



Policy Position: Mandatory Sentencing

June 2014

The key objectives of the Law Council of Australia include promotion of the rule of law and support for the administration of justice. For this reason, the Law Council often provides advice to governments, courts and federal agencies on ways in which the law and the justice system can be improved. This statement addresses the expanded take-up of minimum mandatory sentencing regimes across Australia in recent years, and also responds to increased community interest in this issue.

The Law Council of Australia has consistently opposed the use of sentencing regimes which prescribe mandatory minimum sentences upon conviction for criminal offences. Its opposition rests on the basis that such regimes impose unacceptable restrictions on judicial discretion and independence, are inconsistent with rule of law principles and undermine confidence in the system of justice. Mandatory sentencing is also inconsistent with Australia's voluntarily assumed international human rights obligations.

Mandatory sentencing laws are by definition arbitrary and can limit an individual's right to a fair trial by preventing judges from imposing an appropriate penalty based on the unique circumstances of each offence and offender. Such regimes are costly and there is a lack of evidence as to their effectiveness as a deterrent or their ability to reduce crime.

Mandatory sentencing regimes create especially unjust outcomes for particular groups within society: indigenous peoples, juveniles, persons with a mental illness or cognitive impairment and the impoverished. Apart from their frequent lack of adequate representation to challenge a criminal charge and the inhumanity involved in the imprisonment of juveniles and the mentally disabled, mandatory sentencing regimes are applied selectively and often used in response to particular kinds of crime which are disproportionately committed by these groups. In that sense the regimes operate in a discriminatory way against members of those groups in society who are already most disadvantaged.

The community is of course rightly concerned that law and order policies are effective in reducing crime and recidivism. However there is a lack of any persuasive evidence that mandatory sentencing leads to these outcomes. Rather the evidence points to the significant financial and social cost of mandatory sentencing to individuals and to the community without a corresponding benefit in crime reduction.

The Law Council considers that mandatory sentencing:

- potentially results in harsh and disproportionate sentences where the punishment may not fit the crime. There are already many reported examples where mandatory sentencing has applied with apparently unjust results – such as a 15 year old Aboriginal boy who received a 20 day mandatory sentence for stealing pencils and stationery;
- potentially increases the likelihood of recidivism because prisoners are inappropriately placed in a learning environment for crime, which reinforces criminal identity and fails to address the underlying causes of crime;

- wrongly undermines the community's confidence in the judiciary and the criminal justice system as a whole. Research demonstrates that when members of the public are fully informed about the particular circumstances of the case and the offender, 90 per cent view judges' sentences as appropriate;
- dangerously displaces discretion to other parts of the criminal justice system, most notably law enforcement agencies and prosecutors, and thereby fails to eliminate inconsistency in sentencing, while also removing the transparency and independence of court determination;
- results in significant economic costs to the community, both in terms of increasing imprisonment rates, and increasing the burden upon the already under-resourced criminal justice system, without sufficient evidence to suggest a commensurate reduction in crime; and
- is not consistent with Australia's acceptance of the provisions of international covenants including:
 - the prohibition against arbitrary detention as contained in Article 9 of the International Covenant on Civil and Political Rights (the ICCPR);
 - the right to a fair trial and the provision that prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR; and
 - key obligations concerning children under Articles 3, 37 and 40 of the Convention on the Rights of the Child. These include the obligation to ensure that: decisions regarding children have their best interests as a primary consideration; and children are only detained as a last resort and for the shortest possible appropriate period.

The Law Council notes that evidence is mounting that some overseas jurisdictions with substantial experience of mandatory sentencing are now moving away from such schemes because of doubt regarding the efficacy of mandatory penalties in reducing crime and a recognition of the negative aspects referred to above such as expensive and counter-productive imprisonment, the potential for unduly harsh sentences and the discriminatory impacts.

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

This statement is supported by the Law Council's more detailed *Mandatory Sentencing Discussion Policy Paper* (2014), which is available [online](#).

Attachment A: Profile of the Law Council of Australia

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

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

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the 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 approximately 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 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

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