

**THE LAW SOCIETY  
OF SOUTH AUSTRALIA**

THE VOICE OF THE SOUTH AUSTRALIAN LEGAL PROFESSION

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4 February 2011

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JM;rp

Mr Bill Grant  
Secretary-General  
The Law Council of Australia  
GPO Box 2066  
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Attn: Helen Donovan

Dear Bill

**Draft Policy Statement on Rule of Law Principles**

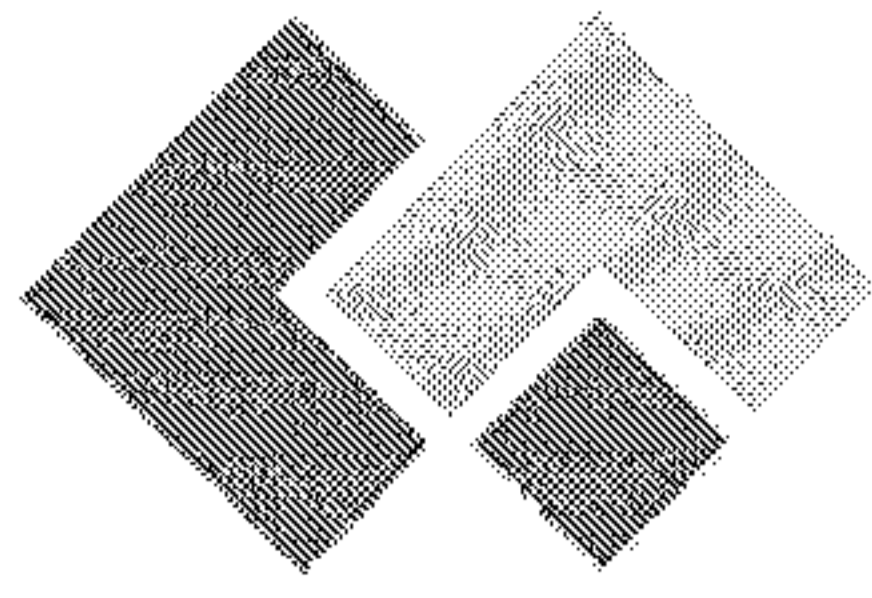
I refer to your memorandum of 13 December 2010 and thank you for providing the Society with the opportunity to comment on the draft Rule of Law policy principles.

The draft principles were distributed to the Chairs of many of the Society's Committees for consideration prior to being put before the Society's Council on 31 January 2011.

I advise that the Council endorsed the draft.

Yours sincerely

Jan Martin  
**EXECUTIVE DIRECTOR**



Law Council  
OF AUSTRALIA

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# Policy Statement on Rule of Law Principles

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## Introduction

A key objective of the Law Council of Australia is the maintenance and promotion of the rule of law. For that reason, the Law Council often provides analysis of federal legislation and federal executive action based on its compliance with so-called "rule of law principles".

This document seeks to articulate some of those key principles. It is intended to act as a guide to the framework often employed by the Law Council and its committees in evaluating the merits of government legislation, policy and practice.

This document is not intended to offer a comprehensive definition of the "rule of law". It is acknowledged that what is encompassed under the banner of that phrase is a matter of some contest and that it is a concept which is not necessarily amendable to an exhaustive definition.

In particular, it is acknowledged that there is considerable debate about two matters:

- the intersection between human rights and the rule of law and the extent to which the rule of law is necessarily predicated on respect for human rights.

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- the intersection between democracy and the rule of law and the extent to which the rule of law necessarily assumes that laws are passed by a democratically elected legislature formed following free, fair and regular elections.

It is not necessary to definitively resolve either of those debates in this document.

Instead, this document focuses on the most basic tenets of the rule of law – and those which are most often invoked in Law Council submissions and advocacy.

With respect to broader human rights principles, it is noted that Australia is a party to the seven key international human rights treaties and has also signed or ratified a number of optional protocols to those treaties. These international treaties, which Australia has voluntarily entered in, set out in clear terms Australia's international human rights obligations. Australia is bound to comply with their provisions and to implement them domestically. For that reason, in an Australian context, regardless of the extent of any agreed overlap between the rule of law and human rights, it is entirely appropriate to evaluate government legislation, policy and practice by reference to its compliance with international human rights law.

## **Key Principles**

### **The law must be both readily known and available, and certain and clear.**

In particular, people must be able to know in advance whether their conduct might attract criminal sanction or a civil penalty. For that reason:

- Legislative provisions which create criminal or civil penalties should not be retrospective in their operation.
- The intended scope and operation of offence provisions should be unambiguous and key terms should be defined. Offence provisions should not be so broadly drafted that they inadvertently capture a wide range of benign conduct and are thus overly dependent on police and prosecutorial discretion to determine, in practice, what type of conduct should or should not be subject to sanction.
- The fault element for each element of an offence should be clear.

### **The law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds**

In particular, no one should be regarded as above the law and all people should be held to account for a breach of law, regardless of rank or station.

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Everyone is entitled to equal protection before the law and no one should be conferred with special privileges.

Where the law distinguishes between different classes of persons, for example on the basis of age, there should be a demonstrable and rational basis for that differentiation.

### **All people are entitled to the presumption of innocence and to a fair and public trial.**

In particular, no one should be subject to punitive action by the state unless he or she has first been found guilty of an offence by an independent, impartial and competent tribunal. Inherent in this is a prohibition on indefinite detention without trial. Furthermore:

- No one should be compelled to testify against him or herself. Where a person is subject to questioning by the state, he or she should be given appropriate warnings about this right. Where a person is compelled to provide information to the state, there should be a prohibition on that information being used in proceedings against that person.
- Upon arrest and/or charge, a person should be fully and promptly informed of any offence which he or she is alleged to have committed and, at trial, an accused person should be afforded a meaningful opportunity to interrogate and challenge the information which is relied upon against him or her.
- A person who is subject to criminal charge should be tried without undue delay. Where the time delay between the conduct constituting an offence and the prosecution for that offence is such that it will unduly prejudice a person's ability to defend themselves, proceedings should be stayed, except where the person has caused or substantially contributed to the delay.
- Persons awaiting trial should not generally be detained in custody, unless they are a demonstrated flight risk or their release poses a demonstrated risk to the community or ongoing investigation.
- The state should be required to prove, beyond reasonable doubt, every element of an offence relevant to the guilt of the person charged, particularly any element which is central to the question of culpability for the offence. Only where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, should the defendant bear the onus of establishing that matter. Even then the defendant should ordinarily bear an evidential, as opposed to a legal burden.
- The state should be required to prove that a person intended, or at the very least was reckless about, each physical element of an offence in order for a person to be found guilty of that offence. Strict and absolute liability should only be applied to less serious offences and where such an approach is necessary for the success of

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the relevant regulatory regime. Strict and absolute liability may also be appropriately applied to those elements of an offence which are not central to the question of culpability (such as jurisdictional requirements).

- A person convicted of a crime should have the opportunity to have his or her conviction and sentence reviewed by a higher tribunal.

## **Everyone should have access to competent and independent legal advice**

In particular, everyone should have access to a competent and independent lawyer of their choice in order to establish and defend their rights. Furthermore:

- The state should provide adequate resources to guarantee this right, even in circumstances where individuals do not have the independent means to retain a lawyer.
- Lawyer-client communications should be regarded as confidential, except where lawyer and client are together engaged in conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.
- Lawyers should not be subject to sanction or discrimination as a result of the legal advice or representation they have provided, except where that advice or representation is negligent or otherwise fails to comply with agreed standards of professional conduct.
- Lawyers should be given timely access to relevant information and documents about their client in order to enable them to provide effective legal assistance to their clients.

## **The Judiciary should be independent of the Executive and the Legislature**

The existence of an independent, impartial and competent judiciary is an essential component of the rule of law. On that basis:

- Procedures for appointing judicial officers should be based on identifying individuals of integrity and ability with appropriate training or qualifications in law and should not be such that they compromise the independence of those appointed.
- The term of office of judges, their independence, security, remuneration, conditions of service, pensions and the age of retirement should be adequately secured by law.

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- Judicial officers should have the power to control proceedings before them and, in particular, to ensure that those proceedings are just and impartial.
  - The allocation of cases to judges within a particular court should be an internal matter of judicial administration.
  - Legislation, particularly legislation which seeks judicial authorisation for executive action, should not limit judicial discretion to such an extent that the Judiciary is effectively compelled to act as a rubber stamp for the Executive. The Judiciary should always have sufficient discretion to ensure that they can act as justice requires in the case before them.
  - In criminal matters, judges should not be required to impose mandatory minimum sentences. Such a requirement interferes with the ability of the judiciary to determine a just penalty which fits the individual circumstances of the offender and the crime.

### **The Executive should be subject to the law and any action undertaken by the Executive should be authorised by law**

Executive powers should be carefully defined by law, such that it is not left to the Executive to determine for itself what powers it has and when and how they may be used. In particular:

- Where legislation allows for the Executive to issue subordinate legislation in the form of regulations, rules, directions or like instruments, the scope of that delegated authority should be carefully confined and remain subject to parliamentary supervision. Moreover, the Executive should not be able to issue an instrument which creates new offences or confers new powers on Executive agencies.
- The use of executive powers should be subject to meaningful parliamentary and judicial oversight, particularly powers to use force, to detain, to enter private premises, to seize property, to copy or seize information or to compel the attendance or cooperation of a person. Mechanisms should be in place to safeguard against the misuse or overuse of executive powers.
- Where the Executive has acted unlawfully, those affected should have access to effective remedy and redress.
- Executive decision making should comply with the principles of natural justice and be subject to meaningful judicial review.

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**No person should be subject to treatment or punishment which is inconsistent with respect for the inherent dignity of every human being.**

In particular:

- No person should be subject to torture. Information obtained by torture should be inadmissible in any legal proceedings. Adequate provision should be made to prosecute and punish the perpetrators of such conduct.
- No person should be subject to cruel, inhuman or degrading treatment or punishment. No person should be held in conditions of detention which amount to cruel, inhuman or degrading treatment. Information obtained by cruel, inhuman or degrading treatment should be inadmissible in any legal proceedings. Adequate provision should be made to prosecute and punish the perpetrators of such conduct.
- No person should be subject to the death penalty.