Karras et al have noted that 'the organisation and motivation required to travel large distances to attend appointments is often beyond the capacity of someone who is mentally unwell'.¹¹⁹ Some clients may fail to attend court - creating the 'very real possibility' of an escalation in criminal justice system contact when failed to appear is added to the record of an alleged offender who does not appear in court.¹²⁰

Distance and transport issues have been consistently raised by Justice Project stakeholders as a key RRR access to justice barrier.¹²¹ Purser et al highlighted that residing in a RRR community can significantly increase cost, as access to justice is often predicated upon travel to larger centres.¹²² Central Coast CLC noted that many of its clients in geographically isolated areas do not have cars and can take several hours to reach their service.¹²³ Hume Riverina Community Legal Service pointed to the lack of

Australia, August 2011) <<https://aifs.gov.au/cfca/publications/relationship-between-transport-and-disadvantage-austr>>.

¹¹² Ibid. See also Karras et al, Law and Justice Foundation of New South Wales, *On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW* (2006) ('*On the Edge of Justice*').

¹¹³ Rosier and McDonald, *The relationship between transport and disadvantage in Australia*, citing Australian Bureau of Statistics, *4102.0 - Public transport use for work and study* (2008).

¹¹⁴ Ibid.

¹¹⁵ Jordan and Philips, *Women's experiences of surviving family violence and accessing the Magistrates' Court in Geelong*, 9.

¹¹⁶ Rice, *Access to a lawyer in rural Australia*, 29-30.

¹¹⁷ Coverdale, *Postcode Justice*, 75-77.

¹¹⁸ Cain, Macourt and Mulherin, *Lawyer availability and population change*, 121.

¹¹⁹ Karras et al, *On the Edge of Justice*, 111.

¹²⁰ Ibid.

¹²¹ See, eg, Kelly Purser et al, *Submission No 69*; Regional Alliance West, *Submission No 94*; Community Legal Centres NSW, *Submission No 106*; Consultation, 10/08/2017, Canberra (Central Coast CLC); Consultation, 29/08/2017, Townsville (Legal Aid Queensland); Consultation, 03/08/2017, Darwin (NT Shelter).

¹²² Kelly Purser et al, *Submission No 69*.

¹²³ Consultation, 10/08/2017, Canberra (Central Coast CLC).

public transport in RRR areas, which means that its outreach services to its most vulnerable RRR clients – who are contending with isolation as well as other factors such as age, poor health, disability and low income – are essential.¹²⁴ These clients have ‘no ability’¹²⁵ to reach their offices.¹²⁶ Knowmore similarly highlighted that geographical isolation severely exacerbates clients’ vulnerabilities.¹²⁷ In Alice Springs consultations, the Central Australian Aboriginal Family Law Unit (‘CAAFLU’) described how, given inadequate bus services to and from outlying communities, parents were unable to reach court in time for court hearings regarding child protection matters.¹²⁸ The NT Shelter described people becoming ‘stuck’ in urban areas due to lack of transportation back to their communities.¹²⁹ The Justice Project team also observed a situation in Kalgoorlie of a woman who had been brought in by police from an outstation for a Magistrates Court hearing for a minor criminal matter. The instructing solicitor told the team that the woman had no money or means of returning home afterwards, despite having left several children in the community.

Submissions also describe how RRR residents must also often travel considerable distances to attend court hearings many hours away, including in urban locations.¹³⁰ This involves significant cost and inconvenience, including for overnight accommodation and child care for clients who have children in their care.¹³¹ Even when hearings are regional, the tyranny of distance can still pose critical barriers. For example, one Mildura private practitioner had stopped taking on cross-border NSW child protection matters, as children were being removed as far away as Dubbo or Sydney, and with parents travelling to these places for the subsequent hearings.¹³²

Distance and transport issues also place real pressure on stretched legal services attempting to reach populations spread across vast regions. For example, Western NSW CLC operates out of Dubbo and encompasses the majority of Northern and Western rural NSW, a ‘very difficult task [...given] this very large area’.¹³³ Meanwhile, Regional Alliance West’s one solicitor and its paralegals cover a geographical area more than twice the size of the United Kingdom. As noted, this can involve driving 600km in one day.¹³⁴ During consultations, the Aboriginal Legal Rights Movement (‘ALRM’) in Adelaide reinforced that to reach the Anangu Pitjantjatjara Yankunytjatjara Lands, travel of over 1000km was involved, requiring a full week for a lawyer’s trip.¹³⁵

Distance issues also impact on justice outcomes in other ways, such as delayed mail and postal service, which Legal Aid Queensland Townsville’s office has characterised as

¹²⁴ Huma-Riverina Community Legal Service, *Submission No 122*. See also Regional Alliance West, *Submission No 94*; Community Legal Centres NSW, *Submission No 106*.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ Knowmore, *Submission No 102*.

¹²⁸ Consultation, 02/04/2017, Alice Springs (Central Australian Aboriginal Family Legal Unit).

¹²⁹ Consultation, 03/08/2017, Darwin (NT Shelter).

¹³⁰ Community Legal Centres NSW, *Submission No 106*; Regional Alliance West, *Submission No 94*; Povey Stirk Lawyers, *Submission No 51*.

¹³¹ Regional Alliance West, *Submission No 94*. See also Povey Stirk Lawyers, *Submission No 51*.

¹³² Consultation, 26/09/2017, Mildura (Private practitioner).

¹³³ Community Legal Centres NSW, *Submission No 106*.

¹³⁴ Regional Alliance West, *Submission No 94*. See also Consultation, 08/09/2017, Kalgoorlie (Aboriginal Family Law Services).

¹³⁵ Consultation, 04/04/2017, Adelaide (Aboriginal Legal Rights Movement).

'highly problematic and a significant barrier to justice'.¹³⁶ For example, in the context of rural farm debt, debt enforcement notices may not be received for up to three weeks under ordinary service rules. This means that the person cannot respond to the notice within the timeframes required, and court orders may be made in their absence.¹³⁷ Other stakeholders agree that delayed mail presents specific barriers for RRR residents.¹³⁸ One relevant example from Western NSW CLC stated that:

*One of the main issues with the Tribunal is filing documents and receiving correspondence. Some divisions of NCAT will only receive documents by post. Although you can file documents via email/post in this division, when you have a client with no email they can only receive correspondence via post. It can take up to 10-14 days to get post from Sydney to this or other rural towns. This creates further delays in the matter.*¹³⁹

Distance and transport barriers are exacerbated by shortages of courts, lawyers and other justice services in RRR areas, as discussed below under 'Critical Gaps in Services'.

Infrastructure

Technological problems can create barriers to accessing justice in RRR areas, particularly more remote areas, for individuals seeking information or advice, lawyers in obtaining information, mentoring and support, and courts and tribunals using virtual technology.¹⁴⁰

The most recent information indicates that there has been substantial improvement over time in the proportion of dwellings with an internet connection (or dwellings from which internet can be accessed) in Australia, including in RRR Australia,¹⁴¹ although this proportion decreases with remoteness. By 2016, while the proportion Australia-wide was as high as 81.8 per cent for inner regional areas (compared to 87.6 per cent of dwellings in major cities), for very remote areas it was 69.6 per cent.¹⁴²

However, research suggests that poor quality internet connections and limited telephone coverage continue to pose real problems in certain RRR areas, particularly more remote communities.¹⁴³ A key issue with technology relates not only to physical access, but also

¹³⁶ Consultation, 29/08/2017, Townsville (Legal Aid Queensland).

¹³⁷ Ibid.

¹³⁸ Povey Stirk Lawyers, *Submission No 51*; Community Legal Centres NSW, *Submission No 106*.

¹³⁹ Community Legal Centres NSW, *Submission No 106*.

¹⁴⁰ Karras et al, *On the Edge of Justice*, 104; Forell, Cain and Gray, *Recruitment and retention of lawyers*, 123; Coverdale, *Postcode Justice*, 49.

¹⁴¹ For example, in 2006, the proportion of dwellings with an internet connection was 63.4 per cent (across Australia). By level of remoteness, this proportion was 66.3 per cent for major cities, 57.9 per cent for inner regional areas, 55.2 per cent for outer regional areas, 56.7 per cent for remote areas, and 46.6 per cent for very remote areas. By 2016, the proportion of dwellings with an internet connection across Australia was 85.5 per cent. For major cities this was 87.6 per cent, for inner regional areas it was 81.8 per cent; for outer regional areas it was 78.6 per cent; remote areas it was 78.6 per cent and for very remote areas it was 69.6 per cent: Department of Infrastructure, *Regional Development and Cities, Progress in Australian Regions Yearbook 2017*, 290.

¹⁴² Ibid 290.

¹⁴³ Mary Dracup and Richard Coverdale, 'E-Learning opportunities and challenges for legal education in Rural Victoria' (2015) 40(2) *Alternative Law Journal* 127, 129; Law Institute of Victoria, Submission No 59 to Department of Justice and Regulation (Victoria), *Access to Justice Review*, 1 March 2016, 33 <<https://www.liv.asn.au/Staying-Informed/Submissions/submissions/March-2016/Department-of-Justice-and-Regulation-Access-to-Jus>> ('*Access to Justice Review Submission*'); Cain, Macourt and Mulherin, *Lawyer availability and population change*, 104; Forell, Cain and Gray, *Recruitment and retention of lawyers*, 123; Coverdale, *Postcode Justice*, 49; Melanie Little, 'Regional justice: Justice in rural and remote areas' (2016)

affordability and digital ability. All three are considered under the Australian Digital Inclusion Index 2017 produced by RMIT University and Swinburne University of Technology.¹⁴⁴ This indicates that while overall, digital inclusion in Australia is growing and geographic differences are slightly narrowing, it remains substantially higher in urban areas than country areas.¹⁴⁵

Such concerns have also been reflected in Justice Project consultations and submissions.¹⁴⁶ For example, Povey Stirk Lawyers, operating in Central Australia, included poor internet and phone reception in its analysis of the multiple challenges presenting in remote areas:

*Remote practice carries its challenges such as slow mail deliveries, expensive and infrequent flights, lack of access to local experts and counsel and the challenges of cross-cultural communication. For many of our clients in very remote areas, these challenges are intensified by issues such as unreliable or non-existent internet and phone reception, infrequent or non-existent mail delivery, lengthy travel for conferences and court appearances and cultural and linguistic barriers.*¹⁴⁷

Regional West Alliance raised poor telephone reception and limited internet coverage amongst its outlying mid-West Western Australian communities as undermining its ability to engage with many isolated clients, including women experiencing family violence.¹⁴⁸ However, these issues were not solely confined to more remote areas. For example, a Cooma private practitioner highlighted that within the surrounding geographic area, the availability of reliable internet was a barrier for many people.¹⁴⁹ She further highlighted that a cohort of RRR legal practitioners, particularly ageing practitioners, remained reluctant to use technology to deliver justice and that work could be done to overcome this reluctance.¹⁵⁰

As discussed further in the Legal Services and Courts and Tribunals chapters, Justice Project stakeholders often reinforced that technological solutions are an important part of the mix in addressing access to justice in RRR areas, and often calling for greater technological solutions to be made more accessible.¹⁵¹ However, they also cautioned that it is essential to consider more digitally excluded RRR residents:

Technology is often seen as the solution to access to justice issues in RRR areas however it cannot be relied upon in isolation. It is certainly a useful tool but good, reliable phone and internet services are not always available in rural and remote communities (and sometimes not at all). A reliance on technology fails to address the needs of people experiencing additional indicators of disadvantage. For example, we were involved in a partnership with

38(9) *Bulletin (Law Society of South Australia)* 1, 24 ('Regional Justice'); Productivity Commission, *Access to Justice Arrangements*, 160.

¹⁴⁴ Julian Thomas et al, RMIT University (for Telstra), *Measuring Australia's Digital Divide: The Australian Digital Inclusion Index 2017* (2017) 5-6.

¹⁴⁵ *Ibid.*

¹⁴⁶ Povey Stirk Lawyers, *Submission No 51*; Regional Alliance West, *Submission No 94*; Consultation, 29/03/18, Teleconference (Private practitioner - Cooma).

¹⁴⁷ Povey Stirk Lawyers, *Submission No 51*.

¹⁴⁸ Regional Alliance West, *Submission No 94*.

¹⁴⁹ Consultation, 29/03/2018, Teleconference (Private practitioner - Cooma).

¹⁵⁰ *Ibid.*

¹⁵¹ National Children's Youth and Law Centre, *Submission No 100*; Consultation, 29/08/2017, Townsville (Legal Aid Queensland); Consultation, 03/04/2017, Adelaide (Law Society of South Australia); Consultation, 12/09/2017, Teleconference (LCA RRR Law Committee).

*Legal Aid WA to develop three online self-help guides for clients with corresponding online training modules for legal workers. We think these are an excellent resource but they will be of limited benefit to clients without appropriate literacy and computer literacy, those who are particularly stressed and overwhelmed, and those that just don't have access to the technology.*¹⁵²

*There is a lack of access to technology. People don't always have phone reception. Technology is expensive – a lot of houses don't even have power. You are often better off driving long distances than trying to use tech – people aren't tech-savvy in Bourke.*¹⁵³

Multiple barriers

Amongst RRR residents experiencing significant disadvantages, barriers such as poorer literacy and education levels prevail. For example, Hume Riverina Community Legal Service's legal needs analysis disclosed that literacy barriers affected 68 per cent of their likely clients.¹⁵⁴ Educational and health outcomes are generally lower across RRR areas, and lack of accessibility is a barrier as a higher proportion of RRR residents have a profound or severe disability.¹⁵⁵ Aboriginal and Torres Strait Islander people in some remote communities face particular socio-cultural and linguistic difficulties, including language and communication barriers, lack of accessibility and a mistrust of the justice system given a history of marginalisation.¹⁵⁶

Cain, Macourt and Mulherin have described the acute, complex needs of significant disadvantaged clients in remote areas:

*We have a really high percentage of acquired brain injury and it's because we have mining industry and high lead levels... Lead affects higher brain function, it affects the ability to reason and think, it affects the ability to read and write. So, we have high proportions of illiteracy. Add to all that, you've got the problems of isolation. People need that face-to-face contact. They just do. (Public Solicitor, Far West NSW)*¹⁵⁷

Relatively poor access to medical specialists and other allied health professionals impact upon people with health problems across many RRR areas, notably those with mental health conditions or cognitive disorders, who may come to the attention of police and get caught up in the criminal justice system.¹⁵⁸ This is particularly the case for young people with undiagnosed disorders, such as Fetal Alcohol Spectrum Disorder ('FASD'). There is evidence that young people with FASD and other disorders are over-represented in the criminal justice system, and do not get the medical treatment that they need until incarcerated.¹⁵⁹

¹⁵² Regional Alliance West, *Submission No 94*. See also Consultation, 03/04/2017, Adelaide (Law Society of South Australia); Consultation, 13/09/2017, Bourke (Mission Australia).

¹⁵³ Consultation, 13/09/2017, Bourke (Mission Australia).

¹⁵⁴ Hume Riverina Community Legal Service, *Piecing together the puzzle*, 13.

¹⁵⁵ National Rural Health Alliance Inc and Australian Council of Social Service, *Snapshot of poverty in rural and regional Australia*, 7-8; Cain, Macourt and Mulherin, *Lawyer availability and population change*, 19, 105.

¹⁵⁶ Pleasence et al, *Reshaping Legal Assistance Services*, 135.

¹⁵⁷ Cain, Macourt and Mulherin, *Lawyer availability and population change*, 104.

¹⁵⁸ Ralph Weisheit, 'Locating crime in context and place: Perspectives on regional, rural and remote Australia' (2017) 26(1) *Rural Society*, 102, 105, citing Alistair Harkness, Bridget Harris and David Baker (eds), *Locating crime in context and place: perspectives on regional, rural and remote Australia* (Federation Press, 2016); Harris et al, 'Courting justice beyond the cityscape', 163-4.

¹⁵⁹ Peta MacGillivray and Eileen Baldry, 'Indigenous Australians, mental and cognitive impairment and the criminal justice system: A complex web' (2013) 8(9) *Indigenous Law Bulletin* 22, 22-3.

Some Justice Project stakeholders in RRR areas often reinforced the multiple disadvantages faced by their clients, most acutely in remote areas. For example, NPY Women's Council drew attention to the complex disadvantage present in remote Central Australia. This includes not only limited employment opportunities and perpetual poverty, but systemic difficulties with numeracy and literacy barriers and substance abuse. It noted that 'the stress this places on families can be extreme and living in low socio-economic conditions is a significant risk factor for elevated rates of domestic and family violence'.¹⁶⁰ Similarly, Regional Alliance West highlighted that:

*Most of our clients are experiencing multiple indicators of disadvantage, including family violence, homelessness, and financial hardship, Aboriginal people, people with disabilities, prisoners and those exiting prison... while it might be convenient to categorise different indicators of disadvantage, we rarely have a client present with just one of these indicators.*¹⁶¹

During consultations, Townsville Community Legal Service estimated around 20 per cent of its clients were people with disability – but given the underreporting of disability, this was probably closer to 50 per cent. Many also experienced family violence.¹⁶²

Limited awareness

The CRRLJ's research states that there is a disproportionate lack of access to information in RRR communities, including even basic information about law and justice issues affecting individuals, and that when information is provided it can be 'metropolitan-centric'.¹⁶³ Regional businesses often access inappropriate services, such as accountants rather than lawyers, or lawyers without the necessary expertise.¹⁶⁴

RRR clients experiencing significant disadvantage, given the multiple barriers described, can have particularly limited awareness of legal rights, limited knowledge for who to ask for legal advice, as well as leaving it until late to resolve problems.¹⁶⁵ Community services can also lack awareness of appropriate legal services to which they should refer clients in RRR areas and their clients' eligibility for help.¹⁶⁶ This was reflected in consultations with Victoria Legal Aid's ('VLA') Mildura office, which commented that frequently, neither providers nor locals fully understood the potential of their services to help them with civil legal issues through their new Health-Justice Partnership. VLA explained, 'civil law issues are the legal issues that people don't know are legal issues'.¹⁶⁷

There were also suggestions that beyond mere lack of legal awareness, there are broader questions of cultural relevance and legitimacy which should be considered regarding remote Aboriginal communities. For example, during consultations, Kimberley Legal

¹⁶⁰ NPY Women's Council, *Submission No 129*.

¹⁶¹ Regional Alliance West, *Submission No 94*.

¹⁶² Consultation, 29/08/2017, Townsville (Townsville Community Legal Service).

¹⁶³ Centre for Rural Regional Law and Justice and National Rural Law, *Submission No 4 to Department of Justice and Regulation (Victoria), Access to Justice Review*, 3-4.

¹⁶⁴ Centre for Rural Regional Law and Justice and National Rural Law and Justice Alliance, *Joint Access to Justice Arrangements Submission*, 6, citing Richard Coverdale, Lucinda Jordan and Jean du Plessis, Centre for Rural Regional Law and Justice and National Rural Law, *Providing Legal Services to Small Business in Regional Victoria* (2012).

¹⁶⁵ Hume Riverina Community Legal Service, *Piecing together the puzzle*, 13.

¹⁶⁶ *Ibid* 12.

¹⁶⁷ Consultation, 26/09/2017, Mildura (Victoria Legal Aid).

Service raised that many remote Kimberley Aboriginal communities can be alienated by 'white law', compared to traditional Aboriginal law, viewing it as 'an external force imposed. People don't accept its legitimacy. They also don't accept agency over it'.¹⁶⁸

Complexity

As recognised recently by the Productivity Commission, increasingly complex laws across Australian jurisdictions pose particular problems for RRR communities by increasing the burden on regional legal practitioners who have traditionally offered generalist services.¹⁶⁹ As discussed below, trends towards specialist service provision to respond to increasingly complex laws were raised during Justice Project consultations as posing difficulties for RRR practitioners.

Economides has also raised that increasingly, legal problems that arise in certain fields, for example the environment and human rights, increasingly require multi-national, multi-disciplinary approaches and levels of expertise that are generally found in the city, yet their impacts frequently are felt in rural communities.¹⁷⁰

During Justice Project consultations, Townsville Community Legal Centre staff noted the consequences of increasingly complex laws for residents without access to legal assistance. They commented that while people were more likely to self-represent, they were less able to do so due to the increasing complexity of the legal system, which demanded increasingly higher legal capability.¹⁷¹

Are there critical gaps in services which are necessary to deliver justice to RRR Australians?

Legal practitioners

Both the research, and Justice Project stakeholder perspectives, regarding shortages of legal practitioners in RRR areas are addressed in turn below.

Research

Significant and ongoing concerns have been expressed regarding the levels of unmet legal need in RRR communities.¹⁷² This includes concerns regarding shortages of both RRR private and public legal practitioners.¹⁷³ Both are discussed below.

¹⁶⁸ Consultation, 10/08/2017, Canberra (Kimberley Legal Service). See also Consultation, 02/08/2017, Maningrida (Burnawarra Elders).

¹⁶⁹ Productivity Commission, *Access to Justice Arrangements*, 134. See also Centre for Rural Regional Law and Justice and National Rural Law and Justice Alliance, *Joint Access to Justice Arrangements Submission*, 6.

¹⁷⁰ Kim Economides, 'Centre-Periphery Tensions in Legal Theory and Practice: Can Law and Lawyers Resist Urban Imperialism?' (2012) 2(Special Edition) *International Journal of Rural Law and Policy*, 3-4 ('Can Law and Lawyers Resist Urban Imperialism?').

¹⁷¹ Consultation, 29/08/2017, Townsville (Townsville Community Legal Service).

¹⁷² See, eg, Centre for Rural Regional Law and Justice and National Rural Law and Justice Alliance, *Joint Access to Justice Arrangements Submission*, 5; Law Institute of Victoria, *Access to Justice Review Submission*, 93; Karras et al, *On the Edge of Justice*, 110-113.

In 2014, the Productivity Commission recorded ongoing concerns being raised by RRR stakeholders, including regarding considerable levels of unmet need in certain remote communities.¹⁷⁴ In the latter context, Cunneen, Allison and Schwartz have cited findings that in many remote communities, access to justice is ‘so inadequate that remote Indigenous people cannot be said to have full civil rights’.¹⁷⁵ The Productivity Commission further accepted that thin markets, especially in rural and remote areas, provided an important rationale for publicly-funded legal assistance services and recommended an additional \$200 million per year for civil legal assistance services alone.¹⁷⁶ It further found that the sustainability of the successful mixed model of legal assistance provision (using in-house and private lawyers) was in question, and that financial incentives were required to attract private practitioners to perform essential legal assistance work, particularly in RRR areas.¹⁷⁷

Several other significant inquiries have recognised unmet legal need and broader access to justice issues amongst RRR communities.¹⁷⁸ In 2004 and 2009, the Senate Legal and Constitutional Affairs References Committee recommended that action was necessary to address this issue.¹⁷⁹ In 2009, the federal Attorney-General’s Department Access to Justice Taskforce stated that ‘research suggests that accessing legal services of any kind (publicly funded or otherwise) is becoming increasingly difficult in regional, rural and remote Australia’.¹⁸⁰ The recent Victorian Government’s *Access to Justice Review* identified RRR Victorians as facing fundamental barriers to accessing justice that resulted in unmet legal needs.¹⁸¹

¹⁷³ Pleasence et al, *Reshaping Legal Assistance Services*, 46; Centre for Rural Regional Law and Justice and National Rural Law, Submission No 4 to Department of Justice and Regulation (Victoria), *Access to Justice Review*, 9.

¹⁷⁴ Productivity Commission, *Access to Justice Arrangements*, 98, citing Law Council of Australia, Submission No 96 to Productivity Commission, *Access to Justice Arrangements*, 13 November 2013; and, Central Australian Aboriginal Legal Aid Service Inc, Submission No 89 to Productivity Commission, *Access to Justice Arrangements*, 11 November 2013.

¹⁷⁵ Cunneen, Allison and Schwartz, ‘Access to justice for Aboriginal People in the Northern Territory’, 220, citing Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Legal aid and access to justice* (2004) [5.120] (‘Senate Legal and Constitutional Affairs References Committee 2004 report’).

¹⁷⁶ Productivity Commission, *Access to Justice Arrangements*, 666, 703.

¹⁷⁷ *Ibid* 703.

¹⁷⁸ Coverdale, *Postcode Justice*, 23-6, citing Legal and Constitutional Affairs References Committee, Parliament of Australia, *Access to Justice* (2009), Recs 1, 3, 6; Senate Legal and Constitutional Affairs References Committee 2004 report, 41, 78; Access to Justice Taskforce, Attorney-General’s Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009), 6, 43, 139 (‘*Strategic Framework*’).

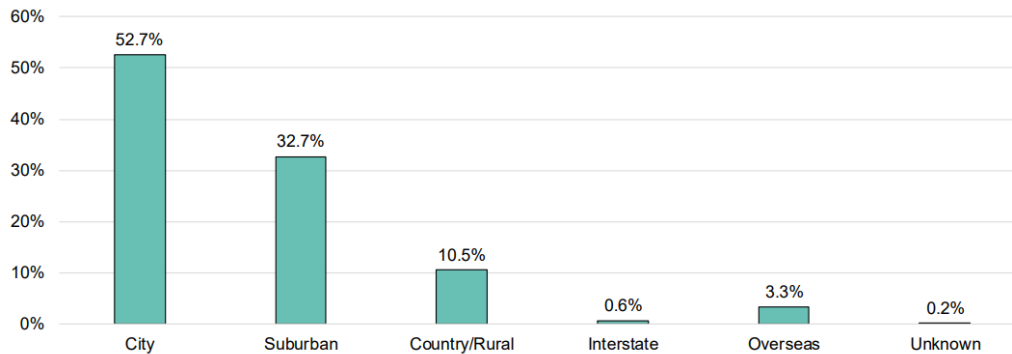
¹⁷⁹ Senate Legal and Constitutional Affairs References Committee 2004 report, xxviii-xxix, 134-135; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Access to Justice* (2009) 24-30.

¹⁸⁰ Attorney-General’s Department (Cth), *Strategic Framework*, 146 citing TNS Social Research (prepared for the Attorney-General’s Department (Cth)), *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia* (2006).

¹⁸¹ Department of Justice and Regulation (Vic), *Access to Justice Review* (2016), 82-84.

Most recently, Urbis reported on the national demographic profile of all practising solicitors in 2016.¹⁸² Nationally, most practising solicitors' workplace locations were in either capital cities (52.7 per cent), or suburban locations (32.7 per cent).¹⁸³ Just 10.5 per cent (7690 solicitors) were practising in a country or rural area,¹⁸⁴ as the following graph demonstrates.

Urbis National Profile of Solicitors 2016: Workplace Location in 2016¹⁸⁵



Base: N=73,307.

Note: The total sample (N=73,307) included data for Victoria based on number of solicitor roles, rather than on number of individual solicitors. Therefore, the total sample was higher than the total number of solicitors in 2016 (N=71,509).

In some states and territories, the proportions of solicitors practising in country and rural areas appear particularly low. For example, only 5.2 per cent of Western Australian solicitors practised in such areas.¹⁸⁶ In South Australia, the figure was 7.1 per cent, while in Victoria, it was 7.7 per cent.¹⁸⁷ The proportion of Queensland solicitors working in country and rural areas, on the other hand, was 15.9 per cent, and in the Northern Territory, it was 15.6 per cent.¹⁸⁸ The following table shows the solicitor location by state and territory.

¹⁸² Urbis (prepared for the Law Society of New South Wales), *National Profile of Solicitors 2016: Report* (2017).

¹⁸³ Ibid 29.

¹⁸⁴ Ibid. The remainder of national practising solicitors were either interstate, overseas or unknown (4.1 per cent).

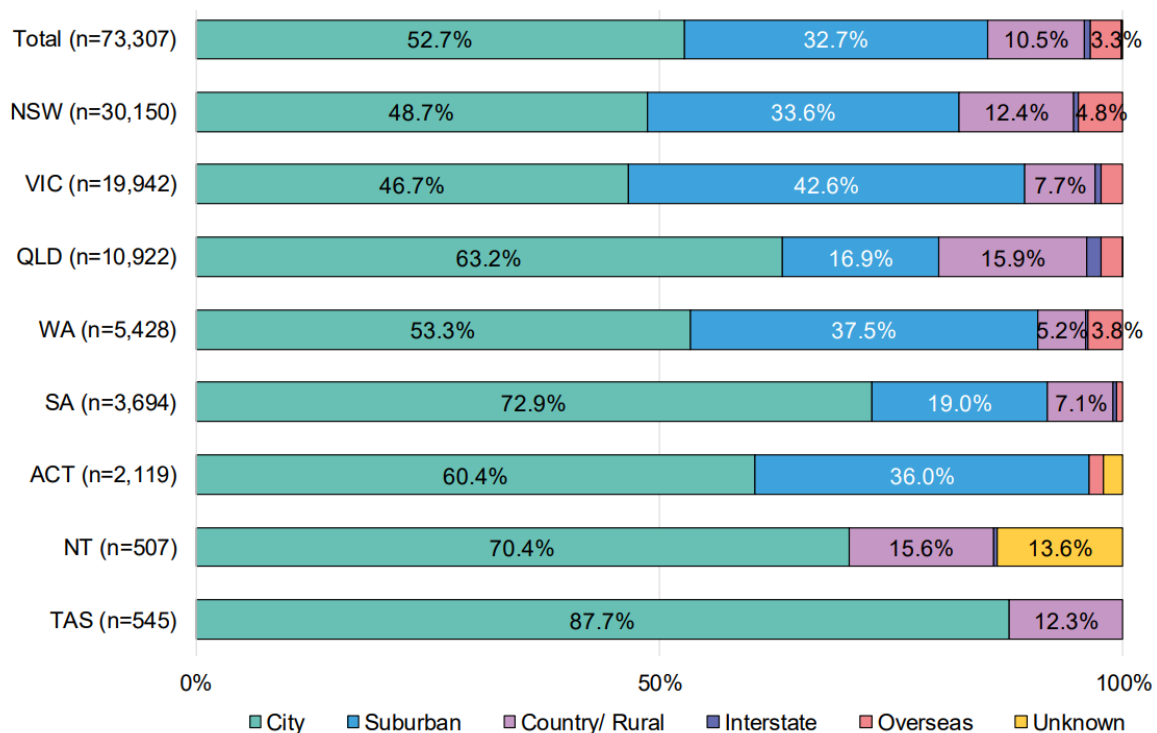
¹⁸⁵ Ibid.

¹⁸⁶ Ibid 30.

¹⁸⁷ Urbis states that for Victoria, the data is based on number of solicitor roles, rather than number of individual solicitors: *ibid*.

¹⁸⁸ *Ibid*.

Urbis National Profile of Solicitors 2016: Solicitor location by state/territory¹⁸⁹



Note: Data for Victoria was based on number of solicitor roles, rather than on number of individual solicitors.

The Urbis study also disclosed that the total number of solicitors in country and rural locations across Australia had increased between 2011 and 2016 by 4.2 per cent.¹⁹⁰ This increase was significantly lower than that for solicitors in city locations (27.3 per cent), and suburban locations (60.1 per cent).¹⁹¹ Overall, the practising solicitor profession grew by 30.7 per cent between 2011 and 2016.¹⁹² However, as discussed, this growth was much lower in country and rural locations.

The Urbis study provides headline comparisons regarding solicitor locations between urban and RRR locations, and should prompt greater investigation to be undertaken into RRR lawyer shortages. However, its lack of detail does not enable analysts to take account of the likelihood that greater numbers of solicitors may be present in urban areas because they provide legal services which more in demand in those areas. This may include multi-national, large-scale commercial legal services, and government-based legal services. As suggested below, future studies could capture more detailed information about the nature of legal work undertaken, as well as client type, to provide a more nuanced comparison between urban and country/rural areas, by drilling down into the local presence of legal services which are most commonly needed by individual residents and small businesses.

Concerns regarding shortages of lawyers in RRR locations have existed for some time. For example, a 2006 study undertaken by TNS Social Research suggested that there was

¹⁸⁹ Ibid 30.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid.

a shortage of lawyers in remote areas with three lawyers per 10 000 adult residents, compared to 10.7 lawyers per 10 000 lawyers in capital cities.¹⁹³ This study drew attention to the higher levels of legal aid provided by private legal practitioners in RRR areas, given their 'strong sense of moral obligation' to their communities: 67 per cent of private RRR firms were providing legal aid compared with only 48 per cent of all firms.¹⁹⁴ Providers of legal aid in RRR areas were 'keeping the system going' with small numbers of lawyers providing significant amounts of legal aid.¹⁹⁵ However, TNS also warned that practitioners were disengaging from providing legal aid, partly due to low remuneration rates, and that this would disproportionately affect RRR areas. For example, 26 per cent of RRR firms used to provide legal aid but had moved away from providing these services.¹⁹⁶ Any decline in legal aid supply was likely to have a greater impact in RRR areas because there were significantly fewer firms operating in those areas.¹⁹⁷ These concerns about a drift by RRR private practitioners away from legal aid provision due to an inability to make a profit have since been reiterated.¹⁹⁸

In 2009, the Law Council conducted a nationwide survey of legal practitioners in RRR areas.¹⁹⁹ Its findings included that:

- 43 per cent of principals surveyed indicated that their practice did not have enough lawyers to serve its client base. The most concerning shortages were being experienced in the Northern Territory, South Australia and Queensland.
- Succession planning was cited as principals' biggest concern (71 per cent), followed by concerns about attracting additional lawyers (58 per cent), and attracting lawyers to replace departures (51 per cent).
- 42 per cent of legal practitioners surveyed did not intend to practise law in five years' time.
- 30 per cent of younger lawyers intended to practise in their area for less than two years, and 25 per cent indicating that they would leave RRR areas for better pay.
- RRR practitioners took on significant amounts of legal aid work (51 per cent of firms). Of these firms, 50 per cent dealt with more than 30 cases per year.
- More than 64 per cent of respondents indicated that their firm undertook pro bono work, and 71 per cent of respondents undertook other unpaid voluntary work within their area.²⁰⁰

81 per cent of respondents were private practitioners, noting that the survey results did not distinguish between public and private practitioner responses.²⁰¹ This survey prompted strong concerns about an urgent need to recruit lawyers to RRR areas to fill

¹⁹³ TNS Social Research (prepared for the Attorney-General's Department (Cth)), *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia* (2006) v.

¹⁹⁴ *Ibid* iii, v.

¹⁹⁵ *Ibid* v.

¹⁹⁶ *Ibid*.

¹⁹⁷ *Ibid*. See also Law Council of Australia, *Report into the Rural, Regional and Remote Areas Lawyers Survey* (July 2009) <<https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/rural--regional-and-remote-areas-lawyers>> ('RRR Lawyers Survey').

¹⁹⁸ See Law Institute of Victoria, *Access to Justice Review Submission*, 93.

¹⁹⁹ Law Council of Australia, *RRR Lawyers Survey*.

²⁰⁰ *Ibid*.

²⁰¹ *Ibid*.

pending national shortages, given the essential role played by RRR practitioners in taking on legal aid, pro bono and voluntary work in their communities. It also helped to prompt several Commonwealth-funded initiatives, further discussed below, to boost the recruitment and retention of lawyers in RRR areas. However, as discussed below, subsequent research undertaken by Cain, Macourt and Mulherin suggests that a more nuanced approach may be needed which is based on an area-by-area, rather than nation-wide, assessment.²⁰²

Coverdale's 2010 survey found that 75 per cent of RRR human service organisations thought that regional Victorians were more likely to be disadvantaged than their city counterparts by the limited availability of adequate legal advice and information services.²⁰³ Fifty per cent of lawyers agreed that regional Victorians were disadvantaged regarding the local availability of specialist legal advice.²⁰⁴

Coverdale pointed to a scarcity of locally available lawyers causing greater 'conflict of interest'²⁰⁵ problems, with 69 per cent of lawyers stating that this impacted adversely upon their regional clients.²⁰⁶ This can cause additional costs to clients in terms of money and time.²⁰⁷ One lawyer in Coverdale's research commented that:

*Conflict of interest is a huge problem for clients in small towns. Some have been with the same law firm for many years but because the firm and their ex-partner were involved in a will or conveyancing or commercial matter, their lawyer will not be able to undertake the family law matter. Clients then have to go to another town or the city to find a lawyer.*²⁰⁸

Conflict of interest issues affect people seeking help from both private and public solicitors.²⁰⁹ In Cain, Macourt and Mulherin's research, one Far West NSW public solicitor remarked that, as a result:

*We refer people routinely to interstate solicitors. The law is different and you do often see that practitioners struggle because there is a difference between jurisdictions. And the court also struggles with the problem of having practitioners that don't really quite know the procedure appearing in front of them. But it's literally this, either they come in and help, or there's no one.*²¹⁰

Coverdale's research also linked shortages to recruitment and retention issues, with 61 per cent of lawyers also citing difficulties in attracting graduates and experienced lawyers to regional communities. A related pressure arose from communities' expectation that regional lawyers could respond to a broader range of legal issues than their metropolitan

²⁰² Cain, Macourt and Mulherin, *Lawyer availability and population change*.

²⁰³ Coverdale, *Postcode Justice*, 84.

²⁰⁴ *Ibid*.

²⁰⁵ Conflict of interest issues arise when a lawyer is approached to act for a person in a dispute that involves another person for whom the lawyer already acts. Professional conduct rules for lawyers generally preclude the lawyer from acting for both parties, unless each client has given informed consent to the solicitor or law practice acting for another client, and an effective information barrier has been established. These rules are further explained in the Legal Services Chapter (Part 2).

²⁰⁶ *Ibid* 86.

²⁰⁷ Centre for Rural Regional Law and Justice and National Rural Law, Submission No 4 to Department of Justice and Regulation (Victoria), *Access to Justice Review*, 10.

²⁰⁸ Coverdale, *Postcode Justice*, 76.

²⁰⁹ Pleasence et al, *Reshaping Legal Assistance Services*, 46-7.

²¹⁰ Cain, Macourt and Mulherin, *Lawyer availability and population change*, 104.

counterparts (58 per cent), and beyond their area of expertise.²¹¹ This was particularly problematic for regional lawyers, many of whom operated generalist practices, and resulted in regional firms attempting to manage cases without the necessary expertise.²¹² Difficulties in accessing professional development, mentoring and support were also raised, particularly for junior RRR lawyers, who often carried great responsibility.²¹³

In 2011, Rice suggested that beyond overall aggregated numbers, 'a much more refined picture of rural lawyers and their communities is necessary'.²¹⁴ The information needed, he argued, was 'where in rural Australia the lawyers and population are, and what their relevant characteristics are',²¹⁵ including lawyers' areas of speciality and amount of legal aid work undertaken. Greater specificity was also needed about 'how much is 'enough' lawyers'.²¹⁶ Although there was no 'right' or sufficient numbers of lawyers in the abstract, some considerations suggested a benchmark for sufficiency in numbers, including 'choice of lawyer' and having enough lawyers to make conflicts manageable.²¹⁷

Subsequent work led by Cain, Macourt and Mulherin in 2014,²¹⁸ following earlier work by Forell, Cain and Gray,²¹⁹ has found that perceptions of a progressive loss of lawyers from RRR NSW were not supported by the evidence, with the numbers of solicitors in those areas increasing between 2000 and 2011, and the per capita rate of solicitors in RRR NSW remaining relatively stable.²²⁰

Inter-regional variations were noted, with some regions losing solicitors and others gaining solicitors. Intra-regional differences were also observed. Solicitor vacancy rates for public legal assistance positions were fairly low outside Sydney.²²¹ However, Remote and Very Remote areas had higher turnover rates of public legal assistance solicitors.²²² In general, solicitors in these areas were younger and had fewer years of experience than solicitors in Inner and Outer Regional NSW.²²³ Public legal assistance services in remote areas experienced the greatest difficulties in retaining solicitors, with their solicitors serving just over 12 months on average in the position, compared with almost 34 months and 48 months respectively for public legal service solicitors working in Inner and Outer Regional areas of NSW.²²⁴

²¹¹ Coverdale, *Postcode Justice*, 88-9.

²¹² *Ibid* 90.

²¹³ *Ibid* 90-1.

²¹⁴ Rice, *Access to a lawyer in rural Australia*, 22.

²¹⁵ *Ibid* 21.

²¹⁶ *Ibid* 15.

²¹⁷ *Ibid* 23.

²¹⁸ Cain, Macourt and Mulherin, *Lawyer availability and population change*.

²¹⁹ Forell, Cain and Gray, *Recruitment and retention of lawyers*. The findings of this research paper, together with those of Cain, Macourt and Mulherin in *Lawyer availability and population change*, are summarised in Michael Cain, Deborah Macourt, Geoff Mulherin and Suzie Forell, Law and Justice Foundation of New South Wales, *Availability of lawyers in RRR locations: what we have learnt*, Updating Justice No 42 (2014) ('Updating Justice RRR Summary').

²²⁰ Cain, Macourt and Mulherin, *Lawyer availability and population change*, x.

²²¹ 9.3 per cent in 2009, and 9.0 per cent in 2011 (outside Sydney), compared to 7.2 per cent in 2009 and 7.9 per cent in 2011 (overall): *Ibid*.

²²² *Ibid*.

²²³ *Ibid*.

²²⁴ *Ibid* 120.

Importantly, some areas had no or few registered practising solicitors at all. There were 19 LGAs with no locally-based solicitors (private or public), while several other LGAs had only one or two.²²⁵ Access to solicitors in these areas typically involved parties travelling long distances.

Cain, Macourt and Mulherin highlighted that such findings should be considered against their demographic context. That is, RRR NSW has seen actual population growth only in certain inner regional centres, while in the surrounding rural and especially remote and very remote locations, there has been sustained population loss.²²⁶ In areas of actual population decline, there has been a reduction in services and amenities, while a growing concentration of commercial and government services has occurred in inner regional centres, or 'sponge cities'.²²⁷ As services, amenities and employment prospects shifted in this manner, the result was a higher proportion of the population left behind in declining areas who were experiencing disadvantage, with effects on legal service provision.

These authors found that the data on the availability of lawyers in RRR NSW suggests that the trend in solicitor availability broadly matches the demographic trends, as evidenced by the stable ratio of solicitor positions to RRR populations. This was 'not to argue that these ratios are appropriate or otherwise, just that they are remaining stable'.²²⁸ For instance, the ratio of residents to solicitors in RRR areas was, they found, only one-third of that for NSW overall, while there were approximately four times as many non-corporate solicitors in Sydney, Newcastle and Wollongong to service every 1 000 residents.²²⁹

With respect to private solicitor positions, Cain, Macourt and Mulherin commented that a key determinant of their number and location was market demand – with such positions increasing with increasing populations, and decreasing with decreasing populations.²³⁰ Their interviews with a sample of 11 private solicitors based in RRR areas with declining populations demonstrated that none had plans, or could afford, to recruit new staff, while most had concerns about whether they would be replaced when they moved or retired. This may, they suggested, present significant problems for those areas experiencing population decline which currently had only one or two solicitors locally.²³¹ They noted that private lawyers engaged in paid legal aid work 'provide a practical and economic alternative in areas where 'on the-ground' public legal services and outreach undertake services are not present or are in short supply'.²³² In addition to maintaining their private practices, these lawyers undertook paid legal aid work and performed duty work at court, while many provided pro bono services. As such, they were a 'fundamental part of ensuring access to justice in RRR Australia'.²³³ However, for some private solicitors, the difficulties of undertaking legal aid work had necessitated that they discontinue this work altogether.²³⁴

²²⁵ Ibid x.

²²⁶ Ibid xi.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid.

²³² Ibid 116.

²³³ Ibid.

²³⁴ Ibid.

For public sector positions, Cain, Macourt and Mulherin have commented that their location and number was determined by other factors, including community need, available resources and political imperatives.²³⁵ However, market forces were also relevant, for instance when new public positions were created to fill gaps which were not met by the private sector.²³⁶ The dynamics of population change meant that demand for free legal assistance was as high as ever in many rural areas.²³⁷

Based on these findings, Cain, Macourt and Mulherin summarised that the availability of solicitors in RRR areas is dependent first on the existence of legal positions, and only then on recruitment and retention to fill those positions. As some areas do not have the population to sustain a viable legal practice, alternative models of legal service delivery may need to be developed and implemented in those areas. They suggest that recruitment and retention issues in RRR areas should be considered as part of a more significant question: 'How to provide the appropriate mix of legal services to address the range of legal needs in RRR areas, especially in remote areas and areas experiencing declining populations?'²³⁸

The above research points to the need for a nuanced discussion regarding access to lawyers in RRR areas, given the considerable variability in RRR locations and likelihood that different responses are appropriate in different locations. Future national data collection could identify overall numbers of solicitors according to Australian Bureau of Statistics ('ABS') area classifications, and consistently classify the nature of their work, core client types and the capacity in which it is undertaken, for example, as sole practitioners, in private firms, government, corporate or public legal assistance services. This would enable better analysis to be undertaken of shortages and trends in specific areas, in light of available demographic and economic data about each local area, and facilitate a more nuanced and targeted discussion.

Nevertheless, the existing Urbis nationwide data on solicitors, and research undertaken by Cain, Macourt and Mulherin (and Forell, Cain and Gray) regarding NSW solicitors in RRR locations, do prompt critical questions about the numbers and proportions of solicitors in RRR versus urban areas in Australia, given the stark contrasts presented, and what is an 'appropriate mix' overall.

Justice Project feedback

Justice Project submissions and consultations have reinforced concerns regarding many of the themes raised above, as well as providing additional perspectives. Key themes raised included:

- *General shortages of lawyers in RRR areas* – for example, Legal Services Commission of South Australia commented that 'rural and remote communities have been hard hit by the gradual removal of legal services ranging from court closures to difficulties attracting young lawyers to regional towns.'²³⁹ These included both shortages of legal assistance services, and

²³⁵ Ibid xi.

²³⁶ Ibid.

²³⁷ Ibid 116.

²³⁸ Ibid xiii.

²³⁹ Legal Service Commission of South Australia, *Submission No 63*. See also, eg, Knowmore, *Submission No 102*; Community Legal Centres NSW, *Submission No 106*; Hume Riverina CLC, *Submission No 122*; Women's Legal Service Tasmania, *Submission No 124*; Consultation, 14/09/2017, Bourke (Aboriginal Legal

private practitioners, as discussed below. A wide range of areas of unmet legal need were flagged in various RRR areas. These included: civil matters such as fines, evictions, child protection, and mental health law; family law matters including family violence; and criminal matters including for driving offences.

- *Scarce and over-stretched legal assistance services in RRR areas* – NSW CLCs' submission emphasised that community legal centres are stretched thin across RRR areas, which necessitates both better promoting existing centres and providing additional government resources to ensure that individuals with legal needs and little means are not denied access to justice.²⁴⁰ Western NSW Community Legal Centre, which operates out of Dubbo, encompasses the majority of Northern and Western rural NSW, said it faces 'a very difficult task in providing support services to this very large area'.²⁴¹ Similarly, Shoalcoast Community Legal Centre indicated that it provides services from the south of Sydney to reaching all the way south to the Victoria border.²⁴² During consultations, the Aboriginal Legal Service in Bourke noted that it was very stretched, doing the best that it could with two solicitors servicing thousands of people across a huge geographic area:

*There can be 100 matters on a list in one day. That adds up to 5-10 minutes of time with a lawyer for each person. It is impossible to cover everything in that time.*²⁴³

Central Australian Aboriginal Legal Service ('CAALAS') similarly described itself as 'hampered by an enormous caseload', which was exacerbated by a high staff turnover.²⁴⁴ Aboriginal Legal Service staff in Kalgoorlie told the Justice Project that the service was critically understaffed for the very high numbers of clients it saw.²⁴⁵

Knowmore highlighted that while visiting or outreach service models are often relied upon to reach geographically isolated clients, this can be at the cost of meaningful connections over time, including support that is consistent and available when needed.²⁴⁶ Regional Alliance West noted that its rural women's legal outreach service to outlying rural communities of Midwest Western Australia had to be cut due to funding cuts. While it continues to service these communities through telephone or video link, it indicates that

Service (NSW/ACT)); Consultation, 08/09/2017, Kalgoorlie (Aboriginal Family Law Services); Consultation, 29/04/2017, Alice Springs (Central Australian Aboriginal Legal Aid Service); Consultation, 26/09/2017, Mildura (Victoria Legal Aid); Consultation, 03/04/2017, Adelaide (Law Society of South Australia); Consultation, 03/04/2017, Adelaide (South Australian Council of Community Legal Centres); Consultation, 10/08/2017, Canberra (Central Coast Community Legal Centre).

²⁴⁰ NSW CLCs, *Submission No 106*.

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ Consultation, 14/09/2017, Bourke (Aboriginal Legal Service (NSW/ACT)).

²⁴⁴ Consultation, 29/04/2017, Alice Springs (Central Australian Aboriginal Legal Aid Service).

²⁴⁵ Consultation, 06/09/2017, Kalgoorlie (Aboriginal Legal Service of Western Australia). See also Consultation, 08/09/2017, Kalgoorlie (Aboriginal Family Law Services).

²⁴⁶ Knowmore, *Submission No 102*.

this does not assist many family violence victims who often have their phone calls or emails monitored.²⁴⁷

VLA emphasised that critical gaps exist for legal representation for mental health tribunal proceedings in regional Victoria, including for electro-convulsive treatment ('ECT'). It noted that while in NSW, patients are represented at their mental health tribunal 78 per cent of the time, in Victoria it is 17 per cent and even lower in regional areas.²⁴⁸ In the last six months of 2017, there were 169 mental health hearings for Bendigo and VLA's specialist lawyer could not attend all of them. VLA stressed that representation makes a real difference - while the tribunal approves applications for ECT in 90 per cent of cases, this drops down to 50 per cent if the person has a lawyer there.²⁴⁹

- *Insufficient loading for legal assistance services to deliver effectively to RRR areas* – For example, Knowmore reinforced that:

*...existing legal assistance service models are often not sufficiently resourced to provide the extent of outreach that many smaller communities require, in particular to remote Aboriginal and Torres Strait Islander communities, where although client numbers may not be high, the level of need and vulnerability is... these clients often then struggle to receive the same access to legal advice, information and referral as others living in more populated areas.*²⁵⁰

Its view is that while the provision of effective legal services to RRR regions is expensive, it is also well justified in terms of engagement with society and the increase in well-being of the communities reached.²⁵¹

The additional cost of service provision to RRR areas was also highlighted by NSW CLCs, which suggested that greater time allowances were needed for legal professionals having to travel and respond to clients' needs.²⁵² Regional Alliance West supported greater recognition of the greater burden of RRR service delivery:

*For those of us living and working in a regional area, and servicing an enormous rural and remote region, the resourcing implications of attempting to address multiple areas of disadvantage are sometimes overwhelming and poorly understood by those making decisions about the allocation of resources from centralised, metropolitan areas ... We seem to be expected to deliver the same level of service for the same cost and in the same time frames as those living in metropolitan areas, which is just not possible.*²⁵³

²⁴⁷ Regional Alliance West, *Submission No 94*.

²⁴⁸ VLA, *Submission No 18*; Stephanie Corsetti, 'Low mental health legal representation in regional Victoria affects patient outcomes, Legal Aid says' (21 March 2018) *ABC News* <<http://www.abc.net.au/news/2018-03-21/mental-health-legal-representation-low-in-regional-victoria/9571696>>.

²⁴⁹ Corsetti, *ibid*.

²⁵⁰ Knowmore, *Submission No 102*.

²⁵¹ *Ibid*.

²⁵² Community Legal Centres NSW, *Submission No 106*.

²⁵³ Regional Alliance West, *Submission No 94*. The Law Access Stakeholders Advisory Group in Western Australia raised similar points regarding the additional cost of service provision in RRR WA: Consultation, 08/09/2017, Perth (Law Access Stakeholders Advisory Group).

- *Insufficient private practitioners* – For example, the Hume Riverina Community Legal Service considered that while legal needs had increased in regional areas recently, at the same time, there were shortages of lawyers. It states that the implications are serious, given that RRR private practitioners undertake significant amounts of legal aid work.²⁵⁴ One regional private practitioner commented of legal aid rates:

*It impacts on our bottom line. We need make money to survive, but we want to help the community too – otherwise we'd be in Melbourne making lots more money.*²⁵⁵

One Cooma-based private practitioner noted that as the only firm in town offering legal aid services, it had recently had to stop doing so for family law matters as it was unable to fill its family lawyer vacancy. This meant that clients who could not pay for services were being referred for legal aid family law matters to the nearest service, which was 200 km away on the South Coast of NSW.²⁵⁶

More generally, this practitioner noted that the profession was ageing in many RRR areas:

*I'm the youngest lawyer in town. We have two practitioners in the town who are almost 80. They have an employed solicitor who is not interested in a partnership so what do they do when they've finished – who services those clients? How do we continue to provide legal services in the bush?*²⁵⁷

She observed that as legal services gradually declined in the bush, this left those remaining solicitors with ever-increasing workloads, in turn affecting their ability to take on pro bono and volunteer work.²⁵⁸

Hume Riverina Community Legal Service also emphasised the importance of private solicitors' pro bono assistance to its community legal work, noting that local gaps in family law pro bono legal work leave financially disadvantaged clients with limited options for representation.²⁵⁹ CLCs NSW shared these concerns that a lack of RRR of private practitioners translates to shortages of pro bono services.²⁶⁰ Meanwhile, the Law Access Stakeholder Advisory Group was concerned that few private practitioners existed above Geraldton.²⁶¹

- *Conflict of interest* – this was described as an acute and significant problem, including in Mildura,²⁶² the APY lands,²⁶³ North-Eastern Victoria,²⁶⁴

²⁵⁴ Hume Riverina Community Legal Service, *Submission No 122*.

²⁵⁵ Consultation, 26/09/2017, Mildura (Private practitioner).

²⁵⁶ Consultation, 29/03/2018, Teleconference (Private practitioner - Cooma).

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Hume Riverina Community Legal Service, *Submission No 122*.

²⁶⁰ Community Legal Centres NSW, *Submission No 106*.

²⁶¹ Consultation, 08/09/2017, Perth (Law Access Stakeholders Advisory Group).

²⁶² Consultation, 26/09/2017, Mildura (Private practitioner); Consultations, 26/09/2017, Mildura (Victoria Legal Aid).

²⁶³ Consultation, 04/04/2017, Adelaide (Aboriginal legal Rights Movement);

Townsville,²⁶⁵ Kalgoorlie,²⁶⁶ and north-west Tasmania.²⁶⁷ Hume Riverina Community Legal Service highlighted that during June to October 2015, over 25 per cent of clients were turned away each month for this reason, with this percentage increasing up to 37 per cent, creating a significant issue and barrier to people living in North Eastern Victoria.²⁶⁸ It strongly supported funding more than one community legal centre in each region, to address conflict of interest issues.²⁶⁹

VLA's Mildura office stated that 'we still have people coming from Bendigo Legal Aid four hours away when we have conflicts'.²⁷⁰ Women's Legal Service Tasmania described conflicts of interest as 'severely impacting' access to justice for potential clients in remote regions of Tasmania when the client does not have financial capacity to see a private solicitor and community legal centres are unable to assist due to professional conflict.²⁷¹

Townsville Community Legal Service explained that conflicts most commonly arose in family law and family violence matters – a real concern given that as discussed, the prevalence of family violence locally was particularly high locally.²⁷² For Aboriginal Family Law Services in Kalgoorlie, which had one solicitor managing family violence and related (eg child protection) matters across a vast geographic area, a conflict meant that there was simply no one else to do the work for its clients.²⁷³

- *Lack of specialist services* – these were raised in several contexts, such as for older RRR Australians, who the Council of the Ageing describes as experiencing poorer service across many areas of need.²⁷⁴ Legal Aid ACT agrees that specialist services for older Australians, particularly about elder abuse issues, form a key RRR service gap.²⁷⁵ The Law Society of NSW is particularly concerned about the lack of specialist legal service in regional and especially rural areas, particularly for Aboriginal and Torres Strait Islander children and young people.²⁷⁶ It supports specialised training for all professionals who work with children and young people as crucial to ensuring more effective access to justice in more remote areas.²⁷⁷ Other areas in which specialist legal service delivery to RRR areas were raised as limited included housing legal services, mental health law, and services targeting recent arrival clients given the expanding numbers locating in regional

²⁶⁴ Hume Riverina Community Legal Service, *Submission No 122*.

²⁶⁵ Consultations, 29/08/2017, Townsville (Townsville Community Legal Service).

²⁶⁶ Consultation, 08/09/2017, Kalgoorlie (Aboriginal Family Law Services).

²⁶⁷ Women's Legal Service Tasmania, *Submission No 91*.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Consultation, 26/09/2017, Mildura (Victoria Legal Aid).

²⁷¹ Women's Legal Service, *Submission No 91*.

²⁷² Consultation, 29/08/2017, Townsville (Townsville Community Legal Service).

²⁷³ Consultation, 08/09/2017, Kalgoorlie (Aboriginal Family Law Services).

²⁷⁴ Council on the Ageing, *Submission No 114*.

²⁷⁵ Legal Aid ACT, *Submission No 115*.

²⁷⁶ Law Society of NSW, *Submission No 111*.

²⁷⁷ Ibid.

locations.²⁷⁸ Recent arrival clients in RRR areas were often reliant on phone advice, which was inappropriate given their needs for face-to-face advice.²⁷⁹ The Mental Health Law Centre in Perth, which is the state's only specialist mental health law provider, noted that it appeared by video-link to some RRR areas, but that its reach was extremely limited.²⁸⁰

The pressures upon generalist services in RRR areas were also noted during consultations. Townsville Community Legal Service estimated that as a generalist RRR service, it dealt with at least 200 different legal problem types.²⁸¹ It identified that CLCs were shifting to specialist rather than generalist services, in order to provide meaningful advice and useful services. However, finding specialist lawyers could be difficult in rural locations due to limitations in resources and expertise.²⁸² Legal Aid Queensland's Townsville office flagged that the need for more specialist service provision posed challenges for traditionally generalist RRR services.²⁸³ While a generic lawyer had previously provided outreach services to remote locations on a monthly basis, this had proved to be ineffective because clients required specialised advice. Instead, outreach was now provided on an as-needs basis by specialised lawyers.²⁸⁴

- *Recruitment and retention issues* – Several RRR legal assistance services, particularly Aboriginal and community legal services in more remote regions, raised local challenges in recruitment and retention. For example, CAALAS and Legal Aid Commission NT's Alice Springs office noted that very high staff turnover, often due to the shock of working in communities with extremely challenging needs, undermined their effectiveness.²⁸⁵ CAAFLU stated that 'starry-eyed' young graduates from the city quickly burn out and leave.²⁸⁶ Further, that junior lawyers required at least a year in the job before they gained community trust, and the time taken to train new lawyers undermines the capacity of more senior staff.²⁸⁷ Similar issues were described by the Central Australian Women's Legal Service ('CAWLS'),²⁸⁸ while the Kalgoorlie Aboriginal Legal Service had been unable to fill its sole solicitor role for a year prior to its current solicitor commencing.²⁸⁹ The Law Access Stakeholders Advisory Group described recruitment and retention problems as acute for RRR Western Australian CLCs generally.²⁹⁰ Hume-Riverina Community Legal

²⁷⁸ Consultation, 04/04/2017, Adelaide (Housing Legal Clinic); Consultation, 18/08/2017, Melbourne (WEstjustice); Consultation, 05/09/2017, Perth (Mental Health Law Centre); Consultation, 29/08/2017, Townsville (Townsville Community Legal Service).

²⁷⁹ Consultation, 18/08/2017, Melbourne (WEstjustice).

²⁸⁰ Consultation, 05/09/2017, Perth (Mental Health Law Centre).

²⁸¹ Consultation, 29/08/2017, Townsville (Townsville Community Legal Service).

²⁸² Ibid.

²⁸³ Consultation, 29/08/2017, Townsville (Legal Aid Queensland).

²⁸⁴ Ibid.

²⁸⁵ Consultation, 29/04/2017, Alice Springs (Central Australian Aboriginal Legal Aid Service); Consultation, 29/04/2017, Alice Springs (Northern Territory Legal Aid Commission).

²⁸⁶ Consultation, 29/04/2017, Alice Springs (Central Australian Aboriginal Family Law Unit).

²⁸⁷ Consultation, 29/04/2017, Alice Springs (Central Australian Aboriginal Legal Aid Service).

²⁸⁸ Consultation, 29/04/2017, Alice Springs (Central Australian Women's Legal Service).

²⁸⁹ Consultation, 08/09/2017, Kalgoorlie (Aboriginal Family Law Services).

²⁹⁰ Consultation, 08/09/2017, Perth (Law Access Stakeholders Advisory Group).

Service indicated that both community legal services, as well as private practices, struggled to attract and retain staff. It supported incentives for lawyers who stay in country areas for at least five years.²⁹¹

Retention and recruitment issues were also raised in consultations by some regional private practitioners. One advised that so many practitioners came and left, it was difficult to succession plan. It was particularly difficult to attract and retain juniors, and more support and incentives – such as cadetships, additional university credits or more support – may be useful in this context.²⁹² However, another suggested that recruiting more experienced lawyers was more of an issue than junior lawyers. In that case, a firm had been seeking unsuccessfully to recruit a family law solicitor with 8-10 years' experience for eight months.²⁹³ Another agreed, noted that while junior lawyers were comparatively easy to recruit, they inevitably returned to the city after a few years.²⁹⁴

The LCA's RRR Law Committee considered that ongoing challenges in recruitment and retention in particular RRR locations required addressing. It supported including stronger RRR curricula into undergraduate legal education.²⁹⁵ In its members experience, one consistent issue was that young lawyers want experience in appearing in front of Magistrates and Judges. If circuit courts do not travel to RRR communities, that experience is unavailable to them.²⁹⁶ This point was confirmed by a Port Pirie practitioner, who commented that audio-visual link ('AVL') court sessions did not provide junior solicitors with the same opportunities as physically being before a Magistrate.²⁹⁷

However, not all of those consulted were faced with recruitment and retention problems,²⁹⁸ which suggests that, as suggested by Rice, more detailed and area-specific mapping is necessary. In this context, Legal Aid Western Australia raised the success of its Country Lawyers program (discussed in the Legal Services Chapter (Part 2)).

²⁹¹ Hume Riverina Community Legal Service, *Submission No 122*.

²⁹² *Ibid.* See also Consultation, 12/04/2018, Teleconference (Private practitioner - Port Pirie).

²⁹³ Consultation, 26/09/2017, Mildura (Private practitioner).

²⁹⁴ Consultation, 06/04/2018, Teleconference (Private practitioner - Townsville),

²⁹⁵ Consultation, 12/09/2017, Teleconference (LCA RRR Law Committee).

²⁹⁶ Consultation, 12/04/2018, Teleconference (Private practitioner - Port Pirie); Consultation, 06/04/2018, Teleconference (Private practitioner - Townsville).

²⁹⁷ Consultation, 12/04/2018, Teleconference (Private practitioner - Port Pirie).

²⁹⁸ Eg, Consultation, 26/09/2017, Mildura (Victoria Legal Aid); Consultation, 29/08/2017, Townsville (Legal Aid Queensland); Consultation, 9/09/2017, Perth (Legal Aid Western Australia).

Impacts of lawyer shortages

Inaction and escalation of matters

The CRRLJ has highlighted that the lack of lawyers and other dispute resolution services 'can prolong and exacerbate matters, which impacts on costs and aggravates individual, family and community tensions'. It also impacts on the health and safety of individuals involved – for example, some women in RRR areas stay in violent relationships due to the lack of access to affordable legal advice and representation. When RRR communities lack legal assistance services, it states that 'the inevitable consequence is that legal problems remain undetected, communities remain uninformed about fundamental legal issues, and so more serious legal problems which are more costly both socially and economically, arise later on'.²⁹⁹

Responding to the Justice Project, a private practitioner in Cooma commented that locally:

*People often appreciate that they have a legal issue but they can't afford to do anything about it – eg they've been evicted from their house, or there's debt recovery issue. They know that it can be legal but they'll try and sort it out on their own, or rather not sort it out because they can't do anything about it and then it escalates until it winds up in court. We don't have a community legal centre here which could give people quick advice on these sorts of things.*³⁰⁰

Regional Alliance West provided the following case study illustrating how issues can escalate gravely for families in circumstances where there is insufficient access to legal assistance:

Samantha and her children had been residing in a Department of Communities (Housing) 'DCH' property situated in a rural town. Unfortunately, while Samantha and her children were attending a relative's funeral in another rural town, some young children entered the property, vandalising it and causing thousands of dollars damage. Samantha had reported the break-in and vandalism to the Police, who did nothing about it, and also to DCH, who came out and took photos of the damage.

As a result of the property damage Samantha and her children were evicted from the property and became homeless.

Samantha was unaware of her legal rights as a tenant and she did not have access to legal advice in her rural community. She was therefore unaware that she could have possibly appealed the eviction decision and avoided homelessness. Samantha stated that she had put in several applications for private rental properties and each time she was declined but the real estate agencies would not tell her why they kept declining her... DCH stated that, due to Samantha's previous property standards, they were not prepared to include her on the Homelessness program until she could prove that she could maintain a private rental tenancy for at least 6 months.

*... As a result of Samantha still being homeless, the Child Protection section of the Department removed her children from her care until she could access permanent housing.*³⁰¹

²⁹⁹ Centre for Rural Regional Law and Justice and National Rural Law, Submission No 4 to Department of Justice and Regulation (Victoria), *Access to Justice Review*, 9.

³⁰⁰ Consultation, 29/03/2018, Teleconference (Private practitioner - Cooma).

³⁰¹ Regional Alliance West, *Submission No 94*.

Self-representation

As discussed elsewhere in the Justice Project, data on self-representation in Australian courts and tribunals is patchy. In particular, regional breakdowns demonstrating the extent of self-representation do not appear to be available. However, commentators have drawn attention to the likelihood that in regional areas with a paucity of lawyers, 'it can be expected that a greater proportion of [individuals] will be unrepresented in court'.³⁰² The CRRLJ emphasises that analysis of self-representation should consider the extent to which it is caused by geographic, as well as other, constraints.³⁰³

Lawyers interviewed by Cain, Macourt and Mulherin in areas lacking legal services reported that the consequence for people was either travelling long distances to find lawyers, or 'choosing' to go without legal assistance:

What people are tending to do is put up with it [and] not bother to get a solicitor unless it's extremely urgent, [they will] represent themselves in court or try and muddle their way through filling forms to doing whatever they have to do. (Private legal practitioner, South Western area, NSW).³⁰⁴

Justice Project respondents raised concerns about self-representation among RRR Australians. For example, the Townsville Community Legal Service observed that people were more likely to self-represent, but less able to do so due to the increasing complexity of the legal system.³⁰⁵ Hume Riverina Community Legal Service commented that local gaps in pro bono family law leave clients self-representing to their own detriment, as 'clients may choose to self-represent but the process is complicated and not a viable option for many people'.³⁰⁶

Aboriginal Family Law Services in Kalgoorlie commented that where services could not help people with family and child protection matters, 'people don't want to go and represent themselves at a hearing. They won't pursue it'.³⁰⁷

One case study provided to the Justice Project regarding the distress that self-representation can cause involved Layla, a survivor of family violence:

Layla had been separated from Brian, the father of her 8-year-old daughter, for 8 years. Layla had left Brian due to his violence towards her and unpredictable behaviour. After she left him he had run her over and absconded with their daughter, who was still being breastfed at the time.

Since separating, Layla has had a number of violence restraining orders against Brian... Brian has brought a number of actions in the Family Court over the years for contact to their daughter and Layla says that she has spent approximately \$25 000 on lawyers and can no longer afford to put money into legal fees...

³⁰² Centre for Rural Regional Law and Justice and National Rural Law, Submission No 4 to Department of Justice and Regulation (Victoria), *Access to Justice Review*, 10; Harris et al, 'Courting justice beyond the cityscape', 165.

³⁰³ Centre for Rural Regional Law and Justice and National Rural Law and Justice Alliance, *Joint Access to Justice Arrangements Submission*, 1-2.

³⁰⁴ Cain, Macourt and Mulherin, *Lawyer availability and population change*, 102.

³⁰⁵ Consultation, 29/08/2017, Townsville (Townsville Community Legal Service).

³⁰⁶ Hume Riverina Community Legal Service, *Submission No 122*.

³⁰⁷ Consultation, 08/09/2017, Kalgoorlie (Aboriginal Family Law Services).

Layla had recently relocated to Carnavon and attended on our Carnavon-based paralegal for assistance, as she was attending court that same day to try and renew her VRO against Brian, which had expired ... She said that Brian was using the arrangements set out in the Family Court orders as an opportunity, with the assistance of his current partner, to harass and talk Layla...

Although our paralegal was able to provide Layla with information and advice about her situation Layla really wanted to have some assistance in court that day, as she felt so worn down, vulnerable, anxious and disbelieved that she didn't think she could adequately represent herself. As the funding for our Gascoyne service is insufficient to attract and retain a lawyer we are limited to providing a paralegal service, which means we are not able to provide court representation to people in Layla's position.³⁰⁸

Loss of social capital, disengagement

Beyond the impacts on particular individuals, several commentators emphasise the loss to whole RRR communities of a paucity of lawyers and courts. It has been suggested that 'a lack of legal services puts 'the future of [rural] communities... in serious doubt'.³⁰⁹

An important point in this regard is the level of pro bono and voluntary work undertaken by local practitioners in RRR communities. As discussed, the Law Council's 2009 survey reported that 64 per cent of respondents undertook pro bono work, and 71 per cent took on other unpaid voluntary work.³¹⁰ As one private practitioner in the North West of NSW has put it:

But here's the problem, when I retire, and all the other lawyers you've been talking to retire, who does that work? Who sits on the committees of any number of community organisations? There's honorary secretary or honorary treasurer providing advice on that sort of basis to numerous community groups.³¹¹

Rice notes that:

Lawyers have a recognised place in the civic identity and economic viability of rural communities: 'well beyond the delivery of specific services to particular clients, [lawyers are] catalysts and supporters of a variety of types of innovation in communities, and... contribute to the fabric of respect for the law that is at the heart of civil society'... The loss of legal practitioners 'is felt in the fabric of the community, as is the absence of a doctor, nurse, accountant or any of a number of other professionals that are part of the "normal" composition of more urban communities'. There is therefore a strong public policy argument to be made for maintaining rural legal practices as integral to civil identity in rural towns.³¹²

Similar points were made by the Law Society of South Australia during Justice Project consultations about the role of lawyers in underpinning local RRR communities:

³⁰⁸ Regional Alliance West, *Submission No 94*.

³⁰⁹ Rice, *Access to a lawyer in rural Australia*, 26, citing John Corcoran, 'Legal Lie 2020: Rural Lawyers Will Become a Dying Breed' *Lawyers Weekly*, 17 September 2009.

³¹⁰ Law Council of Australia, *Report into the Rural, Regional and Remote Areas Lawyers Survey*, 6.

³¹¹ Cain, Macourt and Mulherin, *Lawyer availability and population change*, 106.

³¹² Rice, *Access to a lawyer in rural Australia*, citing Paul Martin, Jacqueline Williams and Amanda Kennedy, 'Professional Services and Rural Services Poverty' (2011) 16(1) *Deakin Law Review* 57, 62.

*Once a community loses its doctor, lawyer, accountant, it becomes difficult to sustain a vibrant, healthy community.*³¹³

Courts and tribunals

Research

Coverdale's research particularly highlighted critical justice barriers posed to regional Victorians due to lack of accessible local courts. He documented a substantial decline in Victorian Magistrates Courts, including the closure of 65 courts in 30 years, down to 54 Magistrates Court locations by 2010.³¹⁴ Coverdale noted that 'this drastic reduction in the number of regional court and localised courts services has had a significant effect on regional communities'.³¹⁵ He cited sentiments that 'in rural Victoria many people believe they are treated as being part of an outpost or backwater from Melbourne. This philosophy not only reduces the rural community access, it also costs them financially in terms of time, travel and accommodation expenses'.³¹⁶ Of Coverdale's survey respondents, 79 per cent agreed that regional communities were disadvantaged because of the distance they must travel to attend court.³¹⁷ Similar concerns regarding the reduced presence of NSW courts in RRR locations have been identified.³¹⁸

Coverdale identified a key issue regarding the prevailing 'problem solving' or 'therapeutic justice' approach in Magistrates Courts, which was based on addressing the underlying links between disadvantage and offending through sentences lining offenders to relevant programs and services. This model, he argued, had only limited availability for regional Victorians, given that such programs – including the Court Integrated Services Program providing multi-disciplinary treatment, credit bail programs and mental health court liaison officer services – were often not available at regional courts.³¹⁹ While there were indications of these programs' success for defendants, the 'inherent unfairness' of their lack of availability to RRR populations was underlined.³²⁰ Their absence in many regional centres, Coverdale argued, was likely to result in inequitable outcomes for court participants,³²¹ with reduced court and community support and rehabilitation programs limiting the sentencing options available to Magistrates.³²² Around 65 per cent of all survey respondents believed that their clients were disadvantaged by the lack of local access to Magistrate Court programs.³²³

Further, 74 per cent agreed that their clients were disadvantaged by a lack of local access to specialist Magistrates' Courts (eg, Drug Courts, the Family Violence Division, the Koori

³¹³ Consultation, 03/04/2017, Adelaide (Law Society of South Australia).

³¹⁴ Coverdale, *Postcode Justice*, 33.

³¹⁵ *Ibid* 34.

³¹⁶ *Ibid* citing Law Reform Committee, Parliament of Victoria, *Review of Legal Services in Rural and Regional Victoria* (May 2000), 289 (Clerk of Courts Group).

³¹⁷ *Ibid* 13.

³¹⁸ Cain, Macourt and Mulherin, *Lawyer availability and population change*, 121.

³¹⁹ Coverdale, *Postcode Justice*, 36-7.

³²⁰ *Ibid* 39.

³²¹ *Ibid* 9.

³²² *Ibid* 43, citing Russell Hogg and Kerry Carrington, *Policing Rural Australia* (Irwin Law, 2006), 98 and Elaine Barkley, Joseph Donnermeyer, John Scott and Russell Hogg, *Crime in Rural Australia – Hogg Punishment and the Courts in Rural Australia* (Federation Press, 2007) 167-179.

³²³ *Ibid* 47.

Court and Children's Court).³²⁴ The rollout of these services was generally limited to larger regional centres.³²⁵ Other issues concerned infrequent sittings, the workload of remaining regional Magistrates' Courts and poor standards of amenities. This included a lack of mediation services, poor security, and a lack of separate waiting areas or client interview rooms, safe spaces for victims of violence, and video-conferencing facilities in smaller regional courts.³²⁶

Coverdale identified that in the County Court regional circuit, problems included a lack of notice given for hearing dates, making it difficult to obtain experienced barristers and expert witnesses,³²⁷ and delays in resolving matters.³²⁸ For regional Victorians, these problems meant that their lives were put on hold, it was harder to secure witnesses and recall events, increased their expenses and was likely to undermine their confidence in the justice system.³²⁹ A regional lawyer indicated that 'there is a sense in regional and rural Victoria that you are forgotten... that you just have to put up with second-rate services'.³³⁰ Other problems raised by Coverdale included relatively poor regional access to the Victorian Civil and Administrative Tribunal, noting that its less formal or adversarial approach was well suited to country towns, where 'people have to live together after a dispute'.³³¹

A recent review of Victorian courts found dramatic disparities and overall poor infrastructure in Victorian courts, particularly the Bendigo Law Courts.³³² Another review of the Geelong Magistrates' Court found that 'many Magistrates' Courts in rural and regional areas are not designed for large volumes of cases, with reports of long waiting periods for cases to be heard, a lack of security and limited safe, private waiting areas'.³³³ Survey participants consistently raised concerns around the long waiting times at court due to the high volume of cases and the limited safe separate waiting areas for women appearing for Family Violence Intervention Order ('FVIO') applications.³³⁴

Similar problems have been raised by other commentators.³³⁵ One review, by Harris et al, of Magistrates Courts in RRR locations across Australia,³³⁶ reinforced Magistrates Courts' essential role in delivering local justice in rural and remote areas, noting that they are 'important spaces of innovation and social change'.³³⁷ However, they highlight that regional citizens often travel great distances to attend Magistrates Courts, without

³²⁴ Ibid 41.

³²⁵ Ibid 42.

³²⁶ Ibid 45-50.

³²⁷ Ibid 50-5.

³²⁸ Ibid 57.

³²⁹ Ibid 57-9.

³³⁰ Ibid 58.

³³¹ Ibid 59-61.

³³² Emma D'Agostino, 'Bendigo Law Courts redevelopment a priority in Court Services Victoria strategic asset plan' (10 February 2017) *Bendigo Advertiser* <<http://www.bendigoadvertiser.com.au/story/4459014/plan-pushes-for-bendigo-law-courts-redevelopment/>>.

³³³ Jordan and Philips, *Women's experiences of surviving family violence and accessing the Magistrates' Court in Geelong, Victoria*, 10.

³³⁴ Ibid 5.

³³⁵ See, eg, Little, 'Regional Justice', 24; Centre for Rural Regional Law and Justice and National Rural Law and Justice Alliance, *Joint Access to Justice Arrangements Submission*, 4.

³³⁶ Harris et al, 'Courting justice beyond the cityscape', 151.

³³⁷ Ibid.

guarantees that scheduled hearings will proceed, while the certainty of hearing dates at regional circuit courts cannot be assured, and courts take place at irregular intervals.³³⁸ Heavy caseloads, limited time and resources compound these problems, placing substantial financial and emotional burdens on citizens and impacting their public confidence in courts.³³⁹ These authors also point towards inadequate support services and 'drastically less access to specialist courts in RRR areas and consequently fewer sentencing options and diversionary pathways'.³⁴⁰ While the available research is limited, Harris et al have considered that existing information available 'suggests an inequitable provision of justice services between metropolitan and RRR communities, raising concerns regarding equitable justice outcomes'.³⁴¹ They identify particular risks for people with a mental health condition, victims of family violence, and Aboriginal and Torres Strait Islander people, culturally and linguistically diverse people and children who engage with Magistrates Courts in RRR Australia.³⁴²

Most recently, the CRRLJ has summarised the disadvantages relating to access to courts and court processes as including travel and public transport availability, availability of court and community based services and programs, cost and time of discovery, and cost and availability of legal representation, experts and witnesses.³⁴³ Magistrates must also sit on matters across a broader range of jurisdictions, placing demands on their expertise.³⁴⁴ The CRRLJ has particularly drawn attention to the need to expand family violence specialist services to regional Magistrate's Courts, as its research highlights that women's safety is placed at risk in regional areas where the complexities of family violence are not understood or dealt with appropriately by the court.³⁴⁵

Little describes some of the 'inadequacies of the makeshift courtrooms' encountered on remote Magistrates court circuits.³⁴⁶ She states that despite extreme heat and extreme cold, air-conditioning and heating are often non-existent or broken, lawyers have limited access to speak privately with clients and witnesses, as well as power failures, and limited telephone access in some areas. Witnesses and defendants must travel long distances to attend these circuit courts, which is time-consuming and costly.³⁴⁷

Justice Project responses

Justice Project stakeholders have also affirmed that there are ongoing concerns about court access in many RRR areas.³⁴⁸ Reductions in local circuit courts were lamented, including due to the loss of justice being 'seen to be done' within the community.³⁴⁹ One

³³⁸ Ibid. See also Little, 'Regional Justice', 24.

³³⁹ Ibid.

³⁴⁰ Ibid 161.

³⁴¹ Ibid 160.

³⁴² Ibid 163-70.

³⁴³ Centre for Rural Regional Law and Justice and National Rural Law, Submission No 4 to Department of Justice and Regulation (Victoria), *Access to Justice Review*, 2.

³⁴⁴ Ibid.

³⁴⁵ Ibid 9 citing Jordan and Philips, *Women's experiences of surviving family violence and accessing the Magistrates' Court in Geelong, Victoria*.

³⁴⁶ Little, 'Regional Justice', 24.

³⁴⁷ Ibid.

³⁴⁸ Regional Alliance West, *Submission No 94*; Community Legal Centres NSW, *Submission No 106*.

³⁴⁹ Consultation, 26/09/2017, Mildura (Private practitioner); Consultation, 12/09/2017, Teleconference (LCA RRR Law Committee); Consultation, 12/04/2018, Teleconference (Private practitioner - Port Pirie).

private practitioner in Port Pirie commented that of the increasing tendency to deliver Magistrates Court services by AVL:

What are the effects of not having the local Magistrates? The community is affected. You can't see the everyday nature of the law in your community when you don't have any lawyers or court staff. You do see the police – there are plenty of them. We need governments to understand the ramifications of the loss of courts and lawyers in rural communities.³⁵⁰

This practitioner suggested that instead of removing Magistrates' physical presence from RRR communities, AVL could instead be used differently. The Magistrate could be retained locally, and AVL could be used to link the Magistrate to conduct city-based work at times of insufficient local demand.³⁵¹

In its submission, CLCs NSW also refers to a lack of judges and courts in easy to access areas, with cases often heard in local Sydney courts, despite the often-considerable distances individuals must travel to hearings.³⁵² In one Western NSW CLC example, the client, a middle-aged man with a workplace incurred injury required help with an employment law general protections matter. The first Federal Circuit Court mention was listed in Sydney, around eight hours away by car. However, the client was unable to drive, and it would have been 'almost impossible' to attend the mention without assistance. Fortunately, the lawyer was in Sydney for other reasons and appeared for the client. Subsequent efforts to arrange for the client to attend the mediation by telephone were not agreed by the other side. While, ultimately, pro bono legal assistance in Sydney was secured, this was a stark example of the difficulties which can be faced by RRR clients in attending city hearings.³⁵³

The Law Society of NSW noted that while specialist Children's Magistrates deal most appropriately with care and protection and criminal matters involving children, their reach does not currently extend well into many RRR areas of NSW, where Local Court Magistrates who do not have specialist expertise adjudicate outcomes which may not adequately reflect the best interests of the child.³⁵⁴ The NPY Women's Council submitted that lengthy court processes and delays in the NPY region can appear 'inconsistent and illogical' for victims of family violence.³⁵⁵ Regional Alliance West also raised the barriers experienced by family violence victims with respect to court hearings:

The Family Court is based on Perth, which is approximately 950 kilometres south of Carnavon and 450 kilometres south of Geraldton. There are no Family Court circuit visits to Carnavon and only one every fourth months (ie three per year) to Geraldton. If matters are urgent, then litigants can apply to appear in Perth by telephone or video link but issues with technology and obtaining advice can prove difficult for these clients. Many end up being self-represented with limited legal advice.

Appearing in court by electronic means is difficult for anyone... but even more so for a stressed and overwhelmed person who is suffering from the effects of family violence.³⁵⁶

³⁵⁰ Consultation, 12/04/2018, Teleconference (Private practitioner - Port Pirie).

³⁵¹ Ibid.

³⁵² Community Legal Centres NSW, *Submission No 106*.

³⁵³ Ibid.

³⁵⁴ Law Society of New South Wales, *Submission No 111*.

³⁵⁵ NPY Women's Council, *Submission No 129*.

³⁵⁶ Regional Alliance West, *Submission No 94*.

In consultations, organisations also emphasised the effects for RRR Australians of inadequate court access. In Alice Springs, the Northern Territory Legal Aid Commission's office stated that the courts were overloaded, with the best part of a year to wait for a Supreme Court trial. The consequence was that many defendants were held on remand for this period.³⁵⁷ In Mildura, Victoria Legal Aid's office highlighted the consequences for clients with little means of waiting for child protection matters to be heard locally:

*There is certainly a disadvantage for RRR clients in court. In one current example, there's a three month wait for child protection matters, compared to three weeks in Melbourne. The family is really disadvantaged. The mother in this case has lost, because at that time the new status quo is set and the baby has been put in care... It's seven hours on a bus to get to Melbourne. The child protection jurisdiction won't fund our clients to get there.*³⁵⁸

The lack of therapeutic and specialist courts were also of concern. For example, in Mildura and Kalgoorlie, the lack of a drug court was lamented, given its potential to assist clients with drug dependency issues.³⁵⁹

Community-based sentencing options

Just Reinvest NSW recently identified that Intensive Corrections Orders ('ICOs'), which provide alternatives to sentences of imprisonment enabling offenders to be managed in the community, supervised by a Community Corrections Officer and undertaking community service work, have been an underutilised sentencing option in regional and remote NSW. It states that in 2015, 74 per cent of NSW offenders who were sentenced to ICOs were in major cities, 19 per cent in regional towns, and just 0.6 per cent in remote NSW.³⁶⁰ It has called for additional resources and greater flexibility for approved service options to ensure the availability of ICOs for all NSW courts. It also recently called for more community services to support ICOs in NSW. These include residential drug and alcohol programs for Aboriginal and Torres Strait Islander people, mental health services, family violence and women's health services and a lack of bail accommodation services.³⁶¹ In this context, the NSW Government has recently strengthened the ICO regime, including by substantially increasing the number of Community Corrections Officers, as part of broader sentencing reforms.³⁶² The effects in RRR communities of these reforms to strengthen the NSW ICO regime are as yet unclear.

Coverdale has characterised the cost of the above-described issues as 'postcode justice'. There is, he states:

... a real danger of being two levels of justice system outcomes: Postcode Justice – dependent on where you live and the location of the court you attend. One system for metropolitan and larger regional centres with the services available to support more

³⁵⁷ Consultation, 29/04/2017, Alice Springs (Northern Territory Legal Aid Commission).

³⁵⁸ Consultation, 26/09/2017, Mildura (Victoria Legal Aid).

³⁵⁹ Ibid; Consultation, 06/09/2017, Kalgoorlie (Goldfields Drug and Alcohol Rehabilitation Service).

³⁶⁰ Just Reinvest NSW, *Policy Paper: Key Proposals #1 – Smarter Sentencing and Parole Law Reform* (17 May 2017) <<http://www.justreinvest.org.au/wp-content/uploads/2017/05/Just-Reinvest-NSW-Policy-Paper-Key-Proposals-11.pdf>>. Further work could be done to assess what proportion of those who are eligible for ICOs in RRR areas are in fact sentenced to an ICO, compared to urban areas.

³⁶¹ Ibid.

³⁶² Department of Justice (NSW), *Tough and smart sentencing for safer communities* (May 2017) <<http://www.vwccs.org.au/wp-content/uploads/2017/05/4-Stronger-Sentencing-Factsheet.pdf>>.

*progressive and innovative programs, and another for smaller regional communities without the required infrastructure.*³⁶³

Justice Project responses

The absence of RRR community-based sentencing options was also raised by Justice Project stakeholders. National Aboriginal and Torres Strait Islander Legal Services urgently recommended more culturally appropriate alternative sentencing options in RRR locations. It is concerned that the lack of these results in Aboriginal and Torres Strait Islander people being sentenced to a term of imprisonment which would not have been imposed if they had lived in a metropolitan area.³⁶⁴ Women's Legal Services Australia also called for flexible, accessible, non-custodial alternatives to prison to be more available, particularly in RRR areas and for pregnant women and carers.³⁶⁵ The Western Australian Commissioner for Children and Young People similarly prioritised ensuring that alternative sentences, such as community-based, diversionary options, are more readily available as an alternative to fines and other custodial orders, particularly in RRR areas. He stated that this would allow young people to remain in their communities with integrated support services and strategies, instead of the current practice of removing and sending them to detention many thousands of kilometres away.³⁶⁶

In Alice Springs consultations, a paucity of real alternatives to incarceration was identified, with community sentencing options being available but unable to be imposed for people in remote areas due to a lack of resources to supervise them.³⁶⁷ In Bourke, Aboriginal Legal Service and Maranguka Community Hub staff noted that ICOs were often unavailable because the surrounding area was too remote, and that generally a lack of diversionary sentencing options prevailed locally.³⁶⁸ It was concerned that resulted in harsher or longer sentencing.³⁶⁹ Legal Aid Queensland's Townsville office also commented that diversionary programs were generally unavailable in rural locations.³⁷⁰ A private practitioner in Mildura stated that sentencing alternatives were far worse over the border in country NSW:

*Sentencing alternatives – these are much worse in NSW. At sentence, there are programs in Broken Hill, like MERIT, but only if you live in Broken Hill, these are not available to others eg river communities. At sentence, in Broken Hill you can do community work but this is not available if you live elsewhere, that's off the table. You can't get an intensive corrections order because there's no one to supervise it, there's no ability for periodic detention, no home detention, they're all completely off the table for the whole district. So there's a whole level of sentencing that just doesn't exist. The sentencing rungs are completely missing... postcode justice. The lack of sentencing options puts a huge pressure on the courts- and the jails – you have no choices.*³⁷¹

³⁶³ Coverdale, 'Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law' (2011) 16 *Deakin Law Review* 156, 175.

³⁶⁴ NATSILs, *Submission No 121*.

³⁶⁵ Women's Legal Services Australia, *Submission No 124*.

³⁶⁶ Western Australian Commissioner for Children and Young People, *Submission No 37*.

³⁶⁷ Consultation, 29/04/2017, Alice Springs (Northern Territory Legal Aid Commission); Consultation, 29/04/2017, Alice Springs (Central Australian Aboriginal Legal Aid Service).

³⁶⁸ Consultation, 14/09/2017, Bourke (Aboriginal Legal Service (NSW/ACT)); Consultation, 14/09/2017, Bourke (Maranguka).

³⁶⁹ Consultation, 14/09/2017, Bourke (Aboriginal Legal Service (NSW/ACT)).

³⁷⁰ Consultation, 29/08/2017, Townsville (Legal Aid Queensland).

³⁷¹ Consultation, 26/09/2017, Mildura (Private practitioner).

In its *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* report, the Australian Law Reform Commission also recently recommended expanding the geographic reach of community-based sentencing options in RRR areas.³⁷²

Sentencing outcomes

The CRRLJ has indicated that ‘the impact on regional communities of the closure of local courts is significant’.³⁷³ It warns that factors such as the loss of local courts and the lack of availability of court or community based programs, all have ‘a significant but often unidentified negative effect on outcomes for rural and regional participants in terms of access, representation and resolutions or penalties’.³⁷⁴

Coverdale’s 2010 research also raised concerns that limitations in sentencing options available to RRR Magistrates result from fewer court and community-based support and rehabilitation programs. The relevant consequences may include higher imprisonment rates. He cited a 2006 examination drawing upon data compiled by the NSW Bureau of Crime Statistics and Research, which suggested that offenders sentenced in country locations were more likely to receive a custodial sentence compared with offenders in the metropolitan area.³⁷⁵ The discrepancy was attributed to the lack of community based sentencing options available at rural court locations, an ‘inequitable’ outcome.³⁷⁶ Coverdale also cited Hogg’s work as highlighting the relationship between limited penalty options and imprisonment, which suggested that rural and remote offenders were more likely to be imprisoned.³⁷⁷

Coverdale indicated that the limited availability of Victorian sentencing data made it difficult to explore regional and metropolitan comparisons in any detail.³⁷⁸ While the available data on community-based order sentencing and imprisonment sentences slightly favoured regional offenders, this data combined courts in both larger and smaller regional centres, limiting the ability to examine variations between the two. More detailed research was required.³⁷⁹ Coverdale was particularly concerned that young and Aboriginal and Torres Strait Islander people in RRR areas may experience disadvantage in sentencing outcomes.³⁸⁰

Similar concerns were identified in a 2014 study of the NSW Children’s Court by Fernandez et al, regarding a disparity between outcomes for young people in RRR areas

³⁷² Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, 2018) Rec 7.1 (*‘Pathways to Justice Report’*).

³⁷³ Centre for Rural Regional Law and Justice and National Rural Law and Justice Alliance, *Joint Access to Justice Arrangements Submission*, 7.

³⁷⁴ *Ibid* 7.

³⁷⁵ Coverdale, *Postcode Justice*, 62, citing Standing Committee on Law and Justice, Legislative Council (NSW), *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (30 March 2006).

³⁷⁶ *Ibid* 62.

³⁷⁷ *Ibid* 63, citing Russell Hogg, ‘Crimes Courts and Sentencing in Rural Communities’, in *Crime in Rural Australia* (Federation Press, 2007) 172-3.

³⁷⁸ *Ibid* 62.

³⁷⁹ *Ibid* 64.

³⁸⁰ *Ibid* 67.

compared to urban areas.³⁸¹ The study's participants identified that 'police practice varies between [rural and urban] areas with young persons in rural areas more likely to be treated as adults by police and to receive harsher sentences from magistrates'.³⁸² This may be partly due to the fact that many Children's Court matters are heard in the Local Court by non-specialist magistrates, with participants also noting differences regarding specialist courtrooms, availability of other specialised staff such as legal representatives and access to staff training. The Australian Institute of Health and Welfare has separately reported that on average between young people aged 10-17 years from 'remote' areas were five times as likely to be under youth justice supervision as those from 'major cities' in 2013-14.³⁸³ Similarly young people from 'very remote' areas were seven times as likely to be under supervision as those from 'major cities'.³⁸⁴

As noted above, Justice Project respondents have also raised concerns that sentencing outcomes in many RRR areas are worse, due to a lack of specialist and therapeutic courts and alternative sentencing options.

Alternative dispute resolution

A limited availability of quality alternative dispute resolution ('ADR') services, particularly for commercial and civil matters, has been identified as a service gap for RRR communities.³⁸⁵ In this context, the CRRLJ and the NRLJA have emphasised that:

*In smaller communities, it is likely that the parties will continue to have to deal with one another – sometimes personally as well as professionally, because of the more insular nature of those communities. Resolving matters through the collaborative processes of mediation rather than through litigation can therefore be a critical element in enabling that relationship to continue in a functional and positive way.*³⁸⁶

They further emphasised that:

*Some areas are more isolated than others and may not receive the regular services afforded to other regional areas. Early intervention, whether by dissemination of legal information or by early representation or alternative dispute resolution processes, reduces the cost to the justice system and to the community as a whole.*³⁸⁷

However, ADR has a 'relatively low profile and presence' in many RRR communities, with many lacking awareness of its potential.³⁸⁸ Sourdin has noted that vulnerable consumers, including people who live in rural areas, have been found to experience additional barriers to accessing ADR schemes,³⁸⁹ such as practical difficulties in accessing photocopying services.³⁹⁰ Economides has also suggested that ADR can be important in RRR

³⁸¹ Elizabeth Fernandez et al, University of New South Wales, *A Study of the Children's Court of NSW: Part of a National Assessment of Australia's Children's Courts* (2014) 21.

³⁸² Ibid.

³⁸³ Australian Institute of Health and Welfare, *Youth justice in Australia 2013-14*, Bulletin 127 (2015) 10.

³⁸⁴ Ibid.

³⁸⁵ Centre for Rural Regional Law and Justice and National Rural Law, Submission No 4 to Department of Justice and Regulation (Victoria), *Access to Justice Review*, 2.

³⁸⁶ Ibid 4.

³⁸⁷ Ibid 10.

³⁸⁸ Ibid 2.

³⁸⁹ Tania Sourdin, 'An alternative for who? Access to ADR processes' (2007) 10(2) *ADR Bulletin* 26, 27.

³⁹⁰ Tania Sourdin and Jane Elix, *Review of the Financial Industry Complaints Service 2002 – What are the Issues?* (August 2002) 72.

communities, including culturally competent services for Aboriginal and Torres Strait Islander populations.³⁹¹

As discussed in the Dispute Resolution chapter, several Justice Project stakeholders raised the increasingly vital and accepted role of ADR processes in offering a cost-effective, swifter and more informal means of accessing justice.³⁹² For many RRR residents, particularly with higher levels of legal capability, this is an important option given the delays, cost, transport and distance barriers which have been discussed above in accessing courts. However, there is little apparent information regarding the precise extent to which these services are available and taken up in RRR communities, by whom, and where gaps exist. This could form a fruitful area for future research and exploration.³⁹³

Critical support services

As discussed, Coverdale's work highlights the critical role played by non-legal services in underpinning the justice system, particularly therapeutic justice models. He states that:

*Community based programs for offenders and potential offenders have a real and attributable impact on the prevention of offending and re-offending. These programs include, for example, those in the areas of disability/psychiatric services, accommodation services, drug and alcohol programs, youth support services, mediation services, relationship counselling services, anger management or domestic violence counselling programs, victim/witness counselling services and interpreter services.*³⁹⁴

Such services play a growing and integral part in court diversionary programs.³⁹⁵ However, 66 per cent of respondents surveyed in Coverdale's research indicated that the lack of availability of such programs in their area impacted on justice system outcomes for their regional clients.³⁹⁶ This was particularly a problem in smaller regional locations. Harris et al concurred that the wide variety of community-based services which are necessary to support effective operation of the justice system are 'less accessible in most rural settings and completely absent from many'.³⁹⁷

This includes a lack of accredited interpreters in RRR areas,³⁹⁸ including AUSLAN interpreters,³⁹⁹ a problem reiterated by many Justice Project stakeholders.⁴⁰⁰ Povey Stirk Lawyers noted while interpreters were more readily available for criminal matters, there

³⁹¹ Economides, 'Can Law and Lawyers Resist Urban Imperialism?', 6.

³⁹² Resolution Institute, *Submission No 25*; Murray Kellam, *Submission No 26*; Australian Dispute Resolution Advisory Council, *Submission No 31*; Stephen Lancken, *Submission No 92*.

³⁹³ *Ibid*.

³⁹⁴ Coverdale, *Postcode Justice*, 74.

³⁹⁵ *Ibid*; Harris et al, 'Courting justice beyond the cityscape', 158.

³⁹⁶ *Ibid*.

³⁹⁷ Harris et al, 'Courting justice beyond the cityscape', 162.

³⁹⁸ *Ibid* 167.

³⁹⁹ Consultation, 29/08/2017, Townsville (Townsville Community Legal Service).

⁴⁰⁰ See, eg, Povey Stirk Lawyers, *Submission No 51*; Regional Alliance West, *Submission No 94*; NPY Women's Council, *Submission No 129*; Consultation, 10/08/2017, Canberra (Kimberley Legal Service); Consultation, 29/04/2017, Alice Springs (Central Australian Aboriginal Family Law Unit); Consultation, 04/04/2017, Adelaide (Aboriginal Legal Rights Movement); Consultation, 29/08/2017, Townsville (Townsville Community Legal Service).

was no equivalent free service for civil matters.⁴⁰¹ Clients who could not afford interpreters must either rely on family members or go without, and 'it is difficult to know how much miscommunication this results in'.⁴⁰² It was also noted that the more remotely an Aboriginal person resides, the more likely it will be that English is not their first language and the greater the need for an interpreter.⁴⁰³

Barwon Community Legal Service submitted that it can be very difficult to obtain appropriately accredited interpreters, given small regional pools and noting that both male and female interpreters are often required given cultural sensitivities.⁴⁰⁴ Despite booking weeks in advance for face-to-face interpreters of particular skills and gender, their availability is still not guaranteed. Milly's story below exemplifies the potentially severe consequences of a lack of interpreters in RRR areas:

Milly was referred to our service by the local Magistrates' Court for assistance with a divorce application. We used a telephone interpreter for our first appointment. The interpreter was on a mobile phone. It sounded like she was driving. The line dropped out just as Milly was disclosing the violence and the sexual assault she experienced during her marriage. She cried quietly while our lawyer called again for another interpreter to complete the interview.

We booked a face-to-face interpreter two weeks in advance for the next appointment. The divorce application had to be sworn and there was an affidavit accompanying it, which needed to be sworn too. A face-to-face interpreter is essential at an appointment like this. There is special provision in the jurat to ensure that the person swearing has understood exactly what they are putting their name to. We also planned to make a Victims of Crime Application so we had booked the interpreter for two hours.

One hour before the appointment, the Interpreter Service sent an email to say that they had been unable to allocate the interpreter despite having previously confirmed our booking with the correct date and time. This was not enough notice to reschedule the client so she had a wasted trip.

Milly was disappointed but resigned. She had a similar experience when reporting the family violence to police. We made another appointment but Milly cancelled. We have not heard from her again. Our efforts were frustrated by the inadequacies of the interpreter service.⁴⁰⁵

In Mildura, it was noted that recent arrival communities also lacked interpreters, and a tendency amongst local police not to use them was also observed.⁴⁰⁶

Poor access to safe and secure accommodation in many RRR locations, particularly for more disadvantaged clients, has been raised, including during Justice Project consultations and submissions.⁴⁰⁷ This affects clients in different ways. For example, Just Reinvest considers that poor bail accommodation contributes to higher numbers of

⁴⁰¹ Povey Stirk Lawyers, *Submission No 51*.

⁴⁰² *Ibid.*

⁴⁰³ Regional Alliance West, *Submission No 94*.

⁴⁰⁴ Barwon Community Legal Service, *Submission No 42*.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ Consultation, 26/09/2017, Mildura (Private practitioner).

⁴⁰⁷ See, eg, Law Society of New South Wales, *Submission No 111*; Consultation, 29/04/2017, Alice Springs (Central Australian Aboriginal Family Law Unit); Consultation, 26/09/2017, Mildura (Private practitioner); Consultation, 29/04/2017, Alice Springs (Central Australian Women's Legal Service); Consultation, 08/09/2017, Kalgoorlie (Aboriginal Family Law Services).

individuals on remand.⁴⁰⁸ This reflects Australian Institute of Criminology findings that a lack of appropriate services to support young people to obtain bail potentially contributes to the high number of young people on remand, particularly for young people from RRR areas and Indigenous young people.⁴⁰⁹ During consultations, Legal Aid Queensland's Townsville office also commented that bail support programs were generally unavailable in rural locations.⁴¹⁰

The Central Australian Aboriginal Family Law Unit noted that not only did clients coming into town from remote locations for court hearings had nowhere to stay, insufficient housing also contributed to decisions by departments that children be removed from their parents.⁴¹¹ CAWLS in Alice Springs also underlined that significant client needs were primarily housing, particularly for clients experiencing family violence who needed to transit from emergency accommodation to stable accommodation.⁴¹² For RRR clients in Western Australian, it was identified that scarce housing options made it significantly harder to leave violent relationships.⁴¹³ Temporary accommodation options were also needed for perpetrators: otherwise local police could reason that victims had access to refuges and perpetrators should remain in the family home.⁴¹⁴ In Mildura, a lack of appropriate, sustainable public housing was raised as a major, relevant barrier.⁴¹⁵ One regional practitioner noted that:

*One client recently – he had three children newly in his primary care, there was family violence on both sides, it was a terrible parental relationship. He had to leave his job to care for children... his family members couldn't put him up for long periods, the local services could put him up for just two weeks, he had no other accommodation except for a one week short term stay. He rang me and said he was aware he was breaching an AVO because he was dropping off the kids with their mother, he knew he would be breached and that he would go to jail, that's exactly what happened. He didn't have any other choices for what to do on housing. So a key priority for us would be ensuring access to housing and making sure that it is secure and sustainable.*⁴¹⁶

Other services which were highlighted during Justice Project consultations as crucial to underpin better justice outcomes included alcohol and rehabilitation services, counselling and mental health services, family violence support services, including for perpetrators, and youth engagement services in RRR regions.⁴¹⁷

⁴⁰⁸ Just Reinvest NSW, *Policy Paper: Key Proposals #1 – Smarter Sentencing and Parole Law Reform* (17 May 2017) <<http://www.justreinvest.org.au/wp-content/uploads/2017/05/Just-Reinvest-NSW-Policy-Paper-Key-Proposals-11.pdf>>.

⁴⁰⁹ Kelly Richards and Lauren Renshaw, *Bail and remand for young people in Australia: A national research project* (Research and public policy series No 125, Australian Institute of Criminology, 2013) <<https://aic.gov.au/publications/rpp/rpp125>>.

⁴¹⁰ Consultation, 29/08/2017, Townsville (Legal Aid Queensland).

⁴¹¹ Consultation, 29/04/2017, Alice Springs (Central Australian Aboriginal Family Law Unit).

⁴¹² Consultation, 29/04/2017, Alice Springs (Central Australian Women's Legal Service).

⁴¹³ Regional Alliance West, *Submission No 94*; Consultation, 08/09/2017, Kalgoorlie (Aboriginal Family Law Services).

⁴¹⁴ Ibid.

⁴¹⁵ Consultation, 26/09/2017, Mildura (Victoria Legal Aid).

⁴¹⁶ Consultation, 2017, (Regional Private practitioner).

⁴¹⁷ See, eg, Consultation, 29/04/2017, Alice Springs (Central Australian Aboriginal Family Law Unit); Consultation, 13/09/2017, Bourke (Department of Juvenile Justice, New South Wales); Consultation, 26/09/2017, Mildura (Private practitioner); Consultation, 05/09/2017, Perth (Aboriginal Legal Service of Western Australia); Consultation, 08/09/2017, Kalgoorlie (Youth Justice Services).

In particular, the National Congress of Australia's First Peoples and National Aboriginal and Torres Strait Islander Legal Services link the absence of culturally appropriate mental health services in many remote Aboriginal communities as inextricably linked to substance abuse and illness, which in turn often leads to crime.⁴¹⁸ During Bourke consultations, the need for mental health professionals was particularly reinforced as indispensable to better outcomes.⁴¹⁹ Another critical issue raised was insufficient drug and alcohol rehabilitation, particularly for young people.⁴²⁰ Mission Australia in Bourke raised that:

*There is nowhere for young kids to detox in rural areas... A 16-18 year old can go to hospital to detox, but nowhere if they are younger. It is backwards that you can go to juvie at 10, but you can't go somewhere to detox.*⁴²¹

Regional Alliance West similarly flagged the unavailability of drug rehabilitation programs, including the following example:

*We had contact with one Aboriginal lady at the Greenough Regional Prison who stated that she had tried very hard to access drug rehabilitation programs prior to her incarceration but had been unsuccessful. She was so desperate to get off drugs that she deliberately committed some offences, hoping to be imprisoned, to give her the opportunity to detox and perhaps access a program while inside.*⁴²²

While not all services were identified or needed in all locations, and different services were prioritised according to local needs, comparisons were drawn between the urban and RRR areas. As VLA's Mildura office noted:

*In a rural area you can't get access to the most intense services to progress issues. Your outcome is different in the country to your counterparts in the city. The laws and requirements are the same but the outcomes are different.*⁴²³

During consultations, some stakeholders also highlighted how insufficient bureaucratic services in RRR communities could result in, or exacerbate, legal problems. For the Kimberley Legal Service, this was particularly so when individuals could not obtain their drivers licences or identification, given the possibility of subsequent driving offences. It noted that '50 per cent of our work is helping people prove who they are'.⁴²⁴ This issue was also reflected in the Australian Law Reform Commission report recommendations.⁴²⁵ On the other hand, tailored administrative programs which were designed around remote service delivery needs made a strong difference.⁴²⁶ CLCS NSW also states that even issues such as obtaining Centrelink documents are much more difficult in rural towns,

⁴¹⁸ National Congress of Australia's First Peoples, *Submission No 97*; National Aboriginal and Torres Strait Islander Legal Services, *Submission No 121*; Consultation, 14/09/2017, Bourke (Aboriginal Legal Service (NSW/ACT)).

⁴¹⁹ Consultation, 14/09/2017, Bourke (Aboriginal Legal Service (NSW/ACT)).

⁴²⁰ Ibid. This issue was also raised in Mildura: Consultation, 26/09/2017, Mildura (Private practitioner).

⁴²¹ Consultations, 13/09/2017, Bourke (Mission Australia).

⁴²² Regional Alliance West, *Submission No 94*.

⁴²³ Consultation, 26/09/2017, Mildura (Private practitioner).

⁴²⁴ Consultation, 10/08/2017, Canberra (Kimberley Legal Service).

⁴²⁵ Australian Law Reform Commission, *Pathways to Justice Report*, Rec 12.3: State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations and community organisations to identify areas without services relevant to driver licensing and to provide those services, particularly in regional and remote communities.

⁴²⁶ Consultation, 10/08/2017, Canberra (Kimberley Legal Service).

where an agent may only visit one morning a week – such as when obtaining power of attorney for an elderly pensioner.⁴²⁷

Another bureaucratic area which consistently attracted concern across multiple RRR regions was child protection. These concerns also related to inaccessible and sometimes unaccountable decision-making that was often difficult to challenge.⁴²⁸ One private practitioner described taking on child protection agencies as like a ‘David versus Goliath’ battle.⁴²⁹ A Kalgoorlie solicitor noted that the effects of questionable decision-making was that families and siblings were separated for good.⁴³⁰ VLA flagged that the rate of child protection interventions in Mildura was three times the state average.⁴³¹ In Alice Springs, serious concerns were raised by CAAFLU about the approach of departmental officials to child protection applications. In one example, a CAAFLU solicitor was excluded from the hearing in which she sought to represent a client who was in the intensive care unit in hospital (and unable to appear). In her absence, final orders were made in respect of care arrangements for the client’s child. There was no opportunity for the client to be heard on the application by the Department. Despite the lack of procedural fairness, this was described as not being an isolated incident.⁴³²

Are there laws, policies and practices which exacerbate access to justice barriers for RRR Australians?

A central theme previously raised by the CRRLJ and NRLJA is that ‘there is insufficient regional engagement in law and policy, that is law and policy is not sufficiently well ‘rural-proofed’.⁴³³

Similarly, many of Coverdale’s interviewees were critical that legislation, policies and practices were drafted with little consideration of their relevance, application or effect upon regional communities. For example, he stated that while certain penalties may not differ greatly from those given to metropolitan participants, they were often inappropriate to regional offenders’ circumstances. The mandatory loss of drivers’ licences in Victoria for certain driving offences was one significant issue raised in this regard, given the greater consequences for RRR residents, including the loss of livelihoods.⁴³⁴ Another law cited as having a disproportionate effect was family law principle that ‘equal shared parental responsibility’ was in the best interests of children. Coverdale’s research disclosed concerns for the consequences for parents, mostly women, who having moved to RRR communities with their husbands, were obliged following separation to stay in the

⁴²⁷ Community Legal Centres NSW, *Submission No 106*.

⁴²⁸ Consultation, 26/09/2017, Mildura (Private practitioner); Consultation, 08/09/2017, Kalgoorlie (Aboriginal Family Law Services); Consultation, 15/08/2017, Hobart (Women’s Legal Service Tasmania); Consultation, 29/04/2017, Alice Springs (Central Australian Aboriginal Family Law Unit); Consultation, 02/08/2017, Maningrida (Burnawarra Elders); Consultation, 29/08/2017, Townsville (Legal Aid Queensland).

⁴²⁹ Consultation, 26/09/2017, Mildura (Private practitioner).

⁴³⁰ Consultation, 08/09/2017, Kalgoorlie (Aboriginal Family Law Services);

⁴³¹ Consultations, 26/09/2017, Mildura (Victoria Legal Aid).

⁴³² Consultation, 29/04/2017, Alice Springs (Central Australian Aboriginal Family Law Unit).

⁴³³ Centre for Rural Regional Law and Justice and National Rural Law and Justice Alliance, *Joint Access to Justice Arrangements Submission*, 5.

⁴³⁴ Coverdale, *Postcode Justice*, 65-6.

communities. These concerns included the women's subsequent isolation, lack of support services and potential consequences of violence from ex-partners.⁴³⁵

Economides has agreed that there is a strong inherent bias amongst legal theorists, educators and practitioners towards representing the interests of city-based students, clients and citizens, with those on the peripheries experiencing the law differently to their urban counterparts. 'Local courts apply and enforce rules that originate in the city to facts that arise in local communities'.⁴³⁶ There is, he states, a need to displace urban bias in both law creation and law reform.⁴³⁷

The Hume Riverina Community Legal Service highlighted that 'it is important that RRR perspectives are heard because RRR factors are often not considered in city-centric law making'.⁴³⁸ The Law Council's RRR Law Committee also agreed that a stronger policy focus on RRR justice issues was required. In this regard, it noted the recent loss of Deakin University's Centre for Rural Regional Law and Justice, as well as the loss of funding for the NRLJA, which had curbed its previously active role.⁴³⁹ It contrasted with the comparative government support for the National Rural Health Alliance, which is comprised of 34 national organisations, and seeks to the health and wellbeing of the seven million people in RRR Australia. This is underpinned by Australian Government Department of Health funding.⁴⁴⁰

'Three strikes' policies, such as with respect to driving offences, were highlighted by the Aboriginal Legal Service in Perth as exacerbating legal needs regionally:

*This is a huge problem in RRR communities – if you're convicted of three or more driving offences with high blood alcohol, you lose your licence for life – there is no public transport, people have their licences disqualified, you can't get a job.*⁴⁴¹

Regional Alliance West's submission underlined the need for more careful consideration of law and policy design which could both drive up legal need and create more barriers in RRR communities.⁴⁴² To illustrate, it refers to three Western Australia ('WA') examples which, it considered, would have benefited from closer scrutiny prior to implementation: Redress WA, WA Country High School Hostels and Stolen Wages schemes. Regional Alliance West was concerned that 'all had very narrow criteria for eligibility, extremely narrow timeframes to apply, and were targeted to people who had experienced significant past trauma, most of whom were continuing with multi-layered and generational disadvantage and who would clearly need legal advice and assistance to apply'.⁴⁴³ As such, they were difficult for local communities to comply with, creating a 'massive drain on our limited legal assistance resources'.⁴⁴⁴ Other policies highlighted as driving up legal need in various RRR locations, particularly amongst more disadvantaged populations,

⁴³⁵ Ibid 66.

⁴³⁶ Economides, 'Can Law and Lawyers Resist Urban Imperialism?', 1-3.

⁴³⁷ Ibid.

⁴³⁸ Hume Riverina Community Legal Service, *Submission No 121*.

⁴³⁹ Consultation, 12/09/2017, Teleconference (LCA RRR Law Committee).

⁴⁴⁰ National Rural Health Alliance Ltd, *About Us* <<http://ruralhealth.org.au/about>>.

⁴⁴¹ Consultation, 05/09/2017, Perth (Aboriginal Legal Service of Western Australia).

⁴⁴² Regional West Alliance, *Submission No 94*.

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.

included the cashless welfare debit card, income support compliance and visa cancellation expansion measures.⁴⁴⁵

A further issue affecting certain RRR communities close to state or territory borders is that the cross-border variation in laws and government programs and policies can create additional confusion, requiring people and lawyers to navigate both sets of laws.⁴⁴⁶ For instance, NPY Women's Council noted that differing legislation across tri-state boundaries presented major barriers in Alice Springs.⁴⁴⁷ The Law Access Stakeholders Advisory Group reflected that cross-border legal issues were also highly relevant to Western Australian legal services operating close to South Australian and Northern Territory borders.⁴⁴⁸ Hume Riverina Community Legal Service's submission noted that in family violence matters, residents must engage with court systems in both NSW and Victoria, as well as different sets of legislation, services and lawyers. This can make it extremely complex to resolve legal problems fully.⁴⁴⁹

Hume Riverina Community Legal Service also noted that given locals' frequent and everyday travel across NSW and Victorian borders, people often do not realise that they have a cross border legal problem until they seek legal advice. For example, they noted that laws criminalising the sharing intimate images of persons under 18 via mobile phone, commonly known as 'sexting', differ significantly between Victoria and NSW. Unaware of the jurisdictional differences, teenagers living in border communities may face severe consequences if images are sent interstate.⁴⁵⁰

In Mildura, one additional cross-border issue raised by Victoria Legal Aid's office was the absence of a large town on the other side of the border, with the nearest Legal Aid NSW office many hours away. This created real challenges given the different state legal frameworks in place, including tenancy, fines and driving infringements.⁴⁵¹ As a result, NSW river residents were missing out on critical assistance in areas of high legal need.⁴⁵²

⁴⁴⁵ Consultation, 29/08/2017, Townsville (Townsville Community Legal Service); Consultation, 10/08/2017, Canberra (Kimberley Legal Service); Consultation, 06/09/2017, Kalgoorlie (Aboriginal Legal Service of Western Australia).

⁴⁴⁶ Economides, 'Can Law and Lawyers Resist Urban Imperialism, 95-96; Centre for Rural Regional Law and Justice and National Rural Law and Justice Alliance, *Joint Access to Justice Arrangements Submission*, 4; Hume Riverina Community Legal Service, *Piecing together the puzzle*, 17.

⁴⁴⁷ NPY Women's Council, *Submission No 129*.

⁴⁴⁸ Consultation, 08/09/2017, Perth (Law Access Stakeholders Advisory Group).

⁴⁴⁹ Hume Riverina Community Legal Services, *Submission No 122*.

⁴⁵⁰ Ibid.

⁴⁵¹ Consultations, 26/09/2017, Mildura (Victoria Legal Aid).

⁴⁵² Ibid.

Priorities

- Governments must acknowledge and act on their responsibility to ensure effective access to justice where there is market failure in RRR areas, particularly in regions with declining populations.
- Governments, peak legal assistance and legal professional bodies should develop:
 - strategies to overcome critical conflict of interest issues which preclude many vulnerable people from accessing justice in RRR areas, including through additional investment to address a scarcity of legal services, regional service planning processes and minimum servicing standards; and
 - RRR access to justice strategies to ensure an appropriate and tailored mix of services, publicly funded and private, in areas of critical need, including through rural placement, targeted mentoring and incentive schemes, additional legal services and increased legal aid rates.
- To enable a more nuanced analysis and policy responses regarding the shortages of solicitors in RRR areas, national data collection regarding solicitors should, over time, seek to capture more detailed, consistent information regarding: the local presence of solicitors according to ABS area classifications, the nature of legal services provided, core client types, and the capacity in which solicitor services are undertaken (eg sole practitioners, private firms, government, corporate or publicly-funded legal assistance services).
- Expand the adoption of RRR-focused curriculums in undergraduate law training.
- Specialist legal assistance services should be supported to expand their reach, particularly to overcome geographic and jurisdictional inequity of access, including through outreach and referral networks;
- Technological innovation should be pursued in the delivery of legal services to clients experiencing disadvantage, including through dedicated funding streams. At the same time, a nuanced, evidence-based and people-centred approach is needed to avoid leaving digitally excluded groups behind.
- Additional funding and resources are required to maintain and, where required, expand RRR circuit courts, having regard to their important function in upholding the rule of law and fostering community engagement through a tangible local presence.
- A full-scale court and tribunal resourcing review should also include consideration of the need to ensure that courts adopting specialist and/or problem-solving approaches are more readily available to RRR residents.
- Decisions regarding moves towards online courts, tribunals and dispute resolution forums in Australia should be based on a strong evidence base. Governments should prioritise research and policy development regarding:
 - the forums in which online courts and tribunals are most appropriate;

Appendix 3

- the availability of sufficient technology to support their effective uptake, particularly in RRR areas;
 - the relative benefits and disadvantages of online courts and tribunals, and to which parties these apply;
 - their likely impact upon disadvantaged online court and tribunal users, having regard to their technological and legal capability; and
 - the necessary safeguards which are needed to support disadvantaged users.
- Expand community-based sentencing options in RRR areas, including through the availability of accessible and appropriate critical support services and diversionary programs.
 - Research and review the extent to which alternative dispute resolution is available and taken up in RRR communities, and how this might be increased in the future.
 - Expand support services which are lacking in many RRR communities, including interpreters, access to stable, secure housing options, bail accommodation and support, alcohol and rehabilitation services, counselling and mental health services and family violence support services.
 - Adopt law and policy development processes which better ensure that the social impact of laws and policies upon RRR populations, having regard to their diversity, are better measured, evaluated and anticipated. This should have particular regard to the circumstances of RRR communities which are close to state and territory borders.
 - Resource bodies which conduct research and/or advocate on RRR law and policy issues commensurate with other sectors.
 - Resource strategies to build awareness of legal issues and responses amongst RRR communities.

PEOPLE IN RURAL, REGIONAL & REMOTE AREAS OF AUSTRALIA

BARRIERS

Key access to justice barriers for RRR Australians include:



Cost

Levels of socio-economic disadvantage generally increase with remoteness.¹

18 of the 20 electorates in Australia with the lowest household incomes were outside the capital cities in 2013.²

Depending on whether seasons are 'good' or 'bad', farming families are often 'income poor and asset rich'.³

Droughts can affect the ability to afford a lawyer.



Distance

Those unable to travel long distances may miss out on obtaining legal advice or attending court.⁴ Distance barriers are exacerbated by a lack of public transport.

For RRR women experiencing family violence, a lack of transport often compounds barriers to safety.⁵

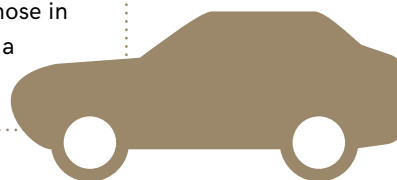


Technological barriers

Poor quality internet connections and limited telephone coverage create barriers, particularly in more remote communities.⁶

RRR needs are often overlooked in the development of laws and policies:

RRR Australians may be particularly affected by laws created in urban areas - eg, a loss of licence for driving offences disproportionately impacts those in remote areas, many of whom depend on a car to maintain a job.⁷



SOME REGIONS ARE CRITICALLY UNDERSERVED

National data on practising solicitors indicates that just 10.5% nationally were practising in a country or rural area in 2016.⁸ However, 29% of Australians live outside major cities.⁹

In 2011, the ratio of residents to solicitors in RRR areas was only one-third of that for NSW overall. 19 local government areas of RRR NSW had no solicitors at all.¹⁰

One legal assistance service in regional Western Australia covers a geographical area more than twice the size of the United Kingdom with a single solicitor.¹¹

Scarcities of locally available lawyers lead to conflict of interest problems, with many RRR residents being turned away for help.¹²

Heavy RRR Magistrate Court caseloads combined with limited time and resources place substantial financial and emotional burdens on residents and impact public confidence in courts.¹³

Limited resourcing for critical support programs in RRR areas, including interpreters, accommodation services and drug and alcohol rehabilitation centres, undermine justice system outcomes for many RRR Australians.¹⁴

A lack of specialist and therapeutic courts, as well as alternative sentencing options, may contribute to worse sentencing outcomes in many RRR areas.

In 2013-14, on average young people aged 10-17 years from remote areas were five times as likely to be under youth justice supervision as those from major cities.¹⁵

PEOPLE IN RURAL, REGIONAL & REMOTE AREAS OF AUSTRALIA

The JUSTICE PROJECT



Priorities in this area include:

- Governments must ensure effective access to justice where there is market failure in RRR areas, particularly in regions with declining populations.
- Governments, peak legal assistance and legal professional bodies should develop:
 - strategies to overcome critical conflict of interest issues which preclude many vulnerable people from accessing justice in RRR areas; and
 - RRR access to justice strategies to ensure an appropriate and tailored mix of services, publicly funded and private, in areas of critical need.
- National data collection regarding solicitors should seek to capture more detailed, consistent information regarding: the local presence of solicitors, the nature of legal services provided, core client types, and the capacity in which solicitor services are undertaken.
- Expand the adoption of RRR-focused curriculums in undergraduate law training.
- Specialist legal assistance services should be supported to expand their reach, to overcome geographic and jurisdictional inequity of access, including through outreach and referral networks.
- Technological innovation should be pursued in the delivery of legal services, including through dedicated funding streams. At the same time, a nuanced, evidence-based and people-centred approach is needed to avoid leaving digitally excluded groups behind.
- Additional funding and resources are required to maintain and, where required, expand RRR circuit courts.
- A full-scale court and tribunal resourcing review should include consideration of the need to ensure that courts adopting specialist and/or problem-solving approaches are more readily available to RRR residents.
- Decisions regarding moves towards online courts, tribunals and dispute resolution forums in Australia should be based on a strong evidence base.
- Expand community-based sentencing options in RRR areas, including through the availability of accessible and appropriate critical support services and diversionary programs.
- Expand support services which are lacking in many RRR communities.
- Resource strategies to build awareness of legal issues and responses amongst RRR communities.

1. Forell, Cain and Gray, 2010.
 2. National Rural Health Alliance Inc and Australian Council of Social Service, 2013.
 3. National Rural Health Alliance Inc and Australian Council of Social Service, 2013.
 4. Karras et al, 2006.

5. Jordan and Philips, 2013.
 6. Dracup and Coverdale, 2015.
 7. Coverdale, 2011.
 8. Urbis, 2017.
 9. ABS, 2016.
 10. Cain, Macourt and Mulherin

11. Regional Alliance West Submission, 2017.
 12. Coverdale, 2011.
 13. Harris et al, 2014.
 14. Coverdale, 2011.
 15. Australian Institute of Health and Welfare, 2015.