



**Aboriginal  
Legal Service**  
(NSW/ACT) Limited

## **Submission to the Independent Review of the National Legal Assistance Partnership 2020-25**

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## 1. About Us

The Aboriginal Legal Service (NSW/ACT) Limited (ALS (NSW/ACT)) is a proud Aboriginal community-controlled organisation (ACCO) and the peak legal services provider to Aboriginal and Torres Strait Islander adults and children in NSW and the ACT.

ALS (NSW/ACT) has more than 380 positions budgeted across 27 offices in NSW and the ACT and supports Aboriginal and Torres Strait Islander people through the provision of legal advice, information, referrals and court representation in criminal law, children's care and protection law, and family law.

Increasingly, we represent Aboriginal and Torres Strait Islander families in the NSW Coroner's Court, provide a variety of discrete civil law services including tenant's advocacy, and undertake policy work and advocacy for reform of systems which disproportionately impact Aboriginal and Torres Strait Islander communities. ALS (NSW/ACT) delivers a Custody Notification Service telephone hotline, which received 24,763 custody notification calls in 2021–22.

ALS (NSW/ACT) provides a range of other services including bail support programs, disability legal support, and representation in alternative, diversionary and holistic court processes such as the Youth Koori Court, Circle Sentencing in NSW and the ACT, the Dubbo Winha-nga-nha List, and the District Court Walama List.

ALS (NSW/ACT) is implementing new programs such as family violence prevention programs, holistic child and family advocacy support services, a Visiting Legal Service for Aboriginal young people in youth justice centres, and a mental health advocacy and referral service. We are also undertaking policy and advocacy work in relation to therapeutic pathways for children, throughcare initiatives and justice reinvestment, in addition to leading the development of a partnership between Aboriginal communities and the NSW Government.

ALS (NSW/ACT) also provides practical legal training to an ever-growing number of student volunteers and interns in return for their important assistance to our staff.

We welcome the opportunity to make a submission to the National Legal Assistance Partnership (NLAP) Review to outline the necessary changes needed to ensure Aboriginal and Torres Strait Islander people do not continue to be over-represented in the legal system.

We consent to this submission being published on the review website.

## 2. Executive Summary

We endorse the submission from the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) to the Review of the National Legal Assistance Partnership 2020-25 (NLAP) (NATSILS NLAP Submission 2023). This submission to the Review of NLAP seeks to expand upon recommendations and information provided in the NATSILS NLAP Submission 2023 and should be read in conjunction.

ALS (NSW/ACT) was established in line with the principle of self-determination to address the well-recognised impacts of lack of access to culturally responsive legal assistance services on Aboriginal and Torres Strait Islander communities. We have provided specialised, independent, culturally safe and community-controlled legal services for over 50 years in NSW and the ACT. We recognise that Aboriginal and Torres Strait Islander people are smart, strong and resilient in the face of long-

standing structural and systemic forces which see communities disempowered and disproportionately brought into contact with the legal system.

Because we understand the needs of communities, we are uniquely positioned to respond to local community needs, to provide effective service delivery, and to platform community voices in our advocacy. We service many of the most marginalised communities in NSW and the ACT, where we are often the service provider of choice for Aboriginal and Torres Strait Islander people who may be reluctant to use mainstream services because of a history of culturally insensitive service provision.

It is important to recognise that we don't just operate in the Legal Assistance Sector but also operate within the Community Controlled Sector and with this comes significant obligations from multiple stakeholders that other legal assistance providers do not have. It is also our strength.

Despite the critical role we play in delivering high quality, culturally appropriate legal services to Aboriginal and Torres Strait Islander people, advocating for justice and achieving community-led change, we have historically and systematically been under-valued, under-funded and under-resourced to meet the known demand for legal services in our jurisdictions.

A summary of recommendations can be found in **Section 3**.

Meaningful self-determination for Aboriginal and Torres Strait Islander communities in NSW and the ACT demands adequate funding and capacity-building for Aboriginal community-controlled legal services to be able to respond to legal need and provide Aboriginal and Torres Strait Islander peoples real choice in legal service providers. The current NLAP funding, received by ALS (NSW/ACT) and discussed in **Section 4 and 8**, does not allow us to offer competitive remuneration as compared to similar roles in the sector. The impact of this pay disparity is creating a significant challenge in relation to the recruitment and retention of staff. The numerous vacant positions increase the workload on remaining staff and creates an administrative burden on operations and corporate services staff.

**Section 5** highlights practice concerns around unsustainable workloads which was the impetus behind the 2023 court freezes across 13 locations, a significant decision that was reluctantly made knowing it would negatively impact Aboriginal communities who have a reasonable expectation of receiving services from their preferred provider.

**Section 6** recognises the requirement and our unique place to provide policy review and advocacy to systemic law and policy reform whilst at the same time recognising the additional strain this places on the limited number of staff engaged in this work.

In order for both governments and the community-controlled sector to meet our shared obligations to implement the National Agreement on Closing the Gap 2020-2030 (National Agreement on CTG), **Section 7** calls for ALS (NSW/ACT) to be appropriately resourced to work in partnership with the communities we represent, other ACCOs and in partnership with governments in relation to legal and policy reform, service design and delivery of Closing the Gap initiatives.

**Section 9** highlights that the current NLAP funding, with indexation at negligible amounts, does not provide any opportunity for capital investment over the term of the agreements. The absence of this funding has left the ALS (NSW/ACT) with legacy owned buildings not fit-for-purpose, some of which are structurally unsound. The lack of capital funding also means the ALS (NSW/ACT) has not been able to invest in best practice technologies resulting in legacy platforms and software not being replaced. And finally, **Section 10** discusses the importance of our obligation to provide data in line with the data standards manual, however data capture is hindered due to the guidance and

definitions provided in the manual that require urgent review as they do not adequately meet the intended of purpose of giving best practice guidance to legal assistance service providers to facilitate the collection of consistent and comparable data. Investment in the IT environment for the ALS (NSW/ACT) across practice, programs and corporate services will have a positive impact across the organisation, benefitting stakeholders with best practice case and client management systems and improved data capture, and reporting.

ALS NSW/ACT also endorses:

- *Building the Evidence Base* – Submission from the Australian Legal Assistance Forum;
- *NLAP and disaster legal assistance* - Submission to the National Legal Assistance Partnership Independent Review 2023, A joint submission by Community Legal Centres Australia, National Family Violence Prevention and Legal Services Forum, National Aboriginal and Torres Strait Islander Legal Services, and National Legal Aid; and
- *Call for Legal Assistance Service Data Action Plan, new agreed data principles, and appropriate data resourcing, National Legal Assistance Partnership Review October 2023* – Submission from the Australian Legal Assistance Forum.

### 3. Recommendations

In addition to those recommendations in the NATSILS NLAP Submission 2023, ALS NSW/ACT recommends:

- i. Governments acknowledge the historical and systematic undervaluing of the ALS (NSW/ACT) and our workforce and address the critical shortage of solicitors and non-legal staff required to meet the known demand and unmet need for culturally appropriate legal services for Aboriginal and Torres Strait Islander people by funding the ALS (NSW/ACT) to offer **salary parity** with the Legal Aid Commission NSW, at a minimum.
- ii. Future funding includes the ability to provide **incentive packages for staff in regional, rural and remote (RRR) offices**. Such incentive packages should include the ability to provide a sign-on bonus and retention payment as well as relocation assistance and housing support for a minimum “establishment period” period. RRR incentive packages should be scaled and increase in value in more remote locations.
- iii. To ensure ALS (NSW/ACT) can continue to provide culturally safe services and to increase the representation of Aboriginal and Torres Strait Islander professionals in the legal sector, ALS (NSW/ACT) should be provided with quarantined funding:
  - for the **establishment of career pathway programs** with NSW and ACT tertiary educational institutions and the private profession; and
  - to establish Aboriginal and Torres Strait Islander **entry level, internship and career development opportunities** across legal, non-legal and corporate services positions.

- iv. Governments are *Paying What it Takes*<sup>1</sup> and **fully funding over-head costs** of ALS (NSW/ACT) so there is an effective, efficient and sustainable operation across all shared and corporate services including Human Resources, Learning and Development, Information Technology, Finance, Project Management, Training and Organisational Frameworks.
- v. ALS (NSW/ACT) is provided with an immediate **capital investment**, to upgrade capital infrastructure including repairing owned office buildings to make them safe and fit for purpose, expanding into new permanent and shared office locations, updating Information Technology, data systems and legacy applications.
- vi. In line with Priority Reform 4 of the National Agreement on CTG, ALS (NSW/ACT) should be funded to build its capability and expertise to **collect, analyse and interpret service data** to enhance service planning, practice management, meet reporting obligations and share with key stakeholders including community.
- vii. Governments resource, ALS NSW/ACT, and all ATSILS to provide culturally appropriate representation to Aboriginal people who are prosecuted when practicing their **cultural rights**, including fishing for cultural purposes.

## 4. Funding

### Shared Responsibility

The responsibility for funding Aboriginal and Torres Strait Islander Legal Services (ATSILS) should sit across the Commonwealth, States and Territories, a reflection of the shared responsibilities of all levels of government under the National Agreement on CTG to improve outcomes for Aboriginal and Torres Strait Islander people, including outcomes through the justice system.

Shared responsibility for funding means a shared approach to ensuring that, when policy and law reform changes have an impact on the demand for legal assistance services, the jurisdiction making the policy or law change takes responsibility for the cost of meeting that increased legal assistance demand.

### Commonwealth NLAP Funding Distribution Model

The current NLAP funding distribution model (FDM) does not consider the need for ALS (NSW/ACT) services, does not ensure equitable funding for Aboriginal and Torres Strait Islander Legal Services (ATSILS), and includes a fixed cost base which is not reflective of the appropriate ALS (NSW/ACT) cost base or the requirement to provide salary parity with the sector.

As the FDM is a mechanism by which funding is distributed to legal assistance providers, it does not ensure the funding is adequate to support the actual need for government funded legal services. Future models must firstly ensure a sector wide and transparent approach to determining the legal need to be funded.

The current FDM favours the Legal Aid Commissions (LACs) and the Community Legal Centres (CLCs) in relation to the population component used throughout the funding distribution calculation. Both

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<sup>1</sup> <https://www.socialventures.com.au/work/paying-what-it-takes-report/>

LACs and CLCs are allocated a share of funding to each jurisdiction based on national population estimates determined by the Need for Legal Assistance Services (NLAS) as developed by the Law and Justice Foundation of NSW. National population estimates include Aboriginal and Torres Strait Islander peoples which means LACs and CLCs are receiving funding based on population numbers greater than their service remit, given the ALS (NSW/ACT) also services this population.

Future funding models must consider the shortcomings in the cost base of the ALS (NSW/ACT) including the need to factor in the additional costs of providing a culturally safe service, the additional costs in delivering services in regional and remote locations, the need to provide salary parity with the NSW LAC (as detailed further in section 7) and the need for urgent and ongoing access to capital expenditure (refer section 8).

## **Indexation**

The annual NLAP core funding increase received by the ALS (NSW/ACT) has been negligible and has not kept pace with inflation and the increase in operational costs. For both the last financial year 2022-23 and for the current financial year 2023-24, the annual funding increase was 2%<sup>2</sup>. The 2024-25 increase is just 2.5%. The compounding impact of inadequate annual indexation has had a significant impact on the ability of the ALS (NSW/ACT) to manage its cost base. Future funding arrangements must be flexible enough to allow for indexation that considers at a minimum, the consumer price index so that the funding indexation is comparable to cost increases experienced.

## **One-off funding injections**

Current NLAP funding is directed towards operational expenditure and fails to acknowledge that like any service provider, ALS (NSW/ACT) requires ongoing investment in relation to physical and technology assets. The failure to provide funding for much needed capital expenditure means the ALS (NSW/ACT) is starved of the necessary core funding required to create a resilient organisation. Investment is required in line with Closing the Gap Priority Reform 2, building the community-controlled sector.

Future NLAP funding agreements must provide an avenue for the ALS (NSW/ACT) to request one-off funding injections throughout the term of the agreement to support essential capital expenditure or operational expenditure if the cost base has increased due to exceptional circumstances not considered at the outset of the agreement.

This issue is covered in more detail below in Section 9, Corporate Services and Capital Expenditure.

## **Term of NLAP agreement**

ALS (NSW/ACT) considers a five-year agreement to be the minimum term. A longer agreement term is preferred so long as at agreed intervals throughout that longer period there is an opportunity to reset the funding to relevant factors at that point in time.

Longer-term funding agreements increase stability and would provide ALS (NSW/ACT) with more certainty and time to ensure future plans are impactful and effective.

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<sup>2</sup> National Legal Assistance Partnership – Multilateral Signed, Table 4: Estimated NLAP financial contributions to the State – multilateral.

## Streamlining government funding agreements

ALS (NSW/ACT) seeks to have core legal services included in baseline funding. Currently, funding for legal services is received from multiple sources<sup>3</sup> and the terms of funding agreements are not aligned. For example, while NLAP funding provides for baseline services in the criminal, care and protection and family practice, the Custody Notification Service (CNS) and Early Appropriate Guilty Plea (EAGP) services are funded by the National Indigenous Australians Agency (NIAA) and Legal Aid Commission NSW respectively.

Consequently, ALS (NSW/ACT) faces challenges in planning for the future and offering job security to teams delivering the CNS and EAGP services. These critical services and the Aboriginal and Torres Strait Islander communities we service should benefit from the same level of consistency and predictability as NLAP funding.

Future NLAP funding arrangements should allow for all expiring core legal services to be rolled into baseline funding at either the onset of the new NLAP agreement or throughout the NLAP agreement term. By increasing the baseline funding in this way, the ALS (NSW/ACT) can avoid “funding cliffs”, provide greater stability for staff, and reduce the administrative burden and costs associated with dealing with multiple funders.

## NSW and ACT funding

### NSW

Although the NSW Government provides funding to ALS NSW/ACT for some limited non-core legal services, including Closing the Gap programs, the long-standing NSW government position is that funding of ALS NSW/ACT is a Commonwealth Government responsibility.

NSW has a Demand Funding Model (DFM). This is an approach / methodology used by the NSW Government to determine funding required to support the criminal justice system. However, we understand that a project is underway to determine funding needs in relation to civil law cases.

The DFM allows DCJ to gain insight into future funding needs, ensuring funding doesn't lag behind changes in demand in the criminal justice system. For example, additional funding flowing to Corrective Services or Legal Aid NSW where a change in bail laws increases people in custody.

We note that there is very limited publicly available information<sup>4</sup> in relation to the DFM and we recommend that the NLAP Review seek information about the DFM from the Department of Communities and Justice in NSW.

At present the DFM factors in publicly funded services that contribute to the criminal justice system, except for ALS NSW/ACT. Legal Aid NSW and ALS NSW/ACT provide the same or similar criminal law services in the system.

We submit that the ALS should be considered in relation to this DFM and should have an opportunity to access NSW Government funding, including increased funding where changes in the

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<sup>3</sup> ALS (NSW/ACT) currently manages 36 separate grant budgets and has reporting obligations under 23 funding agreements included NLAP head agreements for NSW and ACT. The funding agreements vary between 1 and 5 years in length.

<sup>4</sup> <https://www.audit.nsw.gov.au/our-work/reports/stronger-communities-2020> Section 2.6



volume of the demand for services impact Aboriginal and Torres Strait Islander clients, for core services provided to Aboriginal and Torres Strait Islander people in NSW.

ALS NSW/ACT is hopeful that the new NSW Government will recognise their shared responsibility to ensure that Aboriginal people in NSW can access culturally appropriate legal support. We know that the NSW Government is committed to achieving their obligations under the National Agreement on CTG and to their partnership with the NSW CAPO in relation to Closing the Gap.

## **ACT**

By contrast, the ACT Government provides funding to ALS NSW/ACT for core services including, for example, duty lawyer services. ALS NSW/ACT welcomes the commitment for core services to help Aboriginal Territorians access culturally appropriate legal support.

ALS NSW/ACT is not aware of an equivalent of the Demand Funding Model being used in the ACT but would welcome ALS NSW/ACT being included in any current model or being a partner in developing a future fit funding model.

## **5. Services**

It has long been recognised that ATSILS like ALS (NSW/ACT) are often the preferred, and most suitable, providers of legal services to Aboriginal and Torres Strait Islander people and communities.<sup>5</sup> Many Aboriginal and Torres Strait Islander people may not seek legal help where services are not appropriate to the local community, or where services do not consider matters that are important and specific to Aboriginal and Torres Strait Islander peoples. ALS (NSW/ACT) provides specialised, independent, culturally safe and community-controlled legal services to many clients who may be reluctant to use mainstream services because of a history of culturally insensitive service provision.

ALS (NSW/ACT) delivers legal services in criminal law, children's care and protection law, and family law to eligible Aboriginal and Torres Strait Islander people in NSW and the ACT.

Increasingly, we represent families in the NSW Coroner's Court, provide a variety of discrete civil law services including tenancy advocacy and assistance with fines and fine debt, and undertake policy work and advocacy for reform of systems which disproportionately impact Aboriginal and Torres Strait Islander communities.

We also provide a range of other services including bail support programs, disability legal support, and representation in alternative, diversionary and holistic court processes, and, we are implementing new programs within our existing practice areas, including family violence prevention, holistic child and family advocacy support services, a Visiting Legal Service for Aboriginal and Torres Strait Islander young people in NSW youth justice centres, and a mental health advocacy and referral service.

Despite the size of our workforce and the number of services ALS (NSW/ACT) provides, we are not in a position to meet the known legal need of many Aboriginal and Torres Strait Islander people in NSW

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<sup>5</sup> See, eg, Australian Law Reform Commission, *Pathways to Justice: Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Final Report, 2017) 326; Law Council of Australia, *The Justice Project: Final Report* (August 2018) 27, 36; Change the Record, *Blueprint for Change* (2015) 5.

and the ACT. Demand for our services outstrips our capacity to provide the comprehensive legal assistance that many people require from ALS (NSW/ACT).

Multiple legal needs surveys, inquiries and reports have found that Aboriginal and Torres Strait Islander people are more likely to experience multiple legal problems<sup>6</sup> that directly impact upon the physical, social and emotional wellbeing of Aboriginal and Torres Strait Islander people.

ALS (NSW/ACT) would like to comprehensively service Aboriginal communities and address legal need across all domains, including through:

- expansion of our capacity to deliver criminal law services;
- the addition of new services in civil law, care and protection law and family law (noting the high level of need in these areas);<sup>7</sup> and
- providing early support and legal assistance that can prevent unaddressed civil and family law issues from escalating into more costly and harmful criminal law issues.<sup>8</sup>

The ability of ALS (NSW/ACT) to operate effectively and provide the variety, quantity and quality of services required at each service outlet location can be challenged in a number of ways, as discussed below.

## **Criminal Law Practice**

### ***Increases to court sitting days***

Due in part to the significant backlog of unfinalised court proceedings created by COVID-19 'lockdowns' during 2020 and 2021, the NSW Government announced that increased court sitting days across a range of Local Court circuits would commence in July 2022. Eight new Local Court Magistrates were appointed to enable these increases in sitting days, phased in across 2022–23.

ALS (NSW/ACT) recognised that increases in court sitting days would lead to corresponding increased demand for our criminal law services and requested the NSW and Commonwealth Governments commit to increased funding to reduce the impact on our staff and absorb the projected increased demand on existing services. We were unsuccessful.

We appreciated consultation from both the NSW Department of Communities and Justice and NSW Legal Aid in relation to the corresponding increase in demand for our services but were later advised by the Department of Communities and Justice that in relation to the funding that was provided by the NSW Government:

- the funding was developed with reference to the existing NSW Government funding model that considers the funding needs of NSW Government agencies only; and

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<sup>6</sup> See Coumarelos, C, Macourt, D, People, J, McDonald, HM, Wei, Z, Iriana, R & Ramsey, S 2012, *Legal Australia-Wide Survey: legal need in Australia*, Law and Justice Foundation of NSW, Sydney, and Balmer, NJ, Pleasence, P, McDonald, HM & Sandefur, RL 2023, *The Public Understanding of Law Survey (PULS) Volume 1: Everyday Problems and Legal Need*, Victoria Law Foundation, Melbourne. See also Australian Senate, Finance and Public Administration References Committee, [Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services](#) (2016), chs 2, 8; Australian Productivity Commission, [Inquiry into Access to Justice Arrangements](#) (2014), 767; the publications of the [Indigenous Legal Needs Project](#); Commonwealth, Royal Commission into Aboriginal Deaths in Custody, 1991; Australian Law Reform Commission, [Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples](#), (Report No 133, 2018), 41-45

<sup>7</sup> See, eg, the Reports at the [Indigenous Legal Needs Project](#)

<sup>8</sup> See, eg, M Schwartz and C Cunneen (2009) [From Crisis to Crime: the escalation of civil and family law issues to criminal matters in Aboriginal communities in NSW](#)

- funding of the ALS is a Commonwealth Government responsibility.

### ***Expansion of circle sentencing in NSW & ACT***

Circle Sentencing is a restorative justice program available to Aboriginal and Torres Strait Islander people with criminal proceedings before a number of Local Courts in NSW and the ACT. The program allows for input from victims and defendants, and directly involves Aboriginal Elders and Respected Persons in the sentencing process, with the goal of empowering Aboriginal and Torres Strait Islander communities to be involved in legal systems and decision-making.

There is evidence to suggest that, compared with the traditional sentencing process, Circle Sentencing is associated with lower rates of imprisonment and lowering the risk of repeat contact with the criminal process.<sup>[9]</sup> However, it is more time consuming than conventional sentencing due to the more protracted nature of the court proceedings and requires greater resourcing within the ALS (NSW/ACT) to deliver the requisite legal advice, referrals and representation services. While a traditional sentence matter in the Local Court may be concluded in one or two court appearances, Circle Sentencing requires at least four (the initial appearance, an appearance to confirm stability, the Circle proceedings, and the final appearance to confirm the sentence).

In February 2023, the NSW Government announced a \$4.2 million investment into the expansion of circle sentencing across an additional 8 NSW locations, taking the total number of locations to 20. ALS (NSW/ACT) sought additional funding to increase our capacity to provide legal representation to participants in Circle Sentencing, but to date our funding request has not been successful.

In the ACT, the Galambany circle sentencing court has expanded its sitting days to 2 days per week to deal with sentence matters and has recently started convening to consider bail applications alongside the presiding Magistrate. Furthermore, the Supreme Court is considering a commencement date to introduce 'circle sentencing' in its jurisdiction and ALS (NSW/ACT) has collaborated with other key stakeholders on a draft practice note that will guide the circle sentencing process. ALS (NSW/ACT) is closely monitoring the impact of increased Galambany sitting days on our ability to meet our court obligations across the Canberra Practice.

Circle Sentencing is a more culturally safe sentencing model for Aboriginal and Torres Strait Islander people which is strongly supported by Aboriginal communities. It reduces barriers between Aboriginal participants and courts and improves confidence in the sentencing process. It also has broad benefits of reduced incarceration and repeat contact with the criminal process, providing a significant cost benefit to the community as a whole, however, appearing in Circle Sentencing proceedings significantly increases the workload of the ALS (NSW/ACT) and places added pressure on our workforce. A 2020 study by the NSW Bureau of Crime Statistics and Research concluded that Circle Sentencing "has the potential to lower the Indigenous incarceration rate" and that, if it can achieve this goal, "the net benefit to society is difficult to overstate".<sup>9</sup> In short, adequate resourcing of ALS (NSW/ACT) to provide legal representation in Circle Sentencing at all courts would benefit the community as a whole.

### ***Introduction of the Early Appropriate Guilty Plea Scheme***

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<sup>9</sup> "For example, over the 2016-17 financial year, the cost to the NSW government of incarcerating an individual was \$253 per day. Over this same period, there were 3,141 Indigenous Australian held in custody each day. Hence, even a one-percentage point decrease equates to 31 fewer incarcerations per day. This implies a saving of \$7,843 per day or \$2,862,695 per year": Bureau of Crime Statistics and Research, [Circle Sentencing: Incarceration and Recidivism](#) (Report, 2020) p15

In April 2018, significant reforms commenced in NSW pursuant to the *Justice Amendment (Committal and Early Guilty Pleas) Act 2017* which were intended to incentivise the entry of guilty pleas early in the court process. The reforms substantially changed the court process for defendants charged with the most serious offences and aimed to improve efficiency by avoiding committals to trial through an increase in the proportion of cases with an early guilty plea or a guilty plea at any point in the court process.

Due to the number of Aboriginal and Torres Strait Islander people in NSW charged with offences that are captured by the EAGP scheme, both Legal Aid NSW and ALS (NSW/ACT) identified that funding and support would be required by ALS (NSW/ACT) to ensure that these reforms could be appropriately implemented.

In 2017, Legal Aid NSW agreed to provide a stream of both direct and indirect funding to the ALS (NSW/ACT) to hire more staff to take on the additional workload anticipated under the scheme and engage counsel if required in complex matters, to appropriately implement these reforms.

Legal Aid NSW was provided with additional resources to fund the ALS (NSW/ACT) pursuant to this agreement, however, the funding provided suffers from three shortfalls:

1. The high volume of this work statewide means that the ALS (NSW/ACT) struggles to absorb the work while balancing the need to avoid staff burnout;
2. The funding is insecure, and results in a large number of highly skilled lawyers and support officers being engaged on fixed term contracts; and
3. The amount of funding provided to ALS (NSW/ACT) has not increased in line with increased service demand or indexation.

This initial agreement was extended until June 2020. Since then, it has been subjected to short-term extensions leading to a lack of job security that has been a source of anxiety for solicitors and support staff.

Funding for roles to support the increased volume of work created by the EAGP reforms should be additional and embedded in core funding to ensure that the ALS (NSW/ACT) is resourced to meet service need, and to give effect to the priority reforms and targets under the National Agreement on CTG to strengthen the Aboriginal Community Controlled Sector to provide culturally safe, holistic legal services and contribute to reducing rates of incarceration for Aboriginal and Torres Strait Islander people.

### ***Ongoing viability of the Custody Notification Service***

ALS (NSW/ACT) operates a free, 24-hour telephone hotline known as the Custody Notification Service ('CNS'). The CNS operates 7 days per week, 365 days per year. The purpose of the CNS is to provide welfare support and legal advice to Aboriginal and Torres Strait Islander people in police custody in NSW and the ACT, and to enable police to meet their regulatory obligations under relevant statutory frameworks. The CNS was established in response to legislation enacted to implement recommendations of the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') *National Report* (1991).

CNS lawyers provide culturally informed legal advice and detect and respond to welfare issues such as threats of self-harm, un-met medical needs or injuries sustained during arrest. If instructed, lawyers may contact the detained person's family to provide critical information about the person's whereabouts, health and safety.

The CNS also improves access to justice for Aboriginal and Torres Strait Islander people by:

- providing timely and effective advice about a person’s legal rights, including an accused person’s right to silence;<sup>10</sup>
  - improving prospects of bail for persons under arrest in relation to criminal charges;
  - improving support for diversion, pursuant to the *Young Offenders Act 1997*; and
  - improving the professionalism of police in custody management and detention practices.
- The important accountability function of the CNS is illustrated by the case study below.

The ongoing impact and sustainability of the CNS is dependent on reliable and consistent funding. To date, funding for the CNS has been via successive short-term arrangements, resulting in uncertainty in relation to the ongoing viability of the services.

Bringing funding for the CNS under the NLAP would provide increased certainty about the sustainability of the service and enable ALS (NSW/ACT) to continue to improve outcomes for Aboriginal and Torres Strait Islander people in custody.

### **Case Study – Individual Rights Protection for Vulnerable Clients**

The recent NSW District Court decision of *R v Nean* [2023] NSWDC 34 demonstrates the vital function of the CNS in promoting the rights of Aboriginal people in police custody. The Court found that a police custody manager responsible for the custody management of an Aboriginal person in custody was in breach of their obligations under *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). The grounds of those findings related to contemporaneous notes and advocacy by the CNS solicitor who handled the relevant notification call.

*Nean* and numerous other published judgments of courts at all levels demonstrate the vital role of the CNS in ensuring against unfairness flowing from police failures to adhere to their legislative obligations in relation to the treatment of vulnerable people in custody.

### ***Criminal law service freezes***

ALS (NSW/ACT) was forced to impose service freezes at 13 Local Courts on 15 May 2023, which are still in effect at the time of writing. Demand for our services has increased significantly since 2018 but our core Federal Government funding has decreased in real terms. This means we are being pushed harder than ever before and it has become an occupational health and safety risk for staff.

Despite receiving lower rates of remuneration than those available from other legal services, ALS (NSW/ACT) staff are dedicated to maintaining high quality, culturally safe legal services for Aboriginal and Torres Strait Islander people – the services that Aboriginal and Torres Strait Islander people expect and deserve.

This has left some clients without the choice to access their culturally safe legal service in areas where the Aboriginal population is over-represented in the justice system and makes up a significant proportion of matters at the Local Courts. Although other legal services and private practitioners are filling some of the gaps, it is not enough, and some Aboriginal people are opting to appear unrepresented in court.

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<sup>10</sup> See *Evidence Act 1995* (NSW) s 89; *Petty v The Queen* (1991) 173 CLR 95 at 97. An accused person’s right to silence is reflected in procedural regulations, including a custody manager’s obligation to give a caution pursuant to *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 122(a).

In Forster, Aboriginal people make up 0.3% of the population but 34% of Local Court matters and 63% of Children's Court matters. From March 2023 to July 2023, 30 Aboriginal and Torres Strait Islander people were unrepresented.

In Muswellbrook, Aboriginal people make up 0.5% of the population but 41% of Local Court matters and 65% of Children's Court matters. From March 2023 to July 2023, 11 Aboriginal and Torres Strait Islander people were unrepresented.

## **Care and Protection and Family Law Practice**

ALS (NSW/ACT) provides family law<sup>11</sup> and care and protection services across 26 locations; fly-in fly-out services on a case-by-case basis to rural, remote and regional areas in NSW; and represents eligible Aboriginal parties at the Family Court Specialist Indigenous Lists in Sydney, Lismore, and Coffs Harbour, as well as the Winha-nga-nha List at Dubbo Children's Court, a dedicated court list for Aboriginal and Torres Strait Islander families involved in care proceedings.

In 2022, the ACT Government implemented the recommendation from the *Our Booris Our Way Final Report 2019*,<sup>12</sup> "that funding be made available, as a matter of urgency, to professional legal and advocacy services that are culturally appropriate to ensure that Aboriginal and Torres Strait Islander families are able to access formal legal services". ALS (NSW/ACT) entered into a formal agreement with the ACT government in 2023 that secured 2 years of funding (to be paid over 3 years) to expand our practice by 2 solicitors, based in Canberra, to deliver care & protection services. The successful recruitment of 2 solicitors took more than 6 months with multiple job advertisements being placed that initially failed to attract suitable candidates.

ALS (NSW/ACT) faces a range of significant challenges in meeting the care and protection and family law needs of Aboriginal people who seek our assistance in NSW and the ACT, but the overwhelming challenge is our ability to attract and retain lawyers and support staff to work across the practice. Our experience in the ACT is highlighted above, and at the time of writing, ALS (NSW/ACT) had over 30 vacant budgeted positions across the practice and the dedicated programs that fall under the practice.

Our workforce recruitment and retention challenges, largely driven by the absence of salary parity with other employers in the legal assistance sector, is explored more fully in this submission in Section 8.

### ***Challenge of process changes***

The care and protection and family law practice teams also experience negative impacts due to process changes that are driven by policy or legislative change in NSW. In care and protection matters that are filed in court by the Department of Communities and Justice in NSW, the usual waiting time to take initial instructions and arrange to appear in court is 3 days. The Winha-nga-nha List in Dubbo is seeking to bring the filing time forward from 3 days to 1 day, which would significantly hamper the ability of ALS (NSW/ACT) to provide adequate representation to vulnerable children and families listed to appear.

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<sup>11</sup> ALS (NSW/ACT) is not able to offer Family Law services in the ACT due to limited resources

<sup>12</sup> Our Booris, Our Way Steering Committee, formed in response to the high proportion of Aboriginal and Torres Strait Islander children in the ACT child protection system. A review was conducted between November 2017 – December 2019 with the final report released in December 2019.

### ***Unmet service need***

ALS (NSW/ACT) is unable to take on all requests for services in NSW due to lack of resources, and we are forced to reject a significant number of requests due to lack of capacity.

In financial year 2022/2023, ALS (NSW/ACT) was unable to assist in 115 family law matters due to internal resource capacity constraints. In the period 1 July to 30 September 2023 alone, the number of rejected requests for assistance in family law matters was 102.

### **Civil Law Practice and Allied Professional Services**

Of the approximately 16,000 clients ALS (NSW/ACT) assisted with legal services in our criminal law and care/family law practices, the vast majority will also experience civil law issues including (but not limited to) problems with housing, discrimination, fines, credit and debt issues, Centrelink, victims' compensation and institutional abuse claims. For many, these issues are left unresolved, and potentially grow more complex, contributing to an ongoing cycle of interaction with the criminal and care and protection systems.

ALS (NSW/ACT) is currently growing its Allied Professional Services workforce, including mental health workers, social workers, youth and disability workers. This growth is made possible through program-specific Closing the Gap funding and specific purpose NLAP funding. Culturally safe and strengths-based approaches are essential for addressing the unique needs of Aboriginal and Torres Strait islander clients, and a holistic, 'wrap around' approach to legal service delivery is necessary to create lasting change for individuals. Allied Professional Services are critical to early intervention and prevention efforts and need to be funded alongside lawyers and support staff. We cannot redirect funds away from baseline criminal law services, the need for which continues to grow without commensurate increases in funding.

The National Agreement on CTG acknowledges that in order for any of the socio-economic and justice targets to be met, the Priority Reforms must form the bedrock. Those reforms call for genuine partnership with Aboriginal communities and organisations, building the Aboriginal Community Controlled Sector and sharing decision-making. In terms of civil law, this is not currently reflected in the NSW Legal Assistance Sector.

The ALS (NSW/ACT) civil law practice has a staffed practice of 3 lawyers and 4 tenancy advocates. By comparison, the Legal Aid NSW civil team is made up of 233 staff at 22 offices and in FY22-23, 29% of all civil services were delivered to Aboriginal clients.<sup>2</sup> Extrapolating from FY23 annual report data, this amounts to approximately 17,000 advice, minor assistance and representation services. The civil law staff profile at Legal Aid NSW has grown by 67% since FY12-13 when it was just 140 staff and 6.7% of services were to Aboriginal clients. This growth is accounted for by the introduction of the Civil Law Service for Aboriginal Communities at Legal Aid, as well as a concerted effort to increase service delivery to Aboriginal clients as a service priority.

For the Commonwealth to deliver on its commitments under the National Agreement on CTG, ALS (NSW/ACT) must be able to provide Aboriginal people in NSW with a genuine choice of legal service provider. Increased funding will allow for this and enable growth of the civil law practice and the expansion of holistic service delivery models within all practice areas.

This will enable a broader spectrum of the Aboriginal community access to civil law assistance and ensure that clients of the ALS (NSW/ACT) do not need to be referred to mainstream service providers for issues that are inter-connected with their other legal matters. It acknowledges that,

when properly funded, we can achieve better results because we are able draw on our cultural strength to support our communities and improve outcomes for our clients.

### **Expanding our geographic coverage**

The demand for ALS (NSW/ACT)'s legal services continues to grow however our ability to meet demand within current resources is limited. Instead of having the means to grow our service delivery model to meet known needs and service demands, ALS (NSW/ACT) has been forced to effect service delivery freezes and use cash reserves to cover core service delivery at locations such as Taree and Albury.

We are aware of the high number of Aboriginal people with criminal court finalisations in a range of Local Courts that we have been forced to cease servicing. We still receive requests to return to those locations even though, at some locations, our services were suspended as long ago as 2017. This is particularly challenging in remote areas, but also in areas of high population growth such as the Central Coast where ALS (NSW/ACT) is presently only able to service Children's Courts.

Below is data provided by the NSW Bureau of Crime Statistics and Research for Local Court finalisations for Aboriginal people to June 2023 that have no ALS (NSW/ACT) representation available:

Place	Total
Parramatta	1117
Liverpool	972
Wyong	768
Sutherland	687
Gosford	614
Burwood	519
Bankstown	442
Newtown	433
Fairfield	407
Hornsby	283
Windsor	260
Muswellbrook	243
Port Kembla	236
Forster	228
Lithgow	216
Manly	162
Singleton	156
Mudgee	148
Picton	111
Katoomba	102
Byron Bay	98
Moss Vale	96

ALS (NSW/ACT) has developed a 'best practice operating model' that would allow us to enhance our geographic coverage in NSW and increase our overall service delivery across all practice areas.

Our best practice operating model would require significant investment and would see the current staffing establishment increase substantially with a range of positions added to all current locations, and new offices being established at the following locations:



- Liverpool
- Port Macquarie
- Albury
- Tweed Heads
- Central Coast
- Grafton

The model also incorporates a significant increase to service delivery for care and protection and family law and provides for the continuation and expansion of our civil law practice and allied professional services, allowing us to offer civil and care/family legal services from 8 locations around NSW and the ACT while still maintaining a level of fly in/fly out service provision so as to not isolate lawyers from a reasonable sized practice team.

If the ALS (NSW/ACT) was supported with sufficient funding to implement our best practice operating model, we could safely deliver holistic wrap-around comprehensive legal services across NSW and the ACT.

## **6. Policy and Systemic Advocacy**

ALS (NSW/ACT), like other ATSILS, was established in line with the principle of self-determination to address the impacts of lack of access to culturally responsive legal assistance services on Aboriginal and Torres Strait Islander communities. Our specialised knowledge combined with our service delivery footprint across NSW and the ACT, as outlined above, means we are uniquely placed to advocate for to improve outcomes for the Aboriginal and Torres Strait Islander clients and communities we service.

ALS (NSW/ACT) regularly advocates for systems-level change to improve outcomes for Aboriginal and Torres Strait Islander people through evidence-based and community-informed contributions to law and policy reform. In the three-month period from July to September 2023, we received 50 requests to consult on or provide input into proposed legislative reform, legislative reviews, consultations, research studies, parliamentary roundtables and other consultative or feedback mechanisms, almost exclusively at the invitation of governments.

We are frequently the only ACCO included in consultations. Despite this, our contributions to policy and systemic advocacy are not formally supported through our funding quantum, nor through discrete funded activities.

Our policy and systemic advocacy activities are inextricable from our client-facing service provision, which provides us with the evidence base to support advocacy for practice- and community-informed systems change. Our submissions and input are informed by data from our legal practice and qualitative information provided by staff members in the legal practice through internal consultation. In practical terms, our evidence to inquiries and hearings by other bodies examining systemic issues or opportunities for reform is nearly always given by senior staff from our legal practice.

Our policy activities contribute directly to our core service delivery through advocacy for programs that will address discriminatory practices and reduce interactions of Aboriginal and Torres Strait Islander peoples with the legal system.

Based on our expertise, we are commonly asked and expected to input into government and sector reform inquiries and projects. The volume of consultation requests and short turnaround times

demanded by parliamentary processes can limit our opportunities to contribute our expertise and can place additional strain on the limited number of staff engaged in this work. It is important that we are provided with additional resourcing to continue to do this work and to be able to keep pace with an increasing volume of government and other stakeholder demand for community sector input on legal and policy reform.

## 7. Partnerships

Many of our clients have underlying issues that keep them trapped in the legal systems – including undiagnosed or untreated disabilities, mental health and/or alcohol and drug issues. If there were better culturally safe wraparound supports and we had greater capacity to build and grow partnerships with non-legal services, our clients and families may avoid the harms of the criminal justice and child protection systems.

Investing in cross-sector partnerships between ALS (NSW/ACT) and the non-legal sector is vital to achieving better justice outcomes for Aboriginal and Torres Strait Islander people. This includes fostering Aboriginal Health-Justice Partnerships, disability partnerships, and education partnerships to address legal issues at their roots, and support new approaches prioritising early intervention, wrap-around social support, prevention and diversion, rehabilitation, through-care and therapeutic measures.

ALS (NSW/ACT) would also benefit from increased funding to foster new cross-sector partnerships and maintain current ones across the academic, pro bono and philanthropic sectors. This approach recognises the importance of culturally safe community-controlled services (such as ATSILS and other ACCOs like Aboriginal community-controlled health, education and disability services) working together to provide holistic support for Aboriginal and Torres Strait Islander people with cognitive disability and their families.

Health Justice Partnerships (HJPs) are a way of working across sectors to address health, social and emotional wellbeing issues that impact on individuals' justice outcomes. ALS has been informally establishing health justice partnerships for many years, both at the local level and state-wide through our relationship with the Aboriginal, Health & Medical Research Council (AH&MRC). However, a lack of capacity has limited efforts to develop specific and formalised community controlled HJPs across NSW and the ACT, in accordance with Priority Reform 2 of the National Agreement on CTG.

There is enormous potential for ALS (NSW/ACT) to further develop formal health justice partnerships with Aboriginal Community Controlled Health Organisations (ACCHOs) across NSW and the ACT. To leverage this opportunity, we need to establish a state-wide framework to build capacities and drive sustained place-based partnerships, with a particular focus on regional, rural and remote locations.

Establishing stronger partnerships in the disability sector is also a critical area requiring greater investment. Despite the fact that Aboriginal people experience and live with disability at a much higher rate than the non-Aboriginal and Torres Strait Islander population, the Disability Royal Commission found that the needs of Aboriginal and Torres Strait Islander people with disability are “largely overlooked by national policy frameworks.”

The final report characterises this lack of meaningful, culturally appropriate and trauma informed support services for First Nations people with disability as “institutional neglect and a denial of the rights of First Nations people with disability.” The Disability Royal Commission found that “measures to reduce the over-representation of First Nations people in the criminal justice system are crucial”,

and that it is vitally important to invest in specific, disability-related measures to prevent First Nations people with disability from entering the criminal justice system, and to address their disability support needs once they are in the criminal justice system.

### **NSW Coalition of Aboriginal Peak Organisations (NSW CAPO)**

ALS (NSW/ACT) is a proud member of the NSW Coalition of Aboriginal Peak Organisations (CAPO) concerning the Independent Review of the National Legal Assistance Partnership 2020-2025. CAPO is a collective of NSW peak bodies for ACCOs which provides a strong, independent, and coordinated voice to holistically address issues affecting Aboriginal people in NSW. As a signatory to the National Agreement on CTG, we work in partnership with the NSW Government to implement the Agreement in NSW. CAPO current member organisations include:

- NSW Aboriginal Land Council (NSWALC)
- Aboriginal Legal Service NSW/ACT
- NSW Child, Family and Community Peak Aboriginal Corporation (AbSec)
- Link-Up NSW
- First Peoples Disability Network (FPDN)
- BlaQ Aboriginal Corporation
- Aboriginal Health and Medical Research Council (AH&MRC)
- Aboriginal Education Consultative Group (AECG)
- Aboriginal Culture, Heritage & Arts Association (ACHAA)

### **Partnership with Waminda**

South Coast Women's Health and Wellbeing Aboriginal Corporation, trading as Waminda, is a culturally safe and holistic service, providing Aboriginal women and their families an opportunity to belong and receive quality health and well-being support. Having successfully co-located ALS (NSW/ACT) staff to Waminda for a period of time with bushfire funding received in 2019 from the NSW Government, we have continued to build upon the successful 'partnership' after we received Family Violence Prevention Legal Service funding (FVPLS) from NIAA in 2021.

By agreement, Waminda provides a range of holistic and responsive support services to clients accessing our Family Violence Prevention Unit in Nowra and we have built strong referral pathways across several of Waminda's programs back into services provided by ALS (NSW/ACT).

Our successful and growing partnership with Waminda is testament to what can be achieved with sufficient resourcing and the ability to dedicate the time to foster and strengthen our relationship with an Aboriginal controlled organisation.

### **Partnership with Dharriwaa Elders Group**

ALS (NSW/ACT) participates in a collaboration with the Dharriwaa Elders Group (DEG), a local ACCO in Walgett, to support delivery of the DEG Dealing with Fines program. The DEG Dealing with Fines project aims to provide access to justice for the Walgett Aboriginal Community, reducing criminalisation and improving diversion from the criminal legal system. It focuses on assisting individuals in resolving their fine debt permanently through various means. Key elements include early support to access culturally appropriate legal services and advice, preventing further criminalisation through flexible support, and ongoing outreach to gather evidence for appeals or write-off applications. The project emphasises culturally appropriate resolution options to address community priorities and social needs.

As another ACCO, ALS (NSW/ACT) is uniquely placed to be able to respond flexibly and in a culturally safe way to requests for legal advice and assistance from DEG on behalf of clients, and to respond to the requirements of DEG in providing legal education and capacity-building to DEG staff who work most closely with shared clients, as well as strategic advice to inform advocacy by DEG for local interests with government and other stakeholders.

Through a collaborative, shared-client approach where the DEG team works closely with the local community, community members in Walgett can access a greater number of options for dealing with fines and accumulated fine debt. From January 2022 to July 2023, a total of 94 clients were referred by DEG to ALS (NSW/ACT) for legal advice and assistance, and over \$178,000 of accumulated fine debt was addressed by the collaboration. These figures are significant, noting the overall population of Walgett, a remote community in Western NSW, is 5,253. This partnership is an important example of what ACCO-to-ACCO capacity-building and collaboration can deliver for communities through the platforming of community aspirations and priorities in service design and delivery.

## **8. Workforce**

### **Recruitment and retention challenges**

#### ***Lack of Salary Parity***

The current NLAP funding received by ALS (NSW/ACT) does not permit us to offer competitive remuneration as compared to similar roles in the sector.

A recent benchmarking exercise of the positions, grades and salaries against Legal Aid NSW showed an organisational wide gap of over 21%. The salary variance was significantly higher than this percentage for some of the positions. A senior solicitor commencing at the baseline at Legal Aid NSW will receive a salary of \$134,483. ALS (NSW/ACT) can only offer the same position a base line salary of \$101,178 (32.9% less than the Legal Aid NSW salaries). These rates significantly undervalue the work performed by ALS (NSW/ACT) staff.

The impact of this systematic underfunding and pay disparity on the stability and strength of the ALS (NSW/ACT) workforce is significant. In addition to the inability to attract talent, resulting in numerous open positions, retaining staff is a challenge. The constant loss of expertise and knowledge impacts both the remaining staff and the level of service provided to clients and is an ongoing and unnecessary burden across the organisation. As well as the administrative burden on the corporate services team, practice staff spend a significant amount of time in the recruitment cycle, taking them away from delivering services to clients.

Salary parity with Legal Aid NSW is now critical. Providing competitive salaries will ensure staff at ALS (NSW/ACT) are valued and paid equitably against their peers in the sector when undertaking the same work.

As an ACCO that provides culturally safe services, we also want to be an employer of choice for Aboriginal and Torres Strait Islander people. In 2018, 56% of ALS (NSW/ACT) staff were Aboriginal or Torres Strait Islander. Currently that percentage is 36%.

This is a significant drop, and part of the reason is salary parity. By way of example, a practice administration officer, depending on experience and skill, can receive a salary at Legal Aid NSW up to \$86,359 (Clerk Grade 3/4). The highest paid ALS (NSW/ACT) practice administration officer salary is \$70,115 which is 23% less than Legal Aid NSW.

Lack of salary parity is impacting the entire workforce and contributing to the overall decline in Aboriginal and Torres Strait Islander people employed.

Without the funding to provide salary parity now, ALS (NSW/ACT) will be forced to reduce staff to increase salaries of those remaining. This will have a devastating impact on Aboriginal and Torres Strait Islander people accessing justice due to the withdrawal of front-line services.

Closing the Gap Priority Reform 2 calls on the urgent need to strengthen the community-controlled legal sector. Addressing the recruitment and retention issues by way of supporting wage parity with the NSW Legal Aid Commission will provide the much-needed stability the ALS (NSW/ACT) requires to safely deliver effective legal services.

**Recommendation** – Governments acknowledge the historical and systematic undervaluing of the ALS (NSW/ACT) and our workforce and address the critical shortage of solicitors and non-legal staff required to meet the known demand and unmet need for culturally appropriate legal services for Aboriginal and Torres Strait Islander people by funding the ALS (NSW/ACT) to offer salary parity with the Legal Aid Commission NSW, at a minimum.

#### *Impact of short-term government contracts*

Recruitment challenges are further frustrated by the inability to offer permanent employment or even long-term contracts to employees due to the short-term nature of many funding arrangements. Short-term funding also means staff can be on the look-out for their next job which may be outside of the ALS (NSW/ACT). This cost for those staff in terms of onboarding, experience and expertise is then lost.

#### **Industrial Reform**

Future NLAP agreements must provide a mechanism for funding increases throughout the term of the agreement, to accommodate for the financial impact of industrial reforms including the cost of resources to manage these changes.

The employment landscape is not constant and the introduction of new laws impacting staff arrangements must be contemplated by future agreements. For instance, the introduction of the *Fair Work Amendment (Supporting Australia's Economic Recovery) Act 2021* 2020 represents a significant shake up to Australia's industrial relations systems that could not have been contemplated prior to the execution of the current NLAP agreement.

An example of this recent industrial reform now part of the Fair Work Act, and soon to be having a major impact on the ALS (NSW/ACT), is the management of employees on fixed-term employment contracts. Changes will come into effect on 6 December 2023 and will generally reduce the use of fixed-term contracts to a period of two years with limited exceptions.

Many ALS (NSW/ACT) staff who have been provided with rolling employment contracts, in line with funding, will need to transition to permanency with upcoming grant renewals. Short-term government contracts being reissued must consider the potential redundancy burden of permanent staff going forward should funding under these short-term rolling grant agreements come to an end.

Where additional cost burdens are placed on ALS (NSW/ACT) outside of the base costs used in any funding model, the government must provide a funding trigger that will easily and effectively

operate to allow for additional funding to be provided to cover any additional and unforeseen costs that we are required to meet.

### **Workload**

The total demand for ALS (NSW/ACT) services has increased significantly over the last five years whilst core federal government funding has declined in real terms. Funding has not responded to this increase in demand and together with the challenges to recruit and retain staff, those staff continuing to work at the ALS (NSW/ACT) carry a significant load. This load is not comparable to their peers in the sector and not viable in the long term for many.

The following quotes are taken from recent staff exit interviews and highlight the critical need for ALS (NSW/ACT) to address staff entitlements and working conditions:

*“Relentless workload – underfunded and understaffed” - Trial Advocate*

*“Had no intention of leaving until I realised how much work and responsibility was involved for little pay” - Admin Officer*

*“I didn’t really feel valued. I cared about what we were trying to do and felt loyal to clients and community but I look back and I think the fact I was naïve, passionate, idealistic and committed to the cause meant I didn’t know my own value and essentially worked for years above my pay grade” - Care Solicitor*

*“Relentless workload was enjoyable at the start but not sustainable long term” - Crime Solicitor*

*“It often feels like the Executive relies on our love of our colleagues and clients to keep us here and working excessive hours” - Crime Solicitor*

*“ALS (NSW/ACT) culture is passionate and fearless with colleagues committed to similar goals. At the same time, I would characterise many of the ALS (NSW/ACT) staff as stressed and under high workloads” – Paralegal*

Main reason for leaving *“money – cannot survive with kids and mortgage” - CNS Solicitor*

*“The amount of work is incredibly high with very little office time to work on your matters ... I felt at times I was doing a disservice to my clients, and to myse If and the organisation” – Senior Solicitor*

The ALS (NSW/ACT) requires urgent funding for additional staff to manage the current workload.

### **Staff shortages in Regional, Rural and Remote offices**

The ability to attract talent in regional, rural and remote (RRR) offices is challenging not only from a salary parity perspective but also due to the absence of any incentives to encourage candidates to consider moving to these locations. Due to funding constraints, the ALS (NSW/ACT) is unable to provide any sign-on bonuses or location support to candidates.

The ALS (NSW/ACT) currently offers an annual remote allowance to solicitors of \$5,000 gross and to field officers and administration officers of \$2,000 gross. Due to funding constraints, these

allowances have not increased since 2008. ALS (NSW/ACT) remote offices are Bourke, Broken Hill, Griffith, Moree and Walgett.

The ALS (NSW/ACT) currently offers an annual regional and remote loyalty bonus but only to solicitors, administration officers and field officers at or below the level of Grade 2 Level 2 and who have worked for the ALS (NSW/ACT) for 4 years or less. The entitlement does not commence until the staff member has been in a regional or remote office for 18 months.

We would like to be in a position financially to have more inclusive incentives to ensure senior staff remain in these locations after having built relationships with local stakeholders and the community. Should eligible staff stay long enough to receive their full entitlement, this is only \$8,000 gross in total for solicitors by the 4-year mark and only \$2,400 gross in total for eligible administration officers and field officers by the 4-year mark. These amounts are not of a quantum to encourage staff to remain in remote locations and have not increased since 2009.

In the absence of any valued incentives, positions at the regional, rural and remote offices are often vacant. This places a significant burden on the staff that are in these offices as their workload will include carrying some of the workload for the unfilled positions. Workforce and skill shortages can lead to suboptimal legal support for clients. ALS (NSW/ACT) has been in the unfortunate position at times of having junior staff take responsibility for cases in remote areas with supervision and support of senior staff being offered from other locations via AVL or phone.

Together with salary parity, providing incentives to candidates to work in RRR areas will assist in attracting talent to these areas, immediately providing much needed workload support for the current staff and ensuring services for RRR communities.

**Recommendation** – Future funding includes the ability to provide incentive packages for staff in regional, rural and remote (RRR) offices. Such incentive packages should include the ability to provide a sign-on bonus and retention payment as well as relocation assistance and housing support for a minimum “establishment period” period. RRR incentive packages should be scaled and increase in value in more remote locations.

## Wellbeing

As highlighted in this submission, the doubling of services over the last five years together with constraints on pay has contributed to the inability to recruit and retain staff. The wellbeing of ALS (NSW/ACT) staff is of utmost concern. It was wellbeing considerations, ensuring the ALS (NSW/ACT) is protecting the physical and mental health of all our dedicated staff in the face of unprecedented demand, while maintaining the quality of service for our clients and the communities we serve, that led to the decision to freeze services at 13 local courts in May 2023.

The freezes were chosen through an analysis of some of our criminal law practices on how time is spent, including travel, and the scale of impact on affected communities. This was not a cost cutting exercise, but a decision made to support the wellbeing of staff.

This was a significant decision for the ALS (NSW/ACT) as we know service freezes can have dire consequences for Aboriginal and Torres Strait Islander communities.

Future funding must allow for services to be restored to these 13 local courts and to support the return to other identified locations where there is demand to provide service choice to Aboriginal people.

## Career pathways service for Aboriginal and Torres Strait Islander people

Providing a culturally safe and high-quality service for Aboriginal and Torres Strait Islander people requires a framework to recruit and provide pathways for Aboriginal and Torres Strait Islander lawyers and non-legal staff.

Legal Aid NSW, TAFE NSW and Macquarie University commenced a Legal Career Pathways Program in 2022 with the aim of recruiting Aboriginal people to be employed by Legal Aid NSW. This program creates a legal career pathway for Aboriginal people and increases the skills and qualifications of the Aboriginal workforce in legal services.

ALS (NSW/ACT) does not have the funding, size or scale to set up these programs. Such a pathway is essential for ALS (NSW/ACT) to provide culturally safe services and for addressing Aboriginal and Torres Strait Islander underrepresentation in the sector.

**Recommendation** – To ensure ALS (NSW/ACT) can continue to provide culturally safe services and to increase the representation of Aboriginal and Torres Strait Islander professionals in the legal sector, ALS (NSW/ACT) should be provided with quarantined funding:

- For the establishment of career pathway programs with NSW and ACT tertiary educational institutions and the private profession; and
- to establish Aboriginal and Torres Strait Islander entry level, internship and career development opportunities across legal, non-legal and corporate services positions.

## 9. Corporate Services and capital expenditure

Current funding arrangements have failed to keep pace with inflation and do not allow for any investment in property, equipment, technology or growth in corporates services staff. As a charity and with stretched funding, the ALS (NSW/ACT) does not operate with a margin to allow for this type of investment. Given the short-term nature of most grants and the inability to predict funding changes in the future, the ALS (NSW/ACT) cannot risk accessing its limited reserves to manage these investments.

### Corporate Services Team

ALS (NSW/ACT) prioritises the costs of delivering front line services rather than the indirect costs that support the ALS (NSW/ACT) as a whole, rather than any specific grant funded program. Whilst not associated with service delivery, these indirect costs, which include the corporate services team, are essential costs of maintaining and managing the ALS (NSW/ACT) through which services are delivered. The team plays a critical role in many ways including overseeing service delivery, providing back-office services, infrastructure and equipment and ensuring the ALS (NSW/ACT) manages its reporting, compliance and regulatory responsibilities.

The corporate services team has not grown in way that can support the additional work required in relation to new programs and increased complexity and reporting. In addition to current capacity issues, some roles simply do not exist that would lift the ALS (NSW/ACT) in terms of service delivery such as:

- a service innovation team to focus on service development and improvement, policy development, service coordination and stakeholder coordination.



- a cultural business unit that could lead the cultural safety agenda for Aboriginal and Torres Strait Islander staff, clients and stakeholders.

Future NLAP funding must allow for an appropriate increase in the corporate services team to support any growth in the service delivery teams.

**Recommendation** – Governments are Paying What it Takes and fully funding over-head costs of ALS (NSW/ACT) so there is an effective, efficient and sustainable operation across all shared and corporate services including Human Resources, Learning and Development, Information Technology, Finance, Project Management, Training and Organisational Frameworks.

### Offices requiring urgent capital injection

ALS (NSW/ACT) leases 20 offices and owns 7 office properties. Unlike some other legal service providers who benefit from “peppercorn lease arrangements” offered to them by Government, Local Councils or charitable and other institutions, the ALS (NSW/ACT) must compete for and pay commercial rates.

The ALS (NSW/ACT) was formed in 2006, when the 6 ATSILS that had previously served the state and territory came together to form one service. The six regionally based Aboriginal Legal Services were in each of the previous Aboriginal and Torres Strait Islander Commission (ATSIC) regions of NSW and their properties, acquired via previous grants were transferred to ALS (NSW/ACT). With funding under the Indigenous Legal Assistance Program (ILAP) and NLAP funding directed towards operational expenses and front-line services, these buildings and properties have not had any significant investment since acquisition.

Over the past 12 months, independent condition inspections have been arranged for all ALS (NSW/ACT) owned properties in Moree, Dubbo, Wagga Wagga, Bourke, Broken Hill, St Marys and Walgett. The preliminary independent assessments estimated remediation works between \$576.5k and \$1.5m and this estimate did not take into account potential professional and statutory advice, which may be required prior to any remedial works. Additionally, once engineers and consultants are engaged, additional costs may be identified above these ranges for the remedial work.

The independent building condition reports indicate the need for urgent capital injection to remedy issues identified including:

- Structural concerns,
- Upgrades required to electrical distribution,
- Inadequate security,
- Water ingress into offices,
- Carpets and vinyl flooring long overdue for replacement, stained and damaged,
- Carpentry work required to fix broken doors and frames,
- Air Conditioning units in poor condition requiring replacement, and
- Inadequate storage units.

Historically, the ALS (NSW/ACT) has been forced to make the decision to put as much funding as possible into front line positions rather than ‘pay itself’ rent for the owned offices. Future NLAP funding must allow the ALS (NSW/ACT) to recover an amount for notional commercial rent for all owned properties to allow the ALS (NSW/ACT) to build a “sinking fund” for capital works.

Essential to future funding is also a one-off injection to bring all ALS (NSW/ACT) properties to an acceptable, safe and professional condition.

### **Case study – 19 Trail Street Wagga Wagga office**

Following an independent building condition report highlighting structure concerns at the Wagga Wagga office, a structural engineering firm was engaged.

Significant structural integrity concerns were raised:<sup>13</sup>

*In our opinion, the open timber trussed roof to the basement (underground carpark) area lacks structural integrity. The supports consist of single skin masonry piers to the inside of a 230mm masonry wall. Whilst this provides some vertical support, it is unlikely the piers have the capacity to support the trusses effectively and do not provide a portal action for bracing purposes. There is a general lack of bracing throughout the basement structure.*

*Significant wall rotation and roof spread appears to have occurred, most likely due to the saturation of the ground between the two neighbouring buildings on the east side and the separation of the timber truss joints and associated horizontal spreading and deflection of the trusses. Remedial works have been undertaken to the trusses via the installation of vertical tension rods etc., however, the triangulation to the trusses has not been effectively restored. The trusses are in poor condition with inadequate remedial works and modifications historically undertaken.*

Such were the concerns of the engineering firm; we were advised to immediately secure an exclusion area that was deemed unsafe. This exclusion zone included the office kitchen and bathroom facilities.

Since the end of July 2023, the Wagga Wagga office has been ‘skeleton staffed’ and open and operating at reduced hours to the public.

The ALS (NSW/ACT) has arranged for the recommended follow-on reports including a geotechnical engineer inspection, a surveyor and sewer, storm water and water supply line inspection.

Through a limited tender process, temporary make-safe quotes have been received and the work will be proceeding shortly. This is however a temporary solution only. The ALS (NSW/ACT) will now carry out a tender process to understand the work and costs required for a permanent solution to the property.

### **Capacity Issues**

In addition to the building condition concerns noted above, ALS (NSW/ACT) also faces capacity challenges across all its offices. Capacity issues have been growing over time and have been brought about by a number of factors including:

- More staff employed with increases to base line funding over the years of ILAP & NLAP,
- New staff employed across new grants under NLAP & other funding sources, and
- Staff are moved to offices that require additional support.

Future funding must allow for opportunities throughout the agreement term for the ALS (NSW/ACT) to seek capital funding outside the annual baseline funding to accommodate for both improvements and where required, funding to allow expanding into new permanent and shared locations.

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<sup>13</sup> MJM Consulting Engineers Visual Condition Report Existing Commercial Building 19 Trail Street Wagga Wagga NSW 2650 Report Reference: 230275

### **Case study – 23-25 Carrington Avenue Dubbo office**

The ALS (NSW/ACT) is at full capacity in the owned Dubbo office with meeting rooms now reclaimed as offices and with 'single staff' offices being split to accommodate two staff members. Given the capacity issue, advice was sought from a construction company, on the expansion options for the office.

The report concluded that the only viable option if the ALS (NSW/ACT) wishes to create any substantial additional floor space, is to add a first floor. It is not possible to extend outwards on the property given the local planning rules requiring additional car parking for additional office space.

Indicative costs to carry out the building work plus related professional fees (such as architect, town planner, structural engineer, services engineer, project management, certifier) are estimated to exceed \$2M. This is cost prohibitive for the ALS (NSW/ACT) and accordingly the work has not progressed.

The current NLAP funding does not reimburse the ALS (NSW/ACT) for the "notional rent" of the Dubbo office which means we are unable to move to new leased premises to accommodate the team. Leasing a new office would require the ALS (NSW/ACT) to fund the rent and any capital fit out required for a new office.

## **Fleet Vehicles**

The ALS (NSW/ACT) manages a fleet that currently totals 84 vehicles. These vehicles are essential for service delivery and especially for solicitors in remote and regional offices travelling significant distances between the office and the circuits they service. To manage fleet costs in an environment where indexation on the NLAP funding is outstripped by the cost of rising insurance and petrol, the ALS (NSW/ACT) has been forced to lease vehicles that cost less and are not always fit for purpose.

As a result the motor vehicles may not have the safety features required in remote and regional offices such as bull bars and all terrain features required for outback roads. The smaller vehicles allocated to these areas lack the space and comfort required for travelling long distances between courts. The impact of using vehicles not fit for purpose results in repairs and maintenance at increased levels. At the time of writing this report, the ALS (NSW/ACT) had 14 of the 84 vehicles off road for repairs.

Future funding needs to increase to allow ALS (NSW/ACT) to select vehicles appropriate to the location and use of the vehicle to ensure staff are travelling in vehicles that are optimal for the placed based circumstances.

## **IT environment requiring investment**

With funding directed towards services delivery and operational expenditure, the ALS (NSW/ACT) has not been in a position financially to invest in critical technology platforms and to replace legacy applications. An investment in the IT environment will ensure the ALS (NSW/ACT) has the appropriate IT systems and platforms essential for many reasons including:

- the ability to capture, use and analyse data in a meaningful way for both internal and external purposes;
- increased efficiency and productivity;

- the ability to effectively communicate with clients, and manage information and records;
- the elimination of process duplication; and
- the reduction in manual processes.

Having the funds to invest in new technologies is only part of problem. The other part is the inability of the ALS (NSW/ACT) to resource these projects. Significant changes to the IT environment requires dedicated IT and project management resources to firstly dedicate time to the review, then to select and implement any new platform or application and then to develop and deliver subsequent training, and to embed uptake of technologies into existing roles. These projects are time intensive and require dedicated personnel that can step away from their 'day job' to manage the project and the ALS (NSW/ACT) is not set up to resource a project in this way.

Investment in IT systems and platforms is fundamental to the delivery of efficient, quality services and important to the overall strength of the ALS (NSW/ACT).

### **Case study – Law Practice Management System**

Critical to providing client and case management together with grant reporting, is the client management system (CMS). The current CMS used by the ALS (NSW/ACT) has been in place since 2016 and was set up in a time when the Company was much smaller, less diverse in terms of services, and the reporting obligations less onerous. The CMS has evolved in a reactive and piecemeal way to address growing reporting requirements. In its current form the CMS is designed largely around NLAP reporting and data capture, rather than records management, case management and client management.

The CMS used by the ALS (NSW/ACT) is not a unified system to manage the entire process of case management. Such a systems is currently beyond our reach given both the limited funding and resources to dedicate to such a project.

A single system would provide the ability to manage not only the legal practice (criminal law, care and protection, family law and the new civil practice) but also other programs that have a client case load including our growing allied professional services. A flexible system would also allow staff to record information whilst working remotely, including at court, from mobile devices and in the field.

A single system would provide:

- the ability to use best-practice case management and client management
- consistency in case management across all ALS (NSW/ACT) practice areas
- the ability to eliminate paper-based forms and auto-fill template documents
- increased ability to manage compliance with relevant ALS (NSW/ACT) policies and legislative requirements and increased safety from a cyber security perspective as data is centralised rather than stored across numerous platforms.

### **Corporate Services legacy applications**

The ALS (NSW/ACT) corporate services applications and platforms are no longer fit-for-purpose. Further they are not integrated and as a result processes are inefficient, often being duplicated and manual. Examples of the challenges are:

- The Human Resources Management Information System (HRMIS) does not integrate with the Microsoft 365 environment, the learning management system or even the payroll

software. This means data is double handled moving from one application to another and critical data is held in different systems rather than in one place.

- The finance software is a stand-alone legacy software that is over a decade old and is hosted on the only remaining on-site server that ALS (NSW/ACT) manages. The increase in reporting following on from the additional programs now managed by the ALS (NSW/ACT) requires a more sophisticated finance application to support timely reporting and the management of cost allocations.

These legacy applications are buckling under the strain of increased staff, such as those employed under new NLAP programs and other grant and increased reporting obligations. Increased funding is required to support the replacement of legacy applications, necessary to strengthen the corporate services IT environment.

**Recommendation** – ALS (NSW/ACT) is provided with an immediate capital investment, to upgrade capital infrastructure including repairing owned office buildings to make them safe and fit for purpose, expanding into new permanent and shared office locations, updating Information Technology, data systems and legacy applications.

## 10. Enhanced Data Collection and Analysis

ALS (NSW/ACT) recognises the importance of our obligation to provide data in line with the data standards manual, and we have prioritised the need to improve collection across the Practice. In the last financial year, the ALS (NSW/ACT) data team has sought to increase data training to staff throughout both NSW and the ACT. This has included developing written and video material for staff to better utilise ALS (NSW/ACT) data systems. The data team has been working with practice teams within the organisation to develop different data-driven tools. This includes maintaining and developing dashboards that allow staff to access and visualise data as well as creating ad-hoc data entry tools that capture additional data and streamline record-keeping processes.

However, the ALS (NSW/ACT) is also of the belief that that the current NLAP reporting obligations place undue burden on front line staff who consider that their priority should be the quality of the service to clients. This tension together with the level of workload pressure discussed throughout this submission, highlight the primary reason as to why our ‘service count’ data continues to be under reported and not sufficient to accurately measure our achievement on meeting NLAP objectives.

Furthermore, with the increase in the number of required data points needed to comply with the schedule D reporting obligations, ALS (NSW/ACT) submits that the first priority of the NLAP Data Strategy that “service data should support, not detract from, the quality of frontline service delivery” seems meaningless and redundant. Despite the improvements made by us to date and the commitment we have made to continue our effort to improve the quality of data submitted, the only meaningful way for the ALS (NSW/ACT) to make the level of continuous improvement required is to:

- address our retention and workplace pressures;
- increase our administrative support roles; and
- invest in a fit for purpose client management data system.

**Recommendation:** In line with Priority Reform 4 of the National Agreement on CTG, ALS (NSW/ACT) should be funded to build its capability and expertise to collect, analyse and interpret service data to

enhance service planning, practice management, meet reporting obligations and share with key stakeholders including community.

## Data Standards Manual

The Data Standards Manual (the manual) was first introduced in 2015 and was developed by the Commonwealth in consultation with legal service providers and noted that “[t]he Australian Government will only require a small subset of the data for reporting purposes”. At the time ALS (NSW/ACT) was funded under ILAP and was obliged to record data in line with the definitions contained in the manual.

Since its introduction, there have been several versions published as the sector grappled with several significant challenges in consistently applying the definitions contained in the manual across multiple legal jurisdictions and with the ‘operational differences’ of the service providers.

By way of example, the definition of ‘duty matter’ is closely aligned to the practice of LAC’s reliance on private practitioners who appear at court on behalf of Legal Aid NSW and then hand the matter back. If the matter (same charges) is adjourned to another date and the same client returns to court seeking assistance and is again assisted by ‘a duty lawyer’, it is counted as a new and separate duty matter. This continues until either a grant of aid is sought and approved (it then becomes a representation matter and counted as one service until completion), or it continues to be counted as a new duty at each appearance until finalisation. The use of ‘duty lawyers’ is not a typical ATSILS practice. Our team would open a file and appear until the matter concluded or if due to eligibility or conflict, we had to withdraw. Our matter was counted as one from start to finish.

Another significant issue is the value of one. A simple assault matter defended at hearing that may take four months from opening the file to completion, will count as one representation in a reporting period. The same value is given to a complex defended murder charge that may require considerable work across multiple reporting periods by several staff members, but it will also be counted as one, and on its face, carry the same value to the funder.

It is the view of ALS (NSW/ACT) that the guidance and definitions provided in the manual require further careful thought and review as it does not adequately meet its intended purpose of giving best practice guidance to legal assistance service providers to facilitate the collection of **consistent and comparable data**. The iterative process is far from over.

The objective, principles and outcomes of the Data Strategy should be achieved in a manner consistent with the principles in the *National Strategic Framework* and, in the context of services delivered to Aboriginal and Torres Strait Islander Australians, the National Agreement. The Strategic Priorities are subject to meeting relevant legislative obligations. To the extent possible, the activities covered under the Data Strategy should seek to adhere to data sovereignty principles, including consultation on access to and analysis and representation of data.

## 11. Defending cultural rights

Although Aboriginal people make up 4% of people living on the NSW South Coast, they have accounted for 80% of jail terms for fisheries offences since 2009.<sup>14</sup> In particular, Aboriginal people

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<sup>14</sup> Janet Hunt (Honorary Associate Professor, CAEPR, Australian National University), The NSW government needs to stop prosecuting Aboriginal fishers if it really wants to Close the Gap, The Conversation, 11 October 2021, <[The NSW government needs to stop prosecuting Aboriginal fishers if it really wants to Close the Gap \(theconversation.com\)](https://theconversation.com/government-needs-to-stop-prosecuting-Aboriginal-fishers-if-it-really-wants-to-Close-the-Gap)>.

are significantly overrepresented among those jailed or convicted in NSW for offences related to abalone fishing.<sup>15</sup> According to NSW Bureau of Crime Statistics and Research<sup>16</sup>, between 1996 and 2020, Aboriginal people were subject to the following fisheries prosecutions in NSW:

- 30 Custodial sentences
- 23 Custodial alternatives
- 93 Community-based orders
- 279 Fines

Historically, despite the significance of fisheries charges and their impacts on Aboriginal communities, ALS NSW/ACT has been unable to appear in native title defence matters due to resourcing constraints.

For Governments to adequately meet their commitments under the National Agreement on CTG, ALS NSW/ACT, as an Aboriginal Community-Controlled Organisation must be resourced to provide culturally safe representation to Aboriginal people fishing for cultural purposes who have been prosecuted.

**Recommendation:** Governments resource, ALS NSW/ACT, and all ATSILS to provide culturally appropriate representation to Aboriginal people who are prosecuted when practicing their cultural rights, including fishing for cultural purposes.

## 12. Conclusion

ALS NSW/ACT thanks Dr Warren Mundy and the Review team for the opportunity to submit to the Review of the National Legal Assistance Partnership 2020-25.

We acknowledge the important work of the legal assistance sector and we acknowledge and thank our funders, partners, allies and, most importantly, communities across NSW and ACT for your resistance and resilience in the ongoing fight for justice.

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<sup>15</sup> Oxfam Australia, Time to respect First Peoples' traditional fishing rights, March 2022, <<https://www.oxfam.org.au/2022/03/time-to-respect-first-peoples-traditional-fishing-rights/>>.

<sup>16</sup> Ibid.