Consular Strategy 2017-19

Department of Foreign Affairs and Trade

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About the Law Council of Australia

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

The Law Council acknowledges the assistance of the International Law Section Executive, the Access to Justice Committee and the ACT Law Society in the preparation of this submission.
Introduction

1. The Law Council of Australia welcomes the opportunity to provide the following comments to the Department of Foreign Affairs and Trade (DFAT) in respect of its consultation on the Consular Strategy 2017-19 through the background paper titled Development of the Consular Strategy 2017-2019 (Issues Paper).

2. The Law Council previously made a submission to the Review of Consular Assistance for Australians Overseas in 2014. The Law Council’s submission then, and now, is framed with Australia’s international legal obligations and international legal frameworks in mind. Principally, that all States are obliged to protect the interests of their nationals in other countries as a basic principle of international consular law and practice.

3. With respect to the Consular Strategy 2017-19, the Law Council makes the following recommendations:
   
   • the level of consular assistance should be maintained and increased, given the greater number of Australians travelling overseas;
   
   • more details should be provided in the Consular State of Play reports, including:
     - a breakdown of data on the reasons for which Australians have been arrested in each country;
     - a breakdown of the data of the cases of Australians in prison, including what charges have been laid and for which country; and
     - data on the number of consular cases where an Australian is at risk of the death penalty, including broken down by country and the charge attracting the death penalty;
   
   • Australia’s international legal obligations with respect to Article 36 of the Vienna Convention on Consular Relations (VCCR) to provide consular assistance and the relevant international human rights treaties to which Australia is a party should be outlined in the Consular Strategy 2017-19;
   
   • proportionally high levels of resourcing should be directed to support Australians facing capital punishment and those who are subject to extended arbitrary detention or detention in circumstances that endanger their life or health; and
   
   • the creation of a Consular Services Act, putting into domestic statutory form the support provided to help citizens abroad and Australia’s international legal obligations.

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4. In introducing the Australian Government’s first three year strategy, the Foreign Minister, the Hon Julie Bishop MP, stated that there is no right to consular assistance, 'it is a privilege.' According to the Consular Strategy 2014-16, consular assistance extends to those in difficult situations involving serious injury, illness, arrest, detention or death, support during crisis situations, issuing passports and travel documents and offering notarial service. It may, however, be limited in situations where an individual knowingly engaged in behaviour that is illegal or to individuals who deliberately and/or repeatedly engaged in reckless or negligent behaviour that puts themselves or others at risk.

5. The Consular Strategy 2014-16 attempted to encourage Australian travellers to be self-reliant and increase public understanding about consular services. For example, this included promoting the use of travel resources and information on the Smarttraveller website, such as registration of travel details. The Consular Strategy 2014-16 also identified the need during crisis situations to redirect departmental resources to the areas most required.

6. The Law Council notes the accompanying Consular State of Play reports in 2014-15 and 2015-16, which provide data on consular cases to accompany the Consular Strategy 2014-16. While the information contained in the reports is useful, more detail should be provided to greater assist Australian travellers, policy makers and other interested stakeholders. For example, there is information on the number of Australians in prison, but no references to how many of those cases relate to offences where Australians are facing death penalty charges. Additionally, in 2015-16, in the People’s Republic of China, the data indicates that there were 61 cases of Australians in prison. Out of the 61, 30 cases were for fraud. However, there is no detail on what the other 31 prison sentences were for.

7. The Law Council recommends more detailed information be provided in the Consular State of Play reports in relation to the reasons for which Australians have arrested. This should include:
   - a breakdown of data on the reasons for which Australians have been arrested in each country;

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5 Ibid, p10.

6 Ibid, p7.


• a breakdown of the data of the cases of Australians in prison, including what charges have been laid and for which country; and
• data on the number of consular cases which are death penalty related, including broken down by country and the reason for the penalty.

International Law Issues

8. Rights to consular notification, access, and assistance are recognised under United Nations human rights instruments, regional declarations, bilateral or multilateral conventions and international court rulings. For example, Article 36 of the VCCR, to which Australia is a party, provides that when a national of a foreign country is arrested or detained on criminal or immigration charges, the detainee must be advised of the right to have the detainee’s consulate notified and that the detainee has the right to regular consultation with consular officials during detention and any trial.

9. Other examples include the International Covenant on Civil and Political Rights (ICCPR), which contains articles relating to the treatment of persons arrested or detained, such as Articles 9(3), 9(4), 10, 14, 14(3C) and 14(7). The ICCPR does not in and of itself establish extraterritorial obligations in the enforcement of a right to consular assistance. Article 2 limits obligations to “all individuals within its territory and subject to its jurisdiction.” Nonetheless, it does provide guidance as to where consular services could and should be directed.

10. The Law Council suggests that there should be further references to relevant international law conventions in the Consular Strategy to explain why consular services may be provided. The Law Council notes a number of references to consular services being seen by the Australian Government as a consequence of a moral duty or goodwill. While the Consular Strategy 2014-16 notes that it in making decisions on consular assistance they will “…take into account the treatment of an individual by reference to universal human rights standards…” there is no reference throughout the Strategy to the relevant international conventions, such as the VCCR, ICCPR or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

11. The ACT Law Society has noted that the sentence “it is accepted practice that governments help their citizens abroad in certain situations” contained in the Issues Paper does not demonstrate a sufficient grounding for the reasons why a government would assist their citizens. There are many reasons governments choose to assist nationals from their countries, be it genuine concerns about their safety and wellbeing, domestic pressure and, as stated, other countries provide support. However, a principal reason is that governments have international legal obligations to uphold in the context of Article 36 of the VCCR and an interest in protecting and promoting human rights internationally, including through treaties to which Australia is a party.

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9 For more detail on interpretation, see United Nations Human Rights Council General Comment No 21, UN Doc CCPR/C/21/Rev.1/Add.12, [10].
10 Ibid, n4.
12. The Law Council notes that the Consular Operations Handbook references the VCCR, ICCPR and the Declaration on the human rights of individuals who are not nationals of the country in which they live.\textsuperscript{12} With respect to the VCCR, chapter 6.2 of the Consular Operations Handbook states:

\textit{The Convention also obliges the authorities of a state to inform the consular post without delay if they have detained one of its nationals and the detained person requests it, and to forward any communication from a detained person to that person's consul. The authorities must, furthermore, inform the detainee of these rights.}

\textit{The Australian Government takes a serious view of any denial of rights to consular access. Posts should report any denial promptly to the Department. The report should be sufficiently detailed to enable the Department to take up the case immediately, either with the state's diplomatic representation in Canberra or with the foreign ministry of a state not represented in Australia.}

13. The Law Council recommends that Australia’s international legal obligations with respect to Article 36 of the VCCR and the relevant international human rights treaties to which Australia is a party are referred to in the Consular Strategy 2017-19.

\textbf{Analysis of the Consular Strategy 2017-19}

\textbf{Changes to Permanent Residents and Dual Nationals}

14. The International Law Section and the ACT Law Society oppose the non-provision of consular assistance to permanent residents of Australia when they are in their country of nationality and dual nationals when they are in their country of other nationality. It is acknowledged that account should be taken of the individual circumstances and DFAT will “consider exceptions on a case-by-case basis and in a crisis”.\textsuperscript{13} However as the ACT Law Society has noted this may be acceptable in countries where there is a strong tradition of protecting the rule of law, but in a country not so governed, consular assistance should be provided. Further examples of where such situations could arise are outlined in Attachment A.

\textbf{Legal Assistance Services}

15. The Law Council has a particular interest in the capacity for Australians to access legal assistance where they are detained overseas. The Law Council regularly engages in advocacy with regards to the detention of Australians overseas. Matters which attract the Law Council’s attention include:

- cases where Australians are facing serious criminal charges, where there is the risk of an extended prison sentence;
- cases where Australians are at risk of the death penalty;


\textsuperscript{13} Ibid n11.
• cases where Australians are subject to arbitrary detention, engaging Article 9 of the ICCPR; and

• cases where Australians are facing a legal system that does not accord with rule of law principles.\textsuperscript{14}

16. While neither the Consular Strategy 2014-16 or the Issues Paper address legal assistance services, the Law Council notes Part 5 of the Consular Handbook which relates to the provision of legal advice and assistance. Consular staff perform a particularly important role in facilitating the provision of legal support. While posts cannot recommend legal advisers, they are required to hold and maintain a list of local lawyers.\textsuperscript{15}

17. The provision of consular services is supplemented by limited forms of legal assistance provided by the Attorney-General’s Department under the Serious Overseas Criminal Matters Scheme and the Special Circumstances Scheme. Under the Serious Overseas Criminal Matters Scheme, assistance is only available where the accused person is at risk of being punished by:

• imprisonment for 20 years or more; or

• the death penalty.

18. The Law Council strongly supports these schemes to assist Australians overseas who are at risk of receiving the death penalty or length imprisonment.\textsuperscript{16} The Law Council is of the view that this assistance should be as generous and as flexible as possible. The schemes are an important component of Australia’s obligations to protect and promote respect for human rights at home and abroad, and demonstrate a commitment to access to justice for those most in need, for example supporting Australians detained overseas in receiving a fair trial.

19. The Law Council recommends a high level of resourcing arising from the Consular Strategy 2017-19 be directed to support Australians facing the death penalty and those subject to arbitrary detention or detention in circumstances that endanger their life or health.

**Virtual Presence of Consular Services**

20. The International Law Section notes the value of ensuring that DFAT uses a wide variety of methods available to engage the Australians, ensuring that they are safe while overseas. Much emphasis has been placed on making websites easier to navigate and the launch of the mobile apps to improve remote accessibility, which is to be commended. However it is important that consular services do not assume digital literacy, particularly ensuring that they are sufficiently tailored for elderly Australians travelling overseas.


\textsuperscript{15} Ibid n12, Chapter 21.1.

\textsuperscript{16} Law Council of Australia, Letter to Attorney-General’s Department Financial Assistance Consultation, 17 May 2012.
Travel Insurance

21. Acknowledging the need to raise awareness of travel issues, the ACT Law Society recommends that a commitment be included in the Consular Strategy 2017-19 referring to DFAT’s promotion of travel insurance. In many cases the families of a traveller face financial ruin or are themselves financially ruined by the medical costs and transfers back to Australia.

22. The Law Council notes that travel insurance information is included in the Consular State of Play reports and on the Smartraveller website; however the Consular Strategy 2017-19 would benefit from having this specifically outlined as a commitment by DFAT.

Local Customs and Practices

23. Acknowledging the importance of promoting a culture of responsible travelling, the ACT Law Society recommends that a commitment be included in the Consular Strategy 2017-19 that promotes the value of respecting local customs and practices in the country an individual is visiting.

Support for the Development of a Consular Services Act

24. In the Law Council’s view, the conclusion of the Consular Strategy 2014-16 provides an opportunity to reassess the development of a Consular Services Act. The Law Council, the International Law Section and the ACT Law Society support the establishment of a legislative framework to regulate and enhance Australia’s consular relations.

25. A Consular Services Act could build upon the Consular Strategy 2014-16 and the proposed Consular Strategy 2017-19, to make clear the capacity of the Australian Government to represent Australians overseas, outlining the legal entitlements of Australians to representation. Enshrining consular relations would also introduce criteria and thresholds on the level of consular service, providing a fair, equitable and transparent way to ensure that services are allocated appropriately. An Act would also assist DFAT and the Minister in cases attracting extensive media attention, by providing legitimate expectations as to the amount of service that could be provided.

26. The International Law Section notes that the decision to not provide consular assistance in cases for permanent residents when they are in their country of nationality and dual nationals when they are in their country of other nationality provides additional impetus for the development of a Consular Services Act. Given that there is no ‘one size fits all’ approach, a Consular Services Act would be invaluable to give full effect to ministerial intervention where required. Attachment A provides some examples to highlight situations where ministerial intervention may be required.
Attachment A – Examples where Ministerial Intervention may be Required

27. This Attachment provides some examples that may require ministerial intervention.

- **Example 1:** A person holds an Australian passport and a passport for country X which does not offer a comparable consular assistance that Australia provides. The person has little nexus to country X other than holding a passport. The person has been living in Australia for 40 years. That person goes on holiday to country X and travels on their Australian passport, but is detained. If there were substantial rule of law concerns in Country X had a rule of law problem and that person were imprisoned, ministerial intervention may be required.

- **Example 2:** A person holds an Australian passport and a passport for country X which does not offer a comparable consular assistance that Australia provides. The person has little nexus to country X other than holding a passport. The person has been living in Australia for 40 years. That person goes on holiday to country X and enters the foreign country, but enters the foreign country on their foreign passport. That person is an Australian citizen, but has chosen to enter that country as citizen of country X. If there were concerns with the rule of law environment in that country and that person were imprisoned, ministerial intervention may be required, irrespective that the person was not travelling on their Australian passport.

- **Example 3:** A person holds an Australian passport and a passport for country X which does not offer a comparable consular assistance that Australia provides. The person has a strong nexus to country X, having lived in country X for 40 years, never travelling on their Australian passport. If country X had a rule of law problem and that person were imprisoned, there may be a reasonable case that it would not necessarily be appropriate to provide consular assistance, irrespective that the person was an Australian citizen. If the host country where the person is imprisoned is not country X, Australia should provide consular assistance.

28. Situations will become more problematic when dealing with countries that are not party to international human rights law conventions, such as the ICCPR, Second Optional Protocol to the ICCPR or CAT, where human rights abuses are present, there are fair trial concerns or rule of law concerns. In such cases the Law Council supports the provision of the consular assistance.