



# Inquiry into Aboriginal and Torres Strait Islander Experiences of Law Enforcement and Justice Services

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## **Senate Finance and Public Administration Committees**

**20 May 2015**

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## Introduction

1. The Law Council of Australia is pleased to provide the following submission to the Senate Finance and Public Administration References Committee's Inquiry into Aboriginal and Torres Strait Islander peoples' experience of law enforcement and justice services (the Inquiry).
2. As outlined at **Attachment A**, the Law Council is the national peak body for the Australian legal profession. Through the Law Societies and Bar Associations of the States and Territories, the Law Council effectively represents over 60,000 Australian lawyers.
3. This submission sets out the social and economic cost of high imprisonment rates and the case for fundamental change in Australia's approach to crime and recidivism in Aboriginal and Torres Strait Islander communities.
4. The Law Council considers the nation may be at a tipping point, where the Indigenous disadvantage, crime and imprisonment is becoming so entrenched that positive initiatives, such as Closing the Gap, may be set back another generation unless a new approach to criminal justice is found.
5. The social cost of high imprisonment rates is nothing short of catastrophic. The perpetual cycle of disadvantage, poverty, drug and alcohol abuse, child neglect, low education, unemployment, violence and criminal behaviour, arrest, imprisonment and recidivism is writ large in all of the discourse and research around this issue. However, there appears to be an assumption by governments that, with current initiatives to address housing, child education, health and other important matters, high levels of imprisonment will eventually begin to resolve. This approach ignores the insidious nature of the cycle – incarceration is now an entrenched aspect of the Indigenous experience.
6. The economic cost is also breathtaking. While all governments emphasise the difficult economic climate and need for budgetary restraint, the extremely high cost of the corrections system and the criminal justice system as a whole appears to be unacknowledged. As outlined below, overseas jurisdictions have recognised that simply imprisoning more people not only reduces the productive capacity of the economy, it is enormously expensive and has a negligible impact on the crime rate.
7. This submission argues for a national approach, including:
  - a. a national justice reinvestment pilot;
  - b. a national, concerted approach to data collection and program evaluation;
  - c. removal of mandatory sentencing laws, which are known to impact disproportionately on Indigenous peoples;
  - d. increasing funding for justice services, with an objective of diversion, rehabilitation, re-entry and social inclusion;
  - e. the implementation of justice targets; and
  - f. the establishment or identification of a Federal agency to assist in coordinating the efforts of State and Territory governments toward common objectives.

8. The Law Council makes a series of specific recommendations for the justice system at the end of this submission.
9. The Law Council considers that the social and economic cost to the community of ongoing complacency in this area is inexcusable. An intergovernmental agreement is required, as a first step, concentrating on urgent action to address high imprisonment rates, preferably through the Council of Australian Governments. As submitted by the National Justice Coalition, the primary objective should be to:
  - Close the gap in rates of imprisonment by 2040; and
  - Cut the disproportionate rates of violence to at least close the gap by 2040 with priority strategies for women and children,
10. All levels of government need to:
  - Invest in early intervention, prevention and diversion strategies, which address the root causes of violence and imprisonment; and
  - Work in partnership with Aboriginal and Torres Strait Islander people, communities, services and their representatives, to develop and implement solutions.

## Background

11. The Inquiry comes at a time of great urgency. When the Royal Commission into Aboriginal Deaths in Custody (RCADC) handed down its final report in 1991, Aboriginal people were being imprisoned at a rate seven times the broader population.
12. A key finding of the Royal Commission was that the high rate of deaths in custody among Aboriginal people was proportionate to the rate at which they were imprisoned – that is, the real problem was in fact the high imprisonment rate; and the primary task for governments in addressing deaths in custody was to lower the rate at which Aboriginal and Torres Strait Islander people were incarcerated.
13. Today, indigenous incarceration rates have reached catastrophic levels – more than fourteen times the broader population. One in four deaths in custody is Indigenous. 27 per cent of the prison population is Indigenous, while comprising just 2.5 per cent of the national census. Indigenous youths comprise over 50 per cent of juveniles in detention. As noted by Kirstie Parker, co-Chair of the National Congress of the First Australians and the National Justice Coalition, at the recent launch of “Change the Record”, in many areas of the country Aboriginal youths are more likely to be in police custody or prison than in school. The rate of imprisonment of Aboriginal people has increased by over 57 per cent since the year 2000, and is continuing to rise rapidly. Australia locks up its indigenous peoples at higher rates than any other single minority group in the developed world.
14. Juxtaposed against these alarming statistics and facts is the unexplained inertia by successive Australian Governments, despite the Commonwealth’s special responsibility for Aboriginal and Torres Strait Islander peoples. Funding to Aboriginal and Torres Strait Islander Legal Services, Legal Aid Commissions, Family Violence Prevention Legal Services and Community Legal Centres has failed to keep pace with unprecedented levels of demand and has led to a corresponding manifold increase in unmet legal need.

15. The vast majority of custodial sentencing occurs under State and Territory laws, exacerbated by policies such as mandatory sentencing, three strikes policies, increasingly punitive penalties and enhanced law enforcement. Governments in all jurisdictions have singularly ignored the growth in their prison populations. Far from attempting to address criminal behaviour at its source, governments are more easily persuaded to build more and larger prisons. This has come at an enormous social and financial cost for all Australians.
16. This is also at a time when, overseas, various jurisdictions have long since realised that the cycle of imprisonment and recidivism is only perpetuated by politically expedient law and order slogans. In the United States, several jurisdictions have been trialling justice reinvestment for several years with very strong results, in terms of reducing imprisonment and re-offending rates.
17. The Law Council has been calling for action on imprisonment for several years. It has long been clear that another approach is needed. It is unacceptable for any government to abrogate its responsibility of leadership in addressing this issue and it is critical that action be taken immediately.

## Access to legal assistance services

The extent to which Aboriginal and Torres Strait Islander Australians have access to legal assistance services
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18. Aboriginal and Torres Strait Islander Australians have complex legal needs and face substantial barriers in accessing legal assistance. However, funding for legal assistance services has clearly failed to keep pace with increasing demand and this has resulted in substantial unmet legal need.
19. The 2014 *Overcoming Indigenous Disadvantage* report found that between 2000 and 2013, the imprisonment rate for Indigenous adults increased by 57.4 per cent.<sup>1</sup> In the Australian National Audit Office (ANAO) 2014/15 Administration of Indigenous Legal Assistance Programme report, it is noted that these trends indicate that demand for Indigenous legal assistance services is high and is likely to remain so.<sup>2</sup>
20. Further, the Legal Australia-Wide Survey, first published in 2011,<sup>3</sup> found that Aboriginal and Torres Strait Islander Australians have particularly high levels of unmet legal need across a broad range of indicators.
21. The importance of addressing the high levels of unmet legal need amongst Indigenous people is aptly summarised in the submission by James Cook University Indigenous Legal Needs Project to the Productivity Commission's Inquiry into Access to Justice Arrangements:

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<sup>1</sup> Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2014*, Commonwealth of Australia, 4.104.  
<http://www.pc.gov.au/research/recurring/overcoming-indigenous-disadvantage/key-indicators-2014/a3-key-indicators-2014-appendix3.pdf>

<sup>2</sup> Australian National Audit Office Report no 22. 2014/15, Administration of the Indigenous Legal Assistance Programme, 16.

<sup>3</sup> Coumarelos, C, Macourt, D, People, J, MacDonald, HM, Wei, Z, Iriana, R & Ramsey, S 2012, *Legal Australia-Wide Survey: legal need in Australia*, Law and Justice Foundation of NSW, Sydney, <http://www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A910006089D.html>

*The high level of unmet Indigenous civil and family law need...compromises Indigenous peoples' capacity to realise their full legal entitlements. These entitlements are important in their own right, but are also essential to combating Indigenous social disadvantage, evident in a range of areas; including, for example, in access to quality housing, Indigenous rates of employment and incarceration rates and their educational outcomes.*

22. The legal needs of indigenous people are complex: not only do they involve a number of discrete areas of law; they also require lawyers with cross-cultural sensitivity<sup>4</sup> and are compounded by well documented disadvantage in education, housing, employment and income.<sup>5</sup> Indigenous people have been identified generally as a disadvantaged group.<sup>6</sup>

## Remoteness

23. The Productivity Commission's *Overcoming Indigenous Disadvantage* 2014 report noted that 21.3 per cent of Indigenous people in Australia live in remote or very remote communities, compared to just 1.7 per cent of the non-indigenous population).<sup>7</sup>
24. Geographical isolation is a major obstacle in Indigenous access to justice, including access to legal services.<sup>8</sup>
25. Clients from highly mobile and traditionally-oriented communities can be very difficult to contact to obtain instructions,<sup>9</sup> which indicates that Aboriginal people living in remote and very remote areas face specific barriers in this regard.

## Interpreter services

26. The lack of a common language can compromise understanding between client and lawyer. Schwartz and Cunneen reported that:

*... 13% of ATSILS practitioners experience difficulty in understanding what their clients are saying 'very often/often'; a further 50% 'sometimes' experience such difficulties. Practitioners also reported that their clients often struggle to understand what they are trying to convey, either because of the client's shyness or discomfort (65%), a disability that hinders communication (51%), an inability to communicate adequately in English (40%), or because clients do not understand the legal process (77%).<sup>10</sup>*

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<sup>4</sup> Melanie Schwartz and Chris Cunneen, (2009) *Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services*, 7(10) *Indigenous Law Bulletin* 19. <http://www.austlii.edu.au/au/journals/ILB/2009/4.html>

<sup>5</sup> Australian National Audit Office Report no 22. 2014/15, *Administration of the Indigenous Legal Assistance Programme*, 219.

<sup>6</sup> Standing Committee of Attorneys-General Working Group on Indigenous Justice, *National Indigenous Law and Justice Framework 2009–15*, 15.

<sup>7</sup> *Ibid.*, *op cit* 1, figure A3.2.

<sup>8</sup> *Ibid.*, *op cit* 4.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

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27. English is a second, third or fourth language in a number of very remote Indigenous communities<sup>11</sup>
28. The Law Council is advised that the Aboriginal Interpreter Service in the Northern Territory received funding through the Stronger Futures partnership agreements for 10 years. However, this funding is not replicated across other jurisdictions and the Law Council is advised that there are significant shortages of interpreter services for remotes areas across Western Australia.
29. The Productivity Commission found that “Indigenous interpreter services help some Indigenous people to communicate their needs and understand their legal rights and responsibilities. Longer-term investments are required to ensure the ongoing supply of these services,” and recommended that
- “Australian, State and Territory Governments should continue to work together to explore the use of the Northern Territory Aboriginal Interpreter Service as a platform for a National Indigenous Interpreter Service funded by ongoing contributions from the Australian, State and Territory Governments. While this service is being developed governments should focus their initial efforts on improving the availability of Aboriginal and Torres Strait Islander interpreter services in high need areas, such as in courts and disputes in rural and remote communities.”<sup>12</sup>*
30. While the Australian Government has not yet responded to this recommendation, the Law Council considers this recommendation should be implemented as soon as possible.

## **Community outreach and unmet legal need**

31. The Law Council is advised that community engagement and outreach are essential to identifying legal needs and ensuring community access to services. Given the remoteness of many Aboriginal and Torres Strait Islander communities and the lack of sufficient funding, the Law Council is advised that, there are significant challenges in delivering outreach services, which need to be addressed.

## **Civil and family law needs of Indigenous Australians**

32. The ANAO Report on the Administration of Indigenous Legal Assistance Programme stated that:

*Ongoing concerns about the high rates of Indigenous imprisonment and deaths in custody have resulted in legal assistance services being mainly focussed on criminal law matters and on supporting Indigenous people at risk of being detained or imprisoned.<sup>13</sup>*

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<sup>11</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Our Land, Our Languages: Language and Learning in Indigenous Communities*, 2012, Commonwealth of Australia, 91. [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_committees?url=atsia/languages2/report.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_committees?url=atsia/languages2/report.htm)

<sup>12</sup> Productivity Commission, *Report into Access to Justice Arrangements*, September 2014, Commonwealth of Australia, Recommendation 22.3. <http://www.pc.gov.au/inquiries/completed/access-justice/report>

<sup>13</sup> Australian National Audit Office Report no 22, 2014/15 Administration of the Indigenous Legal Assistance Programme, Commonwealth of Australia, 14.



33. Under the Indigenous Legal Assistance Programme, service providers deliver family and civil law services in addition to criminal law assistance, while criminal law matters comprise over 80 per cent of the services delivered.<sup>14</sup>
34. As noted above, the LAW Survey found that Indigenous people had an increased prevalence of multiple legal problems<sup>15</sup>. However, more recent findings by James Cook University indicate that indigenous legal need, particularly unmet legal need, is far more prevalent than that documented by the LAW Survey.<sup>16</sup>

## Disability, crime or legal need

35. It is widely reported that disability is a significant and unaddressed problem in Aboriginal and Torres Strait Islander communities.
36. In its 2010 report *Hear Us: Inquiry into Hearing Health in Australia*,<sup>17</sup> the Senate Community Affairs References Committee received evidence about extensive hearing impairment among Indigenous prisoners, with reports of up to 99 per cent of Indigenous prisoners in a central Australian prison presenting with moderate to substantial hearing loss.
37. Further, it is clear that the vast majority of those entered the criminal justice system, from arrest to trial, conviction and imprisonment, without their impairment having been detected. The Committee noted that:
- “...there is legal precedent which suggests that undiagnosed hearing impairment in a convicted person could, in some circumstances, render that conviction unsafe on the grounds that it is an essential principle of the criminal law that accused persons not only be present at trial, but that they be able to understand what is going on and make decisions about the conduct of proceedings.”<sup>18</sup>
38. The Northern Australian Aboriginal Justice Agency (NAAJA) also provided evidence to that Inquiry that imprisonment can be harsher for those with hearing impairment, noting that “It is unquestionably the case that the experience of jail is significantly more severe on people with hearing impairments. Prisons operate with a heavy reliance on prisoners hearing commands, and responding as required. This includes the use of bells and sirens and following oral instructions.”<sup>19</sup>

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<sup>14</sup> Ibid.

<sup>15</sup> Ibid, *op cit* 3, 178.

<sup>16</sup> Chris Cunneen, Fiona Allison and Melanie Schwartz, *Access to justice for Aboriginal People in the Northern Territory*, Australian Journal of Social Issues Vol.49 No.2, 2014, 220. The authors noted that there were significant methodological limitations to the LAW Survey in relation to assessing Indigenous legal needs, including sampling size, the use of telephone survey (nationally it is estimated that 60.5 per cent of Indigenous people in remote areas do not have a landline telephone (ABS & AIHW 2010)), and the absence of Indigenous interpreters (Coumarelos et al. 2012a., 178, 236, 311). The Indigenous Legal Needs Project ‘attempted to overcome these limitations by using ‘qualitative methodology based on men’s and women’s focus groups. The coordinators were provided with criteria for the selection of local community people to participate in the focus group. Participants were paid for their involvement. At the commencement of the focus group we asked participants to complete a questionnaire that provided quantitative data on key areas of legal need. Given language and literacy issues, the questionnaire was read aloud and explained. Focus group coordinators and other members of the focus group assisted with interpreting as necessary’ (Cunneen et al. 2014, 222).

<sup>17</sup> Senate Community Affairs References Committee, *Hear Us: Inquiry into Hearing Health in Australia*, May 2010, Commonwealth of Australia, 140.

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Completed\\_inquiries/2008-10/hearing\\_health/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2008-10/hearing_health/report/index)

<sup>18</sup> Ibid, 142, referring to *Ebatarinja v Deland* [1998] HCA 62; (1998) 194 CLR 444.

<sup>19</sup> Ibid.



39. Further issues arise with other disabilities which are more prevalent in Indigenous communities, including alcohol-related illness such as Foetal Alcohol Spectrum Disorder (FASD), which varies in severity and can be difficult to detect.<sup>20</sup> However, the existence of such a disability can have a profound impact on the relative culpability of an offender, as well as the appropriateness of prison, rather than diversion into appropriate treatment programs.
40. In 2010, the National Indigenous Drugs and Alcohol Committee stated that:
- “Limited research has investigated the relationship between FASD and contact with the criminal justice system in Australia. The limited Australian literature, complemented by international research, indicates that FASD should be considered at every stage of the criminal justice system, from offending behaviour, through to court proceedings, as well as throughout incarceration and post-release.”<sup>21</sup>
41. The Law Council recommends that all governments invest in methods to ensure the detection and treatment of hearing impairment, FASD and other disabilities which can potentially lead to adverse outcomes in the criminal justice system, particularly for Indigenous Australians.

## Aboriginal legal assistance services resourcing

The adequacy of resources provided to Aboriginal legal assistance services by state, territory and Commonwealth governments

42. There are four main government-funded legal assistance service providers: legal aid commissions (LACs), community legal centres (CLCs), Aboriginal and Torres Strait Islander legal services (ATSILS) and family violence prevention legal services (FVPLS). The ATSILS and FVPLS provide specialised, culturally tailored services for Indigenous Australians and receive virtually all of their funding from the Commonwealth.
43. The Productivity Commission, in its 2014 report on Access to Justice Arrangements, found that:
- “As state-based criminal matters predominate the services of ATSILS, state and territory governments should have a stake in funding these services. This would have the added benefit of enabling many of these service providers to redirect existing Commonwealth funds to better meet the family and other civil law needs of Indigenous Australians.”*<sup>22</sup>
44. The Law Council considers this proposal has merit, but maintains that the Commonwealth has a special responsibility to ensure the legal needs of Indigenous Australians are met. The Law Council agrees that an intergovernmental approach is needed to achieve this objective, with a focus on increasing the pool of legal

<sup>20</sup> See for example, <http://www.abc.net.au/radionational/programs/lawreport/diversionary-programs-in-the-kimberley/5827490>; <http://www.abc.net.au/radionational/programs/lawreport/fetal-alcohol-spectrum-disorder/5144978>.

<sup>21</sup> NIDAC, 2012, *Addressing Foetal Alcohol Spectrum Disorder in Australia*, Submission to Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities, 10.

<sup>22</sup> Ibid, *op cit* 12, 781

assistance funding available and adopting new approaches to address indigenous law and justice outcomes.

45. Further, current funding levels have created significant staff retention problems for ATSILS, which report that they are often unable to retain experienced lawyers due to low salaries and challenging working conditions. Funding for lawyers working at ATSILS is well below mainstream legal services.<sup>23</sup>
46. ANAO has reported that the Northern Territory has the greatest number of Indigenous residents living in highly disadvantaged areas with a total of 44 419 people.<sup>24</sup>
47. Service providers informed ANAO that:
- a. the funding received under the Indigenous Legal Assistance Programme is currently inadequate to allow service providers to meet demand, or to provide the level of services needed—particularly in remote and very remote areas. Many disadvantaged areas with high Indigenous populations have no Indigenous legal assistance service outlets, relying entirely on outreach services.<sup>25</sup>
  - b. the level of funding currently received was considered to have not kept pace with rising delivery costs, nor to reflect policy and legislative changes that increase demand, or the cost of delivery over the funding period.<sup>26</sup>
  - c. over recent years State and Territory governments have introduced legislation relating to child welfare, anti-social behaviour, and housing, among others.<sup>27</sup> The implementation of these policies often impacts disproportionately on Indigenous Australians, significantly increasing legal need.<sup>28</sup>

## **Funding for Family Violence Prevention Legal Services**

48. The Law Council is concerned that the transfer of funding arrangements for FVPLS to the Indigenous Advancement Strategy requires FVPLS to tender for future funding.
49. While all fourteen FVPLSs were successful in procuring funding under the IAS:
- The National FVPLS Program was effectively defunded under the IAS and now has no direct allocation. This means that there is no transparency or guarantee of funding for the program, or national recognition of the value of this model;
  - The majority of FVPLSs received only two years of additional funding, extending significant uncertainty for staff and clients of the services; and
  - None of the FVPLSs received an increase in funding, despite a significant rise in the hospitalisation rates of Aboriginal and Torres Strait Islander victims of family violence and a wealth of other evidence to support increased funding for culturally safe, specialist legal services.

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<sup>23</sup> Ibid, *op cit* 4, 4.

<sup>24</sup> Ibid, *op cit* 14, 48-49.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

50. The Law Council considers that it would be equitable and send a better message to Indigenous victims of family violence if their essential services were subject to at least the same funding arrangements as other publicly funded legal services.

## Funding cuts

51. In December 2013 announcement of the 2013-14 Mid-Year-Economic and Fiscal Outlook, the Federal Government announced \$43.1 million in cuts, including \$13.41 million from the Indigenous Legal Aid and Policy Reform Program. The announcement by the Commonwealth Government in March 2015 that it will reverse \$25.5 million<sup>29</sup> in funding cuts not yet implemented is welcome. However, Indigenous legal assistance services need to be given greater resources, not simply required to subsist at current, inadequate levels. Further, the announcement means that funding for those services is likely to go backwards in real terms, while the forward estimates indicate that after two years the downward trajectory is likely to deepen.
52. It is critical that a long term solution to funding legal assistance services is found.

## Family Violence Prevention Legal Services

The benefits provided to Aboriginal and Torres Strait Islander communities by Family Violence Prevention Legal Services

53. The FVPLS program provides specialised, culturally tailored services for Indigenous victims of family violence. FVPLS are the only legal services dedicated to assisting Aboriginal victims of family violence.
54. As noted in the National FVPLS submission to the Productivity Commission inquiry into Access to Justice Arrangements:
- “The primary function of Family Violence Prevention Legal Services (FVPLSs) is to provide legal assistance, casework, counselling and court support to Aboriginal and Torres Strait Islander adults and children who are victim/survivors of family violence. FVPLSs have adopted holistic, wrap-around service delivery models that prioritise legal service delivery while recognising and addressing the multitude of interrelated issues that our clients face.”<sup>30</sup>
55. As the Productivity Commission notes, the barriers that many Aboriginal and Torres Strait Islander people face in engaging with the Australian legal system, and the lack of trust in the system, have led to the creation of Indigenous-specific legal assistance bodies — ATSILS and FVPLS. The Commission concluded that:
- “Aboriginal and Torres Strait Islander Australians often have complex legal needs and face substantial barriers in accessing legal assistance. The nature and complexity of their civil law needs means that specialist legal assistance services remain justified.”<sup>31</sup>

<sup>29</sup> <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FirstQuarter/26-March-2015-Legal-aid-funding-assured-to-support-the-most-vulnerable-in-our-community.aspx>.

<sup>30</sup> [http://www.pc.gov.au/data/assets/pdf\\_file/0003/136695/subdr194-access-justice.pdf](http://www.pc.gov.au/data/assets/pdf_file/0003/136695/subdr194-access-justice.pdf)

<sup>31</sup> Ibid, *op cit* 12, 761.

## Mandatory sentencing regimes

The consequences of mandatory sentencing regimes on Aboriginal and Torres Strait Islander incarceration rates

56. 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. Numerous reports over the last 20 years have indicated that Indigenous incarceration rates are extremely high and have been rapidly rising, at an increasing rate.
57. There are a range of factors which have contributed to the disproportionate Indigenous presence in the criminal justice system compared to non-Indigenous people. This includes 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.<sup>32</sup> These issues are explored in further depth below.
58. Evidence indicates that state and territory government bail and sentencing policies also play a significant role, particularly in jurisdictions with high populations of Indigenous Australians and where mandatory sentencing regimes are in force. Individuals are often incarcerated for relatively minor offences, such as traffic infringements, failure to pay fines, or minor parole breaches.<sup>33</sup>
59. The Law Council has consistently expressed its strong concern about mandatory sentencing. In May 2014, the Law Council released a *Policy Discussion Paper on Mandatory Sentencing*<sup>34</sup> and a *Mandatory Sentencing Policy*.<sup>35</sup> In the Law Council's view, there is a lack of persuasive evidence to suggest that the justifications often given for mandatory sentences – retribution, effective deterrence, incapacitation, denunciation and consistency – achieve the intended aim. Instead, mandatory sentencing regimes can produce unjust results with significant economic and social costs and without a clear and directly attributable corresponding benefit in crime reduction.
60. The Law Council considers that mandatory sentencing:<sup>36</sup>
- potentially results in harsh and disproportionate sentences where the punishment may not fit the crime;
  - potentially increases the likelihood of recidivism;

<sup>32</sup> 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, 1 and 226.

<sup>33</sup> For example, <https://www.humanrights.gov.au/publications/indigenous-deaths-custody-chapter-7-courts-and-imprisonment>

<sup>34</sup> Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing*, May 2014 at [www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/MS\\_Discussion\\_Paper\\_Final\\_web.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/MS_Discussion_Paper_Final_web.pdf)

<sup>35</sup> Law Council of Australia, *Mandatory Sentencing Policy*, May 2014 at [www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/MS\\_Policy\\_Position.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/MS_Policy_Position.pdf)

<sup>36</sup> Ibid.

- wrongly undermines the community's confidence in the judiciary and the criminal justice system as a whole;
- dangerously displaces direction to other parts of the criminal justice system, most notably law enforcement agencies and prosecutors;
- results in significant economic costs to the community; and
- is not consistent with Australia's commitments under the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*.

61. In the Northern Territory the evidence is particularly stark. The NT's per capita imprisonment rate in 2014 was 843 per 100,000. To place this in perspective, the US has the highest national imprisonment rate in the world at 714 per 100,000. 86 per cent of those imprisoned in the NT are Indigenous. Recently, instead of seeking other solutions to this catastrophic situation, the NT Government began building one of the largest prisons in the country.<sup>37</sup>

62. In its evidence before the Senate Legal and Constitutional Affairs Committee's inquiry into justice reinvestment, the North Australian Aboriginal Justice Agency stated that, as at December 2012, 38 per cent of the Northern Territory's prison population was serving a sentence of three months or less and 63 per cent were serving sentences less than six months.<sup>38</sup> 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.<sup>39</sup>

63. Similarly, first-time violent offenders were disproportionately Indigenous. Aboriginal men made up 91 per cent of those convicted for a violent offence, and were 20 times more likely to be convicted under the offence than non-Indigenous men.<sup>40</sup> Clearly, the overall impact of mandatory sentencing falls disproportionately on the Indigenous population and contributes to the over-representation of Indigenous peoples in the corrective system.

64. The United Nations has recommended that Australia abolish mandatory sentencing, due in part to the discriminatory impact on Indigenous Australians.<sup>41</sup> The Committee against Torture, in its Concluding Observations on the combined fourth and fifth periodic reports of Australia, said:

*"The Committee is...concerned at reports that mandatory sentencing, still in force in several jurisdictions, continues to disproportionately affect indigenous people..."*

<sup>37</sup> John B. Lawrence SC, *Lock-Up Mania: NT Leads the World*, Land Rights News, Northern Land Council, January 2015.

<sup>38</sup> 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, 14.

<sup>39</sup> 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), 3.

<sup>40</sup> Ibid.

<sup>41</sup> United Nations Committee Against Torture, *Concluding Observations of the Committee against Torture: Australia*, 23 December 2014, CAT/C/AUS/CO/4-5, Recommendation 12 at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fAUS%2fCO%2f4-5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fAUS%2fCO%2f4-5&Lang=en).

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*"[The State Party]...should...review mandatory sentencing laws with a view to abolishing them, giving judges the necessary discretion to determine relevant individual circumstances."*<sup>42</sup>

65. Additionally, as discussed in greater detail below, there are substantial economic costs accruing the justice system as a result of mandatory detention and its impact on imprisonment rates.

66. In Western Australia, the *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015* introduced mandatory minimum penalties of up to 15 years for people who committed a serious crime, such as rape or murder, during an aggravated burglary. Western Australia's Corrective Services Commissioner, James McMahon, told a parliamentary estimates committee in May 2014 that the legislation could put a further 206 adults and 60 juveniles behind bars within four years, at an estimated cost of \$93 million.<sup>43</sup> Currently, nation-wide, the annual cost of Indigenous imprisonment is estimated at over \$795 million.

67. Statistics also indicate that Indigenous juveniles are particularly affected by mandatory sentencing:

- in the June quarter of 2013 about half (51 per cent) of juveniles in detention on an average night were Indigenous,<sup>44</sup> despite Indigenous people comprising 2.5 per cent of the total Australian population;<sup>45</sup>
- 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;<sup>46</sup>
- in 2013 Indigenous children constituted 67.5 per cent of the WA juvenile prison population.<sup>47</sup> This is particularly significant as only about five per cent of young Australians are Indigenous;<sup>48</sup> and
- 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).<sup>49</sup>

68. The Law Council recommends that all mandatory sentencing laws be abolished, particularly given their disproportionate impact on Indigenous Australians.

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<sup>42</sup> Ibid.

<sup>43</sup> Parliament of Western Australia Estimates Committee, Hansard, 22 May 2014, p. 11 at [www.parliament.wa.gov.au/Hansard/hansard.nsf/0/5465ab340a3d6c6648257cf30013bcac:\\$FILE/A39+S1+20140522+p423b-445a.pdf](http://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/5465ab340a3d6c6648257cf30013bcac:$FILE/A39+S1+20140522+p423b-445a.pdf).

<sup>44</sup> Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2013*, 10 December 2013, vii at [www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129545393](http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129545393).

<sup>45</sup> Australian Institute of Criminology *RCIADIC Monitoring Report into Deaths in Custody*, 30 June 2011, p. 3 at [www.aic.gov.au/media\\_library/publications/mr/20/mr20.pdf](http://www.aic.gov.au/media_library/publications/mr/20/mr20.pdf).

<sup>46</sup> Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2013*, 10 December 2013, 9 at [www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129545393](http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129545393).

<sup>47</sup> 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 [www.wacoss.org.au/Libraries/State\\_Election\\_2013\\_Documents/Justice\\_and\\_Community\\_Safety\\_Report.sflb.ashx](http://www.wacoss.org.au/Libraries/State_Election_2013_Documents/Justice_and_Community_Safety_Report.sflb.ashx).

<sup>48</sup> Australian Institute of Health and Welfare, *Indigenous Young People in the Juvenile Justice System*, Bulletin 109, November 2012. [www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129542188](http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129542188).

<sup>49</sup> Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2013*, 10 December 2013, 51. [www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129545393](http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129545393).



## Indigenous incarceration rates

The reasons for the high incarceration rates for Aboriginal and Torres Strait Islander men, women and juveniles

69. Existing research indicates that the causal factors between criminal behaviour and victimisation, high imprisonment rates and recidivism are complex and interlinked.

70. Dr Don Weatherburn PSM, Director of the NSW Bureau of Crime Statistics and Research, considers key risk factors include poverty, childhood neglect, alcohol and other drug abuse, unemployment, poor education and other environmental factors. These intersect in a number of ways and are cyclical and reoccurring. Numerous studies indicate the influence each of these factors has the others and on propensity to commit crime. In a presentation to the Law Council's Indigenous Legal Issues Committee in November 2014, Dr Weatherburn advised:

- a. while there is a historical element to high rates of imprisonment, including loss of sovereignty, discrimination and subjugation, there are also a number of interconnected distal causes, including drug and alcohol abuse, child neglect and abuse, developmental delay, poor school performance and low rates of employment. All factors tend to interact. For example, low school completion rates leads to unemployment, which can lead to substance abuse, child neglect, poverty, etc.;
- b. substance abuse is, insidiously, the biggest risk factor for child neglect and abuse and offending;
- c. there are a higher proportion of Indigenous youths at risk of developmental delay, poor school performance, which leads to a dearth of employment opportunities; and
- d. the ratio of employment between Indigenous and non-Indigenous people has stayed the same, although rate of employment overall has increased.

71. Dr Weatherburn notes in *Arresting Incarceration*:

"From the data it is clear that Indigenous Australians fare much worse than non-Indigenous Australians in terms of four critical factors known to play a significant role in the onset, seriousness, duration and frequency of involvement in crime. The insidious thing about these factors is that they form a vicious cycle. Parents exposed to financial or personal stress, or who abuse drugs and alcohol are more likely to abuse or neglect their children. Children who are neglected or abused are more likely to associate with delinquent peers and do poorly at school. Poor school performance increases the risk of unemployment, which in turn increases the risk of involvement in crime. Involvement in crime increases the risk of arrest and imprisonment, both of which reduce the chances of legitimate employment, while at the same time increasing the risk of drug and alcohol abuse. And so the process goes on, a vicious cycle of hopelessness and despair transmitted from one generation of Aboriginal people to the next."<sup>50</sup>

<sup>50</sup> Weatherburn, 2014, *Arresting Incarceration: Pathways out of Indigenous Imprisonment*, Aboriginal Studies Press, 87.



72. Further, it is clear that the largest single factor increasing the propensity to commit crime and go to jail is prior imprisonment. Over 80 per cent of Aboriginal and Torres Strait Islander people who are given a custodial sentence are returning to prison. In addition, in several jurisdictions, a very high proportion of Indigenous prisoners are being held on remand for lengthy periods of time, indicating that bail laws in those jurisdictions may be significantly inflating the rate of imprisonment.<sup>51</sup>
73. As discussed further below, the impact of bail laws and post-release support and supervision are areas in clear need of close examination. Such a high prison return rate for Indigenous peoples indicates there may be a need to develop and adequately fund culturally appropriate post-release and reintegration programs, as well as programs to prevent violence reoccurring, noting that 60 per cent of Indigenous offenders are sentenced for violent offences.
74. It is further noted that bail laws in a number of jurisdictions may be impacting disproportionately on Indigenous people because it can be harder for them to meet bail conditions, parole conditions and conditions attaching to probation.<sup>52</sup>
75. As noted earlier in this submission, existing law and order policy settings are a major contributor to the rate of imprisonment and the cycle referred to by Dr Weatherburn. It is well known that social and economic disadvantage is a major predictor of crime, anti-social behaviour and imprisonment. Mandatory minimum sentences, three-strike policies, punitive bail and parole breach laws and other such measures disproportionately impact on Indigenous peoples because of the widespread prevalence of disadvantage in Aboriginal and Torres Strait Islander communities. For example, there is a presumption against bail for offenders charged with violent offences in NSW. The Australian Bureau of Statistics notes that nearly 86 per cent of Indigenous offenders on remand are being held for violent offences.<sup>53</sup>
76. The Law Council considers that attempting to deal with Indigenous disadvantage under the Closing the Gap strategy without concerted strategies to also lower the rate of imprisonment is likely to be an exercise in futility, because criminal behaviour and imprisonment form part of the perpetual cycle.

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<sup>51</sup> Ibid, 91. For example, in 2012 the proportion of Indigenous prisoners on remand in NSW was 33% over a mean period of 4 months, Queensland was 19.2% over 5.1 months, WA was 19.4% over 2.3 months, NT was 14% over 3 months.

<sup>52</sup> Ibid, 92.

<sup>53</sup> Ibid, 94.

## Statistical information held by governments on Indigenous justice

The adequacy of statistical and other information currently collected and made available by State, Territory and Commonwealth governments regarding issues in Aboriginal and Torres Strait Islander justice

77. The Law Council considers that existing data is sufficient to indicate there is a serious and growing problem, with respect to systemic disadvantage and over-representation of Indigenous peoples in the criminal justice system.
78. A major gap in data collection in all jurisdictions is in relation to the effectiveness of alternatives to imprisonment and the effectiveness of incarceration, as a measure to reduce the crime rate. Governments invest very little in piloting new approaches to criminal justice, but invest considerably more investigating the scale of the problem without illuminating effective solutions.
79. The Productivity Commission and Australian Bureau of Statistics, as well as the ANAO and other Federal agencies (and bodies such as the Australian Human Rights Commission) regularly publish statistics on Indigenous disadvantage, including imprisonment rates. However, data at the State and Territory level is patchy and inconsistent, at best. Further, much of the existing data-set merely reports on the problem as it grows from year to year, without empirically examining, trialling and evaluating potential solutions.

### Existing research on the effectiveness of imprisonment on reducing crime

80. There is clear evidence that the crime rate has decreased significantly in Australia over the last decade.<sup>54</sup> However there is a lack of any evidence or meta-analysis indicating that crime reduction has been impacted significantly by increasing imprisonment rates.
81. In the United States, there has been significant research on this topic, with a number of surprising conclusions. The United States has also seen a significant decline in its crime rate over the past four decades. Since 1970, violent crime has fallen by 51 per cent and property crime by 43 per cent.<sup>55</sup> Over the same period, incarceration rates have increased five-fold, the majority African-American.
82. However, in the largest study conducted into the reasons for reduction in the rate of crime in the US,<sup>56</sup> the largest single factors found were the proliferation of new policing technology, reduction in alcohol consumption, increased income and reduced unemployment, while increasing imprisonment and punitive criminal laws had a negligible impact, particularly since the early 1990s.<sup>57</sup>

<sup>54</sup> For example, [http://www.aic.gov.au/crime\\_types/in\\_focus/crimeprevention.html](http://www.aic.gov.au/crime_types/in_focus/crimeprevention.html)

<sup>55</sup> Roeder, O., Eisen, L-B, Bowling, K, *What Caused the Crime Decline*, 2015, Brennan Centre for Justice, New York University Law School, 3. <https://www.brennancenter.org/publication/what-caused-crime-decline>

<sup>56</sup> Ibid, 17, 22-24.

<sup>57</sup> Ibid, 15.

83. This is a very significant finding. The US spends \$80 billion annually on its prisons alone – and \$260 billion on criminal justice, around one-quarter of its existing deficit. We already know that it costs more each year to keep someone in prison than to fully subsidise their education at a top-tier university. It is noted that in the US:

“A 2014 report from the Brookings Institution’s Hamilton Project explained that incarceration has “diminishing marginal returns.” In other words, incarceration becomes less effective the more it is used. The Brookings report analyzes trends in two regions, Italy and California, to draw this conclusion. Similarly, a 2014 study by the National Academy of Sciences, grounded in a review of past research through 2000, noted that “the incremental deterrent effect of increases in lengthy prison sentences is modest at best.”<sup>58</sup>

84. Given what we know in Australia, that we spend \$795 million each year on imprisoning Indigenous people alone, one would expect governments to be concerned taxpayers are receiving value for money. Year after year, extensive research is carried out on whether legal aid is providing an efficient service, or whether our teachers are working effectively.

85. Yet there is very little evidence collated about the effects of imprisonment on crime or the causal factors behind diminishing crime rates. Evidence that the largest proportion of those imprisoned are actually returning to prison gives weight to the theory that imprisonment may have a limited deterrent effect or impact on recidivism. Further, the findings in the Brennan Centre’s studies are consistent with Dr Weatherburn’s analysis, that:

“...when you reach a point where nearly a quarter of the Indigenous male population has been arrested by police in the last five years, more than one in ten (11.4 per cent) have been imprisoned in the last five years (ABS 2004) and one in every five Indigenous Australians have at some stage lost a parent to prison (Quilty 2005; Quilty et al. 2004), contact with the criminal justice system has probably lost much of its deterrent effect.”<sup>59</sup>

86. The Law Council considers that investing in this kind of research may establish the basis for a rethink in existing criminal justice policies.

## **Research on impact of justice reinvestment on crime and imprisonment**

87. Currently, there is virtually no data in Australia on the impact of justice reinvestment on crime, reoffending and imprisonment, chiefly because most jurisdictions have not piloted it and programs that do exist are in their infancy. Moreover, to date governments have failed to offer significant support to alternative justice mechanisms.

88. Just Reinvest NSW commenced in 2014 with philanthropic funding, which will operate a two year trial in order to demonstrate the effectiveness of justice reinvestment in addressing crime and imprisonment, particularly among Indigenous young people. The trial is centred in Bourke, NSW.<sup>60</sup>

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<sup>58</sup> Ibid, 7

<sup>59</sup> Weatherburn, Ibid, *op cit* 51, 7.

<sup>60</sup> <http://www.justreinvest.org.au/>

89. The Law Council notes that the Senate Legal and Constitutional Affairs References Committee inquired into justice reinvestment in 2013 and was unable to reach a unanimous view on whether it should be trialled in Australia. Majority Senators called for the Commonwealth to take a leadership and coordinating role with the States and Territories, through intergovernmental fora, and for the creation of justice targets, to reduce the rate of Aboriginal imprisonment.
90. Coalition Senators on the Committee, while supporting justice reinvestment in-principle, disagreed with the majority report on the basis that criminal justice remains largely a State responsibility and due to the dearth of information about its effectiveness.
91. The Law Council considers these to be valid points, however such concerns point to the clear need for extensive information to be gathered about the effectiveness of justice reinvestment in Australia. Further, evidence of its effectiveness in the US and UK<sup>61</sup> suggests that it might be effective here. The Commonwealth continues to have a special responsibility for Indigenous Australians and invests heavily in programs directed toward improving education outcomes, increasing employment and reducing disadvantage under the Closing the Gap initiative,<sup>62</sup> as well as on legal services for Indigenous peoples charged with criminal offences or victims of domestic violence.<sup>63</sup> No jurisdiction is unaffected by high Indigenous imprisonment rates. There is clearly a role for the Commonwealth in addressing what is a national crisis, with enormous social and economic costs for the entire nation and consequences for Australia's international reputation.<sup>64</sup>
92. Moreover, all evidence presented in this submission demonstrates that imprisonment impacts upon and exacerbates social disadvantage, which increases propensity to offend and feeds the cycle of imprisonment and disadvantage. At a time when small gains have been achieved under the various National Partnership Agreements concluded by the Council of Australian Governments (COAG) under the Closing the Gap strategy, imprisonment rates of Indigenous adults and youths have continued to rapidly increase.
93. For example, the US Federal Government has been directly involved in the funding and coordination of State-run justice reinvestment programs. In November 2013, the US Attorney-General announced Federal funding of \$62 million to "strengthen efforts to help people returning from prison re-join their communities and become productive, law-abiding citizens."<sup>65</sup> The US Justice Department operates a range of Federal

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<sup>61</sup> For example, Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, June 2013, Commonwealth of Australia.

<sup>62</sup> See for example the Media Release at the 2015 Budget by Senator Scullion, Minister assisting the Prime Minister for Indigenous Affairs in relation to the Indigenous Advancement Strategy, announcing \$4.9 billion investment in programs to advance Indigenous welfare and living standards: <http://us7.campaign-archive2.com/?u=07a26784b130ffd1109d7eef5&id=187443fdbbc&e=6669c5a26f>

<sup>63</sup> For example, in the 2015 Federal Budget, the Commonwealth allocated \$1.3 billion under the National Partnership Agreement on Legal Assistance Services: <http://www.ag.gov.au/Publications/Budgets/Budget2015-16/Pages/Media-Releases/Attorney-Generals-Portfolio-Budget-measures-2015-16.aspx>

<sup>64</sup> See for example the Concluding Observations of the Committee Against Torture, Concluding Observations of the Committee on the Elimination of all forms of Racial Discrimination, Concluding Observations of the UN Human Rights Committee on Australia's obligations under the International Convention on Civil and Political Rights, which all raise concerns about Australia's high Indigenous imprisonment rate.

<sup>65</sup> <http://www.justice.gov/opa/pr/justice-department-announces-more-62-million-strengthen-reentry-probation-and-parole-programs>

programs to identify alternatives to imprisonment, recidivism reduction strategies and juvenile re-entry programs.<sup>66</sup>

94. Finally, a primary objective in justice reinvestment frameworks implemented in the US, UK and elsewhere is “justice mapping” and evaluation.<sup>67</sup> The only way to generate data to determine if justice reinvestment can work in Australia is to establish pilot schemes and adequately fund them. While Just Reinvest NSW has been established with philanthropic funding, these programs need government investment and support, given the substantial public benefits they might achieve.
95. The Law Council submits that funding for justice reinvestment trials in every jurisdiction is necessary, in order to generate the data necessary to determine whether it can be successful in reducing crime, reoffending and imprisonment. The Law Council calls for the Australian Government to negotiate a new National Partnership Agreement through COAG to enable this to occur and for the necessary data to be obtained.

### **Additional research needed into post-release programs**

96. As part of, or in addition to, the piloting of justice reinvestment programs in all jurisdictions, there is a need for research into the effectiveness of post-release programs in reducing recidivism.
97. As noted by Weatherburn, one of four key priorities in relation to the goal of reducing Indigenous recidivism is “a comprehensive assessment of the extent to which Indigenous (and non-Indigenous) prisoners released from custody are receiving the supervision, support and treatment needed to minimise the risk of return to prison.”<sup>68</sup> There is a need to identify programs shown to be successful in:
- a. Reintegration into the community; and
  - b. Minimising violent behaviour among indigenous offenders following release from prison (as noted previously, more than 60 percent of sentenced Indigenous offenders have been imprisoned for a violent offence).

### **Nationally consistent data set needed**

98. The Law Council notes that the collection of data on the reasons for high rates of Indigenous imprisonment is not available. Each jurisdiction collects its own data and may publish it in various forms. However it is generally inaccessible, inconsistent or not sufficiently qualitative.
99. This could be done either by the Australian Institute of Criminology or by another Australian Government agency similar to the US Council of State Governments Justice Centre or National Re-entry Resource Centre.
100. For example, it is impossible to obtain data in all jurisdictions on persons proceeded against (charged) by Indigenous status.<sup>69</sup> The lack of such data and lack of a coordinated effort to understand the problem tends to impede efforts that are being made, or may be made in the future, to address it.

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<sup>66</sup> See *ibid.*

<sup>67</sup> Senate *Inquiry*, *ibid.*, *op cit* 62, 45

<sup>68</sup> Weatherburn, *ibid.*, *op cit* 51, 157.

<sup>69</sup> *Ibid.*, 55

## Alternatives to imprisonment

The cost, availability and effectiveness of alternatives to imprisonment for Aboriginal and Torres Strait Islander Australians, including prevention, early intervention, diversionary and rehabilitation measures

101. There are a number of initiatives which have been trialled, with promising results, but insufficient investment of public funding, including:
- a. Justice reinvestment;
  - b. Indigenous court programs;
  - c. Community outreach and education; and
  - d. Addressing cultural or systemic bias in the criminal justice system.
102. It is important to clearly state the problem and the objective when examining ways to reduce imprisonment and address the conditions that give rise to it. Obviously, repeated criminal or anti-social behaviour leads the public to demand that the behaviour be punished. Further, there is a need also to protect the public or certain individuals, particularly in the case of violent offenders. There needs to be public confidence in the administration of justice, which can be shaken in circumstances where justice was not seen to be done.
103. Further, it is not an appropriate solution to demand leniency on the basis of race. In certain circumstances it may be a relevant factor in sentencing, but this is different to framing the law in order to achieve a biased outcome. Such an approach would be likely to sour public opinion and lead back to more punitive approaches.
104. While it is clear that imprisonment is not an effective deterrent, it is costly and too many prisoners are left to their own devices and fall back into familiar patterns of behaviour. There is an absence of culturally appropriate treatment plans and holistic approaches to criminal behaviour motivated or aggravated by drug addiction or alcohol. The growing prevalence of methamphetamine use in regional communities is only exacerbating the problem. Many criminal courts are reporting anecdotally that on average nine out of ten mentions involve 'ice', more than double the number involving heroin in the 1980s.
105. Further, as noted above, many of those imprisoned are serving sentences of less than 6 months, often for repeated traffic infringements or offences that would otherwise attract a fine, minor parole violations, alcohol-fuelled assaults, minor theft, etc. Evidence suggests the policy approach in a number of jurisdictions is simply making matters worse.
106. For example, recently, the NT Government enacted legislation to allow "paperless arrests", which abrogate the requirement for police to complete any paperwork when arresting and detaining someone for up to four hours, for an offence that might attract an infringement notice – such as using profane language or refusing to 'move on'.<sup>70</sup> Inevitably, this will impact the imprisonment rate and particularly affect Aboriginal and Torres Strait Islander peoples.

<sup>70</sup> <http://www.abc.net.au/news/2015-03-31/northern-territorypaperless-arrests-regime-challenged-high-court/6363294>



107. Meanwhile, 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 reduced the number of Indigenous court appearances by 48 per cent.<sup>71</sup>
108. The Law Council considers there is sufficient evidence from alternative approaches overseas that investment in rehabilitation, justice re-investment and culturally appropriate programs can work in Australia, bring down the rate of crime and recidivism and the rate of imprisonment.

## **Evidence of alternative justice approaches overseas**

109. As noted above, there is evidence supporting the effectiveness of justice reinvestment and reduced reliance on imprisonment in reducing return-to-prison numbers in several US jurisdictions, the United Kingdom, as well as New Zealand and Canada.
110. The simple proposition is that governments can substantially reduce the amount of money being spent on imprisonment and corrections and better address the underlying causes of crime in troubled communities through reinvestment of money saved by diverting offenders into programs designed to give them the best chance possible of reintegrating into society.

### Success in the United States

111. As noted above, evidence in the US has pointed to the fact that increasing imprisonment rates have a negligible impact on crime. The logical conclusion reached by many US State Governors in recent years was that, if a primary objective of criminal justice policy is to prevent crime, imprisonment was not an effective solution.
112. In 2006, the Council of State Governments Justice Centre began to promote justice reinvestment and, by 2014, fifteen US States had implemented it in some form.<sup>72</sup>
113. Former Texas Governor, the Hon. Rick Perry, noted in a recent essay:
- “The amount Texas spent on prisons and parole had ballooned to nearly \$3 billion in 2007 – and it was nowhere near enough. Projections called for an additional 17,000 prison beds, at an additional \$2 billion, just to sustain the system for another 5 years.”<sup>73</sup>
114. In response to this crisis, Governor Perry, a Republican, embarked on a bi-partisan justice reinvestment program in Texas, based on advice from a Democrat judge from Dallas, who argued that imprisoning many non-violent, low risk offenders, “benefited neither the individual nor society at large.” Governor Perry then commenced a program of diverting drug offenders into rehabilitation programs, designed to treat the illness and reduce the offender's propensity to reoffend. Senator Perry describes the success of the program as follows:

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<sup>71</sup> Boris Beranger, Don Weatherburn and Steve Moffatt, ‘Reducing Indigenous Contact with the Court System’ (2010) Issues Paper 54, NSW Bureau of Crime Statistics and Research, 3.

<sup>72</sup> Wood, W, (2014) *Justice Reinvestment in Australia*, Victims & Offenders: an International Journal of Evidence-based Research, Policy and Practice, 9:1, 100-119, 102.

<sup>73</sup> Chettiar, Waldman, Fortier, Finkelman, *Solutions: American Leaders Speak Out on Criminal Justice*, Brennan Centre for Justice, NYCU School of Law, Hon. Rick Perry “Follow the Texas Model”, 89.



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“By the time I left office in 2015, Texas had expanded the number of specialty courts in the state from nine to more than 160. We had reduced the number of parole revocations to prison by 39 per cent. We saved \$2 billion from our budget, not to mention countless lives saved. We did all this while our crime rate dropped to its lowest point since 1968. And for the first time in modern Texas history, instead of building new prisons, we shut down three and closed six juvenile lock-ups.”<sup>74</sup>

115. Several other US States have also trialled justice reinvestment with encouraging results. An assessment of return-to-prison rates over three years, between 2007 and 2010, demonstrated reductions of between 5 per cent and 20 per cent in participating jurisdictions.
116. Connecticut, Georgia, Texas, Michigan, North Carolina, South Carolina, Pennsylvania, Rhode Island, Wisconsin and Colorado all implemented legislative changes to reduce the propensity for re-admission following parole violations and breaches of probation, which generated substantial cost-savings (\$50 million in Connecticut alone).<sup>75</sup> That money was then reinvested in mental health and substance abuse treatment programs, community-based pilots and other evidence-based programs proven to increase the average time between release and re-offending.
117. In addition, a more rational approach was taken to policy development. For example, in Connecticut, following the enactment of these reforms there was a home invasion and triple-homicide which made national news and sent shockwaves through the community. The offenders were parolees whose circumstances had nothing to do with the reforms that had been implemented. In response, policy makers made adjustments to parole decision-making processes, without scrapping the overall package in response to the obvious opportunity to capitalise politically by moving toward a tough-on-crime agenda, and recidivism numbers continued to fall.<sup>76</sup>
118. As a further example, the US State of Michigan experienced significant increases in prison populations and prison expenditure from the late 1990's to 2008. In 2007, Michigan had 51,554 prisoners; the highest prison population ever recorded in that State.
119. Following data analysis, Michigan policy-makers were presented with a series of options for dealing with the increasing prison population and associated expenditure. Examples of some of these options included: providing juveniles at risk of engaging in criminal behaviour (for example, those who had disengaged from school and/or were unemployed) with employment opportunities; expanding employment services for high risk people on probation or parole; and ensuring that everyone released from prison was subject to a period of supervision in the community.
120. By 2010, Michigan had reduced its prison population by 6000 inmates. The reduced prison numbers resulted in Michigan closing 21 prisons and reinvesting the money saved as a result of these closures into community services and programs.
121. The most remarkable achievement of any US State has been in California. In 2003, the State's prison population had soured and a report released that year found that 70 per cent of the State's parole population returned to prison within 18 months.

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<sup>74</sup> Ibid, 91.

<sup>75</sup> *Reducing Recidivism – States Deliver Results*, June 2014, National Re-entry Resource Centre.  
[http://csgjusticecenter.org/wp-content/uploads/2014/06/ReducingRecidivism\\_StatesDeliverResults.pdf](http://csgjusticecenter.org/wp-content/uploads/2014/06/ReducingRecidivism_StatesDeliverResults.pdf)

<sup>76</sup> Ibid, 6.

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As a result of policies implemented between 2010 and 2013, the state's prison population fell by 21 per cent and parole population reduced by 63 per cent.<sup>77</sup>

122. In addition to these measures, there has been growing recognition in the US for a national approach. Since 2009, a number of attempts have been made to enact the National Criminal Justice Commission Act, which would provide a forum and mechanism for analysing and identifying measures to reverse growing rates of imprisonment. This measure has attracted broad support from across the political spectrum and among prominent organisations such as the American Council for Civil Liberties, the American Bar Association, and representative groups for sheriffs and law enforcement. Recently, Hilary Clinton, a potential Presidential candidate in the, raised justice reform as one of her key election platforms, a position which has attracted support from Democrats and Republicans alike.<sup>78</sup>
123. Further, in August 2013, the US Attorney-General announced the elimination of mandatory minimum penalties for low-level drug offences, given evidence of the disproportionate impact on racial minorities. Rights groups have also been calling for Federal adoption of a policy requiring new punitive laws to be accompanied by a 'racial impact statement' (which have already been adopted in Iowa, Connecticut and Oregon) and training for law enforcement and officers in the criminal justice system to reduce racial bias and profiling.

#### Justice reinvestment in the United Kingdom

124. In the UK, where justice reinvestment has been trialled, it has been concluded that there is a need for decentralisation of justice policy and empowerment of local government authorities or governance structures, which are better placed to identify the factors driving re-offending behaviour. For example, in areas with higher rates of homelessness, mental illness and drug problems, there is scope for increasing the rate of diversion for young offenders and reducing reliance on custodial sentencing for those who could be offered greater community-based support.

#### Alternative justice models in New Zealand

125. In New Zealand, Maori courts, 'marae' and family group conferencing have been in operation, in one form or another, since the 1970s. Similar to Koori Courts and Aboriginal community courts, they attempt to involve some elements of traditional Maori justice systems. Further, in 1999 New Zealand adopted a new corrections policy of 'Integrated Offender Management, which aimed to include greater involvement by Maori in managing an offender's risk of re-offending. More recently, NZ adopted a Framework for Reduction of Maori Re-offending :

"The new range of targeted interventions has included the provision of new kaupapa Maori programming, where inmates are able to access and participate in aspects of Te Ao Maori: te reo language programmes, general education in tikanga, and Maori arts such as carving and weaving."

126. Pleasingly, a New Zealand-made initiative of Maori Focus Units in prisons has been adopted in a number of Australian prison systems, which have established therapeutic programs to address rates of reoffending among Indigenous people.

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<sup>77</sup> Ibid, 19.

<sup>78</sup> <http://www.msnbc.com/msnbc/hillary-clinton-calls-ending-era-mass-incarceration>

## Alternative justice approaches in Australia

### Justice reinvestment

127. As noted above, [Just Reinvest NSW](#) commenced in 2014, as a two year justice reinvestment trial in Bourke, NSW, for Aboriginal young people. The objective of the trial is to demonstrate the benefits of new strategies for diverting young offenders from the criminal justice system and break the cycle of crime and imprisonment.
128. The Law Council made a submission to the Senate Legal and Constitutional Affairs References Committee Inquiry into 'Value of a justice reinvestment approach to criminal justice in Australia', which made the following key points:
- a. Justice reinvestment focuses on community-building through crime prevention as opposed to the weakening of communities through imprisonment; and the ability of justice reinvestment to address the multiple underlying causes of offending.
  - b. Another benefit of justice reinvestment is its ability to provide sustainable sources of funding for culturally appropriate community programs such as Indigenous healing programs and residential drug and alcohol programs.
  - c. There is a need for a shift in government policy toward more effective early intervention, diversionary and rehabilitative models, in order to work towards long-term reductions in the over-representation of Indigenous people in the criminal justice system.
129. In 2014, the Productivity Commission recommended that new approaches need to be piloted to address incarceration and noted that justice reinvestment is one such approach.<sup>79</sup>
130. The Law Council notes that the apparent inertia with respect to such new approaches, such as justice reinvestment, is likely to be a political problem. The usual law and order rhetoric has proven unhelpful in this context. The political discourse centres on the need for a hard-line on criminals and therefore the easy, populist solutions usually rise to the surface of the policy debate.
131. It has been suggested that one of the reasons why justice reinvestment enjoys the support that it does in the US, but not in Australia, is that the fiscal circumstances facing many of its jurisdictions allowed more prominence to be given to actuarial concerns and a push for evidence-based policies.<sup>80</sup> The overall imprisonment rate in the US is much higher than in Australia, however as noted above the rate of Indigenous imprisonment in Australia is comparable.
132. Having regard to the experience in other jurisdictions referred to above, the Law Council recommends that coordinated trials be established and adequately funded in all jurisdictions.

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<sup>79</sup> Ibid, *op cit* 1, 4.106.

<sup>80</sup> Wood, Ibid *op cit* 71, 106.

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### Indigenous courts

133. The Productivity Commission has also identified Indigenous courts as measures which can be effective in reducing reoffending and strengthening communities. It noted that:

“A 2010 evaluation found that the proportion of offenders who absconded subject to warrant was lower for offenders appearing in a Murri Court compared to the same offenders appearing in mainstream Magistrates or Children’s Courts. However, appearing for sentence in the Murri Court had no impact on the likelihood or seriousness of offending”<sup>81</sup>

134. Unfortunately, the Queensland Government closed the Murri Court in Queensland, along with the Drug and Special Circumstances courts in 2012 and Murri Court was never adequately funded or equipped with reasonable diversionary options.
135. Similar courts exist in other jurisdictions.
136. The Law Council considers greater funding for Indigenous courts and availability of diversionary options are needed, particularly for young offenders.

### Need for adequate funding and concentrated development of re-entry programs

137. All Australian jurisdictions seriously under-invest in after-prison and re-entry programs. This is remarkable, given the existing literature in Australia and the effectiveness of such programs overseas.
138. Obviously, the environment in Australia is different to the US and UK. A very large proportion of Indigenous people live in remote areas, whereas most US and UK programs are focussed in urban settings.
139. However, the fact that 80 percent of Indigenous people (and nearly 60 per cent of non-Indigenous people) who are imprisoned return to prison, makes it reasonably clear that a long term solution to this issue requires a reduction in the recidivism rate. Further, given the evidence of the success of such programs in overseas jurisdictions and the cost of violent crime for individuals, the community, health services, legal services and the criminal justice system as a whole, there appears to be a reasonable case for greater investment in after-prison and re-entry programs, having regard to potentially substantial downstream savings.
140. Contrary to what may be popular belief, many individuals who are caught up in this cycle are not necessarily bad people. Many are people in desperate circumstances who leave prison with very few employment options, income, housing options or the prospect of a positive reception back into their communities. Many of them have disabilities which are undetected as they are processed through the criminal justice system. The vast majority have very poor education and few life skills that would equip them for successful re-entry into the community
141. The Law Council considers that society is poorly served by governments resorting to simple, short-term, populist solutions to reoffending, when they have failed to invest in establishing a framework which can minimise the likelihood of parolees resorting to former or learned behaviours.

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<sup>81</sup> Productivity Commission, *Overcoming Indigenous Disadvantage 2011*, Commonwealth of Australia, 4.131

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Need for adequate resourcing of prison services

142. Resourcing of services for offenders and prisoners is understandably unpopular and regularly slides down the list of priorities for expenditure in State, Territory and Commonwealth budgets.
143. However the Law Council submits that the cost of neglect in this area simply increases the likelihood of parole breaches and re-offending upon release, prolongs the period before release and parole, which are likely to exceed the cost of adequate investment in rehabilitation, post-release and early intervention programs.

Need for integrated approach between State, Territory and Commonwealth Government agencies

144. Presently, there is no national or strategic approach to corrections, rehabilitation and parole. There is little or no evidence of a coordinated approach to reducing recidivism, but widespread evidence that the problem is worsening.
145. Given crime rates have fallen over the last two decades, if policy settings had remained the same it should be expected that the prison population might also fall. Instead, the non-Indigenous prison population has remained static while the number of Indigenous prisoners has doubled.
146. The Law Council recommends that an integrated approach is required to enable the gathering of detailed data and to facilitate inter-agency cooperation in addressing violent crime and imprisonment. The existing approach, whereby the issue is largely managed by justice agencies, is not working and fails to allow a range of issues to be managed in the re-entry phase.
147. It may be impossible to address imprisonment rates without concerted efforts to diminish inter-communal violence, problems with drug and alcohol, over-crowded housing, appropriate identification and treatment for those under a disability, such as FASD, and child neglect and abuse.
148. There is a need to combine the efforts of key agencies, including liquor licencing, public health, child protection, school education, employment, crime prevention, law enforcement, housing and local government.<sup>82</sup>

Increased funding of legal assistance services

149. As noted above, unmet legal need, particularly in civil and family law, is an acute problem in Indigenous communities. ATSILS and FVPLS, while performing an outstanding service, are seriously under-resourced to meet those needs. LACs and CLCs similarly face significant difficulty meeting demand.
150. A major consequence of legal assistance services being under-resourced is that legal problems of disadvantaged people, when they arise, cannot be quickly identified and resolved, and so they remain unresolved until they escalate and multiply. Major areas of civil unmet need for Indigenous people include housing and tenancy disputes, consumer matters, employment disputes, and family law issues. Unresolved legal problems can balloon into more significant issues, including homelessness, family disputes, loss of work or income, alcohol or drug problems and ultimately to criminal behaviour and imprisonment.

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<sup>82</sup> Weatherburn, *ibid*, *op cit* 51, 155.

151. There is a need for legal assistance services to have capacity for early intervention, and appropriate training in cultural competency, detection of disability and referral to appropriate services, and capacity to properly implement a joined-up service delivery model.
152. It is noted that the Productivity Commission recommended that Australian, State and Territory governments should:
- a. Inject of at least \$200 million into civil and family law assistance services;<sup>83</sup>
  - b. Implement strategies to proactively engage with at-risk Aboriginal and Torres Strait Islander Australians to reduce their likelihood of needing legal assistance to resolve disputes with government agencies, especially in areas such as child protection, housing and tenancy, and social security;<sup>84</sup>
  - c. Establish culturally tailored alternative dispute resolution services;<sup>85</sup>
  - d. Establish a National Indigenous Interpreter Service;<sup>86</sup> and
  - e. Provide for the contribution by State and Territory Governments to Indigenous legal services, given the impact of State and Territory criminal laws on demand for those services.<sup>87</sup>
153. The Law Council recommends, as a first step, that these recommendations be implemented as soon as possible.

## Implementation of 'justice targets'

154. As outlined above, the Law Council considers adoption of justice targets on reducing imprisonment rates and violence afflicting Aboriginal and Torres Strait Islander peoples should be agreed and adopted by COAG as a matter of priority.
155. The Law Council agrees with the target proposed by the National Justice Coalition in its Change the Record campaign:
- a. Close the gap in rates of imprisonment by 2040; and
  - b. Cut the disproportionate rates of violence to at least close the gap by 2040 with priority strategies for women and children.

## Other recommended changes to the justice system

156. The Law Council calls on all governments to

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<sup>83</sup> Ibid, *op cit* 12, recommendation 21.4

<sup>84</sup> Ibid, recommendation 22.1

<sup>85</sup> Ibid, recommendation 22.2

<sup>86</sup> Ibid, recommendation 22.3

<sup>87</sup> Ibid, recommendation 22.4.



- a. Commit to the inclusion of justice reforms as a distinct building block in the COAG framework for the National Indigenous Reform Agreement (Closing the Gap);
- b. Adopt strategies for the prevention, early intervention and diversion of Aboriginal and Torres Strait Islander peoples from the criminal justice system including, within 12 months, the establishment of culturally based restorative justice models in each Australian State and Territory, such as the Koori Court, Gladue Court (Canada), Cree Court (Canada) and Rangatahi Courts (New Zealand);
- c. Through COAG, commit to supporting strategies for the prevention, early intervention and diversion of Aboriginal and Torres Strait Islander people from the criminal justice system with targeted funding of programs for long enough to properly evaluate whether they work (at least 5 years);
- d. Implement strategies to significantly reduce the high number of Aboriginal and Torres Strait Islander peoples being imprisoned for periods of 6 months or less;
- e. Revise the National Indigenous Law and Justice Framework 2009-2015 to include specific measurable objectives and reporting requirements, and refer the Framework from Standing Council on Law, Justice and Community Safety to COAG;
- f. Reform bail and sentencing laws to reduce the disproportionately severe effect of those laws on Aboriginal and Torres Strait Islander peoples;
- g. Repeal section 16AA of the *Crimes Act (Cth)* to enable the establishment of sentencing principles and programs which specifically recognise Aboriginal and Torres Strait Islander customary law and where possible, include customary law considerations in sentencing;
- h. Increase the number of Indigenous people appointed as judicial officers and employed as court staff and interpreters, particularly in courts where significant numbers of appearances by Indigenous people;
- i. Commit to national interpreter protocols to address the issue of language or hearing impairment in court matters; and
- j. Review the rules of evidence and court procedure to accommodate cultural differences that can affect Indigenous interactions and understanding of what is happening in Court.



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

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

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

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

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

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

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

Members of the 2015 Executive are:

- Mr Duncan McConnel, President
- Mr Stuart Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Dr Christopher Kendall, Executive Member
- Mr Morry Bailes, Executive Member
- Mr Ian Brown, Executive Member

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