

## **EXPLANATORY STATEMENT**

### **Issued by the Authority of the Minister for Finance**

*Financial Framework (Supplementary Powers) Act 1997*

*Financial Framework (Supplementary Powers) Amendment  
(Attorney-General's Portfolio Measures No. 1) Regulations 2022*

The *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) confers on the Commonwealth, in certain circumstances, powers to make arrangements under which money can be spent; or to make grants of financial assistance; and to form, or otherwise be involved in, companies. The arrangements, grants, programs and companies (or classes of arrangements or grants in relation to which the powers are conferred) are specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the Principal Regulations). The powers in the FF(SP) Act to make, vary or administer arrangements or grants may be exercised on behalf of the Commonwealth by Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013*.

The Principal Regulations are exempt from sunseting under section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (item 28A). If the Principal Regulations were subject to the sunseting regime under the *Legislation Act 2003*, this would generate uncertainty about the continuing operation of existing contracts and funding agreements between the Commonwealth and third parties (particularly those extending beyond 10 years), as well as the Commonwealth's legislative authority to continue making, varying or administering arrangements, grants and programs.

Additionally, the Principal Regulations authorise a number of activities that form part of intergovernmental schemes. It would not be appropriate for the Commonwealth to unilaterally sunset an instrument that provides authority for Commonwealth funding for activities that are underpinned by an intergovernmental arrangement. To ensure that the Principal Regulations continue to reflect government priorities and remain up to date, the Principal Regulations are subject to periodic review to identify and repeal items that are redundant or no longer required.

Section 32B of the FF(SP) Act authorises the Commonwealth to make, vary and administer arrangements and grants specified in the Principal Regulations. Section 32B also authorises the Commonwealth to make, vary and administer arrangements for the purposes of programs specified in the Principal Regulations. Section 32D of the FF(SP) Act confers powers of delegation on Ministers and the accountable authorities of non-corporate Commonwealth entities, including subsection 32B(1) of the Act. Schedule 1AA and Schedule 1AB to the Principal Regulations specify the arrangements, grants and programs.

Section 65 of the FF(SP) Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2022* (the Regulations) amend table item 87 in Part 4 of Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Justice Services – Community Legal Services Program (CLSP). The CLSP is administered by the Attorney-General's Department.

The objective of the CLSP is to contribute to the provision of access to legal assistance services for disadvantaged members of the community and those with special needs and/or whose interest should be protected as a matter of public interest through the provision of funding to community-based organisations.

The amendments to table item 87 will support additional spending activities under the Program Support and Development element of the CLSP that complements community legal services provided by the states and territories including by providing factual information and/or advice with a focus on systemic issues affecting access to justice.

The additional spending activities relate to the development and delivery of the National Bench Book on Aboriginal and Torres Strait Islander Peoples and the Legal System (the Bench Book) and the Mental Health Training Package for the Legal Assistance Sector (the training package).

The Bench Book will be a practical and readily-accessible resource to better inform judicial officers and legal professionals about the cultural and legal issues faced by Aboriginal and Torres Strait Islander peoples in the criminal and civil justice systems. Grant funding of \$0.6 million over three years from 2021-22 under the CLSP will be provided to the Australasian Institute of Judicial Administration to develop and deliver the Bench Book by 30 June 2024.

The training package will be online compassion-based training for the legal assistance sector to assist providers in identifying clients with mental health conditions, and to better support people in distress. Grant funding of \$2.5 million over four years from 2021-22 under the CLSP will be provided to one or more organisations to develop and deliver this training package.

Details of the Regulations are set out at [Attachment A](#). A Statement of Compatibility with Human Rights is at [Attachment B](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*. The Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

## **Consultation**

In accordance with section 17 of the *Legislation Act 2003*, consultation has taken place with the Attorney-General's Department.

A regulation impact statement is not required as the Regulations only apply to non-corporate Commonwealth entities and do not adversely affect the private sector.

**Details of the *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2022***

**Section 1 – Name**

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2022*.

**Section 2 – Commencement**

This section provides that the Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

**Section 3 – Authority**

This section provides that the Regulations are made under the *Financial Framework (Supplementary Powers) Act 1997*.

**Section 4 – Schedules**

This section provides that the *Financial Framework (Supplementary Powers) Regulations 1997* are amended as set out in the Schedule to the Regulations.

**Schedule 1 – Amendments**

***Financial Framework (Supplementary Powers) Regulations 1997***

**Item 1 – Part 4 of Schedule 1AB (table item 87, column headed “Objective(s)”, paragraph (a) (first occurring))**

Table item 87 in Part 4 of Schedule 1AB establishes legislative authority for government spending on the Justice Services – Community Legal Services Program (CLSP), which is administered by the Attorney-General's Department (the department).

Item 1 inserts the words “legal information and” after the word “provide” to paragraph (a) of the column headed “Objective(s)” to support additional spending activities under the CLSP. The amendments to item 87 will enable funding under the CLSP to support the development and delivery of the National Bench Book on Aboriginal and Torres Strait Islander Peoples and the Legal System (the Bench Book).

The Bench Book supports funding priorities under the Program Support and Development element of the CLSP. The Bench Book will be a practical and readily-accessible resource to better inform judicial officers and legal professionals about the cultural and legal issues faced by Aboriginal and Torres Strait Islander peoples in the criminal and civil justice systems.

The overall policy objectives of the Bench Book are to address the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system and to improve access to and delivery of quality, culturally-sensitive justice and legal assistance services to Aboriginal and Torres Strait Islander peoples.

The Bench Book will cover but may not be limited to:

- relevant background information including relevant Royal Commissions and inquiries;
- aspects of traditional Aboriginal and Torres Strait Islander Australia;
- aspects of contemporary Aboriginal and Torres Strait Islander Australia;
- language and communication issues;
- Native Title, Corporations and Family Law;
- criminal proceedings;
- sentencing, and
- legal practice issues.

The users of the Bench Book will be judicial officers and legal professionals, for the benefit of Aboriginal and Torres Strait Islander peoples in their engagement with the justice and legal assistance services sectors.

The Australasian Institute of Judicial Administration (AIJA) will deliver the Bench Book subject to the necessary grant approval processes. The AIJA was responsible for delivering the *Aboriginal Bench Book for Western Australian Courts* (2002 and 2008) and the *National Domestic and Family Violence Bench Book* (2021). As such, the AIJA has demonstrated relevant skills and experience including:

- judicial and legal qualifications, and research, writing and project management skills and experience;
- expertise in the participation of Aboriginal and Torres Strait Islander peoples in the justice and legal assistance systems and understanding of the relevance and impact of broader historical, cultural and socio-economic issues, and
- expertise in culturally-sensitive engagement with Aboriginal and Torres Strait Islander peoples and their representative organisations in the justice and legal assistance services sectors.

The department will deliver the Bench Book through a one-off, non-competitive grant decided by the Attorney-General under a separate grant opportunity consistent with the CLSP.

Final decisions about Commonwealth expenditure and the selection of the successful grant applicant will be made by the Secretary of the department or the relevant delegate of the Secretary of the department, in accordance with the department's *Financial Framework (Supplementary Powers) Financial Delegation 2017*, as follows:

- Secretary, Attorney-General's Department – to the limit of the total available appropriation and other resources available to the department;
- Deputy Secretary, Legal Services and Families Group - \$10,000,000;
- First Assistant Secretary, Legal Services Policy Division - \$5,000,000; and
- Assistant Secretary, Legal Assistance Branch, Legal Services Policy Division - \$1,000,000.

The decision maker for the Bench Book will be the Assistant Secretary, Legal Assistance Branch. The decision maker is a senior official with the skills and experience deemed necessary to hold the relevant position and make decisions regarding the appropriate spending of relevant money in accordance with the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), the *Commonwealth Grants Rules and Guidelines 2017* (CGRGs) and associated grant arrangements.

The decision-making, assessment, selection and notification processes, as well as eligibility and grant money requirements, will be detailed in the grant opportunity guidelines. The grant will be administered by the Community Grants Hub within the Department of Social Services in accordance with the Commonwealth resource management framework, including the PGPA Act and the CGRGs. Information about the grant will be made available on the GrantConnect website (<https://www.grants.gov.au>).

Merits review of decisions made in connection with grants made from the CLSP, including for the Bench Book, is not considered appropriate because these decisions relate to the provision of a grant to one or more organisations over other organisations. Formal merits review would only promote competition among community groups and would not provide an effective remedy, as a successful application for review by one service provider would require a reduction in funding to other service providers. The Administrative Review Council (ARC) has recognised that it is justifiable to exclude merits review in relation to decisions of this nature see paragraphs 4.16 to 4.19 of the guide, *What decisions should be subject to merit review?* (ARC guide).

Whilst decisions in relation to the Bench Book are not suitable for a merits review process, the decision may be reviewed by the Commonwealth Ombudsman, who may make recommendations, but cannot overturn decisions. Further, the right to review under section 75(v) of the Constitution and review under section 39B of the *Judiciary Act 1903* may be available.

The review and audit process undertaken by the Australian National Audit Office (ANAO) provides a mechanism to review Australian Government spending decisions and report any concerns to the Parliament. These requirements and mechanisms help to ensure the proper use of Commonwealth resources and appropriate transparency around decisions relating to making, varying or administering arrangements to spend relevant money.

Consultation has occurred with the AIJA. In developing the Bench Book, the AIJA will consult with the National Aboriginal and Torres Strait Islander Legal Services, the National Native Title Council, a judicial reference group convened by the AIJA, Commonwealth, state and territory justice departments, legal aid and community legal centre representatives and other experts as required.

The department has also consulted more broadly and has drawn on relevant resources to inform its decision to propose Commonwealth policy and financial support for this program, including:

- state and territory justice departments on the scope, purpose and funding of the Bench Book
- the Australian Law Reform Commission's *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133) which supports the need for a Bench Book
- the *National Domestic and Family Violence Bench Book* (2021) (also developed by the AIJA) on which the proposed Bench Book will draw in relation to matters of Family Law and criminal proceedings
- the *Aboriginal Bench Book for Western Australian Courts* (2008) (also developed by the AIJA) which responds to the over-representation of Aboriginal people in the criminal justice system while acknowledging that there is a need to respond

appropriately to the challenge that offending behaviour, particularly family violence and child abuse, poses, and

- the *Bugmy Bar Book* (2019) developed by the *Bugmy Bar Book* Project Committee, which summarises key research relating to experiences of disadvantage and deprivation as a resource to assist practitioners in the preparation and presentation of evidence.

There is broad support across the justice and legal assistance sectors for initiatives that will assist in reducing the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system and Indigenous incarceration rates. States and territories have agreed to participate in the extensive consultation process for the development of the Bench Book to ensure it is fit for purpose for each jurisdiction.

Funding of \$32.3 million over four years from 2021-22 is available for the CLSP, of which \$0.6 million over three years from 2021-22 has been allocated to the Bench Book. Funding for the item comes from Program 1.4: Justice Services, which is part of Outcome 1. Details are set out in the *Portfolio Additional Estimates Statements 2021-22, Attorney-General's Portfolio* at page 22.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item, including for the Bench Book references the following powers of the Constitution:

- the express incidental power and the executive power (sections 51(xxxix) and 61),
- the communications power (section 51(v));
- the census and statistics power (section 51(xi));
- the race power (section 51(xxvi)); and
- the territories power (section 122).

#### *Express incidental power and the executive power*

The express incidental power in section 51(xxxix) of the Constitution empowers the Parliament to make laws with respect to matters incidental to the execution of any power vested in the Parliament, the executive or the courts by the Constitution. The executive power in section 61 of the Constitution supports the (a) ordinary and well-recognised functions of government and (b) execution and maintenance of the Constitution and laws of the Commonwealth.

#### *Communications power*

Section 51(v) of the Constitution empowers the Parliament to make laws with respect to 'postal, telegraphic, telephonic and other like services'.

#### *Census and statistics power*

Section 51(xi) of the Constitution empowers the Parliament to make laws with respect to 'census and statistics'.

#### *Races power*

Section 51(xxvi) of the Constitution empowers the Parliament to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'.

Territories power

Section 122 of the Constitution would support the funding where it is for the legal assistance sector in a territory.

The *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 3) Regulations 2018*, provide for the CLSP to engage the census and statistics power where the activities assist the Commonwealth in compilation and analysis of relevant data from the legal assistance sector.

The Bench Book is specifically directed at assisting judicial officers, legal assistance service providers and other professionals dealing with Aboriginal and Torres Strait Islander peoples in the justice and legal assistance sectors, with the primary objective of responding to the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.

The Bench Book will be delivered exclusively online and will assist users across Australia, including in the territories.

**Item 2 – Part 4 of Schedule 1AB (table item 87, column headed “Objective(s)”, paragraph (b) (first occurring))**

Item 2 inserts the words “and deliver and receive mental health training” after the words “legal assistance services” to paragraph (b) of the column headed “Objective(s)” to support additional spending activities under the CLSP. The amendments to item 87 would enable funding under the CLSP to support the development and implementation of the Mental Health Training Package for the Legal Assistance Sector (the training package).

The training package supports the funding priorities under the CLSP, in particular, national service delivery, and program support and development activities.

The training package responds to Recommendation 4.2 of the *Connected and Compassionate: Implementing a national whole of governments approach to suicide prevention* report, which was published by the National Suicide Prevention Adviser, Ms Christine Morgan, in December 2020 (<https://www.mentalhealthcommission.gov.au/getmedia/543d313c-5749-404d-b349-b08db3a7fd96/Connected-and-Compassionate>). Ms Morgan recommended that all jurisdictions implement contemporary compassion-based training for front-line workers to enable them to respond to distress – especially those providing financial, employment and relationship support to people experiencing distress.

The training package will be delivered exclusively online and will assist providers to better identify that a person is experiencing a mental illness, to ensure that those people can access the assistance they require and prevent their mental health and legal issues from escalating. The intended outcomes of the program are:

- legal assistance service providers are empowered to deliver services in a client-centric manner that is informed by the needs of people experiencing mental health issues;
- legal assistance service providers are better able to identify mental health issues and support people in distress;
- improved access to justice for people experiencing mental health issues;

- the legal assistance sector builds its own capacity to address the needs of people experiencing mental health issues; and
- legal assistance service providers are supported to build the capacity of their organisations and staff to deliver appropriate services to people experiencing mental health issues.

On 11 May 2021, the Minister for Health and Aged Care, the Hon Greg Hunt MP, announced a historic \$2.3 billion National Mental Health and Suicide Prevention Plan package, which included funding of \$77.1 million under Pillar 1: Prevention and early intervention for the National Legal Assistance Partnership to support early resolution of legal problems for those experiencing mental illness, and for mental health workers in Domestic Violence Units and Health Justice Partnerships to support women who have experienced family violence. The media release is available at (<https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/historic-23-billion-national-mental-health-and-suicide-prevention-plan>).

Funding for the training package was originally intended to be distributed to states and territories through the National Legal Assistance Partnership 2020-25. However, after consultation with states, territories and the legal assistance sector, the Commonwealth will instead provide the funding directly to one or more organisations through a grant process.

The department will deliver the training package through a one-off, ad hoc grant process to one or more organisations which will then develop, deliver and evaluate the training. The funding recipient(s) will be required to enter into a grant agreement with the Commonwealth to receive the funding. The department will receive reporting on the use of the grant funding to determine whether the funding supported the outcomes of the program.

Final decisions about Commonwealth expenditure and the selection of the successful grant applicant will be made by the Secretary of the department or the relevant delegate of the Secretary of the department, in accordance with the department's *Financial Framework (Supplementary Powers) Financial Delegation 2017*, as follows:

- Secretary, Attorney-General's Department – to the limit of the total available appropriation and other resources available to the department;
- Deputy Secretary, Legal Services and Families Group - \$10,000,000;
- First Assistant Secretary, Legal Services Policy Division - \$5,000,000; and
- Assistant Secretary, Legal Assistance Branch, Legal Services Policy Division - \$1,000,000.

The decision maker for the training package will be the First Assistant Secretary, Legal Services Policy Division. The decision maker is a senior official with the skills and experience deemed necessary to hold the relevant position and make decisions regarding the appropriate spending of relevant money in accordance with the PGPA Act, CGRGs and associated grant arrangements.

The decision-making, assessment, selection and notification processes, as well as eligibility and grant money requirements, will be detailed in the grant opportunity guidelines. The grant will be administered by the Community Grants Hub in accordance with the Commonwealth resource management framework, including the PGPA Act and the CGRGs. Information about the grant will be made available on the GrantConnect website (<https://www.grants.gov.au>).



The CLSP is delivered through grant opportunities with funding rounds established on a regular and ad-hoc basis. Grants are made consistent with the relevant grant opportunity guidelines. Grant opportunities may be identified in response to a particular community need or emerging issues. Some grants may be awarded over a number of years (multi-year grant agreements) or as one-off payments. Applicants participating through a closed, non-competitive selection process will be invited to submit applications for a particular activity. In this case, the applications are assessed in accordance with the relevant grant opportunity guidelines.

Targeted or restricted competitive funding rounds may be opened based on the specialised requirements of the particular grant activity or project under consideration. Open, competitive funding rounds may also be opened.

Organisations funded under the CLSP may include:

- not-for-profit organisations;
- national community legal services; and
- legal assistance peak bodies.

Final decisions about Commonwealth expenditure and the selection of successful grant applicants will be made by the Secretary of the department or the relevant delegate of the Secretary of the department, in accordance with the *department's Financial Framework (Supplementary Powers) Financial Delegation 2017*, as follows:

- Secretary, Attorney-General's Department – to the limit of the total available appropriation and other resources available to the department;
- Deputy Secretary, Legal Services and Families Group - \$10,000,000;
- First Assistant Secretary, Legal Services Policy Division - \$5,000,000; and
- Assistant Secretary, Legal Assistance Branch, Legal Services Policy Division - \$1,000,000.

The decision maker for the CLSP varies according to the amount of the grant funding allocated to each organisation. Decision makers are senior officials with the skills and experience deemed necessary to hold the relevant positions and make decisions regarding the appropriate spending of relevant money in accordance with the PGPA Act, CGRGs and associated grant arrangements.

The decision-making and assessment processes, eligibility, funding priorities and selection criteria for each grant opportunity are detailed in the relevant grant opportunity guidelines.

CLSP grants are administered by the Community Grants Hub in accordance with the Commonwealth resource management framework, including the PGPA Act and the CGRGs. Information about the grant, including grant opportunity guidelines, is available on the GrantConnect website (<https://www.grants.gov.au>).

Merits review of decisions made in connection with grants made from the CLSP, including for the training package, is not considered appropriate because these decisions relate to the provision of a grant to one or more organisations over other organisations. Grants from the CLSP involve the allocation of a finite resource. Formal merits review would only promote competition among community groups and would not provide an effective remedy, as a successful application for review by one service provider would require a reduction in funding to other service providers. The ARC has recognised that it is justifiable to exclude

merits review in relation to decisions of this nature (see paragraphs 4.16 to 4.19 of the ARC guide).

Whilst decisions in relation to the CLSP and the training package are not suitable for a merits review process, the decision may be reviewed by the Commonwealth Ombudsman, who may make recommendations, but cannot overturn decisions. Further, the right to review under section 75(v) of the Constitution and review under section 39B of the *Judiciary Act 1903* may be available.

The review and audit process undertaken by the ANAO provides a mechanism to review Australian Government spending decisions and report any concerns to the Parliament. These requirements and mechanisms help to ensure the proper use of Commonwealth resources and appropriate transparency around decisions relating to making, varying or administering arrangements to spend relevant money.

The department consulted with members of the Legal Assistance Services Inter-Governmental Committee (state and territory governments) and members of the National Legal Assistance Advisory Group (which consists of representatives from the national legal assistance sector, research bodies and other national bodies related to legal assistance) about the training package. These are persons with relevant expertise in the legal assistance sector, and are likely to be affected by the training package.

Consultation specifically on the mental health training occurred in May-June 2021. The mental health training package is generally supported by key stakeholders, and multiple stakeholders have expressed interest in developing it.

Funding for the training package was included in the 2021-22 Budget under the measure 'Mental Health'. Details are set out in the *Budget 2021-22, Budget Measures, Budget Paper No. 2 2021-22* at page 117.

Funding of \$2.5 million over four years from 2021-22 for the item will come from Program 1.4: Justice Services, which is part of Outcome 1. Details are set out in the *Portfolio Additional Estimates Statements 2021-22, Attorney-General's Portfolio* at page 22.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item relating to the training package references the communications power of the Constitution

#### Communications power

Section 51(v) of the Constitution empowers the Parliament to make laws with respect to 'postal, telegraphic, telephonic and other like services'.

The training package will be delivered exclusively online.

## **Statement of Compatibility with Human Rights**

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2022***

This disallowable legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the legislative instrument**

Section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) authorises the Commonwealth to make, vary and administer arrangements and grants specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the FF(SP) Regulations) and to make, vary and administer arrangements and grants for the purposes of programs specified in the Regulations. Schedule 1AA and Schedule 1AB to the FF(SP) Regulations specify the arrangements, grants and programs. The powers in the FF(SP) Act to make, vary or administer arrangements or grants may be exercised on behalf of the Commonwealth by Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013*.

The *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2022* (the Regulations) amend table item 87 in Part 4 of Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Justice Services – Community Legal Services Program (CLSP). The CLSP is administered by the Attorney-General's Department.

The objective of the CLSP is to contribute to the provision of access to legal assistance services for disadvantaged members of the community and those with special needs and/or whose interest should be protected as a matter of public interest through the provision of funding to community-based organisations.

The amendments to table item 87 will support additional spending activities under the Program Support and Development element of the CLSP that complements community legal services provided by the states and territories including by providing factual information and/or advice with a focus on systemic issues affecting access to justice.

The additional spending activities relate to the development and delivery of the National Bench Book on Aboriginal and Torres Strait Islander Peoples and the Legal System (the Bench Book) and the Mental Health Training Package for the Legal Assistance Sector (the training package).

The Bench Book will be a practical and readily-accessible resource to better inform judicial officers and legal professionals about the cultural and legal issues faced by Aboriginal and Torres Strait Islander peoples in the criminal and civil justice systems. Grant funding of \$0.6 million over three years from 2021-22 under the CLSP will be provided to the

Australasian Institute of Judicial Administration (AIJA) to develop and deliver the Bench Book by 30 June 2024.

The training package will include an online compassion-based training for the legal assistance sector to assist providers in identifying clients with mental health conditions, and to better support people in distress. Grant funding of \$2.5 million over four years from 2021-22 under the CLSP will be provided to one or more organisations to develop and deliver this training package.

### **Human rights implications**

This disallowable legislative instrument engages the following rights in relation to the Bench Book:

- the right to equality and non-discrimination – Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR), read with Article 2 and Article 5 of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD), read with Article 2;
- the right to a fair and public criminal trial or a fair and public hearing in civil proceedings – Article 14 of the ICCPR; and
- the right to minimum guarantees in criminal proceedings, a fair trial and fair hearing and the presumption of innocence – Article 14 of the ICCPR.

The right to self-determination in Article 1 of the ICCPR and Article 1 of the *International Covenant on Economic, Cultural and Social Rights* and article 3 of the *Declaration on the Rights of Indigenous Peoples* was also considered but not engaged.

#### Right to equality and non-discrimination

Article 2(1) of the ICCPR recognises the right to equality and non-discrimination on, among other grounds, race, colour, language, national or social origin, and birth or other status. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

This right is also reflected in:

- Article 2 of the CERD which condemns racial discrimination and undertakes to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races. Each State Party to the Convention undertakes, amongst other things, to engage in no act or practice of racial discrimination against persons, groups of persons, not to sponsor, defend or support racial discrimination by any person or organisations, and prohibit and bring to an end, by all appropriate means, racial discrimination by any persons, group or organisation.
- Article 5 of the CERD under which, in compliance with Article 2, each State Party to the Convention undertakes to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or

national or ethnic origin, to equality before the law, not in the enjoyment of certain rights. These rights include the right to equal treatment before the tribunals and all other organs administering justice, and the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.

The Bench Book engages and is consistent with Articles 2(1) and 26 of the ICCPR and Articles 2 and 5 of the CERD in that it:

- recognises and responds to the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system; and
- seeks to improve access to and delivery of quality, culturally-sensitive justice and legal assistance services to Aboriginal and Torres Strait Islander peoples in the criminal and civil justice systems by better informing judicial officers and legal professionals about the cultural and legal issues faced by Aboriginal and Torres Strait Islander peoples in the criminal and civil justice systems. Accordingly, the Bench Book is targeted at judicial officers and legal professionals who provide legal advice and assistance, make representations on behalf of, and make judgements in relation to Aboriginal and Torres Strait Islander peoples in their course of their engagement with the criminal and civil justice systems.

Additionally, the AIJA has demonstrated its expertise in the development of similar resources and their expertise in:

- relevant background information relating to the *Royal Commission into Aboriginal Deaths in Custody: National Report* (1991) and other relevant reports such as the *Bringing Them Home Report* (1997), the *Royal Commission and Board Inquiry into the Protection and Detention of Children in the Northern Territory* (2017), and *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Australian Law Reform Commission Report 133);
- the participation of Aboriginal and Torres Strait Islander peoples in the justice and legal assistance systems and understanding of the relevance and impact of broader historical, cultural and socio-economic issues including traditional Aboriginal language groups, languages, social organisation, governance, culture, spirituality, ritual, art and law; and
- culturally-sensitive engagement with Aboriginal and Torres Strait Islander peoples and their representative organisations in the justice and legal assistance services sectors.

The AIJA has also noted in the Foreword to the *Aboriginal Bench Book for Western Australian Courts* (2008) that “the gross over-representation of Aboriginal people in the criminal justice system ... challenges our notions of equality before the law”.

*Right to a fair and public criminal trial or a fair and public hearing in civil proceedings*

Article 14 of the ICCPR provides that in the determination of obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The term ‘suit at law’ includes civil proceedings. This right can be permissibly limited provided that those limitations are reasonable, necessary and proportionate for achieving a legitimate objective. The procedures followed in a hearing should respect the principle of ‘equality of arms’, which requires that all parties to a

proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings.

The Bench Book engages and is consistent with Article 14 in that its policy objectives include improving access to and delivery of quality, culturally-sensitive justice and legal assistance services to Aboriginal and Torres Strait Islander peoples in the criminal and civil justice systems.

*Right to minimum guarantees in criminal proceedings, right to a fair trial and fair hearing and right to the presumption of innocence*

The right to minimum guarantees in criminal proceedings contained in Article 14(3) of the ICCPR includes a range of guarantees relating to procedural matters but also affects considerations such as eligibility for legal assistance in criminal matters and governs the availability of interpreters and translators in criminal proceedings.

The Bench Book engages and is consistent with article as it proposes to cover criminal proceedings, sentencing and legal practice issues as well as broader historical, cultural and socio-economic issues, noting the role of Aboriginal and Torres Strait Islander legal services and that language and communication issues can arise in court proceedings involving Aboriginal and Torres Strait Islander peoples.

This disallowable legislative instrument also engages the following rights in relation to the training package:

- the right to equality and non-discrimination – Article 26 of the ICCPR, read with Article 2;
- the right to equal recognition before the law – Article 12 of the *Convention on the Rights of People with Disabilities* (CRPD), read with Article 4; and
- the right to equal access to justice – Article 13 of the CRPD.

*Right to equality and non-discrimination*

Article 2(1) of the ICCPR recognises the right to equality and non-discrimination on, among other grounds, race, colour, language, national or social origin, and birth or other status. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The UN Human Rights Committee has not attempted to define this term, but has decided it on a case-by-case basis. Among others, the following statuses have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

Article 26 states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

The training package engages and is consistent with Articles 2(1) and 26 of the ICCPR in that it:

- recognises and responds to the need for all people to be able to fully engage with the justice system and receive equal protection of the law; and

- seeks to promote the right to equality and non-discrimination by improving access to, and the delivery of, legal assistance services to vulnerable people who are also experiencing mental ill health.

*Rights to equal recognition before the law and access to justice*

Article 4(a) of the CRPD states that each State Party undertake to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention, and Article 4(c) that each State Party undertake to take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes.

Article 4(i) of the CRPD states that each State Party ‘undertake to promote the training of professionals and staff working with persons with disabilities in the rights recognized in the Convention so as to better provide the assistance and services guaranteed by those rights’.

Article 12(2) of the CRPD provides that States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life, and Article 12(3) provides that States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Article 13(1) of the CRPD provides that States Parties ‘shall ensure effective access to justice for persons with disabilities on an equal basis with others’. Article 13(2) provides that in order to do this, ‘States Parties shall promote appropriate training for those working in the field of administration of justice’.

The training package is directed to ensuring that the legal assistance sector has appropriate training to deal with clients experiencing mental ill health, including those with disabilities. This is supported by General Comment 1 (on Article 12) of the Committee on the Rights of Persons with Disabilities, which says that in implementing Article 13 ‘States must...ensure that persons with disabilities have access to legal representation on an equal basis with others’ and that ‘first responders must be trained to recognise persons with disabilities as full persons before the law’.

**Conclusion**

This disallowable legislative instrument is compatible with human rights because it promotes the protection of human rights.

**Senator the Hon Simon Birmingham  
Minister for Finance**