Law Council of Australia

2016 FEDERAL ELECTION POLICY PLATFORM

Law Council
OF AUSTRALIA

The Law Council was established in 1933, and represents sixteen Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Constituent Bodies of the Law Council. Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

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

In the lead-up to the July 2016 federal election, this platform sets out the key areas for improvement of the law and policy, where the Law Council considers change will benefit the Australian community and promote the national interest.

This document summarises the Law Council's key confirmed policy positions according to the following themes:

- Access to Justice
- Criminal Justice Reform
- Indigenous Australians
- Professional Regulation
- Civil and Family Law Reform
- Rule of Law
- Human Rights

ACCESS TO JUSTICE

a. Funding for legal assistance services

The Law Council and its Constituent Bodies have consistently advocated for increased legal aid funding for many years.

In 1996, the Federal Government substantially reduced its share of legal aid funding with the states and territories from 55% to 30%. The Commonwealth's contribution to legal aid funding has reduced from around $10.88 per capita in 1996-97 to around $8.01 per capita (in real terms, adjusted for inflation and population increases). In 2015, Commonwealth expenditure on legal aid fell by another $40 million and, on current projections by PricewaterhouseCoopers, the Commonwealth's legal aid expenditure will fall to around $7.80 per capita by 2019-20.

From July 2017, Commonwealth funding to community legal centres will be cut by 30% and Aboriginal and Torres Strait Islander legal services will lose another $4.5 million in Federal money, equating to a reduction of over $6 million since 2014.

At current levels of government spending, many Australians living below the poverty line are ineligible to receive legal aid under restrictive means tests. Legal aid is simply not available for many types of legal problems. Even people facing the prospect of a criminal conviction may not be eligible for a legal aid funded lawyer.

In 2014, the Productivity Commission found that Commonwealth expenditure on legal aid was completely inadequate and recommended an immediate injection of $200 million *for civil law matters alone*. That is, the Commission did not consider the level of unmet need in criminal law matters, which fell outside its terms of reference. However, legal aid for criminal law is currently so limited that most people will be ineligible, unless they are likely to go to prison if convicted.

The Commission also found that there would be substantial economic savings from investing in legal aid, in terms of improved efficiency in the justice system and reduced reliance on other government services. These substantial savings are being squandered by the present funding approach, contrary to the Government's fundamental budgetary objectives.

The Law Council calls on all parties to:

- **Return the Commonwealth's share of legal aid commission funding to 50 per cent with the States and Territories. This would amount to an additional $126m in the 2016 Commonwealth Budget.**
- **Immediately provide a further $120 million to cover civil legal assistance, with the States and Territories contributing $80 million, comprising a total of $200 million, as recommended by the Productivity Commission.**
- **Immediately reverse further Commonwealth funding cuts to legal assistance services announced in 2014, including those due to take effect from July 2017.**

ACCESS TO JUSTICE

b. Federal courts and tribunals

An independent, sustainable and properly resourced federal court system is fundamental to the rule of law and to the strength of Australia's democratic system.

The need for proper resourcing (including through the reinvestment of administrative savings) is particularly apparent in relation to the Federal Circuit Court, due to that court's expanding jurisdiction (which is appropriate for this intermediate level court). Corporate insolvency jurisdiction has yet to be conferred on the Federal Circuit Court and the Law Council supports the Court's request for this jurisdiction, as did the Senate Standing Committee on Economics in 2015.

The Law Council remains concerned that Judges in the federal court system are under significant pressure due to increasing workloads, the stressful nature of high-conflict proceedings, the absence of uniformity in access to judicial pensions and the failure to quickly fill all judicial vacancies as they occur. Judicial vacancies result in unacceptable delays in the listing of matters, particularly in some registries of the Family Court. The filling of judicial vacancies that may arise as a result of statutory retirement can be planned for well in advance of each retirement. Retirements due to ill-health can often be planned for. The provision of adequate judicial resourcing for both the Family Court and Federal Circuit Court, and the timely filling of judicial vacancies in these courts, are matters requiring urgent attention.

The Law Council calls on all parties to:

- **Reinvest the savings that have resulted from the merger of the corporate services functions of the Federal Court with those of the Family Court and Federal Circuit Court in the federal court system.**
- **Provide sustainable long term funding of the federal courts system.**
- **Support amendments to the Corporations Law through the Legislative and Governance Forum for Corporations to confer corporate insolvency jurisdiction on the Federal Circuit Court.**

ACCESS TO JUSTICE

c. Lawyers in rural regional and remote areas

The number of legal professionals working in country Australia continues to decline, leaving rural, regional and remote (RRR) communities with a lack of adequate access to legal services and access to justice. Moreover, a Law Council survey conducted in 2009 indicated that this problem will significantly worsen in coming years.[1]

High numbers of law graduates are looking to find legal work, and yet many of them are not choosing to practice in RRR areas.

Several national medical practitioner schemes provide financial and other practitioner incentives to work in RRR Australia. However, most State-based initiatives to attract legal practitioners to country Australia have ceased funding and operating, including Legal Aid regional programs, despite receiving positive evaluations.

The Law Council considers that the viability and health of rural communities can be significantly improved by offering reasonable incentives for graduates to move there. For example, research suggests health and other professionals are much more likely to move to and remain in RRR areas if they are able to access various other service providers within that community, including lawyers. For this reason, the Law Council believes that any measures aimed at encouraging members of the legal profession to live and work in RRR areas are likely to complement similar initiatives already in place in regard to other professions.

1 Law Council of Australia, Report into the Rural, Regional and Remote Areas Lawyers Survey, July 2009, available at http://rrrlaw.com.au/media/uploads/RRR_report_090709.pdf.

The Law Council calls on all parties to:

- **Hold a national summit or roundtable to explore options for improving the availability of services, including legal services, in RRR areas.**
- **Commit to exploring options to improve the delivery of legal services to RRR areas, including through the innovative use of technology.**
- **Consult with the legal profession to develop a suite of proposals that will ensure people in RRR areas can share equal access to justice.**

CRIMINAL JUSTICE REFORM

a. Mandatory sentencing

The Law Council opposes the use of sentencing regimes which prescribe mandatory minimum sentences upon conviction for criminal offences.

Mandatory sentencing regimes impose unacceptable restrictions on judicial discretion and independence, are inconsistent with rule of law principles and undermine confidence in the system of justice. Mandatory sentencing is also inconsistent with Australia's voluntarily assumed international human rights obligations.

Mandatory sentencing laws are by definition arbitrary and can limit an individual's right to a fair trial by preventing judges from imposing an appropriate penalty based on the unique circumstances of each offence and offender. Mandatory sentencing regimes are costly and there is a lack of evidence as to their effectiveness, either as a deterrent or in reducing crime.

Mandatory sentencing regimes impact disproportionately on particular sections of society, including Indigenous peoples, juveniles, persons with a mental illness or cognitive impairment, and the impoverished. Members of these groups are subject to special protections under international law, because they are more likely to be subject to social and economic disadvantage, increasing their vulnerability to adverse justice outcomes.

Many overseas jurisdictions with substantial experience of mandatory sentencing are now moving away from such schemes. It is understood that this trend is being driven by doubt regarding the efficacy of mandatory penalties in reducing crime, as well as a recognition of the negative aspects referred to above (e.g. expensive and counter-productive imprisonment, the potential for unduly harsh sentences, and the discriminatory impact of mandatory sentencing).

The Law Council considers all mandatory sentencing laws should be repealed. Policy makers should consider alternative, evidence-based justice strategies, which have proven to achieve lower rates of crime, recidivism, imprisonment, and improved community safety. Evidence from overseas jurisdictions suggests alternative approaches, such as justice reinvestment, may be more effective in reducing crime, and may be more consistent with the rule of law and Australia's human rights obligations. The Law Council also encourages policy makers to develop comprehensive and targeted policies that address relevant underlying social problems with a view to preventing crime.

The Law Council calls on all parties to:

- **Adopt policies which reject mandatory sentencing and repeal laws that impose minimum terms of imprisonment.**
- **Refrain from the creation of new mandatory sentencing regimes.**
- **Provide flexible sentencing options for federal offenders.**

INDIGENOUS AUSTRALIANS

a. Constitutional recognition

The Law Council supports the recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution, subject to the wishes and aspirations of Indigenous peoples.

The Law Council believes, in order for the constitutional reform process leading to such recognition to be successful, it must be seen as generally advancing the Commonwealth and the important status of the First Australians. As part of this process, broader issues of Indigenous sovereignty, treaties and settlements, non-discrimination and empowerment will need to be dealt with respectfully and in partnership with Indigenous Australians.

The Federal Government, ALP and Greens have committed to the holding of a referendum on constitutional recognition in 2017.

The Law Council calls on all parties to:

- **Ensure that the views, aspirations and wishes of Aboriginal and Torres Strait Islander peoples are sought, respected and encouraged in any constitutional reform process.**

INDIGENOUS AUSTRALIANS

b. Indigenous incarceration

The Law Council is concerned that the rate of Indigenous incarceration in Australia is catastrophic and continues to increase, unabated. The Law Council has been advocating for many years for intergovernmental action on this issue. The Law Council notes with concern that:

- Indigenous disadvantage, crime and imprisonment is becoming so entrenched that positive initiatives, such as Closing the Gap, may be set back another generation unless a new approach to criminal justice is found.
- There appears to be an assumption by governments that, with current initiatives to address housing, childhood education, health and other important matters, high levels of imprisonment will eventually begin to resolve. This approach ignores the insidious nature of the cycle – incarceration is now an entrenched aspect of the Indigenous experience.
- Despite catastrophic rates of violence and imprisonment in Aboriginal and Torres Strait Islander communities, there is no intergovernmental framework on Indigenous justice in place in Australia, nor is the Law Council aware of any governmental action aimed at introducing such a framework.
- The state of data on justice, law enforcement and corrections in Australia is so deficient that government agencies do not publish accurate numbers of people who enter and leave the prison and juvenile detention systems each day, week, month or year.
- In several jurisdictions, people can end up in prison because they have not paid fines.

The Law Council calls on all parties to commit to working with State and Territory governments to:

- **Establish 'justice targets' under the Closing the Gap Framework to reduce rates of Indigenous imprisonment and violent offending.**
- **Establish a national agency to collect and evaluate comprehensive data on corrections, law enforcement, juvenile justice, diversionary measures, to inform government policies around crime and imprisonment.**
- **Repeal or amend all laws which provide for a penalty of imprisonment for offences arising from a fine-default.**
- **Abolish mandatory sentencing laws.**

PROFESSIONAL REGULATION

a. A national legal services market and legal profession

Successive governments and the legal profession have been working for nearly 20 years to create a national legal services market, based on uniform laws in all States and Territories to remove regulatory barriers, simplify regulation and provide consistent protections to consumers. In July 2015 NSW and Victoria created a common legal services market across their states, based on a uniform law and a cooperative, intergovernmental regulatory framework.

The Law Council calls on all parties to:

- **Commit to completing this micro-economic reform imperative by encouraging, supporting and facilitating the other States and Territories to join the legal services common market and uniform regulatory framework established by NSW and Victoria so that Australia has a single legal services market and a single approach to regulating the legal profession and the provision of legal services to the Australian community.**

PROFESSIONAL REGULATION

b. Anti-money laundering legislation

The April 2016 Report into the *Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)* (the Review) recommended a range of measures, including extending an additional new regulatory regime to lawyers. This recommendation has several implications of concern for legal practitioners.

The Review did not report against the performance criteria (confiscations and seizures of cash/proceeds of crime, prosecutions and convictions), promised by the Replacement Explanatory Memorandum to the (then) Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Bill, or engage in any other cost-benefit analysis of the scheme.

The proposed extension of AML/CTF laws to legal practitioners, who are already more comprehensively regulated than any other profession in Australia, would be very costly and significantly impact on the cost of legal services. This has been the experience in the UK where similar laws have applied to lawyers since 2001.

In Australia, this would render legal services even less affordable and more out of reach to the Australian community, exacerbating the present crisis in unmet legal need and placing further strain on government-funded legal assistance services, which are already at breaking point.

Australian lawyers are subject to a unique and effective co-regulatory regime and there is currently no evidence that lawyers are involved in money laundering or financing terrorism, or that the existing legal and regulatory framework is failing to manage any associated risks. Any attempt to force lawyers to secretly report on their clients to law enforcement, as presently being considered in Australia, was rejected by the Canadian Supreme Court in 2015 because to do so is inconsistent with common law principles and the fundamental role of lawyers in the Westminster justice system.

The Law Council calls on all parties to:

- **Ensure that all the performance criteria that were promised to the electorate in the Replacement Explanatory Memorandum to the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006, are publicly reported against.**
- **Require that a comprehensive, independent cost-benefit analysis of the existing AML regime be performed (as well as any proposed extension to lawyers) and be made available for consideration.**
- **Commit to consultation with the Law Council and its constituent bodies prior to any decision to extend the regime.**
- **Commit that lawyers will not be made into "*reporting entities*" that are forced to report on their clients to law enforcement agencies, in contravention of their fiduciary and professional obligations.**

PROFESSIONAL REGULATION

c. Limited liability partnerships, a global business structure for Australia

Strengthening and expanding relationships with our key international trading partners is essential to Australia's future economic growth and prosperity. Trade agreements are based on mutual expectations of facilitation and reciprocity. Professional services providers such as law firms need access to the same kinds of business structures to compete equally with internationalised law firms for a share of the multi-billion dollar trade in services. The choice of business structure for global services firms is the *limited liability partnership*. This business structure is not available in Australia.

The introduction of the *limited liability partnership*, which combines the strengths of the company structure with the strengths of the partnership relationship among its members, is a micro-economic reform that will better enable Australian law firms to seamlessly compete in the international legal services market. Also, Australia needs to reciprocate by recognising limited liability partnerships as a legitimate business vehicle for international law firms that want to enter the Australian legal services market.

The Law Council calls on all parties to:

- **Commit to the introduction of limited liability partnerships as a modern, global and flexible business structure for Australia.**

d. Dual regulation of migration lawyers

In May 2015, the Federal Government announced that it would implement the recommendation of the Review of the Office of the Migration Agents Registration Authority (OMARA), to remove dual regulation of migration lawyers.

Implementation of this promise continues to be a high priority matter for the Law Council. Dual regulation of migration lawyers is unnecessary, imposes administrative costs on consumers and results in inefficient duplication of resources. Removal of dual regulation in this area would result in lower legal costs to consumers, and could therefore improve access to justice (including the ability of migration lawyers to provide pro bono legal services).

Dual regulation of migration lawyers also runs counter to the intergovernmental objective of a single, comprehensive and uniform regulatory framework for the legal profession throughout Australia, which benefits consumers, governments and the profession alike.

The Law Council calls on all parties to:

- **Ensure the timely implementation of the recommendations made by Dr Christopher Kendall in his *Review of the Office of the Migration Agents Registration Authority* (2014) concerning migration law practices.**

CIVIL AND FAMILY LAW REFORM

a. Family violence

The Law Council believes that a nationally consistent approach to domestic and family violence is essential. Further, the Law Council:

- acknowledges that legal initiatives alone can neither adequately curb nor prevent domestic and family violence;
- accepts that the legal system is an important, but necessarily reactive, part of a wider societal approach to a problem requiring cohesive community solutions; and
- believes that there must be a coordinated approach between all levels of government and Courts, both State/Territory and Commonwealth.

The Law Council, through its Family Law Section, has been involved, over several decades, in the review and development of the provisions within the *Family Law Act 1975* (Cth) with respect to family violence.

The Law Council continues to work with the courts to develop and maintain best practice guidelines for lawyers and judicial officers dealing with cases of family violence and abuse, and provide legal education for the profession.

The Law Council is concerned about inadequate resourcing for courts dealing with family law matters and considers present capacity constraints may be placing children and their parents at risk in matters involving family violence.

The Law Council is also concerned that existing family violence support services are inadequate to provide a comprehensive and holistic response for victims of family violence, including culturally appropriate support for Indigenous Australians and people from culturally and linguistically diverse (CALD) communities.

The Law Council calls on all parties to:

- **Properly fund courts dealing with family law matters, as well as family violence support services.**
- **Develop and implement domestic violence strategies for particularly vulnerable groups, including Indigenous Australians and those from CALD communities.**
- **Identify and implement measures designed to reduce the prevalence of domestic and family violence.**

CIVIL AND FAMILY LAW REFORM

b. Royal Commission into Institutional Responses to Child Sexual Abuse

The Law Council views the Royal Commission into Institutional Responses to Child Sexual Abuse (the "Royal Commission") as an important opportunity for Australians to better understand the experiences of survivors, their families and the community who have been affected by child sexual abuse within an institutional context. The Law Council also believes that the Royal Commission provides an opportunity to identify what institutions and governments should do to address or alleviate the impact of past or future child sexual abuse.

In September 2015, the Royal Commission handed down its Redress and Civil Litigation report. The report recommended the establishment of a single national redress scheme for survivors of child sexual abuse, or as an alternative, the development of a redress scheme in each State and Territory.

The Law Council recommends that the Commonwealth, States and Territories promptly consider the development of a nationally consistent approach to redress. It is vital that provision be made for additional funding for legal aid commissions, Aboriginal and Torres Strait Islander legal services, and appropriate community legal services to assist applicants in navigating the redress scheme.

Any proposed statutory redress scheme must not abrogate or limit rights or entitlements at common law. Prompt consideration should be given by the Commonwealth, States and Territories to the civil litigation reforms identified by the Royal Commission. This includes reform to limitation periods, vicarious liability of institutions and identifying proper defendants to civil claims.

The Law Council calls on all parties to:

- **Promptly develop a single national redress scheme, or alternatively, a nationally consistent approach to redress with the establishment of redress schemes in each State and Territory.**
- **Ensure that funding for legal assistance services is made available to assist applicants in the development of any redress scheme.**
- **Promptly consider nationally consistent reforms to civil litigation laws affecting survivors of child sexual abuse through the Law, Crime and Community Safety Council.**

CIVIL AND FAMILY LAW REFORM

c. Justice impact assessments

The Law Council proposes the adoption of a justice impact assessment process that would extend the existing Regulatory Impact Assessment (RIA) process to include analysis of costs and impacts on the justice system. The process would require Government to examine, as part of the RIA process, the specific impacts of legislative or Government policy proposals on courts and tribunals, the legal assistance sector and the administration of justice generally.

The existing Regulatory Impact Assessment (RIA) process is focused on productivity and compliance costs for business. Under the RIA process, agencies that prepare legislation, including regulations, are encouraged to give consideration to social and compliance impacts, but there is no specific requirement to consider the implications of legislative and policy proposals for the justice system.

The consequences of failure to consider specific impacts of legislative and policy proposals on the justice system are significant. For example, any new law enforcement initiative impacts not only police services but prosecutors, courts, legal aid services, corrections and support services. Because these impacts are spread across federal and state or territory jurisdictions, there is seldom any attempt to quantify and fund these additional costs. This has a significant and cumulative impact on capacity within the justice sector.

The Law Council considers that the justice impact assessment process should entail genuine consultation with key stakeholders, including courts and tribunals, legal assistance sector providers and legal professional peak bodies. Such a process would be an important recognition of the downstream costs of changes in legislation and policy to the justice system.

The Law Council's Policy Statement on Justice Impact Assessments provides examples of matters that may be considered in a justice impact assessment process, including the potential impact of regulatory or policy proposals on:

- the volume, length and costs of legal inquiries and disputes;
- the workloads of courts and tribunals;
- access to, demand for and resourcing of publically funded legal assistance services;
- the cost of and demand for private legal services;
- access to, demand for, resourcing of an the workload of federal courts and tribunals and the ancillary impacts to state and territory courts and tribunals when exercising concurrent jurisdiction; and
- the criminal and civil justice system as a whole.

The Law Council calls on all parties to:

- **Introduce a national justice impact assessment process to be undertaken by government agencies in relation to all new Government regulatory and policy proposals.**

CIVIL AND FAMILY LAW REFORM

d. National compensation scheme for victims of human trafficking, slavery and slavery-like offences

The Law Council supports a national compensation scheme for victims of human trafficking, slavery and slavery-like offences. Importantly, there is no current form of redress at a national level for these Federal offences, and as such offences have no State or Territory equivalent, inconsistent State and Territory schemes offer inadequate redress for victims.

The Law Council calls on all parties to:

- **Work with State and Territory Governments through the Council of Australian Governments to establish a national compensation scheme for victims of trafficking.**
- **Ensure that monetary payments to victims are not linked to the assistance that victims may provide law enforcement agencies concerning the perpetrator of the crime.**

RULE OF LAW

a. "Rule of Law Principles"

A key objective of the Law Council is the maintenance and promotion of the rule of law. For that reason, the Law Council often provides analysis of federal legislation and federal executive action based on its compliance with so-called "rule of law principles". The Law Council's *Policy Statement on Rule of Law Principles* provides that:

- the law must be both readily known and available, and certain and clear;
- the law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds;
- all people are entitled to the presumption of innocence and to a fair and public trial;
- everyone should have access to competent and independent legal advice;
- the Judiciary should be independent of the Executive and the Legislature;
- the Executive should be subject to the law and any action undertaken by the Executive should be authorised by law;
- no person should be subject to treatment or punishment which is inconsistent with respect for the inherent dignity of every human being; and
- states must comply with their international legal obligations whether created by treaty or arising under customary international law.

The Law Council calls on all parties to:

- **Abide by rule of law principles and establish laws and policies to ensure these principles are adequately protected.**

RULE OF LAW

b. Counter-terrorism laws

Over the last 15 years, over fifty new counter-terrorism laws have been introduced into Federal Parliament. Many of those laws contain measures that run contrary to established criminal justice principles and the rule of law.

The Law Council has consistently recommended that new counter-terrorism laws should:

- only be introduced where there is a demonstrated necessity;
- align with rule of law principles, including the presumption of innocence and the right to a fair trial;
- accord with Australia's international human rights obligations and only infringe on rights and freedoms to the extent necessary to protect the Australian community; and
- contain in-built safeguards to protect against the arbitrary or unjust exercise of Executive power.

i. *INSLM recommendations*

The Independent National Security Legislation Monitor (INSLM) has reviewed Australia's counter-terrorism legislation and recommended several reforms. While the Government has acted on some of these recommendations, others have not yet been implemented or responded to. The Law Council believes it is important that all recommendations by the INSLM to improve counter-terrorism legislation should be implemented as soon as possible.

ii. *Control orders*

Control orders can involve significant restrictions on a person's liberty without following the normal process of arrest, charge, prosecution and determination of guilt beyond reasonable doubt. Recent counter-terrorism legislation will give expanded powers to law enforcement agencies to monitor compliance with a control order. Secret evidence would also be permitted in control order proceedings without the affected person or their legal representative knowing its content.

iii. *"Special advocates"*

The Law Council supports a system of "special advocates" being introduced to participate in control order proceedings. Such a system could allow each State and Territory to provide a panel of security-cleared barristers and solicitors to participate in closed material procedures whenever necessary.

A special advocate regime could improve – although not necessarily remedy–potential unfairness to a person subject to a control order, by assisting a court in scrutinising national security information prior to admission into evidence.

Review and reform of Australia's anti-terror laws remains an ongoing priority for the Law Council.

The Law Council calls on all parties to commit to:

- **Requiring the Government of the day to respond to INSLM reports within a 6 month timeframe.**
- **Establishing a special advocate regime for control order proceedings.**

HUMAN RIGHTS

a. Death penalty

The Law Council's opposition to the death penalty is outlined in *its Policy Statement on the Death Penalty*. The Law Council opposes the imposition or execution of the death penalty irrespective of a person's nationality, personal characteristics, the nature of the crime of which the person has been convicted, or the time and place of its alleged commission. The Law Council is committed to the international abolition of the death penalty and, in the interim, to an international moratorium on executions and the commutation of existing death sentences. The Law Council also considers that, as a highly competent nation which seeks to uphold the rule of law, Australia should give its advocacy on ending the death penalty the full weight it deserves and needs.

The Law Council is opposed to the death penalty on the basis that it is a breach of the most fundamental human right (the right to life), and that it is a breach of the right not to be subjected to cruel, inhuman or degrading punishment. Consistent with the view that the imposition of the death penalty represents a grave human rights violation, the Law Council believes that it is a matter which transcends considerations of State sovereignty, and that it is a legitimate subject of comment and scrutiny by individuals outside the State or indeed by other States.

In October 2015 the Law Council made a submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade's *Inquiry into Australia's Advocacy for the Abolition of the Death Penalty*. On 5 May 2016 the Committee's Report was released. The Report contained 13 recommendations covering the role of law enforcement agencies, Australia's international engagement, and improving Australia's advocacy on the abolition of the death penalty. The Law Council welcomed the Report, particularly its recommendation to develop, fund and implement a whole-of-government Strategy for the Abolition of the Death Penalty - with a focus on countries in the Indo-Pacific and the United States of America.

The Law Council calls on all parties to:

- **Support and implement the recommendations arising from the Joint Standing Committee on Foreign Affairs, Defence and Trade's Report into Australia's Advocacy for the Abolition of the Death Penalty.**
- **Promptly conduct a review of legislative arrangements for extradition and mutual assistance to ensure that they uphold Australia's obligations as a signatory to the Second Optional Protocol to the International Covenant on Civil and Political Rights.**
- **Strengthen Australia's domestic legal framework and arrangements to ensure Australia does not expose a person elsewhere to the real risk of execution.**
- **Develop a strategy for the abolition of the death penalty, which outlines the methods to be employed to proactively advance the objective of global abolition.**

HUMAN RIGHTS

b. Asylum seekers and immigration detention

The Law Council does not underestimate the challenges faced by Australian Governments in responding to irregular migration, including the risk of loss of life associated with the arrival of asylum seekers by boat. It also recognises the complexities of developing and implementing an asylum seeker policy that promotes orderly immigration, maximizes Australia's ability to protect refugees, complies with Australia's international obligations and protects the Australian community.

The Law Council's *Principles Applying to the Detention of Asylum Seekers* and its *Asylum Seeker Policy* set out the Law Council's position in relation to Australia's domestic and international legal obligations in respect of asylum seekers and refugees.

The Law Council remains concerned about the inordinate and, in some cases, indefinite length of time individuals subjected to immigration detention can be held under the current regime. The Law Council is also deeply concerned about restrictions on access to legal advice for certain people held in immigration detention and restrictions on access to administrative and judicial review of decisions which affect them.

The lack of independent oversight of immigration authorities and detention centres gives rise to significant potential for harm to vulnerable individuals, including children, who are subject to the very broad powers exercised by the Immigration Department and Minister.

The Law Council calls on all parties to:

- **Establish legislative limits on immigration detention, such that any detention should be for a period to conduct health, identity and security checks.**
- **Provide access to free legal advice and interpreter services, to reduce pressure on pro bono legal services and enable more efficient processing of the legacy caseload.**
- **Legislate to reintroduce merits and judicial review of all adverse protection decisions.**
- **Establish an independent reviewer specific to immigration detention centres and an independent, specialist body to review immigration legislation, similar to effective mechanisms in the national security space.**
- **Work with Australia's regional neighbours, the Office of the High Commissioner for Refugees and the International Organization for Migration to establish a long-term, cooperative and transparent regional solution to the flow of asylum seekers into the Asia-Pacific region.**

HUMAN RIGHTS

c. Same-sex marriage

The Law Council supports the removal of legal restrictions on marriage by same-sex couples.

In 2013, the High Court of Australia stated that "marriage" in section 51(xxi) of the Constitution includes a marriage between persons of the same sex and held that the Federal Parliament has power under the Constitution to legislate with respect to same-sex marriage.

The Law Council regards both formal and substantive discrimination on arbitrary grounds, including sexual orientation, to be contrary to the rule of law and Australia's voluntarily assumed international obligations.

In addition to the broad non-discrimination clause at Article 2 of the *International Covenant on Civil and Political Rights* (ICCPR), which requires State Parties to ensure all individuals are to enjoy the rights set out in the ICCPR without discrimination, Article 26 provides that:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law*

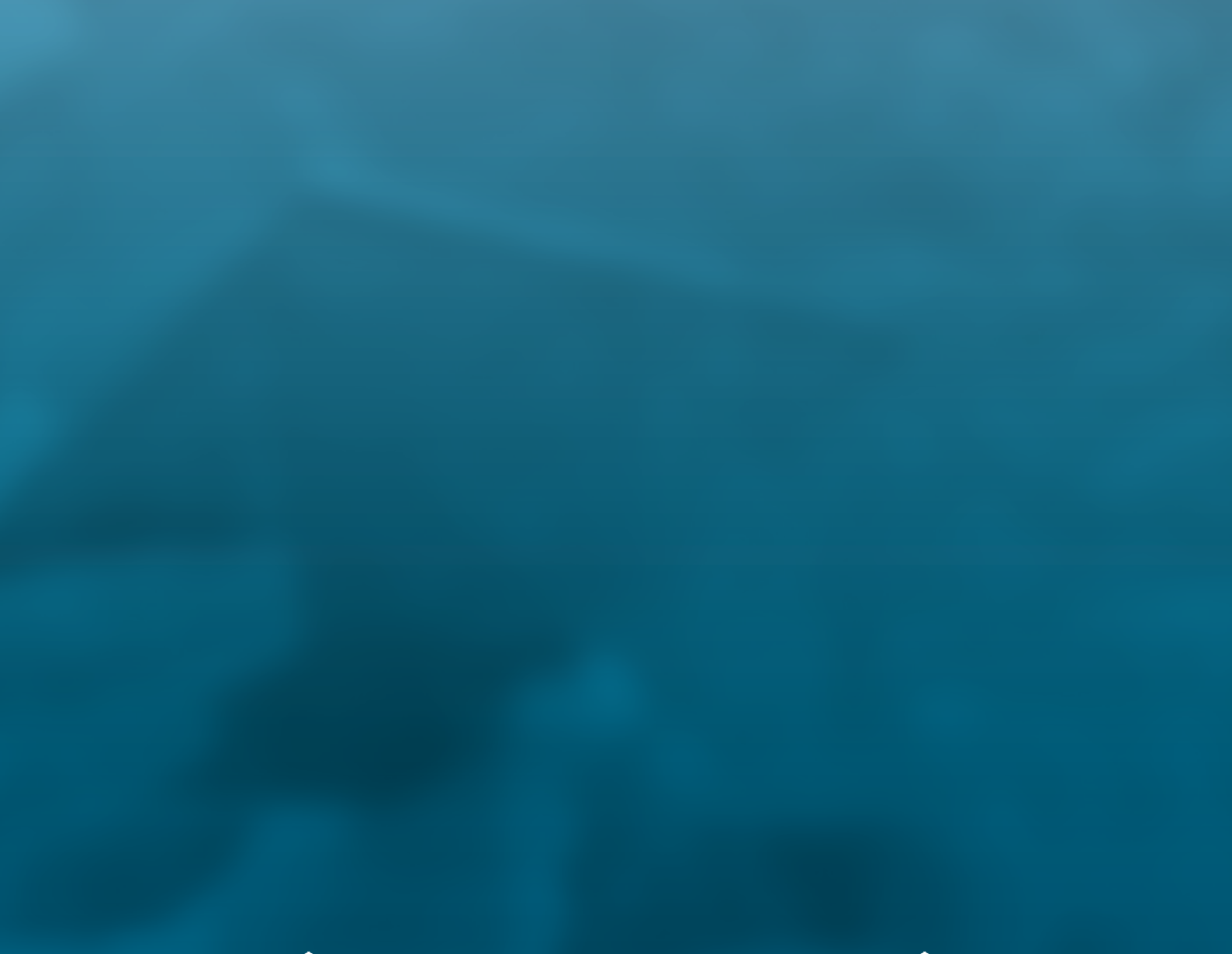
The Australian Human Rights Commission has observed that Article 26 is a "stand-alone" right which forbids discrimination in any law and in any field regulated by public authorities, even if those laws do not relate to a right specifically mentioned in the ICCPR.[1] Although "sexual orientation" or "sexuality" are not specifically referenced in Article 26, the United Nations Human Rights Committee, which is mandated to promote and protect human rights in accordance with international human rights laws and treaties, considers that States are obliged to provide "effective protection" against discrimination based on sexual orientation.[2]

The Human Rights Committee has considered two cases from Australia, and found that discrimination against homosexual people is prohibited pursuant to Article 26.[3]

1 See: https://www.humanrights.gov.au/lesbian-gay-bisexual-trans-and-intersex-equality-0#_edn10.
2 See, for example: Human Rights Committee, *Concluding observations of the Human Rights Committee: El Salvador*, UN Doc CCPR/CO/78/SLV (2003), [16]
3 *Young v Australia* (941/2000), at [10.4]; *Toonen v Australia* (488/1992).

The Law Council calls on all parties to:

- **Clearly articulate when they will legislate to allow same-sex marriage.**



Law Council of Australia

GPO Box 1989, Canberra ACT 2601
19 Torrens St. Braddon ACT 2612

T: (02) 6246 3788
F: (02) 6246 0639
www.lawcouncil.asn.au

@thelawcouncil
@LCAPresident
Law Council TV