



THE LAW SOCIETY OF NEW SOUTH WALES

2023 STATE ELECTION PLATFORM



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OF NEW SOUTH WALES

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SUPPORTING THE JUSTICE SYSTEM

SUPPORTING THE JUSTICE SYSTEM

Improved funding for modernising the court system – in particular the Local Court and NCAT

NSW courts can become fairer, more flexible, and more efficient, by applying the lessons learned from the use of measures introduced to keep the justice system working during the COVID pandemic.

In July 2021, the Law Society conducted a survey of nearly 1,500 practitioner members, the results of which showed overwhelming support for retaining access to a number of COVID related measures to improve access to justice.

More than 90 per cent of respondent solicitors wanted to retain the flexibility to:

- participate in online case management and directions hearings,
- lodge documents and make court applications via internet portal or email,
- view or download files remotely, and
- interview clients in custody by audio-visual link (AVL).

In briefings conducted after the survey with heads of jurisdiction and other stakeholders, there was support for retaining this flexibility, but also an acknowledgement that significantly more resources are needed to realise the goal of having fit for purpose digital infrastructure available across the NSW court and tribunal system.

While there are many matters, particularly defended hearings and cross examination, which benefit significantly from being conducted face to face, the gains made, particularly in conducting non-contested and case management proceedings online, should not be lost.

Many solicitors whose practices are located significant distances from courts have welcomed the ability to conduct remotely a minutes-long mention which would otherwise have required hours of travel and waiting time, all at the client's expense.

Some jurisdictions are particularly in need of greater investment. The Local Court and the NSW Civil and Administrative Tribunal deal with, by far, the greatest proportion of criminal and civil matters in the NSW justice system. But more investment is desperately needed in both jurisdictions, particularly in support of operating online.

In recent years, the Law Society has raised concerns with government about the rising workload imposed on the Local Court as a result of significant increases in police resources and other legislative amendments, without properly funding the court system.

The Local Court deals with more than 94% of all criminal prosecutions, almost all domestic violence matters and has a broad civil jurisdiction. NCAT deals with more than 70,000 matters per year, across a broad range of areas. The challenges confronting both jurisdictions of managing increasing caseloads and operating with reduced judicial resources have been compounded by the COVID-19 pandemic.

Proper investment in equipping NSW courts and tribunals to engage with parties online, where appropriate, has the potential to deliver enormous benefits for the community at large, reducing unnecessary travel, and, in certain situations, significantly reducing the stress associated with physical attendance at court and confronting other parties.

■ ***The Law Society of NSW calls on all parties to commit to making the investments necessary to ensure efficiencies gained through the pandemic are not squandered, particularly in relation to the Local Court and NCAT.***

Additional funding for legal support services

Access to justice is a core value of the Law Society and we have consistently advocated for adequate funding for legal assistance services, given the critical role they play in ensuring fairness and efficiency in our court system. The Law Society provides services to enhance access to justice for the financially disadvantaged, and many of our members provide legal assistance to the most vulnerable in our society, whether as employees of relevant legal assistance agencies, as private practitioners undertaking Legal Aid work, or in their own capacity providing pro bono or low-cost assistance.

While the Law Society of NSW welcomes better resourcing of the legal assistance sector in recent years, there clearly remains unmet legal need in the community. Unmet legal need can have serious consequences that have downstream effects in other areas that affect government spending, such as health, care and protection, education and housing.

The significant increased resources provided to NSW Police in recent years have not been matched by accompanying increases to downstream providers in the criminal justice system, for example the courts and legal assistance providers. These providers will inevitably have to manage the additional pressure on the justice system generated by additional police.

Pro bono work is a highly commendable and long-standing tradition of the profession, but it is not a substitute for a properly funded legal aid system. NSW Treasury should fund legal assistance services as a core priority of government.

The serious and continuing effects on the economy of the pandemic and global events mean that an increasing number of NSW citizens will be under serious financial pressure. We know that such pressures generate legal problems, while reducing capacity to afford the legal help that is needed.

■ ***The Law Society calls on all parties to commit to adequate funding for the legal assistance sector, including Legal Aid, the Aboriginal Legal Service, Community Legal Centres, and private practitioners that undertake legal aid work, to meet the unmet legal needs generated by the pandemic and subsequent economic hardship.***

Better court facilities in regional areas, and flexibility in justice delivery, to improve access to justice outside metropolitan areas

It is vitally important that the justice system harnesses the opportunities brought about by the COVID-19 pandemic to improve access to justice in regional and remote areas. The advent of audio-visual link (AVL) technology, and a shift towards remote modes of working, have the potential to significantly improve access to justice in rural and regional NSW. The closure or partial closure of court houses in these regions represent significant barriers to justice.

For some years, the limited availability of court facilities outside metropolitan areas has led to cooperative arrangements whereby the NSW Local Court and District Court jurisdictions share facilities with the family law jurisdiction. These arrangements became less important during the COVID-19 restrictions when many court processes took place online. However, since the lifting of restrictions and the return to face-to-face hearings, the demand for court facilities far exceeds availability.

Sharing court facilities can be an efficient solution in regional areas, especially as it reduces the need for parties and their representatives to travel large distances to attend court events. However, it requires sufficient investment in staffing and infrastructure to ensure reasonable wait-times, and a flexible approach to resource allocation. When urgent family law hearings are cancelled, for example, due to competing Local Court civil matters, it can escalate conflict and place families and children at risk.

Regional courts also urgently need better capacity to conduct online court events. Inadequate AVL facilities, Wifi and IT equipment makes it difficult for courts to conduct simple processes online, and this in turn exacerbates the demand for physical court facilities.

■ ***The Law Society call on all parties to commit to:***

- ***better court facilities in regional areas, including capacity to conduct processes by AVL as well as physical court events.***
- ***flexible court resourcing to improve access to justice outside metropolitan areas, including through working with the Commonwealth Government to ensure matters in federal jurisdictions are managed efficiently.***

SUPPORTING THE JUSTICE SYSTEM

Planning for justice system infrastructure in areas of growth

Basic access to court room facilities is a key to securing access to justice. The construction of new court facilities is a lengthy and expensive exercise. It is therefore vital that appropriate planning is undertaken as early as possible to identify future areas of need for justice infrastructure, just as planning for other government services such as hospitals and schools is undertaken.

As Sydney continues to grow, it is clear that growth areas will require the construction of new, modern and flexible justice precincts to cope with additional demand. The Law Society has long been on the front foot in ensuring governments take account of these demands, as evidenced by our campaign for a new justice precinct in South West Sydney.

The lessons of the pandemic have shown that justice can be delivered in many ways. While certain proceedings, like contested matters involving cross examination, will always need a traditional courtroom environment, more routine court procedures can be dealt with remotely. New justice facilities need to be equipped with the right digital infrastructure to enable the whole suite of justice system processes to be delivered as efficiently as possible.

The benefits of such investment are very clear. Adequate court facilities deliver the resolution of disputes with fewer delays, and also deliver enormous cost savings for the courts themselves. The benefits to courts through more efficient disposal of case loads improves the quality and speed of the justice system, reducing:

- the inefficiencies created by 20th century systems for managing court files and procedures;
- legal costs for court users, and
- unnecessary travel.

We note the funding for the development of an investment business case for a new South West Sydney Justice Precinct, and we look forward to continuing to work with government on the delivery of that project. We also look forward to working with government to identify other areas of growth to ensure that the justice system continues to provide appropriate services to the public.

■ ***The Law Society call on all parties to commit to a comprehensive review of areas of growing population and legal demand to inform a justice infrastructure capital program.***

Properly fund an autonomous and specialist Coroner's Court

The Law Society supports the implementation of the recommendations of the Select Committee on the Coronial Jurisdiction in NSW, noting the Government's response of 31 October 2022 provided only partial support for the recommendations.

The purpose of the recommendations, which should be taken together, is to provide a cohesive roadmap to ensure that NSW has a modern, specialist and better resourced coronial jurisdiction which has at its centre the object of preventing future loss of life, while enhancing the therapeutic and restorative aspects of the jurisdiction.

The Select Committee reported that the Coroner's Court is experiencing very heavy workloads, and lacks sufficient resources to undertake its important work. This has led to delays in finalising matters, and a significant and growing backlog of cases, exacerbating the grief of the bereaved.

For these reasons, we particularly support the recommendations that the Coroners Court of NSW be restructured as an autonomous and specialist court associated with the Local Court. The Court should be allocated additional resources, including adequate funding and staffing, to ensure it can address current and future caseload pressures, delays and backlogs.

■ ***The Law Society of NSW calls on all parties to commit to implementing the recommendations of the Select Committee on the Coronial Jurisdiction in New South Wales in full.***



BETTER REGULATION TO SUPPORT ECONOMIC RECOVERY AND RESILIENCE

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Planning for climate change – including additional resourcing to improve local government capability, and efficient planning controls

The planning system in NSW does not effectively factor the projected future physical impacts of climate change into strategic planning and project-level decision making.

The consideration of climate change mitigation and adaptation needs to be incorporated into the NSW planning system, encompassing all key stages of the planning process, from strategic land use planning to environmental impact assessment and development assessment.

For the sake of flood and fire affected communities, local authorities, and decision makers, there needs to be a State-wide overarching framework that ensures that climate impacts, including extreme weather projections, are appropriately factored into planning decisions.

The importance of having properly resourced and informed local councils which can appropriately respond to emergencies cannot be overstated. In some of our members' experience, during the 2022 floods, councils did not have the equipment to adequately measure the risk of flooding, increasing the risk of misinformation. Government should make additional investment in the ongoing research and analysis of climate-related events in response to a changing climate across the state.

■ ***The Law Society of NSW calls on all parties to commit to introducing a statewide planning framework that incorporates consideration of climate related impacts, as well as additional resourcing for local government to adequately plan for climate impacts on local communities.***

Review of the NSW *Industrial Relations Act 1996* to better align anti-bullying and anti-sexual harassment protections with the Commonwealth *Fair Work Act 2009*

Bullying and sexual harassment remain pervasive and persistent issues in modern Australian workplaces. Sexual harassment was the subject of a recent National Inquiry by the Australian Human Rights Commission,¹ whose 2018 National Survey found that one in three people experienced sexual harassment at work in the past five years.²

The Law Society calls for a review of the *Industrial Relations Act 1996* (NSW) ("IR Act") to better align the IR Act with the *Fair Work Act 2009* (Cth) ("FW Act") in terms of anti-bullying and anti-sexual harassment protections.

In 2014, a 'bullying' jurisdiction commenced in the Fair Work Commission ("FWC"), which allows national system employees to apply to the FWC for an order to stop workplace bullying. Notably, a bullying complaint can be made even where an employee has made or proposes to make other complaints such as a workers' compensation, discrimination or general protections claim. In 2021, this jurisdiction was expanded to allow the FWC to make orders to stop sexual harassment at work.

The Law Society supports consideration of introducing parallel anti-bullying and anti-sexual harassment provisions in the IR Act to better protect NSW public sector and local government employees who are not covered by Part 6-4B of the FW Act. These amendments would empower the Industrial Relations Commission to make orders to stop bullying or sexual harassment in appropriate cases. Under the current system, SafeWork NSW may investigate bullying and harassment complaints, but lacks the power to make binding orders.

■ ***The Law Society of NSW calls on all parties to commit to a review of the *Industrial Relations Act 1996* (NSW) and ensure it aligns the Act with the anti-bullying and anti-sexual harassment protections in the *Fair Work Act 2009* (Cth).***

¹ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020).

² Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 8.

Review of the impact of the pandemic on the exercise and accountability of executive power

In the early months of 2020, almost every aspect of how we live and work was fundamentally challenged in a way not seen not for many decades.

The challenges of protecting public health meant governments had to reinvent ways of supporting economic and social activity in a very short time. The Law Society worked with government to develop practical short-term solutions in these extraordinary circumstances as quickly as possible.

By the 2023 election, three years will have passed since the onset of COVID-19 in NSW. While many challenges remain, it will be a perfect time to take the opportunity to review dispassionately the regulatory frameworks that were used during the crisis, and those that remain in place. The review should consider appropriate changes to implement a modern and accountable regulatory approach in order to be well prepared for future major disruptions to ‘normal life’.

Such a review would cover fundamental questions of public law, including:

- the way Parliament can and should function when public gatherings are not possible;
- the balance between Parliamentary accountability and the need for the urgent implementation of emergency orders;
- the balance between principal and delegated legislation in regulatory frameworks, and the consequences for public and Parliamentary scrutiny of legislative reform;
- the manner in which changes to legislation and executive orders are publicised, and the consequences for the rule of law of rapid change; and
- the extent to which digital infrastructure can assist and enhance government and Parliamentary decision making and processes.

A forward-looking inquiry of this nature could take the positive and negative experiences of the last three years and contribute to ensuring the systems of government in NSW are best placed to meet the challenge of future unpredictable events that challenge the way our society and government functions.

■ *The Law Society of NSW calls on all parties to commit to establishing a comprehensive review of the legislative and executive frameworks in NSW, using the experience of the pandemic to develop a best practice approach that delivers, fair and accountable regulatory frameworks.*

Developing frameworks for regulating for the future of transport

Transportation in NSW is undergoing a significant and continuing transformation. The NSW government is already trialling the use of e-scooters and preparing for the introduction of automated vehicles. New regulatory and legal settings need to be developed to allow for the safe introduction of such technology.

The use of e-scooters raises a number of legal issues, including:

- liability for the injuries caused by the use of e-scooters,
- whether there should be compulsory registration and third-party insurance, and
- whether persons using e-scooters should be licensed.

Members of the legal profession need the opportunity to provide input regarding these questions, including with regard to personal injury and criminal law.

The States and the Commonwealth should continue to prioritise collaboration on automated vehicles, particularly through the National Transport Commission, including road rule breaches, crash investigations, insurance and consumer law.

We encourage the development of the proposed Intergovernmental Agreement to ensure that the introduction of this new technology is subject to appropriate governance arrangements, particularly in relation to personal injury law.

■ *The Law Society calls on all parties to commit to:*

- *early consultation with the legal community on the use of e-scooters;*
- *continued work between NSW and the Commonwealth on the regulatory settings to ensure the safe introduction of automated vehicles.*

BETTER REGULATION TO SUPPORT ECONOMIC RECOVERY AND RESILIENCE

Comprehensive review and consolidation of workers compensation legislation, and implement the recommendations of the recent statutory review of the *Motor Accident Injuries Act 2017*

The need for a single consolidated piece of workers compensation legislation was recognised in the *icare and State Insurance and Care Governance Act 2015* Independent Review. The independent reviewer, the Hon Robert McDougall KC, recommended a suitable agency or body conduct a review and reconciliation of the *Workers Compensation Act 1987* (NSW), the *Workplace Injury Management and Workers Compensation Act 1998* (NSW), and the *State Insurance and Care Governance Act 2015* (NSW).

A previous review, The Parkes Project, found the legislative regime ‘confusing and ambiguous’. The McDougall Review recognised The Parkes Project made ‘substantial progress towards formulating possible improvements to the legislative scheme’. The Law Society echoes the concerns expressed in both reviews about the complexity of the legislative scheme.³ We strongly support a review that builds on the work of the Parkes Project, and looks at the scheme as a whole, rather than the current piecemeal approach to amendment.

We also encourage thorough attention be given to all recommendations of the recent statutory review of the *Motor Accident Injuries Act 2017* undertaken by Clayton Utz and Deloitte, to ensure that injured motorists receive adequate care and support.

■ ***The Law Society of NSW calls on all parties to commit to a comprehensive review and consolidation of workers compensation legislation, and the implementation of the recommendations of the recent statutory review of the Motor Accident Injuries Act 2017.***

Delivery of a secure and efficient interoperable eConveyancing system, with appropriate consumer safeguards, through a robust legislative framework.

The mandatory electronic lodgement of all land dealings, caveats and priority notices is now well established in New South Wales. The remaining, and significant, hurdle is to achieve interoperability amongst the eConveyancing platforms known as ELNOs (Electronic Lodgment Network Operators).

At present, an eConveyancing transaction can only occur if all the participants are using the same ELNO. Interoperability will allow multiple ELNOs to be involved in one transaction, as the different ELNOs will effectively “talk” to each other, sharing information and data. An individual participant, such as a solicitor or financial institution, can choose which ELNO it wishes to use for the transaction, and the ELNOs will operate seamlessly together, avoiding the need for users to subscribe to multiple systems.

The Law Society has been an active participant in the work to achieve interoperability for several years. Finding the technological solution presents many challenges, but our primary focus is to seek a robust legislative framework that ensures appropriate consumer safeguards are established and the efficiencies of eConveyancing continue for all users. The recently introduced interim enforcement regime for NSW is a welcome addition to the regulatory framework, but it does not provide any direct consumer redress.

A secure and cost-effective interoperable eConveyancing is critical to the continued efficient operation of the property market in New South Wales. A strong regulatory framework which provides consumers with appropriate and accessible safeguards is necessary to provide for a technically resilient system suited to the complexities of interoperable eConveyancing.

■ ***The Law Society of NSW calls on all parties to commit to the timely delivery of a secure and efficient interoperable eConveyancing system, with appropriate consumer safeguards, through a robust legislative framework.***

³ Report by the Hon Robert McDougall QC, Independent Reviewer, *icare and State Insurance and Care Governance Act 2015* Independent Review, 30 April 2021, 21.



INDIGENOUS JUSTICE

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Partnerships with and empowerment of Indigenous peoples

The Law Society considers it significant that Indigenous delegates from all around Australia again identified as a consensus view in the Uluru Statement from the Heart, the importance of Voice, treaty and truth. The Uluru Statement makes clear the need for Makarrata (or treaty) to capture “our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination”.⁴

Meeting the justice and self-determination calls in the Uluru Statement are paramount to achieving better outcomes for Indigenous peoples, and to closing the life expectancy gap between Indigenous and other Australians.

While work is underway at a federal level on the issue of the Voice to Parliament, we note that there is work to be done in relation to treaty and truth in NSW.

The Law Society supports the call for a discussion about Makarrata to provide a framework for the relationship between the NSW State Government and Aboriginal peoples. NSW is home to the highest number of Aboriginal people in Australia. We are of the view that these discussions are important in the context of, among other things, facilitating the economic development of Aboriginal peoples.

Other states and territories are further progressed on their way to treaty negotiations.

- Victoria has passed legislation creating the framework for a treaty process and established a number of treaty bodies to advance the treaty process, and has also established the Yoorook Truth Commission, which has now provided an interim report;
- the Northern Territory has established the Northern Territory Treaty Commission, which has now delivered a Final Report to the Minister for treaty and Local Decision Making; and
- Western Australia has announced that it will begin a two-year consultation process to create an Independent Office for Aboriginal People, intended to create a state-based body comparable to the proposed Commonwealth Voice to Parliament.

The Law Society has long advocated for setting Closing the Gap targets that specifically address the disproportionate rates at which Aboriginal and Torres Strait Islander people are represented in the criminal justice and care and protection jurisdictions. These are significant factors in the life expectancy gap for Indigenous peoples.

We are heartened that NSW has committed to taking steps to implement the National Agreement on Closing the Gap, including in relation to addressing the structural priority reforms as set out in the National Agreement. Implementing these reforms will establish the critical and necessary infrastructure to meet the Agreement’s socio-economic targets.

Putting self-determination and community at the centre of the closing the gap approach is key. We understand that it is the intention of the National Agreement that all parties will “share responsibility for achieving targets” and that “all parties have a role to play in improving outcomes for Indigenous Australians.”

While we commend the commitment to joint design and delivery, we suggest that given the unequal balance of resourcing and power, accountability must ultimately rest with governments to commit to working with Aboriginal peak organisations to determine what existing gaps are, and to commit to creating solutions together with Aboriginal peaks to bring the priority reforms into effect.

■ ***The Law Society of NSW calls on all parties to commit to actioning the three elements (Voice, Treaty, Truth) of the Uluru Statement from the Heart at a NSW level.***

■ ***The Law Society of NSW calls on all parties to commit to achieving the Closing the Gap targets.***

⁴ Uluru Statement from the Heart, available online: https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF

Reducing Indigenous incarceration

The over-representation of Indigenous people in the criminal justice and care and protection systems remains a great concern. More than 25 per cent of the NSW adult prison population is Indigenous, but only 2.9 per cent of the NSW adult population identifies as Indigenous.

The over-incarceration of Indigenous people contributes significantly to the continuing life expectancy gap between Indigenous people and other Australians. Research indicates that the high rates of repeated short-term incarceration experienced by Aboriginal people in Australia have a multitude of negative health effects for Aboriginal communities and the wider society, while achieving little in terms of increased community safety.⁵

The incarceration of Indigenous adults affects not only the individuals involved, but also their families and communities, including by potentially placing Indigenous children at risk of engagement with the care and protection jurisdiction.

The number of Indigenous women in prison continues to increase. An estimated 80 per cent of Aboriginal and Torres Strait Islander women in prison are mothers,⁶ and the incarceration of Aboriginal and Torres Strait Islander women is a key driver in the removal of Aboriginal and Torres Strait Islander children.

Innovative solutions are needed to address the underlying causes of Indigenous offending. Consistent with the recommendations of the ALRC's Pathways to Justice report, and more recently with the recommendations of the Select Committee into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody, the Law Society supports targeted initiatives to improve outcomes for Indigenous people in the criminal justice system. This includes the establishment and expansion of specialised Indigenous courts.

In addition to what the Law Society considers sound fiscal reasons, the Law Society's support for specialist Indigenous courts is underpinned by evidence that there are significant benefits to returning some level of ownership and community engagement of this aspect of the justice system to Indigenous communities.

The Law Society also supports the expansion of the Youth Koori Court to Dubbo, and further throughout NSW. The Youth Koori Court increases Aboriginal involvement in the delivery of justice, ensuring outcomes are culturally relevant. The University of Western Sydney released a study of the Parramatta pilot program that found the program addressed underlying issues such as unstable accommodation, problems with education and employment, and the experience of disconnection from culture. Further, the number of days young Indigenous people participating in the program spent in detention were reduced.

The Law Society continues to support the Walama List in the District Court and the establishment of an Indigenous care list in the Children's Court.

■ ***The Law Society of NSW calls on all parties to commit to supporting and expanding specialist Indigenous courts, including the Walama List in the District Court, the Youth Koori Court and the Indigenous care list in the Children's court.***

⁵ See for example AS Krieg, "Aboriginal incarceration: health and social impacts," (2006) *Med J Aust.* 184(10), 534-6

⁶ Overrepresented and Overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment, 5 https://static1.squarespace.com/static/580025f66b8f5b2dab-be4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf

INDIGENOUS JUSTICE

Reducing the number of Indigenous children and young people in the care and protection system

The Law Society continues to be concerned about the number of Indigenous children and young people in the care and protection system. The issues that the Family is Culture report sought to address in 2019 were urgent then and remain so now.

We support the recommendations made in that report, including immediate action in respect of coordinated legislative reform. The Family is Culture report already provides a roadmap for legislative reform, and note that it is critical that the recommendations made be taken as a whole – they are intended to be interrelated and to act in concert. Legislative reform is only the start of the reform process. Fundamental change is required to keep Aboriginal children with their families (and to restore those children removed), particularly in relation to casework culture and practice.

The best form of permanency is to support vulnerable families so that children can stay. This is particularly true for Aboriginal children, given the clear evidence of the protective effects of growing up culturally strong, and connected to family. In this regard, “[c]onnection to family is the ‘cornerstone’ of Indigenous Australian culture, spirituality and identity.”⁷

Further, “primary forms of health and resilient forms of connection, attachment and continuity are found in flourishing family and kinship networks.”⁸ This can best be achieved through effective early intervention and family capacity building at the critical stages of a family lifecycle. Examples can already be seen in the work carried out in the family law jurisdiction via the Indigenous lists at a number of registries in the Federal Circuit and Family Court of Australia.

A scaffold of coordinated therapeutic and legal support services for families should be available to address the chronic issues that can create family distress, such as trauma, poverty, housing instability, addictions and violence. Vulnerable families should have clear referral pathways to effective, culturally appropriate, and coordinated support services, particularly at critical points in time in a family’s lifecycle. This includes pregnancy and the early post-natal period, relationship breakdowns, restoration of a child from out of home care, entry or exit by a family member into custody.

Services for Aboriginal families should be delivered in a culturally appropriate way by a trusted service provider. Aboriginal controlled community organisations are much better placed than government departments to engage with and deliver family capacity building supports to Aboriginal families, and should be properly resourced and supported to play this role.

The critical nature of trust between vulnerable Aboriginal families and the Department of Communities and Justice as the referral point for services cannot be understated. Better outcomes are unlikely unless this trust exists, as it is the foundation of families’ effective engagement with support services.

The critical work of supporting and strengthening families will be resource-intensive. However, aligning the care and protection system away from crisis-driven approaches will, in the longer term, bring flow-on gains both economic and otherwise. This is in addition to the beneficial outcomes that a front-loaded approach will yield for individuals and their families. This is also true for related downstream jurisdictions, particularly the justice system, and relevant to nearly all of the Closing the Gap targets.

■ ***The Law Society of NSW calls on all parties to commit to implementing in full the recommendations of the Family is Culture report, consistent with Closing the Gap targets relevant to the care and protection of Indigenous children, and to Indigenous family safety.***

⁷ SNAICC (Secretariat of National Aboriginal and Islander Child Care) 2019. SNAICC: National Voice for Our Children.

⁸ Dudgeon P, Blustein S, Bray A, Calma T, McPhee R & Ring I 2021. Connection between family, kinship and social and emotional wellbeing. Produced for the Indigenous Mental Health and Suicide Prevention Clearinghouse. Cat. no. IMH 4. Canberra: AIHW at v, 4-5



REDUCING CONTACT WITH THE CRIMINAL JUSTICE SYSTEM

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Greater emphasis on youth diversion and ensuring adequate access to education, with a particular focus on children in out of home care

Wherever possible, young offenders should be diverted from the formal criminal justice system. As a party to the UN Convention on the Rights of the Child⁹ Australia has committed to implement appropriate diversionary programs:

State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and in particular:

Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

Restrictions on the matters that can be dealt with under the *Young Offenders Act 1997* (NSW) (YOA) should be removed and the scope of the Act broadened. Sections 14(2), 20(3), 37(3) and 40(5) of the YOA already require police and courts to take into account the individual circumstances of each offence and offender in the exercise of their discretion.

These discretionary provisions ensure that those matters that are extremely serious, involve significant levels of violence or harm to a victim, or are not appropriate for other reasons, will not be diverted under the YOA. The discretion of police and the courts to refer all appropriate matters for diversion under the YOA should not be fettered through arbitrary exclusions.

Government should take a holistic view of the factors pushing children and young people into contact with the juvenile justice system, and direct proper funding of support services for young offenders that address underlying causes of offending. This includes:

- Increased funding for specialist forensic psychiatric hospitals to treat young people with mental health issues, particularly where mental health may be related to a young person's offending;
- Increased funding for age-appropriate alcohol and drug rehabilitation services;
- Access to legal advice and health and welfare support services that are crucial to increasing the protective factors and addressing criminogenic risks associated with youth offending; and
- Developing a homelessness strategy which directs funding to comprehensive mental health and intensive case management services for young homeless people.

Young people in NSW, particularly those involved in the out-of-home care system, need adequate access to education. In this regard, the Law Society supports several recommendations of the Office of the Advocate for Children and Young People's recent Report,¹⁰ especially to:

- Ensure that children and young people in OOHC are provided with appropriate school-based supports and that those who have been disengaged from school are referred to alternatives to mainstream education;
- Ensure all school staff are provided with training in child-centred approaches, including respectful engagement with children and young people in OOHC; and
- Increase supports and pathways for young people in OOHC to access higher education.

■ ***The Law Society of NSW calls on all parties to commit to:***

- ***implementing reforms to improve the availability and eligibility for diversionary programs for young people;***
- ***increasing funding for support services for young offenders; and***
- ***improving education supports for young people in OOHC.***

⁹ Convention on the Rights of the Child, opened for signature 20 November 1989, 44 UNTS 25 (2 September 1990) art 40(3)(b).

¹⁰ Office of the Advocate for Children and Young People, *The Voices of Children and Young People in Out-of-Home Care* (2021) 14.

Comprehensive implementation of the criminal justice recommendations of the Ice Inquiry

The Law Society, together with the NSW Bar Association and the Aboriginal Legal Service, publicly and consistently urged the NSW Government to implement critical law reform in response to the Report of the Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants (2020) (“the Ice Inquiry”).

The Government released its response in September 2022, but many of the recommendations, particularly those that relate to the criminal justice system, were only supported in principle. While the Law Society welcomes the increased funding for health services, many of the criminal justice reforms have been set aside or delayed.

In particular, implementing the recommendation to introduce a police diversion scheme for use and possession for personal use of prohibited drugs has been delayed for at least 12 months while relevant support services are established, and is still subject to a ‘final decision’ on implementing such a scheme.

The evidence brought forward by the inquiry made very clear the current criminal justice approach for dealing with drug addiction is not working, and that such addiction should be treated as a health problem. Additional funding for support services is welcome, however there is very little indication that the heavy-handed criminal justice response will be reformed.

Other recommendations, including reforming the way criminal records operate, and improving diversion options for young people were only supported in principle and subject to further consultation, notwithstanding the delay of more than two years in announcing the response. Notwithstanding multiple reports recommending Police no longer use drug detection dogs, that recommendation was not supported.

■ ***The Law Society calls on all parties to commit to implementing the criminal justice recommendations of the Ice Inquiry as a matter of urgency, in particular a pre-court diversion scheme for personal use of prohibited drugs.***

A comprehensive review of how the criminal justice system responds to sexual assault

The Law Society considers that sexual assault is a serious social problem that requires action. In our view, that action needs to move beyond reform of the criminal law. Legislative amendments themselves may not achieve the desired cultural shift necessary to reduce the incidents of sexual assault. Loughnan and co-authors contend that:

While the criminal law is increasingly used to educate the public about community values, there is evidence that it is not an effective tool, particularly for offences that are impulsive or that occur in circumstances of high emotion.¹¹

We consider that there needs to be a greater focus on mitigating the stress and trauma of trial processes on complainants via procedural reforms, such as reducing delays in the District Court and the expansion of the use of pre-recorded evidence where appropriate.

Education about consent in schools, universities, sports clubs and within the wider community – will have a greater impact on dispelling “rape myths” and sexual assault generally, than any change to the law.

A recent example is the legislative amendment to the definition of consent. We consider that the possible benefits of an affirmative consent standard could be better achieved through judicial and community education and jury directions. We are concerned that, while well-intentioned, the affirmative consent model may heighten, rather than reduce, the scrutiny placed on a complainant’s conduct to determine whether they did or said anything to communicate consent.

■ ***The Law Society of NSW calls on all parties to commit to ensuring that current criminal justice approaches are designed to facilitate survivors giving their best evidence, and that matters are dealt with as quickly and fairly as possible by all participants in the justice system.***

¹¹ A Loughnan, C McKay, T Mitchell and R Shackel, Preliminary Submission PCO65, p5.

REDUCING CONTACT WITH THE CRIMINAL JUSTICE SYSTEM

Improved legal training for police

Police play a pivotal role in ensuring the safety of the community. Police are often the first responders in traumatic and volatile situations, and have a heavy responsibility of maintaining public safety and detecting and investigating crime.

A number of reports over recent years have highlighted the serious problems that can arise when police officers with inadequate training are called upon to exercise their powers. Recommendations for increased police legal training have been made in relation to the conduct of strip searches,¹² and in domestic and sexual violence contexts.¹³ The findings of the Law Enforcement Conduct Commission in relation to Operation Monza revealed dangerous misconduct by police officers in harassing a solicitor.

The NSW Government has acknowledged that police require greater training in relation to the recent changes to the law of consent, as well as the introduction of a new offence of coercive control.

Police officers play vital roles in dispassionately and professionally ensuring that the system by which we protect the community operates fairly and transparently. Police conduct that falls short of the high standards expected by the community presents a real threat to the community's belief that the justice system is operating as it should. Ensuring that our police officers are adequately trained to exercise the extraordinary powers they wield is crucial to maintaining those high standards.

■ ***The Law Society of NSW calls on all parties to commit to improved training for police officers on key legal issues, including legislative powers and responsibilities, and the appropriate use of discretion.***

¹² Inquiry into NSW Police Force strip search practices, Law Enforcement Conduct Commission, 2020.

¹³ Inquest into the deaths of John, Jack and Jennifer Edwards. Coroners Court of NSW, 2021, and Police responses to domestic and family violence, Audit Office for NSW, 2022.



RULE OF LAW AND PROTECTING RIGHTS

RULE OF LAW AND PROTECTING RIGHTS

Human rights legislative protection in NSW, including a comprehensive review of the existing anti-discrimination legislative framework

The Law Society has long supported the enactment of human rights legislation in NSW.

Australia is the only common law country with neither a constitutional nor federal legislative bill of rights. Given that states have jurisdiction over matters that can have a significant adverse impact on the rights of individuals, such as crime, health, education, housing and homelessness, it is, arguably, more important that a legislative human rights act exists at a state level.

The ACT¹⁴, Victoria¹⁵ and Queensland¹⁶ have enacted legislation whereby the three arms of government are in ‘dialogue’ on the nature, meaning and scope of human rights. In all three jurisdictions, the focus is on human rights compatible decision-making rather than litigation.

Such protections in NSW would create a more robust culture of human rights than that provided for by existing legislative scrutiny mechanisms. It would foster awareness in the NSW public sector and the community about the meaning and balancing of human rights considerations.

Further, a comprehensive review of the existing anti-discrimination legislative framework in NSW is long overdue. The *Anti-Discrimination Act 1977* (NSW), once considered as a forerunner among the Australian jurisdictions, needs modernisation, including:

- its coverage of protected attributes and across different areas of public life;
- its test for what constitutes discrimination; and
- the absence of a positive duty to make reasonable adjustments for people with disabilities.¹⁷

■ ***The Law Society calls on all parties to commit to:***

- ***conducting a wide-ranging consultation with the community about the need for human rights legislation in NSW;***
- ***establishing an inquiry into the effectiveness of the Anti-Discrimination Act 1977 (NSW) in eliminating discrimination and promoting equality in NSW.***

¹⁴ *Human Rights Act 2004* (ACT).

¹⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁶ *Human Rights Act 2019* (Qld).

¹⁷ For a discussion of some of the changes required, PIAC, *Leader to Laggard – The case for modernising the NSW Anti-Discrimination Act*, 6 August 2021,

Development of an awareness campaign in relation to elder abuse, and consideration of alternative remedies

Elder abuse refers to the abuse or neglect of older people by family, friends or carers and other people the older person may trust. As Australia's population ages, preventing the growing reach of elder abuse is vital.

Psychological and financial abuse are the most common types of elder abuse. Psychological abuse includes verbal abuse, name calling, bullying, harassment and gaslighting. Financial abuse includes taking an older person's money or belongings, forcing an older person to sell or hand over their property, incurring bills for which the older person is responsible, and abusing power of attorney arrangements. Elder abuse is most often perpetrated by a close family member, who may be living with the older person or helping to care for them.

In 2016, the Australian Law Reform Commission (ALRC) released a report with recommendations addressing elder abuse. In 2021 the Australian Institute of Family Studies (AIFS) released the Final Report on its National Elder Abuse Prevalence Study, suggesting that levels of elder abuse, and underlying attitudes of ageism, remain concerning.

The Law Society also notes the recent release of the NSW Law Reform Commission's (NSWLRC) Review of the *Guardianship Act 1987*. We support the implementation of the NSWLRC's recommendations regarding supported decision-making arrangements, and in relation to the right of a legal representative to appear before the Tribunal without seeking leave.

There is a clear need for the development of an effective framework for the prevention of elder abuse, including:

- raising public awareness of elder abuse and changing social attitudes around ageism;
- developing and resourcing more accessible remedies for older people experiencing abuse at the hand of a family member or carer;
- incorporating models of supported decision-making into the frameworks for guardianship and medical treatment;
- developing better safeguards against the misuse of enduring powers of attorney and enduring guardianship; and
- better resourcing for NCAT to provide judicial oversight on these issues.

■ ***The Law Society calls on all parties to commit to the development of an evidence-based framework for the prevention of elder abuse.***

RULE OF LAW AND PROTECTING RIGHTS

Supporting the effectiveness and independence of NSW integrity agencies

The ability of NSW integrity agencies (the NSW Independent Commission Against Corruption (ICAC), the Audit Office, the Law Enforcement Conduct Commission, the NSW Ombudsman and the NSW Electoral Commission) to carry out their functions effectively and independently is critical to their role of maintaining integrity in our public institutions.

Funding arrangements, including decisions about the level of funding, for NSW integrity bodies should more clearly reflect their accountability to Parliament, rather than to either the Department of Premier and Cabinet or the Premier.

We continue to support the recommendations made in the NSW Legislative Council Public Accountability Committee (“PAC”) report, *Budget process for independent oversight bodies and the Parliament of New South Wales*¹⁸ and in the report of the Office of the Auditor-General *The effectiveness of the financial arrangements and management practices in four integrity agencies*.¹⁹

In particular, we note our support for the recommendations of the PAC report that funding for the integrity agencies:

- should not turn on consideration of efficiency dividends, and each of the integrity agencies should be directly allocated their annual funding through the Appropriation legislation;
- should be removed from the cluster-based financial management arrangements; and
- should be overseen and approved by Parliament, rather than the Executive, with the UK model of funding for integrity agencies serving as a useful example.

■ ***The Law Society of NSW calls on all parties to commit to safeguarding the ability of the NSW integrity agencies to carry out their functions effectively and independently.***

¹⁸ NSW Legislative Council Public Accountability Committee, *Budget process for independent oversight bodies and the Parliament of New South Wales* (March 2020), available online: <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2558/Report%20No%205%20-%20First%20report%20-%20PAC%20-%20Budget%20Process.pdf>.

¹⁹ NSW Auditor-General’s Special Report, *The effectiveness of the financial arrangements and management practices in four integrity agencies* (20 October 2020), 41-42, available online: <https://www.audit.nsw.gov.au/sites/default/files/documents/The%20effectiveness%20of%20the%20financial%20arrangements%20and%20management%20practices%20in%20four%20integrity%20agencies.pdf>.

Additionally, the ICAC has released two Special Reports on the need for a new independent funding model for the ICAC: *NSW Independent Commission Against Corruption Special Report No. 2 – The need for a new independent funding model for the ICAC (May 2020 - Section 75 report)* and *NSW Independent Commission Against Corruption Special Report No. 2 - A parliamentary solution to a funding model for the ICAC (November 2020 - Section 75 report)* available online: <https://www.icac.nsw.gov.au/about-the-nsw-icac/nsw-icac-publications/nsw-icac-corporate-publications/section--75-reports>.

Reform of rental laws to address homelessness

The number of homeless people in NSW is increasing, along with an increase in the NSW renting population. There is a link between the lack of security in the private rental market and homelessness. Groups that experience discrimination are particularly vulnerable to housing stress and homelessness, including older people, people living with a disability and Aboriginal and Torres Strait Islander people, and people experiencing family or domestic violence.

Consideration should be given to reform of the *Residential Tenancies Act 2010* (NSW) to enable tenants to oppose the landlord's right to terminate if they say there are not legitimate reasons for the termination. The existing provisions permit landlords to terminate a residential tenancy agreement at any time, with 90 days' notice for a periodic agreement (s 84) and 30 days' notice at the end of a fixed term agreement (s 85).

Specialist legal services in NSW that are focused on financial hardship and homelessness require funding from the government to continue their important work in assisting clients in maintaining tenancies and avoiding homelessness.

■ ***The Law Society calls on all parties to commit to:***

- ***consulting on legislative reform to prevent evictions on unreasonable grounds;***
- ***providing increased funding to specialist legal services focused on homelessness.***

Protecting against the harvesting of children's data

A recent Human Rights Watch report has found that many countries, including Australia, have failed to adequately protect children's privacy in approving online educational products for use in schools during COVID-19 lockdowns. Educational applications that may monitor, collect and sell children's data are particularly pernicious as children are unable to understand, or give informed consent to the collection and use of their data.

While many privacy protections are legislated at the Commonwealth level, the NSW Department of Education uses, and endorses, online learning platforms and educational products for use in schools. It is important that these platforms and products have proper systems in place to ensure that children's data rights are protected. Further, there is a need for schools to play a role in educating parents and children about the importance of protecting their private data online, and the risks in using various applications.

■ ***The Law Society calls on all parties to commit to implementing:***

- ***policies to ensure that all online learning platforms used in NSW schools are adequately protective of children's data rights; and***
- ***programs to educate both children and parents about the privacy risks associated with the use of online applications.***