

Law Council
OF AUSTRALIA

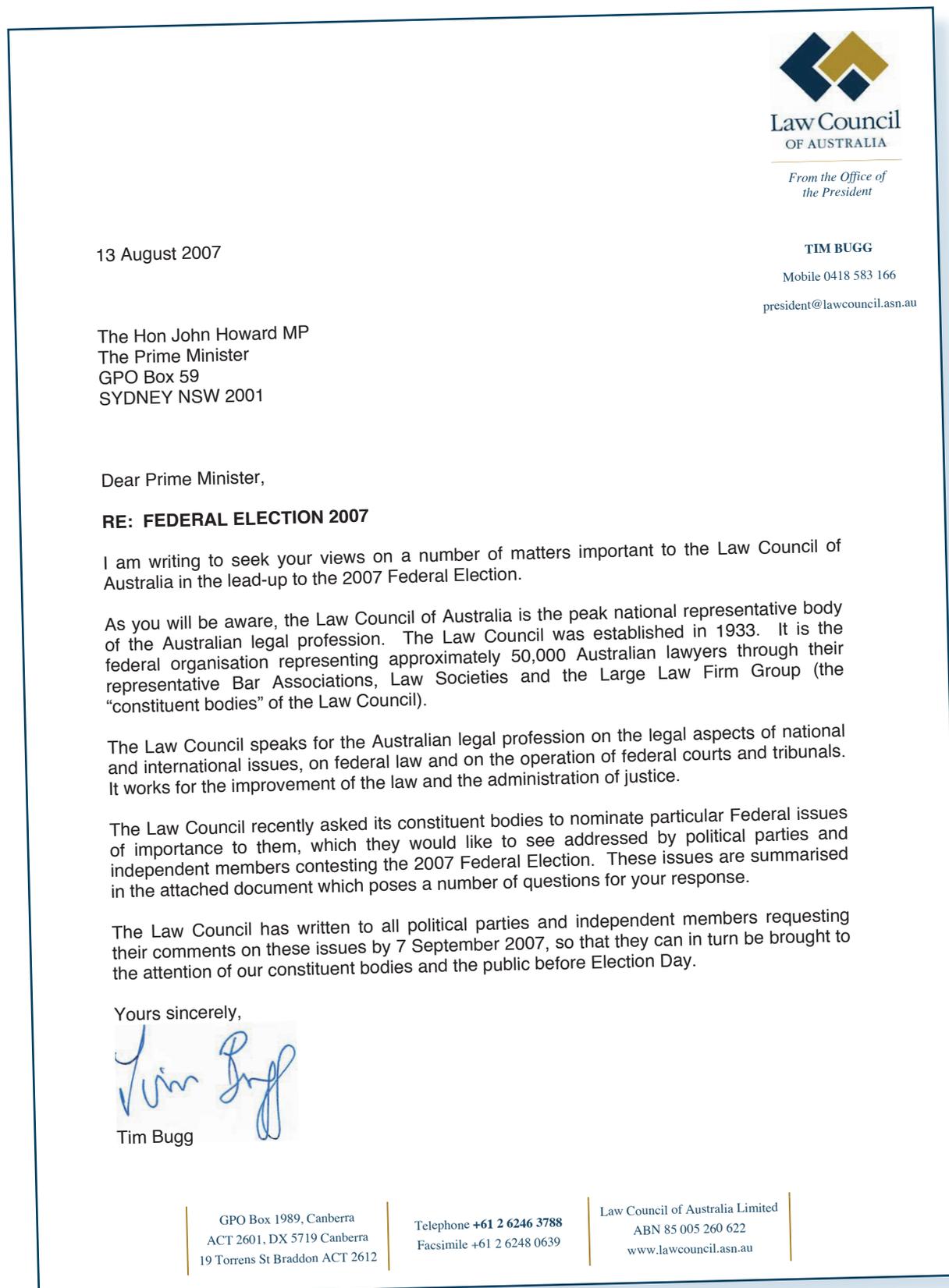
FEDERAL ELECTION 2007

KEY ISSUES

Federal Election 2007: Key Issues

On 13 August 2007, the Law Council sent a letter to all political parties and independent members in the Federal Parliament requesting their comments on important Federal issues. We will publish their responses prior to the Federal Election.

An example of these letters is shown below.



Bill of Rights

The recent enactment of the *Human Rights Act 2004 (ACT)* and *Charter of Human Rights and Responsibilities Act 2006 (Victoria)* has stimulated new debate about the value and place of a Bill of Rights in Australia generally. The Law Council appreciates the arguments advanced on both sides of this issue and supports further investigation of the merits of an Australian Bill of Rights. The Law Council believes the Australian Law Reform Commission is the appropriate body to undertake such research.

The Law Council asks

Will you support a process to examine the merits of a Bill of Rights for Australia by referring the issue (along with the appropriate allocation of resources) to the Australian Law Reform Commission for inquiry and report?

Legal Aid Initiatives

It is well documented that legal aid funding is insufficient to meet the needs of disadvantaged persons in the community, particularly Indigenous Australians and people living in rural and remote areas.

There has been a decrease in overall legal aid funding in real terms since 1996 and the estimated additional one-off amount required to restore funding even to 1996 levels is approximately \$100M. This increased legal aid budget should then be used as the basis for future legal aid funding.

Since 1996 a number of studies have identified significant consequences of the decrease in funding including a large increase in self-represented litigants causing considerable delays in and associated costs to the court system.

In addition to the decreases in overall real funding since 1996, the introduction of new Commonwealth legal aid policies and guidelines in 1997 meant that legal aid funding for civil matters was virtually abolished. Civil matters are disputes (not involving family law, child welfare or de facto property matters) between persons and other individuals or government. The 1997 policies and guidelines effectively restricted legal

aid to criminal and family law matters. The Law Council estimates that an additional one-off allocation of \$40M is needed for a civil legal aid scheme. The resulting increased legal aid budget should then be used as the basis for future legal aid funding.

With expansion of Commonwealth legislation and significant sustained budget surpluses it is critical to re-establish a civil legal aid system to meet the demand for legal services, particularly in areas such as employment law, consumer protection, immigration and social security.

In light of the recognised difficulties facing Indigenous Australians, particularly in rural and remote areas the Law Council believes that tax and other incentives are necessary to encourage young lawyers to practise in rural and remote areas. The Law Council also believes that increased funding is needed for dedicated Indigenous Legal Services.

The Law Council asks

Will you support immediately providing a minimum one-off payment of \$40M to re-establish a civil legal aid scheme and continuing funding for such a scheme?

Will you support immediately increasing funding for legal aid overall by a minimum one-off payment of \$100M (in addition to the \$40M civil legal aid scheme) and continuing funding at this increased level?

Will you support increasing funding for dedicated Indigenous Legal Services?

Will you support providing tax and other incentives to young lawyers to practise in rural and remote areas?

National Harmonisation of Laws

In recent years a number of initiatives have been taken to harmonise State, Territory and Federal laws. Bodies such as the Council of Australian Governments (COAG), the Standing Committee of Attorneys-General (SCAG), and other Ministerial councils are increasingly looking for national solutions for issues that require

governments to cooperate. The Commonwealth government also has before it a November 2006 House of Representatives Standing Committee report on harmonisation.

The Law Council broadly supports harmonisation of laws and believes that effective harmonisation of laws requires cooperation, compromise and a strong commitment from all parties to ensure that there is sufficient public consultation and oversight. The Law Council is keen to co-operate with government in endeavours to harmonise suitable laws.

The Law Council asks

Will you support the establishment of a reference group, including representation from the Law Council, to report to SCAG on identifying harmonisation priorities and progress on harmonisation?

Detention Provisions Under the Terrorism Legislation

Currently the provisions of the *Crimes Act* 1914 (Cth) (the Crimes Act) allow for a person arrested for a terrorist related offence to be held without charge for an indefinite period of time, albeit subject to judicial supervision.

The first test case of the detention provisions demonstrates that the laws do not operate fairly. Mohamed Haneef was detained for 12 days before being charged (although the charge was later dropped).

When a person is arrested in relation to a terrorist offence, an investigation period of up to 24 hours is allowed before the person must be charged, however the investigation period does not include 'dead time' during which police are unable to question the person.

'Dead time' includes time for the person to sleep or speak with a lawyer and also includes any 'reasonable time' approved by a magistrate when questioning is 'reasonably suspended or delayed'.

In the Haneef case, the police successfully applied to a magistrate three times to have days at a time declared as 'dead time' and that time effectively became indefinite detention.

The Crimes Act caps how long police can question a person at 24 hours but does not cap how long police may detain the person in order to conduct that 24 hours of questioning.

The Law Council proposes a maximum cap on the length of time a person may be held prior to charge. The Law Council further proposes that police should have only one opportunity to apply to a judicial officer to declare a certain period as 'dead time' and that police should not be able to obtain a 'dead time' extension if they already have sufficient information to charge the person in custody with a terrorism-related offence.

The Law Council also notes that recommendations of the Security Legislation Review Committee, an independent committee, whose mandate and composition were determined by Parliament, have not been fully actioned.

The Law Council asks

Will you support a review of the provisions under the Crimes Act which allow for the detention of a person in a terror related case to strictly confine the circumstances in which a person may be held without charge and the length of time he or she may be held?

Will you support full implementation of the recommendations of the Security Legislation Review Committee?

Regulation of Legal Practitioners by the Migration Agents Registration Authority

Australia is the only Western country that regulates migration lawyers under a migration agents regulatory scheme. Other countries that regulate the provision of migration services either do not permit provision of migration law services by non-lawyers, or provide that lawyers be regulated separately under the relevant legal profession regulatory regime.

In order to practice migration law, the Commonwealth migration agents registration scheme requires lawyers to submit to regulation by the Migration Agents Registration Authority (MARA), which is effectively operated by the Migration Institute of Australia (MIA). This

means that migration lawyers are subject to dual regulation, both under the comprehensive national legal profession regulatory scheme and by the MIA/MARA.

Dual regulation causes significant conflicts of interest for migration lawyers, undermines the national legal profession regulatory scheme, diminishes consumer protection and provides a disincentive to lawyers practicing migration law. Dual regulation also conflicts with the bi-partisan undertakings of the Government and Opposition in response to the findings of the Regulation Taskforce report, *Reducing the Regulatory Burden on Business*, to remove unnecessary red-tape.

The Law Council asks

Will you support the removal of migration lawyers from the migration agents registration scheme and allow migration lawyers to be solely regulated (as all other lawyers are) by the statutorily independent Legal Services Regulator in each jurisdiction?

Freedom of Information

In September 2006, the High Court handed down its decision in *McKinnon v the Secretary of the Department of Treasury* [2006] HCA 45. The result of that decision is that any information sought by members of the public about Executive action can be withheld if a 'conclusive certificate' is issued by a Minister under the *Freedom of Information Act* 1982 (Cth) (the FOI Act). It is very likely that this decision extends to the issuing of such certificates under comparable State and Territory legislation.

The decision has the effect that the issuing of a conclusive certificate is practically unreviewable, as neither the Administrative Appeals Tribunal, nor the Federal Court, may conduct a proper assessment of the competing public interests in any given case. Instead, the AAT must be merely satisfied that there are 'reasonable grounds' for the Minister's decision.

The High Court also found that, notwithstanding a decision by the AAT that there were not reasonable grounds for the decision outlined in the conclusive certificate, the Minister may ignore

the decision by tabling a statement to that effect in Parliament.

The Law Council considers this to be a significantly lower standard of Ministerial responsibility than was originally intended under the FOI Act, which now effectively provides an illusory check on the power of government to conceal information from the public.

The Law Council believes the underlying aims of the FOI Act, to ensure 'open and accountable government', have been significantly undermined as a result of the decision in McKinnon.

The Law Council asks

Will you commit to consider possible amendments to the FOI Act to enable decisions to issue a 'conclusive certificate' to be subject to merits review, to enable an appropriate balancing of competing public interests in any given case?

Client Legal Privilege

Client legal privilege (CLP) has been identified by the High Court as a fundamental common law right, which is essential to protect the administration of justice. Accordingly CLP exists in the public interest.

Client legal privilege is appropriately named, as it belongs to the client, not to the legal adviser. CLP ensures clients do not fear to disclose all relevant information to their legal adviser, who is duty bound to provide accurate and complete advice to a client about their liabilities and obligations in a complex and ever-changing legal environment. Abrogation or modification of CLP will undermine this important function and consequently damage the administration of justice.

The Law Council notes that CLP is not an absolute right. Where there is an overriding public interest, the Courts have demonstrated that they will suspend CLP if it is suspected that an illegal purpose is concealed. The Law Council also believes that where CLP is abused, there exist robust procedures for taking appropriate action against those involved.

The Law Council does not support wholesale legislative abrogation or modification of CLP in any context. Any legislative action to abrogate or

modify CLP should only be taken in exceptional circumstances and only where absolutely necessary.

The Law Council is concerned that some Commonwealth agencies have adopted a view that CLP does not, or should not, apply when a statutory investigatory or regulatory power is exercised. The Law Council believes that this approach conflicts with current High Court precedent, undermines CLP and, accordingly, the administration of justice.

The Law Council asks

Do you support ensuring CLP is maintained and protected in all contexts, including in the exercise of Commonwealth investigatory and regulatory powers?

Do you support the introduction of legislation clarifying that CLP must be observed by all Commonwealth agencies exercising an investigatory and regulatory function?

Do you support the development of procedures to address concerns about the efficiency of Commonwealth investigatory functions when CLP claims are made?

Anti-Money Laundering

The Federal Government is currently preparing legislation to implement tranche two of its Anti-Money Laundering (AML) reforms. These reforms will be directed at key professions, including the legal profession.

Provided they are consistent with existing professional obligations and not unduly cumbersome or expensive, the Law Council does not object to reforms which are aimed at reducing the risk that legal practitioners might be unwittingly used to facilitate money laundering. Such reforms may include for example customer identification and verification obligations. Such reforms will place significant new obligations on legal practitioners and the Law Council believes that comprehensive advice and support should be made available to the profession by the Government.

However, the Law Council does object to reforms which go further and require a legal practitioner to secretly report on their clients'

'suspicious transactions' to the Government. The Law Council believes that any obligation imposed on lawyers to report on and incriminate their clients is an infringement of client confidentiality and is likely to destroy the important relationship of trust between lawyers and clients. This relationship of trust and the free flow of information it facilitates is central to the effective administration of justice.

The Law Council asks

Do you intend pursuing money laundering reform which will require lawyers to make 'suspicious transaction' reports, even where the communications are subject to client confidentiality?

Will you support providing resources for comprehensive advice and education for the legal profession to implement the reforms?

Civil Unions

The Law Council is concerned that current Australian law defining marriage as the union of a man and a woman is inconsistent with Australia's international obligations under the International Covenant on Civil and Political Rights and with the recognition of same sex marriages or civil unions in many overseas jurisdictions.

The Law Council believes that marriage is a civil right which should be made available to all people regardless of sex. The Law Council also believes that discrimination against same sex couples cannot be adequately addressed without changing the law in relation to marriage.

The Law Council asks

Will you support legislative recognition of same sex marriages or civil unions?

Alternative Dispute Resolution Assistance Scheme

In the context of the Workchoices reforms, the Alternative Dispute Resolution Assistance Scheme (ADRAS) was established to assist eligible employers and employees in dispute

to access alternative dispute resolution (ADR) services. Parties can access up to \$1500 for ADR services or up to \$2000 in rural and remote areas.

The Law Council believes that providers of ADR services should have the same legislative immunity from suit, as provided in such state legislation as the *Commercial Arbitration Act* 1984 (NSW), the *Civil Procedure Act* 1955 (NSW) and the *Mediation Act* 1997 (ACT). Providing such immunity would act as an incentive for more providers to participate in the scheme.

The Law Council asks

Will you support legislation to provide immunity from suit for service providers under ADRAS?

Australian Judicial Commission

There is currently no federal mechanism to deal with complaints of negligence, physical or mental fitness, incompetence or misbehaviour against Federal judges or magistrates.

The Law Council proposes the establishment of an Australian Judicial Commission to manage complaints made against federal judges and magistrates and provide them with education and training in collaboration with such bodies as the National Judicial College of Australia.

The Law Council asks

Will you support legislation for the establishment of an Australian Judicial Commission and provide resources for such a body to manage complaints against and help provide training for Federal judges and magistrates?



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