



Law Council  
OF AUSTRALIA

# The Social and Economic Benefits of Improving Mental Health

The Productivity Commission

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## About 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 Law Firms Australia, 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
- Law Firms Australia
- 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 2019 Executive as at 1 January 2019 are:

- Mr Arthur Moses SC, President
- Mr Konrad de Kerloy, President-elect
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch QC, Executive Member
- Mr Tony Rossi, Executive Member

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

## Acknowledgement

In the preparation of this submission, the Law Council is grateful for the assistance of:

- Law Society of New South Wales;
- Law Society of South Australia;
- Law Society of Western Australia;
- Queensland Law Society;
- Law Firms Australia;
- Access to Justice Committee;
- National Human Rights Committee;
- Indigenous Legal Issues Committee; and
- Indigenous Incarceration Working Group.

## Introduction

1. The Law Council is grateful for the opportunity to provide input to the Productivity Commission in relation to its inquiry into the social and economic benefits of improving mental health. This submission is divided into the following two distinct sections:
  - Part I addresses questions relating to the intersection between mental health and the justice system; and
  - Part II provides input on the legal profession, and how it has responded to challenges relating to mental health within its membership.
2. A significant part of this submission has been informed by the findings of the Law Council's review into the state of access to justice in Australia, the Justice Project.<sup>1</sup> From early 2017, until the release of the Final Report of the Justice Project in August 2018, the Law Council undertook a comprehensive national review into the state of access to justice in Australia for people experiencing significant disadvantage. The Justice Project was overseen by an expert steering group led by the former Chief Justice of the High Court, the Hon. Robert French AC.
3. Through the Justice Project, the Law Council sought to shine a light on the justice issues experienced by 13 priority groups identified as facing significant social and economic disadvantage by uncovering systemic flaws and identifying service gaps. Perspectives, conclusions and case studies arising from the Justice Project, as they relate to mental health in the justice sector, are used throughout this submission.
4. Consistent with the Justice Project, for the purpose of this submission, the use of the term 'people with disability' refers to people living with impairment(s) which, in interaction with social, physical, attitudinal, communication and environmental barriers, hinder their ability to effectively participate in society on an equal basis with others.<sup>2</sup> Impairment refers to the 'medical condition or functional limitation affecting a particular individual'.<sup>3</sup>

## Part I: Mental health and the justice system

### Prevalence of mental health in Australia

5. The Issues Paper released by the Productivity Commission highlights the striking statistics on the number of Australians who experience or have experienced mental ill-health. The Australian Institute of Health and Welfare has reported that, by international standards, 'there is a high prevalence of mental disorders in the Australian population'.<sup>4</sup> The 2007 *National Survey of Mental Health and Wellbeing* estimated that 45 per cent or 8.6 million Australians would experience a mental health-related condition, such as depression or anxiety, in their adolescence and/or adult life.<sup>5</sup>

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<sup>1</sup> Law Council of Australia, *Justice Project – Final Report* (2018) <[www.lawcouncil.asn.au/justice-project/final-report](http://www.lawcouncil.asn.au/justice-project/final-report)>.

<sup>2</sup> *Convention of the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) preamble, art 1, art 3.

<sup>3</sup> Eillionóir Flynn, *Disabled Justice?: Access to justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge, 2015) 6-7; People with Disability Australia, *The Social Model of Disability* <<http://www.pwd.org.au/student-section/the-social-model-of-disability.html>>.

<sup>4</sup> The Australian Institute of Health and Welfare, *Australia's Health 2014*, 23.

<sup>5</sup> The Australian Institute of Health and Welfare, *Mental Health Services: In Brief* (2018) 1 <<https://www.aihw.gov.au/getmedia/0e102c2f-694b-4949-84fb-e5db1c941a58/aihw-hse-211.pdf.aspx?inline=true>>.

6. The high prevalence of mental health conditions among children and young people is of growing concern. Results from the *2013–14 Young Minds Matter Survey* indicate that one in seven (14 per cent, or 560,000) children and young people aged between four and 17 years experienced a mental health condition in the previous 12 months.<sup>6</sup>
7. Aboriginal and Torres Strait Islander people also experience elevated rates of mental health conditions. The Australian Law Reform Commission (**ALRC**) reported that, ‘in 2014-15, almost one third of Aboriginal and Torres Strait Islander people aged 18 years and over reported experience[ed] high to very high levels of psychological distress, 2.6 times the non-Indigenous rate’.<sup>7</sup> The ALRC indicated that high levels of psychosocial disability have been linked to the over-incarceration of Aboriginal and Torres Strait Islander peoples.<sup>8</sup>

### Prevalence of mental health issues in the criminal justice system

8. The Law Council’s Justice Project highlighted a striking over-representation of people with disability in the criminal justice and corrections system.<sup>9</sup> The Mental Health Law Centre has described Western Australian prisons as ‘the biggest facility housing people with mental illness in WA’.<sup>10</sup> A 2017 report by the Mental Health Commission of New South Wales stated that 50 per cent of adult prisoners have been diagnosed with, or treated for, a mental health condition and 87 per cent of young people in custody have a past or present psychological impairment.<sup>11</sup>
9. A 2015 study conducted by the Justice Health and Forensic Mental Health Network (**JHFMHN**) found nearly 63 per cent of the adult population in correctional centres in NSW had received a mental health diagnosis, most commonly, depression and anxiety.<sup>12</sup> In 2010, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health reported that, in NSW, 43 per cent of prisoners met the diagnostic criteria for at least one mental illness, compared with 15 percent of adults in the general population. Psychosis was reported as 10 times more prevalent in prisons than in the community.<sup>13</sup>
10. A 2013 study by Legal Aid NSW profiling the 50 highest users of legal aid services in the State between July 2005 and June 2010 indicated that all of these individuals had complex needs.<sup>14</sup> Of the 50 users, 46 per cent had received a mental health diagnosis, and nearly a third had primary carers with a disability (most commonly, a psychiatric disability).<sup>15</sup>
11. With respect to children and young people in detention, the 2015 *Young People in Custody Health Report* by the JHFMHN found that, when compared ‘to young people in

<sup>6</sup> Australian Institute of Health and Welfare, *Australia’s Health 2016*, 214.

<sup>7</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2018) 68 (*‘Pathways to Justice’*).

<sup>8</sup> *Ibid.*

<sup>9</sup> Law Council of Australia, ‘People with Disability’, *Justice Project - Final Report* (2018).

<sup>10</sup> *Ibid.*, citing Justice Project consultation with Mental Health Law Centre (Perth, 5 September 2017).

<sup>11</sup> Mental Health Commission of New South Wales, *Towards a Just System: Mental Illness and Cognitive Impairment in the Criminal Justice System* (2017), 8 (*‘Towards a Just System’*).

<sup>12</sup> Justice Health and Forensic Mental Health Survey, *Network Patient Health Survey – Aboriginal People’s Health Report* (2015) 11.

<sup>13</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 14<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/14/20/Add.4 (3 June 2010) 70.

<sup>14</sup> Legal Aid NSW, *High Service Users at Legal Aid NSW* (June 2013) 4

<[https://www.legalaid.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0004/16537/Legal-Aid-NSW-Study-on-high-service-users-June-2013.pdf](https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0004/16537/Legal-Aid-NSW-Study-on-high-service-users-June-2013.pdf)>.

<sup>15</sup> *Ibid.*

the community, young people in custody have poorer physical and mental health, high rates of trauma, abuse and neglect and are more likely to have a history of alcohol and illicit drug use and dependence'.<sup>16</sup> A 2014 survey of 273 young people serving custodial orders in Victoria found 39 per cent had depression, 17 per cent had a positive psychosis screening and 22 per cent had engaged in deliberate self-harm within the previous six months.<sup>17</sup>

12. Aboriginal and Torres Strait Islander prisoners with disability are noticeably over-represented in the criminal justice and corrections system.<sup>18</sup> A Victorian study showed that 92 per cent of Koori women in prison had a lifetime diagnosis of mental illness and nearly half were suffering from post-traumatic stress disorder.<sup>19</sup>

13. Reflecting on the high rates of Aboriginal and Torres Strait Islander people with disability in the criminal justice system, the University of New South Wales' *Mental Health Disorders and Cognitive Disability in the Criminal Justice System Project* commented:

*Indigenous Australians with mental and cognitive disabilities are forced into the criminal justice system early in life in the absence of alternative pathways. Although this also applies to non-Indigenous people with mental and cognitive disabilities who are highly disadvantaged, the impact on Indigenous Australians is significantly greater across all measures and experiences gathered in the studies across the project.*<sup>20</sup>

14. Additionally, research indicates that offenders with disability have higher rates of recidivism and are more vulnerable to extended and repeat incarceration.<sup>21</sup> This is often because offenders with disability are less likely to understand socially acceptable behaviour and they are not provided with accessible education and the necessary supports to comply with parole conditions and navigate post-incarceration life. The Mental Health Commission of New South Wales acknowledged that:

*the over-representation of people with mental illness and cognitive impairment in prisons and re-offending statistics ... [does not indicate] a simple cause and effect relationship. Rather, these statistics in large part reflect a failure to provide appropriate services and supports to people with relevant impairments in our community.*<sup>22</sup>

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<sup>16</sup> Justice Health and Forensic Mental Health Network and Juvenile Justice NSW, *Young People in Custody Health Survey*, 99.

<sup>17</sup> SA Kinner, L Degenhardt, C Coffey et al, 'Complex Health Needs in the Youth Justice System: A Survey of Community-Based and Custodial Offenders (2014) 54(5) *Journal of Adolescent Health* 521.

<sup>18</sup> Australian Law Reform Commission, *Pathways to Justice*, 64-8.

<sup>19</sup> Human Rights Law Centre and Change the Record Coalition, *Over-Looked and Overrepresented: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (2017) 18; Australian Law Reform Commission, *Pathways to Justice*, 354.

<sup>20</sup> Eileen Baldry et al, University of New South Wales, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (2015) 12.

<sup>21</sup> Abigail Gray, Suzie Forell and Sophie Clarke, 'Cognitive Impairment, Legal Need and Access to Justice' (Justice Issues Paper No 10, Law and Justice Foundation of New South Wales, 2009) 5.

<sup>22</sup> Mental Health Commission of New South Wales, *Towards a Just System*, 8.



## Responses to questions raised in the Issues Paper

**To what extent does inadequate identification of mental health and individual needs in different parts of the justice system increase the likelihood, and extent, of peoples' future interactions with that system?**

### Difficulties in identifying and responding to disability

15. When disability remains undetected, or where access to disability support is unavailable, people with disability, including people with mental health conditions, may be criminalised because of issues connected with their disability.<sup>23</sup> The Justice Project reported that, particularly in the case of offenders, a lack of understanding of the process often reverberates adversely, compounding their initial offence and sometimes exacerbating the outcome, almost always negatively.<sup>24</sup>
16. Professional training for those working within the justice system is crucial to ensuring that disability-related needs are identified and reasonable accommodations, where available, are made. Given that many people with disability often have limited knowledge of their legal rights, including their entitlement to disability-related supports, and therefore may not request supports or appropriate adjustments, it is important that disability-related needs are recognised by those working within the justice system.<sup>25</sup>
17. Importantly for the current inquiry, due to stigma and fear of negative attitudes and stereotypes about their disability, some people with 'hidden' impairments, such as a mental health condition, may decide not to inform their lawyer or a police officer of their condition and will often be reluctant to admit that they have not understood the advice or precaution given.<sup>26</sup> In its recent report on prisoners with disability, Human Rights Watch (HRW) explained:

*Disability identification relies heavily on self-reporting, which is inadequate since many prisoners are not aware of their disability; do not identify as having one including many Aboriginal and Torres Strait Islander interviewees (there is no equivalent word in traditional languages); have never been diagnosed prior to entering prison; or hesitate to disclose a disability for fear of stigma.<sup>27</sup>*

18. Training in identifying disability for the purpose of understanding an individual's disability-related needs is fundamental to ensuring the justice system can change to accommodate those needs. As the Australian Human Rights Commission (AHRC) noted, failure to identify disability can result in the necessary supports, aids and adjustments not being provided 'because the need is not recognised'.<sup>28</sup> In its 2014 *Equal Before the Law* report, the AHRC found that there is 'widespread difficulty identifying disability and responding to it appropriately' among police, custodial officers, lawyers and courts.<sup>29</sup> Police, for example, may fail to identify disability, and can have difficulty distinguishing between different types of impairment, such as intellectual and

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<sup>23</sup> Law Council of Australia, 'Critical Support Services', *Justice Project – Final Report* (2018) 51.

<sup>24</sup> *Ibid.*

<sup>25</sup> Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (2014) 19 ('*Equal Before the Law*').

<sup>26</sup> Abigail Gray, Suzie Forell and Sophie Clarke, 'Cognitive Impairment, Legal Need and Access to Justice', 6.

<sup>27</sup> Human Rights Watch, "*I Needed Help, Instead I Was Punished*": Abuse and Neglect of Prisoners with Disabilities in Australia (2018) 2-3 <[www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities](http://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities)> ('*I Needed Help, Instead I Was Punished*').

<sup>28</sup> Australian Human Rights Commission, *Equal Before the Law*, 5.

<sup>29</sup> *Ibid* 5, 16.



psychosocial.<sup>30</sup> Psychosocial disability can be invisible, episodic and often not well identified. Better recognition of disability and consequent provision of supports, such as support persons and adjusted interviewing techniques, is crucial given that police officers are frequently the first responders to situations of crisis involving people with disability, whether as victims, witnesses or defendants. As argued previously by the Law Council, lack of awareness of disability:

*contributes to the failure of the criminal justice system to provide appropriate support and may lead to more adverse outcomes both at the stage of police contact and at every other stage, including trial, sentencing and during incarceration.*<sup>31</sup>

19. With respect to prisons and custodial officers, HRW reported:

*Problems exist for people with disabilities throughout detention and prison, beginning with lack of proper assessment and identification of a disability. Without such information, prisons fail to provide appropriate and adequate services and accommodations for the particular needs of prisoners with disabilities, or to track them within the prison system.*<sup>32</sup>

20. A 2018 report by HRW identified instances of problematic practices and abuse towards prisoners with disability in Australia.<sup>33</sup> Among other examples, the report found that prisoners were being disproportionately locked up in solitary detention, often as a punishment for behaviour related to mental health conditions.<sup>34</sup>

21. The Law Council suggests that there is scope for better screening for disability, disability-informed protocols and policy, in addition to training for prison staff, which would help address some of these systemic issues related to prisoners with disability.<sup>35</sup>

22. Training in identification of disability is also critical for lawyers and the judiciary.<sup>36</sup> It has been emphasised that a lawyer's failure to identify a client's mental health condition, for example, may result in that person 'not receiving the time, assistance and understanding they need to resolve their legal issue'.<sup>37</sup> With respect to judicial officers, the Senate Community Affairs Reference Committee has noted:

*Screening of people with cognitive and/or psychiatric impairments needs to be made a priority ... to ensure that the judiciary can make early informed choices about diversion and therapeutic treatment for this group of vulnerable Australians.*<sup>38</sup>

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<sup>30</sup> Ibid 18-9.

<sup>31</sup> Law Council of Australia, Submission to the Australian Human Rights Commission, *Access to Justice in the Criminal Justice System for People with Disability*, 9 August 2013, 5.

<sup>32</sup> Human Rights Watch, *I Needed Help, Instead I Was Punished*, 2-3.

<sup>33</sup> Ibid 39. See also, Victoria Laurie, 'Disabled Prisoners Targeted: Report' *The Australian* (online), 7 February 2017 <[www.theaustralian.com.au/news/nation/disabled-prisoners-targeted-report/news-story/cc8d1137cba6025a68bcdc01a3c4cad2](http://www.theaustralian.com.au/news/nation/disabled-prisoners-targeted-report/news-story/cc8d1137cba6025a68bcdc01a3c4cad2)>.

<sup>34</sup> Ibid.

<sup>35</sup> Law Council of Australia, 'Broader Justice System Players', *Justice Project – Final Report* (2018) 45.

<sup>36</sup> Law Council of Australia, 'People with Disability', *Justice Project – Final Report* (2018) 38-9.

<sup>37</sup> Maria Karras et al, Law and Justice Foundation of New South Wales, *On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW* (2006) xix.

<sup>38</sup> Senate Community Affairs References Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 74.

23. The AHRC concluded that, even when a person's disability is identified, the 'necessary modifications and supports are frequently not provided'.<sup>39</sup> It explained:

*[T]hat despite much good work and the best intentions, people with disabilities have far too many unsatisfactory interactions with the criminal justice system. In particular, knowing what support is available and getting to the right place at the right time seems to be part of the problem.*<sup>40</sup>

### **Disability advocates or support persons**

24. Disability advocates and non-legal support persons play an important role in facilitating access to justice for people with disability at all stages of the justice system.<sup>41</sup> For example, disability advocates can assist people with disability access justice through:

- ensuring that they understand police procedures;
- facilitating effective engagement with police;
- helping them to navigate the court process;
- supporting them to instruct their lawyer;
- ensuring fair procedure and treatment by police or other enforcement bodies;
- enabling early intervention to address burgeoning legal problems; and supporting them to re-integrate into the community following a period of institutionalisation or imprisonment.<sup>42</sup>

25. Without a disability support person, there is a higher risk of a miscarriage of justice as defendants may not understand what is being said in a police interview or victims may be discouraged or dismissed from reporting crimes as police incorrectly assume their evidence is unreliable or inconsistent. At the court stage, a disability advocate or support person can play a vital role in providing emotional support as well as offering practical assistance with administrative tasks, such as filling out forms.<sup>43</sup>

### **Where are the gaps in mental health services for people in the justice system including while incarcerated?**

26. The Law Council's Justice Project confirmed that there are several gaps in critical support services and infrastructure necessary to deliver access to justice to people with disability, including mental ill-health, and to enable equal participation in the justice system.<sup>44</sup> Some of these key gaps are set out below.

### **Rehabilitation and diversionary programs**

27. The Justice Project has highlighted that the availability of rehabilitation and diversionary programs for people with disability is severely limited, especially, in custody and in rural,

<sup>39</sup> Australian Human Rights Commission, *Equal Before the Law*, 16.

<sup>40</sup> *Ibid* 17.

<sup>41</sup> Law Council of Australia, 'People with Disability', *Justice Project – Final Report* (2018) 50-1, citing Justice Project consultations with Intellectual Disability Rights Service (Canberra, 10 August 2017) and People with Disability Australia (Sydney, 12 September 2017), Queensland Advocacy Incorporated, Submission No 43 to the Law Council of Australia, *Justice Project* (28 September 2018); Confidential, Submission No 118 to the Law Council of Australia, *Justice Project* (2018). See also Australian Law Reform Commission, *Pathways to Justice*, 327.

<sup>42</sup> Law Council of Australia, 'People with Disability', *Justice Project – Final Report* (2018) 50-1.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Ibid* 50.

regional and remote (**RRR**) areas.<sup>45</sup> As a result, people with disability are more likely to be given a custodial sentence and, once in prison, have fewer opportunities to participate in rehabilitation and other education and support programs.<sup>46</sup>

28. The Mental Health Law Clinic and the Disability Justice Centre have observed that people with mental health conditions are not always able to take advantage of existing prison programs in Western Australia as they often require tailored or intensive support.<sup>47</sup> Similarly, the North Australian Aboriginal Justice Agency (**NAAJA**) revealed, in consultations with the Justice Project, that people with disability in the Northern Territory lack treatment options in custody and in communities. They stated that 'prison becomes an option of first resort for these people, in terms of treatment'.<sup>48</sup> The following case study of 'Frank' provided to the Justice Project by NAAJA demonstrates the inadequate care and conditions in custody, and the lack of services in the community for people with disability.

*Case study*

*'Frank [has] severe schizophrenia ... [As of 2013, he was] housed in maximum security in the Darwin Correctional Centre. While Frank is case managed by Forensic Mental Health, he is managed on a day to day basis by Correctional Staff who do not have any relevant training in dealing with people with serious mental health conditions. [In 2013, there was] no forensic unit in the Darwin prison, so Frank ha[d] to be accommodated in the mainstream prison in a single cell in the maximum security section. While the Aboriginal community that he comes from does have a health clinic, it does not have any permanent mental health or psychiatric nurses based in the community. It will be extremely difficult for [Frank] to achieve parole prior to his full term. He has no alternative accommodation options, other than to return to his home community. In the past, Frank has been released from custody at the expiry of his full term, stops taking his medication and reoffends in the same way within a matter of days.*

*[Frank] has limited capacity to demonstrate his rehabilitation in custody ... [because] his needs are so significant that he cannot access the regular treatment services in custody, namely group or one-on-one counselling. There are no services to manage his mental health condition in his community, and as a result his risk of reoffending is high. The Parole Board is likely to have significant concerns about community safety and his risk of reoffending if his schizophrenia cannot be appropriately managed in the community. As a result, it will be extremely difficult for Frank to achieve parole'.<sup>49</sup>*

29. Involvement in prison programs, such as drug and alcohol programs, help prisoners to obtain parole, and limited access to them can therefore increase prison time for people with disability.<sup>50</sup> As per the Justice Project, prisons should be required to take steps to

<sup>45</sup> Australian Human Rights Commission, *Equal Before the Law*, 29; Human Rights Watch, *I Needed Help, Instead I Was Punished*, 2.

<sup>46</sup> Law Council of Australia, *Justice Project - People with Disability Consultation Paper*, 15, 30-31; Law Council of Australia, 'People with Disability', *Justice Project – Final Report (2018)* 50-1, citing Justice Project consultation with Disability Justice Centre and Mental Health Law Centre (Perth, 5 September 2017).

<sup>47</sup> *Ibid* 54.

<sup>48</sup> *Ibid*, citing Justice Project consultation with North Australian Aboriginal Justice Agency (Darwin, 31 March 2017).

<sup>49</sup> Northern Australian Aboriginal Justice Agency, Submission to the Australian Human Rights Commission, *Access to Justice in the Criminal Justice System for People with Disability – Issues Paper: April 2013* (August 2013) 19. For other case studies see Barriers 2 Justice, Submission No 67 to Senate Community Affairs References Committee, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia*, (April 2016) 8.

<sup>50</sup> *Ibid*.

actively accommodate the individual needs of prisoners with mental health conditions or cognitive impairment by, for example, arranging counselling for a prisoner on their own if they are unable to participate in group programs.<sup>51</sup>

30. Justice Project stakeholders noted that prison programs are often unavailable for those serving short sentences, or those on remand, and identified this as a missed opportunity to provide rehabilitative responses at a critical time.<sup>52</sup>

### Forensic mental health services

31. The Law Council submits that there is a greater need for cross-disciplinary, person-centred, holistic, flexible and early intervention-based approach to the delivery of services, including legal services, to people with mental health needs in the justice system. In respect of Aboriginal and Torres Strait Islander people, those services must be culturally and disability safe and appropriate in order to be effective. The services must also avoid stigmatising individuals, and be trauma-informed (in particular, intergenerational trauma-informed). Critically, Indigenous-led knowledge and solutions must be properly resourced, as should Aboriginal and Torres Strait Islander community mental health services.
32. In NSW, the JHFMHN provides health care in a complex environment to people in the adult correctional environment, to those in courts and police cells, to juvenile detainees and to those within the NSW forensic mental health system and in the community. There are equivalent agencies to JHFMHN in other jurisdictions in Australia, including Forensicare in Victoria and the State Forensic Mental Health Service in Western Australia.
33. With reference to the NSW experience, as informed by the Law Society of NSW, the Law Council notes that JHFMHN consultants attend most major courts in NSW, and that engagement levels are high as individuals are ready to engage at a time of crisis. The Law Council submits that JHFMHN – and comparable services in other jurisdictions – should be resourced to be expanded, particularly to RRR areas.
34. The Law Council holds the concern, informed by the experience and advice of its Constituent Bodies, for instance the Queensland Law Society (**QLS**), that the current Queensland system is underfunded and lacks coordination with the broader health system and related support systems. QLS has noted that there is a significant deficit in resources for mental health services in Queensland, submitting that incarcerated persons are not provided access to rehabilitative programs and treatments as they should be under the *Mental Health Act 2016* (Qld) and the *Forensic Disability Act 2011* (Qld).
35. The QLS has pointed to the recent Supreme Court case of *Attorney-General v McCann*<sup>53</sup> as demonstrating the failings of the current system. The respondent in the case was placed on a continuing detention order (**CDO**). The CDO required the respondent to be provided with medium to long-term psychiatric treatment for severe mental illness, and admission to a medium secure psychiatric service. Despite this, the respondent was not admitted to such a facility and instead spent most of his time in solitary confinement. Justice Applegarth concluded the system failed the respondent and the community, listing ‘wider systemic problems’ such as limited accommodation in

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<sup>51</sup> Law Council of Australia, ‘Critical Support Services’, *Justice Project – Final Report* (2018) 73, citing Justice Project consultation with Prisoners’ Legal Service (Brisbane, 23 July 2017).

<sup>52</sup> *Ibid.* See also Council of Australian Governments, *Prison to Work Report* (December 2016) 41.

<sup>53</sup> [2018] QSC 115.

acute or medium security units, resourcing problems, and the inability to manage mental illness in a community setting (with supported accommodation).

36. Further, the Law Council holds concerns, informed by the Law Society of WA, about the limited number of forensic mental health beds available in Western Australia. It is understood that the Frankland Centre at Graylands Hospital, which is the State's only secure forensic mental health facility, has not expanded its 30-bed capacity since it opened in 1993, despite the general prison population tripling in that same timeframe.
37. The Law Society of WA informed the Law Council that as the Frankland Centre is now the only secure forensic facility in the State, following the closure of the Plaistow ward at the Frankland Centre in early 2014, the justice system in Western Australia is under-resourced to manage mentally ill accused.
38. A report released by the Western Australian Office of the Inspector of Custodial Services in September 2018 found that 61 per cent of all referrals to a mental health bed from a custodial setting lapsed without a hospital placement.<sup>54</sup> There are a significant number of people who should be held in a mental health facility but instead are finding themselves being held in prisons.
39. On the experience and expertise of its Constituent Bodies, the Law Council submits that there is an urgent need for designated secure mental health facilities that are equipped with different wards and divisions to deal with the various types of people, such as the acutely ill or dementia affected patients.

#### **Diversion of young people with cognitive and mental health concerns**

40. The prevalence of mental ill-health among young people who come in contact with the juvenile justice system is high. Constituent Bodies of the Law Council, such as the Law Society of NSW, have previously submitted that strategies which seek to deal with this group of vulnerable young people must prioritise a therapeutic approach.<sup>55</sup>
41. A study published by the JHFMHN and Juvenile Justice NSW, in December 2017, found that 83.3 per cent of young people in custody in NSW met the threshold for a psychological disorder.<sup>56</sup> However, despite the high rates of mental ill-health for juveniles in the criminal justice system, rates of diversion in the Children's Court of NSW for young offenders with mental ill-health are low.<sup>57</sup>
42. In 2012, the NSW Law Reform Commission found that diversion legislation for people with mental ill-health was not effectively utilised due to a perceived lack of accountability for defendants who are diverted and a lack of programs and services to which courts can turn to support a diversion order.<sup>58</sup> These findings are likely to be similarly applicable to juvenile offenders.

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<sup>54</sup> Office of the Inspector of Custodial Services, Government of Western Australia, *Prisoner Access to Secure Mental Health Treatment* (September 2018) ii.

<sup>55</sup> Law Society of NSW, *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System* (22 February 2011) <[www.lawreform.justice.nsw.gov.au/Documents/Completed-projects/2010-onwards/Mental-health/Submissions/cref120\\_mh36lawsocietyofnsw.pdf](http://www.lawreform.justice.nsw.gov.au/Documents/Completed-projects/2010-onwards/Mental-health/Submissions/cref120_mh36lawsocietyofnsw.pdf)>.

<sup>56</sup> Justice Health and Forensic Mental Health Network and Juvenile Justice NSW, *2015 Young People in Custody Health Survey* (Full Report, 2017) 65

<[www.justicehealth.nsw.gov.au/publications/2015YPICHSReportwebreadyversion.PDF](http://www.justicehealth.nsw.gov.au/publications/2015YPICHSReportwebreadyversion.PDF)>.

<sup>57</sup> R Sheehan and A Borowski, *Australia's Children's Courts Today and Tomorrow* (Vol 7, Springer, Dordrecht) 165-85.

<sup>58</sup> NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System – Diversion* (Report 135, 2012).



### National Disability Insurance Scheme and incarceration

43. The Law Council notes that the Productivity Commission does not intend to revisit the provision of National Disability Insurance Scheme (**NDIS**) support to people with psychosocial disability unless significant new issues arise, or problems are identified that are not being addressed.
44. The Law Council submits that a problem not currently addressed under the NDIS is mental health support for people who are incarcerated. Despite the high rates of mental illness among prisoners in Australia, it is understood that people in the criminal justice system are excluded from mental health support under Medicare and the NDIS due to the operation of section 19(2) of the *Health Insurance Act 1973* (Cth) and the *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth). A 2015 report by the NSW Inspector of Custodial Services found that the waiting time for people in a correctional centre to see a mental health nurse and psychiatrist was 27 days and 42 days respectively.<sup>59</sup>
45. The Law Council considers that detainees in each state and territory should receive the same level of health care that the general public would receive under the public health system. The Law Council submits that the lack of suitable mental health services available within the justice system in Australia is relevant to the current inquiry, given the role that mental wellbeing plays in a prisoner's transition back into the community post-release, and the likelihood of recidivism.<sup>60</sup>
46. The Law Council suggests that a review is necessary into how mental health and disability services, particularly the NDIS, can be improved to support people with mental health and cognitive conditions in the criminal justice system.<sup>61</sup>

### Shortfalls within the legal assistance sector

47. As per the Justice Project, it is well recognised that the legal assistance sector generally, as well as specialist disability legal services, are facing severe resource constraints and, as a consequence, are struggling to meet the growing demand and are having to turn large numbers of vulnerable people away.<sup>62</sup>
48. During consultation on the Justice Project, specialist disability legal services submitted that funding uncertainty impacts their ability to retain staff and under-funding hinders their capacity to meet the demand for their services.<sup>63</sup> It has been reported that many community legal centres (**CLCs**) lack processes that are directed towards people with a disability.<sup>64</sup> The Justice Project heard that not many CLCs are 'sufficiently disability

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<sup>59</sup> NSW Inspector of Custodial Services, NSW Government, *Full House: The Growth of the Inmate Population in NSW* (2015) 53.

<sup>60</sup> N Hancock, J Smith-Merry and K McKenzie, 'Facilitating People Living With Severe and Persistent Mental Illness to Transition from Prison to Community: A Qualitative Exploration of Staff Experiences' (2018) 12 *International Journal of Mental Health Systems* 45.

<sup>61</sup> Law Council of Australia, *2019 Federal Election Call to Parties* (2019) 15.

<sup>62</sup> Law Council of Australia, 'People with Disability', *Justice Project – Final Report* (2018) 56-7, see also Law Council of Australia, 'Legal Services', *Justice Project – Final Report* (2018).

<sup>63</sup> Law Council of Australia, 'People with Disability', *Justice Project – Final Report* (2018) 56-7, citing Justice Project consultation with Mental Health Law Centre (Perth, 5 September 2017) and Queensland Advocacy Incorporated, Submission No 43 to the Law Council of Australia, *Justice Project* (28 September 2018).

<sup>64</sup> Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) 720 (see figure 21.1).

aware', which is likely one of the consequences of inadequate funding and resourcing to develop appropriate resources and train staff.<sup>65</sup>

49. It has been recommended that governments should increase funding for specialist CLCs and Legal Aid lawyers with expertise in disability, in order to enable people with disability to have affordable access to legal representation, irrespective of the complexity of their matter.<sup>66</sup>

### Legal assistance for guardianship, mental health and administration jurisdictions

50. In some jurisdictions, notably Western Australia and South Australia, people with disability who are subject to proceedings under Guardianship and Administration and Mental Health legislation are denied access to free legal assistance and representation for first instance hearings – although free legal representation may be available for appeals to the District Court against initial orders.<sup>67</sup> In other jurisdictions, such as Victoria and Queensland, limited legal representation for first instance hearings may be available either through legal aid or CLCs. However, as noted above, due to resource constraints, legal assistance for these types of civil matters is severely limited and frequently unable to meet demand.<sup>68</sup> In addition to ensuring access to justice for persons with disability, the provision of representation at first instance hearings is likely to ensure efficient use of court resources and reduce the number of appeals.<sup>69</sup>
51. In South Australia, applications can be made to the South Australian Civil and Administrative Tribunal (**SACAT**), pursuant to the *Guardianship and Administration Act 1993* (SA) and the *Mental Health Act 2009* (SA), for various orders, such as involuntary electro-convulsive therapy, community treatment orders (such as involuntary injected medication), and Administration and Guardianship Orders.<sup>70</sup> Many people who are subject to these proceedings cannot afford to pay for legal representation or for expert medical evidence to challenge the application, given that the average fee for an expert medical report is \$800.<sup>71</sup> It has been noted that, for those with a mental health condition or mental incapacity, 'they may not comprehend the powers of the [SACAT] and its potential impact on their lives'.<sup>72</sup>
52. In Victoria, the *Mental Health Act 2014* (Vic) permits people diagnosed with 'mental illness' to be detained for compulsory treatment. Victoria Legal Aid provides some independent mental health advocacy and legal advice and representation for people facing compulsory treatment. The Independent Mental Health Advocacy Service is complemented by the legal advocacy provided by the Mental Health and Disability Law Team.<sup>73</sup> However, the Justice Project heard that this service only assists a minority of people appearing before the Mental Health Tribunal and that the majority of compulsory patients involved in Mental Health Tribunal proceedings are not legally represented.<sup>74</sup>

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<sup>65</sup> Law Council of Australia, 'People with Disability', *Justice Project – Final Report* (2018) 56-7, citing Queensland Advocacy Incorporated, Submission No 43 to the Law Council of Australia, *Justice Project* (28 September 2018).

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid* 57.

<sup>68</sup> *Ibid* 57-61, citing Justice Project consultation with Townsville Community Legal Service (Townsville, 29 August 2017).

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

<sup>70</sup> *Ibid*, citing Jennifer Corkhill, 'The Case for Free Legal Representation for Matters Under the Mental Health Act and Guardianship Board' (2014) 36(10) *Bulletin (Law Society of South Australia)* 26.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*



53. More recent data from the 2017-18 Victorian and New South Wales Mental Health Tribunal Annual Reports indicates that legal representation was provided in 15 per cent of hearings in the Victorian Mental Health Tribunal and in 80 per cent of hearings in the NSW Mental Health Tribunal.<sup>75</sup> The Victorian Mental Health 2016-17 Annual Report provides that the Victorian Mental Health tribunal approved applications for electro-convulsive treatment in 85 per cent of cases but this approval rate dropped to 50 per cent if the person was legally represented.<sup>76</sup>
54. Self-representation in these jurisdictions is problematic as guardianship, mental health and administration proceedings have the potential to impact significantly upon an individual's life and deprive him or her of his or her liberty in a way not dissimilar to the criminal justice system.<sup>77</sup> Additionally, people subject to these types of proceedings often experience multiple forms of disadvantage. The Justice Project reported that 'accessible legal assistance can play an important role in promoting the rights of persons subject to proceedings' in guardianship, administration and mental health jurisdictions and that 'there is room for further education of lawyers about the role they play in these jurisdictions, which are inquisitorial as opposed to adversarial'.<sup>78</sup>
55. The following case study provided to the Justice Project by a South Australian practitioner demonstrates the problems which arise because of a lack of free legal representation for first instance hearings in mental health and guardianship jurisdictions.

#### **Case study**

*'Glenda is an Aboriginal woman who was suffering from extremely severe depression and who was detained against her will under the Mental Health Act in a psychiatric institution. The treating team made an application to the Guardianship Board for Electro Convulsive Treatment (ECT).*

*Under [South Australian] law ECT can only be given without consent if the person lacks capacity. Glenda was taken to a Guardianship Board hearing where the Board and all of the treating team were male. No Aboriginal liaison person was appointed. Funding is not available for legal representation at these hearings.*

*The transcript of the hearing shows that the report of the treating team regarding Glenda's capacity was accepted without question and the order was made.*

*Fortunately for Glenda she had 2 daughters who, when they found out about the order, contacted Aboriginal Legal Rights who contacted me. I was able to get the matter on urgently before the District Court and seek a stay of the order.*

*Glenda was so depressed that she could barely speak but I was, after careful and gentle questioning over a considerable period of time with appropriate breaks, able to obtain clear instructions and make an assessment that Glenda did in fact have legal capacity.*

<sup>75</sup> Mental Health Tribunal (Victoria), *Annual Report 2017-18* (2018) 30; Mental Health Tribunal (New South Wales), *Annual Report 2017-18* (2018) 11.

<sup>76</sup> Mental Health Tribunal (Victoria), *Annual Report 2016-17*, 22; Stephanie Corsetti, 'Low Mental Health Legal Representation in Regional Victoria Affects Patient Outcomes, Legal Aid Says', *ABC news* (online), 21 March 2018 <<http://www.abc.net.au/news/2018-03-21/mental-health-legal-representation-low-in-regional-victoria/9571696>>.

<sup>77</sup> Law Council of Australia, 'People with Disability', *Justice Project – Final Report* (2018) 57-61, citing Office of the Public Advocate Victoria, Submission No 86 to the Law Council of Australia, *Justice Project* (2 October 2017).

<sup>78</sup> *Ibid.*

*She was terrified about the prospect of ECT and had felt powerless to do anything about it.*

*Had Glenda had legal representation at the first instance, her legal capacity could have been established and her daughters could have accompanied her to the hearing. She would have been able to challenge the medical team and the order could not have been made'.<sup>79</sup>*

## **What are the main barriers to lowering the over-representation of people living with a mental illness in the justice system and what strategies would best overcome them?**

### **Health and allied health services**

56. Effective access to health and other allied health services, such as mental health services or counselling, is an important preventative and early intervention strategy for people with disability and can be crucial to breaking the cycle of disadvantage and diverting people with disability away from the criminal justice system.
57. The Mental Health Commission of NSW suggested to the Justice Project that the 'over-representation of people with mental illness in prisons and reoffending statistics' largely reflects 'a failure to provide appropriate services and supports to people with mental illness in our community'.<sup>80</sup> It proposed that 'improvements to health and disability services within the justice system could interrupt the cycle of reoffending and improve public health and safety'.<sup>81</sup>
58. The Mental Health Law Centre echoed this opinion in Justice Project consultations, and considered that, in Western Australia, a lack of access to mental health care combined with an approach by which a frontline response to people with mental health conditions often involves their arrest, prosecution and incarceration, to be highly problematic.<sup>82</sup>
59. Access to mental health services is particularly important for children and young people. The Justice Project noted the 'often determinative impact of mental health issues and trauma' on young people involved in the justice system.<sup>83</sup> A system which does not provide adequate mental health support and does not appreciate the impact of trauma on young people at risk may hasten the path of young people to criminality. The Office of the Guardian for Children and Young People South Australia summarised:

*Pretending that criminal behaviour by children and young people reflects individual or (stigmatised) group moral failings rather than deeply embedded and systemic problems is unjust and will mean that effective long-term solutions will continue to elude us.<sup>84</sup>*

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<sup>79</sup> Ibid, citing email from Jennifer Corkhill to the Law Council of Australia, 19 February 2018.

<sup>80</sup> Law Council of Australia, 'People with Disability', *Justice Project – Final Report* (2018) 31, citing Mental Health Commission of New South Wales, Submission No 96 to the Law Council of Australia, *Justice Project* (October 2017).

<sup>81</sup> Mental Health Commission of New South Wales, *Towards a Just System*, 9.

<sup>82</sup> Law Council of Australia, 'Critical Support Services', *Justice Project – Final Report* (2018) 31, citing Justice Project consultation with Disability Justice Centre and Mental Health Law Centre (Perth, 5 September 2017).

<sup>83</sup> Ibid, citing Office of the Guardian for Children and Young People South Australia, Submission No 48 to the Law Council of Australia, *Justice Project* (September 2017).

<sup>84</sup> Ibid.

60. Aboriginal and Torres Strait Islander stakeholders to the Justice Project also viewed early mental health support to be a critical intervention measure which can address over-imprisonment, considering the high numbers of Aboriginal and Torres Strait Islander people with disability in the prison system.<sup>85</sup> The National Congress of Australia's First Peoples observed that causes of crime in Aboriginal and Torres Strait Islander communities are 'inextricably linked to other policy areas', including the health sector.<sup>86</sup>
61. Mental health and disability and intervention to treat or assist are two important early intervention measures identified by the First Peoples Disability Network that can 'pivot' people away from interaction with the criminal system.<sup>87</sup> However, in RRR areas, the deficiency of accessible mental health services is particularly acute.<sup>88</sup> As such, the 'lack of funding for culturally appropriate health services in many remote Aboriginal communities ... greatly contributes to substance abuse and mental illness, which often leads to crime'.<sup>89</sup>

### Rehabilitation and diversionary programs within the justice system

62. Justice Project stakeholders emphasised the need for government focus on essential services that advance rehabilitation, community cohesion and address the underlying causes of criminal behaviour, instead of incarceration. They are concerned that, without adequate rehabilitative options underpinning the criminal justice system, the system is crippled in its capacity to address and curtail criminal behaviour. For example, the Fitzroy Legal Centre has observed that often clients with serious criminal histories are rejected from rehabilitation facilities, partly due to a lack of resources.<sup>90</sup> The Prisoners Legal Service Queensland summarises:

*Imprisonment is a 'blunt instrument' for people who commit crime. But people commit crime for myriad different reasons and there are many different types of crime. The criminal justice system can't fix crime by focusing on one or two aspects of it – crime should be addressed holistically.*<sup>91</sup>

63. The Western Australian Commissioner for Children and Young People has argued that youth justice should focus on rehabilitation and diversion from the justice system, which includes 'adopting trauma-informed approaches and [the] provision of effective mental

<sup>85</sup> Ibid 61, citing National Congress of Australia's First Peoples, Submission No 97 to the Law Council of Australia, *Justice Project* (October 2017).

<sup>86</sup> Ibid.

<sup>87</sup> Ibid 32, citing Justice Project consultation with First Peoples Disability Network (Sydney, 14 September 2017).

<sup>88</sup> Ralph Weisheit, 'Locating Crime in Context and Place: Perspectives on Regional, Rural And Remote Australia' (2017) 26(1) *Rural Society*, 102, 105, citing Alistair Harkness, Bridget Harris and David Barker, *Locating Crime in Context and Place: Perspectives on Regional, Rural and Remote Australia* (The Federation Press, 2016); Bridget Harris, Lucinda Jordan and Lydia Philips, 'Courting Justice Beyond the Cityscape: Access to Justice and the Rural, Regional And Remote Magistrates' Courts' (2014) 23 *Journal of Judicial Administration* 158, 163-4; Justice Project consultation with Aboriginal Legal Service (Bourke, 14 September 2017), National Congress of Australia's First Peoples, Submission No 97 to the Law Council of Australia, *Justice Project* (October 2017).

<sup>89</sup> Law Council of Australia, 'Critical Support Services', *Justice Project – Final Report* (2018) 31, citing National Congress of Australia's First Peoples, Submission No 97 to the Law Council of Australia, *Justice Project* (October 2017).

<sup>90</sup> Ibid 61.

<sup>91</sup> Ibid, citing Justice Project consultation with Prisoners' Legal Service (Brisbane, 23 August 2017).

health care to children and young people who have contact with the youth justice system'.<sup>92</sup>

64. While diversion and integrated support services are beneficial for people living RRR areas, a lack of availability of these programs in RRR areas remains a significant barrier to justice for many people experiencing significant disadvantage.
65. Community-based sentences are an important approach that can enable rehabilitation and community integration. All states and territories have sentencing regimes that enable some offenders to serve their sentence in the community, yet each regime is different.<sup>93</sup> Intensive orders are a category of sentence that allows an offender to serve a sentence of imprisonment in the community, provided they comply with conditions of intensive rehabilitation, supervision and sometimes unpaid work. One example is Intensive Corrections Orders (**ICOs**).<sup>94</sup> The ICO model in operation in NSW and ACT allows courts to implement these sentences as an alternative to a prison sentence that is likely to be under two years.
66. However, research indicates that these orders are not equally available in practice to all offenders who would otherwise be eligible for them, particularly, those in RRR communities. The lack of community services to support ICOs in NSW has been raised by Just Reinvest.<sup>95</sup> The Law Society of NSW has similarly stated that ICOs require the availability of rehabilitative programs and appropriate community service options that do not currently exist in many RRR areas.<sup>96</sup>
67. A review undertaken by the NSW Sentencing Council in 2016 found that ICOs are 'currently underused and not targeting the offenders who could most benefit from supervision and treatment'.<sup>97</sup> Reasons for this include 'difficulties in making ICOs available across the State'.<sup>98</sup> The NSW Law Reform Commission has also noted difficulties with 'electronic monitoring technology in remote areas' may act as a barrier to implementing certain sentences, including ICOs.<sup>99</sup> These realities reduce the value of ICOs as a sentencing option.<sup>100</sup>
68. While the effects of reforms made by the NSW Government in October 2017 to strengthen the ICO regime upon this picture are unclear,<sup>101</sup> the NSW Government submitted to the ALRC that the new regime will ensure that ICOs are available

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<sup>92</sup> Ibid, citing Commissioner for Children and Young People Western Australia, Submission No 37 to the Law Council of Australia, *Justice Project* (27 September 2017). See also Law Council of Australia, 'People with Disability', *Justice Project – Final Report* (2018) 23, citing Hayley Passmore, Carol Bower and Raewyn Mutch, 'Almost Every Young Person in WA Detention has a Severe Brain Impairment', *The Conversation* (online), 14 February 2017 <<https://theconversation.com/almost-every-young-person-in-wa-detention-has-a-severe-brain-impairment-90695?>>.

<sup>93</sup> Australian Law Reform Commission, *Pathways to Justice*, 230.

<sup>94</sup> Corrective Services, NSW Government, *Intensive Corrections Orders*, <<http://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/Community%20Corrections/offender-management-in-the-community/intensive-correction-order.aspx>>.

<sup>95</sup> Just Reinvest NSW, *Policy Paper: Key Proposals #1 – Smarter Sentencing and Parole Law Reform* (17 May 2017) <<http://www.justreinvest.org.au/wp-content/uploads/2017/05/Just-Reinvest-NSW-Policy-Paper-KeyProposals-11.pdf>>.

<sup>96</sup> NSW Law Society, *Response to the NSW Law Reform Commission Sentencing Review – Questions Paper* (2012) <<https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/582675.pdf>>.

<sup>97</sup> Wang and Poynton, *Intensive Correction Orders Versus Short Prison Sentence* (October 2017) 10, citing NSW Sentencing Council, *Intensive Correction Orders: Statutory Review* (2016).

<sup>98</sup> Ibid vii.

<sup>99</sup> NSW Law Reform Commission, *Sentencing* (Report No 139, 2013) 246.

<sup>100</sup> NSW Law Society, *Response to the NSW Law Reform Commission Sentencing Review – Questions Paper* (2012) <<https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/582675.pdf>>.

<sup>101</sup> NSW Government, *Tough and Smart Sentencing for Safer Communities – Factsheet* (May 2017) <<http://www.vwccs.org.au/wp-content/uploads/2017/05/4-Stronger-Sentencing-Factsheet.pdf>>.

throughout NSW, including in RRR areas. In addition, some barriers will be removed, including the removal of a 32-hour per month work requirement that is difficult for those in remote communities to comply with, as well as those dealing with mental health issues and cognitive impairment.<sup>102</sup>

### **Support for Aboriginal and Torres Strait Islander people with mental health challenges**

69. The Law Council would like to draw the Productivity Commission's attention to the article *Indigenous Australians, Mental and Cognitive Impairment and The Criminal Justice System: A Complex Web*, which sets out the key systems and legal issues as they relate to Aboriginal and Torres Strait Islander people with cognitive and mental impairments coming into contact with the criminal justice system.<sup>103</sup> These issues are discussed in more detail in the 2015 University of NSW study *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System*.<sup>104</sup> The Law Council recommends consideration of this very comprehensive report.
70. These issues have been the subject of a number of other reviews and inquiries, including the NSW Law Reform Commission review of *People With Cognitive And Mental Health Impairments in the Criminal Justice System*<sup>105</sup> and the Australian Law Reform Commission's report on *Equality, Capacity and Disability in Commonwealth Laws*.<sup>106</sup> It is submitted that the Productivity Commission should also have regard to the discussion in the ALRC's 2018 *Pathways to Justice Report* in respect of fitness to stand trial regimes.<sup>107</sup>

**What interventions in the justice system most effectively reduce the likelihood of re-offending, improve mental health and increase prospects for re-establishing contributing lives? What evidence is there about the long-term benefits and costs of these interventions?**

### **Disability advocates or support persons**

71. As mentioned above, support for those with a disability in the justice system, including disability advocates, are beneficial at every stage of the process. It is also noted that the use of peer workers in mental health has been shown to play a beneficial role in connection with corrections and the courts.<sup>108</sup>
72. One development in this area involves the Western Australian Mental Health Co-Response Trial, which commenced in January 2016 and was provided with Western Australian Government funding of \$6.5 million. The trial has been undertaken with the WA Police, Mental Health Commission and Department of Health and has been

<sup>102</sup> Australian Law Reform Commission, *Pathways to Justice*, 236.

<sup>103</sup> Peta MacGillivray and Eileen Baldry, 'Indigenous Australians, Mental and Cognitive Impairment and the Criminal Justice System: A Complex Web' (2013) 8(9) *Indigenous Law Bulletin* 22.

<sup>104</sup> Eileen Baldry et al, University of New South Wales, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (2015) 12.

<sup>105</sup> NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (Report No 135, 2012).

<sup>106</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, 2014).

<sup>107</sup> Australian Law Reform Commission, *Pathways to Justice*, [10.60]-[10.84].

<sup>108</sup> Mental Health Commission of New South Wales, *Inside Outside: Recovery Research Project: A Discussion Paper by the Mental Health Commission of New South Wales* (2017)

<[https://nswmentalhealthcommission.com.au/sites/default/files/uploads/paper\\_-\\_inside\\_outside\\_recovery\\_research\\_project2.pdf](https://nswmentalhealthcommission.com.au/sites/default/files/uploads/paper_-_inside_outside_recovery_research_project2.pdf)>.



designed to test the effectiveness of a police and health collaborative response to mental health related calls for assistance and intervention within the policing environment. Under the trial, mental health clinicians have been embedded within the Western Australia Police Operational framework. 20 police officers have been assigned to Mental Health Co-Response Teams, deployed to deliver the mobile response component of the trial.

73. In Tasmania, the State Government's *Disability Justice Plan for Tasmania 2017-2020* recognises that police play a pivotal role in interacting with people with disability, particularly, at first contact with the justice system.<sup>109</sup> This includes intervening to protect people with disability who may be at risk of harm or the victim of violence or abuse. Police are also often called in as first responders in situations where people with disability may be engaging in unpredictable or inappropriate behaviour. The plan aims to equip police to recognise the possibility of disability at first contact and understand the effect that disability may have, as well as any adjustments to procedures that may be required. As such, its priority actions include enhancing the capacity to recognise, understand and respond appropriately to disability through policy development and training.
74. A further example of initiatives in the disability advocate context is Victoria Legal Aid's (VLA) Independent Mental Health Advocacy (IMHA) service, a joined-up multidisciplinary model that utilises a team of disability advocates and other support workers to complement the legal work undertaken by VLA. As mentioned above, VLA provides legal help to challenge Treatment Orders before the Mental Health Tribunal. However, it recognised that sustained non-legal support is also required for people undergoing compulsory treatment, as 'their autonomy and decision making can be undermined on a daily basis as a result of decisions by their treating team':

*IMHA is staffed by a team of non-legal advocates and a senior consumer consultant. The service works with consumers, support people, mental health services and the mental health system to embed supported decision making and recovery-orientated service delivery. Advocates engage in representational (or instructed) advocacy, and by taking their instructions from consumers, ensure that people are supported to exercise their rights, speak for themselves and have someone 'on their side' who can represent their views, preferences and concerns to service providers and other relevant stakeholders.*<sup>110</sup>

75. A final example is the Justice Support Program ran by Queensland Advocacy Incorporated which fulfils a similar purpose for those in contact with the criminal justice system.<sup>111</sup> This Program utilises legal and community services to help those with a disability (including mental illness) to remain in the community and prevent any further entrenchment into the system. The type of assistance provided by the Program includes helping people to obtain legal advice or representation, trying to resolve the issues they are facing, advocating with service systems to require appropriate and responsive supports and helping people comply with court orders.<sup>112</sup>

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<sup>109</sup> Tasmanian Government, *Disability Justice Plan for Tasmania 2017-2020*, 13.

<sup>110</sup> Law Council of Australia, 'Critical Support Services', *Justice Project – Final Report* (2018) 52, citing Victoria Legal Aid, Submission No 18 to the Law Council of Australia, *Justice Project* (30 August 2017).

<sup>111</sup> Ibid, citing Queensland Advocacy Incorporated, Submission No 43 to the Law Council of Australia, *Justice Project* (28 September 2018).

<sup>112</sup> Ibid.

## Child Safety

76. As the Issues Paper notes, mental ill-health is widespread among children and young people who are in contact with the child protection system. Children and young people and who have suffered trauma which requires intervention of child protection systems need the utmost care. As part of this approach, it is vital that those working in the child protection system undergo appropriate induction and ongoing training that sensitises them to the trauma of the children in the system and assists them with knowing how to respond.
77. This is particularly important for foster carers, as well as case workers, teachers, and health care professionals. It is also essential that governments increase resourcing for secure and therapeutic residential programs for children and young people with highly challenging behaviours, such as Sherwood House, which is operated by the NSW Department of Family and Community Services.
78. In this context, the Law Council submits that it is important for those caring and working with children in the child protection system to know a child's family medical and mental health history, to the extent that the information will assist them in promoting the child's safety, welfare or well-being. On the advice of the Law Society of NSW, the Law Council considers that information exchange provisions, such as section 248 and Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should be utilised to ensure that child protection agencies are able to provide and receive information that promotes the safety, welfare or well-being of the children and young people they have responsibility for, while protecting the confidentiality of the information.

## Specialist court programs

79. The Law Council supports diversionary programs and courts which are established and appropriately customised to address particular health and socio-economic conditions, sometimes in a judicial context. Diversionary programs, such as a post-sentence operational drug court, is considered an effective way to break the cycle of substance abuse, provide a greater incentive for offenders to complete a court order, and provide them with the skills required to deal with drug addiction and mental illness through operative counselling and support.
80. Therapeutic jurisprudence of specialist courts has developed on the basis of accumulated evidence that specific programs and justice administration, which is designed to address behaviours which contribute to criminal offending, will have a positive effect on reducing recidivism. Below are some examples of programs in various jurisdictions that attempt to address issues such as mental health in the judicial system.

### *Mental Health Court Diversion and Support Program (WA)*

81. In Western Australia, the Mental Health Court Diversion and Support Program offers a tailored response for individuals whose offending is linked to a mental health condition. The Program provides participants with judicial supervision and 'holistic support that addresses the underlying causes of their offending behaviour'.<sup>113</sup> The program 'aims to enhance participants' health and wellbeing, improve community safety, reduce repeat offending and, where appropriate, provide an alternative to imprisonment'.<sup>114</sup> The

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<sup>113</sup> Mental Health Commission of Western Australia, *Mental Health Court Diversion Program* <[www.mhc.wa.gov.au/getting-help/diversion-support-programs/mental-health-court-diversion-program/](http://www.mhc.wa.gov.au/getting-help/diversion-support-programs/mental-health-court-diversion-program/)>.

<sup>114</sup> Ibid.



Program comprises two pilot programs: the Start Court for adults and Links for children and young people.

82. The Start Court is a specialist Magistrates Court that deals with offenders who have a mental health condition. It is the only full-time mental health court in Australia.<sup>115</sup> The Start Court has a dedicated team comprised of a Magistrate, court staff, defence lawyer, police prosecutor, mental health clinicians, forensic psychiatrist, community support workers or coordinators, and community corrections officers.<sup>116</sup> To be eligible for Start Court, the offender must experience a mental health condition, consent to participate, enter a plea of guilty and be eligible for, or granted, bail.<sup>117</sup> The Start Court aims to reduce recidivism and future contact with the criminal justice system, improve the participant's mental health and overall wellbeing, and increase the participant's access to treatment and support services. To achieve these aims, the court provides participants with three to six months of intensive, wrap-around support from a dedicated caseworker and support team.<sup>118</sup> Support may be in the form of advocacy, assistance to appear at court, referrals to other support services, and support to address family, health, housing, education or employment issues. Between March 2013 and September 2015, the Start Court provided support to 412 persons, of whom 191 individuals entered a formal program of ongoing support.<sup>119</sup>
83. A 2014 evaluation by the Mental Health Commission found the Start Court's service delivery model to be effective in responding to the complex needs of the target group.<sup>120</sup> Start Court participants and their families 'reported valued improvements in family relationships, access to treatment and overall wellbeing, as well as in their understanding of their own, or their family member's, mental illness'.<sup>121</sup> A supplementary evaluation in 2015 also found positive results, with data collected between March 2013 and September 2015 indicating that:
- 92 per cent of participants were assessed as demonstrating clinical improvement;
  - 67 per cent of participants were assessed as being at lower risk of self-harm or suicide;
  - 53 per cent of participants reduced or ceased problematic use of alcohol or other drugs;
  - 73 per cent of participants experienced overall improvement in wellbeing (a term that encompasses physical health, relationships and accommodation status);
  - 80 per cent of participants who completed the Start Court program either ceased offending or committed less serious offences after engaging with the program;
  - 62 per cent of those individuals who were assessed for, but did not enter, the Start Court program reoffended compared with 49 per cent of participants who completed the program; and

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<sup>115</sup> Law Council of Australia, 'Courts and Tribunals', *Justice Project – Final Report* (2018) 91.

<sup>116</sup> Mental Health Commission of Western Australia, *The Start Court* <<https://www.mhc.wa.gov.au/getting-help/diversion-support-programs/mental-health-court-diversion-program/the-start-court/>>.

<sup>117</sup> *Ibid.*

<sup>118</sup> Law Council of Australia, 'Courts and Tribunals', *Justice Project – Final Report* (2018) 91, citing Justice Project consultation with Mental Health Law Centre (Perth, 5 September 2017).

<sup>119</sup> Mental Health Commission of Western Australia, *Summary of the 2015 Evaluation Mental Health Court Diversion Program* (2015) 1 ('2015 Evaluation').

<sup>120</sup> Mental Health Commission of Western Australia, *Mental Health Court Diversion and Support Program: Summary of 2014 Evaluation* (2014) 1 ('2014 Evaluation').

<sup>121</sup> *Ibid* 2.

- 58 per cent of participants were assessed as posing a lower risk of violence after engaging with the program.<sup>122</sup>

84. The evaluation found that the Start Court Magistrate treated an offender's engagement with the Start Court program as a mitigating factor in sentencing. A number of cases were identified by the Magistrate where an offender was granted bail or received a non-custodial sentence as a result of the support available through the program.<sup>123</sup>

85. In consultation, the Mental Health Law Centre endorsed the Start Court and the therapeutic approach of the Magistrate, stating:

*It's a great court – we're trying to push to have it moved into regional centres ... It's so different, it's really warm. The Magistrate will speak directly to people, really welcome them, congratulate them on their progress. When they complete the program, there is a ceremony to congratulate them, the Magistrate speaks, they speak, their family speak, then they are given a certificate. Sentence is delayed until then – essentially their sentence is that they did the START program.*<sup>124</sup>

86. The Links program is based at the Perth Children's Court and offers mental health assessment and case management support to children and young people.<sup>125</sup> Links is available for young people suspected of having a mental health issue or young people assessed as having significant unmet mental health needs.<sup>126</sup> The Links team is comprised of mental health professionals and community support coordinators, who work collaboratively to assist participants address their mental health needs and other non-legal issues, such as school, employment, housing, transport and relationships.<sup>127</sup> Links works with 'highly vulnerable young people who have serious emotional and mental health needs' to build trusting relationships and improve their wellbeing.<sup>128</sup>

87. The Mental Health Commission of Western Australia's 2014 evaluation of Links found that:

- the program fills 'a gap by providing an essential clinical mental health capacity at Perth Children's Court. The program provides clinical assessments and reports to the court, conducts emergency assessments, helps direct case management and enables early intervention';
- the Links team is skilled at building the trust of young people who have previously been disengaged from services and connecting them to community based treatment, school, accommodation and other services'; and
- the cohesive multidisciplinary team has improved inter-agency coordination.<sup>129</sup>

88. Data collected by the Mental Health Commission of Western Australia between April 2013 and September 2015 indicated that:

<sup>122</sup> Mental Health Commission of Western Australia, *2015 Evaluation*, 2-3.

<sup>123</sup> Ibid 2.

<sup>124</sup> Law Council of Australia, 'Courts and Tribunals', *Justice Project – Final Report* (2018) 92-3, citing Justice Project consultation with Mental Health Law Centre (Perth, 5 September 2017).

<sup>125</sup> Ibid 93.

<sup>126</sup> Mental Health Commission of Western Australia, *Links* <<https://www.mhc.wa.gov.au/getting-help/diversion-support-programs/mental-health-court-diversion-program/links/>>.

<sup>127</sup> Ibid.

<sup>128</sup> Mental Health Commission of Western Australia, *2014 Evaluation*, 2.

<sup>129</sup> Ibid.

- 88.5 per cent of young people case managed by Links were assessed as demonstrating clinical improvement; and
- 86.4 per cent of young people case managed by Links were assessed as being at reduced risk of causing harm to themselves or others.<sup>130</sup>

89. Qualitative analysis revealed that Links was considered to be an essential service that helped other agencies to manage risk effectively and improved coordination between justice, health and welfare services.<sup>131</sup>

90. In terms of costs, the 2014 evaluation revealed that both the Start Court and Links were significantly cheaper to operate per day compared to the cost of imprisonment and juvenile detention, although more expensive than mainstream community corrections supervision. Start Court was also slightly cheaper per day than the cost of the Western Australian drug court.<sup>132</sup>

#### *Assessment and Referral Court List (Vic)*

91. The Assessment and Referral Court List (**ARC**) is a specialist court list within the Melbourne Magistrates' Court that is designed to meet the needs of accused persons who have, or are likely to have, a disability, including a mental health condition.<sup>133</sup> The ARC was modelled on similar programs in South Australia and Tasmania as well as mental health courts in Canada. It aims to address the underlying causes of offending behaviour in order to reduce the likelihood of reoffending and decrease the number of prisoners with mental impairment.<sup>134</sup> The ARC also aims to 'increase public confidence in the criminal justice system by improving court processes and increasing options available to courts in responding to accused persons with a mental impairment'.<sup>135</sup>

92. The ARC provides intensive case management to participants, including psychological assessment, and referral to social security, health, disability, housing services and/or drug and alcohol rehabilitation. Sentencing is deferred while participants are receiving intensive support. For the duration of the program (which on average is 270 days), participants are required to attend regular hearings, usually monthly, before the same magistrate.<sup>136</sup> The hearings are informal and interactive, with the participant, lawyers and the magistrate sitting at an oval table.<sup>137</sup> The hearings support the principles of therapeutic jurisprudence and adopt a problem-solving approach.<sup>138</sup>

93. Participation in the ARC can reduce rates of recidivism among participants. A study of the ARC between 2010 and 2014 revealed that 57 per cent of participants did not reoffend following successful completion of the program.<sup>139</sup> The study showed that those who completed the ARC program had a lower chance of re-offending compared to those

<sup>130</sup> Mental Health Commission of Western Australia, *2015 Evaluation*, 2.

<sup>131</sup> Ibid 3.

<sup>132</sup> Mental Health Commission of Western Australia, *2014 Evaluation*, 3.

<sup>133</sup> Magistrates' Court of Victoria, *Assessment and Referral Court List (ARC)* (31 May 2018)

<<https://www.magistratescourt.vic.gov.au/court-support-services/assessment-and-referral-court-list-arc>>.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Brianna Chesser and Glenn Rutter, 'Still Changing Lives' (2016) *Law Institute Journal*

<<https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/September/Still-changing-lives>>.

<sup>137</sup> Victoria Legal Aid, 'The Assessment and Referral Court List is a Triumph' (Media Release, 18 December 2013) <<https://www.legalaid.vic.gov.au/about-us/news/assessment-and-referral-court-list-is-triumph#section-header>> .

<sup>138</sup> Brianna Chesser and Glenn Rutter, 'Still Changing Lives'.

<sup>139</sup> Brianna Chesser, *Criminal Courts and Mental Illness: An analysis of the efficacy of the Assessment and Referral Court List of the Magistrates' Court of Victoria* (PhD Thesis, La Trobe University, 2015) 20.

who did not complete the program.<sup>140</sup> Of those who completed the program but re-offended, there was a greater gap before re-offending and the severity of the offences decreased.<sup>141</sup>

94. The study demonstrated that successful completion of the ARC was 'the most significant predictor of non-reoffending or a longer time to reoffending'.<sup>142</sup> Reduced recidivism rates have positive flow-on effects for the courts, government and community.

#### **Case study**

*Ms M is a 32-year-old woman who lives alone. She has a history of drug and alcohol abuse, and disability, including borderline personality disorder, obsessive compulsive disorder, substance-use disorder and an ABI. She was first admitted to an adolescent mental health facility when she was 15 years old.*

*Ms M was charged with hindering police, assaulting police on duty, unlawful assault, intentionally causing injury, and recklessly causing injury. Her legal representative referred her to the ARC List due to her history of offending, ongoing substance use, and her limited sources of social support.*

*'Upon being accepted to the ARC List, a case manager organised a meeting to plan for Ms M's time under supervision of the ARC List Magistrate. Ms M, her case manager, representatives from an area mental health service, Victoria Police, hospital staff and the Office of the Public Advocate attended. The outcomes of the meeting were that the area mental health service would develop a treatment plan in consultation with Ms M's GP, Victoria Police would develop a response plan and Ms M's ARC List case manager would refer Ms M to treatment specialists. Ms M was involved in deciding on the arrangements.*

*The ARC List requires offenders to appear before the magistrate each month accompanied by their case manager. Police also attend the meetings. At each meeting, the magistrate asked Ms M to talk about her progress, and to explain any occasions where she had not complied with her treatment plan, offended or come into contact with police. While initially defensive and aggressive, Ms M gradually became more confident, admitting mistakes and volunteering information about her successes.*

*Over her 12 months on the ARC List, Ms M completed drug and alcohol treatment, regularly met her case manager from the area mental health service, and significantly reduced her contact with the local police.*

*By the end of her time on the ARC List, Ms M felt she understood herself better, and was able to take more responsibility for her actions. [She] also had a plan to help her cope better when she experienced a crisis. After 12 months, Ms M had successfully completed the requirements of the ARC List'.<sup>143</sup>*

#### **Court Integrated Services Program (Vic)**

95. The Court Integrated Services Program (**CISP**) at the Victorian Magistrates' Court is another example of a successful diversionary program which reduces recidivism

<sup>140</sup> Ibid 296.

<sup>141</sup> Ibid 295

<sup>142</sup> Ibid 294.

<sup>143</sup> John Doyle, Victorian Auditor-General's Office, *Mental Health Strategies for the Justice System* (2014) 23.

rates.<sup>144</sup> The CISP provides integrated case management at the pre-trial or bail stage to any party to a court proceeding, including applicants, respondents and offenders. Case management services include:

- three levels of support (community referral, intermediate or intensive) based on the individual needs of each client;
- assessment and referrals to support services, including drug and alcohol treatment, ABI services, accommodation services, disability support and mental health care;
- case management for up to four months for medium and high-risk clients; and
- services for Koori clients such as the Koori Liaison Officer program.<sup>145</sup>

96. Through providing individualised case management and priority access to holistic treatment and community support services, the CISP aims to address the health and social needs of an accused person, thereby, reducing recidivism.<sup>146</sup> The CISP is complemented by the Mental Health Court Liaison Service (**MHCLS**), which is a 'court-based assessment and advice service' for 'people coming before the court who may suffer from a mental illness'.<sup>147</sup> This service aims to 'divert offenders with a mental illness from the criminal justice system into appropriate mental health treatment' and 'reduce rates of recidivism'.<sup>148</sup>

97. Evaluations found that the CISP is an effective referral program because it provides clients with seamless movement between legal and non-legal services and facilitates a comprehensive and holistic response to the complex legal and non-legal needs of clients.<sup>149</sup> The evaluation found that CISP successfully matched the intensity of intervention to the risk and needs of clients; the mental health of clients improved during their period on the program; completion of the program was linked to lower rates of re-offending; and clients were more likely to receive a non-custodial sentence.<sup>150</sup> PricewaterhouseCoopers also found the CISP to be cost-effective, estimating a saving of \$1.98 million per annum in avoided costs of imprisonment as a result of the program.<sup>151</sup> Based on the reduced rates of recidivism for CSIP clients, it found that \$5.90 worth of savings were made for the community for every \$1.00 spent on the CISP.<sup>152</sup>

#### *Mental Health Court Liaison Service (Vic)*

98. The MHCLS at the Magistrates' Court of Victoria complements the CISP and is a 'court-based assessment and advice service' for 'people coming before the court who may

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<sup>144</sup> Stuart Ross, *Evaluation of the Court Integrated Services Program: Final report* (2009) 113-116 ('*Evaluation of the Court Integrated Services Program*').

<sup>145</sup> Magistrates' Court of Victoria, *Court Integrated Services Program (CISP)* (30 April 2018)

<<https://www.magistratescourt.vic.gov.au/court-support-services/court-integrated-services-program-cisp>>.

<sup>146</sup> Courts and Tribunals Unit, Department of Justice (Victoria), *Court Integrated Services Program - Tackling the Causes of Crime: Executive Summary Evaluation Report* (2010) 5 ('*Court Integrated Services Program*').

<sup>147</sup> Magistrates' Court of Victoria, *Mental Health Court Liaison Service (MHCLS)* (2 August 2018)

<<https://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-support-services/mental-health-court-liaison-service-mhcls>> ('*MHCLS*').

<sup>148</sup> *Ibid.*

<sup>149</sup> Courts and Tribunals Unit, *Court Integrated Services Program*; Stuart Ross, *Evaluation of the Court Integrated Services Program*; PricewaterhouseCoopers, Department of Justice (Victoria), *Economic Evaluation of the Court Integrated Services Program (CISP): Final report on economic impacts of CISP* (2009) ('*Economic Evaluation of the Court Integrated Services Program*').

<sup>150</sup> Courts and Tribunals Unit, *Court Integrated Services Program*, 12; Stuart Ross, *Evaluation of the Court Integrated Services Program*.

<sup>151</sup> PricewaterhouseCoopers, *Economic Evaluation of the Court Integrated Services Program*, iv.

<sup>152</sup> *Ibid.* 20.



suffer from a mental illness'.<sup>153</sup> Referrals are made directly to the MHCLS and from CISP. The MHCLS is provided by Forensicare (Victorian Institute of Forensic Mental Health) in metropolitan court locations and local mental health services in rural and regional court locations.<sup>154</sup>

99. The MHCLS identifies and impartially assesses accused persons who may have a mental health condition and, where appropriate, makes a referral to a mental health facility in the community or in prison for treatment and support.<sup>155</sup> Assessments as to fitness to plead are also undertaken by MHCLS. The MHCLS aims to 'divert offenders with a mental illness from the criminal justice system into appropriate mental health treatment' and, thereby, 'reduce rates of recidivism'.<sup>156</sup>
100. The MHCLS, complemented by the CISP, is an effective program for improving access to justice for people with disability because it provides a holistic response to their complex and multifaceted legal and non-legal needs through intensive, face-to-face assistance and through facilitating direct referrals to treatment and support services.<sup>157</sup> This is important given the bidirectional relationship between disability and legal problems.

#### *Court diversion programs (NSW)*

101. The Law Council supports the greater use of court diversion programs, such as the *Mental Health (Criminal Procedure) Act 1990 (NSW)* (**MHCPA**) for young offenders with mental health problems. The Law Society of NSW informed the Law Council that the advantages for juvenile offenders diverted under the MHCPA is that they have an opportunity to be diagnosed, to have a treatment plan formulated and to be given appropriate referrals to care and treatment providers. Sections 32 and 33 of the MHCPA are the key provisions utilised to divert young offenders with a mental illness or condition away from the criminal justice system. The provisions provide the courts with greater flexibility to deal with juvenile offenders (for example, they may dismiss the charges and discharge a young person on the condition they obtain a mental health assessment or treatment).
102. However, the Law Council holds the concern, informed by the Law Society of NSW, that there are practical difficulties with implementing these legislative provisions and takes the view that obtaining a mental health diagnosis, followed by a well-resourced therapeutic and treatment program, are the keys to the effective use of diversion legislation for young offenders with mental health issues. The Law Society of NSW advises that the Adolescent Court and Community Team (**ACCT**) is physically based in some Children's Courts and facilitates audio-visual linking or teleconferencing to the other Children's Courts. However, not every local court which sits as a Children's Court has access to this service.
103. The Law Society of NSW further advises that a key role of the ACCT in NSW is to conduct mental health assessments on young people appearing before the Children's Court, with the aim of identifying those with mental health problems and diverting them to appropriate care and treatment. Informed by the experience of the Law Society of NSW, the Law Council submits that, while there is a need for sustainable funding for services such as NSW's ACCT to be located at Children's Courts, this must also be

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<sup>153</sup> Magistrates' Court of Victoria, *MHCLS*.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

supported by increased funding for adequate services to which mental health referrals can be made, including specialist forensic psychiatric hospitals for children.

## Part II: Mental Health and the Legal Profession

104. The Law Council has considered the matters raised by the Issues Paper in relation to mentally healthy workplaces and provides the following additional information for the consideration of the Productivity Commission within the legal profession framework.

### Nature and prevalence of mental ill-health in the legal profession

105. The Law Council recognises that mental health problems and mental illnesses are prominent in the legal profession. By 1999, the available research in North America suggested that lawyers experience certain mental health problems, including depression, anxiety, alcoholism, drug misuse and suicide, at rates higher than the general population.<sup>158</sup> This trend appears to be borne out in the research conducted in Australia. The *Annual Professions Study 2007* found that lawyers indicated higher rates of depressive symptoms and were more likely to use alcohol or drugs to cope with these feelings than other professional groups.<sup>159</sup> *Courting the Blues*, published in 2009<sup>160</sup> and the subject of further papers in 2010 and 2011,<sup>161</sup> similarly reported that ‘members of the legal profession exhibit higher levels of psychological distress and depression than do community members’.<sup>162</sup>

106. Several studies have attempted to isolate the cause of lawyers’ mental ill-health. One study pointed to overcommitment as the most significant factor contributing to psychological distress.<sup>163</sup> In 2014, researchers similarly concluded ‘that no particular type of legal work, workplace, gender, age or stage of career is more prone to depression, anxiety and stress. What really matters are the factors listed under ‘perceived job demands’’.<sup>164</sup> Caution must be had to the small sample sizes of these surveys, however.

107. Bullying, harassment and sexual harassment have also been connected to mental ill-health. For example, in the recent *Victorian Bar: Quality of Working Life Survey*, the highest response to the question ‘How could your quality of working life be improved?’ was ‘better judicial behaviour’, referring to the prevalence of judicial bullying, including denigration and humiliation of counsel.<sup>165</sup>

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<sup>158</sup> See Patrick J Schiltz, ‘On being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy and Unethical Profession’ (1999) 52 *Vanderbilt Law Review* 871, 874–881. See also Jerome M Organ, ‘What Do We Know About the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being’ (2011) 8 *University of St Thomas Law Journal* 225, 268.

<sup>159</sup> Beaton Consulting and Beyond Blue, *Annual Professions Study* (2007).

<sup>160</sup> Norm Kelk, Georgina Luscombe, Sharon Medlow and Ian Hickie, *Courting the Blues: Attitudes towards Depression in Australian Law Students and Legal Practitioners* (Brain & Mind Research Institute, 2009).

<sup>161</sup> Norm Kelk, Sharon Medlow and Ian Hickie, ‘Distress and Depression amongst Australian Law Students: Incidence, Attitudes and the Role of Universities’ (2010) 32 *Sydney Law Review* 113; Sharon Medlow, Norm Kelk and Ian Hickie, ‘Depression and the Law: Experiences of Australian Barristers and Solicitors’ (2011) 33 *Sydney Law Review* 771.

<sup>162</sup> Norm Kelk, Georgina Luscombe, Sharon Medlow and Ian Hickie, *Courting the Blues: Attitudes towards Depression in Australian Law Students and Legal Practitioners* (Brain & Mind Research Institute, 2009) 42.

<sup>163</sup> Adele J Bergin and Nerina L Jimmieson, ‘Explaining Psychological Distress in the Legal Profession: The Role of Overcommitment’ (2013) 20 *International Journal of Stress Management* 134.

<sup>164</sup> Janet Chan, Suzanne Poynton and Jasmine Bruce, ‘Lawyering Stress and Work Culture: An Australian Study’ (2014) 37 *University of New South Wales Law Journal* 1062, 1101.

<sup>165</sup> Victorian Bar, *Victorian Bar: Quality of Working Life Survey* (University of Portsmouth, 2018) 22.



108. More recent research has raised concerns over the impact of vicarious trauma on those in the legal profession who are exposed to trauma in their day-to-day work, such as criminal, family and refugee lawyers and judges.<sup>166</sup>

### Impacts and costs

109. The Law Council is not aware of specific research measuring the financial cost of lawyers' mental ill-health in Australia.<sup>167</sup> *Courting the Blues* found that the percentage of lawyers who reported taking seven or more days out of their role in the month prior to the survey 'does not indicate that legal practitioners differ greatly from the national population' in terms of absenteeism relating to mental ill-health.<sup>168</sup>

110. There is some general literature that suggests working long hours negatively effects productivity,<sup>169</sup> and both quantitative and qualitative evidence points to long work hours, poor work-life balance and burn-out amongst lawyers.<sup>170</sup>

111. The Law Council is also concerned by evidence that lawyers attempting to access mentally healthy workplaces face the barrier of negative and discriminatory attitudes. *Courting the Blues* found that 'more than half of the participants would expect discrimination from their employer'.<sup>171</sup> The authors provided the following commentary in relation to this statistic:

*Clearly, this finding has implications for the establishment of workplace counselling and other forms of help which require depressed people to make their conditions known to their employers or other colleagues.*<sup>172</sup>

112. There have also been criticisms of the legal profession relying on 'tokenistic' programs<sup>173</sup> and suggestions of a need to move beyond 'resilience' and 'mindfulness', which place the burden on the individual to 'primary prevention strategies', targeted at management and industry levels.<sup>174</sup>

### Mentally Healthy Legal Workplaces

113. Professional groups have an important role in supporting the development of mentally healthy workplaces and combating the stigma traditionally associated with

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<sup>166</sup> Grace Maguire and Mitchell K Byrne, 'The Law Is Not as Blind as It Seems: Relative Rates of Vicarious Trauma among Lawyers and Mental Health Professionals' (2017) 24 *Psychology, Psychiatry and Law* 233.

<sup>167</sup> See also Laura Helm, *Mental Health and the Legal Profession: A Preventative Strategy* (Law Institute Victoria and Legal Services Board, 2014) <[www.liv.asn.au/PDF/For-Lawyers/Member-Benefits-adn-Privileges/MentalHealthReportFull.aspx](http://www.liv.asn.au/PDF/For-Lawyers/Member-Benefits-adn-Privileges/MentalHealthReportFull.aspx)>.

<sup>168</sup> Sharon Medlow, Norm Kelk and Ian Hickie, 'Depression and the Law: Experiences of Australian Barristers and Solicitors' (2011) 33 *Sydney Law Review* 771, 779.

<sup>169</sup> See Marion Collewet and Jan Sauermann, *Working Hours and Productivity* (IZA Institute of Labor Economics, Discussion Paper No 10722, April 2017).

<sup>170</sup> See, eg, Janet Chan, Suzanne Poynton and Jasmine Bruce, 'Lawyering Stress and Work Culture: An Australian Study' (2014) 37 *University of New South Wales Law Journal* 1062; Kate Allman, 'The Burnout Profession' (2019) 54 *Law Society of New South Wales Journal* 30.

<sup>171</sup> Sharon Medlow, Norm Kelk and Ian Hickie, 'Depression and the Law: Experiences of Australian Barristers and Solicitors' (2011) 33 *Sydney Law Review* 771, 789.

<sup>172</sup> Ibid.

<sup>173</sup> See, eg, Anonymous, 'Big Firms' Mental Health Façade', *Lawyers Weekly* (online, 15 February 2013) <[www.lawyersweekly.com.au/news/11357-big-firms-mental-health-facade](http://www.lawyersweekly.com.au/news/11357-big-firms-mental-health-facade)>. See also Kate Allman, 'The Burnout Profession' (2019) 54 *Law Society of New South Wales Journal* 30, 34.

<sup>174</sup> See, eg, Marianna Papadakis, 'Lawyers have lowest health and wellbeing of all professionals, study finds', *Financial Review* (online, November 20, 2015) <[www.afr.com/leadership/lawyers-have-lowest-health-and-wellbeing-of-all-professionals-study-finds-20151118-gl1h72](http://www.afr.com/leadership/lawyers-have-lowest-health-and-wellbeing-of-all-professionals-study-finds-20151118-gl1h72)>.

mental illness. The Law Council recognises that the most effective change begins at the top.

114. The Law Council supports the work and initiatives of its Constituent Bodies, Committees and Sections in this context. A number of the Law Council's Constituent Bodies have developed resources promoting and supporting mental health in the legal profession. The Law Council provides a centralised source of information on its mental health and wellbeing website, highlighting the range of resources and services available through Constituent Bodies, as well as through national organisations such as Lifeline and Minds Count.<sup>175</sup>
115. Examples of the work and initiatives of those Constituent Bodies that provided input to the Law Council in relation to this inquiry are summarised below.

#### *Law Society of New South Wales*

116. In 2016, the Law Society of NSW, in collaboration with NSW Young Lawyers and the Australian National University, published *Being Well in the Law: A Guide for Lawyers*. This resource, developed in collaboration with experts from the Australian National University and the University of Sydney, is described as a 'toolkit for lawyers', and draws on multidisciplinary knowledge including mindfulness and meditation.<sup>176</sup>
117. The Law Society of NSW's website also features a portal detailing initiatives available for lawyers experiencing difficulty with mental wellbeing, including Lifeline for Lawyers, LawCare and an independent panel of specialists available for confidential wellbeing consultations.

#### *Law Society of South Australia*

118. The Law Society of South Australia established its Wellbeing and Resilience Committee in 2012 to examine and keep under review the mental health and wellbeing of the legal profession in South Australia. It is tasked with promoting discussion and debate and proposing policies, principles and guidelines directed towards the prevention and understanding of mental illness within the profession, including diagnoses and treatment, and towards the promotion of wellbeing.
119. The legal profession in South Australia is largely made up of sole practitioners and small practices of 5 or fewer practitioners. Overall, even legal practices larger than this in South Australia are still small compared to many companies/workplaces in other industries. Consequently, the internal resources of legal practices to deal with mental health is often very limited or non-existent. As a result, many legal practitioners are entirely reliant on the services of government, industry bodies, not for profits and professional associations (such as the Law Society of South Australia).
120. The Law Society of South Australia understands the makeup of the South Australian legal profession is similar to that interstate<sup>177</sup> – as such, legal practices across Australia are comparable to other small businesses, with the same pressures and resource limitations. While there are a number of initiatives being undertaken across Australia, a national coordinated approach has not yet been implemented. This may be due to issues such as limited funding and resources.

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<sup>175</sup> See Law Council of Australia, 'Mental Health and Wellbeing in the Legal Profession' <[www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/mental-health-and-wellbeing-in-the-legal-profession](http://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/mental-health-and-wellbeing-in-the-legal-profession)>.

<sup>176</sup> Law Society of New South Wales, NSW Young Lawyers and Australian National University, *Being Well in the Law: A Guide for Lawyers* (2016).

<sup>177</sup> Urbis, Law Society of New South Wales, *National Profile of Solicitors* (2016).

121. The Law Society of South Australia notes page 28 of the Issues Paper which suggests a number of measures to improve mental health in the workplace including: anti-bullying policies; improved manager and leadership training to better manage workplace changes; resilience training and stress management; promoting and supporting early help through employee assistance programs; and support and training for those returning to work from mental illness.
122. The Law Society of South Australia provides a number of support services, including: a Lawyers' Support Group; a Young Lawyers' Support Group; a Lawyers' Complaint Companion Service; a LawCare Counsellor; mental health and wellbeing CPDs; and events such as R U OK Day. The Law Society of South Australia provides below a number of options for consideration by the Productivity Commission as options to facilitate more mentally healthy workplaces in the legal profession.
123. The Law Society of South Australia considers that industry associations, professional groups, government bodies and associated parties often provide a core service to members for the development of a professional and personal network. In particular, industry guides are helpful tools that allow industries to determine what is 'standard' across the industry with recommendations on how to consider due diligence on fit for purpose solutions, implementation and measurement.
124. Furthermore, the Law Society of South Australia believes that greater coordination between industry and government is required to address the issue of mental health in Australia. A national approach must be taken to what is a widespread health issue across Australia and particularly prominent in the legal profession. Addressing mental health issues in workplaces is an important step in allowing Australia to reach its full economic and social potential.

#### Commission of research into the mental health of the legal profession

125. The Law Society of South Australia suggests that further research could be conducted into the mental health of the legal profession to inform appropriate systems and interventions to facilitate more mentally healthy workplaces, particularly for small legal practices. Such research could also provide a support component for legal practices by appropriately qualified persons.
126. Furthermore, this type of research could also have wider implications for other small businesses, given the prevalence of small law firms and sole practitioners in the legal profession, as noted above.

#### Educational Law Society of South Australia for workplaces

127. The Law Society of South Australia also suggests a further option could be the development and roll out of a free and easily accessible educational platform for employers and employees to increase awareness of mental illness among employees, to reduce stigma and to facilitate support from work colleagues. This may include the provision of 'tool kits' and workplace guidelines to improve the workplace culture and environment.
128. While there is a plethora of resources at large, a focal point (best driven by the Australian Government) is required with appropriate marketing through social and other media so employers and employees can readily access the latest information on mentally healthy workplaces and effective, practical interventions in the workplace.

### Continuing professional development

129. The Law Society of South Australia notes that its Wellbeing and Resilience Committee has recommended to the Legal Practitioners Education and Admission Council (**LPEAC**) (which is the body responsible for the structure of the Mandatory Continuing Professional Development (**MCPD**) program for the legal profession in SA), that one mandatory hour of the 10 hours of MCPD activities required per year for all legal practitioners be on the topic of Wellbeing and Resilience.
130. This recommendation has not been accepted by LPEAC, although the recommendation is currently being revisited as part of a broader proposal involving professional development in relation to anti-bullying and discrimination. A requirement to attend mental health and resilience sessions may overcome the associated bias and stigma that can attach if employees attend mental health and resilience training on a voluntary basis. Compulsory training of this nature would also increase the likelihood of engagement more than the current voluntary system.
131. The Law Society of South Australia considers that MCPD content could include (but not necessarily be limited to):
- signs and symptoms of the common types of mental health issues;
  - what you can do to support and educate your workforce in the area of mental health;
  - the responsibilities of leadership and management in the area of mental health;
  - who to speak with if you have concerns about an employee's mental health and understanding an employer's privacy obligations;
  - implementing effective communication strategies, for example how to have an 'R U OK?' discussion;
  - preventing harm by identifying and assessing work related mental health hazards and risks, and bullying, stress, harassment and workplace trauma;
  - implementing effective control measures to eliminate or minimise those risks;
  - when is there a 'reasonably foreseeable risk' of psychiatric injury to a particular employee? – Lessons from recent case law; and
  - when does an employee's medical condition create an unreasonable risk to the health and safety of others at work?
132. The generic nature of program content would be suited to all organisations such that economies of scale would apply so that there is potential for the program to be accessible in a free or very cost effective manner. The education programs would also assist in developing a greater understanding of the return on investment available for employers who commit to their role in managing mental health.

### Mental Health First Aid Courses

133. Consideration could be given to making Mental Health First Aid programs compulsory under relevant legislation, in the same way workplaces are required to have a Medical Health First Aid Officer. A ratio of head count could be applied to determine how many mental first aid officers are required to be compliant. Further, subsidies could be made available for small to medium organisations and further development of e-course offerings.

134. The QLS notes that the perception of mental health in the workplace is shifting. Data is now becoming more readily available to demonstrate the loss in profit and productivity as a result of mental health conditions suffered by employees as a result of dysfunctional, toxic, or uncivil workplace cultures. Mentally healthy workplaces cannot be achieved without cultural change.
135. However, cultural change must be championed by management, government and peak bodies. The burden to lead the way to improvement cannot be placed upon vulnerable cohorts such as victims or junior employees. Senior management ought to be equipped with education programs (and the ability to educate staff) on the benefits of mentally healthy workplaces, and on the risks and losses (to the business and to staff) of allowing mentally unhealthy conditions or behaviours to continue.
136. Fundamentally, industries and organisations need to recognise that caring for each other is good business and a worthwhile investment. The QLS has noted that the PricewaterhouseCoopers investigation into the efficacy of staff wellness programs found that investment in staff satisfaction has a return on investment of 2.3.<sup>178</sup> A report by The Economist in 2016 into the impact of workplace programs found that these programs align employer and employee goals more closely.<sup>179</sup> Employees are also more likely to see their own wellness as being linked with professional success.<sup>180</sup>
137. QLS has established a Wellbeing Working Group, which seeks to raise awareness and better understanding of mental health in the legal profession and focuses on support, education, awareness and prevention of mental health issues in the legal profession.
138. QLS also publishes a range of materials on its 'Resilience and wellbeing' website to assist members and organisations develop healthy and supportive workplaces of varying sizes, whether it be an in-house legal team, community legal centre, or law faculty.<sup>181</sup> The portal is strengthened by QLS's Wellbeing Working Group.
139. These materials include tools such as factsheets, videos and the *Tristan Jepson Memorial Foundation Psychological Wellbeing: Best Practice Guidelines for the Legal Profession*. QLS is proud to be the first law society to be a signatory to the Tristan Jepson Memorial Foundation Guidelines, which are intended to support the profession in raising awareness of mental health issues and understanding the initiatives and methods of management that assist in the creation and maintenance of psychologically healthy and supportive workplaces.
140. Further, QLS offers members and staff access to LawCare, which provides a range of confidential, personal and professional services to help in proactively managing health and wellbeing by developing plans to manage issues and providing support; not only to members and staff but also their family, friends and colleagues as needed. These are essential services and QLS encourages the adoption and offering of like services, initiatives and policies as may be applicable to other workplaces and industries.
141. Recently, QLS published a number of articles which highlight concerns regarding mental health and wellbeing in the legal profession. The QLS monthly magazine *Proctor*

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<sup>178</sup> PricewaterhouseCoopers, *Creating a Mentally Healthy Workplace: Return on Investment Analysis* (2014) <[www.headsup.org.au/docs/default-source/resources/beyondblue\\_workplaceroi\\_finalreport\\_may-2014.pdf](http://www.headsup.org.au/docs/default-source/resources/beyondblue_workplaceroi_finalreport_may-2014.pdf)>.

<sup>179</sup> The Economist, *The Wellness Effect: The Impact of Workplace Programs* (2016) <[https://eiuperspectives.economist.com/sites/default/files/EIU\\_Humana\\_Wellness\\_fin\\_0.pdf](https://eiuperspectives.economist.com/sites/default/files/EIU_Humana_Wellness_fin_0.pdf)>.

<sup>180</sup> Ibid.

<sup>181</sup> Queensland Law Society, Resilience and wellbeing resources for the legal profession <[www.qls.com.au/For\\_the\\_profession/Resilience\\_and\\_wellbeing](http://www.qls.com.au/For_the_profession/Resilience_and_wellbeing)>.



often highlights mental health issues in the workplace and encourages attendance at QLS wellbeing events. Further articles authored by members of the QLS Wellbeing Working Group have focused on addressing sexual harassment and gender inequality in the workplace, educating practitioners on the best way to discuss 'difficult' topics with management and assisting early career lawyers in making decisions about their future. The Law Council also notes that there have been similar initiatives by other Constituent Bodies.<sup>182</sup>

142. QLS considers that collaboration with experts such as Black Dog helps to raise awareness and understanding of the key issues and familiarise people with the key concepts of mental health. This collaboration should be in conjunction with strategies such as education seminars, in-house mental first aid experts and toolkits.

#### *Law Firms Australia*

143. Law Firms Australia (**LFA**) represents Australia's leading multi-jurisdictional law firms, namely, Allens, Ashurst, Clayton Utz, Corrs Chambers Westgarth, DLA Piper Australia, Herbert Smith Freehills, King & Wood Mallesons, MinterEllison and Norton Rose Fulbright Australia.

144. First and foremost, LFA member firms are committed to ensuring that they provide safe and supportive workplaces for employees, contractors, clients and visitors. It is recognised that firms' employees and partners determine the success of firms and the wellbeing (psychological, physical, social, financial and intellectual) of those people has a direct impact on engagement, performance and productivity.

145. Policies of LFA member firms have been developed and revised to support the proactive prevention of work-related injuries and illnesses. This in turn fosters wellbeing and maximises engagement. Although specific policies of each firm differ, LFA member firms have generally implemented policies to address the following issues:

- mental health and wellbeing;
- workplace health and safety;
- workplace harassment;
- discrimination;
- bullying;
- domestic and family violence;
- close and personal relationships with colleagues or suppliers;
- diversity and inclusion;
- alcohol and drugs;
- whistleblower protection; and
- technology usage, including social media usage.

146. Firms also develop response plans for mental health risks in the workplace. However, it is recognised that policies alone are insufficient to create a healthy

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<sup>182</sup> For example, but not limited to, The Law Society of New South Wales Journal which includes a regular health and wellbeing section, recent articles including Angela Tufvesson, 'A Perfect Storm' (2019) 53 *Law Society of New South Wales Journal* 55; Angela Tufvesson, 'Digital Therapy' (2019) 54 *Law Society of New South Wales Journal* 55. It has also published longform mental health articles: see, e.g., Kate Allman, 'The Burnout Profession' (2019) 54 *Law Society of New South Wales Journal* 31. The Victorian Bar conducted a health and wellbeing survey and report in 2018, commonly known as the Wellbeing at the Victorian Bar survey: see Victorian Bar, *Victorian Bar: Quality of Working Life Survey* (University of Portsmouth, 2018). See also Law Society of South Australia, *Wellbeing and Resilience Guide* (2016) <[https://www.lawsocietysa.asn.au/pdf/WB\\_Well-being\\_Guide2016.pdf](https://www.lawsocietysa.asn.au/pdf/WB_Well-being_Guide2016.pdf)>.

workplace. The policies must: be understood and accepted by all partners and employees; be capable of being implemented; be subject to feedback and regular review; be consistent with other policies, and; be supported by complementary activities and programs.

147. Accordingly, LFA member firms have also implemented a combination of the following initiatives:

#### External counselling services

148. Such services provide free and confidential access to counsellors and psychologists for firm employees and their family members, typically available 24 hours a day, seven days a week. Sessions may be conducted in person, over the telephone or on Skype, and other services, such as legal advice or financial counselling, can also be provided.

#### Psychological rehabilitation

149. Firms partner with psychological rehabilitation providers to support staff that may be experiencing more significant mental health concerns. Such support includes wellbeing assessments, return to work evaluations, clinical counselling and coaching.

#### Education and awareness

150. Firms provide online and group training to both new staff (as part of the onboarding process) and existing staff (as refresher courses) on a variety of issues, including mental health, harassment, bullying, discrimination, and leadership. Sessions often include mental health first aid to develop skills and capabilities in supporting mental health concerns. Specific training, such as vicarious trauma and workload management, is also provided to teams working on specific matters where such issues may arise.

151. Firms also partner with, or promote, various mental health initiatives such as RUOK Day?, Beyond Blue, and the Potential Project. Such initiatives and firms' wellbeing resources are promoted by workplace campaigns and communications.

#### Active resource management

152. Firms are cognisant of the need to have sustainable levels of utilisation across all teams. As such, firms adopt external programs and internal strategies to track and manage the workload of employees. In doing so, managers are engaged in discussions about how to improve utilisation levels and use fatigue management guidelines. This recognises that regular rest and recovery are pivotal to sustainable performance and firms adopting a preventative approach to mental wellbeing.

#### Workplace surveys and meetings

153. Typically, all partners and employees confidentially complete internal surveys on work related issues, including mental health, support, harassment, and culture. Workshops, particularly with junior lawyers, are also often held following internal surveys to allow for the confidential discussion of issues that have been raised. Such workshops may be facilitated by a third-party provider, with an anonymised report provided to the firm following the workshops.

154. Partners and managers are also encouraged to have individual conversations with team members to foster an environment of support and engage with ideas or concerns raised in firm surveys.



### Contact and wellbeing officers

155. Partners and employees of different levels of seniority are designated and advertised within some firms as contact officers. The role of contact officers is to listen to, provide support to, and discuss workplace issues with, colleagues in a confidential setting. Some firms also have specific wellbeing officers as points for contact for people experiencing wellbeing concerns or observing concerns in others, and mental health champions to promote conversations about wellbeing in the workplace.
156. Appropriate and regular training is provided to contact officers, wellbeing officers and mental health champions to support them in their roles.

### Exit interviews

157. Firms conduct exit interviews with departing employees, during which employees are asked about their time at the firm and any issues they may have experienced.

### Flexible working

158. Firms enable flexible working amongst teams by providing appropriate technology to employees to work remotely and promoting the practice to team leaders. This reflects that autonomy and empowerment enable healthy and productive workplaces.

### Diversity and inclusion initiatives

159. Such initiatives aim to increase the number of partners proactively engaged in promoting diversity and inclusion an integral part of achieving a high-performance culture. Partners are introduced as ambassadors of change who lead by example and seek ensure that all employees feel comfortable to bring their 'whole selves' to work.
160. The mental health and wellbeing frameworks of LFA member firms aim to prevent mental health issues from arising and support employees and partners when they do arise. Firms recognise that improving organisational health and wellbeing will best be achieved by addressing both proximate factors, being the every-day experiences of employees and partners, and systemic factors, being those factors that underpin firms' business models. This is reflected not only in firms' mental health policies and initiatives, but more broadly in the approach taken to ensure that work environments, cultures and leadership behaviours contribute to building psychologically safe workplaces for employees and partners.