

**PUNISHMENT IS BLIND:
MANDATORY SENTENCING OF CHILDREN IN WESTERN
AUSTRALIA AND THE NORTHERN TERRITORY**

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I.

Late 1996 and early 1997 saw the introduction of mandatory sentencing legislation in Western Australia (14 November 1996) and the Northern Territory (8 March 1997). Under these laws, children and young people are being sentenced to detention at unprecedented rates and for longer periods, even for minor offences, than previously. Both provisions breach Article 37(b) of the UN Convention on the Rights of the Child which states that: “[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be ... used only as a measure of last resort and for the shortest appropriate period of time”.

By requiring an automatic order of detention, the laws remove the court’s opportunity to take into consideration the child’s circumstances and the nature and seriousness of the offence. Their bald, arbitrary and punitive nature undermines the child’s sense of dignity and worth and runs counter to the principle of promoting the child’s reintegration into society (Article 40.1).

Both provisions have the effect of treating children and young people alike, regardless of whether they have committed trivial offences because of acute or chronic need, or whether they have a longer and more serious history of offending.

Both pieces of legislation are more harsh on children than on adults. In the NT younger offenders receive multiples of 28 days, whereas adults (those 17 and over) receive multiples of 14 days for the same offence. In WA, children must

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serve half of their sentence (six months) before becoming eligible for release under supervision, whereas adults need serve only one third (four months).

Both ensure that the child does not come out of the sentence with a clean slate. Any further offence is counted as a third (in WA) or second (in the NT) offence and attracts the full sentence again.

In this brief article, I will discuss the differences between the mandatory sentencing laws in the NT and WA, and describe the impact that these laws are having on children and young people. My comments are based on a three week investigatory visit to Perth, Alice Springs and Darwin, from 26 October 1998 to 14 November 1998. I spoke to representatives of legal services, independent lawyers, youth workers, child and family support agencies, staff of detention centres and community-based corrections. A number of these people spoke to me confidentially, either because they are employed by the government or because their non-government employer is dependent on government funding.

The WA legislation targets children from 10 to 17. Mostly, the children are between 14 and 17 but children as young as 11 have received a 12 month sentence (with supervised release after six months). The NT legislation is more restricted, giving a 28 day sentence to 15 and 16 year olds for a second offence and 14 days to 17 year olds (who are treated as adults) for a first offence. No early release is allowed in the NT for the mandatory periods.

The NT law covers a wide range of property offences, including vehicle offences and stealing from houses, cars and shops (although not shoplifting). The WA law specifically targets home burglary, which can include taking food from a tent, but not other stealing such as shoplifting or bag snatching.

Both laws focus narrowly on property offences and ignore more serious offences such as arson, assault and rape. Children are therefore seeing their friends and relatives being imprisoned for minor stealing and being released on bonds for extreme violence. In their fierce clarity and narrow sights, both Acts override more comprehensive juvenile justice Acts which offer humane principles and a wider range of sentencing options.

In WA, in the four months after the legislation came into force, each month saw an average of seven children and young people receiving mandatory sentences. The rate has now dropped to less than one per month. Over 50 children in WA have served or are serving the 12 month mandatory sentences in the State's one juvenile justice detention facility, Banksia Hill, near Perth. Although most are released on an intensive supervision order after 6 months, approximately one third to one half breach supervision and return to finish the full 12 months in detention. The conditions of release are usually excessive compared with adults, and often unrealistic for Aboriginal children, and for rural and remote children.

As the WA law is to be reviewed after four years and a report submitted to Parliament in the 5th year (2001), the Ministry of Juvenile Justice is monitoring the impact of the law and keeping accurate statistics.

In the NT, with no intention to review, specific figures of mandatory sentences are reportedly not being kept. However, Corrective Services Annual Reports indicate that the number of juveniles sentenced to detention for relevant

offences increased 53 per cent in one year to June 1998. The daily average of juvenile detainees has also increased in the same proportion, from 15 to 23. In the two years since commencement, the number of juveniles who have already served or are serving mandatory sentences appears to be at least 66. This represents a dramatic increase on the 1995/6 numbers (22).

II.

There is no appeal against the severity of these sentences. As a result, some members of the magistracy, the police and the community in both jurisdictions are trying a variety of strategies to avoid convicting children in a way that attracts the mandatory sentence.

On nine occasions, WA courts have avoided the sentence by issuing Conditional Release Orders. This, however, may be a temporary reprieve because the full 12 months must be served if the young person breaches his or her conditions. The WA Supreme Court has also decided that offences which are more than two years old cannot count towards a mandatory sentence.

NT courts have found young people guilty of related offences which do not attract the mandatory sentence, such as interfering with a vehicle rather than stealing it, and trespass rather than break and enter.

Concerned members of the public are not reporting break-ins or thefts because they do not want a child to be 'jailed' for it. Some police are issuing cautions or charging children with lesser offences more regularly than they might otherwise do.

While many in the juvenile justice system are horrified by the way in which young offenders are arbitrarily being locked up, these laws continue to be promoted by the respective governments as a 'powerful measure' to protect property and safety in the general community. What is not acknowledged by the politicians is that many of these young offenders are children who have suffered years of physical and emotional neglect, have effectively been abandoned by their families and the welfare system, or are trying to live independent of violent and abusive homes. These are children and young people who have learned to live by their wits and whose survival may already have depended on it.

III.

These two pieces of legislation have allowed gross violations of the human rights of children:

A. Western Australia

In two years, one 11-13 year old from the north has received two sets of 12 months detention, two 12 month conditional release orders and one supervised release order of six months. He has had little family care and was stealing food from houses because he was hungry. All these sentences go onto his record.

B. Northern Territory

A 17 year old chronic petrol sniffer from a top end Aboriginal community is serving a sentence of seven months and 120 days imprisonment for stealing food, alcohol, soft drink, cigarettes and petrol (all consumed with friends), and causing related minor property damage. His sentence was based on an application of the mandatory detention formula (120 days) with additional sentencing (seven months). He has had little family care during his teens but had a clean record until June 1998.

A 17 year old male has served 28 days in an adult jail for a second conviction of minor theft. If his second offence had been committed on or after his 17th birthday, he would have served only 14 days.

A 15 year old girl who was only a passenger in a stolen vehicle is serving 28 days' detention for unlawful possession of the vehicle.

As can be seen from these examples, the NT law has reduced sentencing to a mathematical formula based on technical definitions, not individual circumstances. However, instead of reducing inconsistencies, it has actually increased them.

IV.

In WA, the question of what counts as a 'strike' has become an important point. If the child is cautioned by police or referred to the juvenile justice team, this does not count. If the charge is proved but dismissed under s 67 of the *Young Offenders Act 1994* (WA), where the court can decide that the child has already been punished enough (for example by detention on remand or having apologised and given some reparation to the victim), it also does not count.

A strike is actually a 'sentencing event', that is, an appearance in court at which a sentence is given for one or more specified offences. For a child to have received three sentencing events, it is assumed that he or she has been offending over an extended period of time. However, this depends on how the court deals with a series of offences. If a child is separately sentenced for three trivial offences within a short space of time, for example during the school holidays or a period of family stress, the last offence will attract a mandatory 12 months. If, however, the same three offences are dealt with together by the court, they constitute only one event.

The arbitrary use of detention for children and young people gives to the community, not safety, but the shocking message that harsh punishment is an acceptable early option. It encourages parents, teachers and other adults quickly to use harsh punishments in other settings too. It undermines the legitimate use of detention for intensive rehabilitation services with serious offenders, and it ignores the need for specific reintegration services after detention.

Above all, it criminalises children and young people; it teaches them that the system is against them and that punishment, not justice, is blind.