Submission

The Law Society of Western Australia
The voice of the legal profession in Western Australia

Senate Finance and Public Administration References Committee Inquiry
Access to legal assistance services

To
Senate Finance and Public Administration Committee
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1 Introduction

The Law Society of Western Australia is the peak professional association for lawyers in Western Australia. Established in 1927, the Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.

2 Senate Inquiry Terms of Reference

On 4 March 2015, the following matter was referred to the Senate Finance and Public Administration References Committee for inquiry and report by 10 August 2015: Aboriginal and Torres Strait Islander experience of law enforcement and justice services, with particular reference to:

(a) the extent to which ATSI Australians have access to legal assistance services;

(b) the adequacy of resources provided to Aboriginal legal assistance services by state, territory and Commonwealth governments;

(c) the benefits provided to ATSI communities by Family Violence Prevention Legal Services;

(d) the consequences of mandatory sentencing regimes on ATSI incarceration rates;

(e) the reasons for the high incarceration rates for ATSI men, women and juveniles;

(f) the adequacy of statistical and other information currently collected and made available by state, territory and Commonwealth governments regarding issues in ATSI justice;

(g) the cost, availability and effectiveness of alternatives to imprisonment for ATSI Australians, including prevention, early intervention, diversionary and rehabilitation measures;

(h) the benefits of, and challenges to, implementing a system of 'justice targets'; and

(i) any other relevant matters.

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(a) The extent to which Aboriginal and Torres Strait Islander Australians have access to legal assistance services

(b) The adequacy of resources provided to Aboriginal legal assistance services

(c) The benefits provided to ATSI communities by Family Violence Prevention Legal Services

(f) The adequacy of statistical and other information currently collected and made available by state, territory and Commonwealth governments regarding issues of ATSI justice

The Law Society of Western Australia's comments in relation to terms of reference (a), (b), (c) and (f) are as follows.

- Legal assistance services for Aboriginal and Torres Strait Islander Australians

The need for Aboriginal and Torres Strait Islander legal assistance services is indisputable. The importance of culturally tailored services is broadly recognised. It is 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 that led to the creation of the Aboriginal and Torres Strait Islander legal services (ATSILS) and family violence prevention legal services (FVPLS).[1]

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) is the peak national body for ATSILS in Australia. NATSILS was started in 1971 to deliver effective and culturally competent legal assistance services to Aboriginal and Torres Strait Islander Australians. This role also gives NATSILS a unique insight into access to justice issues affecting Aboriginal and Torres Strait Islander Australians. The NATSILS represent the following ATSILS:

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld)
- Aboriginal Legal Rights Movement Inc. (ALRM)
- Aboriginal Legal Service (NSW/ACT) (ALS NSW/ACT)

[1] Productivity Commission 2014, *Access to Justice Arrangements*, Inquiry Report No. 72, Canberra

- Aboriginal Legal Service of Western Australia (Inc.) (ALSWA)
- Central Australian Aboriginal Legal Aid Service (CAALAS)
- North Australian Aboriginal Justice Agency (NAAJA)
- Victorian Aboriginal Legal Service Co-operative Limited (VALS).

The FVPLS commenced in 1998 to provide the more specialised service of legal assistance and related support for victims of family violence, primarily in regional and remote areas. The Productivity Commission considers both ATSILS and FVPLS face a number of distinctive needs and service delivery challenges emanating from the cross-cultural issues, remoteness and language barriers of their clients. Together with Aboriginal and Torres Strait Islander peoples' well documented socio-economic disadvantages and over-representation in the criminal justice system, these challenges create a distinctive service delivery environment for ATSILS and FVPLS. These unique circumstances warrant the continuation of specialised Aboriginal and Torres Strait Islander-specific legal assistance services. Strong support for this view was contained in responses to the Productivity Commission Inquiry across a range of participants (Legal Aid NSW, National FVPLS Forum, Aboriginal FVPLS Victoria, Law Institute of Victoria, Law and Justice Foundation of NSW, NATSILS and the Law Council of Australia).[2]

While most legal services are provided to Aboriginal and Torres Strait Islander Australians through NATSILS and FVPLS, Aboriginal and Torres Strait Islander Australians are also significant users of legal assistance services provided by legal aid commissions (LACs) and community legal centres (CLCs). For example, in 2012-13, around 12 per cent of all approvals for legal aid were granted to Aboriginal and Torres Strait Islander Australians and around 6 per cent of CLCs' casework clients identified as Aboriginal and Torres Strait Islander Australians. [3]

- ## Specialised legal assistance services for Aboriginal and Torres Strait Islander Australians need to be further developed

The Productivity Commission recognised an unmet need for legal services but found that quantitative reliable data on unmet need was inadequate. A 2012 survey[4] was unable to properly distinguish the legal needs of Aboriginal and Torres Strait

[2] http://www.pc.gov.au/inquiries/completed/access-justice/submissions
[3] Productivity Commission 2014 ibid
[4] *Legal Australia-Wide Survey: Legal Need in Australia* (*LAW Survey*) 2012

Islander Australians particularly in remote areas. Having said that the survey found that the Aboriginal and Torres Strait Islander respondents were:

- 30 per cent more likely to have multiple legal problems;
- significantly more likely to have legal needs in the areas of government, health and rights;
- significantly less likely to have their problem finalised (possibly reflecting the multiple nature of their problems).

Other qualitative studies, such as the Indigenous Legal Needs Project (ILNP)[5], have attempted to bridge this information gap. That project was based on a series of interviews with key stakeholders and separate male-based and female-based focus groups held across a range of urban, rural and remote locations. Whilst most attention is directed to the particular needs of Aboriginal and Torres Strait Islander people who intersect with the criminal justice system, it is important not to overlook the particular needs of Aboriginal and Torres Islander people in relation to civil justice. The ILNP identified a number of areas of unmet legal need. Based on its assessment of the impact of the problem and whether the problem affected sizeable numbers of people, the research specified the following as priority areas:

- child protection (including the removal of children);
- tenancy (such as repair and maintenance, rent, overcrowding and eviction);
- discrimination;
- social security (underpayments or overpayments);
- credit and debt;
- consumer law (mostly mobile phone contracts and car purchases and repairs);
- neighbourhood disputes (mostly identified by Indigenous women and mostly in relation to noise, fences or boundaries and animals);
- victims' compensation and wills (in relation to wills, the issues centred largely on superannuation, burial and child custody arrangements).

The Productivity Commission reported that qualitative evidence suggests that the level of unmet need appears to be highest in more remote locations.
For example, the ILNP stated:

[5] Indigenous Legal Needs Project (ILNP) (James Cook University), "ILNP Reports and Papers" at: http://www.jcu.edu.au/ilnp/resources/inlpreports/index.htm

> *"The further away Indigenous communities are from urban (and to a lesser extent, regional) centres, the less likely they are to access legal assistance and information. …*
> *In a number of Indigenous communities visited by the ILNP, the only legal assistance provided is criminal law-related and any outreach is provided to correspond with the timetabling of the (criminal) circuit court." (sub. 105, p. 7)*

It should be noted that ALSWA's recent increase in civil and human rights outreach independent of the criminal law court circuit is a step in the right direction.[6]

Whilst it might be tempting to take away from resources targeting criminal law need to supply demand in civil and family law areas, civil, family and criminal law issues are closely interwoven. Existing levels of resourcing for criminal law work must be retained (or ideally, substantially increased), with additional funds provided for civil and family law work.[7]

Many times the ILNP has heard during fieldwork that failing to properly resource the work that legal and other services undertake with respect to civil and family law problems makes little economic sense. Unmet civil/family law need leads to an escalation of criminal law need. Unaddressed civil and family law problems can become criminal law matters very easily. For example, neighbourhood disputes, housing and discrimination. Family violence is an example of this, whereby child protection or housing-related debt for damage to homes can ensue. These social issues also inevitably place serious financial demand on government resources." [8]

Undoubtedly, civil, family, criminal and social issues are inextricably linked.

NATSILS has also identified unmet legal need in disputes over the custody of children. [9]

In relation to child protection matters, the Aboriginal Legal Rights Movement (ALRM) submitted to the Productivity Commission concern about the inadequate representation of persons before the court in Child Protection proceedings. By a process of de facto triage, ALRM is only able to represent parents, yet in the

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[6] http://www.jcu.edu.au/ilnp/public/groups/everyone/documents/technical_report/jcu_144396.pdf p 242
[7] See for instance (NATSILS) (2013) *Factsheet: Funding cuts to Aboriginal and Torres Strait Islander Legal Services*:
http://www.natsils.org.au/portals/natsils/submission/Funding%20Cuts%20Factsheet%202%20April%202013.pdf
[8] http://www.jcu.edu.au/ilnp/public/groups/everyone/documents/technical_report/jcu_144396.pdf p 243
[9] Submission 78 Access to Justice Arrangements – Aboriginal Legal Rights Movements

circumstance of extended Aboriginal kinship systems other family members may well be entitled to representation and may have a legitimate interest in the outcome; but they are not represented because ALRM only acts for parents. ALRM cannot represent other extended family members due to potential conflict of interest. ALRM does not have resources to brief these cases out (ALRM annual briefing budget is approximately $50,000 pa.).

ALRM is concerned that these people, who should be represented parties in the litigation may be brought to court, be provided by the Crown Solicitor with a bundle of court documents, but whilst they may have access to an interpreter, they will have no access to legal representation. ALRM does not presume to say that their cases are or are not meritorious; it simply says it is unsatisfactory that potential parties who have locus standi in Child Protection litigation, do not receive representation due to inadequate resources and inability to brief them out at short notice.

The ALRM argues that a more comprehensive policy is required to address this disadvantage and that it is crucial for support services to be accessible in regional and remote communities such as rehabilitation facilities, reunification services to avoid Aboriginal children being relocated to the metropolitan areas and away from their families and communities. Conditions for Aboriginal people living in remote and regional communities continue to be characterised by poverty, poor health, poor housing, high levels of substance abuse and extreme levels of family violence. These factors need to be addressed if neglect and abuse is to be reduced within Aboriginal families, and thereby the overrepresentation of Aboriginal children in Child Protection proceedings.

The ALRM argues that this is more than likely the case for the more Traditional peoples living in remote communities and where English is a second or third language and is very concerned about the lack of use of interpreters as well as the lack of knowledge on Traditional child rearing practices.[10]

- Family Violence Prevention legal assistance services - unmet need

In May 2012 National Family Violence Prevention Legal Services was formally established under a Charter to guide its operation. The forum has 13 member organisations under the Family Violence Prevention Legal Services Program, funded

[10] Submission 126 Access to Justice Arrangements – Aboriginal Legal Rights Movements

by the Commonwealth Attorney-General's Department. Family Violence Prevention Legal Services are located in 31 rural and remote locations around Australia:

- Aboriginal Family Violence Prevention and Legal Service Victoria (Melbourne HO, Mildura, Gippsland, Barwon South West)
- Aboriginal Family Legal Service Southern Queensland (Roma)
- Binaal Billa Family Violence Prevention Legal Service (Forbes)
- Central Australian Aboriginal Family Legal Unit Aboriginal Corporation (Alice Springs HO, Tennant Creek)
- Family Violence Legal Service Aboriginal Corporation (Port Augusta HO, Ceduna, Pt Lincoln)
- Many Rivers Family Violence Prevention Legal Service (Kempsey)
- Marninwarnitkura Family Violence Prevention Unit WA (Fitzroy Crossing)
- Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service (Alice Springs, NPY Tri-state Region)
- Queensland Indigenous Family Violence Legal Service (Cairns HO, Townsville, Rockhampton, Mount Isa, Brisbane)
- Southern Aboriginal Corporation Family Violence Prevention Legal Service (Albany)
- Thiyama-li Family Violence Service Inc. NSW (Moree HO, Bourke, Walgett)
- Warra-Warra Family Violence Prevention Legal Service (Broken Hill)
- Western Australia Family Violence Legal Service (Perth HO, Broome, Carnarvon, Kununnura, Geraldton, Kalgoorlie, Port Hedland)

The Attorney General Senator the Hon George Brandis QC stated in his media release advising that funding for legal services would not be withdrawn:

> *"Over the past 18 months, a national conversation about domestic and family violence has grown with increasing momentum. This is an important dialogue that this Government is determined to lead.*
>
> *For too many years, the issue of domestic violence remained behind closed doors – a stigmatised problem that victims were reluctant to speak about. Sadly, as a nation we were reluctant or afraid to speak about it.*
>
> *With more victims speaking out about this scourge and seeking help to escape such violence, we are responding accordingly with appropriate resourcing. The Government has listened and is acting in the interests of the most vulnerable in our community including Indigenous Australians.*
>
> *Today's restoration of $25.5 million over two years to 30 June 2017, of funding for Legal Aid Commissions, Community Legal Centres and Indigenous legal service providers, builds on our significant commitment to*

> *address domestic violence, both in terms of front line services as well as policies that will lead to long term cultural change. We are committed to ensuring that we stop the violence before it happens."* [11]

The work of the FVPLSs is undoubtedly needed, having been established in recognition of the gap in legal services for Aboriginal and Torres Strait Islander victims of family violence, predominantly Aboriginal and Torres Strait Islander women and children. It provides legal assistance, casework, counselling and court support to Aboriginal and Torres Strait Islander adults and children who are victims/survivors of family violence, including sexual assault/abuse. FVPLSs also provide community legal education, and early intervention and prevention activities.

FVPLS' role is to ensure that the services offered are culturally inclusive and accessible to Aboriginal and Torres Strait Islander adults and children in the specified service region, regardless of gender, sexual preference, family relationship, location, disability, literacy or language.

In a recent address to the Judicial Council on *Cultural Diversity and the Law*, the Chief Justice of Western Australia, The Honourable Wayne Martin AC commented:

> *"What is I think clear beyond argument is that the victims of family violence from CALD backgrounds experience greater difficulty in accessing the courts and other systems available for their protection because of language difficulties and a lack of information with respect to our legal system and the assistance which might be available to them."* [12]

In 2013 the Australian Bureau of Statistics published a report 'Defining the Data Challenge for Family, Domestic and Sexual Violence'. It was found that contextual factors may contribute towards the formation of attitudes about subpopulations and the use of violence, as well as the attitudes held within particular groups. Attitudes of particular interests that emerged in consultation with experts, key stakeholders and users were those about:

- women, children and elders;

[11] 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

[12] Judicial Council on Cultural Diversity and the Law Conference *Access to Justice in Multicultural Australia* by Hon Wayne Martin AC March 2015

- those within particular sub-populations (such as Aboriginal and Torres Strait Islanders and people with disabilities); and
- those within specific ethnic or religious groups.

Information relating to the experience of victims and perpetrators can be used to identify population groups that are over-represented in both categories, and to profile high-risk groups. Information can also inform the needs of individuals and communities so that programs can be differentiated, as necessary, based on culture, socio-economic status, gender and sexuality, place or location and other relevant individual attributes. Information can also be used to inform and educate the general public. Another area for which an understanding of family, domestic and sexual violence incidents, victims and perpetrators is needed is the planning and provision of appropriately targeted services through various government and private systems.

These services include:

- police response;
- court support services;
- services dealing specifically with family, domestic and sexual violence; health, medical, disability and community services;
- treatment and rehabilitation programs;
- child protection services; and
- education and prevention programs.

Interactions between individuals and services take place within the context of perceptions and beliefs about family, domestic and sexual violence as well as the fear and possibility of recurrence of violence. Specific services may be required for different groups of people affected by family, domestic and sexual violence, and the ability to appropriately recognise these people is essential. [13]

It was reported over a decade ago by Jane Mulroney, Senior Research Officer Australian Domestic and Family Violence Clearinghouse,[14] (and the situation has not improved), that Aboriginal and Torres Strait Islander women experience violence

[13] http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4529.02013?OpenDocument

[14] Australian Statistics on Domestic Violence *Jane Mulroney Senior Research Officer Australian Domestic and Family Violence Clearinghouse* http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDUQFjAA&url=http%3A%2F%2Fwww.adfvc.unsw.edu.au%2FPDF%2520files%2FStatistics_final.pdf&ei=PHQqVa4DofCYBeqvgbAK&usg=AFQjCNEgDn_zt1_1HoQuyVuIYY_MfpvBcw&bvm=bv.90491159,d.dGY

at far higher rates than non-Aboriginal and Torres Strait Islander women. Aboriginal and Torres Strait Islander women are the victims of homicide at a rate that is 10 times greater than the rate for non-Aboriginal and Torres Strait Islander women. Based on offences reported to police in Western Australia, Aboriginal women are 45 times more likely to experience family violence than non-Aboriginal women. 69% of assault cases against Aboriginal women were carried out by the spouse or partner (Aboriginal Justice Council 1999). Comparing violence towards spouses between Aboriginal communities and non-Aboriginal communities in Western Australia, Ferrante et al. (1996) found that 39.5% of Aboriginal women experienced serious assaults as compared to 7.5% of non-Aboriginal women. According to Indigenous author and researcher, Judy Atkinson, there have been more deaths of Aboriginal women through assault than there have been deaths of Aboriginal people in custody.

The *Violence in Indigenous Communities* report (Memmott et al. 2001) refers to multi-causal factors that explain higher rates of violence within Aboriginal communities. Historical circumstances, the loss of land and traditional culture, the disempowerment of traditional elders, breakdown of community kinship systems and Aboriginal law, entrenched poverty and racism are clearly factors underlying the use of violence.[15]

Family violence services do not always reach high need areas. In contrast to ATSILS, FVPLS service narrowly defined geographic areas. In 2012-13, there were 14 FVPLS providers servicing 31 locations in regional and remote areas across all states and territories, except Tasmania and the ACT. With catchment areas being more targeted, much rests on focusing services on the 'right' areas. But not all areas considered to be high need are being serviced by a FVPLS. An unpublished report by the Nous Group drew on a variety of ABS and other data in conjunction with mapping and statistical analyses to predict the demand for Aboriginal and Torres Strait Islander family violence protection services in each local government area and ranked each according to need. They then examined how this ranking compared with service provision. The analysis indicated that coverage in remote areas was very

[15] Australian Statistics on Domestic Violence *Jane Mulroney Senior Research Officer Australian Domestic and Family Violence Clearinghouse*
http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDUQFjAA&url=http%3A%2F%2Fwww.adfvc.unsw.edu.au%2FPDF%2520files%2FStatistics_final.pdf&ei=PHQqVa4DofCYBeqvgbAK&usg=AFQjCNEgDn_zt1_1HoQuyVuIYY_MfpvBcw&bvm=bv.90491159,d.dGY

limited often consisting of one to two days of service provision per month and that several locations of high need were serviced through long-distance outreach services. Examples include Ngaanyatjarraku (serviced from Alice Springs, around 1000 km away), Meekatharra (serviced from Geraldton, around 500 km away), and Kunbarllanjnja (serviced from Darwin, around 300 km away). In these locations there are no alternative service providers. Hence FVPLS provide a vital, if limited, service (AGD, sub. DR300).[16]

The Productivity Commission recommends (recommendation 22.2) that the Australian Government should:

- undertake a cost-benefit analysis to inform the development of culturally tailored alternative dispute resolution services (including family dispute resolution services) for Aboriginal and Torres Strait Islander people, particularly in high need areas;
- subject to the relative size of the net benefit of such a service, fully fund these services;
- encourage government and non-government providers of mainstream alternative dispute resolution (including family dispute resolution) services to adapt their services so that they are culturally tailored to Aboriginal and Torres Strait Islander people (where cost-effective to do so) and provide appropriate funding to support this.

The Chief Justice of Western Australia, The Honourable Wayne Martin AC, in his address in March this year to the Judicial Council on *Cultural Diversity and the Law*, referenced recommendations by the Judicial Council in its submission to the Productivity Commission. The recommendations listed below do not relate only to Aboriginal and Torres Strait Islander Australians, but go to the needs of all culturally and linguistically diverse communities. The do not relate to legal services at the front line but within the court system itself exemplifying the need to upgrade legal assistance at all levels within the legal system:

- That a comprehensive survey of CALD community attitudes, knowledge and barriers to the civil legal system be undertaken to identify priority areas for courts and other components of the system.
- That linkages are built with Indigenous and migrant organisations to enable ongoing consultation.

[16] Productivity Commission 2014 ibid

- That a toolkit for community engagement be developed to help courts orient themselves outwards, to include all CALD communities, through outreach and consultation programmes.
- That a range of resources in languages other than English be developed and widely distributed within CALD communities, to explain the role and processes of the courts. Specific attention should be given to the development of language resources for Indigenous communities, including material reflective of Aboriginal English, and Aboriginal culture and practices.
- That an analysis be undertaken of the cost of interpreting services and its impact on access to justice.
- That training programmes be developed and delivered to court staff and legal service providers to assist them to recognise the particular needs of court users from CALD communities, and facilitate their referral to agencies with the skills and resources to assist in meeting those needs.
- That a series of round table events be conducted to consult with community leaders on the accessibility of the courts, covering barriers to access and the actions required to overcome them.

As stated by Chief Justice Martin, "there is a long way to go".[17]

4 (d) The consequences of mandatory sentencing regimes on ATSI incarceration rates

(e) The reason for the high incarceration rates for ATSI men, women and juveniles

(g) The cost, availability and effectiveness of alternatives to imprisonment for ATSI Australians, including prevention, early intervention, diversionary and rehabilitation measures

The Law Society of Western Australia's comments below are in response to terms of reference (d), (e), (g) and as follows.

[17] The Chief Justice of Western Australia, The Honourable Wayne Martin AC, in his address to the Judicial Council on *Cultural Diversity and the Law March 2015*

- ## Mandatory sentences law in Australia

The Law Society of Western Australia is strongly opposed to mandatory sentencing. Both Western Australia and the Northern Territory have mandatory sentencing regimes, and both jurisdictions provide the majority of the empirical evidence in Australia in relation to the faults of mandatory sentencing.

Western Australia first introduced mandatory sentencing with the *Crime (Serious and Repeat Offenders) Act* 1992 which was only in force for about two years and targeted young offenders involved in high speed pursuits in stolen vehicles. In that legislation a repeat offender was a person who had, within the preceding 18 months, accumulated three convictions for prescribed offences of violence, in which case the person was to be sentenced to serve at least 18 months in custody.

The Western Australian government then introduced a three strikes and you're in law in respect of home burglaries in 1996. Under those amendments to the *Criminal Code (WA)*, a person with at least two previous convictions for burglary is required to serve at least 12 months in custody if convicted again.[18]

Then in 2009 the Western Australian government introduced amendments to the *Criminal Code*, prescribing a mandatory sentence of imprisonment (or detention, if the offender is a juvenile) for an offender guilty of grievous bodily harm, where the victim is a police officer or other prescribed public official.[19]

Mandatory minimum sentences for property crime were introduced in the Northern Territory in 1997 but repealed in 2001. Under that regime, offenders were imprisoned for 14 days for a first strike property offence, 90 days for a second strike and 12 months for a third strike property offence. Despite the failure of that mandatory sentencing regime, mandatory sentencing was re-introduced to the Northern Territory with an amendment to the *Sentencing Act (NT),* which came into force on 10 December 2008. The amended s7BA *Sentencing Act (NT)* provides that a mandatory sentence of imprisonment must be served where an offender is found guilty of serious harm, harm, assault causing harm and assaults on police resulting in harm.[20]

New South Wales has life means life provisions in relation to the penalty of life imprisonment for murder, but this is ameliorated by the general power to reduce

[18] International Society for the Reform of Criminal Law, 'Mandatory Sentencing- Where from, Where to and Why?'
[19] S297(5) Criminal Code (WA)
[20] S181, s186, s188 and s189A Criminal Code Act (NT)

penalties, conferred by s21 *Crimes (Sentencing Procedure) Act 1999.* Section 61 of the same Act provides judicial officers with a sentencing discretion by prescribing that the mandatory life sentence will apply where a person is convicted of murder; if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.

Section 61(2) provides a further discretion to the courts to not impose a life sentence on those convicted of a serious heroin or cocaine trafficking offence. Despite their name, the NSW mandatory sentencing provisions do not, therefore, constitute a mandatory sentencing regime; judicial discretion is preserved through s21 and s61 *Crimes (Sentencing Procedure) Act 1999.*

In May 2011, the New South Wales government introduced legislation into Parliament making life sentences mandatory for offenders convicted of murdering police officers. The provisions of the Bill 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 cognitive impairment at the time (not being a self-induced impairment).

The Commonwealth Parliament introduced mandatory sentencing into Commonwealth legislation in 2001, with amendments to the *Migration Act 1958* (Cth). Section 236B prescribes mandatory minimum penalties for certain aggravated offences involving people smuggling. The mandatory sentences include eight years imprisonment for a repeat offence of aggravated people smuggling (at least 5 people), regardless of the motivation of the offender or the circumstances of the offending. [21]

King-hit assaults that kill in New South Wales will now carry a mandatory eight-year minimum sentence if alcohol or drugs are involved.

The *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014*[22] is currently before the Western Australian State Parliament.

[21] Law Institute of Victoria, 'Mandatory Minimum Sentencing', June 30, 2011
[22] http://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=CA0C0F1C2399A1EE48257C99000DB9C3

The Bill amends *The Criminal Code* to:

- provide mandatory minimum sentences for specific serious offences of physical or sexual violence committed in the course of an aggravated home burglary. These minimum sentences apply to adult offenders (18 years of age or older) and juveniles offenders (between 16 years of age and 18 years of age); and
- revise the repeat offender 'counting' rules for the home burglary offence ('the three strikes legislation'); and
- increase the mandatory minimum sentence for adult repeat home burglary offenders; and
- provide a clear distinction between aggravated home burglaries and aggravated burglaries of places other than dwellings;

  And

amends the *Sentencing Act 1995* to provide a minimum non-parole period of 15 years for adult offenders who committed murder in the course of an aggravated home burglary. (See further discussion at page 23).

In a speech on *Sentencing Guideline Judgments*,[23] former Chief Justice Spigelman of the NSW Supreme Court noted:

> *"Research throughout the western world has indicated that there is a widely held belief that sentences actually imposed are not commensurate with the seriousness of the crimes for which they are imposed. However there are now numerous studies which show that the public opinions expressed in polls, through the media and talk-back radio and various other expressions of public opinion, are often ill informed. The belief that there exists a significant disparity of a systematic character between actual sentencing practice and what the public sees as appropriate sentences is wrong. More detailed and sophisticated methods of gauging popular opinion suggest that when the full facts of particular cases are explained, the public tends, to a very substantial degree, to support the sentence actually imposed or, at least, to express the opinion that they are lenient to a significantly lesser extent than answers to general, undirected questions would suggest. This is true of research in the United States, the United Kingdom and in Canada. These studies have been replicated in Australia with generally similar results."*

At 30 June 2014 there were 9,264 prisoners in Australian prisons who identified as Aboriginal and Torres Strait Islander, which was a 10% increase (834 prisoners) from 30 June 2013 (8,430 prisoners).

[23] Honourable JJ Spigelman, AC, Chief Justice of New South Wales, *Sentencing Guidelines Judgments*, Address to the National Conference of District and County Court Judges, 24 June, 1999.

This is the highest number of Aboriginal and Torres Strait Islander prisoners since 2004.

Prisoner statistics, Australia-wide, between 2004 and 2014 are set out below.[24]

Prisoners, selected characteristics, 2004–2014

Year (at 30 June)	Sex		Indigenous status		Total(a)	
	Males	Females	Aboriginal and Torres Strait Islander	Non-Indigenous	Number	Imprisonment rate(b)
2004	22,499	1,672	5,048	19,123	24,171	158.8
2005	23,619	1,734	5,656	19,697	25,353	164.2
2006	23,963	1,827	6,091	19,699	25,790	165.1
2007	25,240	1,984	6,630	20,387	27,224	171.1
2008	25,658	1,957	6,706	20,661	27,615	169.8
2009	27,192	2,125	7,386	21,554	29,317	176.0
2010	27,472	2,228	7,584	21,827	29,700	175.0
2011	27,078	2,028	7,656	21,426	29,106	168.8
2012	27,182	2,199	7,981	21,266	29,381	167.4
2013	28,426	2,349	8,430	22,217	30,775	172.2
2014	31,200	2,591	9,264	24,453	33,791	185.6

Rate per 100,000 adult population

In Western Australia, at 30 June 2014:

- Aboriginal and Torres Strait Islander Australians comprised 40% (2,079 prisoners) of the adult prisoner population;
- The Aboriginal and Torres Strait Islander Australian standardised imprisonment rate was 18 times the non-indigenous age standardised imprisonment rate (3,013.4 prisoners per 100,000 Aboriginal and Torres Strait Islander adult population compared to 166.6 prisoners per 100,000 adult non-indigenous population).[25]

[24] Australian Bureau of Statistics 4517.0 - Prisoners in Australia, 2014 http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2014~Main%20Features~Western%20Australia~10019

[25] Australian Bureau of Statistics (ABS), 4517.0 - Prisoners in Australia, 2014 (11 December 2014) (Table 17).

At 30 June 2014, of all states and territories:

- Western Australia had the highest proportion of prisoners with a most serious offence/charge of unlawful entry with intent (17% or 896 prisoners). [26]
- Western Australia had the highest Aboriginal and Torres Strait Islander imprisonment rate (3,663.5 prisoners per 100,000 Aboriginal and Torres Strait Islander adult population). [27]
- The rate of Aboriginal and Torres Strait Islander prisoners in Western Australia is around 70% higher than the national rate. The next highest rate is in the Northern Territory.
- The rate of imprisonment of Aboriginal women is rising faster than the rate of Aboriginal men, and Aboriginal women comprise 50% of the female prison population in Western Australia.[28]
- The disproportion of Aboriginal children in detention is 58 times greater than non-Aboriginal children per head of population.

The Australian Law Reform Commission, in its 2006 report *Same Crime, Same Time Sentencing of Federal Offenders*[29] identified the key purposes of sentencing as including, retribution, deterrence, rehabilitation, incapacitation, denunciation and restoration.

It is obvious from the above statistics that mandatory sentencing is not a deterrent.

As for the effect of mandatory sentencing on Aboriginal and Torres Strait Islander Australians, research has demonstrated that under the three strikes burglary provisions, Aboriginal children constituted 80% of the cases in the Children's Court.[30]

Analysis from the UWA Crime Research Centre found that 33.8% of offenders of burglary offences were Aboriginal people.[31]

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[26] Australian Bureau of Statistics (ABS), 4517.0 - Prisoners in Australia, 2014 (11 December 2014) (Table 15).
[27] Australian Bureau of Statistics (ABS), 4517.0 - Prisoners in Australia, 2014 (11 December 2014) (Table 16).
[28] Ibid (Tables 4, 13)
[29] 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
[30] Morgan, N, 'Capturing crims or capturing votes? The aims and effects of mandatories' (1999) (1)University of New South Wales Law Journal 267, p272.
[31] At p 19 http://www.law.uwa.edu.au/__data/assets/pdf_file/0018/118530/Aboriginal_Involvment_in_the_WA_Criminal_Justice_System-A_Statistical_Review-2001.pdf

Case studies[32]

The following are some examples of offenders sentenced under the Northern Territory laws.

- A 24 year old Indigenous mother was sentenced to 14 days in prison for receiving a stolen $2.50 can of beer.
- A 29 year old homeless Indigenous man wandered into a backyard when drunk and took a $15 towel. It was his third minor property offence. He was imprisoned for one year.
- A 20 year old man with no prior convictions was sentenced to 14 days in prison for theft of $9.00 worth of petrol.
- An 18 year old man was sentenced to 90 days in prison for stealing 90 cents from a motor vehicle. [33]

• The impact of mandatory sentencing on Aboriginal and Torres Strait Islander Australians

The impact of mandatory sentencing on Aboriginal and Torres Strait Islander Australians was addressed in detail by the Law Council of Australia in its Policy Discussion Paper on Mandatory Sentencing.[34]

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 relate offences – all of which are mandatory sentencing offences. 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. [35]

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[32] Australian Human Rights Commission, 'Mandatory Sentencing laws in the Northern Territory and Western Australia'

[33] Sources: Schetzer, L., 'A year of bad policy: mandatory sentencing in the Northern Territory', 23(3) *Alternative Law Journal* 117, p118; HREOC, *Mandatory detention laws in Australia: An overview of current laws and proposed reform, op.cit*, pp5-6. An interesting comparison to these examples is the cost of accommodating prisoners in the NT. The 1995-96 NT Correctional Services Annual Report stated that it costs $12,432 to accommodate each young person sentenced to a 28 day period of detention, whereas the cost to the public purse for every adult sentenced under mandatory sentencing also imposes greater costs on the court system, as accused parties are more likely to contest charges than plead guilty.

[34] Law Council of Australia Policy Discussion Paper on Mandatory Sentencing March 2014

[35] 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 Straight Islander Wellbeing: A focus on children and youth Report*, April 2011, p. 1 and p. 226.

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. [36]

Under the 1997 mandatory sentencing regime in the Northern Territory, 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.[37]

Mandatory sentencing laws regarding assaults came into effect in the Northern Territory 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.[38] 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. 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.

The Law Council of Australia 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

[36] 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

[37] Northern Territory Office of Crime Prevention, *Mandatory Sentencing for Adult Property Offenders – the Northern TerritoryExperience*, 2003, p. 13.

[38] 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.

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.

United Nations Committees have also voiced concern over the disproportionate impact of mandatory sentencing on Indigenous Australians. [39] On this basis, the United Nations Committee Against Torture recommended that Australia abolish mandatory sentencing.[40] The Australian Human Rights and Freedom Commissioner, has also spoken strongly against mandatory sentencing laws and noted their disproportionate impact on Indigenous Australians. [41]

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." [42]

Mandatory sentences in the *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014* currently before the Western Australian State Parliament include:

- An offender who breaks into a house and violently rapes someone will face a minimum of 15 years jail.
- An offender who breaks into a house and seriously physically assaults someone will face a minimum of 7 years, 6 months jail.
- An offender who breaks into a house and indecently assaults someone in aggravated circumstances will face a minimum 5 years, 3 months jail.

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[39] 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.
[40] Ibid
[41] 120 Human Rights and Freedom Commissioner Tim Wilson, *Queensland Law Society Mandatory Sentencing Policy Paper Launch*, April 2014.
[42] 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.

- A three year mandatory minimum period will apply to juveniles aged 16 and above who commit serious offences of a physical or sexual violence in the course of home invasion. The court must not suspend any term of imprisonment imposed and must record a conviction against the offender and the court is not prevented from making a direction under the *Young Offenders Act 1994 (WA)* section 118(4) or a special order under Part 7 Division 9 of that Act. The former section enables the court to sentence offenders between 16 and 18 years of age to prison under the *Prisons Act 1981(WA)* and the latter division deals with young persons who repeatedly commits serious offences.

It is further proposed in the Bill that:

- The person's conviction for the current offence, if it is a relevant conviction is to be counted within the 3 relevant convictions required for a person to be a repeat offender. Each of the person's relevant convictions is to be counted, regardless of whether the home burglary to which it relates was committed before or after the date of any previous relevant conviction. The proposed counting rules do not necessarily follow the common law rule of Lord Coke, which holds that if a higher penalty is to apply for a second offence, the offender must have committed the offence after already having been convicted for the first.
- Each of the person's relevant convictions is to be counted, regardless of whether it has been counted on the occasion of sentencing for a previous home burglary to determine whether the person was, on that occasion, a repeat offender. Any relevant conviction can be counted again in future determinations whether a person is a repeat offender. This means that an offender who has been determined to be a repeat offender once will always be regarded as a repeat offender when they are convicted for another home burglary offence. This provision is similar to the current rule specified in the end of section 400(3) of *The Criminal Code (WA).*
- Where a person convicted of a home burglary ("the current offence") is a repeat offender, if the current offence was committed **on or after** the commencement day of the Bill, the court must impose 2 years of imprisonment on offenders who were adults at the time of committing the current offence, **or** 1 year of imprisonment or detention on persons who were under 18 years of age. The rules apply regardless of whether or not the

conviction for the current offence is a relevant conviction, and, in regard to persons under 18 years of age, the rules are similar in effect to the current mandatory minimum sentencing regime in section 401(4) of *The Criminal Code (WA)*.

The proposed extension of the mandatory minimum term of 12 months' imprisonment for 'third strike' adults to 2 years' imprisonment and the proposed changes to the counting rules for determining repeat offender status (which apply to juveniles 16 years or over) are likely to increase Aboriginal imprisonment rates significantly.

- ## Alternatives to imprisonment – justice reinvestment

Measures that affect the economic well-being of the community provide more potential leverage over crime than measures that influence the risk of arrest or the severity of the punishments imposed on offenders.

Imprisonment affects the individuals confined, their family and other close associates, and therefore the economic and social conditions in their local community. Incarceration can have a detrimental psychological affect on a person during and after the period of confinement. For example, for some individuals, isolation from familiar places, friends, and family members results in depression, anxiety, and emotional withdrawal.

Difficulties in obtaining legitimate employment increase the pressure and temptation for former offenders to earn income through illegitimate means. Inability to obtain steady, quality employment is one of the biggest risk factors for offender recidivism.

Ex-offenders contend with the time lost from their work or education. Released prisoners often lack the appropriate attire or knowledge of business norms needed to present in a manner reasonably likely to lead to employment, even with fair-minded employers. When employment is found it is generally at the lower end of the income scale.

Families of prisoners are collateral damage. If an otherwise responsible adult is removed from the home, the household loses economic resources, and social and

emotional support. The effects on children may be particularly negative if a parent or other supportive adult is removed from their lives.

Attitudes that develop in childhood and adolescence influence choices individuals make as they transition into adulthood. For example, having a negative adult role model may hinder the children from developing positive attitudes about work and responsibility. And, if criminality is perceived as acceptable adult behaviour, some children may routinely become criminals themselves rather than engage in legitimate employment.

Normal principles of sentencing are focused on four key results: punishment, deterrence, rehabilitation and incapacitation. Their collective result and the ultimate purpose of our criminal justice system is to reduce the incidence of crime.[43] The concept of justice reinvestment has the same ultimate purpose.

Incapacitation in the context of sentencing refers to its effect in terms of positively preventing (rather than merely deterring) future offending. Imprisonment obviously incapacitates prisoners by physically removing them from the community against which they have offended. Incapacitation therefore focuses on an offender's potential to commit future crimes, not what has led to the criminal activity in the first place.

All Australian jurisdictions now provide community corrections services and reparation and supervision orders. These services vary in the extent and nature of supervision, the conditions of the order (such as a community work component or personal development program attendance) and the level of restriction placed on the offender's freedom of movement in the community (for example, home detention). No single objective or set of characteristics is common to all jurisdictions' community corrections services, other than that they generally provide a non-custodial sentencing alternative or a post-custodial mechanism for reintegrating prisoners into the community under continued supervision.[44]

[43] http://www.judcom.nse.gov.au/publications/research-monographs-1monograph26/mono26.pdf
Sentencing serves a utilitarian purpose (the Kantian view of punishment as punishment for its own sake has not achieved legitimacy within the recent history of the common law)

[44] Australian Bureau of Statistics, Corrective Services, September Quarter 2012
abs.gov.au/ausstats/abs@.nsf/mf/4512

The Chief Justice of Western Australia[45] referred to the adage: an ounce of prevention is worth a pound of cure. This adage can be applied to the concept of justice reinvestment in the criminal justice system.

The underlying premise of justice reinvestment is to build communities rather than prisons. It is a comprehensive government (at all levels), non-government, business and community coordinated response funded through reversing prison population growth.

Justice reinvestment dictates a scientific approach. Its four steps are:

1. Gathering data on offending and the criminal justice system;
2. Using the data to create justice maps (areas with the greatest concentration of offenders) and appropriate community programs;
3. Redirecting funds from corrective services to implement programs in 'targeted' locations to reduce offending; and
4. Evaluating the effectiveness of the programs.[46]

First, a geographic analysis of the state's prison population is needed to identify which communities are generating the highest costs to the prison system.

The task of analysing the prison population, its geography and reasons for its growth should to be undertaken by non-partisan independent authorities who have been given access to necessary departmental databases.

Hon Paul Papalia MLA, Shadow Minister for Corrective Services, Western Australia, in his article, *Justice Reinvestment – An Option for WA?* for the Law Society of Western Australia magazine *Brief,* provided practical detail of steps two and three.

> *"Second,[47] data obtained needs to be utilised to develop appropriate programs. This should ideally be conducted by an Inter-Agency Steering Committee comprising representation from every department with relevant responsibility to identify potential options for reducing recidivism, generating savings and increasing public safety. For example, departments such as Corrective Services, Child Protection, Indigenous Affairs, Police, local government, Education and Regional Development.*

[45] http://www.supremecourt.wa.gov.au/_files/Curtin_University_Annual_Ethics_Lecture_Martin_CJ_30_Aug_2012.pdf

[46] Hon Paul Papalia MLA Shadow Minister for Corrective Services *Brief* Magazine September 2010, Law Society of Western Australia.

[47] Ibid

To ensure the appropriate budgetary discipline and clout, the Committee could be chaired by the Under Treasurer. Key specialist government agencies and advisors might easily assist the committee at this stage. Academics and institutions with relevant knowledge also reside in all of the state's tertiary institutions. Both local and federal governments must be included in the process and, if possible, recruited to the cause of coordinated activity focused on reducing recidivism.

Non-government service providers and the business community also have a stake in the outcome of justice reinvestment and should be urged to participate. The committee would have responsibility for looking at any measures that might reduce recidivism. This task would necessarily result in unique solutions for each of the target communities identified in step one.
As no two communities are identical, no single plan for reducing recidivism can meet all of the needs of every community. Engaging with communities to identify their specific challenges and needs will also serve to build ownership of the process and enhance the likelihood of success.

Third, once a comprehensive list of measures to reduce recidivism has been identified, Treasury specialists could conduct a thorough cost comparison of implementing the measures versus housing low-threat offenders in prisons. This comparison could then be provided to the Expenditure Evaluation Review Committee for consideration and advice to Cabinet..... "

Finally, the effectiveness of all initiatives undertaken to reduce recidivism must be closely examined. Unless there are desired results, initiatives should be abandoned.

Opponents of justice reinvestment call it recycling of familiar old 'preventive' and community-based programs in a new wrapping; that it will be no different or an improvement on existing community-based justice programs. To some extent this is true, but it goes further. It is a data driven approach to curbing the spiralling costs of incarceration by reinvesting savings in strategies that decrease crime and make our communities safer by recognising the factors underlying criminal behaviour. It is not intended to replace existing methods and services but provide alternative services specifically aimed at reducing imprisonment.

Justice reinvestment provides resources for initiatives that are specifically focused on reducing incarceration. Savings are made by reducing the cost of expanding the prison system, choosing instead to divert a portion of these funds to initiatives that reduce the prison population. It aims to filter out those who are imprisoned for minor offences and who could more effectively be dealt with in the community.

Justice reinvestment directs resources and attention to communities that are disproportionately represented in our prison system addressing the exacerbating factors that may be either systemic or based in policy.

Justice reinvestment is essential to reducing the over-representation of Aboriginal and Torres Strait Islander Australians in the justice system. To be effective, resources need to be directed to Aboriginal and Torres Strait Islander specific programmes.

In addition to community based programs, prison-based programs can also be effective. In October 2014 the Office of the Inspector of Custodial Services, Western Australia released a report, *Recidivism rates and the impact of treatment programs*.[48] The report concluded that:

- The Department of Corrective Services is missing opportunities in reducing reoffending among those most likely to return to prison.
- Prisoners released from prisons where there were identified deficiencies in service provision were more likely to reoffend.
- In order to improve outcomes and reduce the rate at which people return to prison, the Department needs to adopt a holistic but carefully targeted approach.
- This will require clear goals, well-funded strategies for improvement, and continuous measuring of effectiveness so that alterations can be made where needed.

A well-funded, constructive justice reinvestment approach to the criminal justice system in Australian jurisdictions could have dramatically effective social and economic results.

Matthew Keogh
President

28 April 2015

[48] http://www.oics.wa.gov.au/publications/review/