MANDATORY SENTENCING IN WESTERN AUSTRALIA & THE IMPACT ON ABORIGINAL YOUTH

Prepared for the Aboriginal Justice Council by Neil Morgan and Harry Blagg (Crime Research Centre) and Victoria Williams (Aboriginal Legal Service of Western Australia (Inc)).

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Authors: Neil Morgan, Harry Blagg (CRC) & Victoria Williams (ALS)

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Further information: Tammy Finlay on 61+ (08) 9229 2801 or facsimile (09) 9229 2800 or via Internal Website http://www.waajc.org.au or electronic mail: ajc@justice.wa.gov.au.

LETTER FROM THE CHAIRPERSON

This review represents the strong concerns of the Aboriginal Justice Council (AJC) regarding the discriminatory nature of the mandatory sentencing legislation in Western Australia. We have continually raised our concerns with both the current and former State governments, but it appears no one is listening. Why? This question is extremely relevant considering the plethora of evidence the state government has at its disposal, which clearly shows the disproportionate impact such laws have on Aboriginal people.

They knew before enacting the legislation that it would negatively impact on Aboriginal youth and five years on the statistics have proven the inevitable. But still the government stands by this legislation claiming it is what the community wants. This may be true, but it is also true that race relations in this country are not something we should be proud of. If politicians relied on the populace view then we would still be living under the White Australia Policy. What we need now is strong leadership and a strong government to repeal the mandatory sentencing legislation and start to address the real causes of Aboriginal over-representation in the criminal justice system.

I urge the government not to let politics or community bigotry force 'non-action' where Aboriginal issues are concerned, but to stand up and do what is legally and morally just. That is to abolish these discriminatory laws.

The following review by the Crime Research Centre clearly supports the AJC's position and I commend the work of all those involved in the research and production of this report.

Glen Colbung
Deputy Chairperson
Aboriginal Justice Council

7 December 2001

FOREWORD

This review was undertaken by staff at the Crime Research Centre, University of Western Australia in collaboration with the Aboriginal Legal Service of Western Australia. The case studies were collected by Victoria Williams of the Aboriginal Legal Service of Western Australia, her contribution, as well as a number of her Aboriginal Legal Service of Western Australia colleagues in metropolitan and regional offices, was invaluable. Crucial, also, was the advice and input from Anna Ferrante, Frank Morgan, John Fernandez, Irene Morgan, Richard Harding, Donella Raye, Dean Collard, Bob Anderson and Cherie Yavu-Kama-Harathunian. We would like to thank the Department of Justice for keeping us in touch with the progress of its review and a wide range of professionals working in and around the justice system, who have commented on the legislation. The process has also benefited from discussion with regional members of the Aboriginal Justice Council of Western Australia and from the ongoing support of Tammy Finlay. Thanks also to Associate Professor Chris Cunneen of Sydney University, Susan Newell of the Human Rights and Equal Opportunity Commission (Sydney) and David Allan (Human Rights and Legal Consultant) for their views. The feedback and comments from students taking units of the Master's in Criminal Justice at the Crime Research Centre on sections of the report was useful and constructive.

The Report is designed to be read as a whole. However, each of the main sections is also written as a relatively self contained contribution. Section 3 ('An Evaluation of Mandatory Sentencing') draws on previously published work by Neil Morgan, including: 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories' (1999) 22 *University of New South Wales Law Journal*, 267-279 and 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' (2000) 24 *Criminal Law Journal* 164-183.

We acknowledge a particular and special debt to the late Glynis Sibosado who commissioned this review. Her passionate and unstinting advocacy for Aboriginal people still shines undimmed as a light to follow. We hope this review will help speed the reforms she so tirelessly advocated.

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1. INTRODUCTION

> To explain the over-representation of blacks behind bars that has driven mass imprisonment in the United States, one must break out of the "crime-and-punishment" paradigm to reckon the extra-penological function of the criminal justice system as instrument for the management of dispossessed and dishonoured groups[1] .

In October 2001, the Northern Territory government fulfilled a key election promise and repealed the Territory's mandatory sentencing legislation[2]. Welcoming the repeal of these oppressive laws, that established mandatory minimum terms of imprisonment for trivial property crimes, the Aboriginal and Torres Strait Islander Social Justice Commissioner noted that, "these laws targeted Indigenous people and have been costly and ineffective in deterring crime."[3] . The repeal of these laws leaves Western Australia as the only Australian jurisdiction still imposing mandatory sentences for property crimes.

This research demonstrates that, like the Northern Territory's discredited laws, Western Australia's mandatory sentencing laws are fundamentally flawed. They lack any coherent justification; they are ineffective in reducing crime; they cause injustice and distort proper legal processes; and they are profoundly discriminatory in their impact on Aboriginal youth.

FOOTNOTES

1 L Wacquant 'The new "peculiar institution": On the prison as surrogate ghetto', (2000). Theoretical criminlogy. 4 (3): 356-375.

2 Juvenile Justice Amendment Act (No.2) 2001 (NT) repeals mandatory sentencing for juvenile offenders, while the Sentencing Amendment Act (No. 3) 2001(NT) repeals mandatory sentencing for property offences for adults.

3 Human Rights and Equal Opportunity Commission, Social Justice Commissioner, 19 October 2001. "Commissioner Welcomes Repeal of Northern Territory Mandatory Sentencing Laws".

1. INTRODUCTION

For government, the retention of the laws in its arsenal of responses to law-breaking, may symbolize its willingness to get tough on crime. However, for Aboriginal Western Australians, the laws symbolize government's willingness to exploit racist sentiments in a search for easy scapegoats and simple solutions. There was never any doubt that – like previous selective incapacitation legislation - the laws would impact disproportionately on young Indigenous offenders. The statistics and case studies in this report illustrate the extent to which the laws have seriously disadvantaged Indigenous youth. Recent statistics from the Department of Justice - assembled as part of its 4 year review of the Act, confirm this: over 81% of the 119 individual juveniles sentenced under the legislation were Aboriginal. Moreover, 61% were from non-metropolitan areas and of these 93% were Aboriginal.[4]

This is an astonishingly high rate of over-representation. On the other hand this outcome was entirely predictable given the tendency of the system to target Indigenous people. Whilst creating further disadvantage for young Aboriginal people, the laws have had no impact on rates of home burglary. Further, they have run counter to the recommendations of the *Royal Commission into Aboriginal Deaths in Custody* ("RCIADIC"), in letter and in spirit: recommendations to which successive governments have claimed to be committed.

There is only one genuinely acceptable option for Western Australia's mandatory sentencing laws: they should be repealed in view of their manifest faults and in a gesture of commitment to Indigenous concerns. The alternative, but less palatable option, is for the minimum period to become a presumptive starting point for sentencers rather than a mandatory minimum, and for the laws to cease to have any application to children under the age of 16.

The laws cannot be allowed to remain in their present form.

4 Department of Justice, Review of Section 401 of the Criminal Code, November 2001, 24-25

2. EXECUTIVE SUMMARY

In November 1996 the Western Australian government introduced three strikes mandatory sentencing laws for repeat home burglars. Five years later the Department of Justice completed a review of these laws (*Review of Section 401 of the Criminal Code*) and on 15 November 2001, the Attorney-General issued a media statement that the present government has no plans to abolish the legislation. However, the findings of this Report, as well as statistics and information provided by the Department of Justice Review, reveal that the mandatory sentencing laws in Western Australia are fundamentally flawed. They lack any coherent justification; they are ineffective in reducing crime; they cause injustice and distort proper legal processes; and they are profoundly discriminatory in impact, especially on Aboriginal youth. The Aboriginal Justice Council of Western Australia ("AJC") is therefore strongly of the view that the laws, like their Northern Territory counterparts, should be abolished.

- From late 1999 to 2001, the Northern Territory's mandatory sentencing laws attracted particular criticism. Western Australian Governments have tended to defend this State's laws on the grounds that they are more flexible and have a more limited impact. However, the Western Australian laws have a far more draconian impact on third strike juveniles than the Northern Territory's laws and a Senate Inquiry criticised the State's attempt to 'prioritise badness'. Further, the NT laws only ever applied to offenders aged 15 or more. The WA laws apply to anybody over the age of 10. With the Northern Territory having abolished its laws, the Western Australian laws are likely to come in for greater national and international scrutiny. [Section 3.2].

- The laws have no consistent rationale. They were launched to unequivocal assertions that they would reduce the rate of home burglary. However, when evidence emerged that they had not achieved any such effect, the previous government claimed that this had never been their purpose and that they had been designed to 'reflect public concern' and to reduce recidivism rates. [Section 3.3].

- The laws have not done anything to reduce the high level of home burglaries in Western Australia. Data to this effect were available by 1998 but the then government declined to reveal them even under direct questioning by a Senate Inquiry in early 2000. The community should be concerned that such a public display of a 'tough on crime' policy has not reduced the number of home burglary victims. It should also be concerned that a State government would either be unaware of readily available evidence or would deliberately choose not to reveal such information. [Section 3.4]

2. EXECUTIVE SUMMARY

- There is no valid evidence to sustain claims that the mandatory three strikes home burglary laws have served to reduce recidivism rates. [Sections 3.4 and Section 5.3]

- Mandatory minimum penalties increase the importance of pre-trial decisions by police and prosecuting authorities. These decisions control the decision to prosecute rather than using alternatives and the choice of charge and, therefore, determine both the nature of the current charge and the extent of a person's prior record. They involve decisions which are less transparent and accountable than judicial decision making.

- Compared with other jurisdictions, there is also a lack of proper safeguards for young people in their dealings with police. [Section 3.6.5, Section 4 and Section 5]

- The legislation is essentially irrelevant to adult home burglars. Initially, the Department of Justice did not establish systems to collate data but its recent *Review* indicates that at least 87 % of those adult repeat offenders that could be identified were sentenced to longer than the required mandatory minimum of 12 months imprisonment, as a matter of normal sentencing discretion. Therefore the legislation is unnecessary to ensure that adult home burglars receive appropriate sentences. [Section 3.5.2]

- Inevitably, the greatest impact of Western Australia's mandatory sentencing laws has been on juveniles and, in particular, Aboriginal juveniles. By 1999, research had indicated that 80% of juveniles dealt with under the laws were Aboriginal. In early 2000, the then government 'corrected' this figure to 74%. The recent Department of Justice *Review* affirms a figure of 81%. This means that four fifths of the three strikes case are drawn from less than one third of offenders appearing in the Children's Court. [Section 3.6]

- The picture is particularly bad in country areas. In its *Review of Section 401 of the Criminal Code* the Department of Justice found that about 70% of the 116 cases in its sample involving Aboriginal juveniles were from country areas. The Aboriginal Legal Service statistics in this report are even higher (83% of 110 cases). When sentenced to detention, young Aboriginal people from country areas are sent to Perth, creating further family and cultural dislocation [Sections 4 and 5].

- Such discriminatory impact cannot be dismissed as 'accidental'. It is the result of two sets of conscious and deliberate decisions. The first is the Parliament's decision to target offences in which it is well-known that Aboriginal youth are over-represented. It was obvious from the outset that the main effect would be on Aboriginal youth. [Section 3.6]

2. EXECUTIVE SUMMARY

- The second factor behind discriminatory impact lies in choices taken by police and prosecuting authorities about the processing of cases. Diversionary options (such as cautioning and Juvenile Justice Teams) do not count as 'strikes'. There is clear evidence that Aboriginal youth are less likely to access diversionary options and more likely to be processed though the courts than non-Aboriginal youth. This evidence is far from new and has frequently been drawn to government attention by the Aboriginal Justice Council, the Crime Research Centre and others. [Section 3.6, Section 4 and Section 5.10]

- The effect of prescribing mandatory minimum penalties is that the courts will seek to interpret the laws in such a way as to allow justice to be done in deserving cases. In Western Australia, the courts have read in the power to use a Conditional Release Order for juveniles. The then government initially reacted angrily to this interpretation; but subsequently, successive governments have disingenuously defended the laws on the grounds that the judiciary has this discretion, which was never intended. [Section 3.5].

- Further discriminatory impact occurs as a result of the operation of early release schemes. An adult three strikes offender could be released on parole after one third of the sentence. A juvenile must serve at least 50% of the sentence in custody and is likely to be subject to more stringent monitoring upon release. Government attempts to defend this have been irrelevant and / or misleading. The situation breaches the spirit of international obligations under which children are to be treated no more severely than equivalent adult offenders. [Section 3.6.2].

- The laws are unjust as they impact mainly on less serious offenders. The Department of Justice's *Review of Section 401 of the Criminal Code* concluded that the laws do target serious offenders because most of the juveniles who received detention under the legislation would have received detention anyway and because they had an average of 21 previous burglary offences. However, this evidence actually serves to reinforce the injustice of the laws. The obvious point is that the more serious offenders would have been sentenced to 12 months detention or more even without the three strikes laws. Consequently, the main impact is inevitably at the lower end of the scale (i.e. those with fewer prior convictions and those involving less serious burglary offences). [Section 3.5.2-3 and Section 5]

- The existence of the Conditional Release Order (CRO) does not provide sufficient flexibility as the choice between a CRO and a minimum 12 months detention is too stark. In some cases, a less severe option than a 12 month CRO might be appropriate. In others, a shorter period of detention might be suitable. [Section 3.6.2 and Section 5]

2. EXECUTIVE SUMMARY

Western Australia's mandatory sentencing provisions are of enormous concern to Aboriginal people. First, the laws are of obvious concern to those young people and their families (however few in number) who are unjustly treated as a result of their capricious impact. Secondly, they have enormous symbolic resonance. It was transparently obvious from the outset that they would be discriminatory in impact and this has simply been confirmed by all the reviews.

The retention of such laws is therefore a national and international embarrassment. They cast a blight on our justice system, raise doubts about the bona fides of paper political commitments to Aboriginal justice issues, and serve to obscure other more thoughtful initiatives.

There is only one genuinely acceptable option for Western Australia's mandatory sentencing laws: they should be repealed in view of their manifest faults and in a gesture of commitment to Indigenous concerns. The alternative, but less palatable option, is for the minimum period to become a presumptive starting point for sentencers rather than a mandatory minimum, and for the laws to cease to have any application to children under the age of 16.

The laws should not be allowed to remain in their present form.

3. AN EVALUATION OF MANDATORY SENTENCING

3.1 INTRODUCTION

Mandatory sentences are not new. They were common in the eighteenth and nineteenth centuries and some have had a long history in Australia. For example, murder still attracts a mandatory life sentence in many jurisdictions. In Western Australia, adults who are convicted of wilful murder must be sentenced to life imprisonment or strict security life imprisonment and those convicted of murder must be sentenced to life imprisonment. It is also not uncommon for road traffic legislation to include mandatory components in the form of minimum fines or minimum periods of licence suspension.[5] However, mandatory penalties have been the exception and have not been considered appropriate for most criminal offences.

In late 1996 and early 1997, Western Australia and the Northern Territory revisited the nineteenth century philosophy of prescribing mandatory penalties for common property offences. Both sets of laws reflect the number of times a person has previously been convicted of a similar offence or offences. Western Australia's laws are built around the baseball analogy of 'three strikes and you're out'[6] and mandate a minimum sentence of 12 months' detention or imprisonment for people on their third home burglary 'strike'.[7] The Northern Territory legislation applied to a wider range of property offences and provided two escalating scales of minimum penalties; one for adults and one for juveniles.

When these laws were first introduced, they attracted academic and professional criticism across Australia[8] but did not attract much adverse comment in the media. However, the media began to take greater interest in the issue from around August 1999, when the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill* was read in the Senate and then referred to the Legal and Constitutional References Committee. The Bill was based on Australia's international obligations under the Convention on the Rights of the Child and aimed to override those parts of the Western Australian and Northern Territory laws which imposed a mandatory term of detention on juveniles.

5 Senate Legal and Constitutional References Committee, Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, March 2000, at para 2.19

6 See A Freiberg 'Three Strikes and You're Out - It's Not Cricket: Colonisation and Resistance in Australian Sentencing' in M Tonry and R Frase (eds), Punishment and Penal Systems in Western Countries, (New York, Oxford University Press, 1999).

7 See Section 3.5 below for discussion of what constitutes a 'strike'.

8 See, especially, the special Forum of the University of New South Wales Law Journal 'Mandatory Sentencing: Judicial Discretion and Just Deserts', January 1999 (reprinted in (1999) 22 UNSW Law Journal 256-314). Many of the articles in that issue were subsequently referred to in the Senate's discussion of the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999. Some of the arguments developed here were sketched in N Morgan, 'Capturing Crim's or Capturing Votes? The Aims and Effects of Mandatories' (1999) 22 UNSW Law Journal, 267. See also D Roche, Mandatory Sentencing, Trends and Issues Paper 138, Australian Institute of Criminology, Canberra, 1999

3. AN EVALUATION OF MANDATORY SENTENCING

In a striking turn of events, mandatory sentencing then became the major national news item for several weeks in early 2000. At the very time that the Senate Committee was travelling around Australia to hear evidence, two cases from the Northern Territory attracted widespread coverage. On 9 February 2000, a 15 year old Aboriginal boy who had been sentenced under the mandatory laws died in the Don Dale Detention Centre, Darwin, apparently by suicide. Exactly one week later, a young Aboriginal man was sentenced to 12 months' imprisonment for stealing $23 worth of biscuits and cordial. Other examples soon rolled out: the 17 year old yo-yo thief and the 18 year old cigarette lighter thief, each sentenced to 14 days; the homeless Aboriginal man sentenced to 12 months for taking a $15 towel from a washing line to use as a blanket; and 14 days each for the woman who poured water over a till in a dispute about a hot dog and the one legged pensioner who damaged a hotel fence. [9]

The Senate Committee reported on 13 March 2000 and recommended that the Bill be passed.[10] It was passed by the Senate on 15 March and in April, the Labor Party introduced an equivalent Bill in the House of Representatives. At this time, even members of the Liberal / National Coalition government were expressing deep concern at the Western Australian and Northern Territory laws. However, on 10 April 2000, the Prime Minister Mr John Howard, announced a deal with the Northern Territory under which money was to be provided to support more diversionary programmes and to increase the age of juveniles to include offenders aged 17 (the 'Howard Deal'). This appeased concerns within the government's own ranks sufficiently to ensure that the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill* would not be enacted by federal Parliament.

During the remainder of 2000 and much of 2001, it appeared that, subject to the changes to the Northern Territory laws, the mandatory sentencing laws in Western Australia and the Northern Territory would remain. In an evaluation in mid-2000, one of us tentatively concluded that, in view of the manifold problems and injustices within the three strikes laws:

9 For a full review, see D Johnson and G Zdenkowski, Mandatory Injustice: Compulsory Imprisonment in the Northern Territory (Sydney: Australian Centre for Independent Journalism,2000)

10 Senate Report, above n 5.

3. AN EVALUATION OF MANDATORY SENTENCING

> [We may] have passed the high point of mandatory sentences in Australia, at least for the foreseeable future. Politically, it is very unlikely that either the WA or NT Governments will move to repeal their laws. It is also unlikely that they will be overridden by Federal laws. However, it does seem likely that the laws in both jurisdictions will be reduced in scope by a process of incremental change. It is also now less likely that other mandatory sentencing schemes will come into force in these or other Australian jurisdictions.[11]

To some extent, the landscape has changed since then:

- In August 2001, the Labor party unexpectedly assumed office in the Northern Territory and in October 2001 repealed the Territory's mandatory sentencing legislation. As a consequence, Western Australia's laws are likely to come under increasing scrutiny even though the new Labor State government has expressed support for the laws.

- It should be noted, in this regard, that the Senate Legal and Constitutional References Committee is again examining a Bill to override the mandatory laws.[12] Whilst this has limited prospects of being enacted by the federal Parliament as a whole, Western Australia's laws are clearly on the national and not merely the State agenda.

- However, just as the Northern Territory government moves away from mandatory sentences, the federal Parliament has itself enacted mandatory sentencing laws. Under its new border control laws; anybody who 'facilitates' the coming to Australia of five or more unauthorised people will face a minimum of five years' imprisonment, as will incoming applicants for refugee status who arrive in a group of five or more and provide misleading information to immigration officials. Repeat offenders face a mandatory minimum of eight years with a non-parole period of at least five years.[13]

This section of the report provides a thematic conspectus on the key 'domestic' issues which have emerged; issues which relate to possible breaches of Australia's international obligations have been fully charted in the report of the Senate Legal and Constitutional References Committee.[14]

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11 N Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' (2000) 24 Criminal Law Journal 164, 182.
12 Human Rights (Mandatory Sentencing for Property Offences) Bill 2000.
13 Border Protection (Validation and Enforcement Powers) Act 2001 (Cth), Schedule 2.
14 Senate Report, above, n 5

3.2 PRIORITISING BADNESS: AUSTRALIA'S THREE STRIKES LAWS COMPARED

In evaluating Western Australia's three strikes home burglary laws, it is important to compare them with the State's first experience with respect to three strikes laws in 1992 and with the Northern Territory 1997 laws.

1. The Crime (Serious and Repeat Offenders)Sentencing Act 1992 (WA)

The *Crime (Serious and Repeat Offender's) Sentencing Act 1992* (WA) ("*Crime (Serious and Repeat Offender's) Sentencing Act*") was only in force for just over two years (from 9 March 1992 to 8 June 1994); but it remains very significant, both in terms of understanding the evolution of the current laws and in terms of the research findings to which it gave rise.[15] The Act specifically targeted 'hard core' young offenders involved in high-speed pursuits in stolen vehicles.[16] It stated that if a 'repeat offender' was convicted of a prescribed offence of violence, that person was to be sentenced to serve at least 18 months in custody, to be followed by mandatory indeterminate detention. A 'repeat offender' was a person who had, over the preceding 18 months, accumulated three 'conviction appearances' for prescribed offences of violence or six conviction appearances for other prescribed offences.[17]

2. Western Australia's Three Strikes Burglary Law

Western Australia's three-strikes burglary laws form part of a package of changes which came into force on 10 November 1996. Prior to this, there was just one offence of burglary carrying a maximum of 14 years' imprisonment. There are now two other, more serious, forms of burglary. Burglary of 'a place ordinarily used for human habitation' ('home burglary') carries a maximum of 18 years' imprisonment.[18] 'Aggravated burglary' carries a maximum of 20 years and covers a wide range of situations. These include the use of violence, circumstances where violence appears likely or simply being in company with another person.[19]

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15 See R Harding (ed.) Repeat Juvenile Offenders: The Failure of Selective Incapacitation in Western Australia, 2nd ed, March 1995, University of Western Australia, Crime Research Centre. This provided the first systematic review of many of issues to which this Report refers, including the interpretation and application of the laws, deterrence and constitutional issues.

16 The Government originally intended that the Bill would apply only to juveniles. However, it extended the laws to adults in an effort to cocoon the laws from criticism that they breached Australia's international obligations under the Convention on the Rights of the Child. See M Wilkie, "Crime (Serious and Repeat Offenders) Sentencing Act 1992: A Human Rights Perspective' (1992) 22 UWA Law Review 187.

17 Criminal Code, s 40

18 Criminal Code (WA) s.401

19 They include being 'in company', being armed or pretending to be armed; doing bodily harm and threatening to do injury

3. AN EVALUATION OF MANDATORY SENTENCING

If a 'repeat offender' is convicted of a home burglary, the court must impose a custodial sentence of at least 12 months' duration.[20] A 'repeat offender' is one who has previously been convicted of a home burglary and 'subsequent to that conviction again committed and was convicted of' such an offence.[21] In other words, the 12 month minimum applies to third and subsequent 'strikes'. Four points deserve emphasis:

- The issue is not the number of convictions; the laws are only triggered where the person shows a pattern of further offending after being convicted of previous offences. This means that the person may have more than three actual convictions.

- At the time the laws were introduced, the political and media talk was of 'home invasions', conjouring up images of violent attacks on vulnerable people in their homes. However, any home burglary, however minor, counts as a strike (and there is no need to prove that any of the offences were 'aggravated burglaries').

- Parliament intended that an immediate custodial sentence would truly be mandatory and made a concerted effort to close potential loopholes. Thus, the legislation gives a broad definition to the word 'conviction' to include cases where no conviction was recorded.[22] It states that the law has a retrospective effect in the sense that it applies 'in respect of offences committed at any time and to convictions recorded at any time.'[23] It also prohibits the courts from imposing a suspended sentence of imprisonment.[24]

- Some detailed issues of interpretation are considered later but one matter has assumed particular importance and must be noted here. In the case of juveniles (those under 18), the courts have held that, when imposing a sentence of detention, they have the power to order the person's release under a Conditional Release Order("CRO") rather than requiring the sentence to be served immediately.[25] According to the recent Review by the Department of Justice this power was exercised in only a small percentage of cases (22 out of 143 cases). Although our research identified a higher proportion, the CRO option is clearly of limited application [26]

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20 Criminal Code (WA) s 401(4)
21 Criminal Code (WA) s 400(3)
22 Criminal Code (WA) s 400(4); discussed below
23 Criminal Code Amendment Act (No2)1996 WA, s.4(3)
24 Criminal Code (WA) s 401(5)
25 Young Offenders Act 1994 (WA) ss.99-101; see also below.
26 Department of Justice, above n 4, 24 and see below in Section 5.2. and also section 3.6. It is noted that the sample considered in this report includes cases up to August 2001 whereas the Department of Justice only considered the first four years after the laws were introduced

3. The Northern Territory's Laws

The Northern Territory's laws came into force on 8 March 1997[27] and applied to a wide range of property offences. These included stealing (other than shoplifting), robbery, criminal damage, unlawful entry, unlawful use of a motor vehicle, receiving stolen property and possession of goods reasonably suspected of being stolen. Unlike Western Australia, the laws prescribed a different regime for adults as opposed to juveniles. The Western Australian and Northern Territory laws are compared in Table One below but the Northern Territory laws must first be described in more detail.

(a) Adults

The legislation provided escalating penalties according to the number of strikes:

First Strike: For the first conviction for a prescribed offence, the court was required to impose a minimum of 14 days' imprisonment unless 'exceptional circumstances' existed. The exceptional circumstances provision came into force on 4 July 1999. It was narrow in scope, requiring five conditions to be satisfied:

- a single offence of a trivial nature
- the offender made or tried to make restitution
- the offender was otherwise of good character
- there were mitigating factors that significantly reduced the person's culpability and demonstrated that the offence was an aberration from normal behaviour
- the offender co-operated with law enforcement authorities in the investigation of the offence.

Not surprisingly, this has been tagged the 'white middle class escape clause'. [28]

Second Strike: Where a person was convicted of a prescribed offence and had 'once before been found guilty' of such an offence, the court was required to record a conviction and also to impose a minimum of 90 days' imprisonment.

Third and Subsequent Strikes: On the third or subsequent occasion, a minimum of 12 months' imprisonment applied.

27 They were amendments to the Sentencing Act 1995 (NT) and are found in sections 78A-B
28 See N Morgan, supra, n.11.

(b) Juveniles

Under the general laws of the Northern Territory, juveniles are those aged between 10 and 17. However, the mandatory sentencing laws applied only to those aged between 15 and 17.

First Strike: In the case of first strike juveniles, courts had a range of sentencing options. These included fines, supervised orders (such as community service or probation) and unsupervised options (such as good behaviour bonds and discharges).

Second Strike: Second strike juveniles had to serve a minimum of 28 days' detention unless they were ordered to attend a diversionary programme. The diversionary option was introduced in July 1999. If the offender successfully completed a programme, the court was able to discharge the person.[29] If it was not completed, the 28 day minimum applied. However, diversion could only operate if the Minister had issued an executive order to establish a specific scheme for the place where the court was sitting. There were many places, especially in more remote areas, where there was no designated scheme.[30]

Third and subsequent strikes: Juveniles on a third or subsequent strike were subject to a mandatory minimum of 28 days' detention, without the option of diversion.

4. The Laws Compared

One of the key strategies of the then Western Australian government in evidence to the Senate Inquiry in early 2000 was to try to distance the State's laws from those of the Territory. The government argued that Western Australia's laws are more flexible and have a far more limited impact.[31] However, the Senate Committee Report concluded: 'we are comparing bad with bad and we are trying to prioritise badness.' In any event, the then government's comparisons were altogether too simplistic and grossly misleading. As the following table shows, the Northern Territory laws were broader in some respects but the Western Australian laws have a far more draconian impact on third strike juveniles.

29 Technically, it was still able to impose detention.

30 D Johnson and G Zdenkowski, above n 9, 28 describe diversion as 'more illusory than real'. See also Senate Inquiry, above n 5, at 2.48. There was no diversion scheme on Groote Eylandt in January 2000, when the 15 year old boy who later died in custody was given 28 days' detention.

31 See the then Western Australian Government's written submissions to the Senate Inquiry (Volume 5 of the Written Submissions: Submissions 96 and 96A). Submission 96A included a table which was said to be designed to help 'appreciate the major differences' but which was highly selective I in its coverage and designed to highlight the excesses of the Northern Territory laws. See also the oral submissions of 3 February 2000.

3. AN EVALUATION OF MANDATORY SENTENCING

	Northern Territory	Western Australia
What Offences?	A range of property offences including stealing; robbery; criminal damage; unlawful entry and offences relating to receiving property which is stolen or suspected of being stolen (but not including fraud, forgery etc).	Burglary of a place 'ordinarily used for human habitation' ('home burglary').
Adults	*First Strike*: minimum 14 days, unless 'exceptional circumstances' (narrowly defined) existed. *Second Strike*: minimum 90 days. *Third Strike*: minimum 12 months.	Only applies to Third strike offenders:- minimum 12 months imprisonment.
Juveniles	Applied only to those aged 15 to 17. *First Strike*: Normal Range of Sentencing Options applied. *Second Strike*: minimum 28 days detention unless a diversionary programme was available to the sentencing court *Third Strike:* minimum 28 days.	Applies to all children (aged 10 to 17) Third Strike offenders are subject to a minimum of 12 months detention. (Diversions do not count as strikes) However, the Children's Court has ruled that it has the power to use a Conditional Release Order.

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The table shows that in three respects, the Northern Territory laws were broader:

- They applied to a much wider range of offences.
- They applied to first strike adults and second strike juveniles, whereas the Western Australian laws apply only to third strike offenders.
- In dealing with third strike juveniles, the Western Australian courts have read in the power to impose a CRO. The Northern Territory courts had no such option.

However, this should not be allowed to obscure the fact that the Western Australian laws are far more draconian than the Northern Territory laws in terms of their impact on third strike juveniles.[32]

- The Western Australian laws apply to offenders of all ages (including, for example, 10 or 11 year olds); the Northern Territory laws were limited to those aged 15 and over.
- The Northern Territory laws established a regime for juveniles which were markedly less severe than that which applied to adults. In Western Australia, the same rules apply (except that juveniles may be given a CRO in exceptional circumstances).
- Third strike juveniles in the Northern Territory faced a minimum of 28 days' detention. However, third strike juveniles in Western Australia face a minimum of 12 months unless a CRO is made.

32 H Bayes, "Punishment is Blind: Mandatory Sentencing of Children in Western Australia and the Northern Territory" (1999) 22 UNSW Law Rev, 286

3. AN EVALUATION OF MANDATORY SENTENCING

Although the data are unreliable,[33] it does seem that significantly more offenders have been caught by the Northern Territory laws. The then Western Australian Government also ran the argument that three strikes laws have had minimal impact in that they constitute only 0.5% of cases in the Children's Court. It has described the laws as 'a small component of a progressive juvenile justice system that emphasises the needs of young offenders.'[34] In making these arguments, it has pointed to the State's Aboriginal Justice Plan and to various multi-agency intervention programmes which target underlying issues relating to the over-representation of Aboriginal people in the justice process.[35] In a similar vein the current Attorney-General has stated that "only a tiny fraction of juvenile offenders were being convicted under the mandatory sentencing laws".[36]

However, as this Report shows, the truth is that mandatory sentences are not a 'component' of a progressive system but are anathema to one. It is particularly disingenuous and distasteful to use more progressive practices based on a supposed commitment to reducing the rate of Aboriginal imprisonment to defend laws which have a profoundly discriminatory impact.[37]

33 See below section 3.6.
34 Western Australian Government Submission 96 to the Senate Inquiry, above n 32 at 1 and 6. See also oral submissions, above n 32.
35 Ibid.
36 The Hon. Jim McGinty , Media Statement "Review Shows Mandatory Sentencing Laws Target Chronic Offenders", 15 November 2001 can be accessed through http://www.mediastatements.wa.gov.au/me
37 See below sections 3.6 and 5.

3.3 SHIFTING SANDS: WHY MANDATORY MINIMUM PENALTIES?

This section traces the remarkable twists and turns which have taken place in official statements on the rationales for mandatory sentences. The next section examines the evidence as to how far the laws have met their professed aims.

1. Western Australia

The *Crime (Serious and Repeat Offenders) Sentencing Act* was launched to the bold claim that it would 'excise hard core offenders from society'. This 'rather violently-expressed version of ... selective incapacitation'[38] was bolstered by assertions that it would also have a general deterrent effect. It soon became clear that claims for selective incapacitation were unfounded and 'the Government spokesman next hitched his fortunes to the notion of deterrence.'[39] Research soon disproved these claims as well[40] and, in 1994, after losing office, members of the former Labor Government conceded that the laws had not worked and had been a mistake.[41]

The failure of the 1992 legislation appeared, from 1993 to mid-1996, to have exercised something of a calming influence on Western Australia's justice policies. The new Coalition Government set about reforming the State's antiquated sentencing laws in a far more rational and principled manner. The *Young Offenders Act 1994* (WA) ("Young Offenders Act") formalised a range of diversionary schemes (police cautioning and juvenile justice teams) and new sentencing options for juvenile offenders. It also enacted general principles of juvenile justice and sentencing which directly reflect Australia's obligations under international instruments such as the Convention on the Rights of the Child.[42] In the case of adults, the *Sentencing Act 1995* (WA) ("Sentencing Act") provided a better range of non-custodial options, in an attempt to reduce the use of imprisonment, and also entrenched proportionality as the overriding sentencing principle.[43]

38 R Harding, above, n 16, 5
39 Ibid, 6
40 See below section 3.4
41 R Harding, above, n 16
42 See especially sections 6, 7 and 46
43 N Morgan, 'Non Custodial Sentences Under WA's New Sentencing Laws' (1996) 26 UWA Law Review, 364.

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The three strikes burglary laws were proclaimed, in the run up to a State election, on 10 November 1996. They had been devised over the previous 3-4 months, against the backdrop of "the community's concern about the prevalence of home invasion offences ... and the devastating effect which such offences have on victims."[44] The claims for deterrence and incapacitation were less extravagant than in 1992 but still featured prominently:

> "The aim of the present Bill is to deter burglars and incapacitate those who commit such offences by providing for much tougher penalties."[45]

The three strikes laws cut directly and explicitly across the principles of the *Sentencing Act* and the *Young Offenders Act*, especially with respect to proportionality in sentencing and parsimony in the use of custodial sentences.

As evidence has emerged that burglary rates were unaffected by the three-strikes laws, [46] official policy statements have sought to distance the laws from claims of general deterrence. Instead, the official focus is now predominantly on 'community concern'; in other words, public disquiet about certain types of crime and their impact on victims. In evidence to the Senate Inquiry, the government spokesman even proclaimed, contrary to his Minister's views quoted earlier, that general deterrence had never been an objective:

> "The background to the three strikes legislation is that ... 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 ....*The legislation was not introduced as a means of deterring offenders from committing offences; it was purely to indicate the very serious nature of the offence*."[47]

The Senate Committee was singularly unconvinced:

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44 P Foss, Ministerial Statement, 22 August 1996; http://www.wa.gov.au/cabinet/mediast/dg-35
45 Ibid
46 See below section 3.4 and also Department of Justice , above n 4, 29-31
47 Oral evidence, above n 32, emphasis added

> "... the objective of the Western Australian legislation appears clearly to be deterrence."[48]

Although the Senate Inquiry had been told in no uncertain terms that the overriding official rationale was community concern, the then government produced another rabbit out of the hat when the Senate Report was handed down. This time, it claimed that mandatory sentences can reduce recidivism rates and help to 'turn around the lives of repeat offenders.'[49] This argument has yet to be fully articulated but it appears to suggest either that mandatory sentences operate as a more effective deterrent to individual offenders or that they have greater rehabilitative potential. As such, it provided another possible benchmark for evaluation. However, it may be noted that the recent Department of Justice review chose not to pursue this line of inquiry – perhaps conceding implicitly that the data were fundamentally flawed.[50]

2. The Northern Territory

The Northern Territory's laws involved the mandatory imprisonment of first time property offenders and were not justified on the basis of selective incapacitation. Indeed, the Territory's Chief Minister had implicitly rejected any such rationale:

> "... when it comes to recurrent and habitual criminals I believe mandatory sentencing has sort of run its race. And certainly, in terms of should it apply to 4th, 5th and 6th offences, I think it's well past its run by then and really we need to put a finite time on mandatory sentencing and those sorts of things."[51]

However, at the time of their introduction, the Territory's laws were said to reflect a philosophy of deterrence:

> "I do believe that the deterrent element of sentencing has validity ... it is ... the government's hope that the legislation will lead in time to the reduction in the crime rate ..."[52]

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48 Senate Report, above, n 5, para 2.23
49 P Foss, Ministerial Statement 'Government will not change three strikes legislation' 14 March 2000, can be accessed through http://www.wa.gov.au/cabinet/mediast
50 See below at section 3.4.3 for a critique of the figures provided by the Government
51 Quoted in D Johnson and G Zdenkowski, above n 9, 22
52 Ibid, 20

It is striking that, as in Western Australia, policy statements have sought to distance the laws from deterrence and to shift the focus to community concern.

> "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."[53]

Mr Shane Stone, the former Chief Minister and architect of the laws put it more brutally and perhaps more honestly:

> "Territorians, like most Australians, are sick and tired of the grubs who break into their homes, steal their cars and anything else that is not nailed down."[54]

As in Western Australia, the Senate Committee's criticisms saw a further twist. However, unlike Western Australia, the Territory Government did not defend the laws by reference to recidivism rates or their merits. Instead, the former Chief Minister mounted the rather plaintive argument that it was costly and difficult to set up alternative programmes in the Territory (the cost of prison beds not, apparently, being a problem). He requested Federal Government assistance for diversionary schemes and the Prime Minister, who was attempting to quell mounting disquiet from within his own party room, quickly acceded to this request. [55]

3. Summary

There are some interesting common threads to this saga. All three sets of legislation started life to strong utilitarian claims that they would reduce crime, especially through general deterrence and the Federal Attorney General used the theme of deterrence in order to defend the laws against international criticism.[56] However, the Western Australian and the former Northern Territory Government made no such claims. The fact that they have been forced to duck and weave and to try to shift the focus is tantamount to an acceptance of the evidence presented in the next section; namely, that none of the laws has achieved any demonstrable effect on crime rates. As deterrence has faded, the purported justifications for mandatory sentences have become increasingly rhetorical; 'community concern'; 'don't forget the victims' and 'no money for alternatives.'

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53 Senate Report, above n 5, para 2.24
54 'Victims not Offenders Deserve a Break', The Australian, 17 February 2000, 10-11
55 See The Australian newspaper for 4-6 April 2000.
56 Media Release, D Williams QC 'CERD Report Unbalanced' (26 March 2000)

3.4 DETERRENCE, INCAPACITATION, RECIDIVISM RATES AND PUBLIC CONCERN: HAVE THE LAWS MET THEIR OBJECTIVES?

It is impossible conclusively to measure the impact and effectiveness of the Western Australian and Northern Territory laws for two reasons:

- First, as the rationales shift, so do the benchmarks for evaluation. The then Western Australian Government bluntly told the Senate Inquiry that the forthcoming review of the three strikes laws would 'not be judging the success of the legislation by the extent to which it deters offenders'. [57] Instead, as we have seen, it said that the laws were intended 'purely to indicate the very serious nature of the offence.' However, this involves nothing more than a circular and self-fulfilling prophecy. The laws achieved this purpose simply by their enactment and further evaluation would be pointless. Since the Attorney General insisted that it will take 18 months to conceptualise and conduct a proper review,[58] it must be assumed that there are other issues at stake.

- Secondly, neither Western Australian nor the Northern Territory set up clear systems and procedures for the identification and tracking of offenders so that the impact of the laws could be readily and thoroughly evaluated. The situation is particularly acute in the Territory, where Johnson and Zdenkowski found:

> "It has not been possible to obtain comprehensive data with respect to efficacy and cost. The lack of detailed official crime statistics …, the unavailability of satisfactory statistics relating mandatory sentences …[and] the lack of freedom of information legislation … hampered this [research]"[59]

The situation is not quite as bad in Western Australia, where there are good crime statistics. However, there are very limited figures on the use of the three strikes law for adults and only recently has data been published with respect to juveniles.[60]

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57 Oral evidence to the Senate Inquiry, 3 February 2000, above n 32
58 K Middleton, 'WA rejects rush on jail law' The West Australian, 13 April 2000, 7
59 D Johnson and G Zdenkowski, above n 9, 97
60 Department of Justice, above n 4. Note that there are only statistics in relation to adults who appear to be third strikers rather than any data as to how many adults have actually been sentenced under the three strikes laws

3. AN EVALUATION OF MANDATORY SENTENCING

Despite these problems, an important and growing body of evidence does exist with respect to the effectiveness of the laws.

1. General Deterrence[61]

It is notoriously difficult to evaluate the deterrent effect of harsher sentences. A recent Cambridge University study notes that the ideal research project would include:

> "(1) the use of variables that adequately distinguish severity from certainty of punishment, (2) adequate controls for other possible influences on crime rates; and (3) satisfactory methods of examining whether and to what extent changes in criminal justice policies actually alter potential offenders' beliefs concerning the risks of punishment."[62]

The evidence presented here does not fully meet all these ideal research criteria but it should be stressed that the basic preconditions were present in all three cases and that they were present to an unusually high degree:

- First, the laws were based on an unambiguous *increase in sentence severity*.
- Secondly, whilst there could be no certainty of detection, there was *greater certainty of a custodial punishment* once cases reached the courts because the laws were mandatory and not discretionary.
- Third, on each occasion there was an enormous amount of media publicity prior to the laws. In both Western Australia and Northern Territory in 1996-1997, this was backed up by hard-hitting official poster campaigns.[63] Consequently, although we have no qualitative research into potential offenders' perceptions, there should have been *widespread knowledge about the new laws*.
- Related to this, the laws targeted specific types of offences and their impact was therefore potentially more readily measurable.

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61 There is no reference in the Senate Report to the data discussed here. However, the Report is critical of the fact that data was not provided, especially from the Northern Territory; see above n 5, especially chapter 2 and para 8.5.

62 A Von Hirsch, AE Bottoms, E Burney and P-O Wikstrom, Criminal Deterrence and Sentence Severity: An Analysis of Recent Research, (Oxford, Hart Publishing,,1999). For earlier surveys, D Beyleveld, A Bibliography on General Deterrence, (Farnborough, Saxon House, 1980) and A Blumstein, J Cohen and D Nagin (eds.), Deterrence and Incapacitation, (Washington DC, National Academy of Sciences, 1978); F Zimring and G Hawkins, Deterrence: The Legal Threat in Crime Control, (University of Chicago Press, 1973).

63 M Yeats, 'Three Strikes and Restorative Justice in Australia' (1997) 8 Criminal Law Forum 369, at 377

3. AN EVALUATION OF MANDATORY SENTENCING

There is compelling evidence from Western Australia that neither the 1992 nor the 1996 laws achieved a deterrent effect. The *Crime (Serious and Repeat Offenders) Sentencing Act* targeted young people involved in high speed pursuits in stolen cars. The then Labor Government initially portrayed the laws as a success by pointing to a decline in the number of car chase deaths. However, Broadhurst and Loh demonstrated that this decline was attributable to factors other than the new laws, including changes in police pursuit practices.[64] They argued that the best measuring post for the laws was the number of car thefts, the trigger for pursuits. They discovered that the rate of such offences had been declining prior to the new laws but had increased sharply upon their introduction.

In evidence to the Senate Inquiry, the then Western Australian government did not provide statistical evidence with respect to the impact of the three strikes laws on burglary rates. Instead, they sought to divert attention every time questions were asked on this. The only statistics on crime rates to which it referred were Australian Bureau of Statistics ("ABS") figures from the 1993 National Crime and Safety Survey which showed that Western Australia had the highest rate of home burglaries in the country. It said that there were no more up to date figures. In fact, another ABS Crime and Safety Survey had been published in August 1999. There are also other readily accessible sources based on police data, and these are set out in Table One and Figure One

There are two possible explanations for the then government's stance, neither of which is edifying. The first is that their spokespersons were simply unaware of the evidence and unprepared. The second is that they were fully aware of the evidence but were being deliberately evasive, on instructions from the government. The second is the more plausible explanation.

64 R Broadhurst and N Loh, 'Selective Incapacitation and the Phantom of Deterrence' (1993) 26 ANZ Journal of Criminology 251, reprinted in R Harding (ed), above n 16

3. AN EVALUATION OF MANDATORY SENTENCING

Table One: Burglary Offences Reported to the Police in Western Australia 1991-1998: Annual Figures[65]

	1991	1992	1993	1994	1995	1996	1997	1998
Dwelling: *number*	29,497	30,030	32,798	37,596	41,722	39,210	39,913	42,356
Dwelling: *rate per 1,000 dwellings*	48.7	48.3	50.9	56.5	60.9	56.1	55.9	58.1
Dwelling: *rate per 100,000 population*	1,802.9	1,811.9	1,956.5	2,209.1	2,409.4	2,271.6	2,219.7	2,312.8
Other premises: number	26,728	22,606	20,304	18,592	19,309	16,850	16,642	17,345
Total burglaries	56,225	52,636	53,102	56,188	61,031	56,060	56,555	59,701

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.[66] Even more significantly, the annual burglary rate did not decline with the new laws: it remained constant during 1997 and increased in 1998.

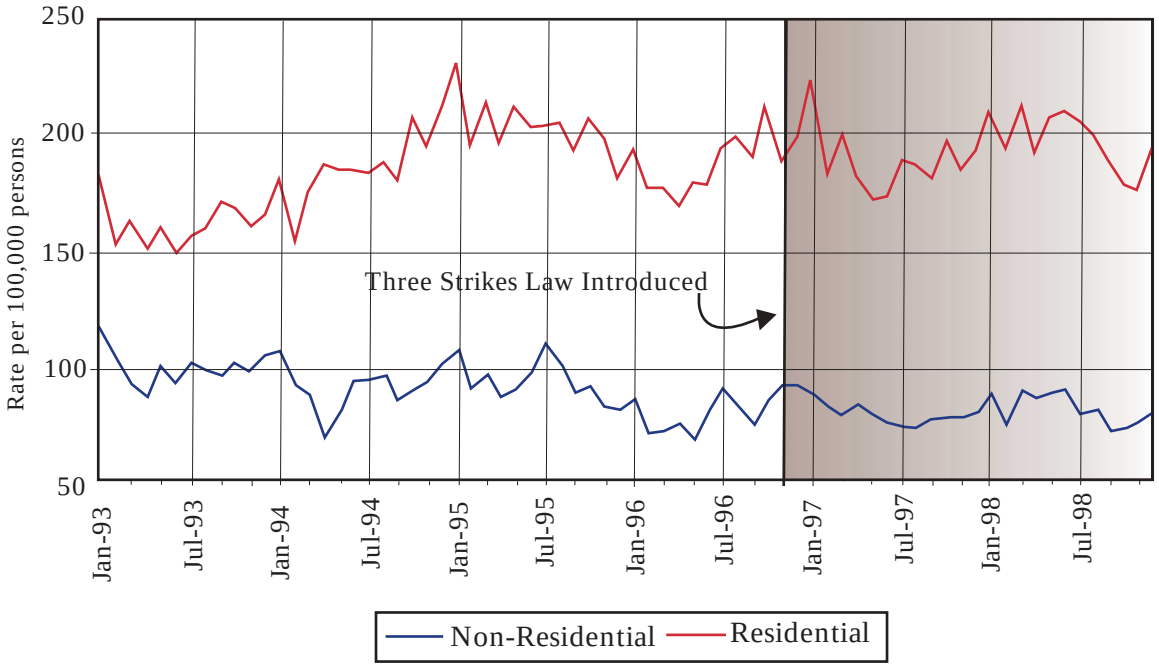
65 Figures taken from AM Ferrante , NSN Loh, and J Fernandez, Crime and justice Statistics for Western Australia : 1997, Crime Research Centre, University of Western Australia , December 1998

66 Police Minister R Wiese, Ministerial Media Statement, 8 November 1996; http://www.wa.gov.au/cabinet/media-ast/dg-46.

Figure One shows the trends on a monthly basis. The most striking observation is that there was a leap in residential burglaries immediately after the introduction of the new laws, at precisely the time when the greatest reduction would have been expected. In fact, the figure for January 1997 was the second highest monthly figure on record. This rise was followed by a decline for a few months, and then another peak in January 1998. The other interesting point is that non-residential burglary rates, to which traditional sentencing laws applied, fared just as well – in fact, they did rather better than residential rates.

The irresistible conclusion is that the three strikes home burglary laws had no deterrent effect. Burglary rates appear to have a lifecycle that is to some extent seasonal and that operates quite independently of punishment levels. These findings are in line with other research studies[67] but are important in both national and international terms because, as in 1992, the preconditions were such that a deterrent effect might reasonably have been anticipated.

Figure One: Burglary Offences Reported to the Police in Western Australia 1993-1998: Monthly Figures



67 See Von Hirsch et al, above n 63.

2. Selective Incapacitation

Selective incapacitation of serious repeat offenders is no longer touted as a major justification for three-strikes laws but it is important briefly to record the main reasons why it has faded from prominence. Leaving aside the philosophical objections to a strategy of selective incapacitation (which have not always proved a sufficient deterrent to policy makers), there are two main factors. First, all criminal offences are based on broad offence definitions and therefore embrace a wide range of behaviour. This inevitably means that mandatory sentencing schemes will catch a large number of trivial offences in their net. Western Australia's 1992 laws were specifically justified on grounds of incapacitating hard core juvenile offenders in the metropolitan area but actually impacted primarily on older Aboriginal men in remoter parts of the State who had records for public disorder and alcohol-related assaults against police.[68]

Secondly, although mandatory penalties tend to have a dramatic impact in terms of the punishment of offenders convicted of relatively trivial offences, they have little or no impact on more serious offenders. This is for the obvious reason that serious offenders receive long sentences as a matter of the normal sentencing process and quite apart from the mandatory laws.[69] This is consistent with the findings of the Department of Justice Review. It found that in the Petty Sessions court 87.5% of adults who had three strikes received more than the mandatory minimum term of 12 months' imprisonment.[70]

It is clear, therefore, that broad offence definitions tell us comparatively little – and that this is especially so in the context of property offences. Consequently, mandatory sentencing schemes based on offence definitions cannot legitimately claim to be tools for selective incapacitation.

3. Reducing Recidivism Rates

In March 2000, the Western Australian Government suggested that recidivism rates could be used as a measure of success. The then Attorney General provided the following figures in a formal Parliamentary statement in which he defended the State's laws against the Report of the Senate Inquiry. The figures purported to show that the three strikes laws are generally effective in reducing recidivism amongst juveniles; and, more particularly, that detention is more successful than a CRO:

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68 See N Morgan, supra n 5.
69 See also below
70 Department of Justice, above n 4, 20-21.Note that the results were similar for the District Court

3. AN EVALUATION OF MANDATORY SENTENCING

> "The fact that only seven out of 57 three strikes juveniles have been resentenced under the same laws suggests that in respect of serious offenders, the law has been effective. I also draw … attention … to the fact that only one-twelfth of juveniles who were detained under the three-strikes provisions repeated their offending behaviour. In comparison, one third of those juveniles who were given conditional release orders re-offended and were again sentenced under the three-strikes provisions. These statistics show a significantly higher incidence of recidivism by juveniles who received community supervision than by juveniles who were detained."[71]

It seems likely that these figures were based on research which had been specifically directed by the government in an attempt to find 'hard evidence' of the 'success' of the laws. They make an interesting contrast with the government's refusal to provide the evidence about deterrence.

It is extremely difficult to develop statistically pure research projects on the relative effectiveness of different sentences and this is not the place for detailed methodological criticism. However, even at a very simple level, the recidivism figures are woefully inadequate indicators of 'success'.

The benchmark for evaluation. It is said that only seven offenders out of 57 were 'resentenced under the same laws' and that only one-twelfth of those detained 'repeated their offending behaviour'. In other words, the benchmark is whether the offenders were again caught *by the three strikes burglary laws*. This is an incomplete and flawed measure which fails to take account of the obvious fact that some offenders will have been convicted of other offences.

71 P Foss, Statement to the Legislative Council, 15 March 2000 – Hansard, Western Australia, Legislative Council, 4977.

Identifying the sample. It is extremely difficult accurately to determine the number of three-strikes cases. For example, it may not be clear whether an offender who was sentenced to twelve months' detention was given this sentence because of the mandatory sentencing laws or by virtue of normal sentencing principles. These difficulties are evident from the different figures that have been used. The statement refers to 57 cases but in 1998, the former President of the Children's Court wrote that there had already been 58 cases in the Children's Court.[72] In its evidence to the Senate Inquiry, the Government referred to 88 up to the end of 1999.[73] Presumably, the sample of 57 comprises some or all of those who have already been released.

Sample size. The sample is only 57 cases and, by my calculations, no more than 6 of these involved a CRO.[74] It is premature; to say the least, to draw conclusions on the relative success of custody and CRO on the basis that two out of six people 'repeated their offending behaviour'.

Over what period is success to be judged? Proper evaluation of the effectiveness of different sentences requires a clear statement of the period over which success (or failure) was measured, and this period must obviously be consistent for all the options that are being compared. The figures do not appear to take account of this variable but refer simply to the number of offenders who have been reconvicted.

What are the points of comparison? The statement notes that only a small proportion of three strikes offenders were again sentenced for home burglary after being sentenced to detention. However, to be of value, there must be some points of comparison. Assuming that the benchmark is being 'resentenced for the same offence', the most obvious would be:

- the rate at which other home burglars are resentenced for home burglary (i.e. those who currently sentenced under normal sentencing principles and all those sentenced prior to the three strikes laws)
- the rate at which other offenders are 'resentenced under the same laws', including burglars of business premises, robbers, arsonists and fraudsters.

72 M Yeats, above n 64
73 In his Parliamentary statement, the Attorney General said there had been 92 cases in that time (the Government's written figures to the Senate Inquiry referred to 83 cases to October 1999).
74 The Government told the Senate Inquiry that 9 of the 88 offenders (ie 10%) were given a CRO

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As they stand, and judged on their own terms, the statistics cannot be regarded as indicative of the success of the Western Australian laws, either in general or in terms of the greater efficacy of detention as opposed to CRO.

It is interesting to note that Department of Justice did not provide any further statistics in relation to recidivism rates in its recent review of the three strikes laws. However, the statistics provided in Section 5.3 of this report indicate that there is no real difference between the likelihood of re-offending after being placed on a CRO or being placed into detention.

4. Summary

The Western Australian and Northern Territory laws have already achieved the self-fulfilling prophecy of reflecting community concern at certain types of offences. However, despite the essential preconditions for deterrence being present, there is not a skerrick of evidence that they achieved a deterrent effect. Laws of this type do not (and cannot) serve as a tool for selective incapacitation and there is no statistically valid evidence to sustain claims that they reduce recidivism rates.

3.5 SYSTEMIC IMPACTS: JUDICIAL RESPONSES, UNJUST SENTENCES AND THE REDISTRIBUTION OF DISCRETION

There is clear evidence that three strikes laws distort the criminal process and just sentencing outcomes. The removal or restriction of judicial discretion does not mean that discretion disappears or that the criminal process becomes more certain. In fact, it leads to a 'redistribution' of discretion from the courts to pre-trial decisions by police and prosecuting authorities and to judges being forced to explore avenues to inject some flexibility into the system. This section discusses:

- Judicial responses to mandatory sentences;
- The distortions which the three strikes laws cause in terms of justice in sentencing;
- The increasing acceptance, even by advocates of mandatory sentencing, that some degree of judi cial discretion is necessary;
- Constitutional implications; and
- The effects of the redistribution of discretion.

These discussions then feed into the analysis of Discriminatory Impact.

1. Judicial Interpretation, Application and Adaptation

(a) Interpretation

The Northern Territory and Western Australian courts have shared a common goal in interpreting the laws. Within the confines of the rules of statutory interpretation, they have sought to interpret the laws in such a way as to limit their application and to allow some flexibility to deal with the circumstances of individual offenders. The best example of this is the decision of the Children's Court of Western Australia to interpret the complex provisions of section 101 of the *Young Offenders Act* to allow the use of a CRO'.[75]

75 The first two cases were DCJ (A Child), unreported, Children's Court of Western Australia, 10 February 1997 and RJM (A Child) unreported, Children's Court of Western Australia, 19 March 1997. See M Yeats, above n 64 and D Saylor 'Three Strikes by the Burglar' (1997) 4 (2) Indigenous Law Bulletin, 14. This practice has been endorsed by the Court of Criminal Appeal; see G (A Child), (1997) 94 A Crim R 593at 596.

Other Western Australian examples involve the question of what constitutes a 'strike'. Under section 189 of the *Young Offenders Act* , convictions of juveniles are generally to be disregarded if a period of two years has elapsed since the person was discharged from a sentence. However, the three strikes laws are expressed to "apply in respect of offences committed at any time and to convictions recorded at any time."[76] In *P (A Child)*[77] the Court of Criminal Appeal held that section 189 still applied in three strikes cases; the previous convictions were to be disregarded and the appellant was not a repeat offender. *G (A Child)* [78] concerned the meaning of a 'conviction.' The three strikes laws define a conviction to include 'a finding or admission of guilt that led to a punishment being imposed … or an order being made in respect of the offender, *whether or not a conviction was recorded*.'[79] Under section 67 of the *Young Offenders Act*, the court can 'refrain from imposing punishment' on a young person provided a responsible adult provides suitable undertakings or agrees to impose a suitable punishment. Despite the broad definition of 'conviction', the Court of Criminal Appeal held that dispositions under section 67 did not constitute a strike.

The Northern Territory cases reveal a similar pattern. The legislation states that a second strike offender is a person who has 'once before been found guilty of a property offence.'[80] In *McMillan* v *Pryce* [81] the Supreme Court held that the phrase did not apply retrospectively: it applied only to offences committed after the commencement of the Act. In *Schluter*,[82] the defendant pleaded guilty to two sets of charges on the same day but the Supreme Court held that 'once before' referred to a 'previous day'. A different problem arose in *Hallam*,[83] where the defendant was clearly subject to the mandatory sentencing laws. He had a previous conviction for a property offence and been convicted of ten counts of stealing, three of unlawful use of a motor vehicle and one of unlawfully entering a building. The issue was whether his sentences were to be concurrent or cumulative. At first sight, the legislation appears to require cumulative sentences.[84] However, Mildren J calculated that this would have amounted to a minimum of more than 14 years. His Honour took the view that this was not what Parliament had intended and held that the minimum was just 90 days.

76 Criminal Code Amendment Act (No 2) 1996 (WA), s4(3).
77 (1997) 94 A Crim R 586.
78 Above n 76
79 Criminal Code (WA), s.400(4), emphasis added.
80 Sentencing Act 1995 (NT) s.78A(2)
81 Unreported, NT SC. 20 June 1997
82 (1997) 6 NTLR 194
83 Unreported, NT SC, 17 September 1998
84 Sentencing Act 1995 (NT) , s.78A(3A)

Although the Western Australian and Northern Territory courts seem to have shared a common goal, it is interesting to observe that they have used rather different techniques of interpretation. The Western Australian courts have adopted the traditional approach that the words of the legislation should be strictly construed in favour of the defendant. In all the cases to which we have referred, they eschewed any reference to 'the intention of Parliament'.[85] However, the Northern Territory Supreme Court has adopted a more purposive approach, using the argument that the Parliament could never have intended the 'astounding result'[86] that would accord with a literal interpretation.

(b) Application and Adaptation

When considering the application of the laws to individual offenders, the courts have insisted on strict proof of the requirements, including previous strikes. Under the *Crime (Serious and Repeat Offenders) Sentencing Act*, the courts required proof (even in some cases where defence counsel had not identified the issue) that there had been 'convictions' on the earlier occasions – a matter that was not always evident from police criminal records. The pattern is similar in the more recent laws. For example, in the Northern Territory, the courts have insisted, where this is relevant, on proof of the offender's previous strikes, including the dates on which the previous offences occurred.[87]

It is also important to record some examples of what I will term the 'adaptation' of court practices to fill gaps in the laws or to meet the needs of the case. At the time the Western Australian laws were introduced, the Children's Court (unlike adult courts[88]) had no express power to 'backdate' sentences to take account of time spent in custody on remand. Its practice had been to reduce sentences to take account of time in custody. However, this was obviously not possible under the three strikes laws. For almost two years, the Court therefore simply backdated mandatory sentences without legislative authority.[89] In another example of adaptation, a Northern Territory magistrate adjourned a case involving a 17 year old third striker so he could deal with the case after the laws had been amended to make the person a juvenile.[90]

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85 This is despite the fact that Interpretation Act 1984 (WA) s.18 states that courts are to prefer an interpretation which accords with the 'purpose or object' of legislation rather than an interpretation which does not.

86 Hallam, above n 84 per Mildren J, at 9. Generally see R Goldflam and J Hunyor 'Mandatory Sentencing and the Concentration of Power' (1999) 24(5) Alt LJJ 211 and D Johnson and G Zdenkowski, above, n 9 , 66-67 and 80-82.

87 D Johnson and G Zdenkowski, above, n 9 , 66.

88 Sentencing Act 1995 (WA), s.87.

89 Importantly, the prosecuting authorities accepted this practice. In August 1998, the court was given the express power to do this: Young Offenders Act 1994 (WA), s.119; inserted by Criminal Law Amendment Act (No.2) 1998 (WA).

90 ABC Radio News, 11 May 2000.

(c) Limitations

Although the severity of mandatory laws have been mitigated as a result of judicial interpretation, application and adaptation, it would be unwise to exaggerate the extent to this has been the case. The examples given here are important but nibble at the edges rather than the core of the laws.[91]

2. Injustice in Sentencing

No amount of judicial ingenuity can eradicate the sentencing distortions to which mandatory sentences give rise. Later sections of this Report show that these distortions are exacerbated by the fact that cases increasingly hinge on discretionary pre trial decisions. However, leaving questions of process aside, there are three major factors behind the distortion:

- Mandatory sentences are irrelevant to people who are convicted of serious offences because, as a matter of normal sentencing discretion, they will receive sentences which are equal to or greater than the mandatory minimum. For example, violent 'home invasions' attracted lengthy custodial sentences before the introduction of the three-strikes laws. They continue to do so quite independently of the new laws.[92] This means that the mandatory minima inevitably impact primarily at the lower end of the scale.

- Mandatory sentences iron out the differences between offences of the same type. For example, a minor home burglary in Western Australia may attract the same sentence of twelve months' imprisonment as a more serious burglary offence. Another example is the use of CROs in Western Australia. This allows room to move in minor cases but is an 'all or nothing' option; the offender faces either a CRO, or the full 12 month minimum. There is nothing in between and therefore no proper gradation of penalties to reflect the seriousness of the offence.

91 See for example, the very limited application of the 'exceptional circumstances' provision in the Northern Territory. See also Trenerry v Bradley (1997) 6 NTLR 175 and the case of Williams, discussed in D Johnson and G Zdenkowski, above n 9, at 67.

92 The leading cases in Western Australia on the 'tariff' for burglary are Cheshire, unreported, Court of Criminal Appeal, 7 November 1989 and Pezzino (1997) 92 A Crim R 135. These clearly show that serious offences of burglary committed by adults will attract sentences well in excess of 12 months.

- Mandatory sentences iron out differences in relativities between different types of offence; for example, a minor opportunistic home burglary may attract a harsher sentence than a systematic fraud or an offence of indecent assault. Alternatively, even where the more serious offences do attract a longer sentence, the differences in penalty may not reflect the differences in criminality.

3. The Worm Turns: Judicial Discretion Matters

Critics of mandatory sentencing have consistently argued that judges should have some flexibility in order to take account of the particular circumstances of the individual case. As Zimring has put it: "We (simply) lack the capacity to define into formal (statutory) law the nuances of situation, intent and social harm that condition the seriousness of particular criminal acts."[93] Initially, the proponents of mandatory sentences treated these concerns with disdain.

However, in a most important shift of tone, both the Northern Territory and Western Australian governments have now acknowledged that some discretion is required. The Northern Territory's first concession came in 1999, with the exceptional circumstances provisions and the option of diversion for second strike juveniles. Although both options have a very restricted field of operation,[94] they constituted an acceptance in principle of the need for some degree of judicial discretion; and, as we have seen, more concessions are now likely to flow.

Western Australia provides a poignant example. When the Children's Court first ruled, in February 1997, that it had the power to use a CRO in lieu of immediate detention, the then government expressed its strong disapproval and foreshadowed legislative change.[95] However, in December 1997, it announced that the amendments would not proceed because this was 'an area where the judiciary can be seen to be exercising its discretion in a responsible and appropriate manner.'[96] By early 2000, this power was no longer something which was to be tolerated as a rather perfunctory concession to judicial competence: it was one of the most important weapons in the government's efforts to defend Western Australia's laws and to distance them from those in the Northern Territory:

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93 F Zimring, "Making the Punishment Fit the Crime: A Consumer's Guide to Sentencing Reform" in A Duff and D Garland (eds) A Reader on Punishment, (Oxford: Oxford University Press, 1994) quoted in D Roche, above n 8.

94 See below, section 5..

95 The media was also critical: see Editorial 'Judge Walks a Dangerous Path', The West Australian, 12 February 1997.

96 Attorney General, Peter Foss, Second Reading Speech on the Criminal Law Amendment Bill 1997, quoted at p.7 of the Government's written evidence to the Senate Inquiry. The Government also proposed to change the law following the decision in G (A Child) (above, n 76) but this was rejected in the Upper House where the Government does not have a majority.

> "The fact that the judiciary has, and uses, its discretion under the legislation when dealing with juveniles undermines the argument that the WA legislation is in breach of United Nations conventions."[97]

The ironies are stunning: advocates of the three-strikes laws now defend them by reference to the bits that didn't work and, by their inventiveness, the courts have helped to defend – and perhaps to preserve – the laws they never wanted. In the absence of this interpretation, Western Australia would have seen more examples of the cases which have given rise to so much concern in the Northern Territory. For example, in one of the first conditional release order cases, a 12 year old boy from the North West faced 12 months' detention in Perth for keeping watch (as an 11 year old) while other children burgled a house and stole a CD player, $15 of food and drinks and a small amount of cash. In another case, an 11 year old boy from the North West faced a similar fate (see case studies in section 3).[98] However, it must again be stressed[99] that the existence of the CRO does not allow justice to be done. It does mean that some offenders may receive a non-custodial disposition but there is then a leap up to a minimum of twelve months' detention or imprisonment.

4. Constitutional Implications

Mandatory penalties are not, in themselves, unconstitutional.[100] However, following the decision in *Kable*[101] there may be grounds for challenge if mandatory sentencing laws generate fundamental structural problems with respect to the position of the courts, and especially the relationship between the courts and the executive.

Writing in *the Sydney Morning Herald*, Justice Santow of the New South Wales Supreme Court has made a spirited case for the application of *Kable* to these laws.[102] Academics have also made similar arguments.[103] However, as he acknowledged, the hurdles are formidable. First, the three strikes laws more directly raise issues about the relationship between the legislature and the courts rather than that between the courts and the executive. Secondly, it would have to be established that the current schemes are open to challenge when earlier schemes have been upheld as valid. In *Wynbyne* v *Marshall*,[104] these two matters appear to have weighed heavily in the High Court's decision to refuse special leave to appeal in the case of a first offender who had been sentenced to 14 days' imprisonment for two very trivial offences.

97 P Foss, media statement, 14 March 2000, http://www.mediastatements.wa.gov.au. See also the Western Australian Government's written evidence to the Senate Inquiry, above n 32, esp at p 16.
98 See the cases studies in this Report and M Yeats, above n 64
99 . See also above.
100 Palling v Corfield (1970) 123 CLR 52. See also Sillery v The Queen (1981) 180 CLR 353 and Cobiac v Liddy (1969) 119 CLR 257
101 (1996) 189 CLR 51.
102 'The High Court and Mandatory Sentencing', Sydney Morning Herald, 28 March 2000, 15. See also Senate Report, para 7.38; discussion of the submission by the Northern Territory Legal Aid Commission.
103 See M Flynn, 'Fixing a Sentence: Are there any Constitutional Limits?' (1999) 22 UNSWLR 280
104 High Court, 21 May 1998

Thus, whilst mandatory sentences do distort the criminal process, they appear very likely to survive formal constitutional challenge.

5. The Redistribution of Discretion

One of the assumptions that commonly underpins proposals for mandatory sentences and their variants is that decisions will become more consistent, predictable and fair if judicial discretion is removed or narrowly confined. However, critics have expressed concern that mandatory sentencing schemes do not remove discretion so much as 'redistribute' it to other parts of the criminal process.[105] In other words, pre-trial decisions (including the decision to proceed with a prosecution, the choice of charge and the processing of multiple charges) determine whether the mandatory laws apply and therefore the outcome of a case.

Until recently, most of the concrete evidence of this phenomenon came from the United States of America, where the decisions and attitudes of prosecutors and the negotiating skills of defence lawyers had often become more important than the objective circumstances of the case.[106] The use of these examples in the Australian context was open to the criticism that the systems are not strictly comparable. It is therefore important to record some the mounting evidence, from within Australia, of the mechanisms by which mandatory sentences are, in practice, avoided or negotiated.

Diversion and alternative dispute resolution. In Western Australia, it is clearly accepted that cases which have been processed by means of cautioning or juvenile justice teams do not constitute a 'strike'. In their Northern Territory study, Johnson and Zdenkowski found that in one Aboriginal community, there appeared to be very few cases of criminal damage. It transpired that this was because the community chose – partly in light of the mandatory sentencing laws – to pursue alternative avenues of redress, including restitution and other forms of dispute resolution.[107] In a number of cases, the Northern Territory police therefore agreed to withdraw the charges.

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105 See eg R Hogg , 'Mandatory Sentencing Laws and the Symbolic Politics of Law and Order' UNSW Law Journal Forum Vol 5 No1, January 1999; and G Zdenkowski, 'Mandatory Imprisonment of Property Offenders in the Northern Territory', ibid; Tonry 'Sentencing Commissions and Their Guidelines' in Crime and Justice: A Review of Research, Vol 17, 1993, University of Chicago Press, 137. AW Alschuller 'Sentencing Reform and Prosecutorial Power' (1978) Uni Pennsylvania L Rev 550.

106 My favourite example is provided by K Knapp, "Arizona: Unprincipled Sentencing, Mandatory Minima and Prison Overcrowding" 2 Overcrowded Times 10. She found that almost a quarter of all felonies ended up as inchoate offences (ie attempts or conspiracies) rather than completed crimes: inchoate crimes were not subject to the mandatory structure which applied to completed crimes and, as a result, charges were routinely 'bargained down.'

107 D Johnson and G Zdenkowski above note 9, at 88

Choice of charge. The Northern Territory study provides numerous examples of the importance of the choice of charge and the role of the defence lawyer as bargain hunter / lobbyist. When the laws were first introduced, there was widespread use of the charge of 'unlawful possession' (which was not an offence triggering the mandatory provisions) instead of stealing or receiving (both of which were subject to the mandatory laws). This 'loophole' was plugged in April 1998 when unlawful possession was added to the list of mandatory offences. However, other examples of overlapping offences remain.[108]

Negotiating multiple charges. In Western Australia, it has become the common practice of defence lawyers to seek to get multiple home burglary charges heard *en bloc* so that they will constitute only one 'strike'. According to Goldflam and Hunyor, Northern Territory practices are similar but 'this is a discretion the prosecution have not always been prepared to exercise in favour of a defendant, and this has influenced in a very real and direct way, the sentences received by offenders.'[109]

Plea negotiation. Prosecutors are, of course, more likely to agree to a proposed course of action if there is 'something in it' for them. Related to the previous points, there is mounting evidence that defendants may feel pressure to plead guilty to non-mandatory offences in order to avoid the mandatory laws.[110]

Ignorance is bliss. There is evidence in Western Australia that a number of people have not been sentenced under the three strikes laws for the simple reason that the matter was not brought to the attention of the court.[111]

All of these avoidance mechanisms involve factors or decisions which are inconsistent and unpredictable and which are less transparent and accountable than decisions taken in open court.

108 Ibid, 89
109 R Goldflam and J Hunyor, 'Mandatory Sentencing and the Concentration of Powers' (1999) 24(5) Alt LJ, 211
110 Ibid
111 Written Evidence to Senate Inquiry; Submission 95, above n 32, 8.

3.6 DISCRIMINATORY IMPACT: PAWNS IN A GAME ARE NOT VICTIMS OF CHANCE

1. Aboriginal and Non-Aboriginal Impact

In responding to international criticism, the Federal Attorney General argued that "mandatory detention laws do not target indigenous people and are racially neutral on the face of the legislation and that consequently the laws do not have a racially discriminatory purpose."[112] It is true that mandatory sentences are 'facially neutral' in the sense that that they allow for no differentiation or prejudice according to race, sex or age. In practice, however, the evidence presented here is that they impact disproportionately on Aboriginal people and young people.

Crucially, we would argue that discriminatory impact is not accidental; it is the result of two sets of conscious and deliberate choices:

- Offence Selection: Three strikes laws and their variants inevitably target offences in which young, minority and lower socio-economic groups are over-represented. (for example, car stealing, criminal damage or burglary).
- Choices with respect to the processing of cases; the choices taken by police and prosecuting authorities about the processing of individual cases have a profound impact on whether or how quickly a person becomes a three strikes offender (for a good example of this see case studies B and C in section 5.10).

These issues are best considered by asking not only 'who gets caught?' but also 'who doesn't get caught but gets diverted?'

112 Media Release, D Williams QC, above n 57.

(a) Who gets caught?

In Western Australia, there are virtually no data available with respect to the use of mandatory sentences for adults but some figures are available with respect to juveniles.[113] Across the board, Aboriginal children are grossly over-represented in the Children's Court, probably constituting around one third of all offenders.[114] The figures on the three strikes laws are far worse. According to early figures, Aboriginal children accounted for 80% of three strikes cases. In evidence to the Senate Inquiry, the government spokesman took pains to explain that the figure was in fact not 80% but 74%.[115] However, the results of the Department of Justice Review, as we have already outlined, reinstated the higher figure – the laws have captured Aboriginal offenders on a significant scale.

This means that the one third of Children's Court offenders who are Aboriginal provide three quarters of three strikes cases. Only one quarter come from the two thirds who are non-Aboriginal. [116]

(b) Who doesn't get caught but gets diverted?

The use or non-use of diversionary schemes is crucial with respect to both the processing of the current offence and the question of whether there are any previous strikes. Western Australia has two mechanisms for juveniles - formal cautioning and juvenile justice teams. However, the evidence is clear that Aboriginal offenders are much less likely to access diversionary schemes and are more likely to be processed through the courts. Two measures illustrate this:

- The number of non-Aborigines to be cautioned has exceeded the number arrested ever since cautioning was introduced in 1991. It took until 1995 for this to be the case for Aboriginal juveniles.[117]

- In 1998, only 18% of juvenile cautions involved Aboriginal children, a figure far below their general level of representation in the Children's Court.[118]

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113 Department of Justice , above n 4.
114 Accurate figures are hard to determine but this is the consensus in numerous reports; see Ministry of Justice, Policy and Legislation Division, Children's Court of Western Australia: Statistics 1997-1998, at http://www.justice.wa.gov.au/division/policy/Sentstat/childstat. See also A Ferrante et al, above n 66 and M Yeats, above n 64.
115 In its written submission, compiled in late 1999, it had put the figure at 80%, based on the work of an Honours student at the University of Western Australia which examined cases up to May 1998.
116 There are no specific figures on the use of mandatory sentences in the Territory. The Senate Inquiry examined general figures on the use of custody and found that the use of imprisonment and detention had increased significantly between 1996/7 and 1997 to 1999. The increase in Aboriginal imprisonment and detention was particularly pronounced. However, in a rather muted and cautious discussion, it declined to draw firm conclusions on whether this reflected the introduction of mandatory sentences or other factors such as increasing levels of fine default. Senate Inquiry paras 3.32-3.51 and 3.55 to 3.56.
117 Aboriginal Justice Council of Western Australia, Our Mob Our Justice: Keeping the Vision Alive, Aboriginal Affairs Department, Perth, 1999, 29-31.
118 A Ferrante et al., above n 66

(c) Accounting for these Figures

The official explanation for these figures is that "more Aboriginal people are being charged with these offences and brought before the courts."[119] Stunning in its simplicity, this truism misses the point and verges on the offensive. The real issues are those of offence selection and processing. It would be equally trite and unenlightening to say that more non-Aboriginal people are charged with fraud or indulge in tax evasion. The point is that fraudsters and tax evaders are not subject to mandatory sentences and, in the case of tax evasion, civil remedies are often used. If fraudsters and tax evaders are successfully prosecuted, judges have the discretion to take full account of all mitigating circumstances.[120]

2. Expected Custody Time for Adults and Juveniles

In Western Australia, three strikes offenders may be eligible for early release. Adults are generally eligible for parole after one third of their sentence. Juveniles must serve at least half the sentence in custody. Taking the example of the twelve month minimum sentence, the adult can expect to serve four months but the juvenile must serve six. In practice, juveniles who are released by the Supervised Release Board are also often subject to more onerous supervision in the community than adult offenders who are released on parole.

In evidence to the Senate Inquiry, the then government sought to defend this on two grounds.[121]

- It argued that judges will generally impose a lower sentence on a juvenile than on an equivalent adult offender.

This is true but irrelevant in the context of mandatory sentences.

- It said that under new parole laws, adults will be required to serve at least 50%.

However, new parole laws were not even on the drawing board at the time the three strikes laws were introduced. Furthermore, the new parole laws which were enacted at the end of 1999 are unfathamable and unworkable.[122] They have not been proclaimed and appear unlikely to be proclaimed in their current form.

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119 Oral evidence, above n 32, at 111

120 See also the views of the Aboriginal and Torres Strait Islander Commission in evidence to the Senate, quoted in Senate Report, above n 5, para 2.40.

121 Above n 32.

122 N Morgan, 'Now You See It, Now You Don't: Truth and Justice Under Western Australia's New Sentencing Laws' (2000) UWA LawReview, 251.

4. THE FAILURE OF DIVERSION: A GOOD IDEA CYNICALLY EXPLOITED

4.1 INTRODUCTION

Western Australia's mandatory sentencing laws have simply reinforced a tendency in the system to deal more harshly with Indigenous youth. Unfortunately, strategies introduced during the 1990s to reduce the numbers of juveniles being brought before the courts have had little impact on Indigenous youth. Indeed, evidence suggests that police cautioning has simply become a form of "property-marking" by police: in other words, cautioning has not, generally, been used a means of diverting Indigenous juveniles from the system but, instead, is allowing police a formal and legal means to pick them out of the crowd for the most trivial offences.

Successive studies by the Crime Research Centre[123] have demonstrated that police cautioning and the juvenile justice teams – the main diversionary mechanisms in Western Australia – have failed to make meaningful in-roads into the numbers of Indigenous youth being arrested, placed before courts and incarcerated. Our research on the impact of mandatory sentencing reveals a number of instances where young Aboriginal people from regional areas have been incarcerated for offences that would have been diverted to a juvenile justice team had the youth been living in the metropolitan area and – preferably – white.

Data by Ferrante[124] confirms that cautioning has been paid for at the cost of significant net-widening. Over the last 5 years or so, the rate of arrest of Indigenous youths has shown a slight increase of around 3%, while the rate of contact between Indigenous youth and the police has increased by 30%. Net-widening tends to mean that the same groups of youths who would previously been arrested are still arrested while a new group of younger, less-delinquent young people who would previously have been dealt with less formally are now given a formal disposal. *Cautioning is supplementing and extending the repertoire of police controls over Indigenous youth, particularly in public settings.*

Nothing has altered those underlying issues. The "push" factors (in terms of the profound alienation of Indigenous youth and their families from white society) and the "pull factors" (the tendency for criminal justice system to select out, capture and criminalise Indigenous youth at a proportionately higher rate) remain The common thread running through a history of troubled relationships between the law and Indigenous people is the role of the police[125].

123 See H Blagg and A Ferrante Aboriginal Youth & the Juvenile Justice System of Western Australia (1995) Perth: Aboriginal Affairs Department ; Ferrante, Fernandez & Loh, The 1999 Crime and Justice Statistics for WA (2000) Perth: Crime Research Centre

124 Ferrante A, (2001) Police Statistics. Unpublished. Perth: Crime Research Centre.

125 C Cunneen and D Macdonald (1996). Keeping Aboriginal and Torres Strait Islander people out of custody: An evaluation of the implementation of the Royal Commission into Aboriginal Deaths in Custody. Canberra: ATSIC.

4. THE FAILURE OF DIVERSION: A GOOD IDEA CYNICALLY EXPLOITED

4.2 "ROUND UP THE USUAL SUSPECTS": ABORIGINAL YOUTH, POLICE POWERS AND THE COURTS

The retention of mandatory sentencing laws in Western Australia (which, we have suggested, redistribute discretion from the courts to the police) is all the more remarkable given the failure of successive governments to legislate some protection for suspects – particularly vulnerable suspects – detained by the police. It is a sad reflection on the true extent of government indifference to Indigenous concerns – notwithstanding the occasional pious declaration lamenting "unacceptable" levels of Indigenous over-representation – that they have legislated to extend police powers while ignoring well grounded concerns that police routinely avoid complying with their own relatively superficial operational orders where Indigenous people are concerned.

Crucial decisions that have serious implications for the life-chances of young Indigenous people and their families are being made by lower level police officers whose decisions are not reviewed by an independent authority. The fact is that the police force in Australia which has the most power to determine the fate of offenders is also the one subject to the weakest controls over its decisions.
The stereotype of the Aboriginal juvenile offender has been a signifier of criminality and disorder. Two key dimensions of the "black crime" problem are, in a sense, being joined together. Sutured on to the traditional frontier issue of black criminality (legitimating invasion, dispossession, the introduction of non-Indigenous economic relations and governance, law and land ownership), there is now a contemporary, urban problem of black juvenile crime. Colonial anxieties about treacherous natives threatening to overwhelm the vulnerable enclaves of white civilisation (and necessitating "extreme' and "exceptional" measures (shootings, floggings, mass incarceration and relocation), have been supplemented by modern forms of moral anxiety typical of "high crime societies". [126]Aboriginal youth have become a source of urban fear, and targets of the kinds of law and order "backlash" aimed at black youth in the United Kingdom and the United States of America.

126 D Garland "The culture of high crime societies: Some preconditions of recent "law and order" policies" *The British Journal of Criminology.* 40: 3. ,359

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Fear of victimisation at the hands of black youth in Western Australia directly stimulated the introduction of tough selective incapacitation and repeat offender laws [127] and, more recently, has been influential in mandatory sentencing legislation. Racial fears have rarely been far from the surface of debates about crime, and particularly juvenile crime, in the last 20 years or so. The body politic of Western Australia has been convulsed and paralysed by periodic bouts of crime terror, based on fears of Aboriginal youth. As Sercombe [128] observed, the "face of crime" was clearly an Aboriginal face, as narratives of Aboriginal juvenile criminality continued to bombard the public mind via the media. His study of, based on a collection of articles published in the *West Australian* newspaper from April 1990 to March 1992, found that "*85 percent of articles which refer to Aboriginal youth are principally about crime*" [129]. Sercombe came to the "inescapable" conclusion, that:

> The news about Aboriginal young people is crime news. The newspaper is not interested in, or does not have access to, accounts of Aboriginal young people who are high achievers, or accounts of the homelessness or unemployment of Aboriginal young people [130]

So pervasive has been the association between youthful Aboriginality and crime in Western Australia, that has tended to block from public gaze criminal acts perpetrated against, rather than by, Aboriginal people[131].

Indigenous organizations have confirmed the evidence of previous research. Indigenous youth tend to be *a priori* suspects when in public settings. All Aboriginal youth are, by definition, targeted suspects: on public transport, in Northbridge, on the streets of country towns. Police, Railways police, security guards routinely stop, detain, question, search, name-check, Indigenous youth because of heightened anxieties that *might* be involved in criminal behavior (rather than having reasonable grounds) and because they are under pressure to "clean up" streets of unwanted "non-consumers".

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127 R Harding , above n 16
128 H Sercombe "The face of the criminal is Aboriginal" in J Bessant , C Carrington and S Cook (Eds). Cultures of crime and violence: the Australian experience (A special edition of the Journal of Australian Studies,1995)
129 Ibid, 78 (emphasis in the original)
130 Ibid
131 This is despite the fact that Aboriginal people remain the most victimised section of society. In 1997, the risk of being a victim of violent crime was 4.6 times greater than for non-Aboriginal people (Aboriginal Justice Council of Western Australia , above n 118,23).

4. THE FAILURE OF DIVERSION: A GOOD IDEA CYNICALLY EXPLOITED

4.3 SYSTEMIC BIAS

In his study of the troubled history of Aboriginal/police relations, Cunneen argues that a systemic bias against Indigenous offenders is expressed at all levels, but particularly at the point of first contact with the system:

> …the effect of police practice in relation to targeting, arrest and bail all impact on the crucial question of why Aboriginal people appear before the courts in the first place and how they in fact obtain criminal records. The end result may be an 'accumulation of disadvantage" in the system deriving from the original police decision to arrest.[132]

As we have suggested, police decision-making takes on added significance in mandatory sentencing regimes, that tend to "redistribute" discretion to the front end of the system (the police) and away from judiciary. Politicians may be concerned about "unaccountable" judges and magistrates but they cheerfully increase the powers of an agency whose decisions and actions remain secret and virtually unchecked by outside scrutiny and remain a law unto themselves.

While the police may argue that the courts act as a check on the manner in which evidence is gathered, this is rarely the case with young people, who tend to plead guilty "to get it over with", and who, generally, don't look at the court process as a place where they have any rights[133] (Courts, it is argued, unwittingly perhaps, collude with the results of "over-policing" of Indigenous youth[134] While courts might provide a veneer of "justice for all", the truth is that they, in many instances, simply function to rubber stamp the decisions of a *police-judicial complex*. As criminologists have pointed out the juvenile justice system is controlled and "configured" at street level by the police who, for most young people, represent the *real* face of the "law" in ever day life[135]

132 C Cunnen , Conflict, Politics and Crime: Aboriginal Communities and the Police,(Sydney: Allan & Unwin, 2001)

133 H Blagg and M Wilkie, Young People and Police Powers in Australia, (Sydney: Australian Youth Foundation, 1995). F Gale, Bailey-Harris and J Wundersitz, . Aboriginal Youth and the Criminal Justice System. (Melbourne: Cambridge University Press, 1990)

134 M Findlay, S Odgers, and S Yeo Australian Criminal Justice(Melbourne: Oxford University Press, ……..)

135 R Dobash et al. "Ignorance and Suspicion: Young People and the Criminal Justice System in Scotland and West Germany"(1990)30 (3) British Journal of Criminology, 306-321

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There is no equivalent of the Anunga Guidelines in the Northern Territory in operation in Western Australia. These guidelines were essential in determining ground rules for interviewing Indigenous people. These rules stipulate that there needs to be an "interview friend" present when Indigenous people are interviewed by police, and there are requirements for interpreters to ensure that an Indigenous person understands the process. It should be noted here, that the *Young offenders Act 1994*, was enacted *before* the Standing Committee on Legislation of the Legislative Council was allowed to complete its inquiries – and in the face of that Committee's recommendations that young people's rights be codified.[136]

The AJC has repeatedly expressed its concern about the lack of controls over police powers in relation to Aboriginal juveniles. In relation to police questioning of juveniles, the 1994 report of the AJC was critical about the lack of progress in implementing Recommendations 243-245 of the Royal Commission into Aboriginal Deaths in Custody, relating to the rights of juveniles detained by the police. While the *Young Offenders Act* placed a requirement for a "responsible adult" to be contacted when a child is detained, the legislation does not require an independent adult to be present during police interrogations. The AJC maintained that:

> Not only should it be a statutory requirement for an independent adult to be present….but also that failure to do so will result in a statement being rendered inadmissible in evidence[137]

Such controls that exist are in the form of police Routine Orders and Commissioner's Orders, rather than enshrined in legislation, this is a notoriously haphazard mechanism for attempting to regulate police practice, as there are no sanctions for not complying[138]. Cant and Downey's evaluation of the 1994 Act is critical of the lack of safeguards of children's rights within the ambit of the legislation, including the lack of automatic rights to legal representation and the right to have an independent third party present in police interviews[139] Not surprisingly, many police officers surveyed for Cant and Downey's review felt they did not need to bother abiding by regulations relating to young people's rights at the time of arrest:

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136 See R Harding (ed) above n16, xi-xiii.

137 Aboriginal Justice Council. Getting Strong on Justice. (Perth, Aboriginal Justice Council 1994), 24

138 Routine Orders or Commissioners Orders are internal police regulations that cover a host of activities, from detention of suspects, treatment, questioning, identification, search and seizure. They offer guidelines for police activity while placing restrictions on police powers. There has been a trend (c/f News South Wales following the Wood Royal Commission, in the United Kingdom under the Police and Criminal Evidence Act 1984 (UK)) to redefine these orders as Codes of Practice (or "subordinate legislation" R Lustgarten, (1986) The Governance of Police. London: Sweet & Maxwell) the infraction of which constitutes and illegal act, or, at the very least, a serious breach of discipline. H Blagg and M Wilkie above n 134 provide evidence of significant jurisdictions variation in Australia in terms of the balance between what is contained in actual legislation and what is held in Police Orders. In Western Australia they found that Orders were often seen by police as just guidelines to be employed with wide discretion: this meant that rules governing interviews with children and young people (enshrined in legislation in other states and New Zealand) were weakly enforced.

139 Cant and Downey, Review of the Young offenders Act 1994,1998 ,14

4. THE FAILURE OF DIVERSION: A GOOD IDEA CYNICALLY EXPLOITED

> Only 52% of the police surveyed…considered that contacting a responsible adult prior to questioning was a reasonable requirement. Further only 54% agreed that it could be met on most occasions. This suggests that young people may well be questioned without the presence of a responsible adult despite the Commissioner's orders and lends some urgency to including a statement of rights in the Act (or in other related legislation). [140]

It is time Western Australia came into line with other states and territories and international best practice and began to rein in the police, when they make arbitrary and capricious approaches to young Indigenous people on the streets. Moreover, the police should cease prosecuting cases in court and – as part a general overall of screening and gate-keeping structures – a new body should be created to make decisions about the prosecution of children and to over-see police decision-making.

4.4 THE POLICE: STILL "BOSS OF THE COURTS"?

The police prosecution role is an anachronism, a hang over from the frontier days when magistrates in Western Australia picked their own police to run country towns. Patrick Dodson[141] observed that the police authority in court confirmed for Indigenous youth that the police were "boss of the courts"- reinforcing their belief that the system was stacked against them.

Successive reports by the AJC have been critical of the lack of progress by government in implementing key recommendations of the RCIADIC in relation to police contact with Indigenous youth, imprisonment as a last resort and for the introduction of diversionary options [142]. The Council's concerns echo other reviews [143]which expressed similar concerns about the lack of progress. In relation to the key RCIADIC recommendations urging "arrest as a last resort" for juveniles the council reported that the "picture continues to be bleak" [144]The AJC expressed considerable disappointment that the conferencing system was not being used sufficiently for Indigenous youth and their families, and pointed to police attitudes as well as an administrative system unsuited to Indigenous people.

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140 Ibid
141 Dodson P (1991). Underlying issues in Western Australia, vol 2. AGPS: Canberra.
142 Royal Commission into Aboriginal Deaths in Custody, (1991) National Report. Recommendations 234 – 245
143 See H Blagg and A Ferrante above n 124; C Cunneen and D Macdonald (1996). Keeping Aboriginal and Torres Strait Islander people out of custody: An Evaluation of the Implementation of the Royal Commission into Aboriginal Deaths in Custody. (Canberra: ATSIC, 1996)
144 Aboriginal Justice Council, above n 118, 54.

4.5 THE JUVENILE JUSTICE SYSTEM IS FAILING INDIGENOUS PEOPLE

Indigenous people in Australia are frustrated by the juvenile justice system. A recent consultative inquiry in Queensland reported continuous "failure" by the system: "the term justice (in juvenile justice) was...a misnomer in light of the escalating numbers of young people in the juvenile justice system" [145]of profound beliefs that the system is itself fundamentally weighted against them; that they cannot expect it deal with them justly and fairly.

Patrick Dodson's sombre appraisal of Aboriginal disenchantment with the system, garnered from numerous consultations across Australia for the RCIADIC, is also immensely revealing. He recalls:

> What became apparent during consultations, was that Aboriginal people felt powerless to change the situation, felt that the police, the courts, the inquiry processes were not just inadequate, but were in direct conflict with, or in opposition to, Aboriginal people. They felt there was no justice anywhere and the police, being the first wave of interaction with the criminal justice system, were very much to blame for this situation.[146]

Set against this dismal background, it becomes clear that the criminal justice system in states such as Western Australia lacks legitimacy for many Aboriginal people.

The problems extend to a cynical distortion of the philosophy of the diversionary system. Police, with the full collusion of the Children's Court, are citing children's previous cautions and referrals to Juvenile Justice Teams as part of the child's criminal record, with the aim of denying them referral to Teams via the court.[147] There is no legal prohibition on children receiving multiple cautions or referrals to Teams and prior contact with the diversionary system should not be an impediment.

145 The Aboriginal and Torres Strait Islander Women's Task Force on Violence (2000) Report,237
146 Dodson, P above n 141, 215).
147 See Police v RMK (a child) 2001 WA CC4.

4.6 CHILDREN'S RIGHTS

In its 1995 report the AJC also called for the creation of an *Office of the Commissioner for Children* – or *Children's Ombudsman* to scrutinise the activities of agencies in relation to children's rights. The rights of Indigenous youth require special consideration given the their vulnerability. The committee was particularly concerned with the position of Indigenous youth, and called for increased use of police cautioning, increased involvement of Indigenous people in the justice process and provision for an independent adult to be present during police interrogations. The AJC was concerned that the human rights of Indigenous youth were being sacrificed to appease a populist law and order lobby. This view has been echoed in Inquiries critical of Western Australia's selective incapacitation and mandatory sentencing laws, as well as police practices in relation to Indigenous youth and their families. A number have pointed to serious breaches of human rights instrumentalities, such as the UN Convention on the Rights of the Child.[148]

In 1995 the AJC commissioned the Crime Research Centre to undertake a review of Aboriginal youth contact with the criminal justice system [149]This research provided further evidence of the scale of Indigenous over-representation in the system, confirming the previous reports view that Indigenous youth over-representation was endemic and that "early involvement" in the system played a role in this. Blagg and Ferrante concluded that in most part the picture remained "bleak". [150]

4.7 EARLY INVOLVEMENT

A review of the juvenile justice system undertaken by the Crime Research centre for the Aboriginal Justice Council have shown that reforms such as police cautioning and referral to juvenile justice teams (now given formal status in the *Young Offenders Act*) are not yet working for Indigenous youth. Once again it was pointed out that they were approximately 32 times more likely to be imprisoned than non-Indigenous youth – worryingly, 1 in 5 of the youths arrested in 1994 were under 14 and, of these, 94% already had an arrest record. The report concluded that:

148 See, for example, Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission. (1997). Seen and heard: priority for children in the legal process. Report No 84. Sydney: Human Rights and Equal Opportunity Commission. H Blagg & M Wilkie above n 134 ;Human Rights and Equal Opportunity Commission. (1997). Bringing them home: report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families. Sydney: Human Rights and Equal Opportunity Commission……

149 H Blagg and A Ferrante ,above n 124

150 Ibid , 5

4. THE FAILURE OF DIVERSION: A GOOD IDEA CYNICALLY EXPLOITED

> Early involvement in the system is a key factor in the development of criminal careers for Indigenous youth. There are indications that Aboriginal children are acquiring an "offender profile" early, which excludes them from diversionary options and makes them the subject of more intrusive intervention [151]

The AJC recommended that a working group be established, chaired by the Chief Justice, that would develop new policies designed to reduce the flow of under 14's into the criminal justice system (including the possibility of removing them altogether from the criminal justice system and having their cases dealt with in welfare based family conferences – the practice in New Zealand). This specific recommendation was not taken up by government. Instead, in 1997/8 an early intervention project aimed at intervening in the cycle of offending was introduced in Geraldton, and later, Midland.

While these projects have produced some worthwhile outcomes in the chosen sites, they have not delivered the systemic changes needed to influence how the system itself operates in individual cases. Changes in the ways agencies do business with each other and communities is important, pinning agencies down to deliver services to Indigenous people is also important; however two vital elements are missing from the early intervention approaches currently on offer in Western Australia.

The first is that they, once again, fail to address the specific problem of Aboriginal/police relations and police powers as a key underlying factor in the criminalisation of Indigenous youth and their families. Secondly, they fail to place Indigenous organisations and Indigenous people closer to decision making in justice issues. Agencies in Western Australia – police, welfare, courts, etc, still do not understand that to empower the Indigenous community requires a process of letting go of some power. The processes thus far tend, as one astute observer expressed it, tends to be one of "programmatic" solutions.[152] That is solutions which extend the powers and resources of non-Indigenous agencies to "solve" problems, when what is required are processes which actively empower and resource Indigenous communities to resolve issues.

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151 Ibid, 6

152 Aboriginal Women's Task Force and the Aboriginal Justice Council, A Whole Healing Approach to Family Violence,(Perth: Aboriginal Justice Council, 1995)

4.8 AGENCY RESPONSIBILITY

Another limitation of the emphasis on "all of government approach", is that it can lead to situations where responsibility is shared out to such an extent that individual agencies are let off the hook. A smorgasbord of agencies become responsible in general, and no single agency in particular. Inter-agency cooperation becomes a means of off-loading responsibility for difficult issues. The focus on the multi-agency approach in the area of early involvement of Aboriginal youth has seen responsibility shared out to health, housing, justice, family and children's services, Aboriginal Affairs and the Aboriginal and Torres Strait Islander Commission. But, as several Indigenous justice workers point out, it is the police, not these agencies, that routinely detain and prosecute Indigenous youth for *offences* that would receive a warning, a caution or a referral to a juvenile justice team, had the child been non-Aboriginal. The case studies (below, Section 5.10) reveal instances where children have been institutionalised for offences that could, indeed should, have been diverted from the system through a family conference.

4.9 LAGGING BEHIND ON EMPOWERMENT

Notwithstanding some of the excellent and innovative work of individuals working within government agencies, particularly at a local level, Western Australia is being left behind in terms of developing initiatives- the organisational culture of key agencies is *complacent, insular and inward looking*. This can be demonstrated by comparison with other states and territories. While the Aboriginal Justice Plan remains just that – a plan, consisting of paper bullet points – Aboriginal communities in Queensland and Northern Territory are running their own local justice initiatives, while, in New South Wales, changes are being made to the ways the courts relate to the Indigenous community.

4.10 COMMUNITY JUSTICE GROUPS IN QUEENSLAND

Community Justice Groups have been active in developing local strategies to deal with justice issues for several years in Queensland.

> "Local justice initiatives are established through a process of community-based planning…which enables communities to determine their own priorities in the area of justice" 153

There are 30 groups, on Aboriginal communities such as Palm Island, Cairns, Yarraba, Kowanyama and Mornington Island. Many run their own "bear foot" patrols on communities, run diversionary projects and participate in court. They are also active in reducing family violence and dealing with problems associated with drinking and gambling. The groups are made up from community people – particularly elders. Groups have had success in reducing problems on communities[154] and could be a model for other communities to follow.

4.11 CIRCLE SENTENCING IN NEW SOUTH WALES

The Aboriginal Justice Advisory Council ("AJAC") of New South Wales recently announced that a "Circle Sentencing" pilot is set to commence in Nowra, New South Wales in November 2001. The two-year trial will be administered from Nowra Local Court House and will involve local Aboriginal communities directly in the sentencing process. The trial will be evaluated after two years.

The AJAC describes Circle sentencing as:

> [A]n alternative sentencing process and involves taking the sentencing court to a community setting where Aboriginal community members and the Magistrate sit in a circle to discuss the offence and the offender. The circle will also talk about the background and effects of the offence and to develop a sentence that is best for that offender. Circle sentencing will involve victims of offences as well as offenders families and other respected community people. [155]

153 Department of Aboriginal and Torres Strait Islander Policy. Interim Assessment of Community Justice Groups, (Brisbane: Department of Aboriginal and Torres Strait Islander Policy)
154 Ibid.
155 Aboriginal Justice Advisory Council, NSW. Newsletter, No 38, 2001.

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The idea of testing Circle Sentencing emerged through the New South Wales Law Reform Commission's report on sentencing for Aboriginal offenders[156] which supported a recommendation by the AJAC that the model should be trailed. Offenders are able to request that their matter is dealt with by Circle Sentencing after pleading guilty or being found guilty by a court.

An offender needs to have support from the local Aboriginal community in their application. Circle Sentencing began in the Yukon, Canada. It deals with serious cases and attempt to involve the community as a whole in finding solutions to crime problems.

> The sentencing circle provides a voice for all persons affected by the offending behaviour, including victims and family members. It also provides a forum for those community members who, while not directly affected by the offence, are generally concerned about safety in their community [157]

The Circle idea is but one of a number of potential initiatives that could pave the way for greater involvement for Indigenous people. Simply repealing the mandatory sentencing legislation is not enough. There needs to be movement on a few fronts to move matters forward.

4.12 SELF – POLICING INITIATIVES

The Warden's schemes in Western Australia continue to lurch from crisis to crisis. Expanded in a flurry of activity in the mid-1990s, which saw Aboriginal community people being sworn in as "special constables", they soon experienced considerable difficulties – many were disbanded as quickly as they were established.[158]

The AJC clearly and cogently opposed the transfer of responsibility for the Warden Schemes to the police, seeing this as offering no solution to the problems of remote communities. Current police policy appears to lean towards bolstering schemes by having more Aboriginal Police Liaison Officers on communities. However, this will not resolve the underlying problems, nor encourage Aboriginal people to take an active role in policing their own communities. There are lessons from the experience in the Northern Territory where remote communities such as Lajamanu and Ali Curong have been empowered to develop their own Law and Justice plans, linking self-policing with a diversity of local initiatives.

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156 New South Wales Law Reform Commission Report 96"Sentencing Aboriginal Offenders" (2000).
157 H Lilles , "Circle Sentencing: Part of the Restorative Justice Continuum" in Morris, A and Maxwell, G (eds) Restorative Justice for Juveniles. Oxford: Hart Press (2001), 167
158 H Blagg and A Ferrante above n 124

As in the Queensland Community Justice Groups, community people undertake diversionary work, conduct Night Patrols, run safe houses, screen out cases before court (with police), liase with police prosecutors, sit with magistrates in court. A notable feature of these schemes is the crucial role played by Indigenous women who have been the mainstay of Night Patrols on many communities and have established their own Safe Houses.

These schemes have flourished because of long term, incremental, community building work led by the Office of Aboriginal Development over several years, rather than one off visits from outside agencies. While the Northern Territory has a number of successful self-policing initiatives on remote communities, Western Australia still cannot get sustained initiatives off the ground. Western Australia could learn lessons from the work done by the Remote Area Night Patrol Coordinating Unit based in Alice Springs at Tangentyere Council

The stakes are high. The "mass imprisonment" of Aboriginal people in Western Australia continues unabated.

4.13 MASS IMPRISONMENT OF BLACK PEOPLE

The mass imprisonment of men from ethnic minority backgrounds is an international phenomenon. In the United Stated of America, some 30% of black men will expect to spend time in prison. As Garland, suggests:

> Imprisonment has become one of the social institutions that structure this group's experience. It has become part of the socialisation process. Every family, every household, every individual in these neighbourhoods has direct, personal knowledge of the prison – through a spouse, a child, a parent, a neighbour, a friend. Imprisonment ceases to be the fate of a few criminal individuals and become a shaping institution for whole sectors of the population [159]

159 D Garland "The Culture of High Crime Societies: Some Preconditions of Recent "Law and Order" Policies(2000) 40 :3 British Journal of Criminology, 6

4. THE FAILURE OF DIVERSION: A GOOD IDEA CYNICALLY EXPLOITED

> This could easily have been written about the Indigenous population of Western Australia. As figures show that the State has by far the highest rate of Aboriginal imprisonment in Australia, and that things have gone from bad to worse since the Royal Commission into Australian into Aboriginal Deaths in Custody. Around 1 in every 17 Aboriginal men are now in prion in the State at any given time. There are uncomfortable parallels, too, with the legacy of the stolen generations, where every Aboriginal person also has a "direct personal knowledge" of the experience, with most families in Australia having "lost" a relative in the catastrophe. Linked together, mass imprisonment and mass removals have created a gulag for Indigenous Australians, few escaping contact with one or both of these twinned institutional experiences. Many Aboriginal people have had their lives shaped by "peculiar institutions" [160] institutions, specifically adopted to warehouse, control, cordon off and confine the dispossessed.

The psychological legacy left by generations of institutionalisation can be found in endemic family violence and family dysfunction, in alcoholism and mental illness. Not surprisingly, Aboriginal women, in particular, see prison as a part of the "cycle of violence" [161] - an experience that rips the heart out of communities, condemns young men to these "shaping institutions" and excludes them from participation in normal social processes.

160 L Wacquant, "The new 'peculiar institution': On the prison as surrogate ghetto", (2000) Theoretical Criminology. 4: 3

161 H Blagg, Crisis Intervention in Aboriginal Family Violence (Canberra: PADV, 2000)

5. AN ANALYSIS OF CASES DEALT WITH IN THE CHILDREN'S COURT UNDER THE THREE STRIKES LAW

5.1 INTRODUCTION

This section of the report analyses a number of cases dealt with under the three strikes legislation. A total of 110 cases were included in this study. This represents as many of the three strikes cases involving clients of the ALSWA that can be identified from the commencement of the legislation until August 2001. The total number of 110 is not the number of separate individuals . There were 73 separate individuals. Only those cases where the juvenile received the minimum mandatory sentence for the home burglary offence (s)) were included. There were other cases where the offender was a third striker but received more than the minimum mandatory sentence.

5. AN ANALYSIS OF CASES DEALT WITH IN THE CHILDREN'S COURT UNDER THE THREE STRIKES LAW

5.2 STATISTICS - TABLE 1

CHARACTERISTIC	NUMBER	% OF TOTAL (110)
SEX		
MALE	107	97. 3 %
FEMALE	3	2.7%
RESULT		
DETENTION	66	60%
IMPRISONMENT	2	1.8%
CRO	42	38.2%
COMPLAINANT OR FAMILY PRESENT	45	40%
VIOLENCE OR THREATS OF VIOLENCE	6	5.4%
AGE		
10-12	9	8.2%
13-15	52	47.3%
16-17	46	41.8%
18	3	2.7%
LOCATION		
METROPOLITAN	19	17.3%
REGIONAL	91	82.7%

5. AN ANALYSIS OF CASES DEALT WITH IN THE CHILDREN'S

5.3 RECIDIVISM

There were 73 separate individual juveniles who were dealt with in the 110 cases.

- Breakdown of number of times dealt with

Number dealt with once	54
Number dealt with more than once	19
Number dealt with twice	8
Number dealt with three times	7
Number dealt with four times	2
Number dealt with five times	1
Number dealt with six times	1
Total	73

- 26 % of the 73 separate individuals were dealt with more than once under the three strikes laws.

- 17 of those juveniles who were dealt with more than once were from a regional area (89.5%).

- Of the 19 individual who were dealt with more than once under the mandatory sentencing laws, 9 of them received a CRO for the first time and 10 of them received detention for the first time. Therefore, there is no clear pattern to determine whether a CRO or detention is more effective in preventing or deterring future similar offending.

5. AN ANALYSIS OF CASES DEALT WITH IN THE CHILDREN'S

5.4 BREAKDOWN OF REGIONAL CASES – TABLE 2

CHARACTERISTIC	NUMBER	% OF TOTAL (91)
LOCATION		
NORTHERN*	50	55%
OTHER	41	45%
RESULT		
DETENTION OR IMP	52	57%
CRO	39	43%
AGE		
10-12	9	9.8%
13-15	46	50.5%
16-17	34	37.4%
18	2	2.3%

* Northern = Kimberley and Pilbara

- A massive 55 % of all regional cases were from the northern area. The number of cases dealt with from the northern area also represented 45 % of all the cases considered in the entire study.

- Even when looking at the separate individuals (ie 73) 56 were from regional areas (76.7 %) and 17 were from the metropolitan area (23.3%).

- Bearing in mind that there are no detention centres outside the metropolitan area this has an enormous impact in terms of where these juveniles are sentenced and where they serve their sentence.

5. AN ANALYSIS OF CASES DEALT WITH IN THE CHILDREN'S

5.5 AGE

The recent Review by the Department of Justice found that the age group from 14 years to 17 years had the most number of cases. [162] Our research indicated that the category with the greatest number was in the age group 13 ton 15 years.

5.6 BREAKDOWN OF THOSE WHO RECEIVED CRO'S – TABLE 3

AGE	NUMBER	%
10-12	6	14.3%
13-15	24	57.2%
16-17	12	28.5%
18	0	0

As one would expect the greatest proportion of those who received the option of a CRO were 15 years or younger (71.5%).

5.7SUBSTANCE ABUSE RELATED TO OFFENDING

In 55 out of the 110 cases some form of substance abuse was identified to the court . In other words reference to substance abuse appears on the transcript of proceedings or material before the Court. Substance abuse includes alcohol, volatile substances and illicit drugs. We would expect the actual number to be much higher as this study relies on what was said to the lawyer and to the court. In other words we can say that at least 50% of the cases involved an offender who had a form of substance abuse.

162 Department of Justice, above n 4, 24

5. AN ANALYSIS OF CASES DEALT WITH IN THE CHILDREN'S COURT UNDER THE THREE STRIKES LAW

5.8 NATURE OF THE BURGLARY OFFENCE

The three strikes laws were introduced as a response to community concern in relation to home invasions.[163] The use of the term "invasion" would usually infer a situation where there was violence or threats of violence to the occupants of the home. It would at least seem to require the presence of someone at home when the offence was committed.

40 % of the cases studied involved the complainant or someone else being present at home when the offence took place. Therefore, 60% of the cases considered involved burglary, offences which are the subject of the least community concern. In fact only *5.4 % of the cases could be properly described as a home invasion*, in the sense of involving some form of violence or confrontation with the complainant or other person at the house.

5.9 TIME IN CUSTODY

Once an offender is alleged to be a third striker the usual course is for them to be remanded in custody prior to sentencing taking place. The ALSWA was able to ascertain the number of days spent in custody in 27 of the cases where a CRO had been imposed. The average time spent in custody was 30 days and the maximum amount of time was 59 days. Therefore, the juveniles who eventually received a CRO had on average, already spent the equivalent of a 2 months sentence of detention prior to being sentenced. The three strikes laws do not allow for this to be taken into account by reducing the length of the CRO imposed.

Another problem which has arisen from the fact that a juvenile is usually remanded in custody if they are alleged to be a third striker , is that on a number of occasions the court has found that they were not in fact a third striker and therefore another penalty is imposed.

163 N Morgan , above n 11 ,166

5. AN ANALYSIS OF CASES DEALT WITH IN THE CHILDREN'S COURT UNDER THE THREE STRIKES LAW

Anecdotal evidence suggests that a large number of juveniles have spent significant amounts of time in custody as a result of being alleged to be a third striker when in fact they were not according to the requirements of the legislation. The Department of Justice has highlighted this problem when it referred to the President of the Children's Court and other's concern that cases were being sent down from the Kimberley and the Murchison before their repeat offender status has been properly determined .[164] Given that over 90% of the three strike cases from the country are Aboriginal [165]one would expect that the majority of these cases would also be Aboriginal.

5.10 CASE STUDIES

The following case study is an example of the unfair consequences of being wrongly alleged to be third striker

Case Study 'A'

'A' was a 16 year old boy from a remote community. Police alleged that 'A' was a repeat offender and he was therefore remanded in custody to Perth for sentence. 'A' faced only one charge of burglary on a home. The offence occurred at his community. 'A' entered a house with some friends at a time when they knew the owner of the house was not at home. While inside the house 'A' and his friends cooked themselves some food and watched TV. 'A' did not have access to a TV in his own residence. 'A' spent 44 days in custody in Perth away from his family. Once it was established that 'A' was not a repeat offender the President sentenced him to a Youth Community Based Order for three months. 'A' had already served the equivalent of a three month sentence of detention.

164 Department of Justice , above n 4 , 16
165 Ibid , 27.

5. AN ANALYSIS OF CASES DEALT WITH IN THE CHILDREN'S COURT UNDER THE THREE STRIKES LAW

The next two case studies are examples of the effects of the under representation of Aboriginal juveniles in diversionary options which do not count as a strike for the purposes of the law.

Case Study 'B'

'B' was a 16 year old boy from a regional area. He faced three burglary charges, three attempted stealing, one false name and one breach of bail. Two of the burglary offences involved people's homes and their circumstances were similar. 'B' entered the houses in company and was disturbed by the complainants and then left the house immediately with nothing stolen.

'B' had never been referred to the juvenile justice team and his first burglary offence therefore counted as a strike. 'B' had a minimal record and one of his strikes would not have counted as a strike 12 days after the day of sentencing.[166] 'B' had never been to detention before and had spent three weeks in custody prior to sentencing. 'B' received a CRO for 12 months. If 'B' had been referred to the juvenile justice team for one of his prior burglary offences he would not have been a repeat offender and would probably had not spent three weeks in a detention centre in Perth.

Case Study 'C'

'C' was a 14 year old boy from a regional area. 'C' faced one home burglary offence as well as a Breach of a Youth Community Based Order imposed for stealing and breaching bail. 'C' had exactly three court appearances for home burglary. For his first appearance in the Children's Court he received a CRO (the most serious option available other than immediate detention) and not a referral to the juvenile justice team. Prior to committing the triggering offence 'C' had travelled with family to another country town away from his usual caregiver. 'C' had no money and no suitable accommodation. On the night of the offence 'C' was at a party with relatives. 'C' had been drinking alcohol and sniffing substances. 'C' was told to go home and he then left on his own. As he was hungry and drunk he entered a house and stole a handbag, phone and cash to the value of $600.00. The complainant and her husband were asleep at the time, however, they were not disturbed. 'C' received 12 months detention. If 'C' had been referred to the juvenile justice team just once he would not have been liable to be sentenced to 12 months detention.

166 P(A child) v The Queen above n 78 and Young Offenders Act 1994 (WA) ,s 189

5. AN ANALYSIS OF CASES DEALT WITH IN THE CHILDREN'S COURT UNDER THE THREE STRIKES LAW

This next case study is a good example of how the laws lead to unfairness.

Case Study 'D'

'D' was a 12 year old boy from a regional area. He faced threecharges of aggravated burglary, one attempt stealing and one breach of bail. 'D' had also breached a Youth Community Based Order. Only one charge involved a burglary on a dwelling. 'D' entered a house, in company with others, at a time when no one was at home. They stole a wallet containing $4.00. The other burglary offences involved a laundry room of a hotel where nothing was stolen and a school canteen where a can of soft drink was taken. 'D' had serious welfare, educational and substance abuse problems. Despite these problems he had completed more than half of the community work and attended two out of six counselling sessions which was required by the Youth Community Based Order. Due to the lack of a suitable placement for 'D' and the likelihood that he could not comply with an order for 12 months , 'D' was sentenced to 12 months detention. Even if 'D' would have received detention prior to the three strikes law he would not have received a sentence of 12 months. A sentence of 12 months detention for a 12 year old in these circumstances is clearly excessive.

These next four case studies involve situations where a positive alternative was available to promote the rehabilitation of the young person in particular by strengthening their family and cultural connections. In each case those options were ignored because of the mandatory sentencing law.

Case Study 'E'

'E' was a 16 year old boy from a regional area. 'E' was sentenced in relation to one offence of aggravated burglary, one offence of steal motor vehicle and one offence of driving without a licence. 'E' had also breached a six months CRO. 'E' went to the complainant's house with a friend and 'E' reached through a window taking a set of car keys. They then left and returned later stealing the motor vehicle. 'E' had a total of 14 offences on his record. 'E' had previously complied with one six month supervision order. At the time of sentencing a proposal had been set up for 'E' to reside at a station with family members far away from the country town where he usually got into trouble. 'E' was sentenced to 12 months detention. Taking into account the principle of rehabilitation the best chance of assisting 'E' to curb his offending behaviour would have been a supervision order which required him to remain at the station.

5. AN ANALYSIS OF CASES DEALT WITH IN THE CHILDREN'S COURT UNDER THE THREE STRIKES LAW

Case Study 'F'

'F' was a 17 year old boy from a regional area. 'F' faced seven charges including one offence of home burglary which counted as this third strike. 'F' had in fact been at the complainant's house prior to committing the offence and had been drinking alcohol with the complainant. After leaving the house 'F' later returned when he knew the complainant would be asleep. 'F' stole a bag which had clothes, shoes and some CD's. 'F' wanted some shoes because he didn't have any. 'F' had a total of eight prior offences which included six burglary convictions. 'F' had only had three prior court appearances. All of 'F's offending had occurred over the preceding 12 months after his parents separated and he had no stable accommodation. 'F' now had stable accommodation with his mother. 'F' received a sentence of 12 months detention. The Sentencing Judge indicated that but for the legislation a CRO would have been appropriate.[167]

Case Study 'G'

'G' was a 15 year old boy from a regional area. 'G' faced sentencing for a total of seven offences and breaching a three month CRO. Only two of the charges involved a home burglary. 'G' had only recently commenced offending when he had moved to a new town and had become involved with a group of offenders. 'G' had only two prior court appearances. The two offences which constituted his third strike were committed in company and no one was present when they entered the houses and stole some property. It was proposed that 'G' could move to a station to the care of his grandfather. 'G' received 12 months detention.

167 Transcript of Proceedings, 8

5. AN ANALYSIS OF CASES DEALT WITH IN THE CHILDREN'S COURT UNDER THE THREE STRIKES LAW

Case Study 'H'

'H' was a 16 year old boy from a regional area. 'H' faced the mandatory penalty for one offence of aggravated home burglary. 'H' and his two accomplices attended at a house and after ensuring no one was at home, the two accomplices entered. 'H' waited outside and acted as a lookout. The owners returned home and they all left. One bottle of alcohol was stolen. 'H' had only two prior court appearances and only two prior burglary offences. Over the last couple of years 'H' had been living with the family of one of his co-offenders. Prior to sentencing he had moved in with his grandmother who was a stable influence on him. 'H' was sentenced to 12 months detention. The Sentencing Judge indicated that he would probably have been dealt with in another way if the three strikes legislation did not exist.[168]

The following case study is an example of how these laws operate to criminalise young children and do nothing to protect the community.

Case Study 'I'

'I' first faced the mandatory penalty when he was 11 years of age . 'I' faced three charges of aggravated burglary, one charge of stealing a motor vehicle and one charge of breaching bail. 'I' had also breached a Youth Community Based Order. 'I' was only 10 years old when he committed these offences. For each of the three home burglaries 'I' stole cash, water and cigarettes. 'I' was purely motivated for money for food as he was hungry. 'I' spent 23 days in custody prior to receiving a 12 month CRO. Those 23 days were spent in Perth far away from his home and family. 'I' was back in custody some months later for another burglary on a home. This time 'I' was in the company of adult co-offenders who stole significant amounts of property. 'I' received only $50.00 which he spent on food and drink for himself and his brother. 'I' spent another 27 days in detention in Perth before receiving another 12 month CRO. 'I' was still 11 years old. Within another couple of months 'I' was again in detention for another home burglary. This time 'I' had entered an unoccupied room at a hostel and took a small amount of money. Once again 'I' purchased food. After twenty six days in custody 'I' received another CRO for 12 months. 'I' appeared at least three more times for sentencing pursuant to the three strikes legislation. He eventually received the 12 month detention sentence when he was 12. He again offended after being released from detention and received another 12 month sentence at the age of 13 years. As a result of the three strikes legislation 'I' would have spent at least 500 days in detention by the age of 13. The mandatory sentencing law has done nothing to deal with the underlying welfare issues which caused this child to steal for food.

168 Transcript of Proceedings, 23.

5. AN ANALYSIS OF CASES DEALT WITH IN THE CHILDREN'S COURT UNDER THE THREE STRIKES LAW

The case study below shows the detrimental effect of being an adult who was sentenced for offences committed as a juvenile.

Case study 'J'

'J' was an 18 year old boy from a regional area who was sentenced in relation to two charges of aggravated burglary , two charges of assaults, one charge of assaulting a public officer and one charge of damage. These offences occurred when 'J' was 17 years of age. 'J' committed the burglary offences in company with others and they went to a hotel and broke into the manager's residence and the manager's office. No one was present when the offences occurred. Money and a safe were stolen. 'J' had also breached a community work order as he had only completed 25 ? hours out of the required 40 hours. 'J' received an intensive youth supervision order for his first burglary on a place ordinarily used for human habitation and a CRO for his second such offence. 'J' didn't commence offending until he was 16 years old when he began drinking alcohol. He had never been into custody before spending a couple of weeks in remand due to these offences. Work was available for 'J' through a family member. Because 'J' was 18 years at the time of sentencing he had to be sentenced to 12 months imprisonment and the option of a CRO was therefore not available. The Sentencing Judge referred to the fact that this was a case that demonstrated " how illogical the three strikes legislation is" as 'J' did not have a serious record and one of the offences which counted as a strike was a burglary which involved stealing a can of coke.[169] The judge further commented that the matter would not ordinarily warrant a term of imprisonment. 'J' was sentenced to 12 months imprisonment for with parole eligibility. He therefore would serve his first custodial sentence for offences which occurred as a juvenile in an adult prison.

169 Transcript of proceedings

5. AN ANALYSIS OF CASES DEALT WITH IN THE CHILDREN'S COURT UNDER THE THREE STRIKES LAW

The next three case studies are examples of what happens when the court is not bound by the mandatory sentencing laws. They show that judicial discretion allows the individual circumstances to be taken into account to arrive at the appropriate sentence.

Case study 'K'

'K' was a 15 year old boy from a regional area who faced court as an alleged third striker in relation to one offence of Aggravated Burglary. He also had four stealing offences, three charges of stealing a motor vehicle , one breach of bail, two damage and a breach of a CRO. The burglary was committed in company with three others at night time . A camera and food from the fridge was stolen and no one was at home. 'K' told the police that his motivation for the offence was that he was hungry. For most of the other charges 'K' was in company and acted as a lookout while his co-offenders broke into numerous vehicles. 'K' was under the influence of alcohol at the time of all of the offences and he admitted to having problems with other substances. A work placement was available for 'K' at a station for three months. 'K' had spent about three weeks in custody waiting for sentencing.

The Sentencing Judge held that 'K' was not in fact a third striker as one of the alleged previous strikes did not specify that the premises was a place ordinarily used for human habitation.

The reports before the court indicated that there was a chance that the placement would be effective for 'K' despite his long record and breaches of past orders. The Sentencing Judge therefore was persuaded to impose a CRO. The length of the CRO was six months and the Sentencing Judge indicated that had detention been appropriate then 'K' would have been sentenced to six months detention.

169 Transcript of proceedings

5. AN ANALYSIS OF CASES DEALT WITH IN THE CHILDREN'S COURT UNDER THE THREE STRIKES LAW

Case study 'L'

'L' turned 14 years on the day that he was sentenced in relation to an aggravated burglary and breaching a six month CRO. He had committed the burglary offence when he was 13 years old and only three days after the CRO had been imposed. It occurred at night time and he was aware that the complainant was at home and after stealing property he was disturbed by the complainant and he left the premises. 'L' had been remanded in custody from a regional location as it was alleged that the aggravated burglary constituted his third strike. He spent 27 days in custody prior to being arrested. 'L' had little supervision from family members, however, it was proposed that his Aunty would look after him and she was the person most likely to influence him in a positive manner. As it tuned out 'L' was not a third striker and therefore was not liable to 12 months detention or a 12 month CRO. As a result of spending 27 days in custody far away from home and without any visits at all the sentencing judge dismissed the matter as 'L' had already suffered significant punishment. The CRO was ordered to continue and he therefore was still subject to supervision and control.

Case study 'M'

'M' was sentenced in relation to three aggravated burglary charges and one damage charge. All of the burglary offences occurred at the community that 'M' resided at. Two of the burglary offences related to the same premised and 'M' in company with others broke into the house two nights in a row. They knew that the owners were away and on the second occasion they cooked themselves some food and watched an "X" rated movie. 'M' only stole alcohol from the premises and his co offenders took other property. The third burglary offence occurred when 'M' heard a bang next door and went to have a look . He came across some other young people who had broken into the house and he too searched for something to steal but did not take anything. 'M' was 15 years old and had never been sentenced to detention before. It was alleged that he was a third striker and he was therefore remanded to the Perth Children's Court for sentence and spent 19 days in custody. 'M' had started to make restitution to the complainants as they were known to him. He had a very difficult upbringing as both his parents died when he was very young. His guardian died about 18 months earlier and this is when he started getting into trouble. A proposal had been put in place for him to reside at a remote community. 'M' was in fact a second striker and the Sentencing Judge imposed a six months CRO taking into account the nature of the offences, his plea of guilty, his efforts at repaying restitution and the availability of a suitable placement.

5. AN ANALYSIS OF CASES DEALT WITH IN THE CHILDREN'S COURT UNDER THE THREE STRIKES LAW

This next case example shows that the judiciary does in fact sentence young people to detention where there is no other appropriate option and therefore supports the argument that there is absolutely no reason for the mandatory sentencing laws in Western Australia .

Case study 'N' AND 'O'

'N' was charged with an aggravated burglary which was committed in company at night time , however, no one was at home. 'O' was charged with receiving the stolen property from the burglary that 'N' had been involved with. 'O' also faced five burglary charges and one attempt burglary.
'N' was 17 at the time and had a cannabis problem. His motivation for committing the offences was to obtain money for cannabis and food. Although he had a significant record he had not been in any trouble for 12 months. He was dealt with as a third striker and sentenced to a 12 month CRO. He had spent 30 days in custody prior to being sentenced. 'O' on the other hand was not a third striker although he had a more serious record. 'O' was 16 years old and was sentenced to five months detention.

The remaining two case studies are further examples of unfairness and in particular how the lack of discretion precluded the court from taking into account important factors.

Case study 'P'

'P' was sentenced as a third striker to 12 months detention for one burglary offence. Approximately two months later he appeared again for sentencing in relation to one charge of burglary. This offence actually occurred before the first strike burglary . 'P' again received 12 months detention as he was a fourth striker. The second 12 months sentence ran from the date of sentencing as it could not be backdated because 'P' had not been in custody in relation to that offence. If both charges had been dealt with on the same day 'P' would have received no more that the 12 months mandatory sentence as there were only two burglary offences and neither involved anything of a particularly serious nature such as the occupants being at home or having a confrontation with 'P'. As a result of the mandatory sentencing laws 'P' was unable to receive the benefit of the totality principle which would usually be taken into account by the sentencing judge.

5. AN ANALYSIS OF CASES DEALT WITH IN THE CHILDREN'S COURT UNDER THE THREE STRIKES LAW

Case study 'Q'

'Q' was a 14 year old boy from a regional area who was sentenced in relation to one aggravated burglary , one charge of possession of cannabis and breaching a CRO. The burglary offence occurred when the complainant and his wife were at home although they were not disturbed. The co offender entered the house and stole $15 . 'Q' was a lookout and did not enter the house at all. 'Q' spent 21 days in custody and 37 days subject to a strict supervised bail regime. 'Q' had a very serious cannabis problem and was prepared to address it by attending counselling sessions. He would smoke up to six cones of cannabis a day. His offending was clearly related to his need to obtain money for drugs. Also he was due to be taken by an older cousin to a remote community to be taken through the law. The Sentencing Judge indicated that if there was a choice, a sentence of detention of less than 12 months would have been imposed [170], however, as a result of the three strikes legislation a 12 month sentence of detention had to be imposed. It seems that this would have been a perfect case for the Drug Court regime which has been operating in the Children's Court since the end of 2000. As a result of mandatory sentencing such an option could not be considered.

170 Transcript of proceedings

6. CONCLUSION

As a result of experience over the past 3-4 years, we now know far more about mandatory sentences. The news is certainly not good:

- The three strikes laws have no clear and consistent rationale. Indeed, as evidence emerged about their lack of effectiveness, the previous State government attempted, in a most disingenuous fashion, to shift the benchmarks for evaluation.
- The laws have not achieved any deterrent effect as originally proclaimed.
- They do not operate as tools for the selective incapacitation of serious offenders but sweep up more trivial offenders.
- Despite claims made in mid – 2000, there is no statistically valid evidence that they reduce recidivism.
- They lead to disproportionate sentences on minor offenders.
- They distort proportionality by ironing out differences in sentencing for offences of a particular type. (eg two offences of burglary of differing gravity may attract the same sentence).
- They distort relativities between different types of offence (eg a minor opportunistic home burglary may attract a harsher sentence than a more serious fraud/assault).
- They subvert proper legal processes in that unaccountable pre-trial decisions become increasingly important to the outcome of the case.

171 Above n 5, para 8.16, quoting with approval the submission of the Law Council of Australia.

6. CONCLUSION

- They have a profoundly discriminatory impact in that:

  - The three strikes laws apply only to offences in which young indigenous people are over-represented;

  - Non-Aboriginal people have greater access to access diversionary schemes such as cautioning and juvenile justice teams, which do not count as 'strikes'.

  - Juveniles are disadvantaged by the operation of early release schemes. Third strike juveniles must serve at least 50% of their sentence before being released. Third strike adults may serve only one third.

There are differences between the recently repealed Northern Territory and Western Australian laws but, as the Senate Report concluded, 'we are comparing bad with bad and we are trying to prioritise badness.'[171]

On a more positive note, there are signs that these lessons have to some degree been learned. Both the Western Australian and Northern Territory governments have effectively conceded that mandatory sentences have no deterrent effect, and that there is a need for judicial discretion and the more vigorous use of diversionary schemes and alternative strategies.

The time has come for the current Western Australian government to follow the lead of the recently elected Northern Territory government. The State's three strikes home burglary laws should be repealed as a blight on our justice system and as a hindrance to the pursuit of reconciliation and justice for Aboriginal people. If they are to be retained, they should be amended as follows:

- The 12 month minimum should be, at most, a presumptive starting point for the courts rather than a mandatory penalty. (The availability of the conditional release order for juveniles does not inject sufficient flexibility).

171 The Convention on the Rights of the Child; generally see M Wilkie, above n 17

6. CONCLUSION

- As in the Northern Territory, the laws should not apply to all children but only to those above a certain age (perhaps 16 or 15).

- Australia is signatory to international conventions which require that children are treated no more severely than adults.[172] In order to meet these obligations, a different scheme should apply to juveniles as opposed to adults. The preferred option would be for a lower presumptive sentence.

Diversion is benefiting non-Indigenous youth and sharpening rather than reducing the racial divide in justice. Western Australia urgently needs to repeal the mandatory sentencing laws. It also needs to pursue a reform agenda to increase the rate of diversion for Indigenous youth and empower communities – not agencies – to deal with justice issues.

This includes:

- Legislate to reduce police discretion to deal arbitrarily and capriciously with Indigenous youth;
- Gate-keep the system more effectively;
- Recruit Indigenous people to run family conferences.
- There needs to be a thorough revision of the diversionary system from an Indigenous perspective.
- Police should cease to prosecute in court;
- Prior cautions and referrals to juvenile justice teams are not part of a child's criminal record and should not be treated as such magistrates and prosecutors.

172 The Convention on the Rights of the Child; generally see M Wilkie, above n 17

6. CONCLUSION

Remote communities:

- No new legislation without work on a number of communities to develop Law & Justice strategies (Balgo, Jigalong, Kulumbaru, Oombulgarri, for example). These should not be imposed from above, but developed in full dialogue with Indigenous people. The strategies should address issues of family violence, alcohol abuse, youth offending and anti-social behaviour;
- Take control of warden's schemes away from police;
- Provide alternatives to warden's closer to remote Night Patrols in the Northern Territory as part of Law and Justice Planning;
- Include all language/skin groups in any process;
- Encourage and ensure women's participations in these processes;
- Introduce three Community Justice Groups on a trial basis (country/remote)
- The pilot Circle Sentencing in New South Wales need to be studied