

CHAPTER 2

MANDATORY SENTENCING LEGISLATION IN THE NORTHERN TERRITORY AND WESTERN AUSTRALIA

Introduction

2.1 This chapter briefly examines the operation of the existing mandatory sentencing legislation in Western Australia and the Northern Territory, in particular that relating to property offences. Mandatory sentencing legislation ensures that minimum sentences of detention or imprisonment are imposed on people convicted of certain offences. The practical result is the removal of some judicial discretion during the sentencing process in relation to particular offenders, and the possibility of inappropriate sentences being imposed.

Terminology

2.2 The mandatory sentencing legislation for property offences in both the Northern Territory and Western Australia applies to juveniles, as well as adults. Because the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* relates only to the impact of mandatory sentencing on juveniles; because mandatory sentencing affects juveniles and adults differently; and because the definition of adults and juveniles varies between States and Territories, it is necessary to be clear on what is a juvenile (or 'child' or 'young person') for the purposes of the criminal law in different states and territories.

2.3 Most Australian jurisdictions treat persons who have not attained the age of 18 years as children for the purposes of the criminal law. However, Victoria (*Children and Young Persons Act 1989 (Vic)*, s. 3(1)) and Queensland (*Juvenile Justice Act 1992 (Qld)*, s. 5) deal with people in the adult criminal system once they turn 17. It was only on 1 February 2000 that Tasmania changed the age at which persons are dealt with in the adult criminal system from 17 to 18 years.¹

2.4 In the Northern Territory, for the purposes of the mandatory sentencing legislation for property offences, a 'juvenile' means a juvenile who has attained the age of 15 years: *Juvenile Justice Act 1995 (NT)*, s. 53AE(1). The term 'juvenile' is defined in the same Act for general criminal justice purposes as meaning a child who has not attained the age of 17 years (*Juvenile Justice Act 1995 (NT)*, s. 3). Section 53AG(2) of the *Juvenile Justice Act* emphasises that persons of or over the age of 17 years must be treated as adults for the purposes of sentencing and detention for mandatory sentencing offences, by requiring them to be transferred to a prison for adults if they attain that age during a sentence of detention.

2.5 For the purposes of the general criminal law in Western Australia, a 'young person' is a person who has not reached the age of 18 years, or who *has* attained 18

1 *Youth Justice Act 1997 (Tas)*, s. 3, proclaimed 22 December 1999.

years but is being dealt with for matters arising from an offence committed before the person reached that age (*Young Offenders Act 1994 (WA)*, s. 3 and 4). It should be noted that special provisions can apply to young persons aged 16 or 17 years. Under section 401(6) of the *Criminal Code (WA)* and section 118 of the *Young Offenders Act* the Children's Court, constituted by a Judge, can direct such young persons to serve their sentences in an adults' prison for a number of reasons, including:

- the risk posed by their behaviour in the detention centre to the safety of other people in custody or staff; and
- their antecedent behaviour.

2.6 However, the Western Australian Government gave evidence that a 16 or 17 year-old would only be placed in an adult prison if it was in the child's best interest.²

The definition of a child in the Convention on the Rights of the Child

2.7 The Convention's definition of a 'child' is:

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.³

2.8 The interpretation of the qualifying phrase will vary among states parties. The issue of age did arise during discussions held between the Commonwealth, States and Territories. However, details on the nature of this discussion are unavailable and the Convention was agreed to by all parties.⁴

2.9 A United Nations publication, *The United Nations and Juvenile Justice: A Guide to International Standards and Best Practice*, issued in 1999, states:

65. There are a number of fundamental principles that apply to each and every stage of the juvenile justice system. Called the international umbrella principles, they are drawn from the relevant international instruments. They ought to be taken into account by all individuals on a daily basis whenever a decision concerning juvenile justice is made.

66. The international umbrella principles are as follows:

(a) Juvenile justice legislation should apply to all those under the age of 18 . . .

2.10 A footnote to the passage quoted says:

There is an evolving convergence setting 18 as the end of childhood: rule 11(a) of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty; article 6, para. 5, of the International Covenant on Civil and

2 *Transcript of evidence*, Western Australian Ministry of Justice, p. 111.

3 Convention on the Rights of the Child, UN Doc A/44/49 (1989) Article 1.

4 *Submission No. 107A*, Attorney-General's department, p.1.

Political Rights; and article 37(a) of the Convention on the Rights of the Child prohibiting the death penalty and life imprisonment without the possibility of release for crimes committed below the age of 18. Article 2 of the African Charter on the Rights and Welfare of the Child defines a child as any 'human being below the age of 18 years'.

2.11 According to the Australian Law Reform Commission (ALRC) and Human Rights and Equal Opportunity Commission (HREOC) Report No.84,⁵ there are grounds for suggesting that Australia, as the State Party in respect of conventions, should take the lead in helping to enforce the age recommended in the Convention on the Rights of the Child (CROC):

18.8 As well as its specific responsibility for young federal offenders, the Commonwealth has assumed responsibilities relevant to juvenile justice processes under international instruments. Articles 37 and 40 of CROC set down principles for the treatment of young suspects and offenders and require States Parties to develop and maintain a separate juvenile justice system. In addition, the UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the Beijing Rules) and the UN Rules for the Protection of Juveniles Deprived of their Liberty 1990 set out detailed principles regarding the treatment of juveniles by law enforcement agencies and in detention.

18.9 The Commonwealth has an important role in assisting to develop national standards for juvenile justice that reflect Australia's international obligations, are effective in promoting rehabilitation, impose appropriate penalties and ensure due process. National standards for juvenile justice should be reflected in uniform legislative provisions. Compliance should be monitored comprehensively by the OFC. This approach to juvenile justice would be consistent with that recommended in the Beijing Rules.⁶

2.12 The Report continued by acknowledging variations within Australia, but recommending that such variations could not be accepted in the face of international conventions to the contrary:

The national standards for juvenile justice should set the framework, require best practice and establish benchmarks for performance. They should allow flexibility within this framework for particular appropriate local variations in practice. However, they should not permit local variations that breach human rights commitments.⁷

2.13 Others may argue that, if there is no specific time or method in place by which all States Parties must agree on the age of 18, then it is possible to continue to use a different age; or they may also argue that the qualifying phrase allows for an exception. However, this is a difficult point: the qualifying age may in fact be the age

5 ALRC/HREOC, *Seen and heard: priority for children in the legal process*, 1997.

6 ALRC/HREOC, *Seen and heard: priority for children in the legal process*, 1997, pp. 467-468.

7 ALRC/HREOC, *Seen and heard: priority for children in the legal process*, 1997, Paragraph 18.10, p. 468.

of majority as far as the Commonwealth is concerned, and the qualifying phrase may relate only to a lower age that has been standard in a country, as opposed to one that is standard in some respects within a part of a country.

2.14 In respect of international convention responsibilities, it is Australia which is responsible for producing reports on its adherence to CROC, and Australia which must defend any allegation that it has acted in contravention of its obligations.

Development of mandatory sentencing

2.15 The application of mandatory sentencing legislation to juveniles represents a shift away from traditional sentencing principles.⁸ Sentencing legislation in most Australian States and Territories has always distinguished between juveniles and adults, emphasising that rehabilitation rather than the protection of the community should be the primary concern in the sentencing of juveniles.⁹ Accordingly, legislation governing the sentencing of juveniles has generally restricted the kinds of sentencing options available in respect of juveniles, showing a clear preference for non-custodial sentences.¹⁰ However, some mandatory sentencing provisions have been brought into operation in several jurisdictions.

2.16 Several Acts in Western Australia and the Northern Territory have provided, or continue to provide, for mandatory sentences of imprisonment or detention for offences other than property offences. For example, the *Crimes (Serious and Repeat Offenders) Act 1992 (WA)* provided, until its expiry on 8 March 1994,¹¹ that juvenile repeat violent offenders must be imprisoned or detained but allowed the court to specify the period.

2.17 In the Northern Territory, the Penalty Guidelines in the *Misuse of Drugs Act*, which came into force in 1990, requires the court, where sentencing a person for an offence against the Act which carries a maximum penalty of at least 7 years, or which was accompanied by aggravating circumstances, to impose a sentence of actual imprisonment for at least 28 days. However, the legislation also provides that the court, having regard to the particular circumstances of the offence or the offender, may choose not to impose such a penalty.¹²

8 *The Laws of Australia*, volume 12, chapter 12.2, The Law Book Company Limited, paragraph 72, p. 66.

9 See, for example: *Children and Young Persons Act 1989* (Vic), s. 139(1); *Children's Services Act 1986* (ACT), s. 5; *Children (Criminal Proceedings) Act 1987* (NSW), s. 6; *Juvenile Justice Act 1992* (Qld), s. 109(2); *Child Welfare Act 1960* (Tas), s. 4 and *Young Offenders Act 1993* (SA), s. 3. Section 7 of the *Young Offenders Act 1994* (WA) recognises that offenders should be encouraged to accept responsibility for their own conduct, that the community should be protected and that offenders should have the opportunity to develop in socially acceptable ways that will strengthen family relationships.

10 The *Juvenile Justice Act 1983* (NT), however, is silent in relation to appropriate guidance principles for the sentencing of children.

11 The Commonwealth repealed the Act as it applied to Christmas Island because it considered that it was contrary to Australia's international obligations. *Applied Laws (Implementation) Ordinance 1992* and Explanatory Statement.

12 *Misuse of Drugs Act 1990* (NT) s. 37.

2.18 The *Domestic Violence Act* was amended in 1996 to provide that a person found guilty of a second or subsequent offence of contravening a restraining order must be sentenced to imprisonment for at least 7 days but not more than 6 months.¹³ In addition, courts must impose a sentence of imprisonment on adults committing certain sexual offences against the Criminal Code¹⁴ or committing, on a second or subsequent occasion, certain violent offences against the Code,¹⁵ although the length of the sentence is at the discretion of the court. There is no minimum term set by the amendments.¹⁶

2.19 The Committee has not had time to search for mandatory sentencing provisions in the law of all jurisdictions. However, Associate Professor John Willis, of the Latrobe University School of Law and Legal Studies, refers to mandatory prison sentences for murder in some jurisdictions. He also mentions section 30 of the *Road Safety Act 1986 (Vic)*, which creates the offence of driving while disqualified and provides that for a second or subsequent offence the penalty is imprisonment for not less than 1 month and not more than 2 years. The term ‘imprisonment’ includes suspended sentences and intensive correction orders, neither of which requires actual incarceration.¹⁷ It is arguable that the Victorian Act would not infringe the Bill but it would be desirable to establish what provisions do infringe it.

2.20 The shift towards mandatory sentencing in Western Australia and the Northern Territory has been most significant in relation to property offences, whether by adults or juveniles. The move towards mandatory sentencing, particularly in relation to juveniles, suggests that the idea of protection of the community has replaced early intervention and diversion as the paramount consideration in relation to the sentencing of certain offenders. The legislative requirement is that sentencing reflects the cost of crime, individual culpability, appropriate punishment and deterrence.¹⁸

Objectives of the legislation

2.21 In the Northern Territory, it was suggested by an officer representing the government, the purpose of mandatory sentencing was punishment rather than deterrence,¹⁹ the legislation being developed to ensure that offenders paid for their crimes. However, this is not strictly the case. In both Western Australia and the Northern Territory, the legislation has been seen as a direct response by government to community concern about home burglary (Western Australia) and a number of property crimes (Northern Territory).

13 Section 10(1A), inserted by Act No. 57 of 1996, s. 5.

14 *Sentencing Amendment Act (No. 2) 1999 (NT)*, s. 78BB.

15 *Sentencing Amendment Act (No. 2) 1999 (NT)*, s. 78BA.

16 *Submission No. 19*, Central Australian Women’s Legal Service, p. 1.

17 *Submission No. 13*, Associate Professor John Willis, vol. 1, p. 79.

18 Department of the Parliamentary Library, *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, Bills Digest No. 62, 1999-2000, p.1.

19 *Transcript of evidence*, Northern Territory government, p. 38.

Western Australia

2.22 According to officers from the Western Australian Ministry for Justice:

The background to the three strikes legislation is that at the time the legislation was introduced into Western Australia, the state had the highest rate in the nation of home burglary....The provisions of the three strikes legislation were intended to reflect the views of the community that the existing penalties for home burglary were manifestly inadequate and did not give due weight to the distressing effect of home burglary on the victims. It set out to provide adequate penalties for burglary and in fact the three strikes provision was part of a slightly larger piece of legislation....[which] set out firstly to re-establish the offence of home burglary and, secondly, a greater penalty for home burglary relative to burglary....The legislation then went on to specifically define the three strikes provisions. If an offender was a repeat offender – in other words if the offender coming before the court for sentencing had already offended two or more times previously, the offender was subject to a mandatory minimum term of detention or imprisonment for 12 months.²⁰

2.23 Although the extent of community concern at home burglary is hard to measure, the objective of the Western Australian legislation appears clearly to be deterrence. This is the case both for adults and for juveniles. With respect to young people, there is no consensus that they are responsible for major crime, although repeated instances of minor crime may be more common. However, the Youth Affairs Council (WA) quoted a statement by the Chief Justice of Western Australia on the involvement of young people in crime:

There is a widely held public perception that young people are generally delinquent and many of them are involved in violent or anti-social crime. This is an inaccurate reflection. In the context of juvenile crime, most offences are relatively minor in nature. Few young offenders become serious or repeat offenders.²¹

Northern Territory

2.24 In the Northern Territory, the stated objective of mandatory detention legislation has varied. It was originally said to have been deterrence and then changed to retribution.²² In a submission to this Committee, the Chief Minister of the Northern Territory stated that the objective of the legislation was to send a clear message to offenders that their actions would not be treated lightly, and that the courts would be forced to take strong action.²³

20 *Transcript of evidence*, Western Australian Ministry of Justice, p. 110.

21 *Submission No. 84*, Youth Affairs Council (WA), vol. 4, p. 857.

22 *Transcript of evidence*, Northern Territory government, p. 38; see *Submission No. 25*, NAALAS, vol. 2, p. 282.

23 *Submission No. 24*, ATSIIC, vol 1, p. 197.

The mandatory sentencing laws were developed in 1997 in response to popular concern about the prevalence of property crime, particularly break and enter into residential dwellings, and a perception that sentences imposed by criminal courts did not properly reflect the seriousness with which the community viewed these offences. The Government was particularly conscious of the inconvenience and trauma that was caused to victims of such crimes.²⁴

2.25 In 1999, also, the Chief Minister is reported to have referred primarily to the ‘punitive’ nature of the legislation, although by that time there had been amendments which appeared to soften the impact of sentencing in some respects.²⁵ It appears that a mixture of deterrence and retribution is accepted as the main reason for the legislation.²⁶

2.26 The element of community desire for such legislation was noted in both Western Australia and the Northern Territory. Other witnesses, however, have stated that there has been no meaningful consultation with the community including with the legal profession;²⁷ other submissions have stated that in fact the community was not as supportive of the legislation as was claimed, especially with respect to severe penalties for mild offences.²⁸

Western Australia

2.27 The mandatory sentencing provisions for property offences in Western Australia are contained in the *Criminal Code* (WA). The relevant legislative amendment came into operation on 14 November 1996.

Adults

2.28 Section 401 of the *Criminal Code* (WA)²⁹ provides a maximum penalty of 18 years’ imprisonment for home burglary.³⁰ Paragraph 401(4)(a) requires the court, notwithstanding any other written law, to impose a sentence of at least 12 months’ imprisonment on an adult convicted of home burglary where that person is a repeat offender. A person is a repeat offender if he or she has previously been convicted on at least two occasions of home burglary.³¹ Conviction for this purpose includes a finding or admission of guilt that led to a punishment being imposed on the offender,

24 *Submission No. 91*, Northern Territory government, vol. 4, p. 910.

25 See below, Paragraphs 2.44 – 2.45.

26 *Submission No. 25*, NAALAS, vol. 2, p. 259.

27 *Submission No. 18*, Central Australian Youth Justice, vol. 1, p. 107; *Submission No. 21*, Northern Territory Bar Association, vol 1, p. 140; *Submission No. 69*, Darwin Community Legal Service, vol. 4, p. 741.

28 See *Submission No. 41*, Northern Territory Legal Aid Commission, vol. 3, p. 542.

29 Section 401 was inserted by the *Criminal Code Amendment Act (No. 2) 1996* (WA), s. 5.

30 Helen Bayes, ‘Punishment is Blind: Mandatory sentencing of children in Western Australia and the Northern Territory’, *University of New South Wales Law Journal*, vol. 5 (1), 1999, p. 14.

31 *Criminal Code* (WA), s. 400(3) and (4).

or an order being made in respect of the offender, whether or not a conviction was recorded.³²

2.29 The legislation is somewhat inflexible. Section 401(5) expressly prohibits the suspension of a term of imprisonment. The regime does not make any concessions in respect of the period that may have elapsed since the earlier convictions. Nor does it differentiate between an adult's previous offences, even if they were committed when the offender was a young person (under 18 years). Thus, in the calculation of prior offences, if an adult has previously been convicted of two offences as a young person and is now convicted of a third as an adult, he or she will be sentenced to 12 months' imprisonment.³³

Young persons

2.30 The *Criminal Code* (WA) relating to the mandatory detention or imprisonment of young persons permits an alternative sentence. It appears that a young person convicted of home burglary is liable, as is an adult, to 18 years' detention/imprisonment.³⁴ Under paragraph 401(4)(b), the court is required, notwithstanding section 46(5a) of the *Young Offenders Act 1994*, to impose a sentence of at least 12 months' imprisonment or detention, as the Court thinks fit, on repeat offenders (persons convicted of home burglary for a third or subsequent time).

2.31 The excluded provision (section 46(5a) of the *Young Offenders Act*), provides that the court is to have regard to the fact that the rehabilitation of an offender is facilitated by the participation of the offender's family in a program. However, sections 98 and 99 of the *Young Offenders Act*, which have not been excluded, provide that the court may make an intensive youth supervision order, with or without a sentence of detention.

2.32 On 10 February 1997, the President of the Children's Court found the court could use those provisions to release a young person who was a repeat home burglar.³⁵ In addition, the Supreme Court decided in 1997 that convictions of young people that are over two years old cannot count towards a mandatory sentence.³⁶ This distinguishes the provisions for young people from those for adults. There has also been a ruling that a previous conviction for home burglary without a penalty being recorded is not to be regarded as a relevant offence.³⁷ The *Young Offenders Act* was

32 *Criminal Code*, s. 404(b).

33 However, see also below, Paragraphs 2.31 – 2.34.

34 Section 118 (1)(b) of the *Young Offenders Act 1994* provides that the term of detention to which a young person is liable is not longer than the term of imprisonment to which the offender would have been liable if the offender was not a young person.

35 *Submission No. 96*, Ministry of the Premier and Cabinet (WA), pp. 6-7.

36 "*P*" (*A child*) v *The Queen*, Supreme Court of Western Australia, Court of Criminal Appeal, SCL 970580.

37 *Transcript of evidence*, Western Australian Ministry of the Premier and Cabinet, p. 111.

recently amended to enable courts to give credit to juveniles for time spent on remand.³⁸

2.33 There is provision in the *Young Offenders Act* for referral to a juvenile justice team of a young person alleged to have committed,³⁹ or charged with,⁴⁰ or found guilty of,⁴¹ various offences, including home burglaries. The team may dispose of the matter by, for example, specifying conditions to be complied with by the young person.⁴²

2.34 The *Young Offenders Act* makes limited provision for the early release of young persons under supervision.⁴³

2.35 The Minister administering the Criminal Code is bound to review the mandatory sentencing legislation after four years from its commencement, and submit a report to Parliament before 14 November 2001.⁴⁴

Summary

2.36 Although it can be argued that the Western Australian legislation in respect of juveniles is severe, given the length of detention imposed, this severity has been matched to an extent by the safeguards that have been constructed. In a sense, this ‘mandatory’ sentencing is not ‘mandatory’.

Alternatives

2.37 The safeguards, as noted briefly, include a number of provisions such as the conditional release order which can impose a strict regime on individuals even though they are not in detention.⁴⁵ Reference was also made to Juvenile Justice scheme panels which are involved in diversionary programs,⁴⁶ although it was noted that these panels did not meet the needs of indigenous juveniles.⁴⁷

38 Section 119 repealed and substituted by Act No. 29 of 1998.

39 Section 27.

40 Sections 26 and 28.

41 Section 28.

42 Section 32.

43 *Young Offenders Act 1994 (WA)*, Part 8.

44 *Criminal Code Amendment Act (No. 2) 1996 (WA)*, s. 6. See also Dr Constable, *Parliamentary Debates*, 24 October 1996, p. 7224, Second Reading Speech, *Criminal Code Amendment Act (No. 2) 1996 (WA)*; Also Helen Bayes, ‘Punishment is Blind: Mandatory Sentencing of Children in Western Australia and the Northern Territory’, *University of New South Wales Law Journal*, vol. 5 (1), 1999, p. 15.

45 See below, Paragraph 5.65.

46 *Submission No. 87*, Prisoners Advisory Support Service, vol. 4, p. 873.

47 *Submission No. 87*, Prisoners Advisory Support Service, vol. 4, p. 873; *Submission No. 89*, Christian Centre for Social Action, vol. 4, p. 884.

Northern Territory

2.38 The Northern Territory mandatory sentencing legislation for property offences came into effect on 8 March 1997 through amendments to the *Sentencing Act 1995* (NT), which deals with persons of or over the age of 17 years, and to the *Juvenile Justice Act 1983* (NT), which relates to persons under 17 years.

2.39 In contrast to the Western Australian legislation which restricts mandatory sentencing to home burglary offences, the Northern Territory general mandatory sentencing legislation applies to a wide range of property offences listed in schedule 1 of the *Sentencing Act 1995* (NT). The list comprises theft (except when the theft occurred when the offender, not being an employee,⁴⁸ was lawfully on premises at which goods were sold),⁴⁹ criminal damage, unlawful entry to buildings, unlawful use of vessel, motor vehicle, caravan or trailer, receiving stolen goods, assault with intent to steal, armed and unarmed robbery, being armed with intent to enter, taking a reward for the recovery of property obtained by means of crime and possession of goods reasonably suspected to be stolen.⁵⁰ All offences carry a maximum sentence of imprisonment, ranging from life (for robbery while armed or in company and other offences) down to 12 months (for possession of goods suspected of being stolen).

Crimes exempt from mandatory sentencing

2.40 Several witnesses stated that a major problem with mandatory sentencing in both the Northern Territory and Western Australia was that minor examples of property crimes received as severe a penalty as major instances. In the Northern Territory white-collar crimes such as fraud were not included. Shoplifting *per se* was also exempt. The consequences of this were that serious crime could have lesser penalties, and that the legislation was aimed at people from low socio-economic groups:

White collar crime such as fraud and embezzlement is not subject to mandatory sentencing, nor is shoplifting.⁵¹

Adults

2.41 The Northern Territory regime for the sentencing of adults in relation to property offences is contained in section 78A of the *Sentencing Act*.⁵² Sentencing is based on the number of appearances an offender makes before a court to be sentenced in relation to property offences:

48 Theft from an employer was added to schedule 1 by the *Sentencing Amendment Act 1998* (NT), section 21.

49 The Attorney-General at the time (Mr Burke) did not explain in his second reading speech why the legislation did not apply to all thefts.

50 Possession of goods reasonably suspected to be stolen was added to schedule 1 by the *Sentencing Amendment Act 1998* (NT), s. 21.

51 *Submission No. 24*, ATSIIC, vol. 1, p. 197.

52 The scheme in section 78A was amended by the *Sentencing Amendment Act (No. 2) 1999*.

- Where a court finds an offender guilty of one or more property offences⁵³ and the offender has not previously been sentenced for property offences, the court, except in exceptional circumstances, must record a conviction and impose a term of imprisonment of not less than 14 days;⁵⁴
- Where a court finds an offender guilty of one or more property offences and the offender has once before been sentenced for property offences, the court must record a conviction and impose a term of imprisonment of not less than 90 days;⁵⁵
- Where a court finds an offender guilty of one or more property offences and the offender has two or more times before been sentenced for property offences, the court must record a conviction and impose a term of imprisonment of not less than 12 months.⁵⁶

2.42 No such term of imprisonment may be served concurrently with any other term of imprisonment.⁵⁷

2.43 The mandatory sentencing legislation was amended in 1999 to provide an exceptional circumstances clause for first-time adult offenders.⁵⁸ Courts are not required to impose a mandatory sentence if the first-time adult offender establishes the existence of ‘exceptional circumstances’. These are:

- there is a single offence of a trivial nature; and
- the offender made or tried to make full restitution; and
- the offender is otherwise of good character; and
- mitigating circumstances (excluding intoxication and drugs) in the commission of the offence reduce the offender’s blame; and
- the offender cooperated with law enforcement agencies in the investigation of the offence.⁵⁹

2.44 The amendments have been seen as providing an exemption for people who may have a previously good character and have been ‘caught up’ in a one-off event.

53 The Sentencing Act had originally provided that a number of property offences should only be grouped together when they formed part of a single criminal enterprise or were specified in the same information, complaint or indictment. Previous findings of guilt were to be taken into account, even when the offences to which they related had been committed after the property offence for which the person was currently before the court.

54 *Sentencing Act 1995* (NT), s. 78A(1).

55 *Sentencing Act 1995* (NT), s. 78A(2).

56 *Sentencing Act 1995* (NT), s. 78A(3).

57 *Sentencing Act 1995* (NT), s. 78A(6A).

58 *Sentencing Amendment Act (No.2), 1999*, s.16.

59 *Sentencing Act 1995* (NT), s. 78A(6B) and (6C).

Consequently, they have been considered to benefit middle class white people,⁶⁰ those with the funds to make restitution, who are also unlikely to have previous convictions.

Juveniles

2.45 A full range of options is open to a court under section 53(1) of the *Juvenile Justice Act* in respect of a juvenile against whom a first strike property offence is proved. The court, whether or not it proceeds to conviction, may do one or more of the following:

- a) Discharge without penalty;
- b) Adjourn for up to 6 months with a view to discharge without penalty if the offender commits no further offence;
- c) Impose a fine;
- d) Order the offender to be of good behaviour for 2 years;
- e) Order participation in community service;
- f) Order participation in a punitive work program;
- g) Place the offender on probation;
- h) Order detention for up to 12 months;
- i) Order participation in an approved project or program; or
- j) Make such order as it could make if the juvenile were an adult.

2.46 The relevant provisions for the mandatory detention of juveniles are contained in sections 53AE to AG of the *Juvenile Justice Act*. As noted above,⁶¹ for the purposes of the mandatory sentencing legislation for property offences, the term 'juvenile' means a juvenile who has attained the age of 15 years⁶² but not the age of 17 years.⁶³

2.47 For the purposes of a second strike property offender, any order by the court under section 53(1) is to be taken as the first strike, even if it did not involve a conviction.⁶⁴ For the purposes of a third strike property offender, any order by the court under section 53AE, even if it did not involve a conviction, is to be taken as the

60 See Chapter 7, Paragraphs 7.3 -7.4, 7.18 – 7.26.

61 See above, Paragraph 2.4.

62 *Juvenile Justice Act 1995* (NT), s. 53AE(1).

63 *Juvenile Justice Act 1995* (NT), s. 3(1).

64 *Juvenile Justice Act 1995* (NT), s. 53AE(2).

second strike. The effective maximum period of detention in respect of a second or third or subsequent strike is 12 months.⁶⁵

2.48 The severity of the original mandatory sentencing provisions was softened by a 1999 amendment. The original regime required the court to sentence juveniles aged 15 or 16 years to not less than 28 days detention if they were found guilty of a property offence for a second or subsequent time.⁶⁶ The *Juvenile Justice Amendment Act 1999* provides the court with some discretion and flexibility in sentencing second time offenders (but not third time or subsequent offenders). The court may order the juvenile either to serve a period of detention of not less than 28 days or to participate in a diversionary program.⁶⁷ However, some evidence provided to the Committee suggested that diversionary programs were not really operating, were not available in areas which most needed them, or had very rigid qualifications which excluded many people who might have benefited from them:

While there may be a variety of programs designed for particular groups and locations, it is intended that the first program will be based on victim/offender conferencing. However before being accepted into a program, offenders will be required to admit their guilt, accept responsibility for their actions and agree to participate in the program.

Under the victim/offender conferencing program, the offender must meet the victim, apologise, listen to the victim's account of the damage caused by the offence and reach agreement with the victim to make appropriate restitution.⁶⁸

2.49 If the juvenile satisfactorily completes the program, the court may discharge the juvenile without penalty or make any other orders under section 53(1) as it thinks fit.⁶⁹ Such orders include adjourning the matter, imposing a fine, ordering a period of good behaviour, placing the juvenile on probation and ordering the juvenile to participate in any other projects or programs.

65 *Juvenile Justice Act 1995* (NT), s. 53AE(10) provides that the Court must not make an order detaining a juvenile in respect of all the property offences for which the juvenile is being sentenced on a particular day that exceeds –

(a) the sum of the maximum periods of detention that could be imposed if a separate period were imposed in respect of each offence; or

(b) 12 months,

whichever is the lesser.

66 *Juvenile Justice Act 1995* (NT), s. 53AE(2).

67 *Juvenile Justice Act 1995* (NT), s. 53AE(2)(c) inserted by *Juvenile Justice Amendment Act 1999*.

68 The Hon Michael Reed, *Northern Territory Parliamentary Debates*, 1 June 1999, pp. 3427-3428, Second Reading Speech: *Juvenile Justice Amendment Act 1999* (NT). In fact, the Second Reading Speech refers to two Bills, the *Juvenile Justice Amendment Act (No. 2) 1999* (NT) and *Sentencing Amendment Act (No.2) 1999* (NT).

69 *Juvenile Justice Act 1995* (NT), s. 53AE(4).

2.50 If the juvenile fails to complete the program satisfactorily, or is found guilty of other offences committed while the matter is adjourned, the court is required to revoke the order for the program, record a conviction and sentence the juvenile to a period of detention of not less than 28 days.⁷⁰

2.51 The period of detention is not to be served concurrently with any other term of detention.⁷¹ Also, as noted above,⁷² juveniles who turn 17 during a period of detention must be transferred to an adult's prison.⁷³

2.52 The Court may also:

- Impose other orders including punitive work orders;⁷⁴ and
- Order that the detention or imprisonment be served periodically or continuously.⁷⁵

2.53 Convictions incurred by a juvenile prior to turning 15 are not relevant for the purposes of section 53AE of the *Juvenile Justice Act* and convictions incurred prior to a person turning 17 are not relevant for the purposes of section 78A of the *Sentencing Act*.

2.54 The following chart summarises the Western Australian and Northern Territory mandatory sentencing laws relating to property offences.

70 *Juvenile Justice Act 1995* (NT), s. 53AE(5).

71 *Juvenile Justice Act 1995* (NT), s. 53AE(9).

72 See above Paragraph 2.4.

73 *Juvenile Justice Act 1995* (NT), s. 53AG(2).

74 *Juvenile Justice Act 1995* (NT), s. 53AF(1). But note that under subsection (2), such an order cannot be made if its effect would be to release the juvenile from the requirement to actually serve the term of detention ordered under section 53AE.

75 *Juvenile Justice Act 1995* (NT), s. 53AG(1).

QUICK REFERENCE

Western Australia's Mandatory Sentencing Regime for Property Offences

Type of Offence	Offence No.	Penalty
Adults (18 years)	Home Burglary	Third or subsequent offence 12 months' gaol.
Young persons (16 and 17 years)	Home Burglary	Third or subsequent offence 12 months' prison or detention. OR Intensive youth supervision order.

Northern Territory's Mandatory Sentencing Regime for Property Offences

Type of Offence	Appearance No.	Penalty
Adults (17 years)	Wide range of property offences	First sentencing Min. 14 days' gaol. Court does not have to impose mandatory sentence in special circumstances Min. 90 days' gaol. Min 12 months' gaol Second sentencing Third and subsequent sentencing
Juveniles (15 and 16 years)	Wide range of property offences	First appearance Court has wide range of sentencing options Second appearance Min. 28 days detention or juvenile must join a special program. If program completed, court may discharge without penalty. If juvenile fails to complete program, court must order 28 days' detention. Court may also impose punitive work orders. Third or subsequent appearance Min. 28 days' detention.

