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# Migration Amendment (Family Violence and Other Measures) Bill 2016

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## **Senate Legal and Constitutional Affairs Legislation Committee**

**18 April 2016**

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## Introduction

1. Thank you for the opportunity to provide comments on the Migration Amendment (Family Violence and Other Measures) Bill 2016 that is currently the subject of an inquiry by the Senate Legal and Constitutional Affairs Committee (the Committee).
2. The Law Council supports the policy objectives underlying the Bill, which include to:
  - strengthen the integrity of the family visa program, initially by applying to partner visas;
  - reduce violence against women and children, particularly in culturally and linguistically diverse communities, by placing greater emphasis on information disclosure and the assessment of persons as family sponsors, consistent with Action Item 11 of the National Plan to Reduce Violence against Women and their Children,<sup>1</sup> and
  - improve the management of family violence in the delivery of the program.
3. However the Law Council is concerned to ensure that the amendments achieve these objectives in a way which is optimally consistent with the human rights of the families and persons involved.
4. The Law Council is grateful for the contribution that the Migration Law Committee (MLC) in the Federal Litigation and Dispute Resolution Section (FLDRS) made to this submission. The work of the MLC includes (but is not limited to):
  - expressing expert views through the Law Council on substantive migration law issues;
  - attending stakeholder meetings with the Department of Immigration and Border Protection (DIBP);
  - providing Continuing Professional Development (CPD) events; and
  - providing networking opportunities for Australian lawyers in the field of migration law.
5. The Administrative Law Committee in the FLDRS and the Privacy Law Committee in the Business Law Section also provided comment on the draft submission.
6. In summary, this submission suggests that:
  - the sponsorship approval process should be concurrent with the visa application process, to ensure that applicants have a right to apply for a visa at the same time as the eligibility and suitability of the sponsor is being considered. This is likely to shorten the processing period, and would also mean that the visa applicant would have a right to stay in Australia or continue

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<sup>1</sup> Australian Government, Department of Social Services, [Second Action Plan 2013-2016 – Moving Ahead – of the National Plan to Reduce Violence against Women and their Children 2010-2022](#), 25. Action 11 provides that violence against women in CALD communities will be reduced, including by requiring additional information disclosure by the Australian husband or fiancé applying for an overseas spouse visa; and development of resource materials to inform and support these overseas spouses, including information about essential services and emergency contacts in Australia.

the application whilst a sponsorship refusal is being considered by the Administrative Appeals Tribunal (AAT) or Federal Circuit Court;<sup>2</sup>

- the availability of merits review should be confirmed once the Regulations under this legislation have been made;
- a formal Privacy Impact Assessment (PIA)<sup>3</sup> should be prepared on the Bill if one has not been prepared already, and the Committee should review this;
- a disclosure exception should apply to spent convictions unless there are reasonable grounds for waiving that exception;
- the Statement of Compatibility with Human Rights attached to the Explanatory Memorandum (EM) should be amended to include consideration of the potential for the proposed amendments to discriminate against families where one partner is a non-citizen on the basis of “national or social origin or other status”, and whether this is reasonable, necessary and proportionate to prevent possible future family violence, consistent with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). If proportionality is not established, the Bill should be amended to ensure compliance with Australia’s international obligations;
- further consideration should be given to the recommendations made by the Australian Law Reform Commission and the Victorian Royal Commission to ensure greater protection for migrant victims of family violence in Australia;<sup>4</sup> and
- the definition of family violence in relevant legislation should be made consistent in the *Migration Regulations 1994* (Cth) and state and territory legislation such as the *Family Violence Protection Act 2008* (Vic), and to ensure that people seeking to escape violence are entitled to crisis payments (regardless of their visa status).

## Outline of the proposed amendments

7. The policy objectives of the Bill are intended to be achieved by extending various aspects of the sponsorship framework currently applicable within the temporary sponsored work visa program under [Division 3A of Part 2 of the Migration Act](#), to family sponsors. This will be done by amending the *Migration Act 1958* (Cth) (the Migration Act) and the *Migration Regulations 1994* (the Regulations).
8. The Bill proposes:
  - that family sponsors be approved before any relevant visa application is made;

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<sup>2</sup> Applications for Temporary Business Entry (Class UC) subclass 457 (Temporary (Work (Skilled) visas) and applications for the approval of sponsors are made concurrently. See the discussion of relevant Migration Act provisions and Regulations in *Ahmad v Minister for Immigration and Border Protection* [2015] FCAFC 182.

<sup>3</sup> Australian Government, Office of the Australian Information Commissioner (OAIC), *Guide to Undertaking Privacy Impact Assessments* (PIA Guide) (2014) <<https://www.oaic.gov.au/agencies-and-organisations/guides/guide-to-undertaking-privacy-impact-assessments>>

<sup>4</sup> See for example: Australian Government, Australian Law Reform Commission (ALRC), *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, ALRC Report 117, 2012, [Section on Partner Visa Sponsorships](#), and Victorian Government, *Royal Commission into Family Violence* (Commissioner: The Hon. Marcia Neave AO) March 2016.

- new obligations for approved family sponsors;
  - new sanctions, if obligations (replacing undertakings) are not complied with; and
  - the sharing of personal information in accordance with the provisions of the Division. Family visa sponsors will be required to undergo a police check.
9. The amendments will establish processes for the Minister to refuse or cancel the approval of a person as a work sponsor or family sponsor in prescribed circumstances. Sponsorship applications may be refused where the sponsor has convictions for paedophilia or other sexual offences against minors, or for offences relating to violence. Refusals will be discretionary and the Minister will consider:
- the length of the relationship;
  - the type of offence;
  - how recently the offence occurred;
  - relevance to the family relationship; and
  - any mitigating circumstances.<sup>5</sup>

## Pre-approval of sponsors

10. One of the objectives of the Bill is to require the assessment and approval of persons as family sponsors before any relevant visa application is made by the sponsor's partner and/or children.
11. The [EM](#) for the Bill states that a person must be approved as a sponsor before family visa applications may be made. Family violence, sexual and other serious offences may bar a person from receiving approval as a family sponsor.
12. Sponsorship applications will be subject to non-mandatory refusal in circumstances where the applicant sponsor has convictions for paedophilia or violent offences.
13. The Law Council is concerned that the proposed amendments involve a broadly discretionary assessment of the character of sponsor applicants, and create a risk for the family unit. If a potential Australian sponsor is not pre-approved, the applicant may feel inclined to end their relationship with their partner, notwithstanding possible rights of review. This is concerning, as visa applicants may be already vulnerable due to a range of factors, including possible language barriers and lack of understanding of immigration and visa processes.
14. The important aim of this measure is to reduce violence against women and children by their partners who are sponsoring their visa application. However, both the Act and the regulations should be carefully drafted to define with particularity a wide range of relevant considerations that may influence the exercise of any discretion to refuse approval, to ensure that waivers and exceptions are appropriate and to

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<sup>5</sup> Section [140L](#) of the Migration Act, regulations made thereunder, and proposed amendments thereto. Australian Parliament, House of Representatives, [Migration Amendment \(Family Violence And Other Measures\) Bill 2016: Explanatory Memorandum](#), circulated by authority of the Minister for Immigration and Border Protection, the Hon. Peter Dutton MP, 23–24.

ensure that review rights are available. It would be appropriate for the legislation to elaborate the considerations that the Minister ought to take into account in detail, when determining whether the results of a police check are relevant or influential, as discussed further below.

15. The Law Council suggests that the sponsorship approval process be part of the visa application process, to ensure that applicants have a right to apply for a visa at the same time as the sponsorship process is being considered. This is likely to shorten the processing period, and would also mean the applicant would have a right to stay in Australia or continue the application while a sponsorship refusal is being considered by the AAT or Federal Circuit Court.

## Disclosure of personal information

16. The amendments allow the Minister to disclose personal information about a sponsor – specifically, the results of their police check – to other parties to the application.
17. Privacy laws and civil procedure currently prevent spouses and domestic partners from obtaining private or confidential information about each other without the other party's consent.<sup>6</sup>
18. The Law Council suggests that the Bill and the supporting regulations and administrative framework would benefit from a formal Privacy Impact Assessment (PIA) being prepared, if one has not been prepared already. This is because the Bill contemplates different types of disclosures of potentially sensitive personal information<sup>7</sup> regulated by the *Privacy Act 1988* (Cth),<sup>8</sup> with different legal consequences and mechanisms for privacy protection. [Regulations](#) made under the Act (when the provisions commence) will prescribe the kinds of personal information that may be disclosed by the Minister under the respective disclosure provisions in ss 140ZH (1) and (1A) as amended; and the type of visa to which the respective disclosure provisions apply. The EM notes that these regulations will be subject to Parliamentary scrutiny and are disallowable. However the Law Council suggests that the preparation of a PIA is an additional safeguard and scrutiny mechanism that should be activated in these circumstances.
19. A PIA is necessary because the legislation will permit the disclosure of personal information to Commonwealth, State and Territory agencies as prescribed by the regulations, and to visa applicants. This disclosure serves different purposes and create different risks. Critical to the privacy assessment is an assessment of proportionality, which in this type of matter would require a review of a combination of the following factors:

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<sup>6</sup> See generally for example: *Elias & Elias* [2014] FCCA 457; *Dalton & Dalton* [2016] FamCA 174.

<sup>7</sup> Clause 60, proposed new s 140ZH(1).

<sup>8</sup> Australian Government Department of Immigration and Border Protection, "Privacy": <[www.border.gov.au/about/access-accountability/privacy](http://www.border.gov.au/about/access-accountability/privacy)>. Under s 16A of the Act "permitted general situations in relation to the collection, use or disclosure of personal information" include where it is unreasonable or impracticable to obtain the individual's consent to the collection, use or disclosure; and the entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety.

- whether it is unreasonable or impracticable to obtain the individual's consent to the use or disclosure;
  - whether there are reasonable grounds for believing that the use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety;
  - whether the result of the police check is shared with one or more other Commonwealth or State or Territory agencies and the visa applicant;
  - whether the result of the police check is shared only with DIBP;
  - whether the disclosure is of the entire report;
  - whether the disclosure is a limited only to the outcome of the police check (i.e. basic confirmation that there is or there is not a criminal record); and
  - what purpose the disclosure serves.
20. The Law Council also notes that neither the Bill nor the Explanatory Memorandum refers to the Commonwealth's [Spent Convictions Scheme](#) under which an individual is permitted not to disclose certain criminal convictions in particular circumstances, and unauthorised use or disclosure of information about the conviction is prohibited. The Scheme applies to convictions for less serious Commonwealth, State, Territory and foreign offences. It also covers pardons and quashed convictions. The states and territories may also have spent conviction schemes. The Law Council considers that a disclosure exception should apply to spent convictions unless there are reasonable grounds for waiving the exception.

## Possible discrimination against non-citizens

21. As noted above, the proposed amendments have the potential to discriminate against families on the basis of national or social origin or other status, where one partner is a non-citizen.<sup>9</sup> There is no equivalent law that requires partners who are either citizens or permanent residents to have their partner's criminal and personal history assessed before they are granted the right to live together. This issue is not addressed in the Statement of Compatibility with Human Rights that is [Attachment A](#) to the Explanatory Memorandum consistent with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).
22. While the decision to refuse a sponsorship proposal is discretionary, it effectively treats Australian citizens or permanent residents differently where they choose to marry a non-citizen or permanent resident and subjects them to a process that allows for no or little ability for the violent partner to be rehabilitated. This may take the provision beyond the "reasonable and proportionate" limitations that are justifiable in limited circumstances in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others, as provided for in human rights legislation and case law.<sup>10</sup>

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<sup>9</sup> ICCPR arts 2.1 and 26, amongst other obligations. See: Australian Human Rights Commission, "Rights to equality and non discrimination", <[www.humanrights.gov.au/rights-equality-and-non-discrimination](http://www.humanrights.gov.au/rights-equality-and-non-discrimination)>.

<sup>10</sup> See for example: *R v Oakes* [1986] 1 SCR 103 and *Momcilovic v The Queen* [2011] HCA 34.



## AAT review

23. The Law Council recommends that the Committee ensure that refused sponsor applicants can appeal to the AAT's Migration and Refugee Division for a review on the merits of decisions to refuse a sponsor application, as is the policy intention of this Bill according to the EM. Rights of appeal appear to be available under ss 5(1), 140E and s 338(2)(d)(ii) of the Migration Act as proposed to be amended by this Bill. However, as rights of review can also be affected by provisions in regulations under the Act, as discussed in *Ahmad v Minister for Immigration and Border Protection* [2015] FCAFC 182, it is not entirely clear whether merits review will be available in relation to refused sponsor applications as the Regulations are not yet available in relation to this policy initiative.

24. The Law Council recommends that the Bill and regulations clearly state that merits review is available. Section 338 of the Act currently provides:

### *338 Definition of Part 5-reviewable decision*

(d) *where it is a criterion for the grant of the visa that the non-citizen is sponsored by an approved sponsor, and the visa is a temporary visa of a kind (however described) prescribed for the purposes of this paragraph:*

(1) *A decision is a Part 5-reviewable decision if this section so provides, unless: ...*

(ii) *an application for review of a decision not to approve the sponsor has been made, but, at the time the application to review the decision to refuse to grant the visa is made, review of the sponsorship decision is pending.*

25. Section 338(d)(ii) has been discussed in several Federal Court decisions.<sup>11</sup> In 2015 the Federal Court in *Ahmad v Minister for Immigration and Border Protection* (Katzmann, Robertson and Griffiths JJ) described s 338(2)(d)(ii) and related provisions in the Act and Regulations as “numerous and complex”.<sup>12</sup>

26. In *Ahmad*, the Federal Court upheld an appeal against a Federal Circuit Court refusal to grant judicial review of a Migration Review Tribunal decision that found the Tribunal had no jurisdiction to provide merits review.

## Effect of amendments on vulnerable partners

27. The Law Council notes that these amendments extend sponsor approval processes currently in place in an employment context, to a family context. However, the nature of ‘family sponsors’ is very different from ‘work sponsors’, as the relationship between a business and an employee is different to a partner relationship. The facts of the relationship are inextricably linked to the assessment of the sponsorship.

28. Under the proposed amendments, if an approved sponsor is refused, then a visa applicant will be prevented from applying for a visa, potentially leaving the visa applicant in a vulnerable position – for example, women (typically) being forcibly returned to their country of origin, without appropriate consideration of their

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<sup>11</sup> *Minister for Immigration and Border Protection v Lee* [2014] FCCA 2881; *Kandel v Minister for Immigration and Border Protection* [2015] FCCA 2013; *Minister for Immigration and Citizenship v Islam* [2012] FCA 195; [202] FCR 46; *SZABO v Minister for Immigration and Border Protection* [2014] HCATrans 226

<sup>12</sup> *Ahmad v Minister for Immigration and Border Protection* [2015] FCAFC 182 [24].



circumstances. These women may have been entitled to a permanent partner visa under the existing framework, under the family violence exception, or may have gender-based claims for protection. Short timeframes often apply in circumstances of visa cancellation and removal from Australia, and there are limited Ministerial intervention options where there is no AAT decision in relation to a person. Persons facing imminent departure may not be able to access legal advice after their sponsor's application has been refused which increases the risk that natural justice and due process will be denied.

29. Women (and men) on temporary visas who have engaged in a relationship with an Australian citizen or permanent resident, might already be vulnerable persons due to heightened isolation, limited social and financial support, issues around language, anxieties about immigration status, poor knowledge of the legal system, and limited time spent in Australia. These issues can be exacerbated by an abusive partner who threatens to thwart the process through which the other party could obtain residency if they try to leave.<sup>13</sup> In addition, many victims of abuse find it difficult, if not dangerous or impossible, to return to their home country after experiencing family violence due to cultural stigma, persecution and discrimination, or financial constraints, or if the marriage does not eventuate.
30. Accordingly, the Law Council is concerned that equating family and employment sponsors may run counter to the objectives of the legislation which include to protect vulnerable women and children.

## Other recommendations for family violence law reform

31. The Law Council notes that other inquiries have evaluated the interaction between the Australian family visa program and family violence.<sup>14</sup>
32. In 2012 the ALRC report on family violence involved extensive research and thorough consultation with community stakeholders concerning the Australian family visa program and family violence. Consideration was given to the regulation of sponsorship for partner visas. The ALRC noted the Department's then view that assessment of sponsors in partner visas could lead to:

*... claims that the Australian Government is arbitrarily interfering with families, in breach of its international obligations. It could also lead to claims that the Australian government is interfering with relationships between Australians and their overseas partners in a way it would not interfere in a relationship between two Australians.*<sup>15</sup>

33. Serious concerns were expressed about procedural fairness, privacy obligations, and risk of discrimination created by approval requirements.

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<sup>13</sup> We note here that the Victorian Royal Commission in 2016 recognised that the immigration status of women who experience family violence has a significant impact on their experience and their ability to leave a violent relationship.

<sup>14</sup> See for example: ALRC, *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, above n 4, 2012, 507 [20.75], [Section on Partner Visa Sponsorships](#), and Victorian Government, *Royal Commission into Family Violence* above n 4.

<sup>15</sup> ALRC above n 4, [20-75].

34. The ALRC considered the family violence exception contained in the Migration Regulations 1994, which applies mainly in partner visa cases and permits the grant of permanent residence to victims of family violence, notwithstanding the breakdown of the spouse or de facto relationship on which their migration status depends. The ALRC's recommendations were aimed at improving the accessibility of the family violence exception to victims of family violence.<sup>16</sup>
35. The ALRC recommended that the family violence exception should be available to permit the grant of a permanent visa to be considered where there is a legitimate expectation of a permanent migration outcome, for example, in a case where a non-citizen has been married to an Australian citizen or permanent resident for some time, or has children with an Australian citizen or permanent resident.<sup>17</sup>
36. The ALRC was of the opinion that the current safeguards surrounding serial sponsorship – namely, a limit of no more than two sponsorships in a lifetime and a five year period between sponsorships with the ability to allow for discretion in exceptional cases – provide a fair measure of protection for victims of family violence (see *Migration Regulations 1.20J*) without encroaching upon Australia's international human rights obligations.<sup>18</sup>
37. The ALRC recommended, in lieu of any changes to the sponsorship requirement, that the safety of partner visa applicants should be promoted by targeted education and training for decision makers, competent persons and independent experts, and better information dissemination for visa applicants in relation to their legal rights, family violence support services both prior to and on arrival in Australia.<sup>19</sup>
38. Similar recommendations were recently made by the Victorian Royal Commission into Family Violence that supported expanding the targeted education and training to accredited interpreters used in family violence matters. The Victorian Government has committed to implementing all 227 recommendations made by the Commission and the Law Council has welcomed the recommendations.<sup>20</sup>
39. The Law Council commends the Australian Government's Department of Social Services for making available a [Family Safety Pack](#) in 46 languages, and for including two fact sheets recently on the role and responsibilities of interpreters in domestic violence situations:
  - interpreting in domestic violence situations (aimed at interpreters); and
  - interpreters and family safety (aimed at front line workers in the domestic violence sector).
40. The ALRC made numerous other recommendations to strengthen the accessibility of migration solutions for victims of family violence and to reduce violence against women and children, many of which are yet to be implemented.
41. The Law Council understands that some current practices conflict with the ALRC's recommendations, including anecdotal comments from practitioners about instances in which the DIBP has refused access to lawyers and migration agents during

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<sup>16</sup> ALRC, above n 4, [20-1] – [20-4].

<sup>17</sup> ALRC, above n 4, [20-3].

<sup>18</sup> ALRC, above n 4, [20-72].

<sup>19</sup> ALRC, see recommendations [20-5] and [20-6], [20.79].

<sup>20</sup> Law Council of Australia, "Law Council calls on COAG leaders to seize historic opportunity to reduce family violence", *Media release* 1 April 2016.

interviews between victims of family violence and independent experts. Expert opinions based on process may later be relied on by the DIBP in its decision-making processes, notwithstanding denial of the victim's right to legal advice and assistance and possible subsequent prejudice.

42. In particular, the ALRC emphasised that any amendments to the law would need to ensure that a victim can take measures to protect his or her safety, by removing barriers to accessing the family violence exception through which independent visas can be obtained. The Law Council is concerned that the proposed "pre-approval" process for Australian sponsors may act as a further barrier for some victims of family violence with uncertain visa statuses who may now be prevented from engaging the migration process.
43. We also note that the Victorian Government, through the Council of Australian Governments, encouraged the Commonwealth Government to broaden the definition of family violence in the *Migration Regulations 1994* (Cth) so that it is consistent with the *Family Violence Protection Act 2008* (Vic) and to ensure that people seeking to escape violence are entitled to crisis payments (regardless of their visa status). It would be appropriate to harmonise the definition of family violence across Australia.

## Conclusion

44. The Law Council is concerned that several of the proposed amendments have the potential to conflict with Australia's international human rights obligations to protect the family unit, privacy, and to comply with the international norm of non-discrimination, unless additional safeguards and proportionality considerations are expressly applied and found to be appropriate.
45. The Law Council suggests that further consideration be given to the recommendations made by the ALRC and the VRC to ensure greater protection for migrant victims of family violence in Australia, and that a PIA be prepared for the Bill and proposed regulations.
46. The Law Council also suggests that the interactions of the Regulations giving effect to this policy initiative be scrutinised when made to ensure that access to merits review in the AAT is available as intended.

## **Attachment A: Profile of the Law Council of Australia**

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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 general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.