

**YOUNG OFFENDERS ACT 1984 (WA), SECTION 126
SPECIAL ORDERS: EXTRA PUNITIVE SENTENCING
LEGISLATION FOR JUVENILES**

CRAIG ASTILL AND WILLIAM YOO ¹

This article examines the impact of Young Offender's Act 1994 (WA) 'YOA' s126. It does this by considering the text, context and purpose of the provision when juxtaposed with the sentencing jurisprudence that underpins the sentencing of young people. The sentencing process of young people is ordinarily complicated. The goal of this article is to shed light on the history and application of this provision in light of that ordinarily complicated sentencing process.

CONTENTS

I	Introduction.....	155
II	The Uniqueness Of Section 126 And The Sentencing Aims Of Children Generally.....	156
III	Judicial Consideration.....	158
IV	Statutory Context Of Section 126 YOA And Analysis.....	160
V	Comparable Legislation? The Northern Territory.....	163
VI	Conclusion.....	164

I INTRODUCTION

Western Australia is unique² in having additional punitive³ sentencing legislation for criminal juvenile recidivists. Section 126 of the *Young Offender's Act 1984 (WA)* 'hereafter YOA' is significant because it provides the power for a

* Craig Astill (LLB, LLM), Senior State Prosecutor for the State of Western Australia
William Yoo (LLB, BA), Senior Solicitor for WA Police, Prosecuting Services Division. Both authors state that the analysis herein are personal and do not reflect the views of the author's respective employers. The authors would like to thank President Reynolds for his time in confirming that no section 126 YOA has been granted and his general advice, Magistrate Horrigan, Graham Pidco and Kathleen Macdonald for their insightful comments. All errors remain our own.

² Formerly, Queensland had legislation where official cautions formed part of a children's criminal record: *Juvenile Justice Act 1992 (Qld)*. In addition in October 2015 the presence of 'boot camps' ended see <https://www.qld.gov.au/law/sentencing-prisons-and-probation/young-offenders-and-the-justice-system/youth-justice-in-queensland/youth-boot-camps/> These boot camps were formerly imposed prior to the commencement of the *Youth Justice Act 1992 (Qld)* and maintained via the transitional provisions. The Northern Territory formerly had a 'punitive work order' whereby the minister determined the sort of work that could be imposed: *Juvenile Justice Act 1983 (NT)*, sections 53AH-AM.

³ For reasons that will become apparent as this legislative note is developed, the nature of section 126 YOA is punitive and not protective. Part of this description is based on the additional 18 months' custody that is imposed as a punitive measure under *Young Offenders Act 1994 (WA)*, section 128(1).

court to impose additional punishment beyond what would ordinarily be considered proportionate to the offending, to a juvenile who:

1. has served two prior periods of custody; and
2. because of their history of re-offending, is likely to serve another period of custody.

If satisfied, then the Court may make a special order which imposes an additional⁴ fixed term of 18 months' imprisonment or detention to the sentence already imposed.

Since its enactment, the Children's Court of Western Australia has never made a special order under section 126, despite a number of applications having been made.⁵

To date there has been an absence of any scholarly review on special orders and only one first instance decision.⁶ Given the potential significant consequences for juveniles in the event that a special order were to be made, it would be of some benefit to examine its intended function and the circumstances governing its application. The focus of this legislative note is how the textual construction of section 126 operates in the context of established sentencing jurisprudence.

II THE UNIQUENESS OF SECTION 126 AND THE SENTENCING AIMS OF CHILDREN GENERALLY

Whilst the jurisdictions of the Northern Territory and Western Australia both have indefinite imprisonment legislation for adults, there is an argument that these provisions serve a preventative detention function, rather than an extra punitive one.⁷ An example of such is the *Dangerous Sexual Offenders Act 2006* (WA),

⁴ Under *Young Offenders Act 1994* (WA), section 128(1) the words, inter alia, state that "...the court, when disposing of" a matter.

⁵ At the date of writing in the history of the Children's Court and the *Young Offenders Act 1994* (WA), no section 126 order has ever been granted. It is not known by comparison how many applications have been sought by the Office of the Director of Public Prosecutions other than that they have been made.

⁶ *State of WA v ZL* [2010] WACC 18. The author, William Yoo discloses that he was signatory on some of the submissions, counsel on some of the hearing dates, as well as the file manager of this matter. Research reveals that ZL is the only judicial authority on section 126, albeit in the first instance. *P (A child) v R* (1997) 94 A Crim R 593, 597 which was a Court of Criminal Appeal decision quoted the section but did not examine its operation.

⁷ See for example *Sentencing Act* (NT), section 65; *Sentencing Act* (WA), sections 98-101, Part 14. Although section 126 YOA is punitive, it can also be described as 'protective' and as to the blurring distinction between the two, see Hands, L 'Constitutional imitations on detention 'at her Majesty's pleasure' *Pollentine v Attorney-General* [2014] HCA 30' (2015) UWA Law Review 442 at 449-450.

which allows for the continuing incarceration of offenders who are serving terms of imprisonment for ‘serious sexual offence.’⁸ Such legislative schemes have been found to be a permissible exercise of preventative detention. However, no other jurisdiction has an equivalent sentencing provision for child offenders, which permits an extra period of fixed incarceration by applying a “predictive test”⁹ based on the service of past custodial terms. Further, as noted section 126 only applies to the imposition of an additional fixed term. Accordingly it would appear that section 126 operates to increase the sentence due to past offending and antecedents rather than imposing continuing detention for preventative or community protection purposes.

At the time, the Attorney General in his second reading speech noted that the cognate provision under *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA) was introduced as a response to ‘lenient sentences’ that arose from high speed chases by child offenders resulting in deaths of other road users.¹⁰ One potential difficulty with the cognate provision was that it applied a mandatory formula in determining a sentence.¹¹ There is nothing to suggest that the additional fixed term is for rehabilitative purposes or that an offender’s risk of reoffending can be adequately addressed during that additional period of incarceration. This is consistent with the stated purpose behind the cognate provision and supports the proposition that section 126 has its origins in legislative policy that was not intended to apply preventative detention principles but, rather, solely for the purposes of increasing or ‘firming up’ sentences that were considered to be too ‘lenient.’

When section 126 was being read for a second time, the Attorney General stated, inter alia, that:

The special measures to be introduced in this Bill will be applied when two conditions are met. Firstly, the offender must be charged with a serious offence as defined in a schedule. This is known as the triggering offence. Secondly the offender’s pattern or

⁸ As defined within section 3 of the *Dangerous Sexual Offenders Act 2006* (WA). For an overview as to what criteria operate to govern this consideration, see section 7 of that Act.

⁹ That is, a pre-condition to the application of the *Young Offenders Act 1994* (WA), section 126 is the application of section 124. In relation to section 124(1)(d), which requires the Court to take into account a young person’s history of re-offending, after release from custody and the Court’s satisfaction that there is a high probability that the young person would commit further offences of a kind for which custodial sentences could be imposed, that it was legislation that “...involves the court in making a prediction...Rather, the provision is directed to an hypothetical future event, about which the court is satisfied taking into account...” see *JSA v State of WA* (2012) 42 WAR 473, 496 (Murphy JA).

¹⁰ Cf Western Australia, *Parliamentary Debates*, Legislative Council, 27 September 1994, 4818, (Peter Foss, Attorney-General).

¹¹ *Ibid.*

*history of previous periods of detention and opportunity time must indicate that there is a high probability of re-offending within a short period of release from detention. Provided these conditions are met, two special provisions of the Bill which are intended as circuit breakers may be applied. These are the special principle and the special order. The special principle allows the court to give primary considerations to the protection of the community in sentencing decisions.*¹²

Prima facie, the punitive aim of section 126 appears to produce a natural tension with the ordinary rehabilitative principles which apply when sentencing juveniles.¹³ The Full Court of Western Australia in *State of WA v A Child*¹⁴ explained this concept of rehabilitation:

The Act places significant emphasis on the sentencing objective of rehabilitation: WO (a child) v Western Australia (2005) 153 A Crim R 352 at 362. As stated in that case, underlying the emphasis on rehabilitation is the long established understanding that the community is best protected by determined efforts to effect the rehabilitation of young offenders. Although retribution, punishment and general deterrence are also relevant sentencing objectives under the Act, they are ordinarily given significantly reduced weight particularly when the offender is still a child.

Accordingly, it would appear that the making of a special order is a legislative alteration of the normal sentencing aim for young persons established under the YOA.

III JUDICIAL CONSIDERATION

The only guidance that the Children's Court has provided in relation to the interpretation and scope of section 126 is from a single first instance decision by the President of the Children's Court of Western Australia.¹⁵ In *State of WA v ZL, Reynolds P* outlined the criteria before a section 126 application is granted:

1. Exceptional circumstances need to be shown before a special order can be imposed because of a young person's sense of time and age¹⁶ and because

¹² Ibid.

¹³ As per the unanimous ruling by the Court of Appeal *WO (A Child) v Western Australia* [2005] WASCA 94; (2005) 153 A Crim R 352, 362. Research does not reveal that this position has been overruled or found to have been in error. This follows an established line of authority since *Ainsworth v D (a Child)* (1992) 7 WAR 102.

¹⁴ [2007] WASCA 115, [16] (the Court).

¹⁵ *State of WA v ZL* [2010] WACC 18.

¹⁶ Reflected under *Young Offenders Act 1984* (WA), section 7(k), *State of WA v ZL* [2010] WACC 18, [61].

a special order arises only where immediate detention has been imposed.¹⁷

The threshold test is a high one;¹⁸

2. If immediate detention is imposed then this will also affect whether a special order should be granted;¹⁹
3. In that regard, a special order is only imposed, after a sentence of detention has already been imposed.²⁰ Accordingly, in first deciding the sentence for the charges before the Court no regard ‘...at all can be made to whether or not a special order should be made’;²¹
4. The Court is also entitled to take into account “...the risk of committing further offences, the seriousness of the criminality of the past and current offences, and also the timing of all of the offences relative to each other and relative to releases from custody;²²
5. Regarding “...young Aboriginal males it is essential that rehabilitation programs be culturally appropriate and be designed to give them cultural knowledge, a sense of their own identity, a sense of self-worth, and a sense of belonging and connection to the community. This will inevitably require Aboriginal mentors and include culturally appropriate rehabilitation programs involving design and delivery by Aboriginal people”.²³ The ODPP needs to generally show that “all necessary and culturally appropriate rehabilitation programs have been tried with the young offender before a special order is made.”²⁴
6. The “...young offender’s remorse or increased level of remorse and engagement in and positive attitude to continue engaging in necessary and culturally appropriate rehabilitation programs are relevant factors in deciding whether or not the special order should be discharged.”²⁵ The

¹⁷ *State of WA v ZL* [2010] WACC 18, [62].

¹⁸ *Ibid*, [64]. This is the ‘exceptional circumstances’ threshold for adult sentences and indefinite sentences under *Sentencing Act 1995* (WA), sections 98-101.

¹⁹ *Ibid*, [56].

²⁰ *Ibid*, [61]-[62].

²¹ *Ibid*, [28]. This is analogous to the requirement of consideration of parole as a second and separate step after the fixing of an appropriate sentence see *P (A Child) v R* 960053C, Court of Criminal Appeal, 17 applying *Archibald v R* (1989) 40 A Crim R 228; *Swain v R* (1989) 41 A Crim R 214.

²² *State of WA v ZL* [2010] WACC 18, [56].

²³ *Ibid*, [79]. This mirrors the position of mitigating factors to be taken into account in relation to adult Aboriginal offenders: see *State of WA v Richards* (2008) 37 WAR 229, [45] (Steytler P). This would have to be taken into account, given the position that young persons who commits an offence cannot be treated more severely for that offence than the person would have been treated if an adult: *Young Offenders Act 1994* (WA), section 7(c).

²⁴ *State of WA v ZL* [2010] WACC 18, [86].

²⁵ *Ibid*, [82].

extent to which a young offender has complied with programs affects whether or not a special order should be made.²⁶

What these criteria show is that judicial discretion²⁷ undoubtedly remains even after the enlivening criteria of section 126 are established. By considering the legislative purpose and context, there is rationality in how the discretionary criteria under section 126 is to be applied. Certainly it appears arguable from the considerations outlined by Reynolds P above at [5] and [6] that the court will be more inclined to exercise its discretion and make a special order if it is demonstrated that rehabilitation is more likely to be achieved during the service of the additional 18 month term. This is notwithstanding that, as outlined above, the stated legislative purpose for section 126 appears to be punitive rather than rehabilitative.

IV STATUTORY CONTEXT OF SECTION 126 YOA AND ANALYSIS

Despite the apparent tension between the intended punitive operation of section 126 and the manner in which it has been interpreted in *ZL*, this interpretation is seen to be entirely consistent when section 126 is considered in the statutory context of its placement within the YOA.

Section 126 is contained under Division 9, which is a division ‘*Dealing with young persons who repeatedly commits serious offences*’. Immediately this suggests that recidivist juveniles are to be placed in a separate category to non-recidivists. This appears to be consistent with the legislative purpose of section 126 as per the second reading speech, namely, that recidivists were to be treated, with separate consideration and be the subject of a ‘firming up’ of sentences, regardless of their prospect of rehabilitation. Section 126 however must be considered to operate in the wider statutory context that governs the sentencing process of children.

In Western Australia, a Court must take into account a number of statutory provisions when sentencing children namely:

1. The express objectives of the YOA,²⁸

²⁶ Ibid [80].

²⁷ *House v The King* (1936) 55 CLR 499.

²⁸ *Young Offenders Act 1984* (WA), section 6.

2. The principles of juvenile justice;²⁹
3. That an immediate custodial detention sentence is a sentence of last resort and when it is imposed it must be for as short as time as possible;³⁰ and
4. The requirement to obtain reports before making various orders.³¹

It is against this frame work and drawn from the text that the procedural and substantive elements that the prosecution are required to prove are:

1. The Director of Public Prosecutions is required to give an offender notice, and then submit to a Court that it intends to apply for a special order;³²
2. The Children's Court, if it is constituted by or so as to include a Magistrate cannot make the order. Consequently it is only the President who can decide whether to make such an order;³³
3. The Prosecution must prove the application of section 124, ie Division 9. The application of Division 9 in turn leads to the application of section 125 YOA, termed the 'special principle'. That special principle effectively re-prioritises the protection of the community ahead of all the other principles and matters referred to in section 46 YOA.³⁴ The application of this principle does not imply abandonment of sentencing principles that apply to children, but it suggests that punishment and general deterrence, principles that would ordinarily be applicable in the sentencing of adults, gains greater priority.³⁵ This is how a Court would shift the standard criterion for sentencing juveniles;
4. Fulfilment of the Court's discretionary criteria. That discretionary criteria is contained in section 126(1), which states, inter alia:

...when disposing of the matter, *may*³⁶ also make a special order in accordance with this Division' [emphasis added].

²⁹Ibid, section 7 and incorporated via section 46(1)(b) in dealing with matters for young persons found guilty of an offence.

³⁰Ibid, sections 120 and 7(h).

³¹ Ibid, section 48.

³²Ibid, section 126(3).

³³ Ibid, section 126(5).

³⁴ Ibid, section 125. As to the test of whether section 125 and 125 applies see *JSA v State of WA* (2012) 42 WAR 473, 488 (Buss JA).

³⁵ *JSA v The State of WA* (2012) 42 WAR 473, 493 [89] (Buss JA) referring to *AM (a Child) v The Queen* (unreported, Court of Criminal Appeal, WA, Franklyn, Wallwork and Murray JJ, 5 February 1996) at 12-14 and *R v KC* [2003] WASCA 144,[57] (Roberts-Smith J).

³⁶ See *Interpretation Act 1984* (WA), section 56(1), which states that "Where in a written law the word *may* is used in conferring a power, such word shall be interpreted to imply that the power so conferred may be exercised or not, at discretion."

Continuing on, section 126(2) then states that in:

...deciding whether to make a special order the court is to have regard to the periods that have elapsed before the offender has re-offended after being released from previous custodial sentences.

This internal tension is reflected in the very placement of section 126 in Part 7 of the YOA for the purpose of punishing young persons while at the same time still incorporating the rehabilitative principles of juvenile justice. It is also difficult to see how section 126 fits with regular and well established principles with respect to adult sentencing, where concepts of general deterrence, punishment and protection of the community factor in as part of the intuitive synthesis of the fixing of a term that is proportionate to the offending; the imposition of a further term, after that process has taken place, due to the antecedents and prior offending of the offender, is unique and seems equally incongruous with the rehabilitative focus of the YOA.

In light of *State of WA v ZL* it seems that a Court will be resistant to granting a special order.³⁷ Indeed a high threshold has been imposed; one that is not necessarily expressly stated as being part of the criteria imposed by the operative provisions. This only seems natural given the general principles of juvenile justice and that section 126 seems to operate for the purpose of displacing those general principles, with significant consequence to the juvenile offender. By confining the exercise of judicial discretion, the Court has understandably concluded that it will only be granted in the most exceptional circumstances, above and beyond those imposed by section 126, which will justify departure. As noted above, since its inception, to date no Court has been satisfied that those exceptional circumstances exist.

In particular, the decision in *ZL* is consistent with the rehabilitative jurisprudence in sentencing children under the YOA.³⁸ Express words would be needed under section 126 to abrogate a fundamental common law right of rehabilitative jurisprudence.³⁹ The express wording of section 126 has arguably not abrogated the common law position. This is so, especially notwithstanding the placement of section 126 under a division related to dealing with young persons who repeatedly commit serious offences and where, in light of the second reading

³⁷ It is worth noting that in *ZL* the court granted an application for section 125 YOA to have effect in the sentencing process see *State of WA v ZL* [2010] WACC 18, [91].

³⁸ "*B*" (*A Child*) v *The Queen* (1995) 82 A Crim R 234, 244.

³⁹ Cf *JA (A Child) v The State of WA* [2008] WASCA 70, [35] (Wheeler JA).

speech, there may have been some legislative intention to single out and place these recidivist juvenile offenders into a different category for sentencing purposes.⁴⁰

The application of section 126 relies on the Prosecution proving section 125 YOA which in turn re-prioritises the protection of the community. In the authors' submission, the application of section 125 effectively adopts and gives weight to principles that would ordinarily apply in the sentencing process for adults, but arguably appears to go even further.⁴¹ This partly explains why section 126 has not been applied – section 125 already achieves this deterrent aspect.

The other explanation is that a principle of juvenile justice is that no child should be treated more harshly than an adult⁴² and yet no WA statute has an equivalent sentencing disposal process for adults. That absence in the adult sentencing process represents a contradiction of one of the principles of juvenile justice. This helps to explain the high threshold before a section 126 order is granted.

Having considered the statutory context of section 126, the next part of the note undertakes a 'comparative' legislative analysis with the Northern Territory. This 'comparative' legislative analysis highlights the unique nature of section 126.

V COMPARABLE LEGISLATION? THE NORTHERN TERRITORY

While this section is termed 'comparable legislation' it should be noted that there is no true comparison between section 126 and anything else.⁴³ Currently in

⁴⁰ Further offences which are defined as 'serious offences' under section 124(3) and Schedule 2 under *Young Offenders Act 1994* (WA), "...may lead to the application of the provisions relating to offenders who repeatedly commit offences resulting in detention." This implies that the statutory context of section 126 alongside sections 124 and 125 implies that Parliament intended that a section 126 order could possibly activate upon the application of these statutory factors.

⁴¹ So, for example in drugs cases it has been held that personal circumstances and antecedents are reduced where deterrence is the dominant sentencing consideration: *Tulloch v The Queen* [2004] WASCA 169; (2004) 147 A Crim R 107 [46]. In the case of sex offences the dominant sentencing consideration is general deterrence with matters personal being less important: see for example *DKA v The State of WA* [2015] WASCA 112, [35]-[36].

⁴² As per *Young Offenders Act 1994* (WA), section 7(g).

⁴³ In ACT, the *Children and Young People Act 2008* (ACT) does not re-prioritise the sentencing principles. In Victoria, *Children, Youth and Families Act 2005* (Vic), section 362 sets out matters to be taken into account solely with no re-prioritization of sentencing principles and is not expressly legislatively altered. In NSW the *Children (Criminal Proceedings) Act 1987* (NSW), section 6 and 33; *Young Offenders Act 1997* (NSW), section 7 provide the basis of sentence with no re-prioritisation. In QLD, the *Youth Justice Act 1992* (Qld), Part 7, Divisions 1 and 4, sections 3 and 175 in particular maintain the sentencing principles with no prioritization detected. In South Australia the *Young Offenders Act 1993* (SA) does not re-prioritise sentencing principles. Nor does the Northern Territory

the Northern Territory, a Court in sentencing a youth may order the youth to participate in a program approved by the Minister.⁴⁴ If the Court so orders, then the Minister may, by notice in the Gazette, approve a program,⁴⁵ described by the Northern Territory cognate provision as a 'punitive work order'.⁴⁶ The Australian Law Reform Commission criticized the cognate provision because it rendered young offenders to:

...discrimination, victimization and retribution from other members of the community. They are likely to harden criminal behavior because they stigmatise the young offender in the eyes of the community and in his or her own eyes⁴⁷

While the second reading speech does not shed any light on whether the current Minister's programs under the *Youth Justice Act* (NT) are indeed punitive in nature,⁴⁸ it is clear that the Northern Territory provision does not impose a further fixed punishment on top of what is already being sentenced for by the Court. Indeed, the operation of section 126 does not in any way mandate what programs ought to be made available to the juvenile offender, other than to note the remarks of Reynolds P in *ZL* outlined above.

While perhaps the most noteworthy comparison, the Northern Territory legislation does not assist in determining why section 126 has not been applied in WA. The prospect of an additional 18 months in custody makes the potential consequence of section 126 distinctive without comparison.

VI CONCLUSION

Section 126 has partially achieved what it set out to do by applying the special principle of sentencing under section 125. However, the consequences of section 126 on young offenders in the context of the ordinary aims of rehabilitative sentencing principles, accounts for the Court's reluctance to impose section 126 orders and, in light of *ZL*, if there is any chance of a special order being made, it will be in circumstances where rehabilitation of the juvenile offender is likely to be

have a reprioritization in its *Youth Justice Act* (NT). Finally, nor does the *Youth Justice Act 1997* (Tas) alter any sentencing principle to favour one principle over another.

⁴⁴ *Youth Justice Act* (NT), section 83(1)(e).

⁴⁵ *Ibid*, section 90.

⁴⁶ Formerly imposed under the *Juvenile Justice Act 1983* (NT) sections 53AH-AM.

⁴⁷ Australian Law Reform Commission Report, *Priority for children in the legal process*, Report No 84 (1997), [19.53].

⁴⁸ Youth Justice Bill No.2 2005, available at http://www.austlii.edu.au/au/legis/nt/bill_srs/yjb22005222/srs.html.

promoted. It is difficult to see circumstances in which that position may be achieved.

Segments of the community quite validly voice a need to target hard-core recidivist offenders. Notwithstanding, it is an equally valid requirement that legislation relating to children equally prioritises their rehabilitation into society. Given the non-application of section 126 to date, it is questionable whether its function is able to meet its purpose. This is especially so when one considers that the statutory context in which section 126 has been inserted is specifically to target core recidivist young persons and yet a section 126 order has never been granted.