

2019 Federal Election

Call to Parties

All Australians
deserve access
to justice



Law Council
OF AUSTRALIA

Introduction

All Australians deserve access to justice and equality before the law.

That is why, since 1933, the Law Council of Australia has proudly represented our nation's legal community, speaking on its behalf on issues of national importance.

Today, the Law Council comprises 16 state and territory law societies and bar associations and Law Firms Australia, promoting the administration of justice, access to justice, a strong legal profession and improvement of the law.

As we approach the 2019 federal election, our Call to Parties provides a roadmap of the key areas that we believe there is a need to improve law and policy for the betterment of the Australian community, our democracy and the legal profession.

Our key policy positions fall under the following themes:

- **Access to Justice: Implementing the findings of the Justice Project**
- **Strengthening Integrity**
- **Human Rights**
- **Indigenous Affairs**
- **Business and Consumer Rights**
- **Professional Regulation**
- **Other Law Reform**



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Access to Justice

A. Legal assistance funding and implementing Justice Project findings

The dire lack of an adequate legal assistance funding safety net for Australians in need continues unabated.

While around 14 per cent of Australians fall under the poverty line, only eight per cent meet legal aid means tests, while community legal centres are turning away approximately 170,000 Australians in need per year.

The Law Council's Justice Project reinforced the personal, community, social and economic costs when people cannot access justice.

These include:

- greater likelihood of incarceration or miscarriages of justice;
- an inability to resolve mounting debts or fines, often resulting in poverty, eviction and homelessness;

- an inability to access a person's unpaid wages, income support or a pension, causing destitution;
- vulnerable people remaining at risk of harm – such as family violence or elder abuse;
- unresolved legal problems escalating from civil, to family, to criminal matters; and
- increasing numbers of self-represented litigants facing the stress of navigating the complex legal systems alone.

Australians in regional, rural and remote communities, who face critical financial, logistical and infrastructure barriers, are amongst those whose access to justice needs are most often overlooked.

As recognised by the Productivity Commission, numerous studies demonstrate there are net public benefits from legal assistance expenditure.

The Law Council calls for a commitment to:

- **increase the level of Federal legal assistance funding to \$310m per annum across criminal, civil and family law matters, thereby meeting the Federal share of the \$390m required;**
- **introduce Justice Impact Tests to facilitate the smoother development of laws and policies that have downstream impacts on the justice system;**
- **ensure funding for legal assistance services is determined by a transparent and evidence-based model that is adequate, predictable, sustainable and long-term;**
- **investigate allocating money seized from proceeds of crime actions as an additional ongoing funding source for legal assistance services;**
- **remove gag clauses for community legal centre contracts that restrict engagement in advocacy activities and to refrain from imposing such restrictions in future contracts;**
- **improve the delivery of legal services to regional, rural and remote areas through dedicated and long-term funding solutions; and**
- **establish a taskforce to implement broader Justice Project recommendations, including a whole-of-government approach to access to justice, multi-disciplinary servicing models, increasing the evidence base and a National Justice Interpreter Scheme.**

Access to Justice

B. Federal courts and fair resolution of family law disputes

The Law Council supports family law reforms which promote better outcomes for families.

Family law is a complex and emotional area of law. The family law courts are chronically overburdened, which creates delays and exacerbates frustration and conflict.

Australians deserve a properly resourced, accessible and responsive family law system, which recognises its highly specialised work through the appointment of judicial officers with family law experience.

Additional legal assistance funding will help improve accessibility to the family law system. Access to legal advice and representation is key to the resolution of matters and helps to ensure litigants are properly informed and understand legal matters.

The proposed merger of the Family Court and Federal Circuit Court is ill-conceived and will not alleviate the court system crisis affecting so many Australian families. In fact, it will make matters worse.

The Law Council calls for a commitment to:

- not proceed with any merger of the Family Court and Federal Circuit Court, an outcome that could hurt Australian families;
- properly fund and resource the Family Court and Federal Circuit Court;
- simplification of the family law system including the creation of a single specialist family court, with a single set of rules and single set of forms;
- appointment of judicial officers with specialist family law experience, recognising it is a highly specialised jurisdiction and proper determination requires considerable expertise;
- additional funding to the legal assistance sector to improve the family law system's efficiency and fairness;
- amendments to the *Family Law Act 1975* (Cth) which reflect the diversity of family structures and backgrounds of Australians and promotes the welfare of all children;
- simplification of Part VII of the *Family Law Act 1975* (Cth), including the 'legislative pathway' currently provided;
- amendments to family law which improve the accessibility of the system for vulnerable and disadvantaged groups;
- introduce national status of children legislation which creates a consistent approach to parentage;
- maintain the principle that the child's best interest is the paramount consideration;
- introduce measures which protect vulnerable litigants from systems abuse;
- improve collaboration and information sharing between the family law courts and state and territory child protection and family violence systems;
- improve children's experience of court proceedings and ensure their views are heard and understood through the provision of additional funding for appropriate experts; and
- support ongoing training of family law professionals and judicial officers on relevant matters including family violence, child development, post-separation family dynamics, diverse family structures and cultural awareness.

Strengthening Integrity

A. Strengthening integrity measures

In the view of the Law Council, the need to reassess and strengthen our systems of integrity and anti-corruption in this country is overdue.

Corruption is a serious global phenomenon that undermines democratic institutions, jeopardises economic development, and threatens the stability and security of governments.

There is a need for addressing corruption in Australia at the federal level through the establishment of a national integrity commission.

Further, preservation of a strong and independent judiciary is essential to maintaining public confidence in the administration of justice and the promotion of the separation of powers.

A judicial commission will enhance openness, transparency and independence of the judicial system.

The Law Council calls for a commitment to:

- **establish a national integrity commission;**
- **establish a federal judicial commission to examine complaints against judicial officers and provide education and training, including cultural awareness training, to judicial officers; and**
- **introduce an apolitical merits-based appointment process for judicial and Administrative Appeals Tribunal Members.**

B. Maintain the independence of the Australian Law Reform Commission

The Australian Law Reform Commission is vital to policy and law reform in Australia.

However, in recent years, Australian Governments have not always fully responded to its comprehensive report findings on issues of national importance.

The Law Council calls for a commitment to:

- **maintain the independence, funding and good governance of the Australian Law Reform Commission;**
- **the appointment of the President of the Australian Law Reform Commission being made with bipartisan support; and**
- **fully respond to all Australian Law Reform Commission reports within a specified timeframe.**

Strengthening Integrity

C. Commonwealth law reform processes

The Australian Government is responsible for making laws across a wide range of areas, which have effects on the lives and livelihoods of Australians.

The Government should make good laws and policies that are grounded in cogent evidence; are clearly drafted and provide certainty to affected individuals; are the result of proper consultation processes; and serve the long-term interests of the Australian community.

The Law Council calls for a commitment to:

- **evidence-based policy-making;**
- **implement a comprehensive consultation process for the formation of legislation. This process should include a one-month stakeholder consultation period (excluding the Christmas and New Year period) prior to the introduction of a bill in Parliament, with any departures from the process documented and tabled in Parliament;**
- **all bills being referred to parliamentary committees, which are allowed at least two months from the date of referral to provide their report;**
- **provide complete explanatory memoranda including comprehensive justification for a bill's deviation from the fundamental principles of law, common law protections and established rules of international law and custom;**
- **provide bills in tracking where bills propose amendments to existing legislation;**
- **avoid the use of omnibus bills or ensure that omnibus bills only contain bills of similar subject matter; and**
- **undertake reasonable consultation on new subordinate legislation and significant amendment to existing subordinate legislation.**

Aboriginal and Torres Strait Islander Peoples

A. Improving justice outcomes for Aboriginal and Torres Strait Islander peoples

Real and tangible progress is critically needed to close the gap in all areas of inequality and remove entrenched levels of disadvantage for Aboriginal and Torres Strait Islander people and communities, with a specific emphasis on justice outcomes.

The criminal justice system in Australia continues to take a vastly disproportionate toll on Aboriginal and Torres Strait Islander people. This is a national crisis that requires national leadership.

Aboriginal and Torres Strait Islander people represent only 2-3 per cent per cent of Australia's population, but comprise more than 28 per cent of Australia's prison population.

Aboriginal and Torres Strait Islander men are 12.5 times more likely to be imprisoned than non-Indigenous men; while Aboriginal and Torres Strait Islander women are over 20 times more likely to be imprisoned than non-Indigenous women.

More than half (58 per cent) of all young people in detention on an average day are Aboriginal or Torres Strait Islander people. Additionally, Aboriginal and Torres Strait Islander children are about 10 times more likely to be in out-of-home care than non-Indigenous children and represent 36 per cent of all children in out-of-home care.

The Australian Law Reform Commission in the 2018 *Pathways to Justice* report, and the Royal Commission into the Protection and Detention of Children in the Northern Territory, both recognised the strong links between the high rate of removal of Aboriginal and Torres Strait Islander children into out-of-home care and their overincarceration as both children and adults.

The Law Council calls for a commitment to:

- **develop meaningful and evidence-based strategies, led and informed by Aboriginal and Torres Strait Islander communities and their representatives, to address the disparate imprisonment and violence rates among Aboriginal and Torres Strait Islander people;**
- **fully implement recommendations from the Australian Law Reform Commission's 2018 *Pathways to Justice* report, the Law Council's Justice Project Final Report and the Royal Commission into the Detention and Protection of Children in the Northern Territory;**
- **pursue the following key priorities:**
 - **through increased funding for Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services;**
 - **comprehensive Justice Targets as part of the Council of Australian Governments' Closing the Gap framework;**
 - **adoption and resourcing of justice reinvestment initiatives and a national justice reinvestment body;**
 - **special focus on the alarming increases in the incarceration rate of Aboriginal and Torres Strait Islander women, including through policies and law reform which address the causes of these increases;**
 - **raise the minimum age of criminal responsibility; and**
 - **Federal leadership through the Council of Australian Governments process to ensure, at the state and territory level:**
 - **adoption of Aboriginal Justice Agreements across each jurisdiction;**
 - **the introduction of a suite of statutory reforms, in relation to: fines; bail and parole reform; mandatory sentencing; and expanded police powers and public nuisance laws which effectively criminalise homelessness and poverty. These statutory reforms should be underpinned by sufficient programs and support services (eg diversionary, rehabilitation) to be effective.**

Aboriginal and Torres Strait Islander Peoples

B. Constitutional recognition of Aboriginal and Torres Strait Islander peoples

The Law Council has publicly provided its full and unqualified support for the recommendations of the Referendum Council and considers the creation of a representative body providing a Voice to the Parliament to be a unique opportunity to recognise and respond to the will of Aboriginal and Torres Strait Islander peoples.

The Law Council reiterates there is no legal impediment to making provision for such a body in the Constitution and continues to support such measures.

Respecting the principles of self-determination and its manifestation in practice by empowering communities and individuals is critical.

Fundamental questions about the nature and the role of the Voice must be addressed through a process led by Aboriginal and Torres Strait Islander peoples.

The Law Council calls for a commitment to:

- **establish a constitutionally enshrined First Nations Voice to Parliament that is designed through a process that is both led, and endorsed by, Aboriginal and Torres Strait Islander peoples.**

Criminal Justice

A. Minimum age of criminal responsibility

The minimum age of criminal responsibility in all Australian jurisdictions is currently 10 years. Additionally, there is a rebuttable presumption (known as *doli incapax*) that children aged between 10 and 14 years are incapable of committing a criminal act.

The Royal Commission into the Protection and Detention of Children in the Northern Territory recommended raising the minimum age of criminal responsibility to 12 years, and recommended against imprisoning those under 14 years, except in certain defined circumstances. The Northern Territory Government has committed to implement these changes but has failed to implement this commitment.

A minimum age of criminal responsibility of 10 years does not meet international standards, as determined by the United Nations Committee on the Rights of the Child. While the Committee's current standard is '12 years as the absolute minimum' it has recently reconsidered its position in a Draft General Comment and proposes to call for a minimum age of criminal responsibility of at least 14 years.

Research indicates that a low minimum age of criminal responsibility criminalises children. The Queensland Family and Child Commission has found that 10 to 12-year-olds are not developmentally mature enough to be held criminally responsible for their actions and 'the low [minimum age of criminal responsibility] further victimises children who are already victims of circumstance'.

The Law Council calls for a commitment to:

- as a mode of Federal leadership towards achieving widespread, multi-jurisdictional change, increase the federal minimum age of criminal responsibility; and
- advance discussions with state and territory governments, through the working group established in November 2018 by the Council of Attorneys-General, regarding raising the minimum age of criminal responsibility, and encourage the development of consistent legislation on this issue in each jurisdiction, in line with recommendations from relevant law reform bodies.

Criminal Justice

B. 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. They are also 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 Aboriginal and Torres Strait Islander people, young people, persons with a mental health condition and those experiencing significant financial disadvantage. 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.

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 for a commitment to:

- **adopt policies which reject mandatory sentencing;**
- **repeal laws that impose minimum terms of imprisonment;**
- **refrain from the creation of new mandatory sentencing regimes; and**
- **provide flexible sentencing options for federal offenders.**

The Law and People Experiencing Disadvantage

A. Family violence

The Law Council remains concerned with the prevalence of family violence in Australia, which is recognised as endemic. On average, Australian police deal with 5,000 family violence matters every week – that is one matter every two minutes.

While welcome, the increased national emphasis on eliminating family violence and better protecting children has placed legal services and courts under extreme pressure.

The Law Council supports increased funding for services such as counselling and safe, secure housing, as well as policies and programs that address underlying factors that lead to domestic violence. It further considers there is an opportunity to take the national lead on domestic and family violence leave.

The Law Council calls for a commitment to:

- **establish an entitlement to, at a minimum, ten days paid family and domestic violence leave for National Employment Standards employees;**
- **increase court and legal assistance funding to better respond to national increases in demand – including specialist and culturally competent service responses;**
- **prioritise homelessness prevention through access to safe, secure housing, given the strong links between homelessness and poor justice outcomes including for family violence victims (and others);**
- **implement behaviour change programs for perpetrators to break the cycle of violence;**
- **increase the family violence policy focus on addressing the specific needs of children and diverse communities, particularly Aboriginal and Torres Strait Islander peoples who are critically over-represented as family violence victims;**
- **provide funding for additional prevention and early intervention initiatives, including holistic family support programs and education campaigns; and**
- **address the fragmentation of Federal, state and territory family violence systems.**

The Law and People Experiencing Disadvantage

B. Mental health, disability and the criminal justice system

There is significant overrepresentation of people with disability, including mental and cognitive health conditions, in the criminal justice system. For example, in 2017, 50 per cent of NSW adult prisoners had a mental health condition and 87 per cent of young people in custody had a psychological impairment, while up to 20 per cent of prisoners had an intellectual disability.

Meanwhile, in Western Australia, 89 per cent of incarcerated young people have at least one form of severe cognitive impairment.

The Law Council believes more can be done, including by the Australian Government, to ensure that people with disability are not over-represented in the justice system and receive sufficient rehabilitative support.

Concerns in this area include:

- a lack of preventative, early intervention services to address mental health and disability, particularly in regional, rural and remote areas;
- difficulties by people with disability in the criminal justice system accessing support under the National Disability Insurance Scheme (NDIS), and Medicare and Pharmaceutical Benefits Scheme funded services; and
- insufficient disability support workers to assist people in the criminal justice system.

The Law Council calls for a commitment to:

- **review how mental health and disability services – particularly the NDIS – can be improved to support people with mental health and cognitive conditions in the criminal justice system;**
- **ensure that detainees in each state and territory receive the same level of health care that the general public would receive under the public health system, including a focus on how Medicare and Pharmaceutical Benefits Scheme funding supports their rehabilitation;**
- **invest in targeted early intervention and prevention services for people with disability, particularly in regional, rural and remote areas, as well as disability support and advocacy for people in the justice system; and**
- **implement broader measures to improve outcomes for people with disability in the justice system, including under the next Council of Australian Governments-agreed National Disability Strategy, and by implementing recommendations from the proposed Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, upon its completion.**

The Law and People Experiencing Disadvantage

C. Fully implement key recommendations to combat elder abuse

The incidence of elder abuse and its direct impacts upon a growing and particularly vulnerable cohort of the community requires urgent attention.

The autonomy and agency of older people should be promoted via language and policies in the community that focus on seeking the views and wishes of older people across cultures, instead of policies that reinforce ageism and discrimination.

In addition, policies which support the autonomy and agency of older people, irrespective of an older person's decision-making ability, should be adopted.

The Law Council calls for a commitment to:

- **fully implement, as part of the *National Plan to Address Elder Abuse* and in cooperation with state and territory governments, key recommendations made by the Australian Law Reform Commission in its *Elder Abuse – A National Legal Response Report*, guided by timely stakeholder consultation and appropriate timeframes;**
- **recognise that elder abuse occurs in numerous forms and settings, including in family, in the community and in various institutional settings such as hospitals, retirement villages and aged care facilities;**
- **take immediate action with respect to the abuses, harm and neglect occurring in residential aged care facilities; and**
- **give priority to immediately implementing key recommendations from the Royal Commission into Aged Care Quality and Safety, upon its completion.**

D. People who have been trafficked and exploited

The Law Council supports a national compensation scheme for victims of human trafficking, slavery and slavery-like offences.

Access to the Australian Government's Support for Trafficked People Program and the Human Trafficking Visa Framework requires a victim to make a 'significant contribution to an investigation' regarding their traffickers.

While many trafficked persons want to see their traffickers brought to justice, experiences of trauma and fear of repercussions may mean they are unwilling or unable to provide such assistance.

Removal of this requirement, which has been repeatedly called for internationally and domestically, would place the interests of victims at the heart of Australia's trafficking and slavery strategy.

A national compensation scheme that recognises harm suffered and is not dependent on cooperation with authorities would support victims that cannot access the support program.

The Law Council calls for a commitment to:

- **introduce a national statutory compensation scheme for victims of human trafficking and slavery in Australia, which recognises psychological harm suffered by victims, is not dependent on cooperation with authorities, and which allows victims who are not permanent residents/citizens to remain in Australia until their applications are processed.**

Human Rights

A. Enactment of a federal human rights charter or bill of rights

The Law Council considers the existing federal legal framework fails to guarantee adequate protection for fundamental human rights.

It is the Law Council's view that the implementation of Australia's international human rights obligations should be pursued through appropriate measures which include, as a minimum, a federal charter or bill of rights.

A human rights charter would enable an approach, consistent with international law and practice, which confirms that all human rights are universal, indivisible, interdependent and interrelated.

The Law Council calls for a commitment to:

- **introduce a national human rights charter or bill of rights.**

B. Federal anti-discrimination law regime

The current federal anti-discrimination law regime provides an inconsistent and fragmented patchwork of protection against discrimination, which is confusing for users.

The Law Council is of the view that it is essential to approach any anti-discrimination reforms in a comprehensive, rather than a piecemeal, manner and therefore supports reforms to consolidate existing anti-discrimination laws into a single Act and address remaining gaps in protection.

The Law Council calls for a commitment to:

- **simplify and enhance federal protections against discrimination, and address remaining gaps in protection, through a consolidated anti-discrimination law.**

Human Rights

C. Asylum seekers, immigration detention and regional processing policy

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. However, it remains deeply concerned by Australia's offshore processing policies, which have resulted in the long-term, indefinite detention of children and adults, and the separation of immediate family members, adding to their trauma and deteriorating health.

The Law Council also remains concerned that Australia's 'turn back' operations, especially to countries of origin, raise a serious risk of *refoulement* where not accompanied

by the procedural safeguards of refugee status determination.

These policies are harmful and are out of step with Australia's international obligations.

It is also deeply concerned about recent restrictions on Federal-funded legal advice for asylum seekers in Australia. This affects not only asylum seekers but also the efficiency of the federal courts.

Further, the Law Council does not support restrictions on access to administrative review and judicial review of decisions affecting asylum seekers – a fundamental procedural fairness safeguard.

The Law Council has adopted guiding policies on a number of contested policy issues in its Regional Processing Statement and its Asylum Seeker Policy.

The Law Council calls for a commitment to:

- establish long-term, durable solutions for all refugees and asylum seekers who remain in offshore processing, in line with Australia's international obligations;
- work with Australia's regional neighbours, the Office of the High Commissioner for Refugees and the International Organisation for Migration to establish a long-term, cooperative, transparent approach to address the flow of asylum seekers into the Asia-Pacific region, in line with Australia's international obligations;
- provide access to free legal advice and interpreter services to asylum seekers to enable more efficient processing and assure procedural fairness;
- enable individual assessment of the need to detain asylum seekers, and enact legislative limits on immigration detention and periodic reviews of detention;
- ensure that the best interests of the child are a primary consideration in all actions concerning children. Children should only be detained as a last resort, for the shortest appropriate period of time, and in community-based detention;
- reintroduce full merits and judicial review of all adverse decisions concerning protection status; and
- implement consistent legal processes for determining protection status, which do not discriminate against applicants based on their mode of arrival.

Human Rights

D. Abolition of the death penalty

The Law Council is opposed to the death penalty on the basis that it undermines the fulfilment of the most fundamental human right - the right to life - as well as the right not to be subjected to cruel, inhuman or degrading punishment.

The death penalty is inimical to human dignity and the rule of law. It is also:

- is an ineffective deterrent to criminal offending;
- is incapable of responding appropriately to the rehabilitation, or the special vulnerability, or impairment of individuals;
- permits no correction of errors in the judicial process; and
- punishes all those connected with it (i.e. not only those who are criminally responsible).

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 launch of *Australia's Strategy for Abolition of the Death Penalty* and the creation of a Death Penalty Consultative Group are welcome initial steps in pursuit of the universal abolition of the death penalty.

Acknowledging that this aim will require the agreement and cooperation of foreign governments, the Law Council notes that further measures are available to the Australian Government in support of abolition.

The Law Council calls for a commitment to:

- **take a strong human rights approach in opposing the death penalty internationally;**
- **fully 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;**
- **continue to advocate for abolition by retentionist countries, including the United States of America;**
- **amend the Australian Federal Police National Guideline on International Police-to-Police Assistance in Death Penalty Situations to include a stronger focus on preventing exposure of all persons to the risk of the death penalty, including a requirement that the Australian Federal Police seek assurances from foreign law enforcement bodies that the death penalty will not be sought or applied if information is provided to the foreign body in question;**
- **consider codifying the National Guideline on International Police-to-Police Assistance in Death Penalty Situations into law; and**
- **conduct a review of the current 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.**

Human Rights

E. Business and human rights

The Law Council considers the protection of human rights in the business context to be of paramount importance and welcomed the passage of the *Modern Slavery Act 2018* (Cth). Various human rights treaty bodies have also emphasised the role for Government attention to overseas, as well as domestic, human rights impacts of Australian companies.

Ongoing vigilance will be required to ensure the Modern Slavery Act is effective in achieving its objectives.

More broadly, the United Nations Guiding Principles on Business and Human Rights and Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises set out standards and guidelines for companies to ensure they are not violating human rights.

A Multi-Stakeholder Advisory Group convened by the Minister of Foreign Affairs recently advised how the Australian Government could best implement the OECD Guidelines, including through the development of a National Action Plan on Business and Human Rights. However, federal action to implement such a plan has since stalled.

Renewed efforts are needed to provide businesses with leadership, direction and a framework within which they can honour human rights.

The Law Council calls for a commitment to:

- **resume and prioritise consideration of how the United Nations Guiding Principles on Business and Human Rights, and the business and human rights framework to which they give effect, might be more effectively implemented in Australia;**
- **action the outstanding recommendations of the report of the Multi-Stakeholder Advisory Group to the Minister of Foreign Affairs released in August 2017, including:**
 - **the development of a National Action Plan on Business and Human Rights;**
 - **more effective remedies for victims; and**
 - **strengthening of the Australian National Contact Point under the OECD Guidelines.**

Business Issues and Consumer Rights

A. Simplification of laws and increased legal assistance in light of Royal Commission into the Banking and Financial Services Industry recommendations

Greater consumer protections, increased penalties for law breakers, expanded enforcement powers for regulators and industry-wide legislative simplification are among sweeping changes recommended by the Royal Commission into the Banking and Financial Services Industry.

The Royal Commission's recommendations will have a far-reaching impact on the banking and financial services sector, ensuring consumers are treated fairly and honestly, in accordance with key principles of the law.

The Royal Commission has shone a light on misconduct – some potentially criminal – in the banking and financial sectors, providing a unique and important opportunity for reform and renewal.

The Law Council supports the simplification of complex laws, making them easier to understand and administer.

Measures to simplify existing law require clear definition of generally applicable norms of conduct to ensure the removal of exceptions and qualifications in law are appropriate.

The Law Council reiterates its recommendation for a referral to the Australian Law Reform Commission to develop propositions for simplification and related matters.

The 'clear need' for the disadvantaged to access financial and legal assistance to deal with disputes on equal footing with large financial entities was also highlighted in the Royal Commission's final report.

Many of the cases before the Royal Commission involved matters where individuals were unable to pursue their rights because of an inability to access legal assistance. This resulted in injustices occurring and wrongdoers going undetected.

The Law Council reiterates its calls for the Australian Federal Government to ensure predictable and stable funding for the legal assistance sector, so all Australians can access justice.

The Law Council calls for a commitment to:

- **refer to the Australian Law Reform Commission the development of propositions for simplification and related matters to implement the Royal Commission into the Banking and Financial Services Industry recommendations; and**
- **ensure predictable and stable funding for the legal assistance sector, so that all Australians can access justice, including in dealings with the banking and financial sectors.**

Business Issues and Consumer Rights

B. Review of Corporations Act 2001 (Cth)

The *Corporations Act 2001* (Cth) is currently in its eighteenth year of operation and given that it is, in many respects, the same as its predecessor, the Corporations Law of 1991, the foundation of Australian corporate law is nearing 30 years of operation.

This means that it does not effectively consider the myriad opportunities and challenges created by digital and online technology.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry also highlighted a number of instances in which the Corporations Act requires amending to properly protect consumers, reduce misconduct and assist enforcement.

The Law Council calls for a commitment to:

- **conduct considered reviews of:**
 - **section 127 of the *Corporations Act 2001* (Cth) and the *Electronic Transactions Act 1999* (Cth) with respect to how it operates in the world of e-commerce to provide clarity about how it applies;**
 - **the *Corporations Act 2001* (Cth) generally to modernise and update the legislation in a co-ordinated manner; and**
 - **legislation imposing obligations and liabilities on directors and officers. There is a concerning trend to include ad hoc obligations and liabilities in various individual acts rather than a centralised approach in the *Corporations Act 2001* (Cth). This approach:**
 - **complicates the statute book;**
 - **makes the law inaccessible;**
 - **introduces unnecessary inconsistency of drafting which makes interpretation and application difficult; and**
- **not 'govern by press release' to ensure certainty for industry, particularly in relation to tax reform which is proposed and announced to be retrospective but which might ultimately not be implemented – this is unacceptable for both individuals and businesses.**

Business Issues and Consumer Rights

C. Consumer protection and protection for employees

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry highlighted in great detail the power imbalance experienced by consumers when dealing with financial institutions and the serious impact on those consumers' lives that can result from misconduct by those institutions.

Many consumers across all industries, as well as many employees, are at a similar risk of power imbalance and misconduct and their rights must be properly protected.

The Law Council is committed to working with the federal Parliament to protect the rights of consumers and the rights of employees.

The Law Council calls for a commitment to:

- **adequately resource regulators, particularly the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission to enable enforcement programs to be carried out, which includes the ability to take action against Australian Consumer Law and other consumer law breaches;**
- **work towards consistent regulation of credit products and enforcement and unify e-disclosure across the National Credit Code, the *Corporations Act 2001* (Cth) and the E-payments Code and oversight of the Banking Codes of Practice;**
- **require credit-repair organisations to become members of the Australian Financial Complaints Authority;**
- **restore the resources previously provided to the Fair Work Ombudsman, and maintain appropriate funding, so that it is able to investigate claims and assist workers; and**
- **increase civil legal assistance funding to ensure that consumers can challenge unconscionable lending practices and workplace exploitation and be represented by a lawyer in such proceedings.**

Business Issues and Consumer Rights

D. Assist businesses, including law firms

Law firms advise business and are businesses themselves.

Focusing regulation and reducing both red-tape and financial pressure on business is much needed in difficult economic conditions.

The Law Council calls for a commitment to:

- review the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) to achieve a balanced, clear and effective issues-focused environmental assessment and approvals framework; and
- harmonise data verification, collection, retention and reporting requirements across federal, state and territory agencies, and a commitment to improving access for businesses and professions with verification obligations to verified data already held by governments, to reduce duplication and compliance costs.

E. Strong and sustainable compensation schemes

The Law Council is concerned that Comcare does not achieve the same outcomes for injured workers as many state and territory schemes.

Further, the migration of new workplaces into Comcare undermines safety, as state and territory schemes employ many more workplace safety inspectors per worker than Comcare.

The Law Council calls for a commitment to:

- not lower the entry threshold to the Comcare scheme as this will reduce benefits for injured workers, increase premiums for businesses in state and territory schemes and adversely affect workplace safety;
- not reduce the current entitlements under the Comcare scheme; and
- work with state and territory governments to enhance the effectiveness of their schemes and ensure that proper compensation and medical treatment is afforded.

Business Issues and Consumer Rights

F. Reform of superannuation law relating to members nominating beneficiaries of their death benefit

As the case of *Re Narumon Pty Ltd [2018] QSC 185* illustrated, there is scope under the *Superannuation Industry (Supervision) Act 1993* (Cth), and *Superannuation Industry (Supervision) Regulations 1994* (Cth), for confusion regarding the definition of dependents, financial dependents and legal personal representatives.

This is particularly salient when it is realised that a person is only eligible to receive a death benefit if he or she is a dependant according to the definition in the trust deed at the date of the member's death, and sometimes even a later date.

The Law Council calls for a commitment to:

- provide clarity in relation to this issue and developing legislative amendments if required.

G. Engage the not-for-profit sector

The not-for-profit and charitable sector is extensive and contributes significantly to the common good and the Australian economy. Effective and focused regulation can enhance that public benefit.

The Law Council calls for a commitment to:

- develop a single national fundraising regulation framework for charities and not-for-profit entities, to allow charities to fundraise in all states and territories of Australia with consistent reporting obligations. Currently an Australian charity that wishes to raise funds online needs to consider obtaining licences from every state and territory regulator;
- establish two advisory groups to develop the required fundraising reforms, comprising representatives of state and territory Attorneys-General and agencies and legal and accounting experts to assess the interaction of the Australian Charities and Not-For-Profits Commission legislative framework, Federal corporations regulation and the operation of the Australian Consumer Law; and
- actively consult with the not-for-profit sector on the recommendations of the Australian Charities and Not-For-Profits Commission Legislation Review 2018 with a view to progressing appropriate reforms for effective regulation of the not-for-profit and charity sectors, the reduction of red tape, and the benefit of the community.

Professional Regulation

A. Anti-money laundering laws and lawyers

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

The extension of these laws to legal practitioners, who already belong to one of the most regulated professions in Australia, would be very costly and have a significant impact on the cost of legal services.

This would render legal services even less affordable and more out of reach for Australians.

The Law Council calls for a commitment to:

- **consult with the Law Council and its constituent bodies prior to any decision to extend the anti-money laundering regime to legal practitioners.**

B. Inclusion and diversity

On 20 June 2018, Australia's Sex Discrimination Commissioner, Kate Jenkins, announced the National Inquiry into Sexual Harassment in Australian Workplaces.

Workplace sexual harassment is a serious issue, with which the Law Council is particularly concerned.

In 2013 the Law Council conducted the National Attrition and Re-engagement Study (NARS) to obtain quantitative data and confirm trends in progression, attrition and re-engagement rates of lawyers.

NARS found that one in four women in the law have experienced sexual harassment in their workplace. More recent studies suggest that these rates may be even higher. The experience of the legal profession is one snapshot of an Australia-wide problem.

The Law Council made a comprehensive submission to the Inquiry, covering the issue of sexual harassment generally as well as its nature and prevalence in the legal profession.

The position of the Law Council is that the current legal framework should be simpler and firmer.

The Law Council supports the consolidation of sexual harassment provisions across jurisdictions in a manner which would increase the accessibility of the law for all Australians.

Broadly, the Law Council also supports: simplifying the sexual harassment definition; making sexual harassment unlawful in all areas of public life, or at least expanding coverage to ensure all persons are protected in all Australian workplaces; introducing positive duties to eliminate, respond to and externally report incidents of sexual harassment; and strengthening formal complaints processes, including by granting own-motion powers to the Australian Human Rights Commission to address what is a systemic issue.

The Law Council calls for a commitment to:

- **review the recommendations of the National Inquiry into Sexual Harassment in Australian Workplaces once these are released with a view to implementation in order to address sexual harassment in the workplace.**

Professional Regulation

C. Dual regulation of migration lawyers

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

Since that time, the Law Council has been actively engaged in reform proposals and assisted in the development of the Migration Amendment (Regulation of Migration Agents) Bill 2018 (Cth), which contains measures that will end the dual regulation of migration lawyers. At the time of writing, this Bill is awaiting resumption of debate in the Senate having successfully passed the House of Representatives in 2018 and gaining bi-partisan support.

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 will improve access to justice (including the ability for more lawyers to provide pro bono legal services on migration matters).

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 for a commitment to:

- **ensure the Migration Amendment (Regulation of Migration Agents) Bill 2018 (Cth) (or similar reform measure) is passed and implemented, resulting in the effective removal of dual regulation of migration lawyers.**

D. The right to representation before the Fair Work Commission and other tribunals

Under section 596 of the *Fair Work Act 2009* (Cth) parties must seek leave from the Fair Work Commission to be represented by a lawyer or paid agent.

This can result in delays in pre-trial procedures, increased time spent at hearing discussing irrelevant matters, a greater number of adjournments, difficulties in advancing settlement discussions, and increased cost for parties.

The Law Council calls for a commitment to:

- **repeal or amend section 596 of the *Fair Work Act 2009* (Cth) so that those who come before the Fair Work Commission have an automatic right to be represented by a lawyer or paid agent; and**
- **repeal or amend any other legislative provision that obliges parties appearing before any other tribunal in Australia to seek leave to be represented by a lawyer or paid agent.**

Professional Regulation

E. National Electronic Conveyancing system

Without changes to the current regulatory framework for National Electronic Conveyancing, practitioners may need to subscribe to multiple Electronic Lodgement Network Operators.

This has the potential to derail the day-to-day operation of electronic conveyancing and create an unworkable system for practitioners, financial institutions and consumers.

The Law Council calls for a commitment to:

- **implement a national regulatory framework to ensure that Electronic Lodgement Network Operators function together seamlessly; and**
- **encourage states and territories to defer mandatory implementation of electronic lodgement until at least a second Electronic Lodgement Network Operator is operational and able to seamlessly interchange data with PEXA so as to achieve a single virtual workspace, thus obviating the need for practitioners to subscribe to every Electronic Lodgement Network Operators.**

Other Law Reform

A. Royal Commissions of Inquiry

Royal Commissions are the highest form of inquiry on matters of public importance.

The recommendations and findings of Royal Commission reports can have a significant impact on the Australian community.

The Law Council calls for a commitment to:

- **implement the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, and where a recommendation is not adopted and implemented, to provide appropriate justification;**
- **deliver a national, comprehensive, intergovernmental response to the findings of the Royal Commission into the Protection and Detention of Children in the Northern Territory. This should involve increasing the minimum age of criminal responsibility as per the Royal Commission's recommendations;**
- **give high priority to implementing key recommendations of the:**
 - **Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry;**
 - **Royal Commission into Aged Care Quality and Safety upon its completion; and**
 - **proposed Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability upon its completion.**

B. Constitutional reform

As well as the issues related to the substance of, and process for, constitutional recognition of Aboriginal and Torres Strait Islander peoples, there are a number of other live issues for constitutional reform, including questions in relation to section 44 of the *Commonwealth of Australia Constitution Act 1900* (Cth), and the issue of a republic.

The issue of constitutional reform will remain contentious over the next parliamentary term and, given Australia's referendum record, the Law Council considers there are questions regarding whether a permanent constitutional reform process is required.

These will include:

- how to separate the issue of constitutional review from political processes;
 - reforming the machinery for staging referenda, including in respect of established procedures for constitutional debate;
 - establishing procedures and sources for funding constitutional reform processes; and
 - consideration of the question of public education about referendum proposals.
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The Law Council calls for a commitment to:

- **consider whether a permanent constitutional reform process is required.**

Other Law Reform

C. Updating privacy laws to respond to new technologies

Laws protecting individuals against breach of privacy have not kept pace with technological developments and should be reviewed and reformed.

New technologies, such as those that enable corporations and governments to build up detailed profiles of individuals based on their personal data and browsing history, present unprecedented scope for serious invasions of privacy.

The Law Council also notes there is currently no comprehensive national framework for consistent

regulation and protection of health information across public and private sectors. Instead, there are overlapping and fragmented federal, state and territory laws which differ depending on who holds health information.

Where it leads to greater security of information, this complex framework should be consolidated and simplified.

The Law Council also supports the harmonisation of all federal, state and territory privacy laws, which we consider to be particularly important given the increasing complexity and public awareness in this area.

The Law Council calls for a commitment to:

- **promote open government;**
- **harmonise health privacy laws;**
- **harmonise, and where possible simplify, federal and state/territory privacy laws; and**
- **harmonise, and where possible simplify, federal and state/territory laws related to data rights and consumer protection related matters.**



Law Council
OF AUSTRALIA

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

(02) 6246 3788
mail@lawcouncil.asn.au

lawcouncil.asn.au

🐦 @thelawcouncil
@LCAPresident