
POLICY DISCUSSION PAPER ON

MANDATORY SENTENCING

MAY 2014



Law Council
OF AUSTRALIA

TABLE OF CONTENTS

ACKNOWLEDGEMENT	4
EXECUTIVE SUMMARY	5
INTRODUCTION	7
MANDATORY SENTENCING IN AUSTRALIA	8
ADDRESSING THE ARGUMENTS FOR MANDATORY SENTENCING	10
Overview	10
Mandatory sentencing ensures adequate retribution	10
Mandatory sentencing provides effective deterrence	13
Incapacitation of offenders prevents further harm to the community	16
Mandatory sentencing denounces the criminal conduct.....	16
Mandatory sentencing provides consistency.....	17
MANDATORY SENTENCING: KEY LAW COUNCIL CONCERNS	20
Overview	20
Mandatory sentencing undermines the rule of law.....	20
Inconsistency with Australia’s international obligations	21
Overview	21
Prohibition against arbitrary detention.....	21
Right to a fair trial.....	23
Children’s rights	23
Economic costs	26
Disproportionate social cost.....	29
Overview	29
Impact on Indigenous Australians.....	29
Impact on juveniles.....	31
Impact on people with a mental illness or intellectual disability	32
Impact of mandatory sentencing for people smuggling offences	33
Other unintended consequences.....	34

JUDICIAL AUTHORITY	36
ALTERNATIVES	39
Overview	39
Justice reinvestment.....	40
Examples of a justice reinvestment approach	41
Youth justice conferencing	41
Murri Court.....	42
Intensive case management programs	43
Summary – justice reinvestment strategy	43
Responding to the underlying social problems and averting crime	43
Other possible tools.....	45
CONCLUSION	46
ATTACHMENT A – MANDATORY SENTENCING IN AUSTRALIAN JURISDICTIONS	48
Western Australia	48
Northern Territory.....	50
New South Wales	52
South Australia	52
Queensland.....	53
Victoria	54
Commonwealth	55

ACKNOWLEDGEMENT

The Law Council is grateful for the assistance of its following constituent bodies and committees in the preparation of this submission: the New South Wales Bar Association; the Law Society of New South Wales; the ACT Law Society; the Law Society of South Australia; the Bar Association of Queensland; the Queensland Law Society; the Northern Territory Law Society; the Law Council’s National Criminal Law Committee; Indigenous Legal Issues Committee; Human Rights Committee; and Access to Justice Committee.

The Law Council notes that throughout this paper, reference is made to Aboriginal and Torres Strait Islander people and Indigenous Australians. The Law Council understands that Aboriginal peoples and Torres Strait Islanders constitute many nations, language groups and cultures, each with separate and distinct identities. The Law Council recognises the diversity of the cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples.

EXECUTIVE SUMMARY

The Law Council of Australia has consistently opposed the use of mandatory sentencing regimes, which prescribe mandatory minimum sentences upon conviction for criminal offences.

Its opposition rests on the basis that such regimes impose unacceptable restrictions on judicial discretion and independence, and undermine fundamental rule of law principles.

The rule of law underpins Australia's legal system and ensures that everyone, including the government, is subject to the law and that citizens are protected from arbitrary abuses of power. Mandatory sentencing is also inconsistent with Australia's voluntarily assumed international human rights obligations.

In the Law Council's view, mandatory sentencing laws are arbitrary and limit an individual's right to a fair trial by preventing judges from imposing an appropriate penalty based on the unique circumstances of each offence and offender. Mandatory sentencing disproportionately impacts upon particular groups within society, including Indigenous peoples, juveniles, persons with a mental illness or cognitive impairment, or the impoverished. Such regimes are costly and there is a lack of evidence as to their effectiveness as a deterrent or their ability to reduce crime.

In particular, the Law Council considers that mandatory sentencing:

- potentially results in unjust, harsh and disproportionate sentences where the punishment does not fit the crime. It is not possible for Parliament to know in advance whether a minimum mandatory penalty will be just and appropriate across the full range of circumstances in which an offence may be committed. There are already numerous reported examples where mandatory sentencing has applied with anomalous or unjust results;
- when adopted, fails to produce convincing evidence which demonstrates that increases in penalties for offences deter crime;
- potentially increases the likelihood of recidivism because prisoners are placed in a learning environment for crime, which reinforces criminal identity and fails to address the underlying causes of crime;
- provides short- to medium-term incapacitation of offenders without regard for rehabilitation prospects and the likelihood of prisoners reoffending once released back into the community;
- wrongly undermines the community's confidence in the judiciary and the criminal justice system as a whole. In-depth research demonstrates that when members of the public are fully informed about the particular circumstances of the case and the offender, 90 per cent view judges' sentences as appropriate;

- displaces discretion to other parts of the criminal justice system, most notably law enforcement and prosecutors, and thereby fails to eliminate inconsistency in sentencing;
- results in significant economic costs to the community, both in terms of increasing incarceration rates and increasing the burden upon the already under-resourced criminal justice system, without sufficient evidence to suggest a commensurate reduction in crime; and
- is inconsistent with Australia's international obligations, including:
 - the prohibition against arbitrary detention as contained in Article 9 of the International Covenant on Civil and Political Rights (ICCPR);
 - the right to a fair trial and the provision that prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR; and
 - key obligations concerning children under Articles 3, 37 and 40 of the Convention on the Rights of the Child. These include the obligation to ensure that: decisions regarding children have their best interests as a primary consideration; and children are only detained as a last resort and for the shortest possible appropriate period.

The Law Council notes that evidence is also mounting that overseas jurisdictions which have substantial experience of mandatory sentencing are now moving away from such schemes because of doubt regarding the efficacy of mandatory penalties in reducing crime; increased incarceration costs; the potential for arbitrary, unduly harsh, and disproportionate sentences; and discriminatory impacts.

Accordingly, the Law Council considers that policy makers should consider alternatives to mandatory sentencing, such as justice reinvestment strategies and diversionary non-custodial options, which may be more effective for reducing crime while remaining compatible with the rule of law and Australia's human rights obligations. The Law Council encourages policy makers to develop comprehensive, targeted policies to address the relevant underlying social problems, before crime occurs.

A primary assurance that a responsive government and parliament can give to the community is that it will be 'tough on crime' in a way that is effective and just. Mandatory sentencing schemes, in contrast, produce unjust results with significant economic and social cost without a corresponding benefit in crime reduction.

INTRODUCTION

1. Key objectives of the Law Council of Australia include the maintenance and promotion of the rule of law, the administration of justice and human rights. For this reason, the Law Council often provides advice to governments, courts and federal agencies on the ways in which the law and justice system can be improved based on the Law Council's Policy Statement on Rule of Law Principles¹ and Australia's human rights obligations.
2. This background paper seeks to examine those principles and obligations as they apply to Australia's mandatory sentencing laws. It provides a review of mandatory sentencing in Australia and seeks to address arguments which are commonly used to support such sentencing regimes. The Law Council's key concerns are then set out in relation to mandatory sentencing, noting the relevant judicial authority on this issue.
3. The background paper also briefly explores some possible policy alternatives to mandatory sentencing, including:
 - justice reinvestment strategies;
 - diversionary non-custodial options; and
 - measures that seek to address underlying social problems before crime happens.

¹ Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011. www.lawcouncil.asn.au/lawcouncil/index.php/divisions/international-division/rule-of-law.

MANDATORY SENTENCING IN AUSTRALIA

4. Australia has nine sentencing jurisdictions: eight states and territories and the Commonwealth. Each jurisdiction has its own criminal justice system and federal laws are often enforced and sentencing generally occurs at a state and territory level.
5. Federal, state and territory criminal legislation generally specifies offences with prescribed maximum penalties. A maximum penalty allows a court to determine an appropriate punishment in the particular circumstances of a case.
6. Australian Parliaments have, however, increasingly asserted power over sentencing in recent years. Prescribed mandatory sentences, where Parliament sets a fixed or minimum penalty for committing an offence is becoming more common.² This growth reflects a desire in some quarters for tougher sentences and dissatisfaction with the traditional sentencing system where courts have a broad discretion to deal with offenders.³
7. The results from a national Australian survey on public opinions towards sentencing shows that the majority of respondents expressed high levels of punitiveness and were dissatisfied with sentences imposed by the courts.⁴ Such views can be exacerbated by the media – for example, newspapers tend to publish letters to the editor criticising judges for lenient sentences rather than those that commend judges for their fairness.⁵ These views, along with the lack of critical analysis in public debate concerning mandatory sentencing, including about the need for judicial independence as a key component of the rule of law in Australia, are of great concern to the Law Council.
8. The Law Council notes that more in-depth research demonstrates that when members of the public are fully informed about the circumstances of the case and the offender, 90 per cent view judges' sentences as appropriate.⁶ In particular, the Tasmanian Jury Sentencing Study was conducted by the Australian Institute of Criminology and based upon jurors' responses from 138 trials. The study found that more than half of the jurors surveyed suggested a more lenient sentence than the trial judge imposed. Moreover, when informed of the sentence, 90 percent of jurors said that the judge's sentence was (very or fairly) appropriate. In contrast, responses to

2 See for instance the range of mandatory sentencing legislation at Attachment A.

3 Gray, Anthony, and Elmore, Gerard, 'The Constitutionality of Minimum Mandatory Sentencing Regimes' (2012) 22 *Journal of Judicial Administration* p. 37.

4 Mackenzie, Geraldine *et al*, 'Sentencing and public confidence: Results from a national Australian survey on public opinions towards sentencing', (2012) 45(1) *Australian & New Zealand Journal of Criminology* p. 46.

5 David Biles, 'Reforms put fairness at Risk', *The Canberra Times*, 2 January 2014.

6 K Warner, J Davis, M Waler, R Bradfield & R Vermey, 'Public Judgement on Sentencing: Final results of the Tasmanian Jury Study', *Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology*, February 2011. p. 3.

abstract questions about sentencing levels mirrored the results of representative surveys. The study's authors concluded that portrayals of a punitive public are misleading and calls for harsher punishment largely uninformed.

9. The introduction of minimum mandatory regimes in most states and territories and the Commonwealth are a political response to the concern that courts are too lenient on offenders. Advocates claim that such laws deter crime, provide consistency in sentencing and address public concerns about leniency within the criminal justice system.
10. Mandatory sentencing regimes direct courts as to how they must exercise their sentencing powers. These laws require offenders to be automatically imprisoned – or in some cases detained – for a minimum prescribed period for particular offences.
11. Jurisdictions vary as to the kind of offences that attract a mandatory sentence (see Attachment A for examples of state, territory and Commonwealth mandatory sentencing legislation). For instance, mandatory sentencing applies in:
 - Western Australia (WA) for repeat adult and juvenile offenders convicted of residential burglary, grievous bodily harm or serious assault to a police officer;
 - the Northern Territory (NT) for murder, rape and offences involving violence;
 - New South Wales (NSW) for murder of a police officer or the offence of assault by intentionally hitting a person causing death,⁷ if committed by an adult when intoxicated (the 'one punch' assaults while intoxicated offence);
 - Queensland for certain child sex offences, murder, and motorcycle gang members who assault police officers or are found in possession or trafficking in firearms or drugs;
 - South Australia (SA) for certain serious and organised crime offences and serious violent offences;
 - Victoria for actions of intentional or reckless gross violence; and
 - the Commonwealth for certain people smuggling offences.
12. An attenuated form of mandatory sentencing includes offences with presumptive minimum sentences. A presumptive sentencing system is where parliament prescribes a minimum penalty that must be imposed *unless* the judiciary determines, in accordance with the legislation and the facts of the case, that a departure is justified. That is, the legislation will stipulate the grounds on which a court may rebut the presumption. These grounds can be broad or narrowly defined.⁸ Some mandatory sentencing schemes also make provision for the court to depart from the mandatory minimum sentence if 'exceptional circumstances' are established.⁹

7 Whether the death was reasonably foreseeable, and whether the person was killed as a result of injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault.

8 Several Australian jurisdictions have offences with presumptive minimum sentences. See for example: section 37 of the *Misuse of Drugs Act 1990* (NT); section 121 of the *Domestic and Family Violence Act 2009* (NT); the *Crimes (Sentencing Procedure) Act 1999* (NSW) Division 1A; section 19AG of the *Crimes Act 1914* (Cth).

9 See for instance section 78DI of the *Sentencing Act 2013* (NT).

ADDRESSING THE ARGUMENTS FOR MANDATORY SENTENCING

Overview

13. Understanding the arguments in favour of mandatory sentencing is necessary in considering the effectiveness and appropriateness of such regimes. Many of the arguments in favour can be understood by reference to the key purposes of sentencing as identified by the Australian Law Reform Commission (ALRC), which include:
- retribution;
 - deterrence;
 - rehabilitation;
 - incapacitation;
 - denunciation; and
 - restoration.¹⁰
14. The rationale behind mandatory sentencing is based firmly on retribution, deterrence, incapacitation and denunciation as a means of crime prevention and reducing the crime rate. Advocates of mandatory sentencing also claim that it delivers consistent, and thus fairer, punishment outcomes. These purposes and reasons for mandatory sentencing will be considered in turn.

Mandatory sentencing ensures adequate retribution

15. Supporters of mandatory sentencing argue that mandatory sentencing ensures adequate retribution for offending conduct. Retribution is based on the principle that those who engage in criminal activity and harm others deserve to suffer.¹¹ The Old Testament's 'eye for an eye' principle is an early example of retributivism. More recently, proponents of 'just deserts' consider that offenders deserve to be punished in proportion to the gravity of the harm caused by the offending conduct.¹²

10 Australian Law Reform Commission, *Same Crime, Same Time Sentencing of Federal Offenders Report*, April 2006, p. 133 at <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC103.pdf>.

11 M Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21, 22.

12 A von Hirsch, *Doing Justice: The Choice of Punishments*, Report of the Committee for the Study of Incarceration, (1976) 6.

16. A justification of mandatory sentencing schemes is to ensure adequate retribution for offending conduct. Crime Victims Support Association (CVSA) argue that judges are greatly removed from the norm of society, often live and work in affluent areas where there are low crime rates and rarely experience physical assault first hand.¹³ As a result, it is argued, judges are often too lenient on offenders.
17. Ralph and Kathy Kelly, the parents of Thomas Kelly, who was fatally punched in King Cross, Sydney, in 2012 have also advocated for mandatory minimum sentences. Kiernan Loveridge was sentenced to four years' imprisonment for killing Thomas while intoxicated. The Kellys subsequently began a petition calling for mandatory sentencing laws in cases of manslaughter. Over 23,000 people signed a petition which initiated new legislation that included the introduction of mandatory sentencing laws for 'one punch' assaults.¹⁴
18. The Western Australian and Northern Territory Governments, the CVSA and media such as the *Herald Sun* have all argued that the criminal justice system places too much emphasis on the offender's mitigating circumstances and not enough on the impact of the crime on the victim and the victim's family.¹⁵
19. Under this view, a democratically elected Parliament represents public opinion about crime and appropriate sentencing. It holds that mandatory sentencing schemes developed by Parliament reassure victims of crime that the offender will suffer just deserts and appropriate retribution.
20. The Law Council is, however, concerned that mandatory sentencing results in harsh and unjust retribution. There have been numerous reported examples of anomalous or unjust cases where mandatory sentencing has applied in Australia, including in which:¹⁶
 - a 16-year-old with one prior conviction received a 28-day prison sentence for stealing one bottle of spring water;
 - a 17-year-old first time offender received a 14-day prison sentence for stealing orange juice and minties;
 - a 15-year old Aboriginal boy received a 20-day mandatory sentence for stealing pencils and stationery. He died while in custody; and
 - an Aboriginal woman and first-time offender who received a 14-day prison sentence for stealing a can of beer.
21. Such cases, which are perhaps not well known amongst the general public, violate well-established sentencing principles that a sentence and retribution should be proportionate to the gravity of the offence.¹⁷ Unjust cases demonstrate how there is a real risk that mandatory sentencing goes against the principle of retribution because the punishment does not fit the crime.

13 See Crime Victims Support Association 'Law Reform: Sentencing', CVSA website, (2013) at <http://www.cvsa.asn.au/sentencing.html>.

14 Ralph and Kathy Kelly, 'Sentencing Laws must be fixed to curb the drunken bashings', *The Canberra Times*, 3 January 2014. See also the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW).

15 See The Hon. Denis Burke, *Parliamentary Debates*, 17 October 1996, p. 9685, Second Reading Speech: Juvenile Justice Amendment Bill. The Hon. Peter Foss, *Parliamentary Debates*, August 1996, p. 4429, Second Reading Speech: Criminal Code Amendment Bill (No 2). The Hon. Cheryl Edwardes, *Parliamentary Debates*, 25 May 1995, p. 4255, Second Reading Speech: Sentencing Bill 1995. See also Crime Victims Support Association 'Law Reform: Sentencing', CVSA website, (2013) at <http://www.cvsa.asn.au/sentencing.html>; For example see: G. Wilkinson 'No Justice Revealed: How Top Judges go Soft on Worst Crimes', *Herald Sun*, 5 August 2010, p. 1; P. Anderson 'Victims Family Stunned – Grieving Parents Watch as Judge Cuts Impact Statements', *Herald Sun*, 14 September 2010, p. 9; A. Howe 'Victims – It's a Dirty Word – Not Only Does the Judiciary Fail Us with Lenient Sentencing – It is Causing Brain Damage to the Blameless Victims of Crime', *Herald Sun*, 1 November 2010, pp. 32-33; Editorial 'Report a Joke', *Herald Sun*, 1 April 2011, p. 3; G. Wilkinson 'Rapists Get Off Lightly', *Herald Sun*, 24 March 2011, p. 15; Editorial 'What About the Victims of Shocking Crimes', *Herald Sun*, June 14 2012, <http://www.heraldsun.com.au/opinion/what-about-the-victims/story-e6frfhqo-1226394889736>.

16 Kate Warner 'Mandatory Sentencing and the Role of the Academic' (2007) 18(3-4) *Criminal Law Forum* 344.

17 *Veen v The Queen [No. 2]* (1988) 164 CLR 465 at 476.

22. The Law Council notes that the Australian Law Reform Commission also shares the view that mandatory sentencing can offend against the principle of proportionality - 'that the penalty imposed be proportionate to the offence in question'.¹⁸ The principle of proportionality in sentencing has been observed by the High Court of Australia:

*It is now firmly established that our common law does not sanction preventative detention. The fundamental proportionality does not permit the increase of sentence imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender.*¹⁹

23. It is questionable whether Australians want unjust and disproportionate sentences, particularly where mandatory sentencing applies to vulnerable members of the community such as juveniles (discussed further below). As the High Court of Australia has observed:

*...there are many conflicting and contradictory elements which bear upon sentencing an offender. Attributing a particular weight to some factors, while leaving the significance of all other factors substantially unaltered, may be quite wrong... [T]he task of the sentence is to take account of all of the relevant factors and to arrive at a single result which takes due account of them all.*²⁰

24. Former Director of Public Prosecutions for NSW, Adjunct Professor Nicholas Cowdery QC AM,²¹ has emphasised the importance of judicial discretion to just retribution:

*The modern historical objective of sentencing in our system is to make the punishment fit the crime and the criminal. It is not possible for the relevant sentencing considerations to be identified accurately and comprehensively in advance of the offending (as Parliament would have to do in order to be able to fix just sentences in legislation). There must be left scope for discretion, to be exercised in a judicial fashion (and not arbitrarily or capriciously). The alternative is not justice.*²²

25. The difficulty arises because mandatory sentences are imposed by the legislature before particular offences have been committed and all the facts and circumstances are known. That is, Parliament imposes a penalty for events that it cannot necessarily foresee. Accordingly, the Law Council queries how the legislature can possibly know whether a penalty will be just and appropriate across a range of possible circumstances that involve the commission of an offence.
26. An Australian study of public opinion reveals a general view that courts are too lenient when sentencing offenders, but, despite this, many respondents were very supportive of alternatives to imprisonment for a range of offences.²³ As noted above, research also demonstrates that when the public is fully informed about the particular circumstances of the case and the offender there is a 90 per cent tendency to view judges' sentence as appropriate.²⁴ This suggests that public confidence in the judiciary can be restored, and disproportionate mandatory sentencing outcomes avoided, through public awareness of sentencing.

18 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process Report 84/19 Sentencing*, 1997, paragraph 19.55, at http://www.alrc.gov.au/publications/19-sentencing/sentencing-options#_ftn113.

19 *Chester v R* (1988) 165 CLR 611 at 618.

20 *Markarian v The Queen* (2005) 228 CLR 357 at [37] per Gleeson CJ, Gummow, Hayne and Callinan JJ citing Gaudson, Gummund and Hayne JJ in *Wong v Queen*. [2001] HCA 64 [74] – [76].

21 Adjunct Professor Nicholas Cowdery AM QC is a former long serving Law Council Human Rights Advisor and National Human Rights Committee Consultant Member.

22 Nicholas Cowdery QC, 'Some aspects of Sentencing', (Speech delivered at Legal Studies Association 2007 Conference, 23 March 2007, Sydney) p. 17.

23 Mackenzie, Geraldine *et al*, 'Sentencing and public confidence: Results from a national Australian survey on public opinions towards sentencing', (2012) 45(1) *Australian & New Zealand Journal of Criminology* p. 46.

24 K Warner, J Davis, M Waler, R Bradfield & R Vermey, 'Public Judgement on Sentencing: Final results of the Tasmanian Jury Study' *Trends & Issues in Crime and Criminal Justice*, Australian Institute of Criminology, February 2011, p. 3.

27. The Law Council recognises that in any sentencing process there is a risk that the judicial officer may err - for example, he or she may not give appropriate weight to factors such as general deterrence. Individual instances in which judges have erred may give rise to legitimate concerns about a particular sentence which has been handed down. However, the Law Council considers that this scope for error is adequately addressed by the system of appeal, which allows counsel on both sides to draw attention to any possible errors and to provide further material that may be relevant to the appeal court (such as evidence of sentences for comparable offences) to ensure the punishment fits the crime. The fact that there is community interest in sentencing outcomes is to be welcomed and encouraged; it is not a reason to support a removal of judicial discretion, rather it is a reason to highlight the need for the full range of factors to be carefully weighed in sentencing.

Mandatory sentencing provides effective deterrence

28. Those in favour of mandatory sentencing argue that it deters offenders from engaging in criminal conduct, and as a consequence, reduces crime and promotes social stability. The notion of deterrence assumes that offenders are rational beings who will desist from engaging in crime if the consequences of the conduct are sufficiently severe.²⁵ Deterrence, then, also relies on notions that the offender is able to understand that certain conduct constitutes a crime, which will carry a penalty. In *R v Raddich*, a New Zealand case that has influenced Australian sentencing jurisprudence,²⁶ deterrence was described as:

[O]ne of the main purposes of punishment... is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages, that has been the main purpose of punishment, and it still continues so.²⁷

29. Deterrence can be either general or specific. General deterrence aims to deter a range of people from engaging in criminal conduct. Specific deterrence aims to deter a specific offender from reoffending.
30. Those in favour of statutory mandatory minimum sentences, such as the Institute of Public Affairs, argue that such penalties deter potential offenders from committing a criminal offence, through fear of the perceived severity of punishment, and public disapproval.²⁸ The deterrence argument only requires that a reasonable number of offenders would be deterred by the penalty for the overall crime rate to reduce.
31. However, the Law Council notes that there are a number of difficulties with the deterrence argument. First, there is inconclusive evidence as to whether mandatory sentencing schemes achieve deterrent effects in Australia. The empirical evidence from Australian statistical data is lacking on the deterrent effectiveness of mandatory sentencing policies.
32. In the United States of America, there is some evidence which suggests that mandatory sentencing may reduce crime.²⁹ One of the difficulties with these studies, however, is that it is not clear whether mandatory sentencing itself resulted in a decreased crime rate or whether several other variables known to influence crime reduction were also contributing factors. Such variables include, for instance, changes in police numbers per capita or police visibility, unemployment

25 Australian Law Reform Commission, *Same Crime, Same Time Sentencing of Federal Offenders Report*, April 2006, p. 135 at <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC103.pdf>.

26 J McGuire, 'Deterrence in Sentencing: Handle with Care', (2005) 79 *Australian Law Journal* 448, 449; M Bagaric 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21, p. 32.

27 *R v Radich* [1954] NZLR 86 at p. 87.

28 Institute of Public Affairs, *Missing the Message on Mandatory Sentencing*, March 2000 at <http://www.ipa.org.au/news/586/missing-the-message-on-mandatory-sentencing/pg/7>.

29 See for instance Eric Helland and Alexander Tabarrok 'Does Three Strikes Deter? A Non-Parametric Estimation' (2007) 42.2 *Journal of Human Resources*, pp. 309-330.

or increases in real wage rates and education.³⁰ Further, a 2007 study from the Vera Institute of Justice in New York, which considered the effectiveness of incapacitation under all forms of sentencing, concluded by querying whether increases in incarceration 'offered the most effective and efficient strategy for combating crime'.³¹

33. Further, faced with unacceptable high levels of prison incarceration rates, United States jurisdictions such as Texas and the Federal Government have sought to implement other measures to counter the consequences of mandatory sentencing laws.³² Since 2000, 29 states have moved to cut back on mandatory sentences.³³ A 2011 report by the United States Sentencing Commission found that that certain mandatory minimum provisions apply too broadly and are set too high; lead to arbitrary, unduly harsh, and disproportionate sentences; can bring about unwarranted sentencing disparities between similarly situated offenders; have a discriminatory impact on racial minorities; and are one of the leading drivers of prison population and costs.³⁴
34. In Australia, there is conflicting evidence as to the deterrent effectiveness of mandatory sentencing. For example, the experience in the NT during the initial mandatory sentencing regime for property offences showed that property crime *increased* during mandatory sentencing, and *decreased* after its repeal.³⁵
35. The NT's Office of Crime Prevention has presented detailed statistics from the four-and-a-half years during which the NT's first 1997 mandatory sentencing regime was in force. On the basis of its data, the Office of Crime Prevention concluded that:³⁶
 - for the property offences the subject of the mandatory sentencing regime there was up to a 15 per cent increase in the prison population;
 - the length of the minimum sentence was not an effective deterrent for the population subject to the mandatory sentencing regime; and
 - the proportion of sentencing occasions resulting in imprisonment was 50 per cent higher during the period that the legislation was in operation than in the period immediately after its repeal.
36. In Western Australia, the former Police Minister, Rob Johnson, and the Attorney-General, Christian Porter, announced that crime decreased under 2009 legislation which introduced mandatory minimum sentences for police assaults. The results were said to indicate a 28 per cent decrease in assaults on police officers one year after the laws were introduced.³⁷ However, the information from the media statement is insufficient to attribute the cause of the decline in assaults on police

30 Don Stemen 'Reconsidering Incarceration: New Directions for Reducing Crime' *Vera Institute of Justice*, January 2007, p. 1.

31 Ibid.

32 Texas for instance has looked to justice reinvestment strategies to reduce prison population numbers – see for instance: Justice Centre: The Council of State Governments, *Justice Reinvestment in Texas: Assessing the Impact of the 2007 Justice Reinvestment Initiative*, April 2009; and *ABC Lateline*, 'Texas Experience with Justice Reinvestment', 16 April 2013, at <http://www.abc.net.au/lateline/content/2013/s3738637.htm>. The Obama Administration has sought to minimise mandatory sentences as they apply to certain drug offences – see for instance Evan Perez, 'Rules change means more drug offenders eligible for clemency', *CNN*, 26 April 2014 at <http://edition.cnn.com/2014/04/23/politics/drug-clemency/>.

33 See Ram Subramanian and Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences*, Policy Report Vera Institute of Justice, February 2014, p. 7.

34 The United States Sentencing Commission, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, Washington, DC: United States Sentencing Commission, 2011, pp. 345-347; see also Ram Subramanian and Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences*, Policy Report Vera Institute of Justice, February 2014, p. 4.

35 Northern Territory Office of Crime Prevention, *Mandatory Sentencing for Adult Property Offenders – The Northern Territory Experience 2003* p. 10. For further discussion of the deterrent impact of mandatory sentencing regimes see Law Institute of Victoria, *Mandatory Minimum Sentencing*, Submission to Victorian Attorney General, 30 June 2011, p. 7, note 9.

36 Ibid, p. 13. This research is supported by Stephen Jackson and Fiona Hardy, 'The Impact of Mandatory Sentencing on Indigenous Offenders', *Sentencing Conference 2010*, National Judicial Conference, Canberra 6 & 7 February 2010, p. 1.

37 Rob Johnson and Christian Porter, 'Assaults against Police Plummet under Mandatory Sentencing Laws.' (Media Statement, 22 September 2010), at <http://www.mediastatements.wa.gov.au/pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=3115>.

officers to mandatory sentencing legislation. The media statement also indicates that there were only 12 charges under the mandatory sentencing legislation which would suggest that there is further uncertainty as to whether the laws themselves were the cause of any reduction.

37. Further, the claims made by the former Police Minister and the Attorney-General appears to be in contrast to the Western Australian Police Union, which has observed that the introduction of mandatory sentencing in Western Australia in 2009 for offenders who assault a police officer has not reduced the accounts of police officers being assaulted, which demonstrates that those 'with a proclivity to offend are not being deterred'.³⁸
38. Evidence suggests that the certainty of apprehension and punishment for an act provides some deterrent effect, but there is little evidence to suggest that a more severe penalty as a legal consequence is a better deterrent.³⁹ In a 2011 review of the evidence as to whether imprisonment deters, the Victorian Sentencing Advisory Council found that:

*The evidence from empirical studies suggests that the threat of imprisonment generates a small general deterrent effect. However, the research also indicates that increases in the severity of penalties, such as increasing the length of imprisonment, do not produce a corresponding increase in the general deterrent effect.*⁴⁰

39. The Victorian Sentencing Advisory Council also found that imprisonment has 'no effect on the rate of reoffending and this in fact actually increases the likelihood of recidivism because it places prisoners in a learning environment for crime, reinforces criminal identity and fails to address the underlying causes of crime.'⁴¹ This is supported by research in 2008, for example, which found that 73 per cent of Indigenous prisoners had a history of prior imprisonment.⁴²
40. A second difficulty with the deterrence argument is that it assumes that offenders have knowledge of specific penalties for offences prior to committing the act. While offenders may have some understanding that if they commit a particular act a penalty will follow (if caught), it is an overestimation that offenders will have detailed knowledge that a specific penalty of, for example, 12 months' imprisonment will be applied.
41. Third, the deterrence argument assumes the rationality of the offender and does not take into account the large number of offenders who suffer from mental impairment, behavioural problems, drug or alcohol intoxication, or poor anger management. As the Law Institute of Victoria has argued 'the reality is that many crimes are committed impulsively, and without a great deal of forethought'.⁴³

38 Western Australian Police Union of Workers, *Mandatory Sentencing Report*, April 2013, p. 53.

39 NSW Bureau of Crime Statistics and Research, 'The Effect of Arrest and Imprisonment on Crime' *Crime and Justice Bulletin* 158, February 2012; Daniel Nagin, 'Deterrence in the Twenty-First Century', *Crime and Justice*, 2013, p. 1 at <http://cebcp.org/wp-content/CRIM760/Nagin-2013.pdf>; A Hoel & K Gelb, *Sentencing Matters: Mandatory Sentencing*, Sentencing Advisory Council August 2008, p. 14. See also Bruce Western, *Punishment and Inequality in America*, Russell Sage Foundation, NY, 2006, p. 178; See for instance Glenn Cranny, 'Mandatory Sentencing – where from, where to and why?', *Justice for All Conference*, International Society for the Reform of Criminal Law, Brisbane, July 2006, p. 10, at <http://www.isrcl.org/Papers/2006/Cranny-Paper.pdf>.

40 Sentencing Advisory Council of Victoria, 'Does Imprisonment Deter? A Review of the Evidence', *Sentencing Matters*, April 2011, p. 23 at https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/does_imprisonment_deter_a_review_of_the_evidence.pdf; See also submissions 13, 21 & 22 to the Victorian Sentencing Council Review of *Statutory Minimum Sentences for Gross Violence Offences*, October 2011, at <https://sentencingcouncil.vic.gov.au/content/publications/statutory-minimum-sentences-gross-violence-offences-report>.

41 Ibid.

42 Melanie Schwartz, 'Building Communities, not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment' (2010) 14.1 *Australian Indigenous Law Review* 7.

43 Law Institute of Victoria, *Mandatory Minimum Sentencing*, Submission to Victorian Attorney-General, 30 June 2011, p. 7.

Incapacitation of offenders prevents further harm to the community

42. Supporters of mandatory sentencing claim that such regimes reduce crime by incapacitating offenders from re-offending through removal from society and imprisonment. The logic is that while in prison, an offender cannot continue to cause harm in the community.
43. Incapacitation can be both general and selective. General incapacitation involves increasing sentencing severity for all offenders convicted of a particular offence.⁴⁴ Selective incapacitation relates to policies and legislation that attempt to identify offenders who are likely to commit serious crimes in the future and sentence them to lengthy prison terms.⁴⁵
44. Mandatory sentencing provisions act as a form of general incapacitation for first time offences, and as selective incapacitation, targeting repeat offenders, who by their prior offending, demonstrate a risk to the community.
45. Incapacitation through imprisonment may have an immediate short-term impact on preventing offenders from reoffending in society. However, the Law Council notes that almost all offenders sentenced to imprisonment will return to the community at some stage. As the Sentencing Advisory Council of Victoria recognises:

*Whatever gains are made in the reduction of crime through the incapacitation of an offender must be considered in light of any increase in crime that results from that incapacitation after the offender is released.*⁴⁶

46. As noted above, there is insufficient evidence to suggest that incapacitation of itself will reduce recidivism. Some research suggests that imprisonment may be associated with an increase in recidivism when compared with community-based sanctions, and that longer sentences of imprisonment are associated with higher rates of subsequent reoffending.⁴⁷ Accordingly, the Law Council is of the view that mandatory sentencing provides short- to medium- term incapacitation of offenders without regard for rehabilitation prospects and the likelihood of prisoners reoffending once released back into the community.

Mandatory sentencing denounces the criminal conduct

47. Advocates of mandatory sentencing argue that such regimes denounce certain crimes. Denunciation is based on the theory that a sentence can send a strong message to the community and the offender of society's disapproval of the criminal conduct and that the law must be obeyed.
48. Mandatory sentencing for certain crimes reflects that such conduct is sufficiently serious to be a complete violation of society's values. That is, a mandatory sentencing regime is about defining the moral code to which society expects people to adhere.
49. However, the Law Council is of the view that mandatory sentencing has no regard for the individual for whom the minimum sentence might not be appropriate - for instance, in the case of a person with a severe mental impairment or a child who steals food to survive. That is, mandatory sentencing forgets the appropriateness of a punishment in particular circumstances in favour of making a 'tough on crime' statement to society. This statement becomes hollow in light of the injustice it can produce. Further, mandatory sentences operate to undermine the community's confidence in the judiciary's ability to impose punishments, and consequently the criminal justice system as a whole.

44 Sentencing Advisory Council Victoria, *Sentencing Matters: How Much does Imprisonment Protect the Community through Incapacitation?* July 2012, p. 6 at https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/how_much_does_imprisonment_protect_the_community_through_incapacitation_0.pdf.

45 Ibid, p. 2.

46 Ibid, p. 11.

47 See for instance P. Smith, C. Goggin and P. Gendreau, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences*, Ottawa: Public Works and Government Services, Canada, 2002; D Ritchie, *Does Imprisonment Deter? A Review of the Evidence*, Melbourne Sentencing Advisory Council, 2011, p. 19.

Mandatory sentencing provides consistency

50. Supporters of mandatory sentencing claim that it eliminates inconsistency in sentencing and ensures fairness by treating like offenders alike.
51. For instance, Mirko Bagaric of the Faculty of Law, Deakin University, has argued that judicial discretionary sentencing systems involve courts imposing inconsistent sentences with unjustified disparity.⁴⁸ Judges and magistrates are often guided by the relevant sentencing legislation and the common law, but mandatory sentencing advocates claim that the sentencing discretion is too broad and leads to inconsistent, disproportionate and disparate sentences.⁴⁹ In turn, this is an affront to principles such as equality before the law and societal notions of fairness as there is the possibility of unequal treatment of offenders who have equally wronged.⁵⁰ Mandatory sentencing attempts to eliminate this inconsistency by prescribing a set penalty for all offenders of an offence.
52. While equal offenders who commit equal wrong should be treated alike, the Law Council is of the view that there are a vast range of factors in individual cases which can impact on criminal culpability. Unequal offenders who are variously criminally culpable should not necessarily be treated the same. Formal equality before the law does not necessarily result in substantial equality before the law. Similarly, formal justice does not necessarily result in substantial justice.
53. Criminal culpability in the criminal justice system does not simply depend on the physical element of committing the offence. Culpability also depends on the degree of an offender's blameworthiness in the commission of a crime; for instance, whether the offender committed the act purposely, knowingly, recklessly or negligently. Some mandatory sentences take intention into account, but culpability also depends on the circumstances of the offence and the offender, including:
- whether he/she was in a position to understand the consequences of his/her actions;
 - the manner in which the offence was carried out and for what purpose; and
 - whether the offender was primarily responsible for the commission for the offence.
54. Mandatory sentencing ignores the range of factors that impinge on criminal culpability, resulting in potentially inappropriate, harsh and unjust sentences. As Gibbs CJ (Wilson J agreeing) in *Lowe v The Queen*⁵¹ stated:

*It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence, have to be taken into account.*⁵²

48 M Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2002) 24 *Criminal Law Journal* 21.

49 Ibid.

50 Ibid.

51 (1984) 154 CLR 606 at 609.

52 Ibid.

55. Further, mandatory sentencing does not eliminate inconsistency in sentencing; it simply displaces discretion to other parts of the criminal justice system, most notably prosecutors.⁵³ As the Australian Institute of Criminology has observed 'discretion in the criminal justice system is unavoidable'.⁵⁴ For example, the decision to prosecute individuals is guided by prosecution policies including the taking into account of:
- available resources;
 - the interests of the victim, the offender and the community;
 - fairness and consistency; and
 - whether there is substantial admissible evidence to support the prosecution.⁵⁵
56. Mandatory sentencing means that when the prosecutor decides which individual is prosecuted, and under what offence, the minimum sentence will apply if the offender is convicted for a particular offence. It is likely to result in different decisions being taken by prosecutors, or even the same prosecutor, regarding the pursuit of certain cases over others.
57. Prosecutors, judges and magistrates aim to achieve consistency in the exercise of their discretion. However, prosecutors are not impartial and independent: their role is to present a case against offenders on behalf of the state.
58. Judicial members in contrast are impartial decision-makers that interpret the law, assess the evidence presented from both sides of the case before making a determination. Impartial judicial officers are better placed than prosecutors to achieve consistency by examining all the relevant circumstances of the offence. Moreover, judicial decisions are publicly accountable and reviewable by appellate courts, which aid consistency.
59. Further, as the Queensland Law Society has observed, mandatory sentencing may encourage judges, prosecutors and juries to circumvent mandatory sentencing when they consider the result unjust.⁵⁶ In some circumstances when offender is faced with a mandatory penalty, juries have refused to convict.⁵⁷ The Queensland Law Society has also noted that prosecutors have deliberately charged people with lesser offences that the conduct would warrant to avoid the imposition of a mandatory sentence.⁵⁸

53 Australian Institute of Criminology, *Trends & Issues in Crime and Criminal Justice: Mandatory Sentencing*, 1999, p. 5 at <http://www.aic.gov.au/documents/C/1/E/per cent7BC1EFCBE4-7FCE-4B22-8BB9-AFD965E2E536per cent7Dt138.pdf>.

54 Ibid.

55 See for instance the Commonwealth Director of Public Prosecution Policy, p. 6 at <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>.

56 Queensland Law Society, *Mandatory Sentencing Laws Policy Position*, 4 April 2014, p. 2.

57 M. Tony, 'Sentencing Matters', 1996, cited in Australian Institute of Criminology, 'No 138. Mandatory Sentencing', 1999.

58 Queensland Law Society, *Mandatory Sentencing Laws Policy Position*, 4 April 2014, p. 2.

60. Mandatory sentencing has been part of the United States legal system for quite some time and extensive research has been carried out to review sentencing reforms. Sentencing guideline research in the United States has indicated that it is highly debatable whether the restrictive application of judicial sentencing discretion has been proven to achieve its objective of overcoming unwarranted disparities in sentencing among the judiciary.⁵⁹ In the United States, there is some evidence to suggest that rather than leading to more consistent sentencing, during the period in which mandatory minimum sentences for drug offences was introduced, there was nevertheless a gap between sentences imposed for black and Hispanic people and white people charged with similar crimes.⁶⁰ Concerns that this form of sentencing has the effect of marginalising minority groups have been reiterated in many research papers from the United States and Canada.⁶¹ Arguably, mandatory sentencing in Australia could have a similar effect between Indigenous and non-Indigenous Australians (see further discussion below).

59 Oren Gazal-Ayal. 'A Global Perspective on Sentencing Reforms: Foreword' (2013) 76:1 *Law and Contemporary Problems*.

60 Ibid, p. ii; see also United States Sentencing Commission, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Criminal Justice System is Achieving the Goals of Sentencing Reform*, 2004, p. xv.

61 See for example: Rachel Eisenberg. 'As Though they are Children: Replacing Mandatory Minimums with Individualised Sentencing Determinations For Juveniles In Pennsylvania Criminal Court After Miller v Alabama' (2013) 86:1 *Temple Law Review*; Gerry Fergusson and Benjamin Berger. 'Recent Developments in Canadian Criminal Law' (2013) 37:5 *Criminal Law Journal* at 315; Sonja Starr and Marit Rehavi. 'Mandatory Sentencing and Racial Disparity Assessing the Role of Prosecutors and the Effects of Booker' (2013) 123:1 *Yale Law Journal*.

MANDATORY SENTENCING: KEY LAW COUNCIL CONCERNS

Overview

61. The Law Council has consistently opposed the use of mandatory sentencing regimes. Its opposition rests on the basis that such regimes impose unacceptable restrictions on judicial discretion and independence, and undermines fundamental rule of law principles. The rule of law underpins Australia's legal system and ensures that everyone, including governments, are subject to the law and that citizens are protected from arbitrary abuses of power. Mandatory sentencing is also inconsistent with Australia's voluntarily assumed international human rights obligations.
62. In the Law Council's view, mandatory sentencing laws are arbitrary and limit an individual's right to a fair trial by preventing judges from imposing an appropriate penalty based on the unique circumstances of each offence and offender. Mandatory sentencing disproportionately impacts upon particular groups within society, including Indigenous peoples, juveniles, persons with a mental illness or cognitive impairment, or the impoverished. Such regimes are costly and there is a lack of evidence as to their effectiveness as a deterrent or their direct ability to reduce crime. These concerns are further outlined below.

Mandatory sentencing undermines the rule of law

63. The Law Council is concerned that mandatory sentencing regimes undermine fundamental principles underpinning the independence of the judiciary and the rule of law.
64. The existence of an independent, impartial and competent judiciary is an essential component of the rule of law. This extends to ensuring that the discretion of judges in sentencing matters is not restricted to the point where the judiciary effectively acts as a rubber stamp for the Executive. As noted in the Law Council's *Policy Statement on Rule of Law Principles*:

A fundamental principle of the rule of law is that:

The judiciary should be independent of the Executive and the Legislature.... *On that basis:*

...Judicial officers should have the power to control proceedings before *them and, in particular, to ensure that those proceedings are just and impartial.*

...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.⁶²

65. Fundamental principles of the rule of law also include concepts of natural justice, procedural fairness and that States must comply with their international obligations whether created by treaty or arising under customary international law.
66. Sentencing in a criminal trial is part of the judicial process.⁶³ Under traditional principles of criminal law, a judge will exercise his or her discretion to impose an appropriate sentence based on a range of matters, including:
- the gravity of the offence;
 - the circumstances of the offence, offender and victim;
 - whether the offender was primarily responsible for the commission for the offence; and
 - statutory or sentencing guidelines which may make recommendations as to an appropriate penalty to be imposed.
67. Mandatory sentencing schemes depart from such well-established principles of criminal law by requiring that only the mandatory statutorily prescribed penalty be imposed. The Law Council therefore considers that mandatory sentencing involves the Executive unduly traversing into an issue of a judicial nature in a direct affront to the rule of law and the independence of the judiciary. Mandatory sentencing schemes mean that upon a conviction of guilt, the judiciary in effect acts as a rubber stamp for an Executive's penalty policy.

Inconsistency with Australia's international obligations

Overview

68. The Law Council considers that mandatory sentencing gives rise to significant human rights concerns under Australia's international human rights obligations, which it has voluntarily assumed, including in particular:
- the prohibition against arbitrary detention as contained in Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR);
 - the right to a fair trial and the provision that prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR; and
 - in the case of juveniles, children's rights, as contained in Articles 3, 37 and 40 of the *Convention on the Rights of the Child* (CROC).
69. The ICCPR entered into force for Australia on 13 August 1980. The CROC was ratified by Australia on 17 December 1990 and came into force on 16 January 1991. Australia is therefore legally bound by the obligations of both instruments.

Prohibition against arbitrary detention

70. Article 9 of the ICCPR provides that 'no one may be subjected to arbitrary arrest or detention, and no one may be deprived of liberty except on such ground and in accordance with such procedures as are established by law'.

62 See the Law Council of Australia, *Policy Statement on Rule of Law Principles*, March 2011, Principle 5, p. 4, at <http://www.lawcouncil.asn.au/lawcouncil/index.php/divisions/international-division/rule-of-law>.

63 Dato' Param Cumaraswamy, 'Mandatory Sentencing: the individual and Social Costs' (2001) 7(2) *Australian Journal of Human Rights* at <http://www.austlii.edu.au/au/other/ahric/ajhr/ajhrindex.html/2001/14.html#Heading140>.

71. The Law Council is concerned that mandatory sentencing may breach Article 9 of the ICCPR and amount to arbitrary detention because the sentence imposed can result in disproportionate sentences (as noted in the anomalous or unjust cases mentioned above).⁶⁴
72. Detention must not only be lawful but reasonable and necessary in all the circumstances. The principle of arbitrariness includes notions of inappropriateness, injustice and lack of predictability.⁶⁵ Under Article 9 of the ICCPR detention must meet certain criteria including that it be:
- reasonable;
 - necessary in the individual case rather than the result of a mandatory policy;
 - for a legitimate objective;
 - proportionate to the reason for the restriction; and
 - for the shortest time possible.⁶⁶
73. The Law Council agrees that the protection of public safety and the reduction of crime are legitimate objectives for a sentencing regime. However, the Law Council is concerned that mandatory sentencing restricts a court's capacity to ensure that punishment is proportionate to the offence and thereby can result in arbitrariness.
74. In *A v Australia*⁶⁷, the United Nations Human Rights Committee indicated that detention is arbitrary if disproportionate in the prevailing circumstances. Therefore, a sentence must not be totally disproportionate to the severity of the crime committed.⁶⁸ In this respect, the Human Rights Committee has made the following comment from Concluding Observations on Australia in 2000:

Legislation regarding mandatory imprisonment in Western Australia and the Northern Territory, which leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed and would seem to be inconsistent with the strategies adopted by the State party to reduce the over-representation of Indigenous persons in the criminal justice system, raises serious issues of compliance with various articles of the Covenant.

*The State party is urged to reassess the legislation regarding mandatory imprisonment so as to ensure that all Covenant rights are respected.*⁶⁹

75. In the Law Council's view, mandatory sentencing is arbitrary insofar as it requires the imposition of a mandatory policy regardless of whether that policy is reasonable, necessary or proportionate in the individual case.

64 See, for example, the case of a 16 year old receiving a 28 day prison sentence for stealing 1 bottle of spring water as referred to in Kate Warner 'Mandatory Sentencing and the Role of the Academic' (2007) 18(3-4) *Criminal Law Forum* 344.

65 As expressed in the Law Council's *Policy Statement on Principles Applying to Detention in a Criminal Law Context: 'Arbitrariness'* is to be interpreted broadly to include not only unlawfulness, but also elements of inappropriateness, injustice, lack of predictability and due process of law. For example, arbitrariness may result from a law which is vague or allows for the exercise of powers in broad circumstances which are not sufficiently defined. See Law Council of Australia, *Policy Statement on Principles Applying to Detention in a Criminal Law Context*, 23 June 2013, p. 4, at <http://www.lawcouncil.asn.au/lawcouncil/index.php/library/policies-and-guidelines>.

66 See, for example, *Van Alphen v Netherlands*, (23 July 1990) Communication No. 305/1988, CCPR/C/39/D/305/1988, paragraph 5.8; *Gorji-Dinka v Cameroon*, (17 March 2005) Communication No. 1134/2002, CCPR/c/83/D/1134/2002, paragraph 5.1; *F.K.A.G. et al. v Australia*, (20 August 2013) Communication No. 2094/2011, CCPR/C/108/D/2094/2011, paragraphs 9.3, 9.6-9.7; and *M.M.M. et al. v Australia*, (20 August 2013) Communication No. 2136/2012, CCPR/C/108/D/2136/2012, paragraphs 10.3-10.4, 10.6; United Nations Human Rights Committee, *General Comment No. 27: Freedom of movement*, (1999), CCPR/C/21/Rev. 1/Add.9, paragraph 13.

67 *A v Australia* (560/93).

68 See also Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3rd ed, 2013) p. 363.

69 United Nations Human Rights Committee, *Concluding Observations on Australia in 2000* (2000) UN doc A/55/40, paragraph 522.

76. The Law Council notes that this concern has been shared by the Joint Standing Committee on Treaties (JSCT). The JSCT was critical of mandatory sentencing in a 1998 report, noting in particular that it did not allow courts to ensure that punishment is proportionate to the seriousness of the offence.⁷⁰
77. A range of legal academics have also argued that mandatory sentencing does not allow consideration of proportionality of the sentence to the crime committed in light of individual circumstances and that this may result in arbitrary periods of detention that are unjust and in violation of Article 9 of the ICCPR.⁷¹

Right to a fair trial

78. The right to a fair trial is contained in Article 14 of the ICCPR and includes the right to have a sentence reviewed by a higher court. Article 14(5) of the ICCPR provides:

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal and according to law.

79. While there may be a right to appeal the conviction for an offence, mandatory sentences prevent substantial review of the penalty. This means that in cases of mandatory minimum penalties Australia may fail to ensure the right of appeal to a higher court for review of a sentence in contravention of Article 14(5) of the ICCPR.⁷²
80. The United Nations Special Rapporteur on the Independence of the Judiciary has also observed that the right of appeal contained in Article 14(5):

...is negated when the trial judge imposes the prescribed minimum sentence, since there is nothing in the sentencing process for an appellant court to review. Hence, legislation prescribing mandatory minimum sentences may be perceived as restricting the requirements of the fair trial principle and may not be supported under international standards.⁷³

Children's rights

81. The Law Council holds serious concerns where mandatory sentences apply to children (such as the property offences in WA legislation).
82. The CROC applies to persons under the age of 18 (Article 1). It requires that in dealing with children:

70 Joint Standing Committee on Treaties, *Inquiry into the United Nations Convention on the Rights of the Child*, Parliament of Australia, 1998, p 346, at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/reports/report17/rept17contents.htm.

71 See for instance Bassina Farbenblum, the University of New South Wales Faculty of Law, Submission to the Senate Legal and Constitutional Affairs Committee's *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, 24 February 2011 at <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=dbe03f90-38cb-4c25-b3fb-d2449eddbe35>; Professor Ben Saul, the University of Sydney Faculty of Law, Submission to the Senate Legal and Constitutional Affairs Committee's *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012* <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=20aed458-671e-4e70-bb7b-352a423c13ce>.

72 Australian Human Rights Commission, Submission to the Senate and Legal Constitutional Affairs Committee's *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, p. 5 at https://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2012/20120227_migration_amendment.pdf; see also Bassina Farbenblum, the University of New South Wales Faculty of Law, Submission to the Senate Legal and Constitutional Affairs Committee's *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, 24 February 2011 at <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=dbe03f90-38cb-4c25-b3fb-d2449eddbe35>.

73 Dato' Param Kumaraswamy 'Mandatory Sentencing: the individual and Social Costs' (2001) 7(2) *Australian Journal of Human Rights* at <http://www.austlii.edu.au/au/other/ahric/ajhr/ajhrindex.html/2001/14.html#Heading140>.

- courts should have the best interests of the child as a primary consideration (Article 3(1))⁷⁴;
 - detention must be used as a last resort and for the shortest appropriate period (Article 37(b));⁷⁵ and
 - sentences must be proportionate to the circumstances of the offence and must be subject to appeal (Article 40).
83. Australia's international obligations under the CROC are given effect in general terms in many of the States and Territories juvenile sentencing legislative guidelines, but these are, the Law Council notes, unjustifiably ignored where mandatory sentencing applies to juveniles.
- (a) For instance, paragraph 7(h) of the *Young Offenders Act 1994* (WA) provides that detention of a young person in custody 'should only be used as a last resort and, if required, is only to be for as short a time as is necessary'.
 - (b) Subsection 120(1) provides that 'the court cannot impose any custodial sentence unless it is satisfied that there is no other appropriate way to dispose of the matter'.
 - (c) The CROC requirement that courts should have the best interests of the child as a primary consideration can be seen, at least by implication, in paragraph 6(d)(iii) of the *Young Offenders Act 1994* (WA), which specifies that one of the main objectives of the Act is to enhance and reinforce the role of responsible adults, families and communities in rehabilitating young offenders. This provision has been construed as requiring courts to exercise their discretion in such a way as to maximise the prospects of rehabilitating young offenders.⁷⁶
84. The Law Council is of the view that where mandatory sentencing applies to children, such regimes do not have the best interests of the child as a primary consideration. Instead, other factors such as deterrence appear to be the primary consideration, and this is despite the lack of evidence which indicates mandatory sentencing provides effective deterrence.
85. The Law Council also notes in this regard that some jurisdictions in Australia exclude general deterrence as a sentencing factor in the case of juveniles because such a consideration would be contrary to taking the best interests of the child as a primary consideration.
- (a) the Victorian Supreme Court, for example, has found that the sentencing principles in the *Children, Youth and Families Act 2005* (Vic) were in the best interests of the child and conveyed a 'clear legislative intention to exclude general deterrence' as a sentencing factor.⁷⁷
 - (b) the Court added that the legislation said 'nothing about the need to deter others from committing violent and wrongful acts'.⁷⁸

74 See also Rule 17.1(d) United Nations General Assembly, *Rules for the Protection of Juveniles Deprived of their Liberty* December 1990, A/RES/45/113 14: 'The well-being of the child shall be the guiding factor in the consideration of his or her case'.

75 See also Rule 17 and 11 of the United Nations General Assembly, *Rules for the Protection of Juveniles Deprived of their Liberty* December 1990, A/RES/45/113 14.

76 *WO (a child) v Western Australia* (2005) 153 A Crim R 352 at 362; *Western Australia v A Child* [2007] WASCA 115 at [16].

77 *CNK v The Queen* [2011] VSCA 228 at [15].

78 *Ibid* at [10]; See also Adrian Lowe, 'Court Blow to Juvenile Sentence Plans,' *The Age*, 15 August 2011, at <http://www.theage.com.au/victoria/court-blow-to-juvenile-sentence-plans-20110814-1it4u.html>.

86. Similarly, the Law Council is of the view that mandatory sentencing, which ineffectively aims to achieve a general deterrence policy, ignores what is in the best interest of children as required by the CROC. It prevents a court from considering the age, maturity, cultural background and reasons for committing the offence in the rehabilitation process.
87. The United Nations Committee on the Rights of the Child has also observed that mandatory sentencing is not in the best interests of children and should be abolished as it applies to juveniles.⁷⁹
88. As noted, Article 37(b) of the CROC provides that for children, detention must be used as a last resort and for the shortest appropriate period. In *Ferguson v Setter and Gokel*⁸⁰, Justice Kearney of the NT Supreme Court expressed the opinion that the mandatory sentencing provisions introduced into the *Juvenile Justice Act 2005* (NT) were 'directly contrary to Article 37(b) of the Convention on the Rights of the Child'.⁸¹
89. Under Article 40 of the CROC, sentences must be proportionate to the circumstances of the offence and must be subject to appeal. In *Police v MK*, the Northern Territory Magistrates Court determined that the *Youth Justice Act 2005* (NT) did not require the mandatory minimum fine to be imposed on a juvenile offender partly because the imposition of such a fine would be disproportionate in the circumstances of the particular case and would be inconsistent with Australia's international obligations under Article 40 of the CROC.⁸²
90. The Commonwealth Parliament's Joint Standing Committee on Treaties has declared that mandatory minimum sentences as they apply to children contravene Article 37(b) of the CROC 'which requires that deprivation of liberty not be arbitrary and is a measure of last resort'.⁸³ Further the Committee stated:

*Detention is a serious measure and should only be ordered after full consideration of the circumstances involved.*⁸⁴

...

*There needs to be a balance between the rights of the person committing the offence and their possible rehabilitation, against the rights of the individuals who are the victims of these crimes.*⁸⁵

79 United Nations Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, 28 August 2012, CRC/C/AUS/CO/4, paragraph 84 at http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf.

80 *Ferguson v Setter and Gokel* (1997) 7 NTLR 118.

81 *Ibid.*

82 *Police v MK* [2007] NTSC at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nt/NTMC/2007/47.html?stem=0&synonyms=0&query=Convention%20on%20the%20rights%20of%20the%20child>.

83 Joint Standing Committee on Treaties, *Inquiry into the United Nations Convention on the Rights of the Child*, Parliament of Australia, 1998, p. 346, at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/reports/report17/rept17contents.htm.

84 *Ibid.*, p. 347.

85 *Ibid.*, p. 349.

91. In 1997, the ALRC also criticised the NT and WA mandatory sentencing laws because, in contravention of ICCPR and CROC, the laws violated the principle of proportionality in sentencing, did not represent a sentence of 'last resort' and the sentences were not reviewable by a higher court.⁸⁶
92. The Australian Institute of Health and Welfare has also noted that:
- Two main principles upon which the Australian youth justice system is based, and which are incorporated in state and territory legislation, are that young people should be detained only as a last resort and that they should be detained for the shortest appropriate period. This is consistent with international guidelines such as the United Nations Convention on the Rights of the Child and the Standard Minimum Rules for the Administration of Juvenile Justice.⁸⁷*
93. In the Law Council's view, mandatory sentencing schemes as they apply to juveniles are inconsistent with the principles upon which the Australian youth justice system is based and Australia's human rights obligations.
94. They are also inconsistent with the Law Council's *Policy Statement on Principles Applying to Detention in a Criminal Law Context*, which state that:
- (a) In all actions concerning children, the best interests of the child shall be a primary consideration.
 - (b) The arrest, detention or imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period of time...
 - (c) Every child accused of or convicted of a criminal offence should be treated in a manner which:
 - (i) is consistent with the promotion of the child's sense of dignity and worth;
 - (ii) reinforces the child's respect for the human rights and freedoms of others; and
 - (iii) takes into account the child's age, sex, or gender and needs and the desirability of promoting the child reintegrating and assuming a constructive role in society.⁸⁸

Economic costs

95. The Law Council is concerned that mandatory sentencing may result in a significant economic cost to the community. Imprisonment is very expensive. It costs more than \$300 a day to keep a person in jail, and more than \$600 a day to keep a juvenile in detention.⁸⁹ In 2011-2012, recurrent expenditure on prisons and periodic detention centres cost approximately \$2.4 billion, and \$0.5 billion on community corrections. Net operating expenditure on corrective services cost approximately \$3.1 billion which was an increase of 4.8 per cent over the previous year.⁹⁰

86 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, ARLC Report 84, 30 September 1997, paragraph 19.63, at <http://www.alrc.gov.au/publications/report-84>.

87 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2013*, 10 December 2013, p. 1 at <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129545393>.

88 See Law Council of Australia, *Policy Statement on Principles Applying to Detention in a Criminal Law Context*, 23 June 2013, p. 8, at <http://www.lawcouncil.asn.au/lawcouncil/index.php/library/policies-and-guidelines>.

89 Steering Committee for the Review of Government Service Provision, *Report on Government Services 2013*, Vol. 1, paragraphs 8.24, 8.27, 8.28.

90 *Ibid*, paragraphs 8.3-8.4.

96. The Law Council is concerned that mandatory sentencing contributes to a higher rate of imprisonment which often unnecessarily increases the costs in the administration of justice. Statistics indicate that the rates of imprisonment have increased dramatically in the past 30 years. In 1984, the rate of imprisonment was approximately 86 prisoners per 100,000 of the Australian population.⁹¹ Since that time the rate has nearly doubled to 170 prisoners per 100,000.⁹²
97. Further, the NT and WA – the states where mandatory sentencing has operated for the longest period of time – have the two highest imprisonment rates in Australia.⁹³ According to the Australian Bureau of Statistics, in June 2013 the imprisonment rate in the NT was 821 prisoners per 100,000 adult population and in WA it was 256 per 100,000, compared to a national imprisonment rate of 170 prisoners per 100,000.⁹⁴
98. In 2013, the Senate Legal and Constitutional Affairs References Committee found that while crime rates have declined in Australia, the rate of imprisonment has increased.⁹⁵ The Committee considered that one of the factors contributing to the rate of increase included the introduction of mandatory sentencing.⁹⁶
99. Such sentencing regimes contribute to the increase in the imprisonment rate because they:
- can increase the length of sentences and hence increase the prison population;
 - capture all offenders of the specified conduct rather than consider more appropriate alternatives to imprisonment where relevant; and
 - potentially increase the likelihood of reoffending as periods of incarceration can promote recidivism.⁹⁷
100. The Law Council submits that an increase in the prison population suggests that mandatory sentencing appears to fail in achieving one of its objectives: the deterrence of criminal activity.
101. In 2008, the Victorian Sentencing Advisory Council, an independent statutory body, assessed whether various mandatory sentencing schemes had been successful in achieving the purported aims. The Council concludes, on the basis of existing research:
- ...that mandatory and other prescriptive schemes are unlikely to achieve their aims. To the extent that such schemes achieve some of their aims, the research indicates that they are achieved at a high economic and social cost.*⁹⁸
102. The Victorian Sentencing Council also found that the mandatory minimum penalty for driving while disqualified was not only ineffective in protecting the community from future offences and preventing an offender from reoffending, but also caused a strain on the criminal justice system.⁹⁹ As a consequence of the Victorian Sentencing Council's findings, the mandatory minimum penalty for this offence was abolished in 2010.

91 Senate Legal and Constitutional Affairs References Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, June 2013, p. 4, at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index.

92 Australian Bureau of Statistics, *Prisoners in Australia, 2013 Report*, 5 December 2013 at <http://www.abs.gov.au/AUSSTATS/abs@nsf/DetailsPage/4517.02013?OpenDocument>.

93 Ibid.

94 Ibid.

95 Senate Legal and Constitutional Affairs References Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, June 2013, p. 7, at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index.

96 Ibid.

97 Ibid, pp. 9-10.

98 Victorian Sentencing Advisory Council, *Sentencing Matters: Mandatory Sentencing*, August 2008, p. 1 at <https://sentencingcouncil.vic.gov.au/landing/publications>.

99 Victorian Sentencing Advisory Council, *Driving while Disqualified or Suspended Final Report*, April 2009, p. viii.

103. In the view of the Law Council, mandatory sentencing may contribute to an increased prison population which potentially results in an unsustainable infrastructure of prison costs and ultimately, an unworkable justice system.
104. This is further exacerbated because defendants are less likely to plead guilty if there is a mandatory imprisonment term. Generally, in Australia offenders can be granted a reduced prison term if they enter a plea of guilty. The High Court has explained the rationale behind this imprisonment discount in *Siganto v The Queen*¹⁰⁰:

*A plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and secondly, on the pragmatic ground that the community is spared the expense of a contested trial...It is also sometimes relevant to the aspect of remorse that a victim has been spared the necessity of undergoing the painful procedure of giving evidence.*¹⁰¹

105. Under mandatory sentencing laws, a defendant has no motivation to plead guilty as there is no chance of a reduced sentence. This means that potentially more contested cases appear before the courts requiring the use of extra resources. The contested cases also produce court delays while not-guilty pleas are being considered. For instance, the Law Society of NSW has noted that Commonwealth people smuggling provisions which involve mandatory minimum sentences resulted in a large number of matters before the District Court in 2012, which placed a considerable strain on the resources of the courts, Legal Aid NSW and the Office of the Commonwealth Director of Public Prosecutions.¹⁰²
106. In addition, courts may be less likely to grant bail to offenders because there will be an increased incentive for offenders to flee, which accordingly increases the remand prison population.¹⁰³ This has negative implications for the criminal justice system as a whole, including individuals' access to legal advice and representation, noting that the criminal justice system is already significantly under-resourced.¹⁰⁴ In addition, contested cases can potentially cause further anguish to the victim and the victim's family because the outcome of the case is uncertain and protracted.
107. In contrast, research indicates that reducing the recidivism rates of offenders will also reduce court appearances. For instance, research suggests that a 10 per cent reduction in the rate of Indigenous recidivism would reduce the number of Indigenous court appearances by more than 30 per cent, and a 20 per cent reduction would reduce the number of Indigenous court appearances by 48 per cent.¹⁰⁵

100 *Siganto v The Queen* (1998) 194 CLR 656.

101 *Ibid*, at p. 664.

102 For example, during January to early July 2012, the Law Society of New South Wales noted that there were over 30 people smuggler cases listed and the delay between committal and trial increased from 13-14 weeks to 19 weeks. A shortage of interpreters and difficulties in obtaining evidence of proof of age for those claiming to be minors also contributed to delays.

103 Nicholas Cowdery QC, 'Legal Reforms in NSW', *ABC Law Report*, 11 February 2014 at <http://www.abc.net.au/radionational/programs/lawreport/one-punch-laws-nsw/5249200#transcript>.

104 The Law Council has on several occasions noted the need for increased legal funding including to the criminal justice system to avoid injustices from occurring. See for instance Law Council of Australia, 'Legal Aid Funding Cuts Creating Criminal Injustice System' (Media Release, 23 August 2013) at <http://www.lawcouncil.asn.au/lawcouncil/index.php/law-council-media/media-releases>.

105 Boris Beranger, Don Weatherburn and Steve Moffatt. 'Reducing Indigenous Contact with the Court System' (2010) Issue Paper 54 *NSW Bureau of Crime Statistics and Research* p. 3.

Disproportionate social cost

Overview

108. The Law Council is also deeply concerned that mandatory sentencing can have a disproportionate effect on vulnerable groups within the community, including:
- Indigenous Australians;
 - juveniles; and
 - persons with a mental illness or an intellectual disability.
109. Mandatory sentencing legislation can have ongoing adverse impacts on such groups of society especially when the laws focus on offences commonly committed by these groups (for example property offences). The people smuggling mandatory sentencing regime can also impact most severely on individuals who are impoverished crew members, not organisers. The disproportionate impact of mandatory sentencing on each of these groups is discussed briefly below.

Impact on Indigenous Australians

110. The over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system continues to be a serious social problem in Australia and a matter of deep concern to the Law Council, which has called for urgent public attention to this issue.¹⁰⁶ Numerous reports over the last 20 years have indicated that Indigenous incarceration rates are extremely high and have been steadily rising.¹⁰⁷ Most recently, an Australian Institute of Criminology report¹⁰⁸ found that the proportion of Indigenous prisoners has almost doubled over the 20 years since the Royal Commission into Aboriginal Deaths in Custody (RCADIC). In 1991, Indigenous people represented around one in seven people in Australian prisons (14 per cent); and in 2011, Indigenous people represented one in four people in prison (26 per cent), and one in five deaths in custody (21 per cent).
111. In June 2013, Indigenous prisoners represented 86 per cent of the NT adult prisoner population, 40 per cent of the WA adult prison population, and 27 per cent of the prison population nationally.¹⁰⁹
112. In June 2013, WA had the highest ratio of Aboriginal and Torres Strait Islander to non-Indigenous age-standardised imprisonment rates in Australia (21 times higher for Aboriginal and Torres Strait Islander prisoners).¹¹⁰ The most common offences for Western Australia and the Northern Territory were acts intended to cause injury, unlawful entry with intent and robbery, extortion and related offences – all of which are mandatory sentencing offences.¹¹¹

106 On numerous occasions, the Law Council has expressed its strong concern regarding unacceptably high imprisonment rates of Indigenous Australians, and called on state and territory governments to adequately address this serious social problem. See for instance Law Council of Australia, 'Law Council calls on COAG to deal with Unacceptable Indigenous Imprisonment Rates' (Media Release, 26 July 2013) at <http://www.lawcouncil.asn.au/lawcouncil/index.php/law-council-media/media-releases>.

107 Between 2012 and 2013, the Indigenous imprisonment rate rose by 6 per cent alone – see ABS, *Prisoners in Australia 2013*, December 2013. Between 2001 and 2008 the Indigenous imprisonment rate rose by 37 per cent - see Jacqueline Fitzgerald, 'Why are Indigenous imprisonment rates rising?' August 2009 *Crime and Justice Statistics Bureau Brief*, NSW Bureau of Crime Statistics and Research at [http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/BB41.pdf/\\$file/BB41.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/BB41.pdf/$file/BB41.pdf). The Australian Institute of Health and Welfare (AIHW) found that the imprisonment rate of Indigenous Australians rose 52 per cent between 2000 and 2010 – see AIHW, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander population: an overview*, May 2011, p. vii, at <http://144.140.150.217:9091/servlet/com.trend.iwss.user.servlet.sendFile?downloadfile=IRES-2034162529-E77CE358-2202-2052-12>.

108 Matthew Lyneham and Andy Chan, *Deaths in Custody in Australia to June 2011: Twenty years of monitoring by the National Deaths in Custody Program since the Royal Commission into Aboriginal Deaths in Custody*, AIC Monitoring Reports 20, Australian Institute of Criminology, 2013.

109 Australian Bureau of Statistics, *Prisoners in Australia*, 2013 Report, 5 December 2013.

110 Ibid.

111 Ibid.

113. The imprisonment rate for Indigenous females increased by 58.6 per cent between 2000 and 2010, while the imprisonment rate for Indigenous males increased by 35.2 per cent over the same period.¹¹²
114. A key factor identified as contributing to the disproportionate Indigenous presence in the criminal justice system compared to non-Indigenous people is the significant disadvantage faced by many Indigenous communities as a result of unemployment, substance abuse, mental health issues, lack of education, over-crowded housing and family violence.¹¹³
115. State and territory government bail and sentencing policies also play a significant role, particularly in jurisdictions with high populations of Indigenous people where mandatory sentencing regimes are in force, and individuals are sometimes incarcerated for trivial offences. In its evidence before the Senate Committee as part of its inquiry into justice reinvestment, the North Australian Aboriginal Justice Agency stated that as at December 2012, 38 per cent of the NT's prison population was serving a sentence of three months or less, and 63 per cent were serving sentences less than six months.¹¹⁴
116. Under the 1997 mandatory sentencing regime in the NT, Indigenous adults were approximately 8.6 times as likely as non-Indigenous adults to receive a mandatory prison term. Indigenous adults formed an even higher proportion of repeat offenders, with 95 per cent of one-year minimum sentences being ordered against Indigenous offenders.¹¹⁵
117. Mandatory sentencing laws regarding assaults came into effect in the NT in 2008, and there were few differences in sentencing outcomes for repeat offenders from Indigenous or non-Indigenous backgrounds. However, an Indigenous male was 68 more times likely to be convicted or in contact with the justice system for this kind of offence.¹¹⁶
118. Similarly first-time violent offenders were disproportionately Indigenous. Indigenous men made up 91 per cent of those convicted under the violent offence, and were 20 times more likely to be convicted under the offence than non-Indigenous men.¹¹⁷ This means, that the overall impact of mandatory sentencing falls disproportionately on the Indigenous population. The result is that mandatory sentencing contributes to the over-representation of Indigenous people in the corrective system.
119. The Law Council has received feedback from the North Australian Aboriginal Justice Agency (NAAJA) that the NT mandatory sentencing provisions are leading to Aboriginal people going to jail who might not have otherwise done so, and to longer sentences being imposed. Further, NAAJA has noted that people in remote communities generally know very little if anything about mandatory sentencing and some of the worst examples of unfair sentences happen to people in remote communities.

112 Steering Committee for the Review of Government Service Provision, 'Overcoming Indigenous Disadvantage: Key Indicators 2011' Productivity Commission, 2011, p. 6.

113 See for instance the Northern Territory Board, *Inquiry into the Protection of Aboriginal Children from Sexual Abuse: Ampe Akelyrnemane Meke Mekarle 'Little Children are Sacred'*, 2007, p. 67 and Australian Bureau of Statistics *Aboriginal and Torres Strait Islander Wellbeing: A focus on children and youth Report*, April 2011, p. 1 and p. 226.

114 See evidence of Mr J. Sharp, North Australian Aboriginal Justice Agency, Senate Legal and Constitutional Affairs References Committee, Inquiry into the value of a justice reinvestment approach in Australia, Hearing Transcript, 1 May 2013, p. 14.

115 Northern Territory Office of Crime Prevention, *Mandatory Sentencing for Adult Property Offenders – the Northern Territory Experience*, 2003, p. 13.

116 Stephen Jackson and Fiona Hardy, 'The Impact of Mandatory Sentencing on Indigenous Offenders' (Speech delivered at Sentencing Conference 2010, National Judicial Conference, Canberra 6 & 7 February 2010) p. 3.

117 Ibid.

120. United Nations Committees have also voiced concern over the disproportionate impact of mandatory sentencing on Indigenous Australians.¹¹⁸ On this basis, the United Nations Committee Against Torture recommended that Australia abolish mandatory sentencing.¹¹⁹ The Australian Human Rights and Freedom Commissioner, Mr Tim Wilson, has also spoken strongly against mandatory sentencing laws and noted their disproportionate impact on Indigenous Australians.¹²⁰
121. The Law Society of South Australia's Aboriginal Issues Committee has noted that the disproportionate impact on Indigenous Australians of mandatory sentencing may also have a detrimental affect on Australia's current reconciliation position. That is, mandatory sentencing laws may operate to widen the gap between Indigenous and white Australians and further marginalise Indigenous offenders and in particular young Indigenous offenders in remote areas. In addition, the Committee has noted that incarceration can lead to an increase in mental illness in Indigenous youths which then leads to desperation and a greater risk of suicide. Accordingly, there is a concern that mandatory sentencing may increase deaths in custody among Indigenous youth.
122. The relevant statistics regarding the detention of, and the impact of mandatory sentencing laws upon, Indigenous juveniles are set out below. These statistics are particularly alarming.
123. In its advocacy regarding Indigenous incarceration rates, the Law Council has emphasised that an increasing number of Australians are coming into the criminal justice system, and then a disproportionately high number are remaining in it. It has also expressed its deep concern regarding the worrying consequences which exist for entire Indigenous communities as a result of the unacceptably high Indigenous imprisonment rate.¹²¹

Impact on juveniles

124. Statistics on juveniles in the criminal justice system reveal the following:
- in the June quarter of 2013 about half (51 per cent) of juveniles in detention on an average night were Indigenous,¹²² despite Indigenous people comprising 2.5 per cent of the total Australian population;¹²³
 - in June 2013 Indigenous youth were 31 times more likely to be in detention than non-Indigenous youth, and this was an increase from 26 times as likely in 2009;¹²⁴
 - in 2013 Indigenous children constituted 67.5 per cent of the WA juvenile prison population.¹²⁵ This is particularly significant as only about five per cent of young Australians are Indigenous;¹²⁶ and

118 See for example the United Nations Committee Against Torture, *Concluding Observations of the Committee Against Torture: Australia*, (April 2008) CAT/C/AUS/CO/1, p. 8: Recommendation 5.4 at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=AUS&Lang=EN.

119 Ibid.

120 Human Rights and Freedom Commissioner Tim Wilson, *Queensland Law Society Mandatory Sentencing Policy Paper Launch*, 4 April 2014.

121 Law Council of Australia, 'Law Council calls on COAG to deal with Unacceptable Indigenous Imprisonment Rates' (Media Release, 26 July 2013) at <http://www.lawcouncil.asn.au/lawcouncil/index.php/law-council-media/media-releases>.

122 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2013*, 10 December 2013, p. vii at <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129545393>.

123 Australian Institute of Criminology *RCIADIC Monitoring Report into Deaths in Custody*, 30 June 2011, p. 3 at http://www.aic.gov.au/media_library/publications/mr/20/mr20.pdf.

124 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2013*, 10 December 2013, p. 9 at <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129545393>.

125 Western Australian Mental Health, Western Australian Council of Social Service and Western Australian Network of Alcohol & Other Drug Agencies, *Justice and Community Safety in Western Australia Report*, p. 6 at http://www.wacoss.org.au/Libraries/State_Election_2013_Documents/Justice_and_Community_Safety_Report.sflb.ashx.

126 Australian Institute of Health and Welfare, *Indigenous Young People in the Juvenile Justice System*, Bulletin 109, November 2012 at <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129542188>.

- young people in detention in the NT increased from 2009 to 2013, from 12.2 to 18.7 per 10,000, and most of those in detention in the NT were Indigenous (89 to 100 per cent in all quarters from June 2009 to June 2013).¹²⁷
125. The impact of mandatory sentencing on juveniles is also visible in the statistics:
- according to the NT Correctional Services Annual Report 2011-2012, the most common offences for juvenile detainees in the NT were 'acts intended to cause injury' and 'unlawful entry with intent/burglary, break and enter'¹²⁸ (mandatory sentencing offences under the new 2013 NT mandatory sentencing regime);
 - between 2007 and 2013 the number of juveniles in detention in WA grew by 56.3 per cent¹²⁹ and according to the Children's Court of WA the most common offences were 'unlawful entry with intent/burglary, break and enter' and 'acts intended to cause injury'¹³⁰ – both of which are mandatory sentencing offences; and
 - in 2002, 81 per cent of juvenile offenders convicted under WA mandatory sentencing legislation were Indigenous. It has been commented that this meant that that 4 per cent of the state's population accounted for approximately 80 per cent of convictions, clearly indicating the uneven impact of the legislation.¹³¹
126. In addition, research indicates that juvenile offenders given a custodial sentence are 74 per cent *more likely* to be reconvicted at any given time than those who receive a non-custodial penalty.¹³² In 2010, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs tabled a report into high levels of incarceration among Indigenous youths and noted that 'there is a strong link between the disproportionate rates of juvenile detention and the disproportionate rates of adult imprisonment'.¹³³
127. These statistics raise strong concerns about the unacceptable impact of mandatory sentencing on juvenile Australians, including young Indigenous Australians. Consequently, as noted above, the Law Council queries whether Australia's mandatory sentencing regimes are consistent with Australia's voluntarily assumed international human rights obligations.

Impact on people with a mental illness or intellectual disability

128. The Law Council is also concerned that mandatory sentencing may have a particularly unjust impact on those with mental illness or intellectual disabilities. Most of the offences to which mandatory sentencing applies prevent a court from taking into account the individual characteristics of the offender, including any mental illness or disability.
129. The idea of mandatory sentencing is in part based on the principle of deterrence. However, a deterrent sentence is not usually appropriate in dealing with a person with mental illness or intellectual disability because the punishment can be meaningless to the offender.¹³⁴ Further, an offender may not be aware of the consequences of his/her actions. While this

127 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2013*, 10 December 2013, p. 51 at <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129545393>.

128 Northern Territory Correction Services *Annual Report 2011-2012*, pp. 30-34 at http://www.nt.gov.au/justice/policycoord/researchstats/researchstats/2013/NTDCS_annual_statistics/2011_12NTCS_annual_statistics.pdf.

129 Western Australian Mental Health, Western Australian Council of Social Service and Western Australian Network of Alcohol & Other Drug Agencies, *Justice and Community Safety in Western Australia Report, 2013*, p. 7 at http://www.wacoss.org.au/Libraries/State_Election_2013_Documents/Justice_and_Community_Safety_Report.sflb.ashx.

130 Government of Western Australia Department of the Attorney-General, *Report on Criminal Cases in the Children's Court of Western Australia 2007/08 to 2001/12*, p. 7 at http://www.department.dotag.wa.gov.au/_manifest/stats_childrens_court.jmf.

131 Glen Cranny, 'Mandatory sentencing – where from, where to and why?', Gilshenan & Luton Lawyers, Brisbane Queensland.

132 D. Weatherburn, S. Vignaendra, A. McGrath, *The specific deterrent effect of custodial penalties on juvenile re-offending*, AIC Technical and Background Paper 33, 2009 Australian Institute of Criminology, p. 9.

133 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, June 2011, Australian Parliament, Commonwealth of Australia, p. 8.

134 See the Senate Legal and Constitutional Legislative Affairs Committee *Inquiry into the Human Rights (Mandatory Sentencing of Property Offenders) Bill 2000*.

should not necessarily absolve an offender from responsibility, other non-custodial remedies such as restorative justice may be more appropriate to enable an offender to understand the consequences and impact of his/her behaviour.

130. While there are no concrete statistics on the impact of mandatory sentencing on people with a mental illness or intellectual disability, research studies in Australia indicate that this particular group are significantly over represented in the criminal justice system. For instance, a study by the Australian Institute of Health and Welfare in 2012 found that 38 per cent of prison inmates reported that they had previously been told by a medical practitioner that they had a mental health disorder (including substance abuse disorders), and that 21 per cent of prison entrants were currently on medication for a mental health condition.¹³⁵ In addition, the study found that Indigenous prison entrants were more likely than non-Indigenous prison entrants to have ever been told that they had a mental health disorder (43 per cent and 29 per cent, respectively).
131. Judicial authority also recognises the unjust impact mandatory sentencing can have on people with a mental illness. In the Northern Territory, in the case of *Trennery v Bradley*¹³⁶, for example, the Chief Justice of the Court, Justice Martin, noted the problems which may arise in relation to defendants who suffer from a mental illness. He pointed out that under mandatory sentencing laws, a court may not consider diagnosis and treatment or make a hospital order, even though this may be more humane in the particular circumstances of a case.¹³⁷

Impact of mandatory sentencing for people smuggling offences

132. Mandatory sentencing is also particularly problematic in the context of people smuggling. Since the late 1990s most of the asylum seekers arriving by boat in Australia have been brought by people smugglers operating out of Asia. These people smugglers appear to recruit crew members who are fishermen from impoverished villages, including minors.
133. Under Commonwealth legislation, mandatory sentences apply in relation to certain people smuggling offences.¹³⁸
134. According to official data, 493 people were arrested for these people smuggling related offences (under section 236B of the *Migration Act 1958* (Cth) (the Migration Act)¹³⁹ between 2008 and 2011. Of these, most arrests were of impoverished crew members rather than the organisers of boat expeditions. In an address to the National Judicial College, the Hon. Wayne Martin, Chief Justice of Supreme Court of Western Australia, summarised this data as follows:

Of those arrests, only ten could be termed organisers, and the remainder described as crew. Typically the people arrested as crew are those who are left on the boat at the time it is apprehended in Australian waters. Very commonly more senior personnel, including organisers, will have disembarked... before there is any risk of apprehension. Those that remain and are arrested and brought before Australian courts are often impoverished and illiterate, and have been induced to work on the boat for a sum which they regard as very substantial, but which is the Indonesian equivalent of between \$300 and \$500.¹⁴⁰

135 The Australian Institute of Health and Welfare, *Mental Health of Prison Entrants*, 2012 at <http://www.aihw.gov.au/prisoner-health/mental-health/>.

136 *Trennery v Bradley* (1997) 115 NTR 1.

137 *Ibid*, at p. 13.

138 Section 236B of the *Migration Act 1958* (Cth) provides for the application of mandatory minimum penalties for certain aggravated people smuggling offences. For a further discussion, of the people smuggling offences see Attachment A and the examples provided regarding Commonwealth mandatory sentencing regimes.

139 *Ibid*.

140 The Hon. Wayne Martin, Chief Justice of Western Australia and Chair – National Judicial College of Australia, *Sentencing Issues in People Smuggling Cases* (Address to Federal Crime and Sentencing Conference, 11 February 2012, Australian National University, Canberra) p. 12.

135. The Hon. Chief Justice also stated:

...the prescription of a minimum sentence creates the risk that a Court may be required to impose a sentence which is disproportionate to the culpability of the offender, or the seriousness of the offence, or which may prejudice the prospects of rehabilitation and which is to that extent unjust...¹⁴¹

136. In *Magaming v The Queen*,¹⁴² the High Court upheld the Constitutional validity of the mandatory sentencing provisions under the *Migration Act 1958* (Cth). However, it is worth noting that at sentencing the trial judge described Mr Magaming as ‘a simple Indonesian fisherman’ and stated that he would have imposed a lighter sentence than that required by the mandatory sentencing provision because:

The seriousness of [Mr Magaming’s] part in the offence therefore falls right at the bottom end of the scale. ... In the ordinary course of events, *normal sentencing principles would not require a sentence to be imposed as heavy as the mandatory penalties that have been imposed by Federal Parliament. However, I am constrained by the legislation to impose that sentence.*¹⁴³

137. Other trial judges have also spoken out about the injustice of the mandatory sentencing regime and the removal of judicial discretion to pass proportionate sentences.¹⁴⁴
138. While the circumstances of those persons most likely to be charged and prosecuted for people smuggling activities should not necessarily absolve them of criminal responsibility, they point to a need for judges to be able to use discretion and take a range of matters into account in issuing an appropriate sentence.¹⁴⁵
139. The case of *Magaming* is further discussed below. Notwithstanding the High Court’s findings regarding the constitutional validity of mandatory sentencing provisions under the Migration Act, the Law Council considers that the available case law helps to demonstrate why mandatory sentencing is undesirable on a policy basis.

Other unintended consequences

140. In addition to the economic and social costs, the Law Council notes that mandatory sentencing can involve other unintended consequences.
141. For example, women’s services and lawyers raised concerns that proposed new mandatory sentencing laws in NSW, in imposing a blanket penalty for certain offences, may have the unintended consequence of reducing the number of people convicted for domestic assault because witnesses may be reluctant to provide evidence.¹⁴⁶ The President of the NSW Bar Association has stated that women are often reluctant to provide evidence for a range of emotional and economic reasons, including sometimes a fear that their breadwinner will be imprisoned for a period of time.¹⁴⁷

¹⁴¹ Ibid, p. 11.

¹⁴² *Magaming v The Queen* [2013] HCA 40.

¹⁴³ *R v Magaming* (Unreported, Blanch J CJDC, District Court of New South Wales, 9 September 2011) at [1.2].

¹⁴⁴ See for instance: *The Queen v Tahir and Beny*, unreported, Supreme Court of the Northern Territory, Mildren J; *The Queen v Mahendra*, Supreme Court of the Northern Territory, Transcript of sentencing proceedings, Blokland J, 1 September 2011.

¹⁴⁵ For specific cases of injustice see for instance Flatley, C, ‘Judge slams mandatory sentence for people smugglers’, *Sydney Morning Herald*, 11 January 2012; *R v Ambo* [2011] NSWDC 182; *The Queen v Mahendra* [2011] NTSC 57; *The Queen v Edward Nafi* [2011] NTSC (unreported). Michael Duffy, ‘Tough laws on people smuggling are a con’, *Sydney Morning Herald*, 13 February 2012, at: <http://www.smh.com.au/opinion/politics/tough-laws-on-people-smuggling-are-a-con-20120212-1szkpk.html#ixzz1nG911yiu>.

¹⁴⁶ Anna Patty ‘Domestic Violence: Mandatory Sentencing Laws may make Victims Reluctant to give Evidence’ *Sydney Morning Herald*, 25 February 2014, at <http://www.smh.com.au/nsw/domestic-violence-mandatory-sentencing-laws-may-make-victims-reluctant-to-give-evidence-20140224-33d4u.html>.

¹⁴⁷ Ibid.

142. In an effort to take these concerns into account the proposed new mandatory sentencing laws under the *Crimes Amendment (Intoxication) Bill 2014* (NSW) (the NSW Intoxication Bill) were amended to apply only for offences involving reckless wounding or reckless causing of grievous bodily harm, where the offender was 'intoxicated in public'¹⁴⁸. However, this response then produces the further anomaly that the sentences afforded will discriminate between victims depending on where the offence occurred (noting that certain crimes, such as domestic violence, are more likely to occur indoors).
143. Similarly, unjust outcomes may arise where mandatory sentences are applied to certain occupational groups with a discriminatory effect, for instance, as is the case in NSW where a mandatory life sentence exists for the murder of a police officer in certain circumstances. As noted by former Director of Public Prosecutions for NSW, Nicholas Cowdery QC:
- Inevitably the families and associates of murder victims from other occupations, quite reasonably, ask why 'their' victim's loss is not viewed by the law as serious enough to attract the mandatory maximum sentence.*¹⁴⁹
144. Members of the Law Council's Human Rights Committee have also raised concerns that the NSW Intoxication Bill contains heavier maximum and minimum mandatory sentences where the victim is a police officer, compared to another individual.¹⁵⁰
145. More broadly, the Human Rights Committee members have raised concerns about the effect of mandatory sentencing upon the general principle of equality before the law.¹⁵¹ While the community may wish to see their concerns about these scenarios addressed, the way in which such laws - which often target particular scenarios, crimes or victim types - operate to undermine such equality may not always be fully understood.
- (a) For example, the Human Rights Committee has noted that the NSW Intoxication Bill focuses only on the *reckless* wounding, or *reckless* causing of grievous bodily harm, where the offender was 'intoxicated in public'. However, mandatory sentences will not apply in relation to *intentional* grievous bodily harm and *intentional* wounding. For those offences, the sentence will remain discretionary whether the accused is intoxicated or not.¹⁵²
- (b) This potential for different sentences to result (depending on the occupation of the victim, the place of the offence) or for lighter sentences for a sober, deliberate accused compared with a reckless, intoxicated accused, undermines the principle of equality before the law.
146. Another possible unintended consequence of mandatory sentencing may be that offenders are charged with lesser offences that do not adequately reflect the nature of the criminal conduct. Given that mandatory sentencing offences may result in more contested cases, prosecutors and police may feel additional pressures to negotiate with the offender and/or the defence and agree to pursue lesser charges to prevent court delay and a backlog of cases. This process is 'not transparent or readily accountable and can be unsatisfactory also for victims of crime'.¹⁵³

148 As defined by proposed section 8A of the *Crimes Act 1900* (NSW).

149 Nicholas Cowdery AM QC. 'Mandatory Sentencing and Juveniles'. (Speech delivered at Law Institute of Victoria Criminal Law Conference, 29 July 2011, Melbourne) p. 8.

150 Subsection 60(3B) of the Intoxication Bill (NSW) imposes both a heavier maximum sentence (14 years) and a heavier mandatory minimum sentence (five years) compared to proposed sections applicable generally (subsection 35(1A) provides a maximum penalty of 12 years and a minimum of four years for reckless grievous bodily harm when intoxicated in public, and subsection 35(3A) provides a maximum penalty of nine years and a minimum of three years for reckless wounding when intoxicated in public).

151 See for example, Article 26 of the *International Covenant on Civil and Political Rights* and the Law Council of Australia, *Policy Statement on Rule of Law Principles*, March 2011. Principle 2, p. 2, at <http://www.lawcouncil.asn.au/lawcouncil/index.php/divisions/international-division/rule-of-law>.

152 Section 33 of the *Crimes Act 1900* (NSW).

153 *Ibid.*

JUDICIAL AUTHORITY

147. For the past 17 years a number of prominent judges writing extra-judicially have expressed the condemnation of mandatory sentencing regimes that can produce disproportionate and unjust sentencing outcomes. For example, on 17 February 2000, former High Court Chief Justice, Sir Gerard Brennan stated:

*A law which compels a magistrate or judge to send a person to jail when he doesn't deserve to be sent to jail is immoral... Sentencing is the most exacting of judicial duties because the interests of the community, of the victim of the offence and of the offender have all to be taken into account in imposing a just penalty.*¹⁵⁴

148. NSW Supreme Court Chief Justice Tom Bathurst has commented in the context of mandatory sentencing that it is a 'mistake to see an excessively punitive approach as the only way courts can recognise the interests of victims' of violent crime.¹⁵⁵ Former Western Australian Supreme Court Justice Murray has stated that 'the need to impose the mandatory punishment simply creates injustice that otherwise would have been avoided by exercising discretion'.¹⁵⁶

149. Members of the judiciary have also observed in proceedings before them that mandatory sentences do not necessarily ensure that the punishment fits the level of criminal culpability. For example, Justice Mildren of Supreme Court of the NT has noted the 'unfairness and irrationality of mandatory sentencing'.¹⁵⁷ In a people smuggling case, Justice Allsop of the NSW Court of Criminal appeal observed:

*Here, in relation to these offences, an illiterate and indigent deckhand having little or no knowledge of, or contact with, the organisers of the smuggling, and knowing little about the voyage in respect of which he or she was charged, pondering his or her incarceration for five years for a first offence, could legitimately conclude that, at a human level, he or she had been treated arbitrarily or grossly disproportionately or cruelly.*¹⁵⁸

154 Sir Gerard Brennan, 'Statement on mandatory sentencing', *The Age*, 17 February 2000, at <https://www.mail-archive.com/recoznet2@paradigm4.com.au/msg02247.html>.

155 Chief Justice Tom Bathurst, 'NSW Supreme Court Chief Justice Tom Bathurst urges Debate on Mandatory Sentencing', *The Sydney Morning Herald*, 4 February 2014, at <http://www.smh.com.au/nsw/nsw-supreme-court-chief-justice-tom-bathurst-urges-debate-on-mandatory-sentencing-20140203-31xgp.html>.

156 Former Western Australian Justice Murray, 'Mandatory Sentencing Defended as Judge Critical', *ABC News*, 19 February 2013, at <http://www.abc.net.au/news/2013-02-19/former-judge-criticises-mandatory-sentencing/4527428>.

157 *O'Connor v Ryan* (2011) NTSC (unreported) at [14].

158 *Mursid Karim v R* (2013) NSWCCA (unreported) at [121].

150. As noted above, in *Magaming v The Queen*¹⁵⁹, the High Court has previously upheld the Constitutional validity of the mandatory sentencing provisions under the Migration Act. In that case, Mr Magaming, a crew member aboard a people smuggling boat, was found guilty of a people smuggling offence for facilitating the coming to Australia of a group of unlawful citizens contrary to subsection 233C(1) of the Migration Act. Under the Migration Act facilitating a single unlawful non-citizen is an offence under subsection 233A(1), which does not carry a mandatory sentence. However, the offence under which Mr Magaming was found guilty – subsection 233C(1) – is an aggravated offence of smuggling a group of at least five people, which carries a mandatory sentence under the Migration Act. Under section 236B of the Migration Act, Mr Magaming was sentenced to the mandatory minimum term of five years' imprisonment with a non-parole period of three years.
151. Mr Magaming contended before the High Court that where a prosecutor can choose between charging an offence that carries a mandatory minimum sentence and another that has no mandatory minimum sentences, the prosecutor in effect impermissibly exercises judicial authority contrary to chapter III of the Constitution.¹⁶⁰ He also argued that the mandatory minimum sentence provision was incompatible with the institutional integrity of the courts and that it required the court to issue an arbitrary and non-judicial punishment.¹⁶¹
152. The High Court dismissed the appeal and held that although the prosecutor in the case had a choice as to which offence to charge, that choice did not involve the exercise of judicial power, that is, a determination of innocence or guilt and what punishment will be imposed.¹⁶² The High Court also held that the imposition of a mandatory minimum sentence was not constitutionally invalid because it required the courts to issue an 'arbitrary and non-judicial punishment'.¹⁶³ In coming to this conclusion the Court observed that:
- mandatory sentences are 'known forms of legislative prescription of penalty for crime';¹⁶⁴
 - the discretion of a judge in sentencing matters is not unbounded and is always constrained by statutory requirements and judicial precedent;¹⁶⁵ and
 - mandatory sentences are but one form of a statutory requirement that limits judicial discretion on punishment matters.¹⁶⁶
153. Further, 'arbitrariness', as considered by the High Court, was limited by Mr Magaming's argument that because the simple offence carried no mandatory minimum term, the imposition of the mandatory minimum penalty for the aggravated offence was arbitrary.¹⁶⁷ The High Court commented that '[h]ow or why that should be so was not explained'.¹⁶⁸

159 *Magaming v The Queen* [2013] HCA 40.

160 *Ibid*, at [11]-[12].

161 *Ibid*.

162 *Ibid*, at [26].

163 *Ibid*, at [42].

164 *Ibid*, at [49].

165 *Ibid*, at [47].

166 *Ibid*, at [47]-[49].

167 *Ibid*, at [44].

168 *Ibid*, at [45].

154. The High Court also held that even if the applicant's sentence was 'too harsh' when:

...measured against some standard found outside the relevantly applicable statutory provisions, that conclusion does not entail the invalidity of any of the impugned provisions.¹⁶⁹

155. The above analysis shows that the High Court's consideration of the Migration Act mandatory sentencing provision was limited to an assessment of the Constitutional validity of the provision in light of the arguments posed by Mr Magaming. That is, the High Court found that it is not beyond the power of the Commonwealth to impose mandatory sentences. The judgement was about the extent of Commonwealth power.

156. The High Court did not consider the issue of whether mandatory sentences were an appropriate form of punishment, or contrary to rule of law principles. Nor did the High Court, in the case before it, consider whether mandatory sentencing is inconsistent with Australia's international human rights obligations as it was not an issue raised in the case.

¹⁶⁹ Ibid, at [52].

ALTERNATIVES

Overview

157. As noted above, the Law Council is concerned that mandatory sentencing imposes unacceptable restrictions on judicial discretion and undermine the rule of law. They may also violate Australia's human rights obligations by being in contravention of various articles within the ICCPR and the CROC. In addition, the Law Council recognises that mandatory sentencing regimes are costly, and that there is a lack of evidence as to their direct deterrent effectiveness and ability to reduce crime. For these reasons, the Law Council considers that alternatives to mandatory sentencing should be pursued. It notes that the Human Rights and Freedom Commissioner, Mr Tim Wilson, has also indicated that there are many alternatives to mandatory sentencing that are more suitable for combating crime.¹⁷⁰ Some examples of such possible alternatives are outlined below.
158. In this discussion, the Law Council recognises that mandatory sentencing provisions are often introduced to combat specific crime problems which are of a concern to the community. It notes, therefore, that particular responses will be required depending on the conduct sought to be addressed. It contends that alternative measures may be more effective for reducing crime while remaining compatible with the rule of law and Australia's human rights obligations. The Law Council highlights some possible alternatives in this regard.
159. The Law Council also encourages policy makers considering the most appropriate responses to specific crime problems to ensure that proposed policies are based on a methodical, research-driven approach. It is also essential to engage stakeholders in policy development (such as victim advocates, Indigenous groups, mental health and intellectual disability advocates, sentencing councils, law societies and bar associations, members of the judiciary, the police and directors of public prosecutions).¹⁷¹

170 Human Rights and Freedom Commissioner Tim Wilson, *Queensland Law Society Mandatory Sentencing Policy Paper Launch*, 4 April 2014.

171 A similar approach has also been recommended by Ram Subramanian and Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences*, Policy Report Vera Institute of Justice, February 2014, pp. 15-16.

Justice reinvestment

160. Justice Reinvestment is an alternative to imprisonment which diverts ‘funds from incarceration to community-based programs and services that address the underlying causes of crime’.¹⁷² The Law Council encourages policy makers when dealing with specific crime problems to consider the potential benefits of implementing a justice reinvestment scheme as an alternative to mandatory sentencing policies.¹⁷³ It notes that the Senate Legal and Constitutional Affairs References Committee has also recommended that ‘federal, state and territory governments recognise the potential benefits of justice reinvestment, and develop and fund a justice reinvestment pilot program for the criminal justice system’.¹⁷⁴
161. Justice reinvestment essentially refers to the diversion of funds that would ordinarily be spent on keeping individuals in prison, and instead, investing this money in the development of programs and services that aim to address the underlying causes of crime in communities that have high levels of incarceration.¹⁷⁵ It has been described as a ‘data-driven’¹⁷⁶ and comprehensive approach which ‘makes us think more broadly and holistically about what really leads to crime and how we can prevent it’.¹⁷⁷
162. As noted by one of the Law Council’s Constituent Bodies, the Law Society of Western Australia (LSWA), the justice reinvestment methodology can be broken down into a series of steps. The first step involves collecting crime data from relevant state and/or local agencies and analysing this data to identify the communities that have the highest imprisonment rates and spend the most amount of money on imprisonment. This involves the use of justice mapping.¹⁷⁸
163. Once this data has been obtained, the data is examined to determine the reasons why the ‘targeted’ communities have such high rates of imprisonment. A set of options are then developed to assist these communities to reduce the amount of money spent on incarceration.
164. The third step in the process involves calculating the savings that are likely to be made as a result of implementing the options identified above, and reinvesting this money in programs and services that address the underlying causes of crime in the ‘targeted’ communities.
165. The final step in the justice reinvestment process involves evaluating the effectiveness of the programs and services in reducing recidivism and imprisonment. The overall impact on the ‘targeted’ communities is also evaluated.
166. Justice reinvestment relies heavily on interactions between agencies at both the state and local level. It also has a significant community-focus, seeking ‘community-level solutions to community-level problems’.¹⁷⁹ It is these aspects of justice reinvestment, along with its evidence-based approach and focus on addressing and preventing the underlying causes of crime such as

172 Senate Legal and Constitutional Affairs References Committee, *Report of Inquiry into Access to Justice*, 8 December 2009, p. xviii. Available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/completed_inquiries/2008-10/access_to_justice/report/index.htm.

173 The following discussion of Justice Reinvestment is based on excerpts from the Law Council’s Submission to the Senate Legal and Constitutional Affairs Committee, ‘Value of a Justice Reinvestment Approach to Criminal Justice in Australia’, 22 March 2013, at <http://www.lawcouncil.asn.au/lawcouncil/index.php/library/submissions>.

174 *Ibid*, Recommendation 21, p. xxiii.

175 *Ibid*, p. 585.

176 A. Dwyer, S. Neusteter & P. Lachman, *Data-Driven Decision-making for Strategic Justice Reinvestment*, (2012) Urban Institute Justice Policy Centre, Brief 2. Available from <http://www.urban.org/UploadedPDF/412543-Data-Driven-Decisionmaking-for-Strategic-Justice-Reinvestment.pdf>.

177 T. Calma, Australian Human Rights Commission, *2009 Social Justice Report – Aboriginal and Torres Strait Islander Social Justice Commissioner*, (2009) p. 12.

178 See D. Brown, M. Schwartz & L. Boseley, ‘The Promise of Justice Reinvestment,’ (2012) 37(2) *Alternative Law Journal*, p. 97.

179 S. Tucker and E. Cadora, ‘Ideas for an Open Society: Justice Reinvestment,’ (2003) 3(3) *Open Society Institute*, at http://www.opensocietyfoundations.org/sites/default/files/ideas_reinvestment.pdf.

unemployment and drug and alcohol abuse, that have given rise to the growing support for justice reinvestment in recent years throughout the world.

167. Justice reinvestment is a relatively new concept in Australia, which means that there is still some uncertainty surrounding the details of how such an approach would actually operate in practice in Australia. Despite these possible challenges, there are potential benefits to this approach which the Law Council submits that policy makers should consider before resorting to mandatory sentencing options. In the Law Council's view, diverting people from incarceration where appropriate, can prevent crime before it happens, promote rehabilitation and reduce recidivism in a manner that makes sense economically and socially. The Law Council considers that policy makers should consider, in particular, the possible benefits of a justice reinvestment approach which is targeted towards certain disadvantaged groups within the community, such as Indigenous Australians, individuals with a cognitive disability and other mental illnesses and juveniles. A justice reinvestment approach could focus on building community support, provide rehabilitation, interrupt the cycle of offending and, therefore, reduce crime.

Examples of a justice reinvestment approach

Youth justice conferencing

168. Some states and territories have already adopted particular types of initiatives in an effort to address the economic and social costs of traditional punishments like prison. Two of the Law Council's Constituent Bodies, the Queensland Law Society and the Bar Association of Queensland, note the effectiveness of a number of diversionary court programs and rehabilitation measures that could provide an evidence base for future justice reinvestment strategies. These include programs such as youth justice conferencing, the Drug Court, and the Murri Court.
169. Youth justice conferencing has been established in a number of jurisdictions in Australia¹⁸⁰ and aims to 'assist juveniles, their parents, victims and the community by facilitating their participation in a process that encourages juveniles to accept responsibility for their behaviour, allows victims to receive restitution, encourages family and community decision-making, reduces costs and prevents recidivism'.¹⁸¹
170. Youth justice conferencing has been found to be an effective way of involving offenders in the process of determining how they should be punished for their behaviour. Indeed, the Queensland Law Society notes that almost all of the youth justice conferences (95 per cent) held in Queensland between 2010 and 2011 resulted in the parties reaching an agreement, and 98 per cent of participants indicated that they considered the conference to be fair and were satisfied with the agreement that was reached.¹⁸² Despite such positive signals, however, the Queensland Government took steps to remove the option of court-ordered youth justice conferencing in 2012. The Queensland Law Society notes that conferencing remains available in Queensland through police referred conferencing, and suggests that it may benefit from further funding or inclusion in part of a broader justice reinvestment strategy.
171. Another diversionary initiative that currently operates, or has recently operated, in a number of jurisdictions in Australia is the Drug Court.¹⁸³ This court acts as a rehabilitative mechanism to address underlying causes of offending behaviour, and requires participants to: have abstained from

180 K. Richards, (2010), *Police referred restorative justice for juveniles in Australia*, Trends and Issues in Crime and Criminal Justice, No.398, Australian Institute of Criminology. Available at http://www.aic.gov.au/documents/8/B/B/per_cent7B8BB6EC00-2FDD-4CB9-A70F-DC451C3C22BDper_cent7Dtandi398.pdf.

181 Ibid.

182 Queensland Courts, Children's Court of Queensland *Annual Report 2010-2011*, p. 20. Available at http://www.courts.qld.gov.au/_data/assets/pdf_file/0019/131608/cc-ar-2010-2011.pdf.

183 Australian Institute of Criminology, *Australian Responses to Illicit Drugs: Drug Courts*. Available at http://www.aic.gov.au/criminal_justice_system/courts/specialist/drugcourts.html.

using drugs for a substantial period; and either be employed or to have developed skills that would assist them to gain employment by the end of the intervention. Studies of outcomes for Drug Court participants have found that individuals who participated in the Drug Court programs were less likely to be reconvicted of an offence, including offences against the person as well as drug offences.¹⁸⁴

172. The Queensland Law Society notes that the Drug Court in Queensland, which was phased out by the Queensland Government in 2012, was an effective way of diverting offenders from prison and providing them with the treatment that they need to overcome their addictions. In fact, this initiative has resulted in 155 people being diverted from the criminal justice system in Queensland. The diversion of these individuals has been quantified as saving the Queensland community resource costs equivalent to 588 years of imprisonment.¹⁸⁵ The Bar Association of Queensland has also noted that the Drug Court was successful in addressing underlying causes of offending behaviour and resulted in significant savings to the community. However, despite these results, the Queensland Government has introduced legislation¹⁸⁶ that provided for the cessation of this court by 30 June 2013.

Murri Court

173. The Murri Court is another initiative that the Queensland Law Society and Bar Association of Queensland have identified as a possible policy alternative to traditional approaches to criminal justice. The Murri Court which was similar to the Nunga and Koori Courts that existed in other jurisdictions in Australia which deal with the sentencing of Indigenous offenders. The Murri Court took into account cultural issues and provided Aboriginal and Torres Strait Islander offenders with a forum in which they can provide input into the sentencing process.
174. The Law Council notes that the Queensland Government closed the Murri Court at the end of 2012 due to concerns that this court was not reducing the imprisonment or recidivism rates of Indigenous offenders.¹⁸⁷ The Queensland Attorney-General attributed this to the fact that many of these offenders returned to their communities and were exposed to the same levels of unemployment and substance abuse that got them into trouble in the first place. However, the Queensland Law Society considers that a justice reinvestment approach, which could increase the capacity of communities to deal with these type of social issues, may be one way in which these types of concerns could be addressed.
175. Further, the Bar Association of Queensland has noted that although the Final Report of the Australian Institute of Criminology on the *Evaluation of the Queensland Murri Court*¹⁸⁸ published in 2010 concluded that there was little difference in recidivism rates between mainstream courts and the Murri Court, it found that the program delivered a range of benefits to those involved, not the least of which was substantially improving the historically poor relationship between the criminal justice system and the Indigenous community. Further, the Bar Association of Queensland agrees with the views expressed by the Queensland Law Society to the effect that a justice reinvestment approach could increase the capacity of Indigenous communities to deal with the social issues that provoke reoffending and notes that such an approach is consistent with the recommendations made by the United Nations Committee on the Elimination of all Forms of Racial Discrimination (discussed further below).

184 D. Weatherburn, C. Jones, L. Snowball & J. Hua (2008). *The NSW Drug Court: a re-evaluation of its effectiveness*, Contemporary Issues in Crime and Justice, No. 121. New South Wales Bureau of Crime Statistics and Research. Available at [http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB121.pdf/\\$file/CJB121.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB121.pdf/$file/CJB121.pdf).

185 Magistrate's Court of Queensland, Magistrate's Court *Annual Report* 2010-2011, p. 31. Available at http://www.courts.qld.gov.au/_data/assets/pdf_file/0012/131610/mc-ar-2010-2011.pdf.

186 See Criminal Law Amendment Bill (No.2) 2012 (Qld).

187 See <http://www.healthinfonet.ecu.edu.au/about/news/1050>.

188 Anthony Morgan and Erin Louis. 'Evaluation of the Queensland Murri Court: Final Report.' *Australian Institute of Criminology*, Technical and Background Paper No. 39, October 2010.

Intensive case management programs

176. NAAJA has also provided feedback that intensive case management programs may also be an effective measure against re-offending. It notes that such programs are voluntary, strengths-based and involve mentoring. Intensive case management programs can assist clients who need help with basic life skills including obtaining identification, opening a bank account, re-engaging with Centrelink, applying for employment or training, accessing education, applying for housing, transport, reporting to Corrections and accessing counselling.
177. For instance, NAAJA's Throughcare program provides intensive support for prisoners pre-and post-release from prison to prevent prison re-offending. NAAJA has indicated to the Law Council that Throughcare clients re-offend at a rate of around 13 percent while they are part of the program, which compares to the Northern Territory's overall recidivism rate of 48 per cent (the worst in Australia).

Summary – justice reinvestment strategy

178. The Law Council notes that the United Nations Committee on the Elimination of all Forms of Racial Discrimination encouraged Australia to adopt a justice reinvestment strategy to address the social and economic costs underpinning Indigenous contact with the criminal justice system.¹⁸⁹ The Committee recommended Australia continue and increase:

*...the use of Indigenous courts and conciliation mechanisms, diversionary and prevention programmes and restorative justice strategies.*¹⁹⁰

179. In particular, the Law Council contends that government policy makers should consider the appropriateness of diversionary non-custodial options, which intend to address the underlying problems causing a person to engage in criminal conduct. As a general principle, diversionary non-custodial options should be available for courts to consider when determining an appropriate punishment. Such orders include, for example, rehabilitation, intervention or treatment programs (for persons with mental health issues, drug/alcohol dependencies or those who experience extreme poverty or homelessness), probationary orders, and community service orders. Victim-offender or family conferencing may also be appropriate.

Responding to the underlying social problems and averting crime

180. Beyond specific justice reinvestment strategies, the Law Council also encourages policy makers to take a broader approach which seek to address underlying social problems and avert crime. This requires being attuned to the needs of the community and the ability to implement a wide range of measures to deal with specific social problems.
181. Some states and territories already attempt to address underlying social problems to ensure the safety of our community. For example, in NSW a number of serious violent alcohol- and drug-fuelled assaults in the Sydney central business district and elsewhere ignited community concern. In response the NSW Government implemented a range of reforms including:
- placing extra police officers on Sydney streets;
 - implementing a three strikes licensing scheme targeting irresponsible venues;
 - trialling sobering-up centres in Kings Cross, Coogee and Wollongong;

¹⁸⁹ United Nations Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, (August 2010) CERD/C/AUS/Co/15-17, paragraph 20, at http://view.officeapps.live.com/op/view.aspx?src=http%3A%2F%2Fwww2.ohchr.org%2Fenglish%2Fbodies%2Fcerd%2Fdocs%2Fco%2FCERD-C-AUS-CO-15_17.doc.

¹⁹⁰ Ibid.

- introducing a plan of management for Kings Cross that included new late-night transport options;
 - new licence conditions for licensed premises;
 - drink restrictions and new security measures;
 - passing new laws that allow for offenders to be banned from licensed venues in Kings Cross and provide for the use of drug detection dogs in the area;
 - extending liquor freezes in Oxford Street, Darlinghurst, and Kings Cross;
 - launching a multimedia advertising campaign aimed at warning of the dangers of excessive binge drinking;¹⁹¹ and
 - lockouts and the cessation of liquor service for hotels, nightclubs, general bars and registered clubs in prescribed high-risk precincts.¹⁹²
182. The Law Council does not support the imposition of mandatory minimum sentences in this context as there is insufficient evidence supporting the benefits of such laws in response to community problems or alcohol and drug abuse. Indeed, as discussed above, evidence demonstrates that mandatory sentencing can lead to increases in property theft and assaults, and also serves to lead to the increased overrepresentation of Indigenous people in the judicial system and in custody.¹⁹³
183. Notwithstanding these concerns, however, it supports the broader, multi-faceted approach to addressing the underlying social issues which has been adopted in this example. These measures seek to avert crime and prevent and deter alcohol- and drug-fuelled violence.
184. The Law Council also notes that the Australian Human Rights and Equal Opportunity Commission has also reported on the most effective anti-crime measures in relation to juveniles as follows:
- Early intervention and social support programs are essential as a means of protecting against later offending. They are relatively inexpensive and have major long term benefits in terms of children's physical and social development. Intervention and welfare programs are far less effective once young people have reached their late teens and are already in a lifestyle of offending...*
- The most effective anti-crime programs are the ones that address poverty, homelessness, discrimination, child abuse and neglect, family breakdown, exclusion from education and other problems. Programs that provide support for people at risk of offending are the most successful in preventing crime.*¹⁹⁴
185. Such provisions are compatible with the CROC and article 24 of the ICCPR.

191 Mr Barry O'Farrell, Second Reading Speech to the NSW Legislative Assembly on the Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014 and the Liquor Amendment Bill 2014, 30 January 2014, p. 2, at <http://bit.ly/1IEGuHp>.

192 Ibid, p. 5.

193 S Barlow, 'Back to the Future in the Northern Territory: the Return of Mandatory Imprisonment for First Offenders' (2009) 33 *Criminal Law Journal* 231, 232. In Victoria, people released from prison are twice as likely to return to corrective services within two years of ending their sentence as those with a sentence involving community correction: Productivity Commission Report on Government Services 2010, C.11-C.12. See also a summary of Dr Quilter's research, available at: <http://media.uow.edu.au/news/UOW164790.html>.

194 Australian Human Rights and Equal Opportunity Commission, Submission to the *Inquiry by the Senate Legal and Constitutional References Committee into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, November 1999, p. 11.

Other possible tools

186. There is a need to ensure consistency in sentencing decisions. Inconsistency offends the principle of equality before the law and is a manifestation of injustice.
187. In this regard, the Law Council notes that other available tools may be preferable to the imposition of mandatory sentences. For example, standard non-parole periods can be set, which still enable judicial discretion as to the head sentence to be imposed.
188. Another tool that is available to the legislature is to increase maximum penalties for particular offences to reflect community concern regarding the seriousness of an offence. As noted in the research quoted above, the increase of a maximum penalty may not achieve a deterrent effect. However, it may provide guidance to judges as to community perceptions as to the gravity of an offence while maintaining judicial discretion in determining a just and appropriate punishment.

CONCLUSION

189. Under the separation of powers, judges are responsible for sentencing offenders. There are a number of factors a judge is required to take into account in sentencing, including the impact of the crime on the victim, the legislation which prescribes the offence and sentencing guidelines.
190. Mandatory sentencing schemes seek to eliminate the factors that can be considered in determining an appropriate sentence. Such schemes operate on the principle that where an offence is committed an automatic mandatory minimum sentence is justified, regardless of the particular circumstances of the offender, the manner in which the offence occurs and the specific victim affected.
191. The Australian Human Rights and Freedom Commissioner, Mr Tim Wilson, has argued against mandatory sentencing on the basis that such laws raise serious concerns about the operation of the separation of powers, create arbitrary outcomes that are often not proportionate to the crime, and undermine the fundamental principle of equality before the law. He has further argued that mandatory sentencing 'is an incremental stake stabbed in the heart of the foundations of our liberal democracy because it assumes that a centralised government with less information can make better decisions about individual cases than a decentralised courts with more information'.¹⁹⁵ The Law Council agrees with these sentiments.
192. Further, in the Law Council's view, there is a lack of convincing evidence to suggest that the justifications often given for mandatory sentences – retribution, effective deterrence, incapacitation, denunciation and consistency – achieve the set aim. Instead, mandatory sentencing regimes can produce unjust results with significant economic and social costs without a clear and directly attributable corresponding benefit in crime reduction. Further, mandatory sentencing schemes undermine community confidence in judges to administer justice and deliver appropriate sentencing outcomes. This is not supported by evidence which shows that when members of the public are fully informed about the particular circumstances of the case, they support judges' sentences as appropriate.¹⁹⁶

¹⁹⁵ Human Rights and Freedom Commissioner Tim Wilson, *Queensland Law Society Mandatory Sentencing Policy Paper Launch*, 4 April 2014.

¹⁹⁶ K Warner, J Davis, M Waler, R Bradfield & R Vermey, 'Public Judgement on Sentencing: Final results of the Tasmanian Jury Study', *Trends & Issues in Crime and Criminal Justice* Australian Institute of Criminology, February 2011, p. 3.

193. The Law Council submits that community confidence in the criminal justice system is vital in ensuring a sense of safety among Australians and victims of crime. Confidence in judicial decisions, as former High Court Chief Justice Murray Gleeson observed, is 'essential for the peace, welfare and good government of the community'.¹⁹⁷ Consequently, policy makers considering criminal justice proposals should be wary of implementing policies such as mandatory sentencing which undermine the rule of law and public confidence in the institutional integrity of the courts.
194. The independence and impartiality of the judiciary are not the only factors that are relevant to the development and implementation of effective criminal justice policies. Achieving a just outcome in the particular circumstances of a case, while maintaining consistency across similar cases and with Australia's human rights obligations, is also paramount.
195. A primary assurance that a responsive government and parliament can give to the community is that it will be 'tough on crime' in a way that delivers effective criminal justice policies, rather than implementing costly mandatory sentencing schemes without sufficient evidence to suggest a commensurate reduction in crime.

¹⁹⁷ Murray Gleeson, *Public Confidence in the Judiciary*, (Speech to Judicial Conference of Australia Launceston, 27 April 2002) at http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_jca.htm.

ATTACHMENT A – MANDATORY SENTENCING IN AUSTRALIAN JURISDICTIONS

Western Australia

Western Australia has had mandatory sentencing for a number of decades in relation to minimum penalties for road traffic and regulatory offences. This should be distinguished from mandatory minimum imprisonment, which was first introduced in 1992 for repeat violent offenders and some stealing motor vehicle offences. These laws were repealed in 1994.

In 1996 the then-Western Australian Government introduced a new mandatory sentencing regime. The former Government introduced amendments to the *(Criminal Code 1913)* (WA) imposing an obligation on judges to sentence an offender to 12 months' imprisonment for committing a third home burglary.¹⁹⁸ Section 401(4) applies to both adults and juveniles, although there is the possibility for the latter (as defined by the *Young Offenders Act 1994*) (WA) to face 12 months' detention.

Section 401(5) of the Criminal Code provides that a court shall not suspend a term of imprisonment under section 401(4). Nonetheless, a decision in 1997 by the President of the Children's Court in Western Australia in *The Police v DCJ* held that as section 401(5) makes no reference to detention (referred to in the *Young Offenders Act*), the court retains discretion in respect of a period of detention and may issue a Conditional Release Order (CRO). The mandatory jail term is reactivated if the CRO is breached. It is estimated that 10 to 15 per cent of mandatory sentencing related matters involving young offenders attract a CRO.

¹⁹⁸ Former section 401(4) of the *Criminal Code 1913* (WA).

Since then successive governments have extended the ambit of mandatory imprisonment. The current table of mandatory imprisonment offences in Western Australia is as follows:

Legislation	Offence	Minimum adult Penalty	Minimum juvenile penalty (16-18)
s401(4) Criminal Code	Home Burglary (3rd strike)	12 months	Conditional release order or 12 month
s297 Criminal Code	Grievous Bodily Harm (Public Officer)	12 months	3 months
s318 Criminal Code	Assault Public Officer (Bodily harm)	6 months	3 months
s318 Criminal Code	Assault Public Officer (Bodily harm and armed or in company)	9 months	
s6 Misuse of Drugs Act	Sell or supply drug to child	First offence suspended or imprisonment only Subsequent offence 6 months	
ss6 & 7 Misuse of Drugs Act	Manufacture or cultivate causing bodily harm to child	12 months	
ss6 & 7 Misuse of Drugs Act	Manufacture or cultivate endangering child	First offence suspended or imprisonment only Subsequent offence 6 months	
s59 Road Traffic Act	Dangerous driving causing grievous bodily harm or death (police pursuit)	12 months	12 months
s59A Road Traffic Act	Dangerous driving causing bodily (police pursuit)	6 months	6 months
s60 Road Traffic Act	Reckless driving (police pursuit)	6 months	6 months
Criminal Organisations Control Act Enacted Nov 2013 Part 10 Schedule 1A	Various scheduled offences committed in association with declared criminal organisation (including being armed all assaults, fighting, threats, corruption, justice related, killing, obstruction, stealing, burglary, robbery, sex assault, damage, conspiracy, drugs, firearm, association)	Min 2 years summarily (even for offences which do not carry imprisonment) 75% of max term (but not less than 2 years) for offences which carry imprisonment If penalty is life, min of 15 years	

On 12 March 2014 the Western Australian government introduced the Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 which, if passed, will:

- change the law so burglary strikes are counted by occurrence not conviction appearance (see below); and
- remove the option of a conditional release order sentence for juvenile offenders so that they face mandatory detention.
 - this means that a child who burgles three neighbouring houses in the same night in order to obtain food will face a mandatory sentence of 12 months imprisonment/detention. Presently on a plea of guilty to all three charges at the one time, they would only count as one strike. There are concerns at the effect such an amendment would have on incarceration rates of Indigenous children.
- where physical or sexual assault occurs during course of a home invasion burglary – require a mandatory minimum 75 per cent of the maximum penalty (eg 15-year minimum for burglary accompanied by sexual penetration). Between 16 and 18, the minimum would be three years' detention; and
- where burglary accompanies an unlawful killing – require a mandatory minimum sentence of 15 years (three years for a juvenile).

Northern Territory

Mandatory minimum sentences for property crime came into effect in 1997 and were repealed in 2001. Under that scheme, offenders had to be imprisoned for 14 days for a "first strike" property offence, 90 days for a second, and 12 months for a third.¹⁹⁹

In June 1999, the *Sentencing Act 1995* (NT) was amended to extend mandatory sentencing to cover second offences of assault and first offences of sexual assault. This applied to adults. A jail term was mandatory, but no minimum sentence was prescribed. The mandatory sentencing provisions did not apply in "exceptional circumstances".

Under section 53AE of the *Juvenile Justice Act 1983* the mandatory sentencing provisions only applied if there was at least one prior conviction. A second offence attracted mandatory imprisonment of at least 28 days. Under section 53 AE(2)(c), a court could order a juvenile to participate in a program, generally referred to as a "diversionary program", which, if satisfactorily completed, could avoid the imposition of a sentence.

Once a young person had been referred to a diversionary program, he or she could not be referred to such a program again, thus reviving the mandatory detention provisions for future convictions.

Despite the subsequent repeal of the 1997 and 1999 regime, mandatory sentencing was re-introduced in 2008 with amendments to the *Sentencing Act* (NT). The amended section 78BA of the *Sentencing Act* provided that a mandatory sentence of imprisonment must be served where an offender commits serious harm, harm, assault causing harm and assaults on police resulting in harm.

On 1 May 2013 the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* amended the *Sentencing Act* to insert Division 6A in replacement of section 78BA and provide five new levels of violent offence and their corresponding mandatory sentences. The Act also introduced new mandatory minimum sentences of three or 12 months depending on the level of the violent offence. A 'violent offence' is defined in section 78C of the *Sentencing Act* to include:

¹⁹⁹ Section 78BA of the *Sentencing Act 1995* (NT).

- (a) an offence against a provision of the Criminal Code listed in Schedule 2; or
- (b) an offence substantially corresponding to an offence mentioned in paragraph (a) against:
 - (i) a law that has been repealed; or
 - (ii) a law of another jurisdiction (including a jurisdiction outside Australia).

Offences contained in Schedule 2 of the Criminal Code are wide ranging and include for instance (but is not limited to) terrorism, contribution towards act of terrorism, murder, manslaughter, setting man traps, attempting to injure by explosive substances, common assault, assaults on police/judges/magistrates/member of crew of an aircraft, unlawful stalking, robbery, and assault with intent to steal.

It also provides an exemption from the application of mandatory penalties where there are "exceptional circumstances" or where the offender was a juvenile at the time of the offence, but the offender must still be sentenced to a term of imprisonment. The Law Council has been advised, however, that the "exceptional circumstances" threshold is limited and rarely made out.

Under section 78F of the Sentencing Act where a court finds a person guilty of a sexual offence, the court must record a conviction and order the offender to serve a term of imprisonment. A sexual offence is defined as an offence listed in Schedule 3 of the Sentencing Act to include for instance offences against various sections of the Criminal Code, including: sections 125B (possession of child abuse material), 125C (publishing indecent articles), 127 (sexual intercourse or gross indecency involving a child under 16 years), 128 (sexual intercourse or gross indecency involving a child over 16 years in special care), 130 (sexual intercourse or gross indecency by provider of services to mentally ill or handicapped person), 131 (attempts to procure a child under 16 years), 131A (sexual relationship with a child), 132 (indecent dealing with a child under 16 years), 134 (incest), 138 (bestiality), section 188(2)(k) (indecent assault), 192 (sexual intercourse and gross indecency without consent) or 192B (coerced sexual self-manipulation).

There are also forms of mandatory sentencing where an offender must generally be sentenced to a term of actual imprisonment. For example, under subsection 37(2) of the *Misuse of Drugs Act 1990* (NT) when sentencing a person for an offence under the Act the court must impose a sentence requiring the offender to serve actual imprisonment unless, having regard to the offender's particular circumstances or the circumstances of the offence, actual imprisonment should not be imposed. This section applies to an offence that has a maximum penalty of seven years or more pursuant to section 37(2)(a) or where the maximum penalty is less than seven years but the offence is accompanied by an aggravating circumstance prescribed in section 37(1), section 37(2)(b) refers. Subsection 37(3) requires where a sentence is imposed that it be no less than imprisonment for 28 days.

Subsection 121(2) of the *Domestic and Family Violence Act 2009* (NT) contains a presumptive minimum sentence of seven days imprisonment for a subsequent breach of a domestic violence order. However, that provision does not apply if no harm is caused or if the court is satisfied that it is not appropriate in the circumstances to record a conviction and sentence.

The offence of murder in the Northern Territory carries a mandatory sentence of life imprisonment.²⁰⁰

²⁰⁰Section 157 of the *Criminal Code Act 1983* (NT), as amended by section 17 of the *Criminal Reform Amendment Act (No 2) 2006* (NT).

New South Wales

In 2014, the NSW Parliament passed the Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014 (NSW) which amended the *Crimes Act 1900* (NSW), the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), the *Crimes (Sentencing Procedure) Act 1999* (NSW) and introduced mandatory sentencing laws for "one punch" assaults, that is, the offence of assault by intentionally hitting a person causing death (whether the death was reasonably foreseeable and whether the person was killed as a result of injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault), if committed by an adult when intoxicated. Under the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW), the following penalties apply:

- (a) a 20-year maximum sentence will apply to a person who assaults another person who dies as a direct or indirect result of the assault; and
- (b) an eight-year minimum mandatory sentence and 25-year maximum sentence will apply where the offender was intoxicated by alcohol or drugs (section 25B of the *Crimes Act 1900* (NSW)).

Section 428E of the *Crimes Act 1900* was also amended to provide that evidence of self-induced intoxication cannot be used by the offender to establish that he or she did not have the requisite intent to commit the offence.

On 26 February 2014 the New South Wales Government introduced the Crimes Amendment (Intoxication) Bill 2014 to increase maximum sentences and impose sentences for certain other offences committed when the offender was intoxicated and in public. The Opposition has also proposed an amendment to create the single offence of reckless grievous bodily harm when intoxicated in public and in circumstances of gross violence. The Bill remains before the Legislative Council for concurrence.

The *Crimes Amendment (Murder of Police Officers) Act 2011* (NSW) also inserted section 19B into the *Crimes Act* which makes life sentences mandatory for offenders convicted of murdering police officers. The provisions do not apply if the person was:

- under the age of 18 years at the time the murder was committed; or
- if the person had a significant (but not self-induced) cognitive impairment.

There are also standard non-parole periods for the murder of police and persons in a list of occupations (item 1A in the Table in the *Crimes (Sentencing Procedure) Act 1999* (NSW)).

South Australia

Where the Court believes that the offence is serious enough to impose imprisonment but there is good reason to suspend the sentence, it may do so under section 38 of the *Criminal Law (Sentencing) Act 1988* (SA). However, unless exceptional circumstances exist a court may not suspend a sentence for:

- a serious and organised crime offence or a specified offence against police (section 38(2b)(a)); or
- a defendant being charged for a designated offence (that is, a serious violent offence) who has received a suspended sentence in the past five years for a designated offence (section 38(2b)(b)).

A serious and organised crime offence includes:

- participation in a criminal organisation;
- blackmail or abuse of public office where the offence is aggravated by committing the offence for the benefit of or in connection with a criminal organisation;
- offences concerning witnesses and jurors; and
- offences of trafficking and manufacturing of controlled drugs.

Specific offences against police include:

- attempted manslaughter and attempted murder where the victim is a police officer; and
- causing serious harm to a police officer.

Designated offences include:

- conspiracy to commit murder or manslaughter;
- aiding suicide;
- unlawful threats and unlawful stalking;
- dangerous driving to escape police pursuit;
- causing harm and causing serious harm;
- shooting at police officers;
- kidnapping;
- rape, compelled sexual manipulation, unlawful sexual intercourse, gross indecency, persistent sexual exploitation of a child, indecent assault, abduction;,
- robbery;
- serious criminal trespass; and
- assaults with intent.

The threshold of 'exceptional circumstances', however, is high and means that the majority of offenders participating in organised crime including blackmail, corruption and drug making or trafficking are likely to be given mandatory jail terms.

The situation is similar for those convicted of causing serious harm, attempted murder or manslaughter of a police officer, rape, robbery, home invasion, kidnapping, shooting at police or starting a pursuit if the offence has occurred within three years of receiving a suspended sentence for a serious violent crime, including an offence committed as a youth.

Under section 11 of the *Criminal Law Consolidation Act 1935 (SA)* the offence of murder in South Australia carries a mandatory sentence of life imprisonment.

Queensland

The *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld)* (CLCOD Act) introduced three new offences into the Queensland *Criminal Code 1899 (Qld)* in an attempt to combat bikie-related violence. These offences made it illegal for participants in criminal organisations to:

- knowingly gather together in a group of three or more;
- to enter or attempt to enter a prescribed place, or attend or attempt to attend a prescribed event; and
- to recruit another person to that organisation.

All of these offences carry a mandatory minimum penalty of six months' imprisonment.

The CLCOD Act amends a range of other offences (including affray, misconduct in relation to public office, assault offences and obtaining or dealing with identification information) to create circumstances of aggravation where the offender is a participant in a criminal organisation and to impose new mandatory minimum penalties of imprisonment for these aggravated offences.

In addition, the CLCOD Act imposed mandatory disqualification of a driver's licence for certain offences where the offender is a participant in a criminal organisation, regardless of whether the offence was committed in connection with or arose out of driving a motor vehicle. The mandatory minimum penalty for the offence of failing to stop a motor vehicle was also increased.

The *Vicious Lawless Association Disestablishment Act 2013* (Qld) (the VLAD Act) was also created and imposed new forms of aggravated criminal offending for persons who fall within the definition of terms such as: 'vicious lawless association', 'vicious lawless associate', 'office bearer', and 'participant'. The VLAD Act imposed a new mandatory sentencing regime for persons who fall within such categories and commit certain declared offences.²⁰¹

The *Criminal Law (Two Strike Child Offenders) Amendment Act 2012* (Qld) amended the *Penalties and Sentences Act 1992* (Qld) and the *Corrective Services Act 2006* (Qld) to insert new mandatory sentences of life imprisonment, with a 20 year minimum non-parole period for certain repeat child sex offenders. The regime applies where:

- an adult offender is convicted of a relevant serious child sex offence;
- such offence is committed after the commencement of the Act;
- the offender has a prior conviction as an adult for a relevant serious child sex offence; and
- the second offence is committed after the conviction of the first offence.

The court in sentencing the offender on the second occasion must impose life imprisonment.

The regime applies to the *Criminal Code* offences listed in Schedule 1A to the *Penalties and Sentences Act 1992* (Qld) committed in relation to a child under 16 years and in circumstances where an offender convicted of the offence would be liable to imprisonment for life.

Queensland also has mandatory sentences regarding murder offences which carry a mandatory sentence of life imprisonment.²⁰²

Section 182A of the *Criminal Law and Other Legislation Amendment Act 2013* (Qld) creates a mandatory minimum non-parole period of 80 per cent of the sentence for a drug trafficking offence. Further, under Part 5A of the Act requires a judge to make a graffiti removal order requiring a person found guilty of a graffiti offence to perform a certain number of hours in unpaid graffiti removal service. Where the offender is a juvenile, he or she must participate in a mandatory graffiti removal program under Division 7A of the *Youth Justice Act 1992* (Qld).

Subsection 176B(3) of the *Youth Justice and other Legislation Amendment Act 2014* (Qld) introduced requirement that juvenile recidivist motor vehicle offenders residing in Townsville must be sentenced to a boot camp order.

Victoria

The *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) (GVO Act) introduced statutory minimum sentences for offenders who intentionally or recklessly cause serious injury in circumstances of gross violence. In particular, the GVO Act introduced two new offences into the *Crimes Act 1958* (Vic):

- a new section 15A of the Crimes Act, which creates an offence of causing serious injury intentionally in circumstances of gross violence; and
- a new section 15B of the Crimes Act, which creates a new offence of causing serious injury recklessly in circumstances of gross violence.

Subsection 4(a) defines 'gross violence' to include planning in advance to cause the serious injury, or being in company with two or more persons when the serious injury was caused; or causing the serious injury pursuant to a joint criminal enterprise with two or more persons; or planning in advance to have or to use a weapon, and using that weapon; or continuing to assault the victim after he/she were incapacitated.

The penalty for a gross violence offence is a mandatory minimum sentence of four years, with a maximum penalty of 20 years' imprisonment for intentionally inflicting gross violence under section 15A and 15 years for recklessly inflicting gross violence under section 15B. The mandatory minimum sentence

²⁰¹ The *Vicious Lawless Association Disestablishment Act 2013* Schedule 1 details declared offences, including the possession of dangerous drugs under s 9 of the *Drugs Misuse Act 1986* (Qld).

²⁰² Section 305 of the *Criminal Code Act 1899* (Qld).

applies unless the Court finds that a special reason exists under s 10A *Sentencing Act 1991* (Vic) including where the offender is:

- a juvenile;
- significantly assists the Crown or police;
- aged 18-20 and it is established that the offender is psycho-socially immature and unable to regulate his/her behaviour; and
- has a mental health condition or impairment that the court considers should be taken into account in determining criminal culpability.

The Act came into force on 30 January 2014.

Commonwealth

On 26 September 2001, the Commonwealth Parliament passed the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth). This Act provides, *inter alia*, for mandatory minimum sentences of five years for a first offence, and eight years for further offences, with mandatory non-parole periods of three and five years respectively, for what have become colloquially known as "people smuggling" offences under the the Migration Act.²⁰³ The mandatory sentencing provisions do not apply if it is established, on the balance of probabilities, that the offender was under 18 at the time the offence was committed.²⁰⁴

The Bill was included in a package of seven bills that made sweeping changes to Australia's treatment of asylum seekers who attempt to make onshore applications. No specific justification for the mandatory sentencing provisions is mentioned in either the second reading speech or explanatory memorandum for the Bill, except a general statement in the explanatory memoranda:

The amendments in these Bills are being made in response to the increasing threats to Australia's sovereign right to determine who will enter and remain in Australia. These threats have resulted from the growth of organised criminal gangs of people smugglers who bypass normal entry procedures.

Section 233A of the Migration Act creates an offence of people smuggling where a person, 'the first person':

- organises or facilitates the bringing or coming to Australia or the entry or proposed entry into Australia of another person, 'the second person';
- 'the second person' is a non-citizen; and
- 'the second person' had or has no lawful right to come to Australia.

The penalty is 10 years' imprisonment or 1000 penalty units or both.

Section 233B of the Migration Act creates an aggravated offence of people smuggling where the circumstances of aggravation relate to exploitation; cruel, inhuman or degrading treatment; or a risk of death or serious harm. The penalty is 20 years' imprisonment or 2000 penalty units or both. Section 236B provides a mandatory minimum sentence of at least eight years for a conviction under section 233B.

Section 233C of the Migration Act creates an aggravated offence of people smuggling where the circumstances of aggravation relate to the smuggling of a group of at least five people. The penalty is the same as the section 233B aggravated offence. Section 236B provides that a minimum mandatory sentence of five years for a conviction under section 233C. In addition, section 236B provides a mandatory minimum sentence of five years for an aggravated offence under section 234A which relates to presenting false documents and false or misleading information to an officer performing functions under the Migration Act relating to a group of five or more non-citizens.

²⁰³ Sections 236B(3) 236B(4) and of the *Migration Act 1958* (Cth).

²⁰⁴ *Ibid*, section 236A.

Law Council of Australia

19 Torrens Street

Braddon ACT 2612

AUSTRALIA

Telephone: +61 2 6246 3788

Email: mail@lawcouncil.asn.au

www.lawcouncil.asn.au

Follow us on Twitter:



[@thelawcouncil](https://twitter.com/thelawcouncil)

[@LCAPresident](https://twitter.com/LCAPresident)