



**SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT**

**REPORT OF THE  
STANDING COMMITTEE ON LEGISLATION  
IN RELATION TO THE  
YOUNG OFFENDERS AMENDMENT BILL 2003**

Presented by Hon Jon Ford MLC (Chairman)

Report 25  
November 2004

## **STANDING COMMITTEE ON LEGISLATION**

### **Date first appointed:**

May 24 2001

### **Terms of Reference:**

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

#### **“1. Legislation Committee**

- 1.1 A Legislation Committee is established.
- 1.2 The Committee consists of 5 members.
- 1.3 The functions of the Committee are to consider and report on any bill or other matter referred by the House.
- 1.4 Unless otherwise ordered, the policy of a bill referred under subclause 1.3 at the second reading or any subsequent stage is excluded from the Committee’s consideration.”

### **Members as at the time of this inquiry:**

Hon Jon Ford MLC (Chairman)

Hon Peter Foss QC MLC

Hon Giz Watson MLC (Deputy Chair)

Hon Bill Stretch MLC

Hon Kate Doust MLC

### **Staff as at the time of this inquiry:**

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### **Note**

The twenty-fifth report of the Legislation Committee consists of a Report of the Committee and a Minority Report of Hon Peter Foss QC MLC and Hon Bill Stretch MLC.





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## EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE

### REPORT OF THE STANDING COMMITTEE ON LEGISLATION

#### IN RELATION TO THE

#### YOUNG OFFENDERS AMENDMENT BILL 2003

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#### EXECUTIVE SUMMARY

- 1 The Young Offenders Amendment Bill 2003 was referred to the Standing Committee on Legislation on April 1 2004 for inquiry and report by June 30 2004. The Legislative Council granted an extension of time within which to report, to October 21 2004 and a further extension to November 19 2004.
- 2 The Bill is a private Member's bill, which is a bill introduced by a Member other than a Minister. Hon Peter Foss QC MLC introduced the Young Offenders Amendment Bill 2003 in the Legislative Council.
- 3 The Bill proposes to amend the *Young Offenders Act 1994* to affect the application of certain *Criminal Code* provisions, which are commonly known as the 'three strikes' legislation, to young offenders.
- 4 Pursuant to sections 400 and 401 of the *Criminal Code*, if a young person is convicted of three offences (or 'three strikes') of burglary committed in respect of a place ordinarily used for human habitation then the court is required to impose a mandatory sentence of 12 months imprisonment or detention.<sup>1</sup> A number of judicial decisions have held that when these sections of the *Criminal Code* are considered in light of provisions of the *Young Offenders Act 1994*, there are certain situations in which offences committed by young persons do not constitute convictions or 'strikes'.
- 5 The Young Offenders Amendment Bill 2003 is intended to overcome the effect of these judicial decisions and expand the circumstances in which an offence committed by a young offender will constitute a conviction or a 'strike' for the purposes of sections 400 and 401 of the *Criminal Code*.
- 6 The Report outlines the purpose of the Young Offenders Amendment Bill 2003, the nature of the proposed amendments and some of the issues raised by the submissions.

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<sup>1</sup> The second offence must be committed and a conviction recorded **subsequent** to the conviction for the first offence and the third offence must be committed and a conviction recorded **subsequent** to the commission and conviction for the second offence. See submission No 9 from His Honour, Judge Reynolds, President, Children's Court of Western Australia, May 20 2004, p1.

Given time constraints, the Committee did not analyse or address the issues raised by the submissions because these are matters that have previously been through political debate in the Legislative Council.

- 7 To assist the Legislative Council, the Committee has attached at **Appendix 3** a copy of the relevant sections of the *Young Offenders Act 1994* with the proposed amendments marked.
- 8 A majority of the Committee comprising Hon Jon Ford MLC, Hon Giz Watson MLC and Hon Kate Doust MLC accepts the arguments raised by the submissions opposing the Bill and recommends that the Young Offenders Amendment Bill 2003 not be passed.
- 9 A minority of the Committee comprising Hon Peter Foss QC MLC and Hon Bill Stretch MLC dissents from this recommendation and presents a Minority Report.

#### **RECOMMENDATION**

- 10 The recommendation appears in the text at the page number indicated.

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**Recommendation 1: The Committee recommends that the Young Offenders Amendment Bill 2003 not be passed.**

There was dissent from this recommendation.

# REPORT OF THE STANDING COMMITTEE ON LEGISLATION

## IN RELATION TO THE

### YOUNG OFFENDERS AMENDMENT BILL 2003

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#### **1 REFERENCE**

- 1.1 The Young Offenders Amendment Bill 2003 (**Bill**) was referred to the Standing Committee on Legislation (**Committee**) on April 1 2004 for inquiry and report by June 30 2004.<sup>2</sup>
- 1.2 Pursuant to the Committee's requests, the Legislative Council granted an extension of time within which to report, to October 21 2004 and a further extension to November 19 2004.
- 1.3 The referral granted the Committee the ability to consider the policy of the Bill.

#### **2 PROCEDURE**

- 2.1 The Committee invited submissions on the Bill from the general public through an advertisement in *The West Australian* newspaper on April 17 2004. In addition, the Committee wrote to specific stakeholders inviting submissions. A list of these stakeholders is attached at **Appendix 1**. Details of the inquiry were available on the parliamentary website ([www.parliament.wa.gov.au](http://www.parliament.wa.gov.au)).
- 2.2 A list of the submissions received by the Committee is attached at **Appendix 2**.
- 2.3 The Committee thanks the individuals and organisations that provided evidence and information as part of the inquiry.

#### **3 SCOPE OF THE REPORT**

- 3.1 The Report outlines the purpose of the Bill, the nature of the proposed amendments and some of the issues raised by the submissions. The references to the issues raised by the submissions are indicative only and are not exhaustive. Given time constraints, the Committee did not analyse or address the issues raised by the submissions because these are matters that have previously been through political debate in the Legislative Council.

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<sup>2</sup> Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, April 1 2004, p1450-1463.

- 3.2 The public submissions received by the Committee should be read to appreciate the range and depth of the matters raised. Copies of public submissions may be obtained from the Committee Office of the Legislative Council.

#### **4 BACKGROUND TO THE BILL**

- 4.1 The Bill is a private Member's bill, which is a bill introduced by a Member other than a Minister. Hon Peter Foss QC MLC introduced the Bill in the Legislative Council on December 4 2003.
- 4.2 The background to the Bill was set out by Hon Peter Foss QC MLC in the Second Reading Speech as follows:

*In 1996, the Parliament enacted amendments to section 401 of the Criminal Code to provide that offenders who appear before court on three occasions charged with burglary involving home invasion, when each offence in the three took place after the previous conviction, would be sentenced to a minimum of 12 months imprisonment or 12 months detention in the case of a young offender. This was commonly known as the three strikes legislation because it gave an offender three chances before a mandatory sentence was imposed. The actual number of offences was usually well in excess of three because, for a strike to count, it had to have occurred after the last court appearance from the previous strike.*

*A number of Supreme Court decisions affected the operation of this provision with regard to its effect on young offenders, mainly by reason of the Young Offenders Act. Three exceptions to the broad principles of the legislation emerged -*

*(1) Instead of imposing a period of detention, the court could impose an intensive youth supervision order.*

*(2) Even though found guilty, if no conviction was recorded and no penalty was imposed, that offence did not count as a strike.*

*(3) After two years, a young offender's conviction expires, which means it cannot be counted as a strike for this legislation.<sup>3</sup>*

- 4.3 Hon Peter Foss QC MLC indicated to the Legislative Council that the Bill is intended to overcome the second and third exceptions referred to.<sup>4</sup>

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<sup>3</sup> Hon Peter Foss QC MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, December 4 2003, p14170.

- 4.4 If the proposed amendments are passed, they will expand the circumstances in which a young offender may receive a ‘strike’ pursuant to the provisions in the *Criminal Code* which are commonly referred to as the ‘three strikes’ legislation.

## 5 ‘THREE STRIKES’ LEGISLATION

- 5.1 Sections 400 and 401 of the *Criminal Code* are the key to the ‘three strikes’ legislation. These provisions apply to both adult and young offenders. A young offender is referred to as a “*young person*”.<sup>5</sup>
- 5.2 Pursuant to section 401(4) of the *Criminal Code* if a person is convicted of an offence of burglary committed in respect of a place ordinarily used for human habitation **and** was a “*repeat offender*” at the time the offence was committed, the court is required to impose a mandatory sentence of:
- at least 12 months imprisonment for an adult; and
  - at least 12 months imprisonment or detention for a young person.
- 5.3 A “*repeat offender*” is essentially an offender who has two previous convictions or ‘strikes’ due to a conviction for the offence of burglary in respect of a place ordinarily used for human habitation, hence the reference to ‘three strikes’ (see section 400(3)).<sup>6</sup>
- 5.4 The Committee notes that the past President of the Children’s Court, his Honour, Judge Fenbury, held that for young persons, instead of imposing a sentence of imprisonment or detention for 12 months, the court could impose a 12-month **conditional release order**.<sup>7</sup> This is the first exception to the ‘three strikes’ legislation referred to in the Second Reading Speech which the Bill is not intended to address.<sup>8</sup>

<sup>4</sup> Hon Peter Foss QC MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, December 4 2003, pp14170-14171. The Bill is not intended to address the first exception. See paragraph 5.4.

<sup>5</sup> “*Young person*” is defined in section 3 of the *Young Offenders Act 1994* to be a person who has not reached the age of 18 years or a person to whom the Act applies because of section 4. Section 4 of the *Young Offenders Act 1994* provides that the Act applies to a person who commits or allegedly commits an offence before reaching the age of 18 years.

<sup>6</sup> The second offence must be committed and a conviction recorded **subsequent** to the conviction for the first offence and the third offence must be committed and a conviction recorded **subsequent** to the commission and conviction for the second offence. See submission No 9 from His Honour, Judge Reynolds, President, Children’s Court of Western Australia, May 20 2004, p1.

<sup>7</sup> Submission No 9 from His Honour, Judge Reynolds, President, Children’s Court of Western Australia, May 20 2004, p3. An **intensive youth supervision order** can be made with or without detention. If it is made with an order for detention it is known as a **conditional release order**. See section 101, *Young Offenders Act 1994* and,

[http://www.justice.wa.gov.au/portal/server.pt/gateway/PTARGS\\_0\\_2\\_323\\_201\\_0\\_43/http%3B/justicecontent.extranet.justice.wa.gov.au/displayPage.aspx/Juvenile+Offenders/Juvenile+Offending/Offenders+in+the+Community/Sentencing+Options/After+Conviction++What+Next/structureID=7139358/resourceID=35316896](http://www.justice.wa.gov.au/portal/server.pt/gateway/PTARGS_0_2_323_201_0_43/http%3B/justicecontent.extranet.justice.wa.gov.au/displayPage.aspx/Juvenile+Offenders/Juvenile+Offending/Offenders+in+the+Community/Sentencing+Options/After+Conviction++What+Next/structureID=7139358/resourceID=35316896), (current at November 1 2004).

5.5 The Committee understands that the cases indicate that the Children's Court, where possible, will impose an **intensive youth supervision order (conditional release order)** in preference to detention which it orders only when there is no form of supervision available for the young offender.<sup>9</sup>

5.6 As the Second Reading Speech indicated, the courts have held that the 'three strikes' provisions in the *Criminal Code* do not apply to certain convictions of young persons based on the interaction of these provisions with the *Young Offenders Act 1994*. The Bill is intended to address two situations in which the 'three strikes' provisions have been held by the courts not to operate and these are outlined in Parts 6 and 7 of the Report.

## 6 CLAUSE 3 - AMENDMENT TO SECTION 55, *YOUNG OFFENDERS ACT 1994*

6.1 Pursuant to section 66 of the *Young Offenders Act 1994*, the court may refrain from imposing any punishment on an offender. In addition, pursuant to section 67, the court may refrain from imposing any punishment:

- on the basis of undertakings given by the offender or a responsible adult;
- on the basis that punishment has been inflicted on the offender; or
- on the basis a responsible adult has undertaken that punishment will be inflicted on the offender.

6.2 Section 55 of the *Young Offenders Act 1994* relates to the recording of the criminal convictions of young persons. Section 55(5) provides that if a young person is found guilty of an offence and under section 66 or section 67 the court refrains from imposing any punishment, the court is not to record a conviction.

6.3 In *G (a child) v R* (1997) 94 A Crim R 586, the Court of Criminal Appeal held that a dismissal under section 67 should not be taken into account as a conviction or a 'strike' for the purposes of section 401 of the *Criminal Code*.

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If the court makes a **conditional release order**, the offender is released from detention under sentence to the community. The **conditional release order** is similar in operation to the **intensive youth supervision order** but is managed more intensively and failure or breach may mean a return to detention. A conviction is recorded against each person placed on a **conditional release order**.

[http://www.justice.wa.gov.au/portal/server.pt/gateway/PTARGS\\_0\\_2\\_323\\_201\\_0\\_43/http%3B/justicecontent.extranet.justice.wa.gov.au/displayPage.aspx/Juvenile+Offenders/Juvenile+Offending/Offenders+in+the+Community/Sentencing+Options/Intensive+Youth+Supervision+Order+-+detention/structureID=7139358/resourceID=23876938](http://www.justice.wa.gov.au/portal/server.pt/gateway/PTARGS_0_2_323_201_0_43/http%3B/justicecontent.extranet.justice.wa.gov.au/displayPage.aspx/Juvenile+Offenders/Juvenile+Offending/Offenders+in+the+Community/Sentencing+Options/Intensive+Youth+Supervision+Order+-+detention/structureID=7139358/resourceID=23876938), (current at November 9 2004).

<sup>8</sup> Hon Peter Foss QC MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, December 4 2003, p14170.

<sup>9</sup> Hon Peter Foss QC MLC, 'Mandatory Sentencing', presented at *Symposium 2000 'Mandatory Sentencing - Rights and Wrongs'*, October 2000, p45 and the attachments which refer to *The Police v L (a child)* and *The Police v J (a child)*.

- 6.4 With respect to the effect of this judgment, Hon Peter Foss QC MLC stated in the Second Reading Speech that:

*When it is considered that the offender may very well have already been through other diversionary processes such as cautions and juvenile justice teams, and may also have committed a number of offences at the same time that were similarly dealt with, it is clear that it is undermining the concept that an offender is given a chance to amend his or her ways but with a clear end point to the public acceptability of the behaviour. Furthermore, if a judicial officer wishes to avoid the three strikes legislation, this loophole provides an incentive to let an offender off without even imposing any penalty. For home burglary, this appears totally unacceptable and I am surprised that such instances have occurred.*<sup>10</sup>

- 6.5 To address these concerns, clause 3 of the Bill proposes to insert the following subsection in section 55:

*(4a) Although a conviction is not recorded and no punishment is imposed, the offender is deemed to have been convicted for the purpose of the application of section 401(4) of the Criminal Code to the sentencing of the offender for another offence.*

- 6.6 **Appendix 3** contains a copy of section 55 of the *Young Offenders Act 1994* with the proposed amendment marked.

- 6.7 In relation to clause 3, the issues raised by the submissions included:

- For a six month period ending April 30 2004, only one charge out of 1,914 charges in the Children's Court (0.05%) was dealt with under section 66 and only 51 charges out of 1,914 charges (2.6%) were dealt with by section 67. Thus, it is submitted that the exception is of no real substance.<sup>11</sup>

<sup>10</sup> Hon Peter Foss QC MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, December 4 2003, p14171. **Juvenile Justice Teams** are a relatively new way of dealing with young people who have committed minor offences or are in the early stages of offending. The 'teams' process involves the young offender, their parents and the victim sitting down face-to-face, talking things through and agreeing on a penalty. The teams offer young people a choice. They can choose to go through a mediation process and face the victim of their crime or they may choose to have the matter dealt with in court. If the juvenile chooses the mediation process, they must accept responsibility for their actions. If they are not willing to do this, the matter must be referred back to the courts.

[http://www.justice.wa.gov.au/portal/server.pt/gateway/PTARGS\\_0\\_2\\_323\\_201\\_0\\_43/http%3B/justicecontent.extranet.justice.wa.gov.au/displayPage.aspx/Juvenile+Offenders/Juvenile+Offending/Alternatives+to+Detention/Juvenile+Justice+Teams/structureID=7139358/resourceID=7246113](http://www.justice.wa.gov.au/portal/server.pt/gateway/PTARGS_0_2_323_201_0_43/http%3B/justicecontent.extranet.justice.wa.gov.au/displayPage.aspx/Juvenile+Offenders/Juvenile+Offending/Alternatives+to+Detention/Juvenile+Justice+Teams/structureID=7139358/resourceID=7246113), (current at November 1 2004).

<sup>11</sup> Submission No 9 from His Honour, Judge Reynolds, President, Children's Court of Western Australia, May 20 2004, p5.

- It is unlikely that sections 66 or 67 would be used in a case where an offender committed a serious home burglary or burglaries in circumstances where it or they constituted a third 'strike'.<sup>12</sup>
- In practice, the options in sections 66 and 67 are usually reserved for first offenders or offenders who only have a minor record.<sup>13</sup>
- Sections 66 and 67 help minimise the progression of young people into the justice system where they are minor offenders who can convince the court that they or their families are able to take responsibility for their behaviour. Progression into the justice system increases the likelihood of further offending. The proposed amendment will penalise those young people who do have family support.<sup>14</sup>
- The proposed amendment will have the effect of making a 'three strike' conviction more accessible as the court's discretion is no longer available. It is therefore more likely to lead to higher incarceration rates for young indigenous people.<sup>15</sup>

## **7 CLAUSE 4 - AMENDMENT TO SECTION 189, *YOUNG OFFENDERS ACT 1994***

- 7.1 Section 189 of the *Young Offenders Act 1994* relates to situations in which certain convictions of young persons are not to be regarded as convictions for any purpose (except in limited circumstances provided in the section).

### **Section 189(2)**

- 7.2 Section 189(2) provides that convictions imposed on young persons are to be disregarded as convictions after two years has expired.<sup>16</sup>
- 7.3 In *P (a child) v R* (1997) 94 A Crim R 593, the Court of Criminal Appeal held that convictions that are disregarded because two years has expired, are not to be counted as a conviction or a 'strike' for the purposes of section 401 of the *Criminal Code*.

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<sup>12</sup> Submission No 9 from His Honour, Judge Reynolds, President, Children's Court of Western Australia, May 20 2004, p5.

<sup>13</sup> Submission No 5 from Aboriginal Legal Service of Western Australia (Inc), May 14 2004, p7.

<sup>14</sup> Submission No 11 from Ms Jackie Tang, Executive Director, Community and Juvenile Justice, May 18 2004, p4.

<sup>15</sup> Submission No 10 from Mr Les Turner, Group Manager, Culture, Rights, Law and Justice, Aboriginal and Torres Strait Islander Services, May 18 2004, p3.

<sup>16</sup> The two-year period for the purpose of the section runs from either the date of conviction or, where a sentence was imposed, from the discharge of the sentence. See section 189(2), *Young Offenders Act 1994*.



## Section 189(5)

- 7.4 Section 189(5) provides that when a **youth community based order**<sup>17</sup> is made as a result of the conviction of a young person then, unless they are subsequently dealt with for that offence (for example, as a result of a breach of the order or re-offending), the offence is not to be regarded as a conviction.
- 7.5 In *R v GRC and Ors* (2002) 31 SR (WA) 23, her Honour, Judge O'Brien held that a **youth community based order** does not constitute a conviction or a 'strike' for the purposes of section 401 of the *Criminal Code* because of section 189(5) of the *Young Offenders Act 1994*. Her Honour also held that an **intensive youth supervision order (without detention)** cannot constitute a conviction or a 'strike'.<sup>18</sup>

## Clause 4

- 7.6 Based on the Second Reading Speech, it appears that clause 4 is directed to overcoming the decision in *P (a child) v R* with respect to the expiry of convictions after two years. In the Second Reading Speech, in relation to clause 4, Hon Peter Foss QC MLC stated:

*This is also unacceptable because of the time frame set by the Criminal Code. In order to give effect to the concept that the offender be given a more strict punishment because an offence occurred and they had already been given a chance in the court, there can very well be an extended time frame for bringing offenders to court over subsequent offences. In the meantime, the child could very well have run riot. There is almost an incentive to cram in as many offences as*

<sup>17</sup> A **youth community based order** is a court order that requires a juvenile offender to be supervised in the community by juvenile justice officers. This means they must report regularly to their juvenile justice officer, must not break the law and must not change their address without notifying their juvenile justice officer. In addition, offenders may be required to perform unpaid community service work or undergo alcohol and drug use counselling or other self-development programs while under supervision in the community. See section 73, *Young Offenders Act 1994* and,

[http://www.justice.wa.gov.au/portal/server.pt/gateway/PTARGS\\_0\\_2\\_323\\_201\\_0\\_43/http%3B/justicecontent.extranet.justice.wa.gov.au/displayPage.aspx/Juvenile+Offenders/Juvenile+Offending/Offenders+in+the+Community/Sentencing+Options/Youth+Community+Based+Order/structureID=7139358/resourceID=19646893](http://www.justice.wa.gov.au/portal/server.pt/gateway/PTARGS_0_2_323_201_0_43/http%3B/justicecontent.extranet.justice.wa.gov.au/displayPage.aspx/Juvenile+Offenders/Juvenile+Offending/Offenders+in+the+Community/Sentencing+Options/Youth+Community+Based+Order/structureID=7139358/resourceID=19646893), (current at November 1 2004).

<sup>18</sup> An **intensive youth supervision order** can be made with or without detention. If it is made with an order for detention it is known as a **conditional release order**. Intensive youth supervision orders are supervised by juvenile justice officers and the young offender may be ordered to go to a rehabilitation program or a course. The order can also include doing unpaid community work for between 10 and 100 hours. The work must be done within three months and must be supervised. If the order is made without detention, and includes supervision conditions, the offender must report to his or her juvenile justice officer up to three times a week and must follow instructions. See sections 99 and 101, *Young Offenders Act 1994* and,

[http://www.justice.wa.gov.au/portal/server.pt/gateway/PTARGS\\_0\\_2\\_323\\_201\\_0\\_43/http%3B/justicecontent.extranet.justice.wa.gov.au/displayPage.aspx/Juvenile+Offenders/Juvenile+Offending/Offenders+in+the+Community/Sentencing+Options/After+Conviction+-+What+Next/structureID=7139358/resourceID=35316896](http://www.justice.wa.gov.au/portal/server.pt/gateway/PTARGS_0_2_323_201_0_43/http%3B/justicecontent.extranet.justice.wa.gov.au/displayPage.aspx/Juvenile+Offenders/Juvenile+Offending/Offenders+in+the+Community/Sentencing+Options/After+Conviction+-+What+Next/structureID=7139358/resourceID=35316896), (current at November 1 2004).

*possible in the interim and for the counsel to seek to defer court appearances. Accordingly, there is a further amendment proposed to subsection 189(8) of the Young Offenders Act. This will add a new paragraph (e) that limits the capacity of section 189, which contains subsection (2) - the two-year limitation - to affect section 401 of the Criminal Code.*<sup>19</sup>

- 7.7 Section 189(8) sets out circumstances in which section 189 does not operate. Clause 4 proposes to insert the following paragraph in section 189(8) such that section 189 will not operate with respect to:

*(e) the obligation of a Court to impose a sentence of imprisonment or detention under section 401(4) of The Criminal Code.*

- 7.8 Proposed paragraph (e) would prevent the court disregarding the ‘expired’ convictions of young persons under section 189(2) for the purposes of section 401 of the *Criminal Code*.

- 7.9 **Appendix 3** contains a copy of section 189 of the *Young Offenders Act 1994* with the proposed amendment marked.

- 7.10 In relation to clause 4, the issues raised by the submissions included:

- Pursuant to the proposed amendment, prior convictions will count as a ‘strike’ regardless of when they occurred. This will result in significantly more offenders being subject to the ‘three strikes’ legislation.<sup>20</sup>
- The proposed amendment would apply to each and every one of the provisions contained in section 189 including section 189(5). This would mean that a **youth community based order** or an **intensive youth supervision order** would constitute a ‘strike’. This would result in a significant increase in the number of offenders coming before the court to be sentenced as ‘three strikers’. The lack of a conviction being recorded or the fact that a conviction will not be taken into account is an important incentive for young persons to rehabilitate themselves and this will be undermined by the proposed amendment.<sup>21</sup>

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<sup>19</sup> Hon Peter Foss QC MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, December 4 2003, p14171.

<sup>20</sup> Submission No 5 from Aboriginal Legal Service of Western Australia (Inc), May 14 2004, p8.

<sup>21</sup> Submission No 9 from His Honour, Judge Reynolds, President, Children’s Court of Western Australia, May 20 2004, pp6-7.

- The proposed amendment may have unintended consequences for adults. The prohibition against counting convictions as ‘strikes’ that are over two years old also applies to adults in relation to their Children’s Court convictions. If the Bill is passed there will be a number of adults who are subject to the ‘three strikes’ legislation for their first ever home burglary offence as an adult because their first two ‘strikes’ occurred when they were juveniles (as young as ten years of age).<sup>22</sup>
- Children and adolescents have a very different sense of time to adults and the rate of physical, intellectual, social and emotional change they experience is significantly greater than at other stages of life. It is unusual for a young offender to achieve two years between home burglaries and it would be contrary to the principles in the *Young Offenders Act 1994* that aim to encourage self responsibility and work within a young person’s sense of time, to count offences after a two year break.<sup>23</sup>
- The proposed amendment will enable the ‘three strikes’ legislation to be more readily applied. Given that the ‘three strikes’ legislation has been shown to impact disproportionately on young Aboriginal persons from non-metropolitan areas, this proposed amendment is likely to lead to higher incarceration rates for young Aboriginal and Torres Strait Islander peoples.<sup>24</sup>

## 8 GENERAL ISSUES RAISED

8.1 Several submissions raised matters relating to the general impact of the Bill rather than specific clauses and some of these matters are outlined below.

8.2 The issues raised in general support of the Bill included:

- Even before they start incurring ‘strikes’, children already get adequate chances to get off by way of Juvenile Justice Team cautions.<sup>25</sup>
- It is a good yardstick that it is shown by statistics from the early years (before the “loopholes” opened up) that there was very low recidivism among young people detained under mandatory sentencing.<sup>26</sup>

<sup>22</sup> Submission No 5 from Aboriginal Legal Service of Western Australia (Inc), May 14 2004, p9. See also submission No 9 from His Honour, Judge Reynolds, President, Children’s Court of Western Australia, May 21 2004, pp1-3.

<sup>23</sup> Submission No 11 from Ms Jackie Tang, Executive Director, Community and Juvenile Justice, May 18 2004, p3.

<sup>24</sup> Submission No 10 from Mr Les Turner, Group Manager, Culture, Rights, Law and Justice, Aboriginal and Torres Strait Islander Services, May 18 2004, p4.

<sup>25</sup> Submission No 8 from Cabbies Against Crime, May 14 2004, p1.

<sup>26</sup> Submission No 8 from Cabbies Against Crime, May 14 2004, p2.

- It is imperative that the safety of the wider community is afforded a priority and that offenders receive penalties commensurate with their crime and of such a level as to deter repeat or copycat offenders.<sup>27</sup>
- The proposed amendments are supported as they provide clarification to an area of law that, in recent times, has posed some interpretation problems for the judiciary.<sup>28</sup>

8.3 The issues raised in general opposition to the Bill included:

- It is well known that Aboriginal youth have been grossly over-represented amongst those young people who have been sentenced under the ‘three strikes’ legislation. If the Bill is passed there will be an astonishing increase in the number of Aboriginal juveniles and in particular, very young Aboriginal juveniles from regional locations, who will be sentenced to detention.<sup>29</sup>
- This legislation is quite clear and has been in operation for some ten years. There is no reason at all to think that the legislation has been interpreted in any way differently from that intended by the Parliament when it was first enacted.<sup>30</sup>
- With an increase in the sanctions that constitute a ‘strike’, any incentive to pleading guilty is taken away, thus, more matters will be pleaded not guilty, thereby proceeding to trial. More trials means more resources are needed by the Children’s Court. Furthermore, access to legal representation is limited, especially in country and regional areas, thus a young person in the absence of legal representation may plead guilty to an offence for which he or she has a defence.<sup>31</sup>
- The Senate Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999 (Cth) by the Legal and Constitutional References Committee indicated that the circumstances in which the courts had found the ‘three strikes’ legislation in Western Australia did not operate meant that the

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<sup>27</sup> Submission No 8 from Cabbies Against Crime, May 14 2004, p2.

<sup>28</sup> Submission No 7 from Mr Chris Dawson, Acting Assistant Commissioner, Strategic and Corporate Development, Western Australian Police Service, May 13 2004, p1.

<sup>29</sup> Submission No 5 from Aboriginal Legal Service of Western Australia (Inc), May 14 2004, p5. See also submission No 10 from Mr Les Turner, Group Manager, Culture, Rights, Law and Justice, Aboriginal and Torres Strait Islander Services, May 18 2004, pp2-3 and submission No 4 from Dr Neil Morgan, Director of Studies, Crime Research Centre, University of Western Australia, May 13 2004, pp2-3 where similar issues are raised.

<sup>30</sup> Submission No 1 from Mr Ian Weldon, President, Law Society of Western Australia, April 28 2004, p1.

<sup>31</sup> Submission No 3 from Ms Cheryl Cassidy-Vernon, Manager, Youth Legal Service Inc Western Australia, May 5 2004, p4.

legislation was less obviously in contravention of Australia's international obligations. The Bill severely restricts the already limited discretion available to the courts and it is questionable whether the legislation would still comply with international standards.<sup>32</sup>

## **9 CONCLUSION**

- 9.1 A majority of the Committee comprising Hon Jon Ford MLC, Hon Giz Watson MLC and Hon Kate Doust MLC accepts the arguments raised by the submissions opposing the Bill and recommends that the Bill not be passed.
- 9.2 A minority of the Committee comprising Hon Peter Foss QC MLC and Hon Bill Stretch MLC dissents from this recommendation and presents a Minority Report.

### **Recommendation**

**Recommendation 1: The Committee recommends that the Young Offenders Amendment Bill 2003 not be passed.**

There was dissent from this recommendation.



**Hon Giz Watson MLC**  
**Deputy Chairman**

**November 16 2004**

<sup>32</sup> Submission No 11 from Ms Jackie Tang, Executive Director, Community and Juvenile Justice, May 18 2004, pp2-3.



**APPENDIX 1**  
**STAKEHOLDERS TO WHOM THE COMMITTEE WROTE**





# APPENDIX 1

## STAKEHOLDERS TO WHOM THE COMMITTEE WROTE

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NAME	ORGANISATION	DATE
Mr Barry Matthews Commissioner	Western Australian Police Service	April 8 2004
Mr Robert Cock QC	Director of Public Prosecutions	April 8 2004
Hon Chief Justice David Malcolm CitWA AC	Supreme Court of Western Australia	April 8 2004
Her Honour, Chief Judge Antoinette Kennedy	District Court of Western Australia	April 8 2004
Mr Ian Weldon President	The Law Society of Western Australia	April 8 2004
Mr Ian Viner QC President	Western Australian Bar Association	April 8 2004
Mr Hylton Quail President	Criminal Lawyers Association	April 8 2004
Mr Michael Dean General President	Western Australian Police Union of Workers	April 8 2004
Dr Neil Morgan Director of Studies	Crime Research Centre University of Western Australia	April 8 2004
Mr Dennis Eggington Chief Executive Officer	Aboriginal Legal Service of Western Australia	April 8 2004
His Honour, Judge Denis Reynolds President	Children's Court of Western Australia	April 8 2004
Mr Steven Heath Chief Stipendiary Magistrate	Local Court of Western Australia	April 8 2004
Mr Mike Davies Acting Manager	Killara Youth Support Service	April 8 2004
Ms Cheryl Cassidy-Vernon Manager	Youth Legal Service Inc Western Australia	April 8 2004
Ms Meredith Turnbull Executive Officer	Youth Affairs Council of Western Australia	April 8 2004
Mr George Turnbull Director	Legal Aid Western Australia	April 8 2004

NAME	ORGANISATION	DATE
Mr Tim Hardy Chairperson	National Children's and Youth Law Centre	April 8 2004
Mr Lionel Quartermaine Acting Chairperson	Aboriginal and Torres Strait Islander Commission	April 8 2004
Mr David Kaeding Registrar	Royal Association of Justices of Western Australia (Inc)	April 8 2004
Ms Jo Buontemto General Manager	Sussex Street Community Law Service	April 8 2004
Mr Hugh McLennan	Cabbies Against Crime	April 8 2004
Mr Paul Murray	Radio Station 6PR	April 8 2004
Ms Holly Hammond Research and Policy Officer	Federation of Community Legal Centres	April 8 2004
Mr Martin Flynn	Human Rights Western Australia	April 8 2004
Mr David Ritter	Labor Lawyers	April 8 2004
Professor Paul Moyle	Edith Cowan University, Joondalup Campus	April 8 2004

**APPENDIX 2**  
**WRITTEN SUBMISSIONS RECEIVED**



## APPENDIX 2

### WRITTEN SUBMISSIONS RECEIVED

NAME	ORGANISATION	DATE	
Mr Ian Weldon President	The Law Society of Western Australia	April 28 2004	1
Mr Robert Cock QC	Director of Public Prosecutions	April 30 2004	2
Ms Cheryl Cassidy-Vernon Manager	Youth Legal Service Inc Western Australia	May 5 2004	3
Dr Neil Morgan Director of Studies	Crime Research Centre University of Western Australia	May 13 2004	4
Mr Mark Cuomo Director Legal Services	Aboriginal Legal Service of Western Australia	May 14 2004	5
Ms Colleen Hayward Acting State Manager	Aboriginal and Torres Strait Islander Services	May 14 2004	6
Mr Chris Dawson Acting Assistant Commissioner Strategic and Corporate Development	Western Australian Police Service	May 13 2004	7
Mr Hugh McLennan	Cabbies Against Crime	May 14 2004	8
His Honour, Judge Denis Reynolds President	Children's Court of Western Australia	May 20 2004	9
His Honour, Judge Denis Reynolds President	Children's Court of Western Australia	May 21 2004	9
Mr Les Turner Group Manager, Culture, Rights, Law and Justice	Aboriginal and Torres Strait Islander Services	May 18 2004	10
Ms Jackie Tang Executive Director Community and Juvenile Justice	Department of Justice	May 18 2004	11
Ms Louise Goodchild Principal Solicitor	National Children's and Youth Law Centre	Undated, received May 26 2004	12

<b>NAME</b>	<b>ORGANISATION</b>	<b>DATE</b>	
Hon Chief Justice David Malcolm CitWA AC	Supreme Court of Western Australia	May 19 2004	13

**APPENDIX 3**  
**PROPOSED AMENDMENTS - SECTIONS 55 AND 189,**  
***YOUNG OFFENDERS ACT 1994***





**APPENDIX 3**  
**PROPOSED AMENDMENTS - SECTIONS 55 AND 189, *YOUNG***  
***OFFENDERS ACT 1994***

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**Section 55**

**55. Conviction, when to be recorded**

- (1) If the court —
- (a) finds a young person guilty of a Schedule 1 offence or a Schedule 2 offence; or
  - (b) finds a young person guilty of any offence and imposes a custodial sentence,

the court is required to record a conviction unless it is prevented from doing so by subsection (5) or it is satisfied that there are exceptional reasons for not doing so.

- (2) If the court finds a young person guilty of an offence other than a Schedule 1 offence or a Schedule 2 offence and does not impose a custodial sentence, the court is not to record a conviction unless it is satisfied that there are exceptional reasons for doing so.
- (3) Whenever, for exceptional reasons, the court departs from the requirements of subsection (1) or (2), it is to record its reasons for doing so.
- (4) Although a conviction is not recorded, the offender is deemed to have been convicted for the purpose of the making, under this Act or any other written law, of any order that may be, or is required to be, made upon convicting a person of such an offence or for the purpose of the operation of any provision of the *Road Traffic Act 1974* relating to the cancellation of, or disqualification from holding or obtaining, a driver's licence under that Act (but not for any other purpose).
- (4a) Although a conviction is not recorded and no punishment is imposed, the offender is deemed to have been convicted for the purpose of the application of section 401(4) of *The Criminal Code* to the sentencing of the offender for another offence.
- (5) If a young person is found guilty of an offence and, under section 66 or 67, the court refrains from imposing any punishment, the court is not to record a conviction.

## Section 189

### **189. Certain offenders to be regarded as not convicted**

- (1) This section does not apply to, or in relation to, a person convicted of committing or attempting to commit an offence of wilful murder, murder, manslaughter or infanticide.
- (2) If a young person is convicted of an offence and a period of 2 years has expired since —
  - (a) the discharge of any sentence imposed as a result of the conviction, or every sentence if more than one sentence was imposed; or
  - (b) the date of conviction, if no sentence that required to be discharged was imposed as a result of the conviction,the conviction is not to be regarded as a conviction for any purpose, except as provided in this section.
- (3) On the application of the person concerned the court, if it thinks that special circumstances exist, may declare that subsection (2) applies in relation to a conviction of a young person even though the period of 2 years mentioned in that subsection has not expired.
- (4) In subsection (2), the reference to a sentence imposed as a result of a conviction includes a reference to an order made as a result of the conviction, and when the order has been fully complied with the sentence is to be regarded as having been discharged.
- (5) If a young person is convicted of an offence and a youth community based order is made as a result of the conviction, unless the person has been subsequently dealt with for that offence the conviction is not to be regarded as a conviction for any purpose, except as provided in this section.
- (6) The reference in subsection (5) to a youth community based order includes a reference to a probation order or community service order made under the *Child Welfare Act 1947* before the commencement of section 198.

- (7) This section does not prevent —
- (a) a person in respect of whom a youth community based order has been made upon the person's conviction of an offence from being subsequently dealt with for the offence as a person so convicted if a condition of the order is not observed;
  - (b) any subsequent proceedings that may be taken against the offender under this Act or on indictment in relation to the offence to which this section applies or for a subsequent offence; or
  - (c) the making of a record of anything that paragraph (a) or (b) allows.
- (8) This section does not affect —
- (a) the right of a person to appeal against a conviction or to rely on a conviction in bar of any subsequent proceedings for the same offence;
  - (b) the revesting or restoration of any property in consequence of the conviction;
  - (c) the right of a court to disqualify a person from holding or obtaining a driver's licence issued under the *Road Traffic Act 1974*; or
  - (d) any cancellation or disqualification that occurs by operation of any written law.
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- (e) the obligation of a Court to impose a sentence of imprisonment or detention under section 401(4) of *The Criminal Code*.
- (9) Part 3 of the *Spent Convictions Act 1988* has effect in relation to a conviction that, under this section, is not to be regarded as a conviction as if it were a spent conviction under that Act.