Misuse of Drugs Act 1981
Part VI – Penalties
Subsections 34(3)-(7)
Mandatory sentencing framework provisions.
Preface
On 24 March 2012, subsections 34(3)-(7) of the Misuse of Drugs Act 1981 (MDA) commenced. These provisions were inserted by section 9 of the Misuse of Drugs Amendment Act 2011 (Amendment Act).

The Amendment Act implemented a 2008 Liberal Party election campaign policy to “crack down on drug dealers who sell or supply illicit drugs to children; protect children from endangerment by tightening sentencing for exposing children to harm, or the danger of serious harm, as a result of the manufacturing of prohibited drugs and the cultivation of prohibited plants”.1

The Amendment Act sought to achieve the above mentioned outcomes by providing a mandatory sentencing framework for offenders who sell or supply a prohibited drug or plant to a child; manufacture a prohibited drug, or cultivate a prohibited plant in circumstances that endanger or cause bodily harm to a child. Subsequently subsections 34(3)-(5) were inserted into the MDA.

Additionally, the Amendment Act inserted subsection 34(6) into the MDA, providing that the Minister must carry out a review of the operation and effectiveness of the Amendment Act, as soon as practicable after the expiry of 3 years from the commencement of that section; and subsection 34(7) to provide that the Minister is to lay a report of the review before both houses of Parliament as soon as practicable after the review is completed.

Mandate
Statutory review required by section 34(6) of the MDA.

Scope
This review has been conducted to investigate the operation and effectiveness of the amendments made to section 34 of the MDA by the Amendment Act.

Methodology
As part of this review, research was conducted by analysing and reviewing a range of different information sources. The following sources were utilised throughout this process to assist with the collection of the relevant information;

- Western Australia legislation
- Interjurisdictional legislation
- Western Australia Hansard Commentary
- Criminal Law, Western Australia – Commentary
- State Crime Portfolio of Western Australia Police Force endorsed data on Clandestine Drug Laboratories.

1 Misuse of Drugs Amendment Bill 2011 – Second Reading Speech.
Consultation

During the review, the following internal and external stakeholders were consulted:

2. WA Police Force Prosecuting – Superintendent Greg Knott
3. Operational police – WA Police Force
4. Aboriginal Legal Services – Mr Peter Collins
5. The Office of the Director of Public Prosecutions – Ms Amanda Forrester and Ms Nari Vanderzanden
6. The Law Society – Ms Priya Pillay
7. Legal Aid WA – Ms Maureen Kavanagh
8. WA Bar Association – Mr Hylton Quail.

Data

According to information, data and statistics provided by the State Crime Portfolio of Western Australia Police Force (State Crime), the majority of Clandestine Drug Laboratories (CDLs) in Western Australia are addict-based labs set up by individuals for personal use and to supply close associates, rather than large commercial operations run by organised crime associates. The most common method of production is the Birch Reduction Method - also known as the Nazi method.

Addict based labs use basic equipment and simple procedures. Typically, the operators have limited or no knowledge of chemistry and simply follow instructions. A typical manufacture cycle would yield less than 50 grams.

The Birch Reduction Method - Nazi method, is quick, inexpensive, simple and portable. It does not require a heat supply or a water source and items needed are sourced from hardware stores and chemists. The process is usually completed in less than an hour, can be as quick as 15 – 30 minutes and generates anhydrous ammonia, hydrogen chloride gas and toxic reduction waste. This method has been seen on several occasions within Western Australia.

The following statistics provide details on all CDLs located between 2012 – 2019 and indicate where section 34 is relevant (i.e.: children were involved);

**Illicit Drug Manufacture Sites Located**

<table>
<thead>
<tr>
<th>Financial Year</th>
<th>Total IDMS</th>
<th>Section 34 Related</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012/13</td>
<td>136</td>
<td>19</td>
</tr>
<tr>
<td>2013/14</td>
<td>96</td>
<td>4</td>
</tr>
<tr>
<td>2014/15</td>
<td>84</td>
<td>4</td>
</tr>
<tr>
<td>2015/16</td>
<td>40</td>
<td>1</td>
</tr>
<tr>
<td>2016/17</td>
<td>33</td>
<td>1</td>
</tr>
</tbody>
</table>

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2 Please note that with the exception of the State Crime Portfolio of WA Police Force, all consultation was conducted in August – October 2017; further consultation has not been conducted.
It is worth noting that the total number of CDLs have decreased significantly since 2012. The following statistics provide details on locations and size of all CDLs;

**Locations**

<table>
<thead>
<tr>
<th>Year</th>
<th>Residential</th>
<th>Rural Residential</th>
<th>Commercial Industrial</th>
<th>Hotel Motel</th>
<th>Vehicle</th>
<th>Public Place (include bush)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012/13</td>
<td>72</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>10</td>
<td>54</td>
</tr>
<tr>
<td>2013/14</td>
<td>49</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>45</td>
</tr>
<tr>
<td>2014/15</td>
<td>53</td>
<td>6</td>
<td>2</td>
<td>2</td>
<td>6</td>
<td>15</td>
</tr>
<tr>
<td>2015/16</td>
<td>21</td>
<td>3</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>13</td>
</tr>
<tr>
<td>2016/17</td>
<td>14</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>1</td>
<td>15</td>
</tr>
<tr>
<td>2017/18</td>
<td>16</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>2018/19</td>
<td>9</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

**Size of CDLs**

<table>
<thead>
<tr>
<th>Year</th>
<th>Addict Based</th>
<th>Small</th>
<th>Medium</th>
<th>Commercial</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012/13</td>
<td>134</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2013/14</td>
<td>86</td>
<td>10</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2014/15</td>
<td>73</td>
<td>9</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>2015/16</td>
<td>33</td>
<td>6</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>2016/17</td>
<td>27</td>
<td>5</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>2017/18</td>
<td>22</td>
<td>3</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2018/19</td>
<td>11</td>
<td>3</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Clandestine Laboratories detected that could be categorised as ‘small scale’ usually deviate from the normal Birch Reduction Method - Nazi method of production, to methods such as Hypophosphorous (HYPO) and Red Phosphorous Method (Red P). Production amounts for “small scale”, are again usually for close associates and personal use.

The HYPO method requires a heat supply and water source. The process is more involved than the Birch Reduction Method - Nazi method and usually takes between one and a half and three hours to complete. Phosphine gas is produced during the reaction which is highly toxic and can be fatal. Toxic Iodine and HI vapours are also produced during the reaction. Additionally, the acids and bases used produce corrosive substances and can cause burns to the skin, eyes and respiratory system.

The Red P method also requires a heat supply and water source. The process is again more involved than the Birch Reduction Method - Nazi method and the HYPO method, and usually takes between nine and 12 hours to complete. The gases created and acids used produce the same effects as mentioned in the HYPO method, the only difference is that the Red Phosphorous used can ignite from heat or friction.
In addition to the above statistics, State Crime collated further statistics identifying all charges laid and their sentencing outcomes for all drug offences involving children between 2013 - 2019. Please find statistics attached marked ‘Annexure 1’. The statistics revealed that in the majority of cases, the penalty incurred was greater than that specified by the mandatory minimum sentencing provisions.

External Stakeholders

Legal Aid WA
Feedback from Legal Aid Western Australia (LAWA) suggests that since the legislation was enacted, LAWA has seen very little of its implementation. Subsequently section 34(3)-(7) of the MDA has rarely been considered by LAWA staff.

A LAWA regional lawyer identified one case where there were extenuating circumstances for the supply of the prohibited drug to the child. These extenuating circumstances were accepted by the court and the police. The offender pleaded guilty to the charge and received a suspended imprisonment order and consequently could not be considered for a spent conviction order. The view of the LAWA lawyer involved was that it would likely have been a fine only offence had it not been for section 34(3). In this situation, the mandatory provisions were not necessarily reflective of the circumstances of the offence. Unfortunately, for confidentiality reasons the details of this case cannot be provided.

Additionally, some LAWA lawyers expressed the view that sections 34(3)-(7) were unnecessary. The argument being - “The court always has a wide sentencing discretion which can always take presence of children into account for sentencing purposes. Even without the mandatory sentencing aspect, it would be extremely unusual and above exceptional for a client not to be imprisoned in the case of manufacturing methylamphetamine”.

Law Society.
The Law Society did not have any comments to make on the specific legislation itself (section 34(3)-(7)), however they provided a paper of the Law Society’s position on mandatory sentencing generally.

The general overview of the paper is that the Law Society is opposed to mandatory sentencing in any form. The Law Society’s opposition to mandatory sentencing is consistent with the view of the legal profession across Australia, as set out in the policy position paper from the Law Council of Australia. The Law Council of Australia has consistently opposed the use of mandatory sentencing regimes, which prescribe mandatory minimum sentences upon conviction for criminal offences.3 Its opposition rests on the basis that such regimes impose unacceptable restrictions on judicial discretion and independence, and undermine fundamental rule of law principles. In the Law Council’s view, mandatory sentencing laws are arbitrary and limit an individual’s right to a fair trial, by preventing judges from imposing an appropriate penalty based on the unique circumstances of each offence and offender.

Additionally, the Law Society opposes mandatory sentencing for the following reasons;

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• It may result in harsh and disproportionate sentences where the punishment does not fit the crime
• It may actually increase the likelihood of recidivism because sentenced prisoners may be inappropriately placed in a learning environment for crime, which reinforces criminal identity and fails to address the underlying causes of crime
• It may undermine the community’s confidence in the judiciary and criminal justice system as a whole
• It removes discretion from the judiciary and dangerously displaces it to other parts of the criminal justice system, most notably law enforcement agencies and prosecutors
• It results in significant economic cost to the community, both in terms of increasing imprisonment rates, and increasing the burden upon the already under-resourced criminal justice system, without sufficient evidence to suggest a commensurate reduction in crime.4

Office of the Director of Public Prosecutions
The office of the Director of Public Prosecutions (ODPP) commented that the legislation rarely comes into operation in matters prosecuted by the ODPP.

The ODPP stated that in the majority of cases, the circumstances to which the mandatory provisions contained in subsections 34(3)-(5) apply, are likely to incur a penalty greater than that specified by the mandatory minimum provisions. If a person is endangering a child by dealing drugs to them or manufacturing drugs in circumstances such as to put them in danger, it is unlikely that they will receive a suspended term of imprisonment and it is likely they will receive a penalty of more than 6 months imprisonment. Very few drug dealers and hardly any manufacturers receive anything less than a suspended term and most are imprisoned.

It is important to note that the ODPP additionally commented that they are of the view that there are insufficient numbers of cases to provide any useful information on the sentencing statistics.

Aboriginal Legal Service of WA
Aboriginal Legal Service of Western Australia (ALSWA) stated that they have not acted for any clients charged with “breaches” of sections 34(3)-(7) of the MDA. Under these circumstances, ALSWA were not in a position to comment or contribute to this review.

WA Bar Association
The WA Bar Association nominated Mr Hylton Quail (a member of the association who practises in criminal law) to comment on their behalf.

Mr Quail prosecuted a matter that is believed to be the only case where a child has suffered bodily harm during an attempt to manufacture methamphetamine. This is the only case that identifies specific issues with sections 34(3)-(7) of the MDA. Unfortunately, this case has not been made publically available due to a suppression order and as a consequence, information and details on this case are not able to be included within this report.

4 Briefing Paper – Mandatory Sentencing, December 2016 - The Law Society of Western Australia.
Mr Quail was of the view that in certain circumstances, (the above case being one of them), the Judge should have the power of discretion to sentence according to the circumstances and not have discretion removed by parliamentary mandatory sentencing. If the Judge considers that a suspended sentence or term of imprisonment is not suitable due to extenuating circumstances, the discretion to impose a lesser sentence should be available.

Additionally, Mr Quail was of the opinion that Parliament are enacting mandatory sentencing laws to respond to the public call for harsher penalties, as the courts are being perceived as being too soft on crime. Mr Quail stated that the mandatory sentencing provisions within section 34(3)-(7) do not appear to be reflective of this, as the judiciary (in most cases) are imposing higher penalties than set out in the mandatory provisions. Subsequently, the mandatory provisions appear to be an irrelevant consideration when a Judge is handing down a sentence.

Mr Quail commented that the mandatory provisions only seem to capture drug users and addicts and was of the view that the Law Reform Commission of Western Australia (rather than any political party) should be making recommendations to parliament on how to crack down on drug dealers who sell or supply illicit drugs to children and expose children to harm, or the danger of serious harm, as a result of the manufacturing of prohibited drugs and the cultivation of prohibited plants.

**Internal Stakeholders**

**Prosecuting Division WA Police Force**

The Superintendent of the Prosecuting Division of WA Police Force was unable to provide feedback on the specific legislation itself (subsection 34(3)-(7)), as the Division have had no dealings with this legislation.

**Operational Police Stations**

Return correspondence has been received from the Wheatbelt District Office and the Kimberley District Office. Both Districts have indicated that they have not had cause to use the legislation.

**Interjurisdictional Legislation**

New South Wales, South Australia, Tasmania, the Northern Territory and Victoria make special provisions for circumstances in which children are involved in drug offences. Queensland is similar to Western Australia, where a result is achieved by making the involvement of children an aggravating circumstance in relation to sentencing.

It is important to note that Western Australia is the only state that has imposed mandatory minimum sentencing for drug offences involving children.

All of the above mentioned jurisdictions provide offences for the sale or supply of prohibited drugs to a child. In Victoria, the penalty for supplying a drug of dependence to a child is a maximum of 15 years imprisonment, or if supplied in a school or a public place, a maximum
penalty of 20 years imprisonment. South Australia provides that it is an offence to sell, supply or administer a controlled drug to a child with a maximum penalty of imprisonment for life.

In New South Wales a person who supplies, or knowingly takes part in the supply of, a prohibited drug to a child that is less than the commercial quantity, is subject to a higher penalty that would otherwise be imposed by the Act “in the case of a penalty for imprisonment for 2 years – to a penalty of 2 years and 6 months”. For the same offence where the amount of prohibited drug is not less than the commercial quantity, a maximum penalty of imprisonment of 25 years is provided.

In the Northern Territory, a maximum penalty of life imprisonment is provided for a Schedule 1 drug, regardless as to whether the quantity is more or less than the commercial amount. If the amount of prohibited drug is of a commercial quantity in regards to a schedule 2 drug, the maximum penalty provided is imprisonment for 25 years, whereas if the quantity is less than the commercial amount, a maximum penalty of 14 years is provided.

Tasmanian legislation provides a maximum penalty of 21 years imprisonment if a drug is supplied to a child and in Queensland, if the minor is under 16 years old, a maximum penalty of life imprisonment is imposed for dangerous drugs listed within Schedule 1 and 25 years imprisonment for a Schedule 2 dangerous drug. If the minor is 16 years or more, a maximum penalty of 25 years imprisonment is imposed for a Schedule 1 drug and 20 years imprisonment for a Schedule 2 drug.

Provisions in Victoria, New South Wales and the Northern Territory provide that it is an offence to manufacture a prohibited drug where children may be involved, or present. Legislation in Victoria provides a maximum penalty of 20 years imprisonment, unless the offence is in a school or a public place, in which case, the maximum penalty provided is 25 years imprisonment. In New South Wales, legislation provides a maximum penalty of 18 years imprisonment if the quantity of the manufactured prohibited drug is less than the commercial quantity and a maximum penalty of 25 years imprisonment, if the quantity was not less than the commercial quantity. Finally, legislation in the Northern Territory provides a maximum penalty of 25 years imprisonment for manufacturing a Schedule 2 drug and life imprisonment for a Schedule 1 drug.

New South Wales and the Northern Territory are the only States that provide offences for the cultivation of cannabis where children are involved. It is important to note that in New South

5 Drugs Poisons and Controlled Substances Act 1981 (Vic), s. 71B(1) and s. 71B(1A).
6 Controlled Substances Act (SA), s. 33E – 33H.
7 Drugs Misuse and Trafficking Act 1985 (NSW), s. 25(1A) and 25(2A)
8 Drugs Misuse and Trafficking Act 1985 (NSW), s. 33AA.
9 Misuse of Drugs Act 1990 (NT), s. 5B and 5C.
10 Misuse of Drugs Act 2001(Tas), s. 14
11 Drugs Misuse Act 1986 (Qld), s. 6(1) and (2).
12 Drugs Poisons and Controlled Substances Act 1981 (Vic), s. 71AB(1) and (2) - Trafficking a drug of dependence to a child. The definition of traffic includes manufacture a drug of dependence.
13 Drugs Misuse and Trafficking Act 1985 (NSW), s. 24(1A) – lower than commercial quantity of prohibited drug and s. 24(2A) – not less than the commercial quantity of the prohibited drug.
14 Drugs Misuse and Trafficking Act 1985 (NSW), s. 33AC
15 Misuse of Drugs Act 1990 (NT), s. 6(G) – Manufacture of dangerous drug in presence of child. Schedule 1 – Dangerous Drugs, Schedule 2 – Other dangerous drugs.
Wales, it is a defence if the exposure of the child to the prohibited plant cultivation process, or to substances being stored for use in that process, did not endanger the health or safety of that child.\textsuperscript{16} Additionally, in the Northern Territory, the person must be reckless in relation to having the child present,\textsuperscript{17} this also applies to all of the provisions within the Northern Territory relating to drug offences involving children.

**Key findings**

The review found generally that although there is no indication that the legislation providing mandatory sentencing provisions doesn’t work, the overall feedback provided by external stakeholders is that the legislation is either irrelevant, (in the majority of cases, the circumstances to which the mandatory provisions apply are likely to incur a penalty greater than that specified by the mandatory minimum provisions), or rarely used.

Alternatively, some comments provided by external stakeholders related to the ‘unacceptable restrictions’ of mandatory sentencing generally, however only a couple of case examples were discussed where harsh penalties were imposed due to the removal of discretionary powers from the judiciary.

All States within Australia provide some form of offence, or aggravating circumstance, in situations where children are involved in drug offences. Western Australia is the only state that provides mandatory sentencing provisions for such circumstances.

The statistics and data relating to children involved in the manufacturing of drug offences provided by the State Crime Portfolio revealed in the majority of cases, the penalty incurred is greater than specified by the mandatory minimum sentencing provisions. The statistics additionally showed a decline in offences relating to manufacture of drugs which involve children. These statistics may indicate that the mandatory sentencing provisions appear to be working, however it is important to note that clandestine laboratories have decreased significantly over the years, which will be highly reflective within the statistics.

**Recommendation**

WA Police Force do not hold a firm position on the effectiveness of section 35(3)-(5). However in light of the information available, and the limited amount of cases that have been effected by this legislation, it is recommended that the status quo be maintained and no legislative amendments be progressed.

\textsuperscript{16} Drugs Misuse and Trafficking Act 1985 (NSW), s. 23A(6)

\textsuperscript{17} Misuse of Drugs Act 1990 (NT), s. 6C(c) and 6D(c).
<table>
<thead>
<tr>
<th>DATE</th>
<th>PREMISES</th>
<th>CHARGES</th>
<th>SENTENCING OUTCOME</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>6/03/12</td>
<td>Residential</td>
<td>Possess a Prohibited Drug (Methylamphetamine)</td>
<td>IMPRISONMENT: 1 YR &amp; 6 MTHS IMP FROM 09.01.17</td>
<td>The accused was on at the premises with her 4 year old son. There was an explosion - adult and child burnt.</td>
</tr>
<tr>
<td>20/11/12</td>
<td>Residential</td>
<td>Possess a Prohibited Drug (Methylamphetamine)</td>
<td>IMPRISONMENT: 18 MTHS CONC TOTAL: 18 MTHS IMPRISONMENT: 3 MTHS CONC TOTAL 18 MTHS</td>
<td>Items utilised in the manufacturing of methylamphetamine were located inside the house which was easily accessible to the children living at the premises.</td>
</tr>
<tr>
<td>24/02/12</td>
<td>Residential</td>
<td>Attempt to Manufacture a Prohibited Drug</td>
<td>DISM - FOR WANT OF PROSECUTION</td>
<td>The accused residing with his de facto partner and two children who are aged five and nine.</td>
</tr>
<tr>
<td>3/03/13</td>
<td>Residential</td>
<td>Attempt to Manufacture a Prohibited Drug</td>
<td>IMPRISONMENT: 2 YRS FROM 6.3.12</td>
<td>Also located in the premises was the accused partner and 18 month old son.</td>
</tr>
<tr>
<td>7/03/13</td>
<td>Residential</td>
<td>Attempt to Manufacture a Prohibited Drug</td>
<td>IMPRISONMENT: 2 YRS FROM 6.3.12</td>
<td>At the address the accused 12-month-old daughter was present in the vehicle whilst being pursued and whilst clandestine drug laboratory items were stored in the vehicle.</td>
</tr>
<tr>
<td>11/03/13</td>
<td>Residential</td>
<td>Attempt to Manufacture a Prohibited Drug</td>
<td>DISM - FOR WANT OF PROSECUTION</td>
<td>The accused residing with his de facto partner and two children who are aged seven and 10 years.</td>
</tr>
<tr>
<td>17/03/14</td>
<td>Residential</td>
<td>Attempt to Manufacture a Prohibited Drug</td>
<td>IMPRISONMENT: 2 MTHS &amp; 6 MTHS FROM 27.11.13</td>
<td>After conviction: The chemicals and gasses used in the Birch Reduction method of manufacturing methylamphetamine would endanger and harm the health and safety of a child.</td>
</tr>
<tr>
<td>17/05/14</td>
<td>Residential</td>
<td>Possess a Prohibited Drug (Methylamphetamine)</td>
<td>IMPRISONMENT: 18 MTHS</td>
<td>Upon arrival, the accused and her nineteen-month-old granddaughter were located as well as several items being observed on the property consistent with use in the manufacturing of prohibited drugs.</td>
</tr>
<tr>
<td>18/02/14</td>
<td>Residential</td>
<td>Possess a Prohibited Drug</td>
<td>IMPRISONMENT: 2 MTHS FROM 20.02.14</td>
<td>The accused lived at the address with her twin children aged 10 and 11. Upon conviction: The chemicals and gasses used in the manufacturing of heroin would endanger and harm the health and safety of a child.</td>
</tr>
<tr>
<td>20/02/14</td>
<td>Residential</td>
<td>Possess a Prohibited Drug</td>
<td>IMPRISONMENT: 2 MTHS &amp; 6 MTHS FROM 27.11.13</td>
<td>The accused resides at the premises.</td>
</tr>
<tr>
<td>21/03/14</td>
<td>Residential</td>
<td>Attempt to Manufacture a Prohibited Drug</td>
<td>IMPRISONMENT: 14 MTHS IMP FROM 15.7.13</td>
<td>Items utilised in the manufacturing of methylamphetamine were located inside the house which was easily accessible to the children living at the premises.</td>
</tr>
<tr>
<td>27/06/14</td>
<td>Residential</td>
<td>Attempt to Manufacture a Prohibited Drug</td>
<td>IMPRISONMENT: 18 MTHS</td>
<td></td>
</tr>
</tbody>
</table>