The Parliament of the Commonwealth of Australia

Senate Legal and Constitutional References Committee

Inquiry into the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000

March 2002

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CHAPTER 1

INTRODUCTORY

Conduct of the Inquiry

1.1 The *Human Rights (Mandatory Sentencing for Property Offences) Bill 2000*[1] ('the Property Offences Bill') was introduced into the Senate on the motion of Senator Brown and read for the first time on 6 September 2000. On the same day the second reading debate on the Bill was adjourned. On 24 May 2001, the Senate referred the Property Offences Bill to the Legal and Constitutional References Committee for inquiry and report by 7 August 2001. On 26 June 2001, the time for reporting was extended to 25 September 2001. On that date, it was again extended to the last sitting day in March 2002.

1.2 The Committee invited a range of individuals and organisations to make submissions and advertised the inquiry on 30 June 2001 in the following newspapers: The Australian, the West Australian and the Northern Territory News. The Committee received 108 submissions (including supplementary submissions), which have been made public and listed at Appendix B.

1.3 Elections for the Northern Territory Legislative Assembly and the Commonwealth Parliament were held on 18 August 2001 and 10 November 2001 respectively. The elections caused scheduled public hearings to be deferred.

1.4 Public hearings were held in Canberra and Sydney on 6 and 14 August 2001 respectively and in Darwin and Perth on 23 and 25 January 2002 respectively. Witnesses are listed at Appendix C.

Background to the Inquiry

1.5 The Property Offences Bill is similar to an earlier Bill, the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* (the Juvenile Offenders Bill), which was introduced by Senators Brown, Bolkus and Greig into the Senate on 25 August 1999.[2] The Senate referred a number of matters related to the Juvenile Offenders Bill to the Legal and Constitutional References Committee, which reported

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1 The Bill is reproduced In Appendix A

2 The Juvenile Offenders Bill was passed by the Senate on 15 March 2000 and introduced into the House of Representatives and given a first reading on the same day. It had not progressed any further when the Parliament was prorogued and the House of Representatives dissolved on 8 October 2001

to the Senate in March 2000.[3] The matters on which the Committee was to report were:

(a) the legal, social and other aspects of mandatory sentencing;

(b) Australia's international human rights obligations in regard to mandatory sentencing laws in Australia;

(c) the implications of mandatory sentencing for particular groups, including Australia's indigenous people and people with disabilities; and

(d) the constitutional power of the Commonwealth Parliament to legislate with respect to existing laws affecting mandatory sentencing.

1.6 The Juvenile Offenders Bill provided that Commonwealth, State and Territory laws must not require a court to sentence a person to imprisonment for an offence committed as a child (being a person less than 18 years old).[4] The Property Offences Bill, which covers both children and adults, provides that Commonwealth, State and Territory laws must not require a court to sentence a person to imprisonment or detention for a property offence.

1.7 A property offence includes any offence (including an inchoate offence) involving theft, criminal damage to property, unlawful entry to buildings, unlawful use of a vessel, motor vehicle, caravan or trailer, receiving stolen goods, unlawful possession of goods reasonably suspected of being stolen, taking reward for the recovery of property obtained by criminal means, assault with intent to steal, robbery, armed robbery, unlawful interference with the property or property rights of another.[5]

1.8 Western Australia and the Northern Territory are the only jurisdictions to which the Property Offences Bill has been or is relevant. The list of property offences in the Bill closely parallels the list that was in the relevant Northern Territory legislation when the Bill was introduced. Unlawful entry to (residential) buildings is the only offence in Western Australia that would be covered by the Property Offences Bill.

1.9 At the time the Property Offences Bill was introduced, the range of sentencing options in the Northern Territory for property offences committed by both adults and children 15 years of age or older was much narrower than that which was available for most other offences. Although there were changes in the Northern Territory in October 2001, this is still the position there in relation to adults to some extent. The range of sentencing options in Western Australia for both adults and children (persons

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3 The title of the report was *'Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999'*

4 At the time of the inquiry into the Juvenile Offenders Bill, the Northern Territory law regarded a child for criminal purposes as being a person less than 17 years old. The age of adulthood was raised from 17 to 18 years on 1 June 2000, after the Committee's report was tabled

5 See clause 4, *Human Rights (Mandatory Sentencing for Property Offences) Bill 2000*

of any age up to 18 years) committing property offences was, and continues to be, narrower than that applicable for most other offences.

1.10 The general sentencing regime for adults in the Northern Territory provides a court with the following options when it finds a person guilty of an offence:

a) without recording a conviction dismiss the matter or order the person's release;

b) record a conviction and order the person's release or discharge;

c) with or without recording a conviction, order payment of a fine or make a community service order;

d) record a conviction and order service of a term of imprisonment simpliciter or wholly or partly suspended or suspended on entry into a home detention order.

1.11 The range of options in the general sentencing regime for juveniles is even wider. A court can:

a) discharge the juvenile without penalty;

b) adjourn the matter for six months with a view to discharge without penalty if there is no further offence;

c) impose a fine;

d) put the juvenile on a good behaviour bond or probation;

e) order participation in an approved project or program;

f) order detention or, in the case of older juveniles, imprisonment; or

g) make an order applicable to an adult.

1.12 Under the general Western Australian sentencing regime for adults a court can:

a) order release of an offender without sentence;

b) order release of an offender after imposing a conditional release order or a fine or a community based order or an intensive supervision order or suspended imprisonment; or

c) impose a term of imprisonment.

1.13 Under that for juveniles, a court can:

a) simply refrain from imposing any punishment;

b) refrain from imposing any punishment if approved undertakings are given to it or the juvenile is punished informally;

c) refrain from imposing any punishment if the juvenile enters into a recognisance to be of good behaviour;

d) impose a fine;

e) impose a youth community order; or

f) impose an intensive youth supervision order.

Northern Territory

Before 22 October 2001

1.14 Before its repeal on 22 October 2001 by the new Legislative Assembly, legislation provided for mandatory sentencing in particular circumstances of adults and juveniles of or above the age of 15 years for property offences.

Adults

1.15 Adults were subject to s. 78A of the Sentencing Act in respect of property offences. This effectively provided that where a person was found guilty of 'first strike' property offences, i.e., he or she had not previously been sentenced for property offences, the court must record a conviction and impose a term of imprisonment of at least 14 days unless there were specified exceptional circumstances, namely, triviality of offence, restitution made or attempted, offender's otherwise good character, mitigating circumstances and cooperation with investigating authorities. For a 'second strike' property offence, the court had to record a conviction and impose a term of imprisonment of at least 90 days and, for a 'third strike', the court had to record a conviction and impose a term of imprisonment for at least 12 months.

Juveniles

1.16 On a 'first strike' for property offences, a juvenile of any age could be dealt with under the general range of sentencing provisions (as set out in paragraph 11 above). S. 53AE(2) of the Juvenile Justice Act provided that where a juvenile 15 years of age or older was on a 'second strike' for property offences, i.e., he or she was before the court for sentence in respect of property offences and had been dealt with by the court on a previous day in respect of such offences, the court could only choose between ordering participation in a program approved by the Minister and convicting and ordering at least 28 days' detention.

1.17 S. 53AE(6) provided that where a juvenile 15 years of age or older was on a 'third strike' for property offences, i.e., he or she was before the court for sentence in respect of property offences and on a previous day had been ordered under s. (2) to serve a period of detention of at least 28 days for property offences or to undergo an

approved program, the court must record a conviction and order detention for at least 28 days.

1.18 In short, on a 'second strike' by a juvenile 15 years of age or older, there were only two alternatives, one of which was an order for detention for at least 28 days. On a 'third strike', there must be an order of detention for at least 28 days.

1.19 The NT *Police Administration Amendment Act 2000* was passed after the Committee reported on the inquiry relating to the Juvenile Offenders Bill. The Act enabled a member of the Police Force reasonably believing that a juvenile had committed an offence to refrain from laying a charge but instead to give the juvenile a verbal or written warning or a formal caution or a reference to a 'pre-court' diversionary program.

1.20 The programs can include family conferencing, substance and drug abuse programs and a wide range of community-based diversion. Diversion is required where the juvenile has committed a minor property offence and the value of the theft or damage is less than $100. Police have discretion to provide diversion where the offence is more serious but not where it involves serious assaults, rape or other sexual assaults.[6]

From 22 October 2001

1.21 The current legislation establishes a separate sentencing regime for 'aggravated property offences' committed by adults. Children of any age who commit 'aggravated property offences' are subject to the general juvenile sentencing regime. The new concept of 'aggravated property offences' is generally similar to the old concept of 'property offences'.

1.22 The *Sentencing Amendment Act (No 3) 2001* came into operation on 22 October 2001. It replaced Division 3.6 (ss. 78A-B) – Minimum Mandatory Imprisonment for Property Offenders - with a new Division 3.6 (ss. 78A-B) – Aggravated Property Offences. The new s. 78A states that the purpose of the Division is to ensure that community disapproval of persons committing aggravated property offences is adequately reflected in their sentences.

1.23 S. 78B states that a court finding a person guilty of an aggravated property offence must take into account the purposes of the Division before sentencing him or her. A court that records a conviction against a person found guilty of an aggravated property offence must:

a) order a term of imprisonment; or

b) order participation in an approved project under a community work order, unless there are exceptional circumstances in relation to the offence or the offender.

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6 Northern Territory Government Publication, '*What it is all about*', March 2001, p. 3

There is no legislative restriction on the matters that may constitute exceptional circumstances. A court that orders a term of imprisonment may only wholly suspend it on the offender entering into a home detention order. Additional orders may be made.

1.24 The *Juvenile Justice Amendment Act (No 2) 2001* also came into operation on 22 October 2001. It removed the separate sentencing regime that applied to property offences by deleting ss. 53AE-AG. There is no longer any requirement for courts to sentence a juvenile convicted of a property offence to detention or imprisonment.[7]

Western Australia

1.25 On 14 November 1996 the Western Australian *Criminal Code Amendment Act (No. 2) 1996* came into effect. It amended the *Criminal Code* by inserting s. 401. This section required 'third strike' home burglars to be sentenced to imprisonment in the case of adults or older juveniles,[8] or detention in the case of younger juveniles,[9] for at least 12 months. The Children's Court subsequently ruled that, when it imposes a mandatory sentence of 12 months' detention, it is able to suspend the sentence and release the juvenile under a Juvenile Conditional Release Order (JCRO). The amendment specifically states that sentences of imprisonment are not to be suspended.

1.26 The Act also required the Minister to review the operation and effectiveness of s. 401 after 4 years from its commencement and to lay the report on the review before each House within 5 years of the commencement. This report – the *Review of Section 401 of the Criminal Code* - was tabled during the course of the inquiry, on 15 November 2001.

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7 The Juvenile Pre-Court Diversion scheme is still in operation and the relevant provisions of the Police Administration Act have not been amended. Submission 42B from the Northern Territory Police supplied case studies under the Scheme. They are contained in Appendix D

8 If a juvenile would attain the age of 18 years before his or her sentence had expired, he or she would be sentenced to imprisonment instead of detention

9 In Western Australia, there is no threshold age for a juvenile under the property offences sentencing regime unlike in the Northern Territory before 22 October 2001

CHAPTER 2

NORTHERN TERRITORY

Background

2.1 The Committee conducted two public hearings and received the majority of its submissions before the Northern Territory mandatory sentencing legislation was repealed.

2.2 The National Children's and Youth Law Centre referred to the announcement on 27 July 2001 by the Federal Attorney-General, the Honourable Daryl Williams, AM QC MP, and the Northern Territory Chief Minister, Mr Denis Burke, MLA, of diversionary programs for juveniles[1] and an improved interpreter service, and submitted:

> Following the implementation of the changes announced in July 2000, there are now few cases of young offenders in the Northern Territory being sentenced to periods of detention, who would not have been so sentenced were the mandatory sentencing provisions not in existence. Accordingly, in relation to young offenders, mandatory detention now appears to exist only in legislation. It is therefore incongruous that legislation which for reasons previously identified in earlier reports and inquiries, places Australia in breach of its international obligations, and exposes Australia to international ridicule and criticism, remains intact. Whilst the operation of the legislation has been limited to rare circumstances, it is submitted that the failure of the law to reflect common practices has the potential to undermine public confidence in the administration of criminal justice, and only serves to provide a politically expedient purpose.[2]

Considerations

2.3 The legislative changes which came into effect on 22 October 2001 have been explained above.[3] As a result of the changes, the Northern Territory Department of Justice stated in a submission dated 22 January 2002:

> It is respectfully submitted that even if the Human Rights (Mandatory Sentencing for Property Offences) Bill was passed into law, it would have no application in the Northern Territory.[4]

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1 See paragraph 1.16 above

2 *Submission 19*, National Children's and Youth Law Centre, p. 4

3 See paragraphs 1.19-1.22 above

4 *Submission 42A*, Northern Territory Department of Justice, p. 3

2.4 Witnesses generally agreed with this assessment, for example, the Law Society of the Northern Territory:

> Senator - . . . is there no dispute in your mind or the Law Society's mind that mandatory sentencing for property offences in the Northern territory is now past tense?
>
> Witness - Yes, there is no doubt about that.[5]

2.5 While not disagreeing with this general view, the Aboriginal and Torres Strait Islander Commission thought that the Bill should still proceed in its current form:

> . . . we wish to voice strong support for the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000, as it will ensure that no state or territory government will introduce such draconian legislation in future. The legislation is an important step towards alleviating the devastating effect of incarceration on Aboriginal people and addressing their over-representation in the criminal justice system.[6]

2.6 However, many of those who agreed that the Bill no longer had any application in the Northern Territory were concerned about the current sentencing regime for adults convicted of aggravated property offences. The concern of the Law Society of the Northern Territory was so great that it did not support the Bill:

> Senator . . . you make it quite clear that in fact the Law Society does not support the bill which is the subject of this inquiry. I understand that to be because you see it - if I might paraphrase - as curing only one ill rather than all the ills of concern to the Society, with regard to mandatory sentencing. Is that an accurate assessment?
>
> Witness That is an accurate assessment. We see the bill as one which reacted to the difficulties that we and Western Australia were having at the time. But we now see the possibility of, rather than curing one defect, looking more widely across the criminal justice system and improving what is there.[7]

2.7 Perhaps the best statement of the deficiencies that were seen in the new regime was made by the Aboriginal Justice Advocacy Committee:

> . . . the fact that mandatory sentencing provisions have gone is most welcome and it will change things in a big way at the coalface, beyond the shadow of a doubt. But the fact remains that judicial discretion is still curtailed. The committee would support the concession made earlier that

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5 *Transcript of evidence*, Law Society of the Northern Territory, p. 162. The Miwatj Aboriginal Legal Service (page 172 of transcript), the Aboriginal Justice Advocacy Committee (page 175), the Australian Association of Social Workers Northern Territory Branch (page 187) and the Darwin Community Legal Service Inc. (page 197) also agreed

6 *Transcript of evidence*, Aboriginal and Torres Strait Islander Commission, p. 148

7 *Transcript of evidence*, Law Society of the Northern Territory, p. 166

> mandatory sentencing, as such, no longer exists. But the fact that judicial and magisterial discretion is still curtailed will mean that some Aboriginal people are going to be unfairly punished when one considers that ordinary sentencing principles at common law and under statute would have rescued a group of people who will in future be sentenced under the new regime.
>
> . . .
>
> We recommend to the committee that it take legislative action to have repealed, in effect, the amendments to the Sentencing Act which create the new regime . . . we submit that the bill in its present form ought to be reworked to encompass, in the effect that it makes, knocking on the head not only the mandatory sentencing laws in Western Australia but also the new amendments as they stand with respect to adults under the Sentencing Act and the Criminal Code.
>
> . . .
>
> Culturally, if you get a traditional young man or woman, there are no fences to be seen in most communities, and trying to get someone to stay at home would be just too difficult. For practical purposes, home detention is seen as just not an option. Now that rules that out . . . That leaves community service order and prison, assuming exceptional circumstances are not made out.
>
> 'Exceptional circumstances' is a term of art, but basically it means what it says. It has got to be better than good. It has got to be very good – some exceptional reason why someone ought to get something less than a community service order. We are worried about that.[8]

2.8 Others who expressed disquiet about the limited orders available in the case of adults were the Northern Territory ATSIC[9] and the Australian Association of Social Workers Northern Territory Branch.[10] The Darwin Community Legal Service Inc. suggested that:

> . . . it has been drafted in such a way . . . to present it that this new government is still going to be tough on crime.[11]

2.9 The government's idea of 'exceptional circumstances' (which does not seem to be far from that of the Aboriginal Justice Advocacy Committee) was described by the Northern Territory Department of Justice in the following terms:

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8 *Transcript of evidence*, Aboriginal Justice Advocacy Committee, pp. 174-178

9 *Transcript of evidence*, Aboriginal And Torres Strait Islander Commission, p. 150

10 *Transcript of evidence*, Australian Association of Social Workers Northern Territory Branch, p. 150

11 *Transcript of evidence*, Darwin Community Legal Service Inc, p. 197

> It is no longer incumbent upon a court to convict after a finding of guilt, so a court would be entitled, if this were aberrant behaviour by someone with an obvious mental disability, not to impose a conviction but to perhaps put the person on a bond, with some treatment. The court does not have to impose imprisonment or a community work order if there are exceptional circumstances, and that person's disability would quite often amount to the sorts of exceptional circumstances that would justify a court not imposing a community work order or imprisonment . . . or detention. I gather one of the reasons behind the exceptional circumstances – why it was decided that an order did not have to be for imprisonment, home detention or a community work order – was these types of cases. It was decided that it would not be appropriate for people with mental disabilities, or various other people in the community, to be kept in home detention or to have to perform a community work order.[12]

Conclusion

2.10 The Committee is cognisant that it is inquiring into the Property Offences Bill and agrees that the provisions of the Bill, if passed by the Commonwealth Parliament, would not impact on the current Northern Territory adult sentencing regime for aggravated property offences.

2.11 In responding to the suggestion by the Aboriginal Justice Advocacy Committee that the Bill be amended to impact on the new sentencing regime, the Committee formed the view that the Bill would require major restructuring in order to achieve this, fundamentally altering the nature of the Bill and rendering it beyond the scope of this reference. The Committee therefore does not support the suggestion.

12 *Transcript of evidence*, Northern Territory Department of Justice, p. 141

CHAPTER 3

WESTERN AUSTRALIA

3.1 Prior to 16 November 1996, the Western Australian *Criminal Code* provided for just one offence of burglary carrying a maximum penalty of 14 years' imprisonment.[1] On that date there came into operation amendments providing in s. 401 of the Code that it is a crime for a person to enter another person's place without that other person's consent and with intent to commit an offence. It is punishable with imprisonment for up to a maximum of 20 years if committed in circumstances of aggravation (done in company, bodily harm done, etc). It is punishable with imprisonment for up to a maximum of 18 years if the place is someone's home but there are no circumstances of aggravation and punishable with imprisonment for up to a maximum of 14 years in any other case. If a person convicted of home burglary is a repeat offender, i.e., he or she has previously been convicted twice of home burglary, he or she must be sentenced to at least 12 months imprisonment or, in the case of a young person, to at least 12 months detention or imprisonment. A court is not permitted to suspend a sentence of imprisonment although a sentence of detention can be suspended.[2]

Adults

3.2 In spite of difficulties in producing relevant sentencing statistics in relation to adults, the report by the Western Australian Department of Justice, the *Review of Section 401 of the Criminal Code*, came to a firm conclusion about the impact of the amendments on adults. It took two samples, the first of people recently sentenced for burglary (but who had previous burglary convictions)[3] and the second of people convicted in the District Court in 1999. In relation to the first sample, the report states:

> Analysis of the sample identified 257 offenders as having at least two 'strikes'. Of these 41% were not 'repeat offenders' within the meaning of the Act.
>
> Of the remainder:
>
> 4% received exactly 12 months imprisonment on their third 'strike';

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1 *Submission 89*, Aboriginal Justice Council, '*Mandatory Sentencing in Western Australia & the Impact on Aboriginal Youth*', p. 12

2 See paragraphs 3.10-3.13 below

3 It is understood that this sample related to the Courts of Petty Sessions

87.5% received more than the required sentence, including being sentenced to 12 months imprisonment before their third 'strike' or receiving more than 12 months imprisonment before or on their third 'strike';

8.5% received imprisonment of less than 12 months.

Hence, in this sample:

all offenders who were assessed in this study to be 'repeat offenders' received imprisonment, and

a considerable majority received longer sentences than was required by the amendments.[4]

3.3 In relation to the second sample, it states:

Analysis of District Court data yielded similar results. A sample of 350 conviction events, each of which had at least two convictions for s401 offences, were sampled from 1999 District Court sentencing data.

After manual analysis of court documentation, 18 were found to definitely satisfy the repeat offender criteria. Sixteen of the 18 received sentences of imprisonment ranging from 25 to 48 months and averaging 26.4 months. However, two received Intensive Supervision Orders.[5]

Of the 35 which could not be clearly identified as repeat offenders, but which were likely to be, 30 were sentenced to imprisonment for periods ranging from 16 months to 60 and averaging 20.5 months.

These results demonstrate that, although no mechanism has been successful in tracking the number of occasions that 'repeat offender' status information has been presented to court at the time of the sentencing of an adult, the great majority received sentences which at least satisfied, and frequently exceeded the amendments' requirements.

These results are supported by many of the views obtained from interview.

The prevailing view among Judges and Magistrates, and largely supported by defence counsel, is that the repeat offender component of the legislation has had little impact on the adult courts. Under most circumstances someone facing their third conviction for home burglary would be sentenced to imprisonment anyway and 12 months would be below or at the bottom of the range of sentences being considered.[6]

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4 *Submission 16B*, Western Australian Department of Justice, *Review of Section 401 of the Criminal Code*, pp. 20-21

5 It is not clear how this could have been done within the restrictions of the law

6 *Submission 16B*, Western Australian Department of Justice, *Review of Section 401 of the Criminal Code*, p. 21

3.4 The Report concluded:

> Overall, the amendments have had little impact on the criminal justice system. They have been rarely used in the adult courts, as offenders with the required offence history have been sentenced to more than 12 months' imprisonment.[7]

3.5 In presenting the Western Australian Department of Justice report to the Parliament on 15 November 2001, the Attorney-General, the Honourable Jim McGinty, MLA, agreed that the report showed that the legislation had had minimal impact in the adult jurisdiction.[8] Furthermore, the Western Australian Department of Justice referred the committee to a statement made by the Attorney-General on the government's reasons for retaining the legislation in its current form.[9] In that statement the Attorney-General acknowledged:

> In terms of being identified as a repeat offender, adults are largely unaffected because the mandatory imprisonment length of 12 months for a repeat offender is typically at the lower end of the sentence expected for an offender with the sentence history required to qualify . . .[10]

3.6 The Aboriginal Justice Council said:

> I would also note that the Department of Justice has given absolutely no justification for the laws applying to adults – indeed, it is accepted that the laws are largely irrelevant to adults.[11]

3.7 The Law Society of Western Australia said:

> If you look at . . . what the government report says in relation to ss. 400 and 401, you can see that there does not seem to be any increase in sentences for burglary. It would seem that most people, if they were adults, were going to get 12 months or more for burglary in any event. So it has been a complete failure for adults . . .[12]

Conclusion

3.8 Because the government recognises that the mandatory sentencing provision is ineffectual in relation to adults, the Committee believes that it would be logical for the provision to be repealed.

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7 *Submission 16B*, Western Australian Department of Justice, *Review of Section 401 of the Criminal Code*, p. 5

8 *Western Australian Hansard*, 15 November 2001, page 5637

9 The complete text of the statement is reproduced at Appendix E

10 *Transcript of evidence*, Western Australian Department of Justice, p. 206

11 *Transcript of evidence*, Aboriginal Justice Council, p. 228

12 *Transcript of evidence*, Law Society of Western Australia, p. 291

Juveniles

Juvenile Conditional Release Orders

3.9 Although it is not possible to suspend a sentence of imprisonment under s. 401,[13] whether on an adult or a juvenile, a sentence of detention on a convicted juvenile can be suspended. The Children's Court is able to issue a Juvenile Conditional Release Order (JCRO), under which a juvenile who has been convicted and sentenced to detention can be released on conditions, which must be observed for the period for which the (suspended) sentence of detention had been imposed.[14]

3.10 The capacity of the Children's Court to issue a JCRO was established on 10 February 1997 by Fenbury J., then President of the Children's Court. He said when sentencing an offender:

> More specifically, before sentencing the defendant to 12 months detention, it must be clear that section 401 excludes a sentence of 12 months detention coupled with an Intensive Youth Supervision Order (IYSO) known as a Conditional Release Order (CRO) which is an order under the Young Offenders Act pursuant to which a young offender is released on a variety of conditions.
>
> This boy would be suitable to be placed on such an order but for the provisions of S. 401 having regard to his age, antecedents, the fact that he has now tasted detention on remand for 42 days, the fact that he has never had an opportunity before on such an order.
>
> . . .
>
> In my view a juvenile offender, who is a repeat offender in home burglary and who therefore must be sentenced under section 401 of the Criminal Code to a mandatory term of 12 months detention, can, in appropriate cases determined under the Young Offenders Act, also be placed on an IYSO the combined effect of which is that he is entitled to an order to be released and to stay at liberty on compliance with a variety of quite onerous conditions.[15]

3.11 The approach taken by Fenbury J. has been followed by subsequent Presidents of the Children's Court. The Department of Justice report states:

> Presidents have mainly used twelve-month juvenile conditional release orders (JCROs) for very young juveniles . . .

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13 See paragraph 3.1 above

14 In this report, the expression 'sentenced to detention' will only be used in cases where no JCRO has been issued

15 *Submission 16B*, Western Australian Department of Justice, *Review of Section 401 of the Criminal Cod*e, Appendix 3, pp. 2, 7

> Apart from age, the Children's Court policy is to use JCROs sparingly and when there are exceptional circumstances to justify it such as a minor offence, Aboriginal children stealing food, a change in the juvenile's circumstances or extenuating circumstances . . .
>
> The President can increase the sentence but cannot go below the twelve months minimum for either a JCRO or a detention order. If a JCRO cannot be imposed then twelve months detention must be imposed.[16]

3.12 In presenting the Department of Justice report to the Parliament, the Attorney-General expressed the view that:

> . . . there is considerable flexibility in the system as the judiciary can still impose a non-custodial sentence where this is considered appropriate . . . If there is a glimmer of hope, the judiciary can still divert them from detention, but in most cases they represent a real threat to the community that must be addressed.[17]However, the Committee notes the relative infrequency with which the JCROs are used,[18] which is consistent with the Department's description of the Court's policy as being 'to use JCROs sparingly and when there are exceptional circumstances to justify it'.

Statistics on Juvenile Mandatory Sentencing

3.13 The Department of Justice report indicated that the detection and tracking of offenders was not as difficult in the case of juveniles as it was in the case of adults.[19] However, the available information in relation to juveniles continues to be deficient. For example, the Department of Justice knew of 143 relevant sentencing events but was able to produce 'personal profiles' for only 118 of them.[20] The Department knew of only 22 relevant JCROs[21] whereas a study of 110 sentences of juvenile clients of the Aboriginal Legal Service indicated that 42 such orders had been given.[22]

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16 *Submission 16B*, Western Australian Department of Justice, *Review of Section 401 of the Criminal Code*, p. 25

17 *Western Australian Hansard*, 15 November 2001, p. 5637

18 See paragraph 3.15 below

19 *Submission 16B*, Western Australian Department of Justice, *Review of section 401 of the Criminal Code*, p. 23

20 *Submission 16B*, Western Australian Department of Justice, *Review of section 401 of the Criminal Code*, Appendix 8

21 *Submission 16B*, Western Australian Department of Justice, *Review of section 401 of the Criminal Code*, p. 24

22 *Submission 89*, Aboriginal Justice Council, '*Mandatory Sentencing in Western Australia & the Impact on Aboriginal Youth*', p. 58, Table 1

3.14 The 143 'repeat offender' sentences known to the Department of Justice involved 119 juveniles.[23] The number of juveniles[24] at particular ages on conviction and the sentences received by them were: [25]

Age	Convictions	Detentions	JCROs	Imprisonments
11	5	0	5	0
12	4	3	1	0
13	9	5	4	0
14	19	10	9	0
15	27	26	1	0
16	30	28	2	0
17	41	37	0	0
18	8	2	0	6

Impact of mandatory sentencing on Aboriginal Juveniles in particular

3.15 An analysis of the figures in the previous table reveals that persons of Aboriginal background made up all of the eighteen juveniles between the ages of 11 and 13, seventeen of the nineteen 14 year-olds, twenty-one of the twenty-seven 15 year-olds, twenty-one of the thirty 16 year-olds, thirty-five of the forty-one 17 year-olds and four of the eight 18 year-olds.[26] The point was reinforced by the Aboriginal Justice Council:

> . . . the younger the offender, the worse the picture. If you look at the DOJ [Department of Justice] study, you find that 90 per cent of those aged 15 and under are Aboriginal and 100 per cent of those aged 13 and under are Aboriginal.[27]

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23 *Submission 16B*, Western Australian Department of Justice, *Review of Section 401 of the Criminal Code*, p. 23

24 Only three sentences involved females (two Aboriginal, one non-Aboriginal)

25 *Submission 16B*, Western Australian Department of Justice, *Review of Section 401 of the Criminal Code*, p. 24. As explained at footnote 8 to Chapter 1, a juvenile would be sentenced to imprisonment instead of detention if he or she would attain the age of 18 years before his or her sentence had expired

26 S. 4 of the Young Offenders Act provides that if a person commits or allegedly commits an offence before reaching the age of 18 years, the Act applies to him or her or to any order made in dealing with him or her for the offence

27 *Transcript of evidence*, Aboriginal Justice Council, p. 228

3.16 Of the 116 sentences involving Aboriginals, in 81 cases the person's home location was country and in 35 cases it was metropolitan. Of the 27 sentences involving Non-Aboriginals, in 6 cases the person's home location was country and in 21 cases it was metropolitan. The information given in relation to the 143 cases does not indicate the home locations of the juveniles at the different ages.

3.17 Apart from the issue of the precise break-up between detention orders and JCROs, these figures were generally compatible with the information provided by the Aboriginal Justice Council.[28] The Council's figures show that 107 cases involved males and only 3 involved females. In 66 cases, detention was ordered, in 2 imprisonment and in 42, JCROs. There were nine children between the ages of 10 and 12, fifty-two between the ages of 13 and 15, forty-six between the ages of 16 and 17 and three 18 year olds. Nineteen were from the metropolitan area and ninety-one were from regional areas. Only those cases where the juvenile received the minimum mandatory sentence for the home burglary offence(s) were included although there were other cases where the offender received more.[29]

3.18 The Western Australian Department of Justice pointed out in evidence that 93 per cent of the juveniles involved in the sentence events who lived outside the metropolitan area were Aboriginal.[30] They also said:

> It is also clear that . . . we have a clear overrepresentation of indigenous juveniles overall, but within that distribution they are also clearly over-represented in the earlier age groups. For example, 30 per cent of indigenous juveniles concerned are below the age of 15, while only seven per cent of non-indigenous juveniles were under the age of 15.

3.19 The Attorney-General acknowledged that the impact of the legislation on Aboriginal children in the country was disturbing. In presenting the Western Australian Department of Justice report to the Parliament on 15 November 2001, he said:

> One disturbing aspect, however, is that 81 per cent of the offenders were Aboriginal and 60 per cent were from the country. I am concerned by this disproportionate impact on Aboriginal people, particularly in country areas.[31]

3.20 The Committee considers that the picture is even more disturbing if one looks at Appendix 8 to the Western Australian Department of Justice report which contains the 'personal profiles' of juveniles involved in 118 'sentence events'.

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28 *Submission 89*, Aboriginal Justice Council, *'Mandatory Sentencing in Western Australia & Aboriginal Youth'*, p. 58, Table 1

29 *Submission 89*, Aboriginal Justice Council, *'Mandatory Sentencing in Western Australia & Aboriginal Youth'*, p. 57

30 *Transcript of evidence*, Western Australian Department of Justice, p. 211

31 *Western Australian Hansard*, 15 November 2001, page 5637

- Of this group, the three juveniles aged 11 years at conviction were all Aboriginal and lived in the country and were given JCROs.
- The four 12 year-olds were all Aboriginal and lived in the country. However, only one received a JCRO.
- The six 13 year-olds were also all Aboriginal and lived in the country; half of them received JCROs.
- Of the fifteen 14 year-olds, twelve were Aboriginal country residents. Seven received JCROs; seven did not, and it is not possible to determine what sentence the fifteenth person was given.
- Of the nineteen 15-year-olds, eleven were Aboriginal country residents. Only one (a non-Aboriginal metropolitan resident) received a JCRO.
- Of the twenty-seven 16-year-olds, only twelve were Aboriginal country residents. Only one (an Aboriginal country resident) received a JCRO.
- Of the thirty-nine 17-year-olds, only sixteen were Aboriginal country residents. Only one (an Aboriginal country resident) received a JCRO; two (both Aboriginal, one a country resident, the other a metropolitan resident) were sentenced to imprisonment for 18 months; one (an Aboriginal metropolitan resident) was sentenced to detention for 15 months and one (an Aboriginal metropolitan resident) was sentenced to imprisonment for 12 months. All the others were sentenced to detention for 12 months.
- Of the five 18-year-olds, only two were Aboriginal country residents. All were sentenced to imprisonment or detention for 12 months.

3.21 Of this group, all of the children aged from 11 to 13 were Aboriginal and lived in the country. Nearly half of them were sentenced to detention. It seems to the Committee that younger country Aboriginal juveniles have borne the brunt of the mandatory sentencing legislation. There is support for this conclusion in the guarded statement in the Western Australian Department of Justice report:

> . . . There is also evidence that Aboriginal juveniles in the country clock up earlier convictions and for less serious home burglaries than juveniles in the metropolitan area.[32]

Incidence of home burglaries under mandatory sentencing legislation

3.22 The Western Australian Department of Justice explained the main reasons for the government's decision to retain the legislation in its present form to the Committee. They included:

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32 *Submission 16B*, Western Australian Department of Justice, *Review of Section 401 of The Criminal Code*, p. 26

- Of all the Australian states and territories, Australian Bureau of Statistics surveys show that Western Australia continues to have the highest rate of reported burglary and, as commented on by the Crime Research Centre, has had the highest rates of reported burglary offences since the start of the ABS national recorded crime series in 1993. ABS victimisation surveys show that Western Australia also has the highest rates of household breaking and entering and attempted breaking and entering.

- The legislation has high acceptance by the people of Western Australia and has bipartisan political support in this state. In addition to reporting household breaking and entering and attempted breaking and entering, the ABS victimisation surveys also measure people's perceptions about problems in their area. The category 'household breaking, burglary, theft from homes' is the most common perceived problem, but the proportion of respondents from Western Australia who reported that it was a perceived problem has dropped over the period in which the legislation has operated, from 45.3 per cent of respondents considering it was a problem in October 1995 to 40.3 per cent in October 2000.[33]

3.23 The effectiveness of the amendment in combating house burglaries is discussed in the Western Australian Department of Justice report.[34] A table shows the trends in victimisation rates according to Australian Bureau of Statistics surveys. The report states:

> Measured as the percentage of households affected, the graph shows increases from the estimate made in April 1993 to that of October 1995, followed by a reduction to April 1998. Given the amendments were implemented in November 1996 they may have been one of the factors causing reversal of the upward trend. The degree to which the legislation may have contributed is difficult to assess. The legislation amending Section 401 was preceded by about six months by legislation amending the *Pawnbrokers and Secondhand Dealers Act*, amendments which made it much harder to sell household items for which no proof of ownership was available.
>
> Another interpretative problem with this data is that there are only four data points, which means that the point at which the direction changed is imprecisely identified.[35]

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33 *Transcript of evidence*, Western Australian Department of Justice, p. 206, quoting the Attorney-General. See Appendix E for full statement

34 *Submission 16B*, Western Australian Department of Justice, *Review of Section 401 of The Criminal Code*, pp. 29-31

35 *Submission 16B*, Western Australian Department of Justice, *Review of Section 401 of the Criminal Code*, p. 30

3.24 Another table depicts the numbers of theft, robbery and burglary offences reported to the police between July 1995 and March 1998. The report states:

> The graph for home burglary shows a general increase in the number of offences reported each month until about August 1996 then, aside from a peak in January 1997, a relatively unchanging rate from the time of implementation of the amendments through to January 1998.
>
> . . .
>
> Findings: These data suggest the amendments may have had a part in arresting an increase in the rate of home burglary but the same could be said for the impact of the *Pawnbrokers and Secondhand Dealers Act*. There appears to be no reduction in the numbers of offences committed after introduction of the amendments.[36]

3.25 The Western Australian Department of Justice said in evidence:

> . . . I could find no evidence for the legislation having an impact on the rate of burglary. In particular, there is no evidence for that in terms of the number of burglaries being reported to police.[37]

3.26 The Aboriginal Justice Council report drew a similar conclusion from its statistics on burglary offences reported to the Police over the period 1991-1998:

> The table shows that the annual rate of residential burglaries had increased significantly from 1991 to 1995 but that this was, to some extent, offset by a decline in burglaries of other premises. More important, the rate of residential burglaries declined in 1996 after reaching a peak in 1995. This decline cannot be attributed to the three strikes laws, which came into force only in November. In fact, the then government was well aware of the downward trend; shortly before the new laws came into force, it had pointed with some pride to an 8% decline in burglary over the preceding 12 months. Even more significantly, the annual burglary rate did not decline with the new laws: it remained constant during 1997 and increased in 1998.[38]

3.27 The police 'clean-up rates' for home burglaries were also discussed by the Department of Justice:

> Senator -. . . one of the aspects of deterrence is the fear of getting caught. Does anybody know what the number of unresolved home burglaries is in this state?

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36 *Submission 16B*, Western Australian Department of Justice, *Review of Section 401 of the Criminal Code*, pp. 30-31

37 *Transcript of evidence*, Western Australian Department of Justice, p. 211

38 *Submission 89*, Aboriginal Justice Council, *'Mandatory Sentencing in Western Australia & the Impact on Aboriginal Youth'*, p. 26

> Witness - I cannot answer number-wise; I can only answer rate-wise. You are referring to what the police refer to as 'clean-up rates', that is, the proportion of reported offences – in this case, burglaries – versus the number [of] charges laid against the reports where people are identified. The rate in this state - and I do stand a little corrected – is about 12 per cent or 13 per cent.
>
> Senator - So someone has an 88 per cent chance of not being caught if they break into another person's house.
>
> Witness - That is correct. I might also say that that figure for offensive burglary is fairly consistent nationwide.[39]

Conclusion

3.28 The Committee can only conclude that the mandatory sentencing legislation has not brought about a reduction in the rate of home burglaries in Western Australia. This is hardly surprising, when one considers, not only that the clean up rate for burglaries is so low, but also that the legislation has been irrelevant for adults and that most of the juveniles dealt with under it have lived in the country, not the metropolitan area.[40]

Impact of mandatory sentencing legislation on alternative offences?

3.29 There was no agreement on whether mandatory sentencing for home burglaries had led to an increase in the number of alternative offences. The Law Society of Western Australia said:

> . . . some members of the legal profession who appear in the criminal jurisdiction believe this sort of legislation just redirects the offences elsewhere. In other words, there has been an increase in street muggings and the robbing of soft targets – that is, delicatessens and petrol stations – as a direct result. If you are a juvenile, you think, 'Jeez, I automatically get 12 months for burgling this house as a third strike or I can walk into this deli with a syringe.' They do not think that ultimately that is probably a more serious offence and the maximum penalty they are exposing themselves to is greater; all they remember is the mandatory penalty.[41]

3.30 The Committee does not consider that this impressionistic evidence justifies rejection of the commentary in the Western Australian Department of Justice report

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39 *Transcript of evidence*, Western Australian Department of Justice, p. 220

40 See paragraphs 3.18 and 3.19 above for home locations of offending juveniles. The *Year Book Australia 2001* shows at page 80 that as at 30 June 1999 the population of Perth was 1,364,200 and that of the balance of Western Australia was 496,800

41 *Transcript of evidence*, Law Society of Western Australia, p. 291. See also evidence of the Legal Aid Commission of Western Australia, pp. 268, 270

on the table of reported theft, robbery and burglary offences mentioned at paragraph 3.24 above:

> The numbers for the other offences are also presented to provide a picture of the rates for those offences most likely to be substituted if offence substitution was an outcome of the amendments. The high-number offences such as stealing, other burglary and motor vehicle theft all follow similar trends to that exhibited by home burglary and the others comprise so few number of offences as to be unimportant as candidates for substitution.
>
> . . . There would . . . appear to have been little significant offence substitution.[42]

Greater practical effect of legislation on juveniles

3.31 The Committee accepts that the practical effect of a twelve month sentence is more severe for a juvenile than for an adult. The Aboriginal Justice Council gave evidence:

> . . . the 12-month minimum applies both to adults and juveniles. It should be an accepted principle that juveniles are dealt with less severely . . . juveniles in fact face longer in custody if they receive a 12-month sentence. An adult who receives a 12-month sentence may well be released on parole after four months. A juvenile will have to serve six months in custody.[43]

3.32 The Western Australian Department of Justice report agreed with this, subject to a possible qualification because of the greater availability of diversionary options for juveniles (which, however, as appears later in this report, do not work as well for country Aboriginal children as for metropolitan children):

> Police prosecutors and defence counsel both cited the anomalous situation where juveniles can serve longer sentences, in real terms, than adults as a result of this legislation. They make the point that a juvenile who received a mandatory twelve-month sentence is likely to serve 50% of it, equating to six months. An adult however with the same sentence will be granted four months remission, could then have the sentence reduced by a further four months for good behaviour, resulting in the adult serving only four months for their twelve month sentence, two months less than a juvenile with the same sentence. From the perspective of police prosecutors the impact of this is mitigated by the diversionary options that operate.[44]

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42 *Submission 16B*, Western Australian Department of Justice, *'Review of Section 401 of the Criminal Code*', pp. 30-31

43 *Transcript of evidence*, Aboriginal Justice Council, p. 228. A similar point was made by the Legal Aid Commission of Western Australia, p. 265

44 *Submission 16B*, Western Australian Department of Justice, *Review of section 401 of the Criminal Code*, p. 26

3.33 The Western Australian Department of Justice report acknowledged a major problem with detention of juveniles:

> Because there are no detention facilities in the country, juveniles form country areas detained for sentencing or sentenced to twelve months' detention must come to Perth. Many are Aboriginal juveniles and come from the more remote parts of the State. They are unlikely to receive visitors while in detention or to have the support of their parents or close relatives in court because families cannot afford the trip to Perth. The latter can be a problem for these juveniles accessing bail if it is available, although there is a supervised bail program available.[45]

3.34 Implicit in this acknowledgment was the fact that there is a number of adult regional prisons, four of which were mentioned by the Aboriginal Legal Service – Broome, Roebourne, Greenough and Eastern Goldfields.[46] The Western Australian Department of Justice mentioned in evidence that videoconferencing links had been introduced between the main detention centre and the Department's offices throughout the state to enable parents to talk with detainees.[47] The Aboriginal Justice Council commented in response:

> . . . . regarding conditions of incarceration, juveniles who are in detention will do their time in Perth, creating further family and cultural dislocation. I was astonished by the argument made by the department this morning that video links can somehow replace personal contact. Adults from regional areas are somewhat more likely to serve their sentences closer to home . . .[48]

One size fits all?

3.35 The Attorney-General does not seem to have recognised that the same punishment is being applied to offences with significantly different levels of severity. When presenting the Western Australian Department of Justice report to the Parliament, he said:

> The review found that the overwhelming majority of those convicted under the mandatory sentencing laws have an appalling history of offending. The juveniles being caught by these laws have, on average, 50 prior offending convictions. In one case, a juvenile had been convicted of 184 previous offences. . . .
>
> On average, juveniles sentenced under the laws have prior convictions for 21 burglary offences. The worst case involved an offender with 112

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45 *Submission 16B*, Western Australian Department of Justice, *Review of section 401 of the Criminal Code*, p. 26

46 *Transcript of evidence*, Aboriginal Legal Service, p. 275

47 *Transcript of evidence*, Western Australian Department of Justice, p. 219

48 *Transcript of evidence,* Aboriginal Justice Council, p. 228

> previous burglary convictions. Only one offender had the minimum two prior burglary convictions.[49]

3.36 Further, the Attorney-General's statement on the government's reasons for retaining the legislation, as read to the Committee by the Western Australian Department of Justice, says:

> The legislation appears to be well targeted, affecting few offenders but identifying, with few exceptions, those who have extensive sentencing histories . . . Juvenile repeat offenders have pleaded, or have been found, guilty of significant numbers of burglary offences: on average about 50 offences each of which about 20 were burglaries.[50]

3.37 Others saw great disproportion in the offences for which the same sentence is handed out. The Aboriginal Justice Council said:

> When I refer to the case studies in the Department of Justice review, I find it intriguing that every single offender who got detention got 12 months.[51] They were not all the same types of offenders. I would draw your attention to two examples, and we can talk about them later if you wish. Case 17 involved a 17-year-old. He had 181 previous charges, 18 sentencing appearances and 61 burglary charges. He got 12 months detention. Case 118 was a 15-year-old. He had only five previous charges, four sentencing appearances and four burglary charges. That is gross injustice in sentencing. Further problems arise in the relativities between different offence types. You might find a minor home burglary attracting a significantly longer sentence than a serious physical or indecent assault.[52]

3.38 The Western Australian Department of Justice report makes the same point as the Aboriginal Justice Council:

> . . . considerable variation may occur between the circumstances and opportunities for any two repeat offenders. The timing of previous convictions, variation in the number of charges at each sentence event and variation in the opportunity to receive diversion options means that one

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49 *Western Australian Hansard*, 15 November 2001, p. 5637

50 *Transcript of evidence,* Western Australian Department of Justice, pp. 206-207. See Appendix E

51 This is not quite correct. Paragraph 3.18 above indicates that two 17 year-olds were sentenced to imprisonment for 18 months and one was sentenced to detention for 15 months. In addition, as the Aboriginal Justice Council indicated later in its evidence at page 243, it had thought that there had been some instances of third strike juveniles receiving 18 months

52 *Transcript of evidence*, Aboriginal Justice Council, p. 228. A similar view was expressed by the Legal Aid Commission. See Transcript of evidence, p. 268

> repeat offender may have as few as 3 home burglary charges triggering a third 'strike' or, possibly, hundreds.[53]

3.39 The inevitable corollary of this is that juveniles at the lower end of the criminal scale are very harshly treated by the mandatory sentencing legislation. The Aboriginal Justice Council said:

> I also want to take issue with claims that the laws fairly target hard-core offenders, which was stressed this morning. The first point to make is the obvious one: the Children's Court has always, in its ordinary sentencing discretion, imposed tough sentences on serious hard-core offenders, irrespective of the three-strikes laws. It follows inexorably that the major impact of the laws is in the context of less serious offences or offenders with less entrenched criminal histories.[54]

3.40 The Western Australian Department of Justice report comes to the same conclusion:

> There is general agreement among judicial officers, defence counsel and prosecution that the repeat offender legislation has had most impact on juveniles.
>
> While it is likely that for the most part juveniles sentenced to detention under section 401 would have gone into detention anyway, a few would not and for others shorter terms may have been considered more appropriate.[55]

3.41 Further, the Western Australian Department of Justice agreed that the list of case studies in the review had identified instances where magistrates, in handing down sentence, had said that they would rather be in a position to be able to hand out some sentence other than a CRO or the 12-month mandatory detention.[56]

Too few options?

3.42 One witness expressed concern that the choice between a sentence of detention and a JCRO for twelve months is too 'stark'.[57] ATSIC said:

> The two options are the 12-month conditional release order and the 12 months detention . . . Let us look at the example of a child aged 10 who, under the mandatory sentencing legislation, is released on a 12-month

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53 *Submission 16B*, Western Australian Department of Justice, '*Review of Section 401 of the Criminal Code'*, p. 26

54 *Transcript of evidence*, Aboriginal Justice Council, p. 227. A similar view was expressed by the Aboriginal and Torres Strait Islander Commission. See Transcript of evidence, p. 253

55 *Submission 16B*, Western Australian Department of Justice, *'Review of Section 401 of the Criminal Code*', pp. 25-26

56 *Transcript of evidence*, Western Australian Department of Justice, p. 222

57 *Transcript of evidence*, Aboriginal Justice Council, p. 227

> conditional release order. The ability of that child to understand the consequences of the conditions of that release order may be limited. If the child has taken money, as a consequence of being hungry, 12 months is a long time to remain hungry before they offend again.[58]

3.43 The Western Australian Department of Justice report stated:

> If a JCRO cannot be imposed then twelve months detention must be imposed. Comment was made about the unfairness of this when it is the juvenile's first experience of detention and/or the child is young.[59]

Age group to which mandatory sentencing legislation applies

3.44 The Aboriginal Justice Council pointed out that, in one respect, the Western Australian mandatory sentencing laws were harsher than those of the Northern Territory had been, in so far as they applied to juveniles down to the age of eleven and not just to those fifteen years and above. He said:

> . . . children as young as 10 or 11 are being caught by the laws. The Northern Territory's discredited laws only ever applied to people aged 15 and above.[60]

Aboriginal underrepresentation in diversion

3.45 The Department of Justice acknowledged that Aboriginal juveniles were underrepresented in diversion programs. They said:

> The situation in Western Australia is that the indigenous population is roughly three per cent. Overrepresentation starts at arrest, and the Crime Research Centre, which published a report just before Christmas, revealed that, in 2000, 30 per cent of arrests were of indigenous people. We then need to tackle the question of underrepresentation in diversion. This has been referenced in a number of reports, including the report commissioned by the Western Australian Aboriginal Justice Council, and I think that one of the submissions to your committee highlights the fact that Aboriginal or indigenous people are underrepresented in diversion. That is correct. About 21 per cent of people cautioned are indigenous, and about 25 per cent of juvenile justice teams – which is our other diversionary process – are indigenous people. But I am pleased to say that both these figures are improvements on the previous year and on the year previous to that. They have been slowly improving. Nevertheless, compared to the population, it is an underrepresentation. In community service orders – we are slowly

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58 *Transcript of evidence*, Aboriginal and Torres Strait Islander Commission, p. 253

59 *Submission 16B*, Western Australian Department of Justice, *Review of Section 401 of the Criminal Code*, p. 25

60 *Transcript of evidence*, Aboriginal Justice Council, p. 228

> going up the hierarchy – Aboriginal juveniles make up 55 per cent, and in detention Aboriginal juveniles make up 60 per cent.[61]

3.46 The Aboriginal Justice Council suggested reasons for this underrepresentation. They said:

> One of the problems we have in a big state is the ability to provide services across the whole state. We feel that that is one reason why such a large proportion of the three strike offenders are from the remote parts of the region. In our study [that for the Aboriginal Justice Council] . . . almost half our figures, which were Aboriginal Legal Service figures, were from the Kimberley and Pilbara – a staggering proportion. There must be some problem with access, and we feel that it is partly a problem of availability of programs. It is also probably a reflection, in part, of policing practices.[62]

Mandatory sentencing only a small part of the Justice system?

3.47 On the other hand, the Western Australian Department of Justice argued that the three strikes legislation played a very small part in a system that had a very effective filtering process. It said that about 12,000 of the 215,000 juveniles, i.e., people between the ages of 10 and 17 years, in Western Australia, came into contact with the police each year. About 4,500 appeared in court, the remainder being dealt with by caution, juvenile justice team 'and so on'. Of the 4,500, 1,700 received community based orders and 250 were sentenced to detention, the remainder (2,550) being given fines, good behaviour bonds and dismissals. Of the 250 juveniles detained, 21 were sentenced under section 401 of the Criminal Code.

3.48 The Department said:

> These figures show a system that is working pretty effectively at weeding out or diverting minor offenders and dealing with other offenders in a graduated way, ending up with the most serious offenders who have to be detained. The way the three strikes legislation has been enacted in Western Australia simply extends this system and affects the most serious of the serious offenders. To put this in context: since 1996, over 17,000 juveniles have been sentenced in our courts and yet only 143 have been dealt with under the three strikes legislation.[63]

Conclusion

3.49 This description of the criminal justice system in general and the mandatory sentencing system in particular differs from much of the evidence received by the Committee. This evidence includes the overrepresentation of younger country

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61 *Transcript of evidence*, Western Australian Department of Justice, p. 208

62 *Transcript of evidence*, Aboriginal Justice Council, p. 230

63 *Transcript of evidence*, Western Australian Department of Justice, p. 207

Aboriginals,[64] the longer terms for which juveniles serve sentences,[65] the lack of regional detention centres,[66] the possibility of considerable variation between the circumstances and opportunities for any two juvenile offenders[67] and the inappropriateness of twelve month detention sentences for some juvenile offenders.[68] Moreover, the effectiveness of the mandatory sentencing legislation is placed in doubt by the lack of evidence that it has had any impact on the high rate of home burglaries in Western Australia.[69]

Big picture or little picture?

3.50 The Western Australian Department of Justice attempted to place the Aboriginal juvenile overrepresentation under the mandatory sentencing legislation in the context of the overrepresentation of Aboriginal people in general in the criminal justice system, sketched the efforts the government is making to improve the overall situation and suggested that there was little point in concentrating on the three strikes issue:

> You need to see indigenous overrepresentation – the figures that were revealed in the three strikes review – in the context of the whole system. The answer lies in changing the whole system and intervening at every point in the system. The answer is not in simply removing one part of the system, which is obviously the most serious part - the three strikes – where the overrepresentation is at its highest. But our goal is to affect the whole system.
>
> . . .
>
> The Aboriginal Justice Plan - a plan signed by the State Aboriginal Justice Council and the state government about 18 months ago – really sets the stage for this process. In particular, it has three focus areas: family, education and policing. You can see from that that the emphasis is on trying to stop indigenous people from getting into the system in the first place. But it tackles the policing issue, and the policing focus group is tackling issues such as supporting the police through the Aboriginal patrols, which in a sense you could talk about as arrest prevention – in other words, looking at alternatives to arrest – and other issues relating to policing.
>
> . . . We are piloting a juvenile justice team process in which Aboriginal sessional workers are employed to liaise with Aboriginal families, and an

64 See paragraphs 3.21, 3.22 above

65 See paragraph 3.34,3.35 above

66 See paragraph 3.36 above

67 See paragraphs 3.40, 3.41 above

68 See paragraphs 3.42, 3.43 above

69 See paragraphs 3.25-3.31

> Aboriginal coordinator has been appointed to deal with Aboriginal families . . .
>
> Further into the juvenile justice system, we have the Aboriginal cyclic offending program in Geraldton; we have the Aboriginal families supervision program; we have a major project occurring at the moment called the Kimberley action plan – or the Kimberley project – where we are looking at integrating our justice services and making them more responsive to indigenous people, particularly the local community[70]

3.51 In response to a question about removing the mandatory sentencing aspect of the legal structure , the Western Australian Department of Justice said:

> I was not saying that it is wrong; I was saying that it will have little impact. If we want to make an impact on indigenous overrepresentation, we will need to intervene right across the system and that is what international research shows us. That is what we are trying to do.[71]

3.52 There was a cogent comment from the Aboriginal Justice Council:

> . . .there is only one genuinely acceptable option for Western Australian mandatory sentencing laws. They should be repealed, in view of their manifest faults and as a gesture of commitment to indigenous concerns.[72]

Conclusion

3.53 The argument put by the Department of Justice gives too little weight to the fact that individual Aboriginal children, particularly younger country Aboriginal children, are detained under the mandatory sentencing laws in circumstances in which non-Aboriginal children would not be detained. These children suffer most from the operation of the mandatory sentencing legislation because they are not protected from its excesses by such factors as diversionary processes to anything like the same extent as other children. The Committee considers that mandatory sentencing in the overall context operates against young country Aboriginals in particular in a manner that is effectively discriminatory.

3.54 The Committee agrees with the view expressed by ATSIC, which said:

> . . . it [the mandatory sentencing legislation in Western Australia] is inconsistent with . . . the Royal Commission into Aboriginal Deaths in Custody recommendations, especially recommendation No. 92, which states that imprisonment should only be used as a sanction of last resort.[73]

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70 *Transcript of evidence*, Western Australian Department of Justice, pp. 208-209

71 *Transcript of evidence*, Western Australian Department of Justice, p. 218

72 *Transcript of evidence*, Aboriginal Justice Council, p. 226

73 *Transcript of evidence*, Aboriginal and Torres Strait Islander Commission, p. 249

3.55 The Committee suggests that the particularly negative effect of mandatory sentencing on certain socio-economic groups be noted by the Western Australian government. In this context, the Committee suggests that the Western Australian government reconsider their mandatory sentencing laws and, in doing so, take into account the recommendations of the Royal Commission into Aboriginal Deaths in Custody Report. (The recently conducted Review of section 401 of the Criminal Code did not have regard to the Royal Commission's recommendations.) The Committee concludes that, in relation to adults, the legislation is ineffectual and, in relation to children, it effectively discriminates against young Aboriginal country children.

CHAPTER 4

CONCLUSION

Effect of the terms of the Bill

4.1 Although there are parallels between the Western Australian mandatory sentencing legislation and that previously applying in the Northern Territory, they are different Acts with different consequences. The latter applied to a wider range of more general property offences and provided for different minimum sentences, depending on the number of previous strikes and whether the offender was an adult or a juvenile. Although the alternative to detention for convicted juveniles in the Western Australian system applies only narrowly, there was no such alternative in the Northern Territory system. On the other hand, the Northern Territory legislation did not apply to younger juveniles and it appears that the Territory's pre-court diversionary program diminished the number of juveniles actually being prosecuted for mandatory sentencing offences. However, the differences are (or were) only in the operation of essentially similar systems.

4.2 As indicated in the second chapter, the Bill was overtaken by events in the Northern Territory. The Bill purports to apply to property offences, which are defined to cover the wide range of offences to which mandatory sentencing applied in the Northern Territory until 22 October 2001. The only remaining relevant 'property offence' in the Bill is 'unlawful entry to buildings' in Western Australia.

4.3 In Western Australia, the Bill clearly applies to sentences of imprisonment and detention which are actually implemented. It also applies where a juvenile is released on a JCRO, in so far as there must first be a sentence of detention, which is then suspended. In its terms, then, the Bill would override the whole current mandatory sentencing system in Western Australia although, given the level of penalties actually imposed on adults, there would be no point in it applying to them.

Constitutional Issues connected with the Bill

4.4 In response to a question about an article on the Kable decision in the High Court[1], the Aboriginal Justice Council said:

> . . . there is probably nothing inherently unconstitutional in mandatory sentences - for example, we have mandatory penalties for murder, and there are certain forms of mandatory disqualifications for certain driving offences.

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1 *Kable v. Director of Public Prosecutions for New South Wales*, (1996) 138 ALR 577. The High Court held that State legislation could not authorise a State court (which might exercise judicial power under Chapter III of the Commonwealth Constitution) to make an order for preventive detention because it was incompatible with the exercise of that judicial power

> I do not think that you can run an argument that those sorts of schemes are in themselves unconstitutional.[2]

4.5 The Youth Justice Coalition suggested that the provisions saying that a law of a state must not require a court to sentence a person to imprisonment could be seen as a direction to the state parliaments as to what they may and may not do. It said:

> . . . to do so would be to interfere with the operation of the state parliaments and that is something the Commonwealth is not allowed to do by an implied doctrine of intergovernmental immunity . . . or by s. 106 of the Constitution which preserves the continuing operation of the state constitutions.[3]

4.6 The Youth Justice Coalition suggested that the provision be amended to state that a sentencing court would retain a discretion to impose a penalty up to the maximum provided in the Commonwealth, State or Territory legislation creating an offence but was not required to impose any penalty.[4]

4.7 On the question of a constitutional basis for the Bill, the Committee has previously considered this issue in the report on the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999.* This Report stated:

> As a general proposition the external affairs power will support a law, the purpose of which is to implement an international treaty or convention. When a law purports to give domestic effect to an international instrument, the primary question to be asked is this: has the law selected means which are 'reasonably capable of being considered appropriate and adapted to implementing the treaty'?
>
> ...
>
> The High Court will, within reason, defer to the judgment of the Parliament as to the means by which a treaty may be implemented. Thus the test is not whether the High Court thinks the law is 'appropriate and adapted' to the purpose of implementation, but whether it is 'reasonably capable of being considered' so. The level of constitutional scrutiny is not as strict as it would be if those latter words were not included. [5]

4.8 The main issue is the question of which international instrument the legislation was purporting to implement. The obvious possibilities are the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Rights of

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2 *Transcript of evidence*, Aboriginal Justice Council, p. 240

3 *Transcript of evidence*, Youth Justice Coalition, p. 118. In its report on the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, this Committee had referred to the implied prohibition in the Constitution on Commonwealth legislation inhibiting or impairing the continued operation or existence of the states

4 *Submission 75*, Youth Justice Coalition, pp. 3-5.

5 Senate Legal and Constitutional References Committee: Report on the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, p. 44

the Child (CROC) and the International Covenant on Civil and Political Rights (ICCPR). The issue was not debated at any great length before the Committee. For example, the spokesperson for the Western Australian Law Society said:

> . . . the council of the Law Society . . . took the view that the external affairs power, in particular Australia's being signatory to the Convention on the Rights of the Child, would provide the constitutional basis upon which this legislation would operate . . . In the absence of having taken specific advice on it from a constitutional expert, we have no particular constitutional concerns.[6]

4.9 A counter argument was put, in answer to a question about the application of the CERD, by the representative of the Department of Justice:

> As has been pointed out, although the legislation has a significant impact on indigenous people, it is not designed and has no provisions to separately apply to indigenous people. Some of the submissions have rather cynically raised the question that the offence of burglary has been chosen because that is the offence which most Aboriginal people are involved in, so therefore it is discriminatory. I would like to correct that. The reality is that most Aboriginal people are not jailed for burglary; burglary is actually the fifth most frequent reason why Aboriginal people are jailed. If the state government were that cynical, they would have chosen the offence of assault if they wanted to particularly target indigenous people.[7]

Possible alternatives to passage of the Bill

4.10 The Committee received very little evidence of support for a direct challenge on the Western Australian legislation in the High Court. In response to a question about an article on the Kable decision in the High Court[8], the Aboriginal Justice Council said:

> . . . there is probably nothing inherently unconstitutional in mandatory sentences - for example, we have mandatory penalties for murder, and there are certain forms of mandatory disqualifications for certain driving offences. I do not think that you can run an argument that those sorts of schemes are in themselves unconstitutional.[9]

4.11 The Committee notes that a person who was subject to the Northern Territory mandatory sentencing laws had sent a communication to the United Nations Human

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6 *Transcript of evidence*, Western Australian Law Society, p. 300

7 *Transcript of evidence*, Department of Justice, p. 221

8 *Kable v. Director of Public Prosecutions for New South Wales*, (1996) 138 ALR 577. The majority of judges in the High Court held that State legislation could not authorise a State court (which might exercise judicial power under Chapter III of the Commonwealth Constitution) to make an order for preventive detention because it was incompatible with the exercise of that judicial power.

9 *Transcript of evidence*, Aboriginal Justice Council, p. 240

Rights Committee, alleging several breaches of the International Covenant on Civil and Political Rights.[10]

4.12 The Law Society of Western Australia expressed the view that the fact that a juvenile receiving the minimum sentence for a house burglary could actually serve more of the sentence than an adult would seem to be a blatant breach of some of the international conventions concerning children.[11] It suggested that there were a number of reasons why action such as that taken in the Northern Territory had not been taken in Western Australia, for example, the greater focus on the Northern Territory before the repeal of its legislation in October 2001 and the perceived possibility of change in Western Australia as a result of the review of s. 401 of the Criminal Code. The Law Society also referred to the need to select an appropriate candidate as the subject for an approach to an outside body (such as the High Court or the United Nations Human Rights Commission). It said:

> I suppose the answer to the question about what happened in the Northern Territory is that a lawyer who felt particularly passionate about this brought an application to the High Court.[12]

4.13 In the light of considerable public and media discussion on the issues, the Committee also notes that the Northern Territory experience has shown that a political party's opposition to mandatory sentencing will not necessarily prevent it winning office. The repeal of the Northern Territory legislation may mean that Western Australia may become the subject of the scrutiny on this issue that was previously applied to the Northern Territory.

Conclusion

4.14 Although the Committee considers that the Commonwealth Parliament may have the power to pass and enact the Bill, using the external affairs legislative power, the Committee is not minded to make this recommendation at this stage. The prime responsibility for rectifying the situation in Western Australia rests with the Western Australian government.

4.15 The Committee notes that, following tabling of the Committee's report *'Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999'*, the Commonwealth provided the Northern Territory with funds in connection with its diversion and interpreter programs for four years from 1 September 2000.[13] In so far as the Western Australian government provides limited funding for

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10 *Submission 42A*, Northern Territory Government, p. 6

11 *Transcript of evidence*, Law Society of Western Australia, p. 287

12 *Transcript of evidence*, Law Society of Western Australia, p. 293

13 See paragraphs 1.19-1.22 above

diversionary and interpreter services to Aboriginal juveniles, particularly in remote areas,[14] it might also pursue discussions with the Commonwealth for these purposes.

Recommendation

4.16 The Committee recommends that the Bill not proceed at this time, in order to allow the Western Australian Government to address the serious negative impact of mandatory sentencing on indigenous juveniles.

4.17 If the Western Australian government chooses to ignore the deleterious effect of mandatory sentencing on indigenous youth, the Committee will revisit the issue through other mechanisms available to it.

Senator Jim McKiernan

Chair

14 See paragraphs 3.17-3.22, 3.33, 3.34, 3.45 and 3.46 above

ADDITIONAL COMMENTS
AUSTRALIAN GREENS

The Committee has provided an excellent analysis. I back the proposal for Commonwealth assistance to Western Australia to move to the better alternatives to mandatory sentencing.

However, this remains patently unlikely. The evidence against mandatory sentencing, which disproportionately ensnares young Aboriginals is compelling. I therefore advocate the passage of the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000 to override the mandatory sentencing provision of the W.A. Criminal Code.

Furthermore the passage of the bill would prevent any other state or territory from imposing a mandatory sentencing regime on the community in the future.

Senator Bob Brown

ADDITIONAL COMMENTS ON BEHALF OF THE AUSTRALIAN DEMOCRATS

The Australian Democrats share the Committee's misgivings in relation to mandatory sentencing. For that reason, we support its condemnation of these laws and its criticism of the Western Australian State Government's retention of them.

However, we cannot support the Committee's excessively cautious recommendation that, "the Bill not proceed at this time, in order to allow the Western Australian Government to address the serious negative impact of mandatory sentencing on indigenous juveniles."

This proposition assumes that the WA Government might desire repeal of this law and will pursue such reform. To the contrary, the WA Government has made it very clear, including in election promises made before its recent election to power, that these laws would remain under a Gallop Labor Government. This view is strongly shared by the State Opposition.

It is extremely unlikely that mandatory sentencing will be removed from the WA statutes for some time unless the Commonwealth intervenes.

We note that the Committee (when considering a very similar Bill in 1999), did not advocate that the Northern Territory Government be accorded time to consider repeal of its mandatory sentencing laws. Rather, it supported Federal intervention. This was later reflected in the Private Member's Bill presented by Mr Kim Beasley MHR, then Leader of the Opposition. This Committee contradiction between the two Bills is unreasonable.

It is not the job of politicians to tell judges and magistrates what must be done in each and every case. But when politicians do interfere in the proper administration of justice in a fashion that clearly breaches international human rights conventions, particularly as they relate to children, we must respond as a nation through our Federal parliament. Under the Commonwealth Constitution, it is the duty of the Commonwealth to ensure that our international obligations are observed. It is not only proper that we respond with Federal intervention, it is our humanitarian duty.

We consider that this legislation is important not only to override the laws that apply in Western Australia, but also to ensure that similar laws are not enacted elsewhere in Australia in the future. The Democrats consider that there has been more than enough debate and deliberation on this issue and that Parliament should take prompt action to eliminate mandatory sentencing. The Bill should proceed forthwith.

Senator Brian Greig

APPENDIX A

HUMAN RIGHTS (MANDATORY SENTENCING FOR PROPERTY OFFENCES) BILL 2000

Human Rights (Mandatory Sentencing for Property Offences) Bill 2000
No. , 2000

(Senator Brown)

A Bill for an Act to implement Australia's human rights obligations under various international instruments with respect to the sentencing of people for property offences

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Human Rights (Mandatory Sentencing for Property Offences) Act 2000.*

2 Commencement

This Act commences on the day on which it receives the Royal Assent.

3 Act extends to external territories

This Act extends to every external Territory.

4 Interpretation

In this Act:

child means a person under 18 years of age.

property offence means any offence involving:

(a) theft (irrespective of the value of the property); or
(b) criminal damage to property; or
(c) unlawful entry to buildings; or
(d) unlawful use of a vessel, motor vehicle, caravan or trailer; or
(e) receiving stolen goods; or

(f) unlawful possession of goods reasonably suspected of being stolen; or
(g) receiving stolen goods after change of ownership; or
(h) taking reward for the recovery of property obtained by criminal means; or
(i) assault with intent to steal; or
(j) robbery; or
(k) armed robbery;

or any other offence involving an unlawful interference with the property or property rights of another person, including an offence consisting of attempting or conspiring to commit, or aiding, abetting, counselling, or procuring the commission of, a property offence.

5 Mandatory detention or imprisonment of juveniles

A law of the Commonwealth, or of a State or of a Territory must not require a court to sentence a person to imprisonment or detention for a property offence committed as a child.

6 Mandatory detention or imprisonment for property offences

A law of the Commonwealth, or of a State or of a Territory must not require a court to sentence a person who is at least 18 years of age to imprisonment or detention for a property offence.

7 Application

To avoid doubt, enactments that are contrary to section 5 or 6 have no force or effect as laws of the Commonwealth, or of a State or of a Territory, except as regards the lawfulness or validity of anything done in accordance with those laws before the commencement of this Act.

8 Transitional

Any person (including a child) in prison or detention at the commencement of this Act pursuant to an enactment that is contrary to section 5 or 6 must be brought within 28 days after the day on which this Act commences before the court that sentenced him or her for re-consideration of the remainder of the sentence in accordance with this Act. The court has full discretion to vary the sentence if it thinks fit in all the circumstances of the offender and the offence.

APPENDIX B

LIST OF SUBMISSIONS

Submission Number	Organisation/Individual
1	School of Law and Legal Studies, La Trobe University - Associate Professor John Willis
2	Ms Hilary Ash
3	Middle Australia
4	Ms Filomena Nichols
5	Unemployed Workers Group
6	Ms Jennifer Tannoch-Bland
7	Mr Graham Bond and Ms Monique Bond
8	Ms Diane Cluer
9	Director of Public Prosecutions, NSW
10	Mr Greg Bloomfield
11	Ms Anne Wharton
12	Ms Linda Eisler
13	Ms Margaret Adkins
14	Multicultural Council of the Northern Territory Inc
15	Mr Stephen Seiver
16	Attorney-General, Western Australia
16A	Attorney-General, Western Australia
16B	Department of Justice, Western Australia
17	The Law Society of NSW
18	Mr Richard Wallace
19	National Children's and Youth Law Centre
20	Para Districts Community Legal Service Inc
21	Ms Monique Potts
22	Ms Robyn Erwin
23	University of Western Australia, Crime Research Centre
24	Men's Confraternity Incorporated
25	Redfern Legal Centre

26	Ms Kate Cullinan
27	Mr P Coleman
28	Ms Carolyn Wilkinson
29	Prison Reform Group of WA (Inc)
30	Ms Rae Quigley
31	Mr Paul Woodward
32	Rev Jim Downing AM
33	Mr Ian Cohen MLC and Ms Lee Rhiannon MLC
34	Australian Institute of Criminology
35	Aboriginal Justice Advocacy Committee
35A	Aboriginal Justice Advocacy Committee
36	Hills Greens
37	Mr Keith Jones
38	Mr John Orme
39	People Against Racism in Aboriginal Homelands
40	Mr Rob Wesley Smith
41	Australian Greens
42	Attorney-General's Department, NT
42A	Department of Justice, NT
42B	Northern Territory Police
43	Australian Association of Social Workers Northern Territory Branch
43A	Australian Association of Social Workers Northern Territory Branch
44	CRC Justice Support
45	Northern Territory Legal Aid Commission
46	Mr Danny Blay
47	Aboriginal Legal Service of WA and the WA State Policy Office of the Aboriginal & Torres Strait Islander Commission
48	Ms Geraldine Mackenzie
49	Ms Pamela Trotman
50	Mr David Pollock
51	Mr Christopher O'Reilly
52	Mr Shane Gibbs
53	Mr Gary Meyerhoff
54	Disability Employment Action Centre
55	Central Australian Aboriginal Legal Aid Service Inc
56	Ms Jillian Cranny BA

57	The Hon Peter Breen MLC
58	Aina Ranke
59	Mr Don Ditchburn
60	Australians for Native Title and Reconciliation – Northern Territory
61	Australian Lawyers for Human Rights
61A	Australian Lawyers for Human Rights
62	NSW Bar Association
63	Darwin Community Legal Service
64	National Social Responsibility & Justice, Uniting Church in Australia
65	Human Rights Committee, NSW Young Lawyers
66	Aboriginal and Torres Strait Islander Commission, NT Northern Zone
66A	Aboriginal and Torres Strait Islander Commission, National Centre for Legal and Preventative Service Centre, Sydney
66B	Aboriginal and Torres Strait Islander Commission, WA State Policy Office, Perth
66C	Aboriginal and Torres Strait Islander Commission, State Policy Centre (NT) for NT Commissioners, Darwin
66D	Aboriginal and Torres Strait Islander Commission, National Centre for Legal and Preventative Service Centre , Sydney
67	Disability Discrimination Legal Service (Victoria) Inc
67A	Disability Discrimination Legal Service (Victoria) Inc
67B	Disability Discrimination Legal Service (Victoria) Inc
68	Australian Human Rights Centre
69	MIWATJ Aboriginal Legal Service
69A	MIWATJ Aboriginal Legal Service
70	The Hon Giz Watson MLC
71	Mental Health Legal Centre Inc
72	Mr Gregor Sutherland
73	Dr Dianne Johnson & Mr George Zdenkowski
74	Mr Kenneth Graham
75	Youth Justice Coalition
76	Human Rights & Equal Opportunity Commission
77	UNICEF Australia
78	Central Australia Youth Justice
79	Defence for Children International
80	Tangentyere Council
81	The Hon Denis Burke MLA

82	Ms Dallas Kinnear & Mr Murray Winter
83	The Law Society of Western Australia
84	Anglican Diocese of Sydney
85	Youth and Family Service (Logan City) Inc
86	Mr Eric L Smith
87	Faculty of Law, University of New South Wales - Mr George Williams and Ms Melissa Lewis
88	Attorney-General's Department, Canberra
88A	Attorney-General's Department, Canberra
88B	Attorney-General's Department, Canberra
89	Aboriginal Justice Council
90	Law Society Northern Territory
91	Law Council of Australia

APPENDIX C

PUBLIC HEARINGS

Public hearings were held as follows:

CANBERRA, 6 AUGUST 2001

Witnesses:

Aboriginal & Torres Strait Islander Commission (ATSIC)
Mr Allen Hedger, National Manager, Legal & Preventative Services Program
Ms Rachel Ardler, Manager, Strategic Planning and Development
Miss Elizabeth Brookes, Senior Policy Adviser

Uniting Church in Australia - National Social Responsibility and Justice
Reverend Professor James Haire, President
Rosemary Miller, National Director
Reverend Sealand Garlett, Uniting Aboriginal and Islander Christian Congress
Reverend Dr Brown

Attorney-General's Department
Dr Dianne Heriot, Assistant Secretary, Crime Prevention Branch
Ms Robyn Frost, Acting Assistant Secretary, Public International Law Branch
Ms Kathy Leigh, First Assistant Secretary, Civil Justice Division

Dr Dianne Johnson

SYDNEY, 14 AUGUST 2001

Witnesses:

National Children's & Youth Law Centre
Mr Louis Schetzer, Director

Disability Discrimination Legal Service (Victoria) Inc
Mr Jonathan Goodfellow, Co-ordinator

NSW Bar Association
Mr Brett Walker, SC, Senior Vice-President

The Law Society of NSW
Mr Nicholas Meagher, President
Ms Sherida Currie, Senior Legal Officer, Practice Department

Australian Human Rights Centre
Professor Garth Nettheim ,Faculty of Law, University of NSW

Human Rights & Equal Opportunity Commission
Dr Bill Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner
Mr Darren Dick, Director, Social Justice Unit
Ms Susan Newell, Senior Policy Officer
Ms Way Frith, Senior Policy Officer

Redfern Legal Centre
Ms Rebecca Neil, Solicitor
Ms Polly Porteous, Tenants Adviser

Youth Justice Coalition
Ms Jane Sanders
Mr Jeremy Kirk

DARWIN, 23 JANUARY 2002

Witnesses:

Northern Territory Government:

Department of Justice
Mr Richard Coates, Chief Executive Officer
Ms Jenny Blockland, Director of Policy

Northern Territory Police
John Daulby, Acting Commissioner
Mr Graham Waite, Superintendent

Aboriginal & Torres Strait Islander Commission (ATSIC)
Ms Alison Anderson, Commissioner for NT Central
Mr Jim Walker, State Policy Manager, NT Policy Centre
Ms Stacey Lange, Senior Policy Advisor, NT Policy Centre
Ms Libby Stewart, Policy Officer, NT Policy Centre

Law Society of Northern Territory
Mr Ian Morris, President

MIWATJ Aboriginal Service
Mr Graham Carr, Director

Australian Association of Social Workers Northern Territory Branch
Mr Barry Sullivan, Member, Social Justice & Human Rights Committee
Ms Michelle Jones, Member
Ms Gemma Smyth, Member

Aboriginal Justice Advocacy Committee (AJAC)
Mr Christopher Howse, Executive Officer

Darwin Community Legal Service
Ms Cassandra Goldie, Coordinator
Ms Wendy Morton, Disability Discrimination Advocate

PERTH, 25 JANUARY 2002

Witnesses:

Department of Justice, Western Australia
Mr Andrew Marshall, Director, Justice Policy Unit
Mr Vincent Badham, Senior Policy Analyst, Courts Division

Crime Research Centre, University of Western Australia
Mr Neil Morgan, Director of Studies

Western Australian Aboriginal Justice Council
Mr Glen Colbung, Chair

Aboriginal & Torres Strait Islander Commission:

Commissioner Eric Wynne, Commissioner for WA South West
Mr James Murphy, ATSIC Chairman of Wongatha (WA Goldfields) Regional Council
Mr Mick Gooda, State Manager, WA Policy Centre
Ms Donella Raye, Policy Officer, WA Policy Centre

Legal Aid Commission of Western Australia
Ms Marilyn Loveday, Youth Law Unit

Aboriginal Legal Service of Western Australia
Mr Mark Cuomo, Director of Legal Services

Law Society of Western Australia
Ms Claire Thomson, President
Mr John Pryor, Criminal Lawyer

APPENDIX D

CASE STUDIES

(Submission 42B - Northern Territory Police)

NORTHERN TERRITORY POLICE

JUVENILE PRE-COURT DIVERSION SCHEME

CASE STUDY 1

A 16-year-old non-indigenous male juvenile was involved in an ongoing neighbourhood dispute over a number of weeks. One night after drinking a quantity of alcohol, the juvenile responded to a disturbance outside by producing a weapon and threatening several neighbours. A member of the juveniles family intervened and a scuffle occurred which resulted in the attendance of Police. The juvenile was intoxicated and in a very aggressive and agitated state.

The juvenile is from a dysfunctional family in which his parents separated when very young. The death of one of the parents and the other parent entering a new relationship caused hurt, resentment and anger in the juvenile and this contributed to behaviour difficulties throughout his formative years. His behaviour manifested itself into violent outbursts and excessive bouts of binge drinking which brought him into constantly into conflict with family, peers and Police.

The juvenile has no recorded criminal history but had been the subject of Police attention through recorded incidents of antisocial behaviour over the preceding 12 months. His lack of remorse and acknowledgment of wrong doing reflected in the choice of diversion offered, which was to participate in a 2-month anger management program. The program resulted from discussions with his family and his hostile uncooperative manner during conference assessment. Given his aggressive behaviour towards his family and his unwillingness to talk about his situation, it was felt a conference with his family would not be appropriate for safety reasons and he was placed directly on a suitable counselling program. Initially, his participation was met with some resistance from the juvenile and his attendance was under sufferance and only in lieu of prosecution.

The juvenile attended a number of counselling sessions over the two-month period and a good rapport developed between himself and his counsellor. During this time, some of the behavioural causes and related issues were raised and discussed. This assisted the juvenile to work through and deal with a number of emotional issues that had been with him for a number of years. The program was successfully completed and a report from the counselling program spoke highly of the juvenile.

Whilst still dealing with issues that have affected him in the past the juvenile continued full time employment with the knowledge and support of his workmates. He has yet to resolve his difficulty within his family, but he has access to people he now accepts as part of his support system.

In the past 6 months, the juvenile has not re-offended since commencing his counselling program and has not come to Police notice since completing it.

CASE STUDY 2

A 15-year-old indigenous male juvenile stole a $3000 competition BMX bike from a local service station. The bike was to be used in a forthcoming championship in which the victim had been selected to represent the Northern Territory. The bike was subsequently dismantled and the parts used to rebuild the juvenile's own bicycle.

The juvenile is a repeat offender from a single parent family with a low socio-economic background. He had previously received a written warning for stealing. Attendance at school was erratic and there were some behavioural issues that affected his performance. He suffers from Attention Deficit Disorder (ADD) and was associating with other young offenders. Alcohol was a part of his social life and he attended parties on a regular basis.

When the juvenile stole the bike he was unaware of its value or significance. A victim & offender conference was conducted which detailed to the juvenile how important and significant this bike was to the victim. The conference also highlighted the impact the theft had had on the victim's and juvenile's families. The victim's parents were extremely hostile and could not understand why the juvenile failed to understand the importance of this bike and the possible consequences of his actions.

The juvenile's football coach had attended the conference as a friend and mentor. He expressed great disappointment at the juvenile's actions. The coach then stated that as he could not trust the juvenile, his position on the team was in jeopardy as the team was travelling to Darwin for a competition. The impact of this comment caused some shock and the juvenile only then realised that his actions did and do affect other people. The coach offered a second chance but suspended the juvenile's scholarship with the team until the conference and any outcomes were completed.

The juvenile did acknowledge that his actions were wrong and showed some remorse for what he had done. The juvenile did expect some punishment or consequence for stealing the bike but he did not expect it to come from one of his supporters.

As an outcome of the conference, the juvenile participated in a 20-hour community service program over 4 weeks. This service took the form of minor grounds maintenance, car washing and some gardening. He also assisted in the supervision of children in sporting activities and helped in their skill development. As the juvenile was responding well to the program and to promote his talent as a young footballer, he was offered a place on the Indigenous Sports Program Forum. The Forum met in Yulara and the juvenile was able to meet and talk to many of Australia's prominent indigenous sporting personalities about their achievements, success and motivation.

The juvenile has not re-offended in the 6 months since this conference. He is active in sport and is currently attending school where he is completing Year 10. He also travelled to, and participated in, a national indigenous youth summit held at Ross River.

CASE STUDY 3

Two indigenous female juveniles aged 14 and 17 years had consumed a large amount of alcohol and were very intoxicated. They saw the victim sitting and talking with a group of

friends in a park adjacent to a river. The two juveniles had been told earlier that the victim had been making derogatory comments about them at school. Seeking to address this issue the juveniles approached the victim in a highly aggressive and hostile manner. As a result the victim fled into the nearby river where the juveniles caught and assaulted her. The assault was fairly intense and the victim was left on the ground in a semi conscious condition.

Both juveniles have stable families and both are new mothers. Having no recorded criminal history and given the severity of the assault, the juveniles were asked to participate in a victim offender conference. What the juveniles were not aware of was that as a result of their assault on the victim, a second and more serious assault was committed on the victim by others who took advantage of the victim's condition and situation. This second assault was spoken about by the parents of the victim during the conference.

The juveniles found themselves facing a hostile and angry reception from the victim's parents. The victim was not present due to her fear of the juveniles. A statement tendered on behalf of the victim made quite an impact on the juveniles and they responded to the parents of the victim by saying sorry. Both juveniles exhibited shame and showed remorse for their actions. They stated that they should apologise to the victim for the hurt and suffering they had caused. The consumption of alcohol and their intoxicated state contributed to this offence and an agreement to participate in a alcohol awareness and counselling program was accepted by all parties involved in the conference.

A written apology was later presented to the victim via the mother and the juveniles attended their program. This program was conducted over a 3-month period with both juveniles attending individual weekly counselling and information sessions. These sessions covered topics related to alcohol usage, personal health issues, and exercises in self-esteem and assertive behaviour. A good rapport developed between the counsellor and the juveniles which was extended to include the parent and guardian. The program counsellor was very pleased with the juveniles' involvement and active participation.

Both juveniles have returned to part time study and both have not re-offended since the assault. They have given statements concerning the second assault and have been interviewed in relation to that matter. The victim is happy with the outcomes from the conference and will return to give evidence in relation to the second assault when that matter is heard in Court.

CASE STUDY 4

A 16 year old indigenous youth in the company of others unlawfully entered nine private residences over a two-week period. The total amount in property stolen amounted to just over $16,000.00. Only $4,000.00 has since been recovered.

Poor self-esteem and susceptibility to peer pressure was a contributor in the commission of these offences. The juvenile lacked family support and he was expected to provide for the family in the absence of the father. The juvenile was resentful of this, which bought him into conflict with his mother. As a result he spent considerable time living with friends and other relatives. He had dropped out of school and lacked the motivation or discipline needed to seek other training or employment.

Due to the seriousness of this matter, the number of victims involved and a lack of recorded criminal history, the juvenile was recommended for a victim offender conference. Of the nine

victims involved, two had left the Territory and one refused to attend. Of the remaining six victims, one had deep reservations and concerns about participating but did attend on the day.

The juvenile heard how his actions had affected and impacted on the victims and their families. He also heard through the tears of one victim how upset she was over the theft of a small item of significant sentimental value which had been discarded and lost by the juvenile. The juvenile listened as other victims told similar emotional stories. He responded by saying how sorry and ashamed he was of his behaviour. This shame was extended to the juvenile's mother who was also in tears as she expressed her sorrow and hurt for what her son had done.

As an outcome of the conference, the juvenile apologised to each victim in writing and participated in a 20-hour community service program over four weeks. This program involved gardening, grounds maintenance, and vehicle cleaning. He was involved in sporting activities with young children and assisted them with skills development. The community service enabled him to interact in a positive manner with other youth and adults outside of his peers and to put something back into the community. He received very high praise for his involvement, attitude and work ethic from the program coordinator. The juvenile also attended an education and training program in conjunction with his community service that got him back into school. The education and training program, which was completed over 3 months, enabled him to achieve an accredited trade certificate in basic building maintenance.

The juvenile has not re-offended since this conference and has not come to police notice.

CASE STUDY 5

A 16-year-old non-indigenous female juvenile caused $2,000.00 damage to the victims parked motor vehicle by walking around the vehicle scratching the panels with a ring on her finger. This damage was the result of a dispute with the victim that had been ongoing for over 12 months. This dispute originated in school and extended to other family members. The juvenile was not involved in any criminal behaviour and this was the first time she had been involved with Police.

This ongoing dispute, the seriousness of the offence and the lack of a criminal record indicated that a victim offender conference would be the best way to deal with this matter. Both juvenile and victim agreed to participate but the juvenile did not want her family involved. It was later established that the juvenile had failed to tell her family the whole truth and this caused the mother some embarrassment when the relevant facts were disclosed during the conference.

The victim in this matter initially agreed to participate in the conference but later refused to attend when advised of the conference details. The victim was hostile and offered no reason for the change of decision. Without victim (or representative) participation it was decided that a family conference would be more appropriate.

The juvenile had since left home and was residing with other family members. She had dropped out of school during Year 12 and had limited work experience with any regular employer. Her interaction with peers was becoming aggressive and she was involving herself in increasing bouts of anti-social behaviour. This affected her self-esteem and reduced her capacity for positive social interaction with her family and friends.

In the resulting family conference, the juvenile stated that she was sorry for the stupidity of her actions. A proposal to send a written apology was, unfortunately, rejected by the victim.

As an outcome of the conference, the juvenile agreed to participate in a 25-hour community service program over two weeks. This program involved a variety of tasks including filing, photocopying and other reception duties at a youth facility, which included the responsibility for petty cash. She also assisted with the supervision of children in a vacation care program and attended to cleaning duties. This program was completed with a positive and complimentary report from the program provider. The program provider has offered to mentor the juvenile if she returns to study and would employ her if there was sufficient funding.

The program provided the juvenile with some career options and other support and assistance. The juvenile is now considering returning to study and completing a Certificate III in Early Childcare.

In the 12 months since this offence was committed, the juvenile has not re-offended and has not come to Police notice.

CASE STUDY 6

A 17-year-old indigenous juvenile with others unlawfully entered the clubrooms of a sporting association. The entry was forced and some damage was caused. The juvenile searched the premises and left after realising he had activated a silent alarm. He took a quantity of alcohol with him.

The juvenile is a repeat offender having committed other similar offences over the previous two years. He is a regular cannabis user having started at 12 years of age. His attendance at school was erratic and he spent most of his time hanging out at the local shopping centre. He has not attended school for 3 years and has not been able to find a job. The juvenile has domestic problems with his family and these problems are exacerbated with him suffering from Attention Deficit Hyperactive Disorder (ADHD).

The sporting association being the victim in this matter asked for a victim offender conference to be conducted so that they could express their views and explain to the juvenile how his actions had impacted upon the association. The juvenile and his family agreed and a conference was held. The juvenile showed genuine remorse for his actions and he apologised for his actions to the victim in writing. He also agreed to attend the sporting associations premise and undertake a day's community service. This community service involved moving sand, repairing irrigation systems, and some cleaning of the sports centre. The juvenile was asked about his future plans and asked whether or not he would consider further education and/or training. As a result of his comments and discussion from the conference participants, the juvenile agreed to participate in a 6-week education and training program. This was a residential program requiring the juvenile to attend another regional centre.

The juvenile attended and successfully completed a Certificate I in beef cattle production. He developed some basic skills and enjoyed working on a cattle station. With the course completed he was due to return home. He opted to remain and commence further study over another 7 weeks, which resulted in his obtaining a Certificate II in beef cattle production. He did this at his own expense and he is now qualified to gain employment in the cattle industry. This is an opportunity he has not had before.

In the 6 months since his conference, the juvenile has not re-offended.

CASE STUDY 7

A 14-year-old indigenous male juvenile climbed on to the roof of the local community store and lifted up one of the tin sheets forming the roof. He climbed down into the store and helped himself to food, drink, clothing and electrical equipment. He took as much as he could carry and left the premises by climbing back out the hole in the roof. The total amount of property stolen and/or consumed was nearly $1,000.00.

The juvenile was subsequently caught and interviewed in relation to the theft. His family attended the local police station where the juvenile was formally cautioned regarding his behaviour. The juvenile had no recorded criminal history. The victim in the matter was quite happy with the juvenile being cautioned but felt that he should be required to complete some form of service as reparation for the damage and hurt he had caused. It was suggested to the victim that perhaps the service could be completed in the store. This was met with a little trepidation from the victim who expressed some concerns about the suggestion. After some discussion with the juvenile and his family, a somewhat reluctant victim agreed to provide the community service.

An agreement was reached for the juvenile to attend the community store for two weeks. During this time he assisted in cleaning the store, re-stocking shelves, and performing minor errands for the store manager. The juvenile attended to his tasks so well that at the end of the two week period, the store manager offered him a part time job working in the store for a three month period. The offer of a job was accepted and the juvenile commenced part time work. The juvenile enjoyed the responsibility and trust placed in him and he responded by alerting the store when other people attempted to steal property.

In the five months since committing this offence, the juvenile has not re-offended. The victim has also reconsidered his position and has willingly offered to provide service opportunities for other suitable young people.

CASE STUDY 8

A 14-year-old indigenous male watched as his friend smashed the rear side window of an unattended car that was parked in a secluded area of the town. The door of the vehicle was unlocked and his friend climbed in and began searching the car. The juvenile waited until the friend located an ignition key which was used to start the engine. He jumped into the vehicle and the friend drove away. The vehicle was driven around the town and then driven to vacant crown land where the juvenile began searching bags and luggage belonging to the owners of the vehicle. Property and personal effects which were not wanted were thrown from the vehicle into the scrub. The vehicle was furiously driven around the area and then driven to a nearby residential area where the vehicle ran out of fuel. The manner in which the vehicle had been driven had attracted a number of complaints and Police apprehended the juvenile at the scene.

A full investigation was conducted and the total value of the theft amounted to over $13,000.00. Most of the property was recovered and returned to the victim. $3,000.00 worth of property has been lost and not accounted for.

The owner of the vehicle was an international tourist and he had returned home prior to this matter being resolved. He did however, provide a victim impact statement that was later read at a victim/offender conference involving the offender, his family and attending officers. The youth was very apologetic and felt ashamed of what he had done. He agreed to write a letter

of apology to the owner of the car and return to school on a regular basis for the rest of the school term. The victim also agreed to attend a community service program with a local youth group for a period of two weeks.

During the first week, the juvenile assisted in erecting a fence, which exposed him to the use of power tools and other equipment that he had not previously had the opportunity to use. At the completion of the project the youth was very pleased at what he had achieved. During the second week the juvenile attended with a group of his peers to a remote National Park where he assisted in carrying out a flora and fauna survey and assisted in the laying of new paths. This experience enabled the youth to work in a team environment, and again offered him the opportunity to learn new skills, whilst re-building his self esteem which had previously been low.

Prior to this offence the juvenile had not committed any other offences. He came from a dysfunctional family, where his parents had separated. He often lives with an Aunt. His older brother was currently involved in criminal activities, which had a detrimental affect on the juvenile.

The juvenile successfully completed all tasks required of him and in the 15 months since the juvenile committed the offence, he has not come to police attention or re-offended.

APPENDIX E

STATEMENT BY THE HON JIM MCGINTY MLA ATTORNEY-GENERAL OF WESTERN AUSTRALIA

Subsequent to the tabling in parliament of the report of the review of the operation and effectiveness of section 401 of the Criminal Code, the West Australian government has decided to retain the legislation in its current form. There are four main reasons for this decision:

- Of all the Australian states and territories, Australian Bureau of Statistics surveys show that Western Australia continues to have the highest rate of reported burglary and, as commented on by the Crime Research Centre has had the highest rates of reported burglary offences since the start of the ABS national recorded crime series in 1993. ABS victimisation surveys show that Western Australia also has the highest rates of household breaking and entering and attempted breaking and entering.

- The legislation has high acceptance by the people of Western Australia and has bipartisan political support in this state. In addition to reporting household breaking and entering and attempted breaking and entering, the ABS victimisation surveys also measure people's perceptions about problems in their area. The category 'household breaking, burglary, theft from homes' is the most common perceived problem, but the proportion of respondents from Western Australia who reported that it was a perceived problem has dropped over the period in which the legislation has operated, from 45.3 per cent of respondents considering it was a problem in October 1995 to 40.3 per cent in October 2000.

- The legislation appears to be well targeted, affecting few offenders but identifying, with few exceptions, those who have extensive sentencing histories. In terms of being identified as a repeat offender, adults are largely unaffected because the mandatory imprisonment length of 12 months for a repeat offender is typically at the lower end of the sentence expected for an offender with the sentence history required to qualify. Juvenile repeat offenders have pleaded, or have been found, guilty of significant numbers of burglary offences: on average about 50 offences each of which about 20 were burglaries. Over the first four years of operation of the legislation, only 143 juvenile sentence events were identified.

- Mandatory sentencing does not necessarily mean detention for juveniles. If the court believes there are special circumstances, a juvenile offender may not receive a sentence of detention. The court has the discretion, in appropriate cases, to impose an alternative sentence of a juvenile conditional release order. The review found that such discretion had been used in about 17 per cent of cases and had been applied where the offender was very young or when the nature of the offences was considered to have important mitigating circumstances such as where the reason for the burglary was to obtain food because the offender was hungry.