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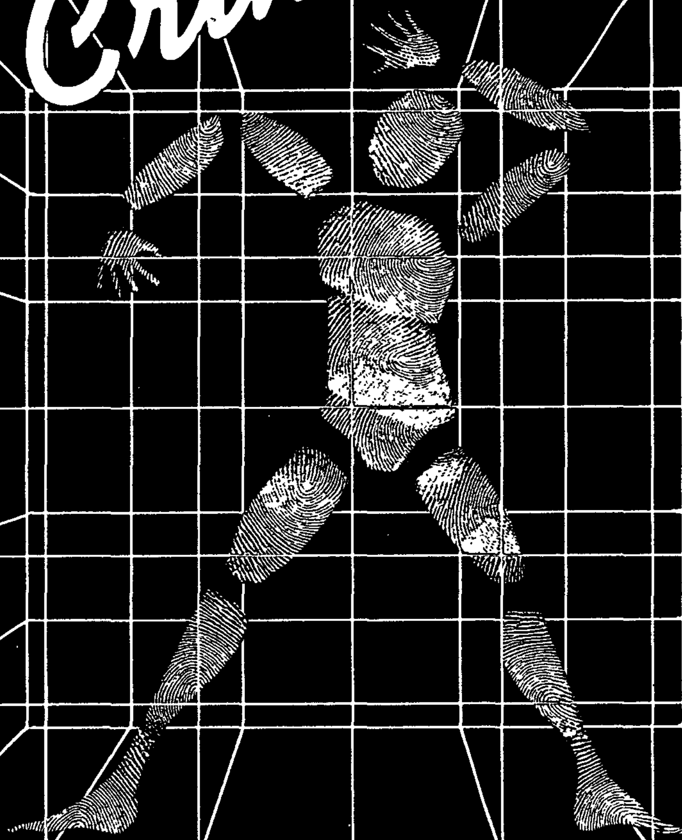
Simply Criminal



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SIMPLY CRIMINAL

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Preface

A society can be evaluated on the basis of its treatment of those within it who are deviant or different. Two of the most powerful institutions for the control of social deviancy are prisons and psychiatric hospitals. Australian society has not shied away from using both institutions to remove mentally abnormal persons accused of crime from the mainstream of society. In the case of mentally retarded, as distinct from mentally ill, offenders, detention in either a mental hospital or prison can be inappropriate and counterproductive to the aims of rehabilitation of offenders, and prevention of crime. The alternative is *not,* however, special, segregated institutions for mentally retarded offenders. The principles of normalisation and integration of retarded people into the mainstream of society are principles which must be applied in the criminal justice context. To do otherwise is to impose unwanted and unnecessary paternalism.

It is essential that professionals working in all aspects of the criminal justice system–the judiciary, lawyers, police officers, probation and parole officers, mental health professionals, medical practitioners, rehabilitation staff and criminologists–realise that they have a moral and professional obligation to improve the lot of any person suspected of or found guilty of having committed a crime. True, some specially vulnerable groups may need extra assistance–but improvement in the general situation will probably serve minority groups better in the long run.

SUSAN HAYES
ROBERT HAYES

July, 1983

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Many other people contributed valuable knowledge and experience, helping us to relate the legal aspects of the topic to actual cases and practical dilemmas facing professionals working in the criminal justice system. Chief amongst these were:

- Mr. David Biles, Assistant Director (Research) of the Australian Institute of Criminology;
- Mr. Stanley Hewitt, an ex-police officer and fervent lobbyist for the training of police officers in the recognition and handling of mentally retarded suspects, of Bath, Avon; and
- Mr. Robert F. Smith, former Senior Superintendent of Prisons, Queensland, 1957-1971, and currently a Deputy Sheriff of the Supreme Court of New South Wales.

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Chapter 1

Neither Mad nor Bad

Mentally retarded people in our society tend to be ignored, forgotten, segregated, and the object of discrimination. Society prefers to think of itself as a homogeneous group of people, fairly equal in terms of physical and intellectual abilities, status and power. To many people, physical disability, mental illness, and mental retardation are states which do not, and will not, impinge upon their lives in any way; this belief is held despite the escalation in the numbers of people in the population having a chronic disease or disability which will affect their lifestyle in some significant way. If our society is unwilling to consider the difficulties of physically and intellectually disabled people living in the community, how much more unwilling is it to address the problems, once these people become involved with the criminal justice system? Prisoners, gaols and gaolers all arouse enormous emotional responses, mostly negative. People do not wish to be reminded of crime, and the need for punishment and corrective services. The reasons for this are complex, but involve feelings of fear (fear of violence; fear that "there but for the grace of God, go I"); guilt (at imposing conditions of deprivation and segregation upon those unlucky enough to be caught); helplessness (when faced with the prospect of rehabilitating a confirmed offender or, on the other hand, of reforming the prison system); and the realisation of the degree of human error and prejudice which can result in one person being imprisoned while another goes free. Combine these two problems which society is unwilling to face–retardation, and corrective services–and it seems unsurprising that the mentally retarded person in the criminal justice system has not received great attention.

When examined from another perspective, however, the dearth of research concerning the mentally retarded accused *is* surprising, because mental retardation and criminal behaviour are frequently regarded as being linked.

> "Every feeble-minded person, especially the high grade imbecile, is a potential criminal, needing only the proper environment and

opportunity for the development and expression of his criminal tendencies."[1]

(Theories of criminality, particularly those espousing a causal link between mental retardation and criminal behaviour, are examined in Chapter 2.) Certainly, it is widely assumed that criminals must be either simple, or mentally abnormal, in order to become involved in criminal behaviour in the first place. This assumption poses other questions–if criminal offenders are mentally abnormal, is gaol an appropriate place for them? To what extent does society need to punish, or rehabilitate, such mentally abnormal offenders? Does society need to be protected from them?

The aim of this book is to examine legal and social issues relevant to mentally retarded offenders in the criminal justice system. The general term "mentally abnormal offender" makes no distinction between mentally ill and mentally retarded individuals; and in practical terms, those suffering from mental retardation are usually treated in law as if they were mentally ill, that is, suffering from psychiatric disturbances.

There is small recognition of the great gulf between the two conditions, and the enormous differences in terms of aetiology, symptomatology, prognosis, treatment and management. In consequence, the options which are available for retarded offenders at every step of the criminal justice process are inappropriate. For example, defence counsel may plead insanity, or a court may find that the defendant is unfit to plead to the charge. As a result, a retarded defendant finds himself incarcerated in a mental hospital until he recovers from mental illness. Retardation is not, of course, a condition from which one "recovers"; a retarded person is not even "mentally ill". Again, when a court seeks expert assistance, assessment procedures may be based upon a medical, rather than an educational or social-adaptive model. Or a retarded person may be sent to a quite unsuitable rehabilitation programme designed for psychiatrically ill patients. The list goes on.

Thus, the first task of this book (to which the remainder of this chapter is devoted) is to differentiate between mentally ill and mentally retarded defendants. Then follows a review of current knowledge about retarded offenders–how many there are; the types of crime likely to have been committed; and relevant theories of criminality. In subsequent chapters, the book addresses itself to the "career" of the men-

1. W. E. Fernald, "The Burden of Feeblemindedness", *Journal of Psychoasthenics,* 1912, 17: 87-111, at pp. 90-91.

tally retarded accused, as he passes through the stages of the criminal justice process—suspicion, apprehension, questioning, possible diversionary procedures (including diversion into mental health facilities); the courtroom process, possible defences, taking oaths and giving evidence; sentencing, and available options; imprisonment, its effect, and the availability of rehabilitation programmes; alternatives to imprisonment, such as community service orders, or good behaviour bonds; and parole and probation.

At each step, the procedures and options are critically evaluated to determine their suitability or otherwise for retarded defendants, and recommendations for changes in legislation, procedures, programmes, and options are canvassed.

Mental retardation defined

A definition of mental retardation accepted by the American Association on Mental Deficiency states:

> "Mental retardation refers to significantly sub-average intellectual functioning which manifests itself during the developmental period and is characterised by inadequacy in adaptive behaviour."

The term "mental retardation" is used throughout this book, in preference to terms such as "intellectually handicapped", "developmentally delayed", "developmentally disabled", or "mentally handicapped", for a number of reasons.

First, it is the most precise of the available terms, meaning literally, a slowing down of an individual's mental process. The general term, "retardation", can include physical as well as mental delays, and will be used only in that general sense. It is the case that physical delays often accompany mental retardation, and a delay in achieving physical milestones is often the first indication of mental retardation, but this book focuses upon *mental* retardation because of the legal implications of a person's mental capacity. For similar reasons the terms "developmental delay" or "developmental disability" are not used when the more precise meaning of "mental retardation" is intended. The definition of "developmental disability" used by the N.S.W. Department of Health is of interest, however, because it attempts to narrow the initial wide scope of the term, and details the long-term implications of the state:

> "The term 'developmental disability' means a severe chronic disability of a person which:

a. is attributable to an intellectual or physical impairment or combination of intellectual and physical impairments;

b. is manifested before the person attains age 18;

c. is likely to continue indefinitely;

d. results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, economic self-sufficiency; and

e. reflects the person's need for a combination of sequence of special interdisciplinary or generic care, treatment or other services which are of lifelong or extended duration and are individually planned and co-ordinated.

For practical purposes this included persons with intellectual handicap, severe epilepsy, cerebral palsy, brain damage acquired in childhood, and those with other neurological disorders needing similar provision."[2]

The terms "intellectual handicap" or "mental handicap" are not used, owing to the incorporation of the word "handicap". It is important to distinguish between the terms "disability" and "handicap", because of the implications of the latter.

A *disability* is defined as an impairment or loss of a physical or mental structure or function, for example, loss of vision, loss of a limb, loss of memory, or impairment of reasoning abilities.

A *handicap* encompasses the personal and social consequences of a disability, and the emotional adjustment problems which follow.[3]

Thus, it is possible to have a disability without a handicap, and, furthermore, the extent of handicap is not directly related to the severity of the disability. A mentally retarded person may not be handicapped by his condition, in that he may not experience difficulties in personal, social, or emotional adjustment, whereas a deaf person may be severely handicapped in social situations.

In Europe mentally retarded and mentally ill persons were lumped together in the same category—as different, sinister or deviant—for the

2. J. Dey, *Health Services for the Developmentally Disabled. Draft Policy Document, 1982,* Health Commission of New South Wales, January 1982, pp. 1-2.
3. T. Kenny and G.A. Lentz, "Management of the Handicapped Child", in G. V. Balis, L. Wurmser, E. McDaniel, and R. G. Grenell (eds), *Psychiatric Problems in Medical Practice* (Butterworths, U.S.A., 1975), pp. 418-419.

purposes of management, until the 16th century. A legal definition of idiocy was originally promulgated in 1534, the first scientific treatise on cretinism was delivered in 1675, and the pioneer medical text including a section on mental retardation was published in 1672.[4] In 1690, John Locke distinguished between idiocy and insanity, stating that the intellect was only a storehouse for information gathered by the senses, and whereas the insane put together wrong ideas, the retarded put forth no ideas.[5]

During the late-19th century, descriptions and theories of mental retardation and mental illness took a new direction, moving away from social and psychological criteria towards medical classification systems describing biological factors in the causation of mental retardation. The medical model predominated from then on and still predominates, despite the fact that the majority of those described either as mentally retarded or mentally ill have conditions with no known organic aetiology, and do not suffer from medical problems to any greater extent than the rest of the population.[6]

Besides the medical classificatory system, the other major, albeit controversial, system of classification is based upon intelligence quotient, or IQ scores. Reliance upon IQ scores in classification of mentally retarded people is condemned on many grounds, principally—that IQ scores do not reflect social or adaptive skills, that the tests are not fair to persons from differing cultural backgrounds, that the categories are arbitrary and an individual's IQ may change, for example, as a result of environmental deprivation, or special education programmes, and that the categorisation is of little value in predicting an individual's long-term adjustment or abilities.[7] Nevertheless, because of the continued wide-spread use of the IQ as a means of classification, the World Health Organisation classificatory system is reproduced here:

Mental Retardation Category	IQ levels
Mild	52-67
Moderate	36-51
Severe	20-35
Profound	under 20

4. R. Macklin and W. Gaylin (eds), *Mental Retardation and Sterilization* (Plenum Press, New York, 1981), pp. 11ff.
5. Ibid., p. 13.
6. R. Koch and J. C. Dobson (eds), *The Mentally Retarded Child and His Family* (Brunner/Mazel, New York, 1976), pp. 11ff.
7. S. C. Hayes and R. Hayes, *Mental Retardation: Law, Policy and Administration* (Law Book Co., Sydney, 1982), Ch. 1.

Despite the apparent ease of classification according to IQ, it is now generally agreed that in deciding whether or not a person is mentally retarded, a number of criteria must be used–cognitive abilities; capacity for abstract thought; comparison with other members of the population of similar age (in other words, deviation from the norm); social, adaptive, and self-help skills; and environmental factors, such as stimulation or deprivation. The presence or absence of medical or neuro-physiological abnormalities or defects is relevant to determining the aetiology of the retardation, but is not directly relevant to the classificatory process.

The difference between mental illness and mental retardation

On the face of it, the difference between mental illness and mental retardation seems very clear–the former group is mad, while the latter is slow. It would seem a simple task to differentiate the two groups. In practice, however, the differential diagnosis is not so simple. Severely retarded people may evince emotional disorders, or psychotic-like behaviour, such as described in the following passage:

> "withdrawal, bizarre motor posturing (or ritualistic mannerisms), marked preoccupations with certain inanimate objects, echolalic speech, and regression of (sic) previously acquired social-adaptive skills . . . [T]hey represented instances of a schizophrenic adaptation with associated regressive phenomena occurring against the backdrop of delayed early developmental milestones."[8]

Such behaviour may occur as a consequence of family disruption, drugs, brain damage, disease or degeneration, or emotional or physical deprivation (particularly in an institutional environment).[9]

On the other hand, a person suffering from mental illness may appear "slow", when assessed on standard intelligence tests. This can be due to the effects of drugs, learning or perceptual disabilities, emotional trauma, lack of concentration, lack of motivation in the test situation, or thought disorder.[10]

The making of a differential diagnosis, therefore, may depend upon meticulous history-taking, observation, and assessment by a number of health professionals.

8. F. J. Menolascino, "Psychiatric Aspects of Retardation in Young Children", in Koch and Dobson, note 6 above, pp. 422-423.
9. F. J. Menolascino, in Koch and Dobson, op. cit., pp. 400ff.
10. See generally, G. V. Balis, L. Wurmser, E. McDaniel and R. G. Grenell (eds), *Clinical Psychopathology* (Butterworths, U.S.A., 1978).

Apart from the difficulties posed by overlap, or apparent overlap between the two categories, other difficulties arise because psychiatric disease has yet to be defined with the precision of physical illnesses. Consequently, mental illness is described in terms of its outward manifestations, the symptoms or behaviour of the patient. In the absence of any organically determined defect or abnormality (such as brain damage, or a biochemical abnormality), mental illness may be conceptualised in a number of different ways, according to the theoretical orientation of the psychiatrist. For example, a phobia may be viewed as owing to faulty learning, or to an unconscious conflict having its roots during childhood, depending upon the psychiatrist's "school".

Even when the manifestations are clearly and unambiguously observable, whether or not the appearance of certain symptoms should constitute a mental illness is a debatable point. What is considered normal or abnormal behaviour is really a question of values and expectations currently prevailing in society. In 1974, by popular vote, the American Psychiatric Association deleted homosexuality from its list of disease entities, under pressure from activist homosexual groups.[11] Thus, in determining mental illness

> "it is necessary to appreciate that social behaviour considered abnormal by community standards is not necessarily a consequence of mental illness but may be simply a form of eccentricity or even a protest against standards of behaviour generally acceptable by the community. Whether such behaviour actually results from mental illness is a matter for medical judgement but the assessment of behaviour and the determination of its acceptability by the community are matters for both medical and lay judgement in the light of changing social patterns."[12]

In summary, any attempt to define mental illness must take into account the following principles:[13]

11. J. R. Lion, "Nomenclature in Psychiatry", in G. V. Balis, L. Wurmser, E. McDaniel and R. G. Grenell (eds), *Basic Psychopathology* (Butterworths, U.S.A., 1975), pp. 365-385.
12. D. M. Myers, D. Fitzgerald, J. R. B. Ball, *Report of the Consultative Council on Review of Mental Health Legislation* (Govt. Printer, Melbourne, December 1981), p. 31.
13. L. S. Wrightsman, C. K. Sigelman and F. H. Sanford, *Psychology: A Scientific Study of Human Behaviour* (5th ed., Brooks/Cole, California, 1979), Ch. 15, "Psychological Disorder", pp. 551-590.

1. Each society determines the range of behaviour it considers normal–what may be considered normal in one culture may be viewed as highly abnormal in another.
2. Customs and laws change over time.
3. Behaviour cannot be evaluated as normal or abnormal without considering its social context–walking around nude is considered acceptable at home or at a nudist beach, but very abnormal in a department store.
4. There is a continuum between normal and abnormal behaviour–life stresses, life experiences, and coping styles vary enormously between individuals, but also in the course of one person's lifetime. Mental health is, therefore, not a static quality, but a dynamic one.

Taking all of these principles into consideration, it can be said that an individual is suffering from mental illness if he has a serious psychological disorder, involving drastic changes in personality functioning, in behaviour, or in the perception of his environment. This could be described as a "lay" definition of mental illness. Legal definitions incorporate other features, and rightly so, because many mentally ill persons survive and cope adequately in society, sometimes with support from family or friends, without major disruption to their own or others' lives, and never come into contact with the legal system. Society can tolerate eccentrics, alcoholics, drug addicts, and those who are withdrawn, hallucinating or abnormal–up to a point. The legal cut-off point is usually made when the person becomes a danger to himself or society. In other words, the legal system–and the social system–is prepared to leave a mentally ill person to his own devices, or to the care or protection of his family or health professionals, until he begins to impinge upon society in a serious way.

Much has been written about the problems associated with legal definitions of mental illness, how the definition fluctuates with time, or even at different stages of the criminal process.[14] Later sections of this book will address themselves to the issues raised by legal definitions, and legal procedures involving mentally ill persons as applied to mentally retarded persons. The important thrust of this section can be summarised as follows:

14. A. Frieberg, "Out of Mind, Out of Sight: The Disposition of Mentally Disordered Persons Involved in Criminal Proceedings", [1976] 3 *Mon. Law Rev.* 134; I. Potas, *Just Deserts for the Mad* (Australian Institute of Criminology, A.C.T., 1982), Ch. 2, "The Meaning of 'Mental Illness' ", pp. 18-30.

- Mental illness and mental retardation are two very different concepts of mental disorder.
- Yet, mentally retarded people are *not* differentiated, under most present legal definitions–they are subsumed under the general category of "mental illness".
- Consequently, mentally retarded individuals are subjected to inappropriate treatment, management and disposition.

For example, if any offender is considered "unfit to plead", he may be held until he is "cured", and fit to plead. Retarded offenders, unlike those suffering from mental illness, are not going to be "cured". A retarded offender may be placed in hospital, and receive medical "treatment", whereas placement in a residential facility and enrolment in educational programmes designed to improve social and cognitive skills would be more appropriate. These issues are discussed in detail later in this book.

Mental retardation: myths and facts

A number of myths about mentally retarded people exist, particularly with respect to the relationship between retardation and criminal behaviour.

MYTH: Mentally retarded people look different from non-retarded people.

Most mentally retarded individuals do not have any distinctive physical characteristics or abnormalities. The notion that mentally retarded individuals are slobbering, shambling, clumsy, and easily identifiable by appearance is not accurate. Some mentally retarded persons suffering from particular medical syndromes may have physical signs, but these are often so slight as to be unnoticeable except by trained health professionals. It is important, therefore, for criminal justice personnel not to rely upon appearance as a method of recognising that an accused is retarded.

MYTH: Mentally retarded people cannot learn.

Retarded people can learn more than is often assumed, but they learn at a slower pace and need educational programmes which are especially structured to their needs. Such programmes have small incremental steps, and considerable repetition. Most mildly retarded persons can learn skills of reading, writing and numeracy sufficient to enable them to live independently in the community. Intellectual growth and development may be hindered by overprotectiveness, and lack of stimulating opportunities.

MYTH: Mentally retarded people are not aware that they are different from other people.

Retarded people are usually aware that they are different from other people. They may be frustrated at their lack of ability to cope in society. They may attempt to disguise their disability, or to divert attention from it by seeking popularity and acceptance in other ways.

MYTH: Most mentally retarded people are mentally ill.

As described above, the two conditions are very different, and mentally retarded people are no more likely to develop mental illness (such as personality or behaviour disorders, or lack of awareness of reality) than are non-retarded individuals. Sometimes mentally retarded people may demonstrate behaviours which appear to be signs of mental illness (such as, rocking back and forth, and head-banging) but this is likely to be a response to an unstimulating or frustrating environment.

MYTH: Mentally retarded people usually have physical disabilities.

The vast majority of mentally retarded people have no serious physical handicaps.

MYTH: Mentally retarded people are more violent and sexually aggressive than non-retarded people.

Mentally retarded people do not have a higher level of violence, or a greater sexual urge than other people. Difficulties may arise when the retarded person has not had the opportunity to learn appropriate social and sexual behaviour. He may be functioning in a way appropriate to his mental age (that is, touching and cuddling people as a six-year-old would; or unable to control aggressive behaviour in an adult manner), but inappropriate for his chronological age or size.

MYTH: Most retarded people need constant care and supervision, and an institution is the most appropriate placement.

The majority of retarded people are capable of independent or semi-independent living in the community, at home with their families, or in a small group home, or hostel. Twenty-four-hour nursing care in a hospital environment is required by only an extremely small percentage of severely handicapped persons. Community services as an alternative to large mental retardation institutions are becoming more widely available.

MYTH: Mentally retarded people cannot hold a job.

Most mentally retarded people are capable of working, either in a sheltered work environment or open employment. Open employment opportunities tend to become more restricted as unemployment increases. Mentally retarded people usually make reliable, honest, and congenial employees if they have received appropriate vocational training.

Legal rights of mentally retarded persons[15]

A right is an interest recognised and protected by law, respect for which is a duty, and disregard of which is a wrong. In some areas, mentally retarded citizens have the same rights and obligations as other citizens. Many rights–such as, the right to enter into contracts, give valid consent to medical treatment, vote, marry, have and rear children, own property, make a will, sue and be sued–can be curtailed legally only if it can be demonstrated that the retarded person lacks the capacity to understand the nature and effect of his action, or of the agreement into which he is entering. In practice, owing to overprotective attitudes and segregation, many retarded people lack the opportunity to exercise their legal rights.

In other areas, "rights" for mentally retarded citizens do not exist. There is no "right" to education, or to a least restrictive alternative, or to equal protection of the law, or to employment, for Australia does not have a Bill of Rights such as exists in the United States of America, which comprehensively states basic human rights. A number of rights are established by statutes, or by common law.

Who is responsible for the crime?

Legal writers, criminologists, and philosophers have adopted the "mad or bad" principle to summarise the issue of responsibility for criminal offences.[16] Basically, there are two broad classifications of offences–

- Offences of *strict liability,* for example, the offence of being in possession of illegal drugs. Strict liability offences refer to statutory offences which do not require proof of intention, recklessness, or negligence; and

15. See generally, S. C. Hayes and R. Hayes, note 7 above.
16. E.g. D. Biles and G. Mulligan, "Mad or Bad?–The Enduring Dilemma", *British Journal of Criminology,* 1973, 13, pp. 275-279; H. A. Prins, "Mad or Bad–Thoughts on the Equivocal Relationship Between Mental Disorder and Criminality", *International Journal of Law and Psychiatry,* 1980, 3, pp. 421-433.

- Offences requiring mens rea, or criminal intent, on the part of the offender.

The term "mens rea" refers to the mental element of a crime, and is taken from the maxim "actus non facit reum nisi mens sit rea": there is no guilty act without a guilty mind. Depending on the offence, it may be satisfied by intention to bring about the forbidden result (for example, death, in the crime of murder), recklessness, or criminal negligence (a given departure from the standard of conduct to be expected in the circumstances). If a person is incapable of forming an intention, or incapable of awareness of possible consequences of his action, or incapable of controlling his conduct, owing to lack of physical ability, or to insanity, then he may be found to have lacked the necessary mental element. In order to have a guilty mind, one must have a mind.

Does a mentally retarded person have a mind? If he has some, albeit limited, awareness and ability to form an intention, but has a "subnormal" mind, should he take responsibility for his crime? The dilemma is that a retarded offender may be *neither mad nor bad.* Where are the guiding legal principles then?

There are other principles–social, cultural, humane–which are also relevant. One of these is the principle of *normalisation,* that is, making available to mentally retarded people patterns and conditions of everyday life which are as close as possible to the norms and patterns of the mainstream of society.[17] This principle would indicate that a person should not be excused from taking responsibility for a criminal action, by reason alone of retardation. Nor should he be considered insane, unless he shows evidence of mental illness. What are the options? Alternative defences, such as that of diminished responsibility? Alternative forms of disposition? Alternative forms of rehabilitation?

The dilemma of being neither mad nor bad is the subject of this book.

17. Hayes and Hayes, note 7 above, pp. 5ff.

Chapter 2

The Mentally Retarded Offender—How, Who and Why?

Before beginning an examination of the criminal justice system and its efficacy in dealing with mentally retarded offenders, it is imperative to place the problem in context. With how many such people are the police, the courts, and the gaols dealing? What types of offences are being committed? How is mental retardation related to crime? Is it a direct, causal link, in that retarded people are more prone to become criminals? Or is the problem explicable in terms of sociocultural factors? Could it be that retarded people are unwitting victims of social, familial and legal processes which render them poor, defenceless, unlikely to assert their rights, unable to obtain access to appropriate legal advice—not necessarily more criminal, but more likely to end up embroiled in the legal system? Are corrective services the last resort following the failure on the part of other institutions and agencies to deal with the problem of appropriate placements, occupations, or social skills programmes for retarded citizens?

Prevalence of mental retardation in the offender population

Using a statistical definition, between 2 and 3 per cent of the total population is defined as mentally retarded. The prevalence of retardation in the general population varies according to the age group under study, with under-diagnosis occurring in the pre-school age group, and the highest estimates occurring during school age.[1] Reliable estimates of the prevalence of retardation are almost non-existent in Australia, and where they do exist, are often under-estimates owing to the fact that they rely upon information provided by specialist service agencies. Many mildly retarded people use ordinary community services—such as schools, medical services, job training programmes—and are therefore not included in such surveys. A study of intellectually handicapped

1. C. Judge, *Retarded Australians* (Melbourne University Press, Melbourne, 1975), pp. 3ff.

adults in a region of Sydney found 1.86 handicapped persons per 1,000 population.[2]

In the United States of America, similar problems are encountered, and estimates of retardation in a range of studies have varied from 0.2 to 2.4 per cent of the population.[3] A British study found a prevalence rate of mentally handicapped adults of 2.58 per 1,000.[4] In the Soviet Union, where IQ tests are not used, less than 1 per cent of children are diagnosed as retarded.[5]

Clearly, the variation in prevalence rates depends very heavily upon the definition used. An arbitrary cut-off point, such as two standard deviations below the IQ mean, or an IQ of 70 or less, inevitably results in a higher prevalence rate because those people within these categories are *by definition* retarded; whereas, for the reasons outlined above, a survey of the retarded population known to agencies inevitably results in under-estimation. For administrative purposes, a prevalence rate of 1 per cent is often used. Using the most pessimistic estimates, no more than 3 per cent of the population is regarded as mentally retarded.

The various efforts to estimate the prevalence of mental retardation amongst the offender population have also failed to yield any clear figures. A review[6] of studies conducted between 1918 and 1966 found that the percentage of retarded offenders in penal populations varied from as low as 2.4 per cent, up to 28 per cent. National surveys indicate that rates can vary enormously from area to area. In the United States of America, South Carolina reports a rate of 7.9 per cent whereas Georgia reports 39.6 per cent.[7] An overall national rate of 9.5 per cent was found,[8] which parallels a Danish study which found a rate of 10 per

2. M. Basser and H. M. Molony, *A Survey of Needs and Functioning of an Adult Intellectually Handicapped Population,* 13th Annual Conference, Australian Psychological Society, Newcastle, August, 1978.
3. G. Tarjan, S. W. Wright, R. K. Eyman and C. W. Keeran, "National History of Mental Retardation: Some Aspects of Epidemiology", *American Journal of Mental Deficiency,* 1973, 77, pp. 369-379.
4. A. Kushlick, "A Method of Evaluating the Effectiveness of a Community Health Service", *Social and Economic Administration,* 1967, 1, pp. 29-48.
5. J. Wortis, "Mental Retardation", *Science,* 1967, 155, p. 1442.
6. H. A. Prins, "Mad or Bad—Thoughts on the Equivocal Relationship Between Mental Disorder and Criminality", *International Journal of Law and Psychiatry,* 1980, 3, pp. 421-433.
7. A. E. MacEachron, "Mentally Retarded Offenders: Prevalence and Characteristics", *American Journal of Mental Deficiency,* 1979, 84(2), pp. 165-176.
8. MacEachron, ibid., p. 165.

cent (despite the transfer in Denmark of "idiots" and "imbeciles" from prisons to ordinary services for mentally retarded clients).[9]

A number of factors have been postulated as contributing to regional differences in prevalence rates.[10] These include–

- differences in State sentencing and parole regulations, and State prison reforms;
- availability of community services for retarded persons;
- psychometric factors, such as use of individual as compared with group intelligence tests; the professional expertise of the test administrator; and the inadequacy of brief IQ measures in classifying retarded prisoners;[11]
- population base, inasmuch as prevalence rates tend to be higher when based on total offender populations than when based only on new admissions to prison, or offenders serving longer sentences;
- sampling of the prison population–rates tend to be lower when a sample is tested, rather than when all offenders have taken an intelligence test; and
- the operational definition of mental retardation, since prevalence rates are lower when standard z scores (of more than two standard deviation units below the mean) rather than test scores are used to identify retarded offenders. (At least one study has demonstrated a prevalence rate among male offenders that is only slightly higher than that of retarded male adults in the general population, when the standard score concept is used.[12])

Data pertaining to the prevalence of retarded offenders in Australian gaols are difficult to obtain. One New South Wales study of offenders serving sentences of longer than 12 months found that approximately 5 per cent have an IQ of less than 70.[13] This figure is probably an under-

9. B. B. Svendsen and J. Werner, "Offenders Within Ordinary Services for the Mentally Retarded in Denmark", in P. Mittler (ed.), *Research to Practice in Mental Retardation, Volume 1, Care and Intervention* (I.A.S.S.M.D., 1977), pp. 419-424.
10. MacEachron, note 7 above.
11. H. J. Thompson, R. N. Roberts and M. F. Whiddon, "Inadequacy of Brief IQ Measures in the Classification of Mentally Retarded Prisoners", *American Journal of Mental Deficiency*, 1979, 83(4), pp. 416-417.
12. MacEachron, note 7 above, pp. 174ff.
13. J. Gordon, Research Officer, New South Wales Department of Corrective Services–personal communication, May 1980.

estimate, because prisoners serving sentences of less than 12 months, and those offenders who are not gaoled, are not included. Retarded offenders who commit minor offences and are given probation, or short sentences, or alternative forms of disposition, are therefore not included in the test sample.

Adding to the confusion surrounding estimates of prevalence of retardation in penal populations is the fact that prevalence rates may not be static over time. A radical drop in prevalence occurred, for example, in Iowa between 1965 and 1972, when the proportion of retarded inmates decreased from 13 per cent to 2 per cent.[14] The reasons postulated for this include the effects of an evaluation of existing institutional programmes; and, more importantly, changing court attitudes and policies, particularly in urban areas where alternative resources (such as probation and parole) are offered.

A further confounding factor to be considered when examining prevalence rates is the existence of significant differences in proportions of the general population who are in prison. In Australia, rates of imprisonment vary dramatically between the States, from a high of 244.4 prisoners per 100,000 population in the Northern Territory, to a low of 20.2 in the Australian Capital Territory.[15] The proportion of prisoners on remand also varies considerably (37.0 per 100,000 population in the Northern Territory; 3.8 in Victoria), as do the rates of persons on parole[16] (46.3 per 100,000 in Western Australia; 14.7 in Tasmania). Interestingly, the rates of persons on probation vary in a different pattern, with Tasmania having the highest rate (330.2 per 100,000 population) and the Australian Capital Territory, and Victoria having low rates (68.5 and 72.1 respectively).

Clearly such figures do not necessarily reflect a greater likelihood of the residents of some States committing crimes, but rather, differences in policies of police forces, courts, and parole and probation authorities, which in turn to some extent reflect State government policies. Thus, in some States, it could be hypothesised that fewer retarded offenders would be in prison, because the imprisonment rate generally is lower, and also because parole and probation would be more likely alternatives.

14. E. Rockoff, "The Retarded Offender: Missing in Action", *Corrective and Social Psychiatry and Journal of Behaviour Technology Methods and Therapy,* 1978, 24(3), pp. 130-132.
15. D. Biles, "Australian Prison Trends", *Reporter,* June 1982, 3(4), p. 15.
16. I. Potas, "Probation and Parole", *Reporter,* June 1982, 3(4), p. 15.

A further relevant consideration is the proportion of the population in mental institutions. It has been found that the greater the provision of mental hospital accommodation the smaller the proportion of the community which is held in prison.[17] One postulated explanation of this is that where mental hospital bed rates are high, the level of crime and the numbers of offenders will be reduced because people who are insane or mentally retarded are unable to break the law, simply because they have been institutionalised.[18] Furthermore, it has been shown that the amount of crime and the imprisonment rate in a community are not correlated.[19] In other words, higher rates of hospitalisation of mentally retarded or mentally ill persons do not lead to a lower crime rate. Rather, the inverse relationship between mental hospital accommodation and imprisonment rates appears to be related to different styles of administration, that is to say,

> "either the police or the courts may make the decision that an offender is mad rather than bad and initiate his admission to a mental hospital rather than to a prison. And, of course, this decision is facilitated if adequate mental hospital accommodation is available."[20]

Thus another factor to be taken into account when assessing the prevalence of retardation in the penal population is the availability of mental hospital accommodation as an alternative, and the likelihood of the retarded offender being diverted into health facilities.

In summary, it appears from the information available that the prevalence of retarded prisoners in the penal population in Australia is at least twice that of the prevalence of retarded adults in the general population. The proportion may be found to be higher if testing of all offenders was undertaken; although it could be expected that there would be differences between the States, owing to differences in imprisonment and probation rates, and the availability of mental hospital accommodation as an alternative mode of disposition.

There are no known data describing the proportion of retarded offenders who receive non-custodial sentences, such as probation or

17. D. Biles and G. Mulligan, "Mad or Bad?—The Enduring Dilemma", *British Journal of Criminology,* 1973, pp. 275-279.
18. L. S. Penrose, "Mental Disease and Crime: Outline of a Comparative Study of European Statistics", *British Journal of Medical Psychology,* 1939, 28, pp. 1-15, as reported in Biles and Mulligan, ibid., p. 278.
19. Biles and Mulligan, note 17 above, p. 278.
20. Biles and Mulligan, note 17 above, p. 279.

community work orders. The court may take the mental condition of the offender into account when passing sentence, but in the absence of any statistical information, it is impossible to determine whether this would result in higher proportions of retarded offenders receiving non-custodial sentences (on the grounds that prison is an unsuitable placement option) or custodial sentences (because of the need for society to be protected and the prisoner to be supervised)—or whether retardation is seldom recognised by the court, and is irrelevant to sentencing deliberations. Further research in this area is needed.

Retarded juvenile offenders

There are large differences between the States in the numbers of persons aged 10-17 years in juvenile corrective institutions. Although rates per 100,000 population are not available, it is noteworthy that when two fairly similar States are compared, New South Wales has more than three times as many offenders or alleged offenders in juvenile corrective institutions as are held in Victoria.[21]

Assessment of the prevalence of retarded juvenile offenders is fraught with all of the problems described above for the adult population and more, mainly because of the greater range of informal procedures for disposition of juvenile offenders, particularly offenders with a patent intellectual deficit. Those data which are available, however, suggest that mental retardation and/or schooling and learning difficulties occur frequently in the juvenile offender population. A Victorian study found that 44 per cent of a sample of children admitted for care were at least two years behind their age peers in their schooling.[22] Significant differences were found between males and females, with only 22 per cent of males being in a class of average standard for their age. Educational backwardness has been linked with juvenile delinquency for nearly a century, but it should be emphasised that educational backwardness does not always mean the presence of mental retardation—attitudes and motivation towards schooling are also important determinants.[23]

A study of the ecology of juvenile delinquency in metropolitan Syd-

21. S. Mukherjee, "Juveniles under Detention", *Reporter*, June 1982, 3(4), pp. 15-16.
22. B. Szwarc, *Pilot Study of a Sample of Children Admitted to Care During 1974*, Social Welfare Department, Victoria, Research and Statistics Division (Mimeo).
23. J. Kraus, "Delinquency and Socio-Economic Status as Factors in Illiteracy of Male Juveniles", *Australian and New Zealand Journal of Criminology*, 1977, 10, pp. 195-203.

ney found that a factor labelled low socio-educational status (combining variables such as low education, crowding in dwellings, high birthrate, high proportion of children, mental retardation, perinatal mortality, females not working, residence in outer suburban "dormitory" developments, and unemployment) accounted for 32 per cent of the variance of juvenile delinquency.[24] It appears that in this factor, mental retardation was usually mild, and attributable to socio-familial factors rather than to genetic or medical causes.

A study in Texas[25] of all new admissions to a juvenile offender service found that 13 per cent of males and 17 per cent of females had IQ scores of less than 70. The vast majority of those classified as retarded were black or Latin Americans. The most common offence committed by retarded and non-retarded male juveniles was burglary, and for females, running away from home. One quarter of non-retarded and one third of retarded juvenile offenders had never attended school. These data support the hypothesis that retarded juvenile offenders tend to have backgrounds of considerable socio-familial deprivation.

Looking at the retardation/delinquency nexus from a different perspective, the moving of retarded juveniles out of State institutions into supervised community living has been shown to result in a significant improvement in most areas of social adjustment with the exception of delinquent behaviour.[26] Of interest is the finding that the retarded subjects with an IQ closer to normal committed more offences than those who were more retarded. The author noted that this could be a reflection of greater initiative,[27] and reassuringly mentioned that increased supervision does not control the delinquency of intellectually average juveniles either.

Whether through frustration, motivational or attitudinal difficulties, peer group pressure, socio-familial factors, or unemployment, it appears that mental retardation (or at the very least, educational backwardness) is strongly related to juvenile delinquency, particularly amongst mildly retarded juveniles.

24. J. Kraus, "Ecology of Juvenile Delinquency in Metropolitan Sydney", *Journal of Community Psychology*, 1975, 3(4), pp. 384-395.
25. D. Kirkpatrick and J. Haskins, *The Mentally Retarded Youthful Offender, A Preliminary Statistical Summary* (Texas Dept. of Mental Health and Mental Retardation, 1971).
26. J. Kraus, "Supervised Living in the Community and Residential and Employment Stability of Retarded Male Juveniles", *American Journal of Mental Deficiency*, 1972, 77(3), pp. 283-290.
27. Kraus, ibid., p. 289.

Characteristics of adult retarded offenders

In the United States of America, a number of studies report similarities in the characteristics of retarded offenders.[28] Typically, they are found to be in their late 20s or early 30s, non-white, educated to early high school level but functioning educationally up to three years behind this level, holding low-skill jobs (when employed), and living on low incomes (for example, social security benefits). It has also been shown that retarded offenders tend to have few other disabilities, are single, are likely to have been in special education classes, come from large families, and are likely to have alcohol-related problems.[29] Approximately 27 per cent are reported to have character disorders.[30] Clearly, some of these characteristics are peculiar to the North American situation; nevertheless, a Danish study supported the finding that the dominant age group was 25-29 years of age, and also found that 94 per cent of retarded offenders were males.[31] The vast majority of retarded offenders falls into the mildly retarded range.[32]

Unfortunately, studies of characteristics of retarded offenders are confounded by other social and demographic factors which are associated with mild retardation. The incidence of mental handicap among children in the lowest social class has been shown to be nearly nine times that in the top two classes.[33] It is rare to find a child in a higher social class having an IQ of less than 80 unless he has a clinical abnormality, and then he usually falls into the moderately or severely retarded range.[34]

In order to put mentally retarded offenders in perspective it is necessary to compare their characteristics with those of the penal population in general. The vast majority of prisoners are male, only 3.4 per cent of the Australian prison population being female.[35] The sex difference is not due to the greater innate criminality of males, but the ascription

28. MacEachron, note 7 above, p. 167.
29. MacEachron, note 7 above, p. 171.
30. MacEachron, note 7 above, p. 171.
31. Svendsen and Werner, note 9 above, p. 421.
32. Svendsen and Werner, note 9 above, p. 422.
33. H. G. Birch, S. A. Richardson, D. Baird, C. Horobin and R. Illsley, *Mental Subnormality in the Community: A Clinical and Epidemiological Study* (Williams and Wilkins, Baltimore, 1970).
34. M. Craft (ed.), *Tredgold's Mental Retardation* (12th ed., Balliere Tindall, London, 1979).
35. J. Walker and D. Biles, *Australian Prisoners 1982* (Australian Institute of Criminology, Canberra, 1983), p. 16; see also G. M. Sykes, *Crime and Society* (Random House, New York, 1967), pp. 86ff, stating that in the U.S.A. in 1966, 88 per cent of those *arrested* were male.

to males and females of different social roles which influence behaviour extensively. As the social role of women alters, their crime rates become more similar. If retarded women tend to commit crimes less often than typical women (and it is difficult to say whether this is so, because of the paucity of research), it is probably because retarded women tend to be more closely supervised than typical women, or than retarded men. Fear of sexual exploitation is one reason why retarded women are protected by their families.

With respect to age, the majority of persons arrested are under the age of 35; the peak age is between 18 and 24,[36] not so different from the age range into which most retarded offenders fall. There are age differences in the type of offence committed, with younger persons typically being arrested for car theft, larceny, burglary and vandalism, and the age of arrest being higher for homicide, rape, robbery, assault, embezzlement and gambling.[37]

Perhaps the most important factor is socioeconomic status.

> "Individuals who are committing the so-called major crimes are drawn predominantly from the ranks of those who have had little education, who work at jobs that stand low in the hierarchy of occupations, who have relatively low incomes."[38]

This is not to say that low socioeconomic status (SES) is directly and causally linked to criminal behaviour, but rather that the accompaniments of low SES may lead to greater incidence of criminal acts, higher arrest rates, and lack of legal representation. Relevant considerations include poor housing in low-rent neighbourhoods; disrupted family structure, such as might be occasioned by unemployment for the male wage earner, or long hours of work; low levels of schooling limiting the individual's achievement potential; early withdrawal from school; adolescent drift into a youth culture characterised by rebellion against parental values; and employment opportunities which give rise to frustration, low work satisfaction, lack of steadiness in employment, and affiliation with deviant peer groups. Despite many theoretical analyses of the causation of crime, particularly the effect of low SES,[39]

36. Sykes, loc. cit.
37. Sykes, loc. cit.
38. Sykes, op. cit., p. 96.
39. See further Sykes, note 35 above; E. van den Haag, *Punishing Criminals* (Basic Books, N.Y., 1975); B. Wootton, *Crime and Penal Policy* (Allen and Unwin, London, 1978); A. Neier, *Crime and Punishment, A Radical Solution* (Stein and Day, New York, 1976).

there remains a great deal of uncertainty as to the contribution made by each of the factors mentioned above. One finding clearly emerges, however: the background characteristics of the retarded offender are not radically different from those of the general criminal population.

Are criminals generally mentally abnormal?

To look at the issue from "behind the looking-glass", are criminals generally mentally abnormal? Studies demonstrate that mental disorder is not more often present amongst the penal population than among others in the same socioeconomic group,[40] and psychiatrists have recognised that there are great similarities between the socioeconomic conditions that nurture criminal behaviour and those that foster mental illness.[41] Overall psychiatric morbidity in criminal populations has been estimated at between 15 and 20 per cent, and in some subpopulations (such as life prisoners) could be even higher.[42] It is almost impossible to determine any direction in the causal link—some offenders may commit a crime because they are mentally ill, whereas others may suffer the onset of mental illness as a consequence of the deleterious effects of imprisonment.[43] Undoubtedly, some criminals are mentally retarded, or psychopathic, or otherwise mentally abnormal, but mental abnormality cannot be used as a general explanation of criminal behaviour.

An early criminologist, Cesare Lombroso, believed criminality to be genetically inherited.[44] This theory seems to have come full circle, there being a current hypothesis of a greater frequency of genetically abnormal males (XYY chromosomal complement) in correctional institutions,[45] the frequency (compared with newborn males) being about five times higher in adult correctional institutions, and ten times in institutions for juvenile offenders. Lower than average intelligence, and problems of poor impulse control, and aggression have been suggested as contributing to the higher rate of imprisonment of XYY males.[46]

40. Van den Haag, ibid., pp. 120ff.
41. A. F. Leuchter, "The Responsibilities of the State for the Prevention and Treatment of Mental Illness Among Prisoners", *J. Forensic Sciences,* 1981, 26(1), pp. 134-141.
42. Leuchter, ibid.
43. Leuchter, ibid.
44. Van den Haag, note 39 above, p. 119.
45. R. F. Daly and J. P. Harley, "Frequency of XYY Males in Wisconsin State Correctional Institutions", *Clinical Genetics,* 1980, 18, pp. 116-122.
46. E. Dorus, "Variability in the Y Chromosome and Variability of Human Behaviour", *Archives of General Psychiatry,* 1980, 37(5), pp. 587-594.

Another genetic abnormality which has been linked with a higher frequency of criminal behaviour, mental illness, and low SES is Klinefelter's syndrome, karyotype 47, XXY.[47] Despite the higher levels of criminal behaviour, however, such genetically abnormal offenders constitute only about 1 per cent of the prison population,[48] leaving the remainder to be accounted for according to some other theory of criminality. Furthermore, of this 1 per cent not all could be described as mentally retarded, so they do not constitute even a significant subgroup of the retarded offenders.

Types of crime committed by retarded offenders

Studies indicate that retarded offenders most frequently commit offences against property and persons, but seldom commit rape or other sexual offences.[49] Offences for drugs, alcohol, escape, or parole violations are infrequent. Retarded adult offenders frequently have a history of offending as juveniles, and are likely to have been previously incarcerated, with a pattern of increasing involvement in serious crime over time.[50] They are unlikely to be involved in negative prison incidents whilst incarcerated, but have a low rate of participation in prison rehabilitation programmes, particularly academic or vocational training programmes.[51]

Whilst there is no known information about the types of crimes committed by retarded offenders in Australian prisons, data concerning those retarded offenders where the insanity defence is raised, or who are confined in a security patients hospital prove interesting. Of five cases examined in Western Australia where the insanity defence was raised, or where mental condition was a factor in imposing indeterminate sentences, two of the offences involved violent assault, one of arson, one of unlawful grievous bodily harm, and one of murder.[52] Of

47. J. Nielsen, S. G. Johnsen and K. Sorensen, "Follow-up 10 Years Later of 34 Klinefelter Males with Karyotype 47, XXY and 16 Hypogonadal Males with Karyotype 46, XY", *Psychological Medicine,* 1980, 10(2), pp. 345-352.
48. Daly and Harley, note 45 above.
49. MacEachron, note 7 above; B. A. Rowan, "Corrections—Principal Paper", in M. Kindred, J. Cohen, D. Penrod and T. Shaffer (eds), *The Mentally Retarded Citizen and the Law* (Free Press, New York, 1976), pp. 650-675.
50. MacEachron, note 7 above.
51. MacEachron, note 7 above.
52. Law Reform Commission of Western Australia, personal communication, September 1982.

18 intellectually handicapped patients in a security hospital in Queensland, five had committed offences involving sexual assault, seven involved property offences (including breaking and entering, vandalism, and arson), and the remainder involved aggressive or violent behaviour often causing bodily harm.[53] It would appear from this small and nonrandom sample that the offences committed by retarded offenders who are *also* regarded as being insane or needing psychiatric care tend to be different, particularly with respect to the incidence of sexual assault, from the offences committed by retarded prisoners who are held in gaols.

In terms of severity of the crime, a bi-modal distribution has been found,[54] with one subgroup of retarded offenders having committed relatively minor crimes and another, quite serious crimes. Non-retarded offenders tend to cluster in the "minor crime" subgroup. The retarded offenders who commit serious crimes do not appear to be more aggressively motivated, but rather, their lack of ability to inhibit expression of aggressive impulses leads to the greater likelihood of violence.[55] The low incidence in the middle range of seriousness is probably owing to the lack of planning ability, whereas the high incidence in the minor crime category may be due to repeated offences, and the court deciding that imprisonment is the only available solution.

Conclusion

Whilst it appears that retarded people are over-represented in penal populations, compared with the proportion in the general population, the reasons are not clear. As with the general prisoner population, low socioeconomic status appears to be related to likelihood of imprisonment, and this link is further borne out by the prevalence of mildly retarded individuals amongst the retarded offender group, since mild retardation is related to cultural-familial factors. There seems to be a tendency for retarded offenders either to commit quite minor, but repeated offences, or a major, violent crime. Usually the offence is against property or persons, but crimes of a sexual nature are not

53. Dr. P. Mulholland, Division of Psychiatric Services, Department of Health, Queensland, personal communication, August 1982.
54. B. S. Brown, T. F. Courtless and D. E. Silber, "Fantasy and Force: A Study of the Dynamics of the Mentally Retarded Offender", *Journal of Criminal Law, Criminology and Police Science,* 1970, 61(1), pp. 71-77.
55. E. S. Rockoff and R. J. Hofmann, "The Normal and Retarded Offender: Some Characteristic Distinctions", *International Journal of Offender Therapy and Comparative Criminology,* 1972, 21(1), pp. 52-56.

prevalent, except in offender-patient populations. Lack of ability to curb aggressive impulses appears to be an important factor, rather than a higher level of aggressive motivation. Adult retarded offenders have frequently been known to correctional agencies as juveniles—to some extent it appears that imprisonment for repeated minor offences is a last resort when other avenues have failed, or when the court feels that "something must be done".

Chapter 3

Apprehension, Questioning and Diversion

Brian is a mentally retarded, semi-literate man who left school at 14 and comes from a broken home. He was charged with arson when he tried to set fire to Manly Police Station, and was released on bail. While out on bail, he committed four or five "break and enter" offences and confessed to them. The arresting police officer could not understand when Brian's solicitor pleaded Not Guilty on the grounds that Brian was incapable of forming an intention. "But the man said, 'I'm guilty, I did it' ", said the officer.[1]

Larry, a bizarre-looking retarded man in ill-fitting clothes, took a fancy to a woman at a bus station, and asked her for a date. When the woman refused, Larry persisted and finally kissed her on the cheek. A non-retarded male who did this might have been considered amusing and rakish, but Larry was arrested on a charge of assault.[2]

A more infamous British case was the murder of transvestite, Maxwell Confait. Confait's body was found by firemen in an upstairs back room in an old Victorian house, a fire having broken out in a pile of rubbish at the foot of the staircase. Whether he was strangled first, and the fire lit to destroy any evidence, was debatable. Three youths spent three years in prison after being convicted of the crime. They were released following a campaign, implemented by a Member of Parliament, which resulted in an appeal and a judicial inquiry. One of the accused youths, Colin Lattimore, aged 18, had the mental age of an eight-year-old. Another of the youths was of borderline intelligence, and aged 15 at the time of the offence and the subsequent police interviews. Superintendent Jones, the interviewing officer, was found to have broken the Judges' Rules (which guide police questioning) on three occasions. Lattimore said to a newspaper reporter, "I only confessed because the police promised I could go home with my mum if I

1. Interview with officers of N.S.W. Police Force, September 1982.
2. B. De Silva, "Retarded Persons Create a Problem in Criminal Justice", *Washington Post,* 24 March 1980, p. A6.

did I was just a lad I didn't understand"[3] "The retarded are convicted more easily and get longer prison sentences than the average lawbreakers because they seldom plea bargain and often confess"[4]

A Scottish study questioned the value of using criminal records when researching the criminal behaviour of retarded delinquents

> "The chief heuristic inadequacy appears to be absence of true indication of gravity of intent Entries in the criminal records such as 'theft of tree', 'theft of rabbit', or 'stole two pigeons' leave one to weigh the probable common sense of the constabulary against the less probable guilelessness of the retardate"[5]

These four examples serve to highlight some of the problems faced by the mentally retarded person and the police officer when they encounter each other in the wake of the commission of an offence The problems include recognition of the intellectual disabilities (memory, cognition, ability to foresee the results of one's actions) experienced by retarded people, the fear of abnormality held by the general public and police officers, the temptation of obtaining a "confession", although the person being questioned does not comprehend warnings against self-incrimination, and is likely to submit to even mild pressure or duress, and the process of labelling the offence which can result in a retarded offender facing a much more serious charge than, say, the student son of a wealthy family who, although having performed the same act, has access to solicitors who can enter into "pre-trial negotiations"

The overriding point is that the justice system does not begin with the courts—it begins when evidence is being gathered, witnesses are being interviewed, and suspects are being questioned It begins with the involvement of police, and ordinary citizens, who will suspect a person of crime more readily if that person is in some way deviant or belongs to a minority group Other minority groups vociferously oppose this "scape-goating" tendency—the difficulties that migrants, Aborigines and psychiatric patients experience with police and the

3 S E K Hewitt, *How the interviewing of mentally retarded persons can proceed with some degree of benefit to the suspect and little disadvantage to the interrogator By the latter having due regard for the degree of retardation of the former and not taking advantage of it,* mimeo, Bath, U K , November 1981 See also C Price and J Caplan, *The Confait Confessions* (Marion Boyars, London, 1977)

4 De Silva, note 2 above, p A6

5 W I Fraser, "A Retrospective and Cross-Sectional Investigation of a Deviant Subcultural Group", *American Journal of Mental Deficiency,* 1970, 75(3), pp 298-303 at 301

criminal justice system are well documented.[6,7] There is little awareness, however, of the fact that mentally retarded people could also be victimised, and at least part of the reason may be the difficulties experienced by many retarded people in expressing themselves verbally.

RECOGNISING A MENTALLY RETARDED SUSPECT

Police officers have great power and enormous discretion when dealing with mentally retarded suspects. The wisdom, attitudes and ethics of an individual police officer can mean the difference between a retarded person being dealt with through appropriate community resources, or ending up in prison for stealing a tree, or being falsely imprisoned for an extremely serious offence. In North America, Britain and Australia, the need for police training in the area of mental retardation has been recognised. The Committee on the Rights of Persons with Handicaps (in South Australia) stated:

> "We stress again how important it is for the police to be conscious of the possibility that a suspect may have diminished capacity and act to ensure the implementation of adequate pre-trial procedures."[8]

A Canadian report recommended

> "that a review be made of the training and education of the police in identifying and handling mentally handicapped suspects and accused persons, to ensure that they are adequate."[9]

A British report indicated the significance of the police role:

> "[W]hether a person who has committed an anti-social act is charged and brought before a court . . . often depends upon preceding

6. R. Francis, "Contemporary Issues Concerning Migration and Crime in Australia", in D. Chappell and P. Wilson (eds.), *The Australian Criminal Justice System* (Butterworths, Sydney, 1977), pp. 100-111; F. G. Cohen, D. Chappell and P. R. Wilson, "Aboriginal and American Indian Relations with Police", in D. Chappell and P. R. Wilson (eds.), loc. cit.
7. G. Boehringer and P. O'Shane, "Legal Advocacy and Mental Health", (1978), *Legal Service Bulletin,* pp. 193-197.
8. Committee on the Rights of Persons with Handicaps, *The Law and Persons with Handicaps,* Vol. 2, *Intellectual Handicap* (S.A. Govt. Printer, 1981), pp. 232-233.
9. B. B. Swadron, *Mental Retardation—the Law-guardianship* (National Institute on Mental Retardation, Toronto), p. 34.

decisions taken by the police . . . in the exercise of their discretion and professional judgement."[10]

The exercise of professional judgment depends heavily upon the officer's ability to recognise an offender who is mentally retarded. Trainee police officers in New South Wales have a total of five hours' training on topics *related* to mental retardation (including a two-hour lecture on the *Mental Health Act*), of which one hour is provided by an expert in the field of retardation. In some British police forces, two-to-four hours of lectures, films and discussion are included in training programmes for police. The major drawbacks are (1) the fact that not all forces include the topic, and (2) the frequent involvement of voluntary agencies in providing lecturers means variability in content and orientation.[11] In some localities, police training comes only through self-education, and articles appearing in police journals.[12]

At the other end of the spectrum, comprehensive and useful training manuals have been produced,[13] covering issues such as prevalence of retarded offenders; the disadvantaged position of the retarded offender in the criminal justice system; problems of identification (including physical appearance, speech and language problems, and social behaviour); clinical aspects of retardation as it relates to criminal behaviour; rehabilitation (including details of testing, programmes to teach activities of daily living, vocational training and job placement, academic training, and counselling); and the legal rights of retarded offenders and retarded people generally.

The last area—that of legal rights of retarded offenders—is of par-

10. *Report of the Committee on Mentally Abnormal Offenders,* Cmnd. 6244, Home Office and Dept. of Health and Social Security, HMSO, London, 1975 (Chairman, Lord Butler), p. 7.
11. P. Thompson, "Training the Police in Dealing with Mentally Handicapped People", *Law and the Mentally Retarded Citizen,* Report of the Thirteenth Spring Conference of Mental Retardation, University of Exeter, MENCAP, 1980.
12. For example, M. A. Greenberg and E. C. Wertlieb, "The Police Role in the Case of the Mentally Retarded Child", *FBI Law Enforcement Bulletin,* September 1982, pp. 18-25; B. De Silva, "The Retarded Offender: A Problem Without a Program", *Corrections Magazine,* August 1980, pp. 24-33.
13. M. B. Santamour and B. West, *Retardation and Criminal Justice, A Training Manual for Criminal Justice Personnel,* President's Committee on Mental Retardation, Washington D.C., 1979; National Institute on Mental Retardation, *Law Enforcement and Handicapped Persons: An Instructor's Training and Reference Manual,* NIMR, Toronto, 1975.

ticular significance. Like many other professionals, police officers are more highly motivated to adhere to legal and ethical guidelines if disregarding them attracts a penalty. A case against a mentally retarded woman in Britain who "confessed" to two counts of arson was withdrawn, with a "not guilty" verdict being directed by the judge, because the interviewing police officer ignored Home Office Circular 109/1976, para. (ii) which states that a mentally handicapped adult should be interviewed only in the presence of a parent or other person in whose care, custody or control he or she is, or of some other person who is not a police officer.[14] The officer said he was not aware of the Circular, although it had been in existence for one year. The judge made it clear that he was in no way criticising the officer because the Circular had not been brought to his attention. Failure to be aware of a vital piece of professional information would not be an acceptable excuse in other professions, however. If injury resulted to a patient because a junior medical officer used equipment which a health authority had, one year previously, declared unsafe but the junior medical officer had not been apprised of this by senior hospital staff, would not that action be regarded as unprofessional?

Most of the guidelines laid down for police officers when interviewing mentally retarded[15] or other susceptible offenders[16] are discretionary, and non-compliance *may* result in a case being dismissed. There is no direct incentive, either positive or negative, for police officers to adhere to the guidelines if it is "not practicable".

Training of police officers in the area of retardation needs to be comprehensive and on-going (including in-service courses for officers). Police officers need practical and clear guidelines for recognising retarded suspects, such as provided by the following Canadian material:

> "There is little in most retarded persons' physical appearance to indicate that they are retarded. However, persons with *Down's Syndrome* may have such common features as slanting eyes, stubby hands, and sometimes a tendency towards obesity. (These characteristics can be minimized by choice of hairstyle and diet.) As well, once in a while you may be tipped off that a person who is dressed

14. *R. v. Williams* (1979) C.L.R. 47.
15. S. Mitchell (ed.), *Archbold–Pleading, Evidence and Practice in Criminal Cases* (40th ed., Sweet and Maxwell, London, 1979), 1391a (4A), Interrogation of mentally handicapped persons. (This section was inserted in Archbold following the Confait confessions–see note 3 above.)
16. For example, aborigines, see notes 37 and 38 below.

inappropriately, for example, wearing a jacket in summer, *may* be a person who is retarded and has not yet learned what is typical dress.

On the whole, it is mainly by conversation with retarded individuals that you will be able to tell if they are retarded and to what degree. In a conversation, a retarded person may have a hard time understanding what you are saying to him, or his attention may wander, or he may be unaware of "proper social distance", that is, he may be overly friendly.

Generally a retarded person could have trouble with the following tasks:

finding his number in the telephone book

counting an exact amount of change

giving you directions to his home, school or work. He may know how to get there on his own, but have difficulty telling someone else how to get there.

In making a judgement about a person it is most important to *avoid forming a hasty and possibly wrong conclusion.* Two of the most common mistakes are:

(1) Thinking that a physically disabled person or retarded person is under the influence of alcohol or drugs. If the person does not smell of alcohol, this may indicate that a handicap exists rather than intoxication.

(2) Assuming that a person who is physically disabled, blind or deaf, is also retarded. Remember that most physically disabled persons are of at least average intelligence.

It has been suggested that handicapped persons could wear an identification bracelet, or carry a card in their wallet indicating their disability. Some handicapped persons think that this is a reasonable suggestion, but many more are either fearful that this could lead to discrimination, or resent this type of identification which emphasizes their handicap."[17]

Training programmes also need to incorporate material on the consequences–to the suspect, the force, and the individual officer–of not recognising the retarded offender and dealing with him in an inappropriate manner.

17. National Institute on Mental Retardation, note 13 above, pp. 10-11.

THE RETARDED SUSPECT: APPREHENSION AND QUESTIONING

Apprehension

Anecdotes regarding apprehension of retarded suspects vary from the sublime to the ridiculous. Near a large mental retardation hospital on the outskirts of Sydney, police approached a man lying on a park bench and asked him if he was on drugs. When he stated that he was, he was taken into custody and remained in the cells for three days until hospital staff located him, and explained that the drugs he admitted taking were medication for epilepsy.

Ronald is a 33-year-old Rhode Island (U.S.A.) man who functions at the level of a ten-year-old. He is serving a five-year sentence at an adult correctional institute for a bank robbery. Police had no difficulty catching him because he signed his holdup note.[18]

Timothy Evans was hanged for murder in October 1950. Sixteen years later he was granted a free pardon by the Queen. He had gone to the police station at Merthyr Vale and told a detective constable that he wanted to give himself up, because he had disposed of his wife by putting her down a drain. He had a mental age of a ten-year-old, and could not read or write. He was given an official caution by police before they proceeded with further questioning, and was convicted on his confession.[19]

According to one study, the court trials of mentally retarded prisoners were little more than a formality, as 95 per cent either confessed or pleaded guilty.[20] Another study found that confessions or incriminating statements were obtained in two thirds of the cases of retarded offenders.[21]

These case histories and research data indicate that serious problems can arise in the apprehension and questioning of retarded suspects. The police force cannot be described as comprising malevolent, scheming officers, whose only aim is to obtain a successful conviction, at the expense, if necessary, of trust, civil liberties, and even life. Most police officers are as fair, humane and well-meaning as the bulk of the popula-

18. De Silva, note 2 above, p. A6.
19. S. E. K. Hewitt, *The Interviewing of Mentally Handicapped Persons,* mimeo, 1980.
20. R. C. Allen, "The Retarded Offender; Unrecognized in Court and Untreated in Prison", *Federal Probation,* 1968, 32(3), p. 22.
21. B. S. Brown and T. F. Courtless, *The Mentally Retarded Offender,* President's Commission on Law Enforcement and Administration of Justice, Washington D.C., 1967.

tion. Like the bulk of the population, they are not well informed about mental retardation, they are wary of people if they look or act differently, and they make the (misguided) assumption that mental retardation is linked with criminal tendencies.

In the apprehension of suspects, all of these widely-held preconceptions come into play. Suspects are more likely to be apprehended if they have a bizarre appearance (as a few retarded people may have) which is readily recalled by witnesses; if they are already known to police because of nuisance value or previous offences; if they are not wise enough to hide when an offence has been committed; if they say "Yes" when asked if they committed an offence; or if they have little family or collegiate support. There are a great many psychological and sociological factors which contribute to the fact that mentally retarded people are more likely than typical people to be *brought into* police stations and questioned about crimes.[22] The process of the police interview, however, designed to separate the criminal wheat from the chaff, should function efficiently in the case of retarded suspects, dismissing the patently absurd "confessions", diverting the minor nuisance offenders into other community resources, and pressing charges which reflect the real gravity of the offence committed (stealing a tree being fundamentally different in gravity from stealing thousands of dollars from a trust fund). Unhappily, the police interview does not seem to function as an effective screening procedure for retarded suspects.

Safeguards during questioning

The Institute of Criminology's Proceedings on police questioning and confessional statements concludes

> "in the case of persons with apparent infirmity, feeble understanding or special disability and of persons apparently unfamiliar with the English language such special measures as are practicable and appropriate shall be taken to ensure a fair interrogation . . .
>
> If the person being questioned is suspected of being of feeble understanding, such person shall, if reasonably practicable, be interrogated in the presence of a parent, guardian, relative, friend or other responsible person not associated with the inquiry."[23]

22. For discussion of the causes of deviance, and labelling, see D. Edgar, *Introduction to Australian Society* (Prentice-Hall, Sydney, 1980), Ch. 12, "Deviance and Social Restructuring", pp. 305-328.
23. Proceedings of the Institute of Criminology: *No. 18: Police Questioning and Confessional Statements,* Faculty of Law, University of Sydney, p. 37, 1(e), 2(c).

Officers of the New South Wales Police Force, interviewed during this study, stated that they would question a retarded offender in the presence of a third person, but none of the officers were sure whether or not the abovementioned instructions were still applicable, although they had been incorporated into the Commissioner's Instructions in January 1974.

In Britain, Judges' Rules exist which guide the process of interrogation of criminal suspects. Judges' Rules are not rules of law, but rules of practice drawn up for the guidance of police officers. Non-observance of the Rules may, and at times does, lead to the exclusion of an alleged confession. Generally speaking, these Rules apply in Australian jurisdictions.[24] There are a number of important rules of police interrogation:[25]

(a) While investigating a crime, police have the right to question any witness, informant, or suspect, although the person being questioned has no duty to answer (except in certain instances, e.g. motor traffic cases);
(b) If a police officer says he is arresting a suspect, he is bound to tell the suspect the charge;
(c) A suspect does not have to answer questions unless he wants to;
(d) Police officers will refer, in court, to conversations and unsigned records of interview, as well as written statements;
(e) Because of the right to silence, before questioning a suspect, police should caution him that questions need not be answered, but that any answers may be used in evidence;
(f) There is no absolute legal right to have an independent witness or lawyer present during questioning, although cases have determined that a lawyer should be allowed to be present if requested by the suspect;[26]
(g) Confessions are inadmissible if made as a consequence of an untrue representation, or a threat or promise.

The English Rules were changed in 1964, and there is some doubt whether or not subsequent modifications have been adopted in Aus-

24. P. A. Sallmann, "Accountability in Criminal Justice Administration", in D. Chappell and P. Wilson (eds.), note 6 above, pp. 492-505 at 500.
25. See generally, M. Mobbs (ed.), *Legal Resources Book* (*N.S.W.*) (Redfern Legal Centre, Sydney, 1978), Ch. 16, "Crime", pp. 16-1ff.
26. *R. v. Dugan* (1970) 92 W.N. (N.S.W.) 767; *Driscoll v. R.* (1977) 51 A.L.J.R. 731 (H.C.).

tralia. This is of some significance, because it was not until after the 1976 inquiry into the Confait confessions[27] that the following guidelines concerning police interrogation of mentally handicapped persons were included:

"Interrogation of mentally handicapped persons

(a) If it appears to a police officer that a person (whether a witness or a suspect) whom he intends to interview has a mental handicap which raises a doubt as to whether the person can understand the questions put to him, or which makes the person likely to be especially open to suggestion, the officer should take particular care in putting questions and accepting the reliability of answers. As far as practicable, and where recognised as such by the police, a mentally handicapped adult (whether suspected of crime or not) should be interviewed only in the presence of a parent or other person in whose care, custody or control he is, or of some person who is not a police officer (for example, a social worker).

(b) So far as mentally handicapped children and young persons are concerned, the conditions of interview and arrest by the police are governed by Administrative Direction 4 above [which is no different to interrogation of non-retarded children and young persons].

(c) Any document arising from an interview with a mentally handicapped person of any age should be signed not only by the person who made the statement, but also by the parent or other person who was present during the interview. Since the reliability of any admission by a mentally handicapped person may even then be challenged, care will still be necessary to verify the facts admitted and to obtain corroboration where possible."[28]

The principles governing police questioning are sometimes ignored (as in the Confait case), or may be followed, yet a difficult situation arises where the police caution is not comprehended by a mentally retarded suspect. A study of retarded adults, with an average age of 28 years, and IQs ranging from 73 to 80, indicated that four out of five did not understand the official caution, which in the United Kingdom is:

27. Price and Caplan, note 3 above.
28. See note 15 above.

> "Do you wish to say anything? You are not obliged to say anything unless you wish to do so, but whatever you do say will be taken down in writing and may be given in evidence."[29]

Sixty per cent knew what "evidence" was, but none knew what "obliged" meant.

The official caution (the so-called Miranda Rights[30]) in the United States of America is more complex:

> "You have the right to remain silent. If you give up the right to remain silent, anything you say can and will be used against you in a court of law. You have a right to speak to an attorney and to have the attorney present during questioning. If you so desire and cannot afford one, an attorney will be appointed for you without charge before questioning.—Do you understand these rights?—Do you wish to give up the right to remain silent?—Do you wish to give up the right to an attorney and to have him present during questioning?"[31]

It has been shown that the average level of reading difficulty for the Miranda Rights is grade 8 with 50 per cent comprehension, and grade 11.6 with 100 per cent comprehension. A grade 13 level was necessary for 100 per cent aural comprehension. The study concluded that any suspect with limited English-speaking ability or limited educational background could have difficulty understanding the rights, as read by or to him.[32] Clearly, most retarded suspects would not comprehend the important features of the official caution.

As stated above, in the United Kingdom, a suspect can be acquitted if the Judges' Rules are not followed during questioning. This occurred in the case of 30-year-old Alan Westlake, known as "the penguin", who was a charge hand at a dairy. He had a mental age of 12 years. He was accused in March 1978 of attacking a 15-year-old schoolgirl, and throwing her off a train, as a consequence of which she was in a coma for

29. S. E. K. Hewitt, *Retarded Persons and the Law—the Interface*, 6th Conference of the International Associations for the Scientific Study of Mental Deficiency, Toronto, August 1982.
30. See, for a general discussion of the implications of the Miranda Rights, M. Wald, R. Ayres, D. W. Hess, M. Schantz and C. H. Whitebread, "Interrogations in New Haven: The Impact of *Miranda*", (1967) 76 *Yale Law Journal*, pp. 1519-1643.
31. E. J. Briere, "Limited English Speakers and the Miranda Rights", *TESOL Quarterly*, 1978, 23(3), pp. 235-245.
32. Briere, ibid.

seven weeks. The jury was instructed to give a verdict of "not guilty" because the Judges' Rules had been broken when he had been questioned for three days by detectives, in the absence of a third party,[33] contrary to the stipulations of Home Office Circular 109/1976, paragraph (ii). In the absence of specific, and authoritative Judges' Rules in Australia, it is likely that "the penguin" would not have been acquitted.

Confessions

It has already been pointed out that confessions are obtained from many retarded suspects. Their validity poses problems. Because of a retarded person's suggestibility, he may be willing to confess to a crime, whether or not he committed it. The reasons for this can include the retarded person's desire to please persons in authority; the fact that a retarded person gives in to coercion more readily than a typical person; and the literal interpretation of questions (such as, "Are you taking drugs?").[34] The cases outlined above demonstrate the serious miscarriages of justice which can occur when a retarded person's confession is accepted unquestioningly by the court.

One study of interrogation procedures demonstrated that there is substantial pressure to confess, and that the official caution does not alleviate the pressure.[35] Coercive interrogations involve the following techniques:

(a) hostile attitudes on the part of police;
(b) employment by police of "tactics" during interrogation, designed to trick a suspect into confession (for example, the "good" and "bad" police officer routine; or offering a suspect a legal excuse, such as, that the crime was committed in self defence);
(c) questioning the suspect for more than one hour;
(d) refusal to terminate the questioning even after the suspect indicated he wished to stop;
(e) neglecting to tell a suspect he could contact family or friends, until after questioning was completed.

It would take a remarkably determined and tough suspect to withstand such questioning, and the effect upon a retarded person with literal interpretation and limited comprehension would be great.

33. Hewitt, November 1981, note 3 above; *R. v. Westlake* (1979) Crim. L.R. 652.
34. D. P. Biklen and S. Mlinarcik, "Criminal Justice", in J. Wortis (ed.), *Mental Retardation and Developmental Disabilities, An Annual Review* (Brunner/Mazel, New York, 1978), pp. 172-195.
35. Wald et al, note 30 above.

Although guidelines for the questioning of retarded suspects have not been established in Australia, an interesting precedent has been set in the case of another vulnerable minority group. The admissibility of confessions given by Aboriginal suspects has been the subject of judicial guidelines, as follows:[36]

(1) An interpreter should be present;
(2) A "prisoner's friend" should be present where practicable;
(3) Care should be taken in administering the caution;
(4) Care should be taken in formulating questions;
(5) Even when a confession has been obtained, police should continue to investigate the matter, for proof from other sources;
(6) The prisoner should be offered food and drink;
(7) Reasonable steps should be taken to obtain legal assistance; and
(8) No interrogation should take place while the prisoner is disabled by illness, drunkenness or tiredness; and the interview should not continue for an unreasonably long time.

A further case established that confessional statements from the two Aboriginal defendants should be excluded from evidence because police failed to observe instructions as to questioning of Aborigines.[37] It should be noted, however, that the trial judge has the discretion to hold that a confession is voluntary, and to admit the evidence even though the police have failed in some respects to observe the rules laid down in *Anunga*.[38] In establishing the rules guiding the questioning of Aboriginal suspects, courts have recognised that some especially vulnerable groups require extra protections and safeguards in the criminal justice process. The Judges' Rules pertaining to interrogation of mentally retarded suspects should be adopted in Australia before a Confait case occurs.

In summary, confessional statements obtained from mentally retarded suspects are obviously fraught with difficulties. There are problems of whether the suspect comprehends the caution and understands his rights; the issue of suggestibility; whether the statement is made voluntarily; and whether the confession is, in fact, true. Most of these difficulties could be ameliorated by the adoption of the English Judges' Rules which require an independent third party to be present

36. *R. v. Anunga* (1976) 11 A.L.R. 412, per Foster J.
37. *R. v. Ajax and Davey* (1977) 17 S.A.S.R. 88.
38. *R. v. Collins* (1979) 4 N.T.R. 1; *Collins v. R.* (1980) 31 A.L.R. 257.

during questioning, and the *Anunga* Rules, particularly that relating to continuing investigation of the crime in order to provide independent evidence. In the interests of justice, it is imperative that this specially vulnerable group be given particular protections and safeguards.

ALTERNATIVES TO ARREST

Anecdotal evidence reveals that on some occasions mentally retarded offenders are not charged, or if they are charged, the charge is dropped before the case gets to court. This form of diversion is actually enshrined in Swedish legislation, where a State prosecutor may decide not to prosecute if the crime is committed by an offender suffering from mental abnormality. Psychiatric care in a mental hospital, or placement in an institution for mentally retarded people is then effected without legal action.[39] This possibility is rendered more feasible because, under Swedish law, retarded or insane offenders cannot be sent to prison in any case—the only available options are surrendering to special (hospital) care, a fine, or protective supervision (probation).[40] In societies where punishment by imprisonment is seen as a reasonable option for retarded offenders, informal methods of diversion tend to be employed when it is clear to police or others that the prison environment would not be appropriate.

If the offence is not serious, police officers may simply return the retarded person to his family or care-givers, or to the institution where he lives. Sometimes the person against whom the offence has been committed agrees to drop the charges. This may not be possible. One retarded man who had lived in an institution for 39 years was prosecuted after he had shoplifted an 89 cent beanie, because it was the policy of the store to proceed with charges against all shoplifters. When the case came before the court, it was dismissed by the magistrate.[41]

Police also have the option of taking the offender to a psychiatric admission centre. Under the New South Wales *Mental Health Act*[42]

> "A person may be admitted to and detained in an admission centre ... where he is taken to such admission centre by a member of

39. *Raettengangsbalken* (RB) Kap. 20, s.7 (Sweden).
40. *Brottsbalken* (BrB) Kap. 33, ss. 2, 4 (Sweden).
41. Interview with officers of N.S.W. Police Force, September 1982.
42. *Mental Health Act* 1958 (N.S.W.), s.12 (1)(e).

> the police force who in writing informs the superintendent . . . that such member believes such person to be a mentally ill person and that such member found such person wandering at large or committing some offence against the law or in circumstances which reasonably led him to believe that such person was about to commit some offence against the law."

Similar provisions can be found in the New South Wales Mental Health Bill, before Parliament in November 1982,[43] and in the legislation of other States.[44,45] The provisions under which police officers may do this vary slightly—for example, in Queensland, the person must appear to be mentally ill and in immediate need of treatment or control, in the interests of that person or for the protection of other persons, and under the proposed amendments to the mental health legislation, the police officer must furnish an authority for detention of the person to the hospital administrator.[46] Other State legislation also omits specific mention of the person having committed or being likely to commit a crime.[47] In Victoria, the police officer may apprehend the person and take him before two justices, and not directly to a place of safety or a hospital; and in South Australia, the officer takes the person for examination by a medical practitioner who then may make an order for admission to an approved hospital.[48]

In Western Australia, the *Mental Health Act* and lack of adequate forensic provisions in legislation for mentally retarded people provides an interesting situation, because intellectually handicapped persons are specifically not included in the definition of a mentally ill person[49] and cannot be detained in an "approved hospital".[50] Therefore, presumably Western Australian police may take a retarded suspect only to an institution for mentally retarded people, and examination or detention

43. Mental Health Bill 1982 (N.S.W), s.77.
44. See, for example, *Mental Health Act* 1980 (N.T.), s.9 (1)(b); *Mental Health Act* 1974 (Qld.), s.26.
45. W.A.: *Mental Health Act* 1981, s.56; Tas.: *Mental Health Act* 1963, s.100; Vic.: *Mental Health Act* 1959, s. 45(2); S.A.: *Mental Health Act* 1976-1977, s. 18; A.C.T.: Proposed *Mental Health Ordinance* 1981, s. 23.
46. *Mental Health Act* 1974 (Qld.), s. 26(1); Mental Health Act and Criminal Code Amendment Bill 1983 (Qld.), cl. 25.
47. *Mental Health Act* 1980 (N.T.), s.9 (1)(b)(f).
48. See note 45 above.
49. *Mental Health Act* 1981 (W.A.), s.3.
50. Loc. cit. s. 26.

under that State's *Mental Health Act* is not possible. The person could be held only as an informal patient, in an institution for retarded people.

Police officers complain that these diversionary tactics are sometimes not effective, as the hospital may refuse to admit the suspect; or after brief examination may release him. Officers report returning to the police station from the admission centre, only to find the suspect has already been there, demanding the return of his gun.[51]

CONCLUSION

The discretionary powers of police in pre-trial manoeuvres and diversions of suspects are wide, and can have a significant influence upon the future life and liberty of the suspect. In recent years, a number of cases have arisen which demonstrate the susceptibility of retarded offenders when being questioned by police, and the miscarriages of justice which can occur when police think they have obtained a confession, when in reality they have obtained agreement from a suggestible suspect. Police officers have developed skill in recognising offenders who are suffering from psychiatric illness—studies have shown that in the vast majority of cases the action of the police in taking the person to a hospital was fully justified.[52] Most such people have come to police attention because of threatening and bizarre behaviour, such as wandering, delusions, self-neglect or aggression. More at risk of not being recognised, however, is the apparently normal and docile mildly retarded offender. Police training in the area is not sufficient, given the frequency with which they encounter the problem.[53] It is the responsibility of senior officers to decide if a suspect can be interviewed alone, or whether a third party should be present. The experience of questioning a retarded suspect for a police officer who has received no formal training can be exasperating, to say the least.[54] It is essential that police (and other criminal justice personnel) receive training in the recognition and handling of such persons; also, it is imperative that the range of appropriate alternative diversions be increased, so that police officers are not presented with a situation where the only choices are the cells or the mental hospital.

51. Interview with members of N.S.W. Police Force, September 1982.
52. *Report of the Committee on the Mentally Abnormal Offender,* note 10 above, p. 135.
53. Royal Commission on Criminal Procedure, *Police Interrogation—The Psychological Approach—A Case Study of Current Practice,* Research Studies No. 1 and 2, HMSO 1980.
54. Royal Commission, ibid.

Chapter 4

Competence in Court

Two basic issues must be resolved in respect of a mentally retarded accused who comes before the court. First, is the person fit to plead (or to stand trial)? In other words, is he intellectually capable of comprehending the proceedings of the trial, so as to be in a position to defend himself? Secondly, is his mental state at the time of the commission of the offence a relevant factor? That is, at the time of committing the act was his reason so impaired that he was incapable of knowing the nature and quality of the act he was doing; or if he knew *what* he was doing, was he incapable of comprehending that it was wrong?

These are vitally important legal concepts, for they can have a significant effect on what happens to the mentally retarded accused, whether he ever comes to trial, whether he can give evidence himself, the plea which he may enter, and the place in which he may serve the sentence–prison, security patients' hospital, or a community placement. In this chapter, the competence of the mentally retarded accused is considered, that is, his ability to cooperate with legal counsel in his own defence, and his awareness and understanding of the proceedings. Chapter 5 discusses the ability of the retarded person to take the oath and give evidence (at his own or another's trial) and considers the defences available to the mentally retarded accused involved in criminal proceedings.

The lack of clear differentiation between mentally retarded and mentally ill accused persons again raises difficulties, as it has in previous stages of the criminal justice process. The capacity of the mentally retarded accused to follow the proceedings of the court and to instruct counsel are assessed according to the same criteria which apply to accused persons who are mentally ill. For example, the law uses terminology such as "insanity" or "unsoundness of mind" on the part of the accused person. The evaluation of the accused's competence in following court proceedings is often made by a psychiatrist, who may not possess special expertise in assessing the cognitive and adaptive skills of retarded persons. Furthermore, it may not be made clear to the court that the retarded accused is unlikely to "recover" from the

affliction of retardation and develop the competence to take part in court proceedings at some future time. The criteria, processes, and outcomes may be fairly applied to a mentally ill accused person, but, as will be seen below, can have grave consequences for a mentally retarded accused.

Because the legal terminology does not recognise the separate category of incompetence in court proceedings owing to mental retardation, terms such as "insane" and "mentally ill upon arraignment" are used throughout this chapter to apply to retarded accused persons. This usage does not imply that it is appropriate or useful to regard mentally retarded accused persons *as if* they are insane. Nevertheless, unless it is otherwise indicated, terms such as "insane" must be read as if they include retarded individuals.

FITNESS TO PLEAD AND FITNESS TO STAND TRIAL

Differentiating between the terms

The terms "fitness to plead" and "fitness to stand trial" are extremely difficult to differentiate. In some jurisdictions, one or other of the terms is used to the exclusion of the other; in other jurisdictions, they are used in such a way as to imply that there is a difference in meaning, but the difference is not made clear. Or legislation may not use either term, but distinguish between the two situations in some other way. An example is the N.S.W. *Mental Health Act,* which refers to a person found mentally ill "upon arraignment" (that is, unfit to plead) or mentally ill "upon trial" (that is, unfit to be tried).[1] The confusion may be lessened as a result of proposed alterations to the New South Wales mental health legislation, because the Crimes (Mental Disorder) Amendment Bill only uses the term "unfit to be tried".[2]

An early case (1836) attempted to differentiate the two terms.[3] A deaf and dumb prisoner, indicted for bestiality, was able to read and write. He read the indictment and made a sign that he was not guilty. The jury found that he was able to plead. The jury then had to determine whether or not he was sane. Witnesses swore that the prisoner was "nearly an idiot, and had no proper understanding; and that though he might be made to comprehend some matters, yet he could

1. *Mental Health Act* 1958 (N.S.W.), s. 23(1)(a) and (b).
2. Crimes (Mental Disorder) Amendment Bill 1982 (N.S.W.), Part XIA. This Bill is cognate with the Mental Health Bill 1982 (N.S.W.), and would insert a new Part XIA into the *Crimes Act* 1900 (N.S.W.).
3. *R. v. Pritchard* (1836) 7 Car. & P. 304; 173 E.R. 135.

not understand the proceedings on the trial".[4] Thus, the jury found that he was not capable of taking his trial. The judge in this case referred to a similar case[5] where a deaf and dumb woman was considered fit to plead because, through signs, she could understand that she was accused of wilful murder of her bastard child by cutting off its head, and could, in response, make signs importing a denial. Although she could understand "common subjects of daily occurrence which she had been in the habit of seeing" (sic) it was impossible to make her understand the nature of the proceedings against her and make a defence. It was found that she was fit to plead, but not fit to stand trial.

These two cases appear to differentiate the terms with reference to the degree of abstract reasoning required of the accused person. It is easier for a person to understand, through the written word or actions, the act of which he is accused, and to indicate his response to the accusation, than it is to comprehend the intricacies of courtroom procedure.

A distinction based not on degree of abstract reasoning, but on the time when the insanity becomes apparent can be found in Hale's *Pleas of the Crown:*

> "If a man . . . before arraignment becomes absolutely mad he ought not by law to be arraigned during his frenzy, but be remitted to prison until that incapacity be removed . . . and if such person after his plea and before his trial became of non-sane memory he shall not be tried."[6]

The *Crimes Act* of Victoria[7] differentiates the terms in yet another way:

> "If any person presented indicted or informed against for any indictable offence is insane and is upon arraignment so found by a jury lawfully impanelled for that purpose so that such person cannot be tried upon such presentment indictment or information, or if upon the trial of any person so presented indicted or informed against such person appears to the jury charged with such presentment indictment or information to be insane, it shall be lawful for the court before whom any such person is brought to be arraigned or tried as aforesaid to direct such finding to be recorded; and

4. Ibid.
5. *R. v. Dyson,* footnote to *R. v. Pritchard,* note 3 above at pp. 135-136.
6. R. P. Roulston, "The Legal Background to Fitness to Plead in New South Wales", Proceedings of the Institute of Criminology, Report No. 1, University of Sydney, 1967, pp. 81-98, quoting at p. 81 Hale's *Pleas of the Crown,* Vol. 1, pp. 34-35.
7. *Crimes Act* 1958 (Vic.), s. 393.

thereupon to order such person to be kept in strict custody until the Governor's pleasure shall be known. And if any person who has been charged with any indictable offence is brought before any court to be discharged for want of prosecution and such person appear to be insane, it shall be lawful for such court to order a jury to be impanelled to try the sanity of such person; and if the jury so impanelled finds such person to be insane, it shall be lawful for the court to order such person to be kept in strict custody in such place and in such manner as to such court seems fit until the Governor's pleasure is known. And in all cases of insanity so found the Governor may by order direct that he be kept in safe custody during the Governor's pleasure in the place designated in the order or in such other place as a person or authority designated in the order may from time to time determine."

It would appear that if the person is found to be insane upon arraignment, then he is unfit to plead, that is, the case does not proceed to trial. Alternatively, during the trial the person may appear to the jury to be insane, in which case he is unfit to stand trial.

In Canada, the *Criminal Code*[8] "equates, like many other criminal codes, fitness to stand trial to the absence of sanity at any time before the verdict".[9]

The *Criminal Code* of Queensland[10] uses different terminology again. In s. 613, under the title "Want of understanding by the accused person", it states that if when the accused is called upon to plead to the indictment, it appears uncertain whether he is capable of understanding the proceedings at the trial so as to be able to make a proper defence, then a jury finds whether or not this is so. Section 645, entitled "Accused person insane during trial" states that

> "If on trial of any person charged with an indictable offence it is alleged or appears that he is not of sound mind, the jury are to be required to consider the matter . . ."

It is clear that the distinctions between fitness to plead, fitness to stand trial, and insanity at the time of the trial are unclear, and often the terms are used interchangeably.[11]

8. *Criminal Code* R.S.C. 1970 (Canada), C. C-34.
9. J. Arboleda-Florez, "Fitness to Stand Trial—Is It Necessary?", *Int. J. Offender Therapy and Comparative Criminology*, 1982, 26(1), pp. 43-48.
10. *Criminal Code* 1899 (Qld.).
11. See the discussion of fitness to plead which becomes a discussion of unfitness to stand trial, in R. P. Roulston, *Introduction to Criminal Law in New South Wales* (Butterworths, Sydney, 1975), pp. 36ff.

The outcome remains the same. Whether the person is found unfit to plead, unfit to stand trial, or not of sound mind at the time of the trial, what actually happens is that the accused is "held in strict custody until dealt with by the Minister",[12] or "kept in custody in such place and in such manner as the Court thinks fit",[13] or "kept in safe custody during the Governor's pleasure".[14] In a case in which a person charged with an offence for which he has not been tried is detained in a mental hospital, the *Mental Health Act* 1958 (N.S.W.), s. 26 allows the Attorney-General to order that the person be removed to a prison and the issue of fitness determined by a jury. It is unclear as to how the Attorney-General has this state of affairs brought to his attention.

For those persons who are held at the Governor's pleasure, the situation has been graphically described as "find[ing] themselves marooned in the no-man's-land between the vaguely defined jurisdictional boundaries of two of the most potent systems of modern social control: the criminal justice and the mental health systems".[15] (The implications of this for a mentally retarded accused will be discussed in detail below.)

Because there is no clear cut and consistent distinction between the terms "unfit to plead" and "unfit to stand trial", the former term will be employed here because it seems to be more widely used. The term is generally used to refer to an absence of understanding of the legal and court procedures on the part of the accused, at any time before the verdict.

The history of the concept

When acquainted with the concept and consequences of fitness to plead, the lay person's reaction is usually to ask why the trial cannot go ahead in any case. On the face of it, it seems fairer for an insane person to be tried, and either convicted or freed, than to be held indefinitely in a place of strict custody until he regains his senses sufficiently to stand trial.

The origins of the concept that a person should not be subjected to a trial unless he is capable of understanding the proceedings and participating in his own defence lie far back in the history of English common law—so far back, in fact, that no single legal rationale has consistently emerged. A number of raisons d'être are advanced. One

12. *Mental Health Act* 1958 (N.S.W.), s. 23(1).
13. *Criminal Code* 1899 (Qld.), s. 613.
14. *Crimes Act* 1958 (Vic.), s. 393.
15. S. N. Verdun-Jones, "The Doctrine of Fitness to Stand Trial in Canada", *Int. J. Law and Psychiatry,* 1981, 4, pp. 363-389 at 363.

explanation is that the concept is related to the reluctance of the common law to conduct a trial when the accused is in absentia—in this situation, the accused is only present physically.[16] (The terms commonly used to describe insanity reflect this idea quite neatly—"out of his mind", "not all there", "his mind is wandering".)

The concept may also be traced back to the time when an accused person did not have counsel. If he was insane he was also incapable of mounting a defence, and therefore the trial would not have been accurate or fair.[17] The argument has also been advanced that one of the aims of the criminal law, namely, retribution, can only be served if the accused understands why he is being punished.[18] Other reasons justifying the concept are that it is necessary as a means of maintaining the dignity of the judicial process; that it maximises the efficacy of punishment by ensuring that the accused realises the reprehensibility of his conduct; and for reasons of humanity.[19] The Law Reform Commission of Canada concludes that:

> "The purpose of the fitness rule is to promote fairness to the accused by protecting his right to defend himself and by ensuring that he is an appropriate subject for criminal proceedings."[20]

This circular statement not only offers no strong justification for the fitness rule, but also assumes a perfect system. The latter encompasses a "perfect" accused person who is capable of contributing to his defence (how does this notion apply to a person who was drunk at the time and cannot remember clearly? or someone from a different cultural background who cannot comprehend the basis of the English common law system? or a person so paralysed by fear of the proceedings that he is unable to follow what is going on?). It also assumes a perfect "insane" person who, after a period of treatment, will recover sufficiently to stand trial; and a perfect forensic psychiatry service wherein no-one gets "lost" and spends 17 years in a mental hospital for purse snatching.[21] And a perfect judicial system which can accurately perceive, evaluate, and cull out those who are inappropriate subjects for criminal proceedings.

16. Verdun-Jones, ibid.
17. Verdun-Jones, ibid., and Arboleda-Florez, note 9 above, p. 44.
18. Verdun-Jones, ibid.
19. Verdun-Jones, ibid.
20. Law Reform Commission of Canada, *A Report to Parliament on Mental Disorder in the Criminal Process* (Information Canada, Ottawa, 1976), p. 13.
21. Arboleda-Florez, note 9 above, p. 45.

Unfortunately, the perfect system does not exist. The strongest rationale for the inception of the fitness rule originated when the accused had to act as his own defence counsel. The strongest rationale for maintaining it is that it is unfair to place on trial a person who may find the process extremely traumatic; who may (through violent or erratic behaviour in the courtroom) jeopardise his own defence or the safety of the court; or who may not be able at the time to provide the court with vital evidence. In fairness to the accused, the trial should be postponed for a short period of time. Given the uncertain nature of prognosis in psychiatry, and the chronic nature of many psychiatric illnesses, however, the concept of fitness to plead should be torn away from its historical roots and re-evaluated in the light of current judicial and psychiatric practices.

Criteria of fitness to plead

The difficulties inherent in definitions of "mental illness" or "insanity" provide a common and sound basis for criticism of the criminal law.[22] The definition "seems to change chameleon like, with each stage of the criminal process".[23] The criteria for determining fitness to plead are different from those determining whether an accused was insane at the time of committing the offence.

Taking the law in Victoria by way of example, s. 393 of the *Crimes Act*[24] uses the word "insane", but the term is not defined either in the *Crimes Act* or in the *Mental Health Act*.[25] Section 2(5) of the latter Act provides, inter alia, that the expression "the criminal insane" in any other enactment shall, unless inconsistent with the context or subject matter, be deemed to refer to "security patients" (defined in s. 3 of the *Mental Health Act*). Arguing that the two expressions "insane" and "criminal insane", deriving from two different Acts, are nevertheless interchangeable, would not advance clarification of the terms because the result would be illogical and circular under any of the three definitions of "security patient". For example, the first definition of "security patient" is:

22. See, for example, I. Potas, *Just Deserts for the Mad* (Aust. Institute of Criminology, A.C.T., 1982), Ch. 2, "The Meaning of 'Mental Illness' ", pp. 18-30.
23. A. Freiberg, "Out of Mind, Out of Sight: The Disposition of Mentally Disordered Persons Involved in Criminal Proceedings", [1976] 3 *Mon. Law Rev.*, 134 at 137.
24. See note 7 above.
25. *Mental Health Act* 1959 (Vic.).

> "any person who under the Crimes Act 1958 or any corresponding previous enactment is ordered to be kept in safe custody in any State institution either until the Governor's pleasure be known or during the Governor's pleasure."[26]

If this definition was used, a person would not be insane for the purpose of s. 393 of the *Crimes Act* unless he had already been ordered to be detained at the Governor's pleasure; and he could not be so detained unless he had first been found to be insane. The other two definitions of "security patient" give equally inappropriate meanings to a definition of "insane".

The situation is less contorted in States which provide an operational definition of fitness to plead. In New South Wales, for example, a person is unfit to plead if found to be "mentally ill" (as defined in the *Mental Health Act*[27]) by a jury[28] or two medical practitioners.[29] Proposed changes under the Crimes (Mental Disorder) Amendment Bill 1982 clarify the criteria further. Clause 428B provides that a person is "unfit to be tried" if, because of disability,

(a) he is incapable of understanding the nature or purpose of the proceedings brought against him; or
(b) he is incapable of communicating adequately with a person for the purpose of conducting a defence to the proceedings brought against him.

"Disability" is defined as including:

> "mental illness, intellectual handicap, developmental disability of mind, speech impairment and hearing impairment, and any combination of them."[30]

Furthermore, under cl. 428D the court or a jury could make a determination that a person is unfit to be tried if the person is so incapable of understanding or so incapable of communicating

> "that in all circumstances it would be likely to result in unfairness to the person if the hearing of proceedings brought against him . . . were to commence or continue."

Not only are the definitions of fitness in the Bill more precise, but individual factors relating to fairness to the person could be considered, giving the court much greater flexibility in deciding whether or not

26. Ibid., s. 3.
27. *Mental Health Act* 1958 (N.S.W.), s. 4.
28. Ibid., s. 23(1).
29. Ibid., s. 24.
30. Crimes (Mental Disorder) Amendment Bill 1982 (N.S.W.), cl. 428A.

to go ahead with the trial. These proposed changes represent a marked improvement on previous criteria for determining fitness to be tried.

Where statute law does not adequately define "insane" for the purposes of determining whether an accused is fit to plead, however, it is necessary to refer to the common law, and to judicial interpretation of terms in superseded legislation. The Full Court of the Supreme Court of Victoria considered most of these precedents for interpretation in *R. v. Judge Martin; Ex parte Attorney-General*,[31] referring for clarification to the *Criminal Lunatics Act* of 1800,[32] and suggesting three forms of insanity:

- dementia naturalis, which covered idiocy and fatuity from birth;
- dementia accidentalis or adventitia, a deprivation of reason, which could be caused by sickness, fever, a fit, stroke or trauma, and may be permanent, intermittent or a single episode; and
- a lunatic, one labouring under a species of the dementia accidentalis or adventitia but distinguishable in that the person has intervals of reason or understanding.[33]

It is not necessary to be a qualified psychiatrist to realise that these categories are no more than tangentially relevant to current definitions of mental retardation and psychiatric illness–and that categorising insanity according to its aetiology, time of occurrence in the lifespan, and its possible duration is of little assistance when determining whether the accused is currently incapable of understanding court proceedings.

A more practical set of criteria is adumbrated in the following judgment, where it was stated that the accused

> "needs . . . to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceedings, namely, that it is an enquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able

31. *R. v. Judge Martin; Ex parte Attorney-General* [1973] V.R. 339.
32. *Criminal Lunatics Act* 1800 (39 and 40 Geo. 3, c. 94).
33. *R. v. Judge Martin*, note 31 above, per Nelson J., Smith A. C. J. and Little J., at 344ff.

> to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is, and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel."[34]

The accused is not required to understand the legal issues relating to his case, although he should understand the nature of the evidence and be capable of instructing counsel,[35] principles which have been adopted legislatively in the proposed changes to the N.S.W. mental health legislation.[36] The client does not have to be capable of giving the lawyer detailed instructions pertaining to every development in the case—a statement of overall aim is sufficient. It was held that a woman suffering from very severe physical disabilities associated with cerebral palsy adequately instructed her counsel to proceed with a writ of habeas corpus seeking her release from a State institution, even though her instructions were very brief, and not conveyed verbally.[37]

The Law Reform Commission of Canada considers that the following criteria are the most appropriate:

> "A person is unfit if, owing to mental disorder:
> (1) he does not understand the nature or object of the proceedings against him, or
> (2) he does not understand the personal import of the proceedings, or
> (3) he is unable to communicate with counsel."[38]

The Commission indicates that amnesia for the action should not be a ground for unfitness, as long as the accused is presently rational and able to communicate with his lawyer. This point of view is in accord-

34. *R. v. Presser* [1958] V.R. 45 at 48.
35. *Ngatayi v. R.* (1980) 54 A.L.J.R. 401 at 404.
36. See note 30 above.
37. *R. v. The Health Commission of Victoria, et al; Ex parte McDonald,* unreported, Supreme Court of Victoria No. H.C. 3199, 17 May 1979, pp. 9-10.
38. Law Reform Commission of Canada, 1976, note 20 above, p. 14.

ance with that expressed in the Butler Report;[39] and amongst other reasons, this Report advances the argument that amnesia can readily be feigned. The Report also suggests that the test of fitness should not include the ability of the accused to challenge a juror.

There is little uniformity between the States with respect to the issue of fitness to plead, either in terminology, determination of criteria, or even the statutory context for the relevant provisions. In New South Wales, for example, the provisions are found in legislation concerned with mental health, whereas in most other jurisdictions, statutes concerned with criminal conduct raise the issue while mental health law deals with disposition of the unfit accused.[40] If proposed changes to the Queensland mental health legislation are adopted, there will be two different sets of criteria, one in the *Criminal Code,* referring to the want of understanding of the accused person,[41] and the other in the *Mental Health Act* where "fit for trial" would be defined as

> "in relation to a person, fit to plead at his trial and to instruct counsel and endure his trial, with serious adverse consequences to his mental condition being unlikely."[42]

Thus, there is the potential for conflict over legal definitions of fitness to plead between the two pieces of legislation, and also within the one piece of legislation as a consequence of amalgamating in the one section the two common law concepts of fitness to plead and fitness to be tried, without adequately defining either.

Raising the issue of fitness

The issue of fitness may be raised by almost any person associated in some way with the accused or his trial.

39. *Report of the Committee on Mentally Abnormal Offenders,* Cmnd. 6244, Home Office and Dept. of Health and Social Security, HMSO, London, 1975 (Chairman, Lord Butler), Ch. 10, "Disability in Relation to the Trial," pp. 143ff.
40. *Criminal Code* 1913 (W.A.), s. 652; *Crimes Act* 1958 (Vic.), s. 393; *Criminal Law Consolidation Act* 1935-1978 (S.A.), s. 293(1); *Criminal Code* 1899 (Qld.), s. 613; *Criminal Code* 1924 (Tas.), s. 382; *Lunacy Act* 1898 (N.S.W.), s. 66(1) (relevant to the A.C.T.); *Criminal Code* 1983 (N.T.), s. 357; *Mental Health Act* 1958 (N.S.W.), s. 23.
41. *Criminal Code* 1899 (Qld.), s. 613.
42. Mental Health Act and Criminal Code Amendment Bill 1983 (Qld.), cl. 27, which would insert a new s. 28A in the *Mental Health Act* 1974 (Qld.).

> "[T]he courts act ... upon any information conveyed to it from any quarter. It may come from the defendant himself, or his advisers, or from the prosecution, or from an independent person such as the medical officer of the prison."[43]

Normally the issue is raised by the Crown. It is rarely raised by the defence, because of the grave consequences to the accused of being held in a mental hospital for an indeterminate period of time, sometimes far longer than if he had been convicted and sentenced.[44]

The issue is, in most jurisdictions, tried by a jury empanelled for the purpose. The person is found "sane and fit to plead" or "insane (or mentally ill) and unfit to plead". If the latter verdict is found, the trial judge orders that the finding be recorded and the accused be kept in strict custody until dealt with under mental health legislation (see further below).

The issue is raised when the accused appears in court, despite the possibility of the accused showing signs of mental illness soon after his arrest.

> "Not raising the issue before trial may result in an unfit accused awaiting trial in jail, being at liberty without the benefit of therapy or being remanded for observation under a provision of the [criminal law] not expressly dealing with fitness."[45]

Mental health legislation, for example, the Queensland *Mental Health Act*,[46] may provide that a person who is mentally ill while awaiting trial may be removed to a security patients' hospital for treatment for mental illness. Nevertheless, the point made by the Law Reform Commission of Canada is valid—that is, the accused is dealt with under a different piece of legislation, and this may or may not be relevant to the consideration of his fitness to plead.

The issue of fitness may be decided upon arraignment, or during the trial,[47] or when the person appears for sentence.[48] There is a duty upon the court to resolve the issue as early as possible.[49]

43. *R. v. Dashwood* [1942] 2 All E.R. 586 at 587.
44. T. S. George, "Commitment and Discharge of the Mentally Ill in South Australia", *Adelaide Law Review*, 4, 1971-1972, p. 330.
45. Law Reform Commission of Canada, 1976, note 20 above, p. 15.
46. *Mental Health Act* 1974 (Qld.), ss. 33, 34.
47. See note 40 above.
48. E.g., *Mental Health Act* 1974 (Qld.), s. 29(2).
49. *R. v. Podola* [1959] 3 All E.R. 418, where it was stated that "if a court becomes aware, either before or during a trial, that the accused person's sanity is doubtful, it is the duty of the court to have the doubt resolved before beginning or continuing the trial".

In some jurisdictions, for example, Victoria and Western Australia, the issue of fitness is further complicated by the fact that it pertains only to indictable offences. What happens to a manifestly unfit accused brought up on a lesser charge is left to the wide and undirected discretion of officials and police officers. He may be dealt with under mental health legislation, or the charge may be dropped. Such lack of clarity, and the unpredictability which is a consequence, does not enhance the criminal justice system.

Disposition of the unfit accused

The relevant legislation[50] pertaining to disposition of the unfit accused is usually phrased in terms such as

> "If the jury find that the accused is not capable of understanding the proceedings, the finding is recorded and the Court *may* order the accused person to be discharged or *may* order him to be kept in strict custody during the Governor's pleasure" (emphasis added).

In some States the legislation does not actually specify that the accused may be *discharged* by order of the court.

The legislation would seem to give the court a discretion as to *whether or not* to order detention at the Governor's pleasure, but this has not been borne out by case law. In *R. v. Judge Martin*,[51] two of the three judges found that it was mandatory that the court make the order to keep the insane accused in strict custody.

The question of where the unfit accused shall be held in strict custody was also addressed in *Judge Martin's* case. According to Little and Nelson JJ.,[52] whilst the wording of the section appears to give the court a discretion as to where the person may be detained, it does not in fact do so. The court must direct that the person be detained in gaol, and the transfer to a mental hospital then takes place under the executive arm of government, as laid down in the particular State's mental health Act.[53]

An interesting problem of disposition arises in Western Australia. Under that State's *Mental Health Act*[54] mental illness means:

50. See note 40 above.
51. See note 31 above.
52. *R. v. Judge Martin,* note 31 above, per Nelson J. at 361.
53. See, for example, *Mental Health Act* 1974 (Qld.), s. 34(2).
54. *Mental Health Act* 1981 (W.A.), s. 3(1).

> "a psychiatric or other illness or condition that substantially impairs mental health, but does not include a handicap whereby a person is an intellectually handicapped person."

An intellectually handicapped person is defined as:

> "a person who has a general intellectual functioning which is significantly below average and concurrently has deficits in his adaptive behaviour, such conditions having become manifest during the developmental period."

Under s. 53 of the Act, a person who is committed for trial and found to be mentally ill is admitted as a patient to an approved hospital and detained until a psychiatrist certifies he is fit to be discharged; or held in custody at the Governor's pleasure (s. 54). Since intellectually handicapped accused persons are not, by definition, suffering from mental illness, presumably s. 53 of the Act does not apply to them. It is unclear as to what would happen in Western Australia to a person found unfit to plead because of intellectual handicap.

The fate of the Governor's pleasure detainee has not been painted in glowing terms. Although few studies of Governor's pleasure detainees refer specifically to the unfit accused (most examine offenders found not guilty by reason of insanity), the usual pattern is that the accused is held in gaol until (following psychiatric examination showing him to be mentally ill) he is transferred to a security patients' hospital, when he is held until found to be fit to stand trial. A mentally ill person who is finally reviewed by a Mental Health Tribunal, and/or psychiatrist(s) and found to be no longer suffering from mental illness is returned to gaol, and comes to trial. A mentally retarded person is not going to "get better" as a result of treatment in a mental hospital, and therefore will probably never be found fit to plead. He may spend the rest of his life in a mental hospital for security patients for an alleged offence for which he has never been tried. Clearly, this is not a system which provides justice for the mentally retarded offender.

Attempts to avoid these negative consequences have been made in the proposed changes to the N.S.W. *Mental Health Act.*[55] If a person is likely to become fit to be tried within 12 months, the court would

55. Mental Health Bill 1982 (N.S.W.) and cognate with it, the Crimes (Mental Disorder) Amendment Bill 1982 (N.S.W.) which would insert a new Part XIA into the *Crimes Act* 1900 (N.S.W.), relating to fitness to plead.

be able to order that he be admitted to and detained in a hospital (cl. 428I(2)(b)), where he would be dealt with as a forensic patient.

Although a mentally retarded person found unfit could conceivably have the potential to become fit within 12 months (for example, if given the opportunity to receive a language or social skills programme) most mentally retarded persons would not be expected to become fit within this period. Difficulties will doubtless arise in attempting to predict this under the proposed changes in New South Wales. Nevertheless, if the person is not likely to become fit within 12 months and the offence is not trivial in nature (see below), the court would hold a special inquiry, within 30 days, to determine guilt or innocence. The special inquiry would be conducted as if it were a criminal trial, and the accused would be deemed to have pleaded not guilty. If the special inquiry found that the person was not guilty of the alleged offence, the person would be discharged (cl. 428L(4)) regardless of his mental condition.

Different disposition orders are provided for those who are mentally ill within the meaning of the N.S.W. Mental Health Bill 1982 and those who are not, thus recognising that a distinction needs to be made between mentally ill persons and mentally retarded or disabled persons. Where, in the court's opinion, a person was not mentally ill and the offence was so trivial in nature that the court was of the opinion that it was inappropriate to inflict punishment,[56] the court could make any one or more of the following orders:

(a) that the charge be dismissed;
(b) that the person be released on an undertaking that he will attend and be informally admitted to a mental hospital; or
(c) any other order that the court considers appropriate.

If the special inquiry found that the person committed the offence, then the court would state the sentence which it would have considered appropriate if the investigation had been an ordinary criminal trial. The court could then make any one or more of the following orders:

56. Mental Health Bill 1982 (N.S.W.), cl. 428I (2) and (3). The Bill does not make provision for types of orders which may be made when a trivial offence has been committed and the court thinks it is APPROPRIATE to inflict punishment. Furthermore, the term "punishment" is inappropriate in the circumstances, as the accused has not been tried, and hence, not found guilty. It implies that the accused is being punished for being found unfit to be tried because of a disability, which is a most offensive implication.

(a) that the person be discharged;
(b) that he be released upon an undertaking that he attend and be formally admitted to a mental hospital; or
(c) any other order it considers appropriate.[57]

The latter provision would give the court a wide discretion. In order to utilise this discretion to the best effect, the court would need to be aware of the nature and aetiology of the accused's retardation and its relationship to his criminal act, and the available programmes, agencies or institutions which would be most appropriate for the mentally retarded accused.

Retaining the concept of fitness

There are a number of pertinent questions which need to be examined in relation to fitness to plead. Is it a concept which needs to be retained? If it is, are there ways of improving the system so that the accused does not spend an unreasonable length of time under detention, without having been tried?

These questions are addressed by Arboleda-Florez[58] who, after examining some grave miscarriages of justice which have occurred, concludes that

> "Because the accused is always deemed to be innocent and it is up to the prosecution to prove, on the merits of the case, that he has committed the offence, it would be much better to go ahead with the trial in those few cases in which the issue of fitness arises, and to let the defence counsel act not only as a representative of the accused but also as his *alter ego,* that is, as if he was in fact the accused representing himself. The mental condition would then be a problem to be dealt with after the trial. With theoretical reasons absent, and practical reasons being only so few, is there any justification to keep the concept of fitness in criminal law? The nightmare of 'fitness' is that, however reasonable the justification to keep it, its disastrous end results overrule any advantages it may have."

The possibility of going ahead with the trial of a mentally ill offender exists in a limited way under Queensland legislation, where a person who pleads guilty, but appears to the court to be mentally ill, may have a plea of not guilty entered on his behalf,[59] and is proposed in forthcoming changes to mental health legislation in New South Wales.[60]

57. Ibid., cl. 428L(1)(b).
58. Arboleda-Florez, note 9 above, p. 47.
59. *Mental Health Act* 1974 (Qld.), s. 29.
60. See note 55 above.

In the Northern Territory, while the concept of fitness is retained, the responsibility for the disposition of the accused is removed from the executive arm of government and given to the Supreme Court.[61] The Supreme Court may vary the conditions under which the accused is detained, or absolutely discharge the accused, or order that the accused be tried for the offence.

The Law Reform Commission of Canada does not recommend abolition of fitness to plead, but states that where some form of detention is deemed necessary, it must be subject to review, and that in no circumstances should it be indeterminate; that detention should be a last resort when all other procedures had been considered; that there should be a range of possible orders available to the trial judge (including release; or a treatment or hospital order); and that disposition should be made by the court, not the Lieutenant Governor of the province.[62]

Likewise, the Butler Committee[63] concludes that the fitness concept not be abandoned, but if there is no prospect of the defendant recovering, a trial of the facts should take place. If a finding of not guilty is not brought in, the jury should be directed to find that the defendant should be dealt with as a person under disability, but this verdict should not count as a conviction nor should it be followed by punishment.

Potas recommends the adoption of a Statute of Limitations for unfitness to plead,[64] so that people will not be held for an indeterminate period of time and still have the possibility of facing a trial and being sentenced if found guilty. Potas states that

> "Principles of parsimony, humanity and justice do not require that all those caught in the criminal justice seive be brought inevitably to trial."

Nor do principles of parsimony, humanity, and justice require that every person brought to trial be capable of entering a plea, understanding the proceedings, and instructing counsel. A fair trial could be conducted in the absence of these qualities on the part of the accused. There seems little justification for retaining a rule that the accused must become fit to plead, particularly in view of the discrimination against chronically mentally ill and mentally retarded offenders which could result.

61. *Criminal Code* 1983 (N.T.), s. 357.
62. Law Reform Commission of Canada, 1976, note 20 above, pp. 41ff.
63. See note 39 above, pp. 158ff.
64. Potas, note 22 above, pp. 50ff.

THE STAR CHAMBER APPROACH TO FITNESS TO PLEAD– THE QUEENSLAND EXAMPLE

The pitfalls of raising the issue of unfitness to plead for mentally retarded offenders in court have been discussed. A less public and more insidious procedure is the examination and determination of fitness to plead by the Executive arm of government and the Public Service–a parallel of the pre-Reformation Star Chamber determination of guilt or innocence.

Section 590 of the Queensland *Criminal Code* 1899 ensures the right to be tried when a person is charged with a serious offence:

> "A person committed for trial before any Court for any indictable offence may make application in open Court at any time during the first sittings of the Court held after his committal to be brought to his trial.
>
> If an indictment is not presented against him at some time during these Sittings, the Court may ... admit him to bail and is required to do so, unless it appears upon oath that some material evidence for the Crown could not be produced at those sittings.
>
> Any person committed as aforesaid, who has made such an application to be brought to his trial, and who is not brought to trial at the second Sitting after his committal for trial, is entitled to be discharged."

It would seem from the foregoing that a person must be brought to trial, and bail must be considered, and that if he seems mentally ill or retarded, then ss. 613 ("Want of understanding of accused person") and 645 ("Accused person insane during trial") are brought into play. The issue of the accused's fitness is to be determined by a jury, and only then can the Executive play a part in determining where and for how long the accused person can be held "at the Governor's pleasure". The spirit of the *Criminal Code* 1899 (Qld.) clearly is to ensure fairness in court proceedings against persons alleged to have committed crimes, and to prevent incarceration of accused persons in institutions by the Executive or Public Service. The civil liberties and natural justice issues are apparent–an ill-intentioned government is prevented from using this form of detention to silence its enemies by alleging insanity at or before trial and quietly disposing of the person by diversion into a mental institution.

There is, of course, no implication that the Queensland Government is using mental health legislation as a weapon to silence opposition to

its practices or policies. Nevertheless, there are documented examples of instances where principles of natural justice are not being adhered to by the Mental Health Tribunal, and the civil liberties of the patient concerned are being infringed. In one case, the solicitor acting for a regulated patient requested that the Tribunal allow him to represent his client at a hearing for release from regulation, and the request was allowed. The report of the situation continues:

> "The solicitor then submitted to the Tribunal that the Body was bound to follow the rules of natural justice and particularly that the client was entitled to be advised of the case against her. In this particular situation, that included access to reports submitted by the treating hospital doctor and any other information which the Tribunal had before it that would be considered in their decision making process. The solicitor also submitted that the Tribunal should allow cross-examination of witnesses and allow evidence to be presented to answer the case established. The Tribunal rejected all submissions and indicated that it felt that it was not bound by those rules, and further did not have the power to release hospital records or reports before it. The Tribunal advised the solicitor that he could be present while the treating doctor was before the Tribunal and that the solicitor would be allowed to ask some questions of the treating doctor, but not in the manner of a cross-examination."[66]

A number of allegations concerning the patient's so-called "dangerous" behaviour were raised by the Tribunal, but since the independent psychiatrist was not allowed access to the medical record, he was unable to evaluate or comment upon these occurrences. Eventually the Tribunal rejected the client's application, giving no explanation of its reasons.[67]

While the intention of the *Criminal Code* is clearly to prevent diversion and detention without trial, the reality of the matter is that it does not do so for all, or even most, alleged offenders. Before committal for trial, the provisions of the *Mental Health Act* 1974 (Qld.) can be invoked, and instead of trial of unfitness to plead or insanity being

66. C. Williams, "Mental Health Tribunal—Case of client 'N', in Papers delivered at the Seminar held by the Legal Aid Office (Queensland) in Relation to the Mental Health Act and Criminal Code Amendment Bill and the Intellectually Handicapped Citizens Bill", 20 May 1983, pp. 47-48.
67. Williams, ibid.

conducted by a jury, the evidence of two medical practitioners is all that is required.

The relevant sections of the *Mental Health Act* are s. 32 ("Persons charged with simple offences mentally ill") and s. 33 ("Persons charged with indictable offences mentally ill upon examination of witnesses"). Both sections permit an accused to be admitted to a hospital (in the instance of s. 33, a security patients' hospital) on the evidence of two medical practitioners, if the justice is satisfied on such evidence that the defendant is mentally ill. These sections are not substantially altered in the proposed amendments to the Queensland *Mental Health Act.*

How can determination of the issue by a jury be replaced by determination by the justices and two medical practitioners? The answer lies in the fact that although the *Mental Health Act* states, in s. 28, that it

> "shall be read and construed with and as being in addition to and in aid of and not in substitution for or in derogation from the provisions of *The Criminal Code*"

the Code is silent on the issues of simple (i.e. non-indictable) offences, and committal proceedings. In addition, the *Justices Acts* 1886-1965 (Qld.), which determine procedures for simple offences, are silent on the issue of unfitness to plead. Into this vacuum has been introduced the provisions of the *Mental Health Act.* The effect is that before a person has a chance to plead to the charge of an indictable offence, or when the complaint for a simple offence is before justices for hearing, the Executive arm of government has the opportunity to prevent the matter coming to trial. Under s. 33 (indictable offences) of the *Mental Health Act* 1974 (Qld.) the accused's right to bail is also removed, by s. 33(3)(a)–

> "Where justices make a court order pursuant to subsection (1) or subsection (2) . . . no order shall be made that relates to custody or bail."

Such a situation results in an unacceptable denial of an accused's right to natural justice, trial, and due process of law. The Queensland Government is currently examining proposals for reform of the *Mental Health Act* (see Chapter 5 below, the section on Reforming the Law). The proposals include:

- for a simple offence, instead of determination being made by Governor-in-Council as to whether or not proceedings should

or should not be continued, this determination will now be made by the Attorney-General, and

- a Supreme Court Mental Health Tribunal be established, consisting of a Supreme Court Judge and two psychiatrists. The tasks of this Tribunal would be to determine matters of criminal responsibility, fitness to be tried and fitness to plead in cases of major indictable offences.[68]

Wherever in the criminal justice process such interventions and determinations would be made, the proposed reforms do not attack the basic flaws in the present system.

Counsel appearing for a mentally ill or mentally retarded accused under such a situation would be well-advised to claim the right to trial and to bail under the relevant section of the *Criminal Code.* This clash of objectives between legislation concerning mental health and legislation controlling criminal proceedings is not confined to Queensland. The good intentions of those branches of the public service concerned with the welfare of mentally ill citizens can easily result in people being very over-protected. Public servants may view the "trauma" of trial as a procedure not in the "best interests" of the ill person. Presumptions of guilt, however, can all too readily arise, the consequence being severe curtailment of a person's civil liberty without access to a fair hearing, which under no circumstances is in the best interests of an accused, whether he be ill, retarded, or allegedly of guilty mind and intent.

SUMMARY

Whilst the historical context of the concept of fitness to plead may have had some validity, the present situation for chronically mentally ill, disabled, and mentally retarded accused persons who are unlikely to become fit results in grave injustice. It is desirable that when an accused appears unlikely to become fit to plead, a trial of the facts should be held to determine guilt or innocence. If innocent, the accused should be discharged and, if necessary, dealt with under those provisions of mental health legislation which are concerned with the care and management of ordinary and intellectually handicapped members of the community who become mentally ill. If guilty, the court should have a number of disposition options open to it, one of

68. G. Urquhart and P. K. Mulholland, *Proposed Queensland Legislation Concerning Mentally Ill Offenders,* Paper presented at Aust. Inst. of Criminology Seminar, June 1982.

which may be treatment as a forensic patient under mental health legislation. It is highly unlikely, however, that rehabilitation of a mentally retarded unfit offender will be effectively achieved by placement in a psychiatric hospital. Therefore non-custodial community-based sentencing options should be available to the court. Given the current law and facilities available to an accused person found unfit to plead, where possible a mentally retarded accused should be given the opportunity to plead, and to undergo trial, rather than be exposed to the uncertainties of being detained until found fit.

Chapter 5

Guilty or Not Guilty?

Because the criminal law is generally based upon notions of an individual's responsibility and moral fault, most jurisdictions recognise that in some situations because of the effects of the defendant's mental condition, he should be held free of criminal responsibility. It must be emphasised again that while the law subsumes both mentally ill and mentally retarded accused persons under the term "insane", they are totally different conditions. The two states of mind differ dramatically in terms of

- time of onset (mental retardation is usually present from birth);
- diagnosis (mental retardation is usually not accompanied by psychiatric symptoms such as loss of touch with reality, depression, emotional instability or delusions);
- treatment (mental retardation itself is not improved by medication such as mood-altering drugs, or group or individual therapy); and
- outcome (the degree and effect of retardation may be lessened through education and social skills training programmes, but will not be cured).

As a consequence of these important differences, two questions arise:

(1) Are the defences which take account of limited criminal responsibility appropriate to a mentally retarded accused? and
(2) Does the implementation of a defence which recognises the limitations and special needs of a mentally retarded person sometimes work to the disadvantage of that person, for example, by allowing an indefinite term of detention?

TAKING THE OATH AND GIVING EVIDENCE

An important part of any trial is the swearing in of witnesses, and presentation of their evidence to the court. This is particularly significant for a retarded accused who may wish to testify on his own behalf, but also in the case of a retarded victim of or witness to a crime. The court's acceptance of that individual's evidence is likely to be

influenced by any personal characteristics (such as slow speech; or dress and appearance) which would indicate the presence of retardation and hence it is important that counsel recognise that a limitation in one area does not always mean that the person cannot be a witness.

The common law requires that a person taking the oath understand its nature and consequences. The direct and indirect consequence of this is that the court considers whether the person is competent to give evidence. A witness (appearing on his own behalf, or at the trial of another person) who appears mentally retarded may be challenged, and may be required to submit to a court determination of his competence to give evidence. With respect to people who are of low intelligence

> "(S)uch persons may not give evidence if they do not understand the nature of the oath or are not 'complete in point of understanding'."[1]

The common law position has been modified in some States and Territories, through legislative provisions which enable an incompetent witness who cannot take the oath to make an affirmation or declaration, or give unsworn evidence.[2] In most jurisdictions, the judge before receiving the evidence must impress upon the witness the obligation to speak the truth, and that he may be liable to punishment if he does not do so.

The Australian Law Reform Commission has examined the factors which might affect a witness' competence, including the logic of conversation, the function of comprehension, and personal characteristics which can interfere with the mental processes of conversation.[3] Each of these areas has particular applicability to mentally retarded witnesses.

The basic principle of conversation is co-operation, for if the participants are aiming toward a mutually acceptable goal, a basis is established for making inferences about a speaker's intended meaning.[4] The mutuality of conversation, however, is predicated upon similar background, understanding, and ability on the part of the participants. Fourth grade children, aged nine-ten years, can draw inferences that are

1. Law Reform Commission, *Competence and Compellability of Witnesses,* Australian Law Reform Commission, Research Paper No. 5. Sydney, 1981, p. 2.
2. Law Reform Commission, ibid., p. 3.
3. Law Reform Commission, ibid., pp. 7ff.
4. H. P. Grice, "Logic and Conversation", in P. Cole and J. L. Morgan (eds.), *Syntax and Semantics,* Vol. 3: Speech acts (Seminar Press, N.Y., 1975), pp. 41-58.

required to make communication coherent, and can discriminate between utterances that are useful for understanding and those which are not.[5] This highlights the difficulties which may confront retarded witnesses and their questioners. The retarded witness may have a mental age which renders his understanding, memory and conceptualisation quite different from that expected of a ten-year-old child, or an adult. The retarded witness may have the concrete operational thought,[6] understanding of grammatical constructs (for example, the inability to distinguish between "I saw the person ten minutes before" and "I saw the person for ten minutes"), and moral development of a much younger child. If a retarded witness has poor verbal fluency, language skills, or pronunciation, he may emphasise utterances inappropriately, causing the judge and jury to draw erroneous conclusions from what he says. The mutuality of the basis for effective communication can be destroyed by any or all of these characteristics of a retarded witness' communication.

The Australian Law Reform Commission proposes that all persons shall be competent to give evidence unless the court considers that they are incapable of

> "–understanding the questions put to them;
> –giving rational responses;
> –understanding that they are obliged and expected to give truthful answers; [and]
> –communicating their answers"[7]

and that recognition must be given to the fact that a witness may be able to cope with some questions and give some evidence.

The difficulty still exists, however, that the court may not *recognise* a witness' incompetence; may not be able to *differentiate* between the questions or areas he is competent to give evidence about and those in which he is incompetent (for example, descriptive speech is easier to construct than explanatory speech);[8] and may give greater credibility

5. A. Hildyard and D. R. Olson, "Memory and Inference in the Comprehension of Oral and Written Discourse", *Discourse Processes,* 1978, 1, pp. 91-117.
6. B. Inhelder and J. Piaget, *The Early Growth of Logic in the Child* (Routledge and Kegan Paul Ltd., 1964), pp. 90ff; R. L. Ault, *Children's Cognitive Development* (Oxford University Press, N.Y., 1977).
7. Law Reform Commission, note 1 above, pp. 41-42.
8. H. Levin, I. Silverman and B. Ford, "Hesitations in Children's Speech During Explanation and Description", *J. Verbal Learning and Verbal Behaviour,* 1967, 6, pp. 560-564.

to the witnesses whose speech and presentation is more fluent and acceptable. The issue of the retarded person's competence as a witness becomes of great significance when he is the victim of a crime (and perhaps the only direct witness); or when he is the accused. In Chapter 3, the pitfalls of accepting the confession of a retarded offender were described, yet courts generally accept such confessions uncritically (particularly when backed up by police statements), and some grave miscarriages of justice have resulted. It would be impossible ever to determine how many wrongful convictions of retarded offenders occur, because only a few cases attract attention and are reviewed.

There is no doubt that retarded witnesses should be able to take the oath and give evidence, or give unsworn statements, if they fulfil the criteria outlined by the Australian Law Reform Commission (see above). For such criteria to be meaningful, however, lawyers and judges must be more aware of the difficulties and limitations in the communication of retarded witnesses, and must become more alert in recognising witnesses who possess such characteristics.

THE INSANITY DEFENCE

It is not the purpose of this section to examine in detail the complex question of the insanity defence (this has been exhaustively treated by other writers[9]), but rather, to evaluate the insanity defence in terms of its applicability to the mentally retarded accused person.

The criminal law recognises that any person bereft of his mind cannot have a guilty one. In New South Wales, Victoria and South Australia the defence of insanity in the criminal law is derived from the English common law, whereas in Queensland, Western Australia and Tasmania, the law has been codified. The major difference is that mental deficiency is expressly brought by the codes within the definition of insanity, whereas the common law guidelines (the M'Naghten Rules) do not mention this condition.

The M'Naghten Rules (laid down in 1843) are as follows:

> "[To] establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from

9. See, for example, I. Potas, *Just Deserts for the Mad* (Aust. Institute of Criminology, A.C.T., 1982), pp. 53ff; R. P. Roulston, *Introduction to Criminal Law in New South Wales* (Butterworths, Sydney, 1975), pp. 26ff; C. Howard, *Criminal Law* (4th ed., Law Book Co. Ltd., Sydney, 1982), pp. 327ff.

> disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."[10]

Many criticims have been levelled at the M'Naghten Rules,[11] amongst them being the criticism that inordinate weight is placed upon intellectual factors. Howard states, with supreme disregard for aetiology, diagnosis, prognosis and treatment that

> "there is no reason why a person who is born, and remains, mentally deficient should not be within the M'Naghten Rules if the degree of his mental incapacity otherwise amounts to insanity. The point is put beyond question by the codes, each of which expressly includes 'natural mental infirmity' or 'natural imbecility' within the definition of insanity. There is no warrant for introducing a difference between the common law and the codes here, and no reason for supposing that the High Court would do so."[12]

This is tantamount to saying that children should not be treated differently under the criminal law, for their immature development and defects of reason would mean that by legal criteria, they would be viewed as insane.

The simple fact is that in 1843, medical diagnostic categories did not clearly differentiate between mental illness and mental retardation. Since there was no specific treatment for either, it did not matter that insane and mentally retarded people were placed in the same institutions and treated in the same way. Furthermore, the concept of intelligence testing did not emerge until the very end of the 19th century, so there was only an impressionistic and subjective test to differentiate the various levels of intellectual impairment. The effects of institutionalisation[13] were likely to increase the observable similarities in the behaviour of mentally ill and mentally retarded persons. The community and relevant professional groups have advanced far beyond these early rough categories in terms of recognising different levels of ability and understanding of mentally retarded persons, of communicating with non-verbal persons, and most importantly, in designing appropriate habilitation programmes for mentally retarded people. It

10. *M'Naghten's Case* (1843) 10 Clark and Fin. 200.
11. Roulston, note 9 above, pp. 29ff; Potas, note 9 above, pp. 50ff; Howard, note 9 above, pp. 328ff.
12. Howard, note 9 above, pp. 331-332.
13. S. C. Hayes and R. Hayes, *Mental Retardation: Law, Policy and Administration* (Law Book Co. Ltd., Sydney, 1982), pp. 148ff.

behoves the criminal law to attempt to keep up with these changes in community standards. The aims of the criminal process include deterrence, punishment and rehabilitation, but none of these can be fulfilled adequately or appropriately while mentally retarded offenders remain categorised as "insane".

If the issue arises of whether the person was insane at the time of committing the offence, medical and other expert testimony may be sought, but the question is decided by the jury. The terminology varies slightly between the States–Victoria,[14] the Australian Capital Territory,[15] and the Northern Territory[16] state that the offender is "acquitted on account of insanity"; South Australia[17] and Tasmania[18] use the term "acquitted ... on the ground of insanity"; Western Australia[19] and Queensland[20] state "acquitted on account of unsoundness of mind"; and New South Wales[22] refers to the person being "acquitted ... on the ground that he was ... mentally ill".

The defence of insanity, the House of Lords stated in 1963, can be raised by the accused, or by the prosecution, and the latter has a duty to do so rather than allow dangerous persons to be at large.[23] Subsequent Australian cases do not support this view.[24] The burden of proof is on the defendant, in that the prosecution may rely on the assumption that the defendant is sane until the defendant proves otherwise on the balance of probability.[25] This reverses the traditional burden of proof in the criminal law where the prosecution must prove specifically and beyond reasonable doubt that matters raised by the accused by way of alibis, explanation, excuse or justification are lacking in substance. The covert reason for this may be the assumption that the defendant can see some advantage in being acquitted on the grounds of insanity. Any imagined advantage is highly dubious since the abolition of the death penalty, for if the person is acquitted on those

14. *Crimes Act* 1958 (Vic.), s. 420.
15. *Lunacy Act* of 1898 (N.S.W.), s. 65.
16. *Criminal Code*1983 (N.T.), s. 38.
17. *Criminal Law Consolidation Act* 1935-1975 (S.A.), s. 292.
18. *Criminal Code Act* 1924 (Tas.), s. 381(1).
19. *Criminal Code* 1913 (W.A.), s. 653.
20. *Criminal Code* 1899 (Qld.), s. 647.
21. *Crimes Act* 1914-66 (Cth.), s. 20B.
22. *Mental Health Act* 1958 (N.S.W.), s. 23.
23. Howard, note 9 above, p. 342.
24. Howard, note 9 above, p. 342.
25. Howard, note 9 above, p.342.

grounds, the judge orders him to be held in custody (in a gaol or mental hospital) until the Governor's pleasure is known.[26]

The Governor's pleasure

The disadvantages of being held at the Governor's pleasure have been mentioned in passing in the discussion on fitness to plead and fitness to be tried (above, Chapter 4) and are also discussed in Chapter 7, "Sentencing-Custodial Options". Whilst detention at the Governor's pleasure is, strictly speaking, a sentencing consideration and not a defence, it is impossible to evaluate the relative advantages and disadvantages of this defence in the absence of information concerning the disposition of accused persons acquitted on the ground of insanity. The debate about the insanity defence is largely based upon the sentencing options available to the court, and for this reason, the topic is introduced here.

The court in some States has no discretion—if a person is acquitted on the grounds of insanity, the court must order that the person be kept in strict custody until the Governor's pleasure is known.[27] This can result in anomalous situations. In one case, *R. v. Butterworth*,[28] a woman had assaulted her son while suffering from depressive mental illness. She received treatment after the offence, made a complete recovery and was allowed out on bail pending her trial. She lived a normal lifestyle in the community for ten months while awaiting trial. The jury acquitted her outright of two major offences, and acquitted her on the ground of mental illness of the lesser charge of inflicting grievous bodily harm. Nevertheless, the trial judge had no discretion but to order that she should be placed in strict custody at the Governor's pleasure. In New South Wales, invariably the order is committal to a penal institution,[29] although proposed amendments to the *Mental Health Act* extend the places of detention to include a hospital, a prison or any other place.[30]

The Nagle report summarising the findings of a Royal Commission into New South Wales prisons, describes the process which follows.[31]

26. For variations in terminology between the States, see Potas, note 9 above, pp. 43ff; and Ch. 7 below.
27. *R. v. Judge Martin; Ex parte Attorney-General* [1973] V.R. 339 at 341.
28. *R. v. Butterworth*, described in *Report of the Royal Commission into New South Wales Prisons* (Nagle Report) (N.S.W. Govt. Printer, Sydney, 1978), p. 320.
29. *Mental Health Act* 1958 (N.S.W.), s. 23(3).
30. Mental Health Bill 1982 (N.S.W.), cl. 113(2).
31. Nagle Report, note 28 above, pp. 320ff.

The prisoner undergoes psychiatric assessment which is supposed to occur almost immediately, but which took place in *Butterworth's* case, 26 days after reception at the prison. The prisoner cannot be transferred from the prison to a mental hospital unless certified as mentally ill by two psychiatrists. The definition of mental illness used in this process is much more restrictive than that which was applied by the jury, following the M'Naghten Rules. It is as follows:

> "a person who owing to mental illness requires care, treatment or control for his own good or in the public interest, and is for the time being incapable of managing himself or his affairs.[32]

Consequently, many "detainees" acquitted by the jury on the ground of mental illness are never admitted to a mental hospital. Of the 51 Governor's pleasure prisoners detained in New South Wales in December 1976, only 29 were in mental hospitals. Of the 97 Governor's pleasure prisoners released during 1966-1976, only 26 had spent some time in a mental hospital during the course of their detention.[33] A psychiatrist may argue that mental retardation does not constitute mental illness as defined under the Act. Thus, the retarded Governor's pleasure prisoner is likely to be multiply disadvantaged–given the indeterminate sentence of Governor's pleasure, unlikely to recover from his "insanity", yet not transferred to a mental hospital because mental retardation is not regarded as mental illness.

In New South Wales, when a prisoner is no longer mentally ill, he is either released or, more frequently, returned to prison. The decision to release the prisoner is made by the Governor, on the advice of the Executive Council. The matter is referred to the Executive Council by the Minister, who is advised by the Life Sentence and Governor's Pleasure Review Committee, an administrative body. The Nagle Report criticises the appropriateness of this process, and recommends that a different procedure be adopted.[34] Proposed amendments provide for the Mental Health Review Tribunal (which shall include psychiatrists and persons having other suitable qualifications or experience) to make a recommendation to the Minister, after which the Governor may make an order for detention or release.[35] The report also refers to the unduly long time spent by Governor's pleasure prisoners in prison. Not only does the length of time often exceed the sentence they would

32. *Mental Health Act* 1958 (N.S.W.), s. 4.
33. Nagle Report, note 28 above, p. 321.
34. Nagle Report, note 28 above, p. 322.
35. Mental Health Bill 1982 (N.S.W.), cl. 113(1) and (2).

have received had they been found guilty, but frequently they receive no psychiatric help, and their mental illness is exacerbated by the uncertainty of an indeterminate sentence. Furthermore, no-one seems to know the rules of the game–those responsible for release of the prisoners have no guidelines for their decision.

New South Wales is currently an example of all the worst aspects of disposition of Governor's pleasure prisoners. In other States, the procedure and consequences are not as draconian. In Queensland, for example, a prisoner does not have to be found to be mentally ill (in psychiatric terms) in order to be transferred to a security patients' hospital. It is sufficient that the person was found not guilty on the ground of unsoundness of mind–in other words, the legal hurdle and the psychiatric hurdle are the same, and the offender can be transferred immediately, and have the benefit of psychiatric help.[36] A mentally retarded offender, found not guilty on the grounds of unsoundness of mind in Queensland, would be transferred to a security patients' hospital whereas in New South Wales it is probable that he would remain in prison. It could be argued that a security patients' hospital is not an appropriate placement for a retarded offender, but the environment may be more conducive to habilitation programmes than that of a typical prison.

It has been strongly argued that neither prison nor security patients' hospital is an appropriate placement for some offenders found unfit to plead or not guilty on the grounds of insanity, and that rather than being held in strict custody at the Governor's pleasure, the trial judge (in all States) should have the discretionary power to order an absolute discharge of the person.[37] Potas quotes the case of a Northern Territory aborigine, found unfit to plead, who had a long history of mental illness, and became aggressive if he was locked up. The matter was considered to be a social and medical problem rather than a legal one, and he was given an absolute discharge, to live at an Aboriginal settlement where he could receive appropriate medication daily.[38] This form of sentencing seems also appropriate for retarded offenders who are not regarded as dangerous to themselves or society. The justifications for detaining in custody persons found not guilty by reason of insanity include the arguments that the person's moral judgment is gravely flawed; that the community needs to be protected; and that the person

36. *Mental Health Act* 1974 (Qld.), s. 37.
37. Potas, note 9 above, pp. 44ff.
38. Potas, note 9 above, pp. 48-49.

is not actually innocent of the crime.[39] The criminal legal process would be hypocritical, however, to apply double standards in this area. It is contradictory to assert the punitive aspects of holding a person at the Governor's pleasure, since one of the original arguments for retaining the insanity defence is the inability of the accused to realise he is being punished. Furthermore, insanity at the time of the offence does not necessarily imply that the person continues to be a danger to himself or to others. (Dangerousness is a totally different concept from mental illness, and is discussed below, in Chapter 8.) It seems that, when the façade is torn away, the justification for retaining the concept of "held at the Governor's pleasure" is in reality the antiquated and superstitious notion that being insane is somehow sinful and immoral, and worthy of punishment in itself.

In summary, therefore, evidence indicates that detention in strict custody at the Governor's pleasure is sometimes unfair. The detainees may be held for far longer than would be the case if they had pleaded guilty; they frequently are detained in prison where they do not receive appropriate psychiatric and other health treatment; the uncertainty of the sentence may exacerbate their mental condition; even if they are held in a security patients' hospital, this placement may be inappropriate for a retarded offender; the fact that, in most jurisdictions, a trial judge lacks power to order an absolute discharge may result in grave hardship to the detainee; and the lack of appropriate review provisions and mechanisms may result in a person becoming lost in the system. There seems to be no justification for retaining Governor's pleasure provisions in legislation and, indeed, the perpetuation of the insanity defence is debatable,[40] particularly as in an increasing range of offences (for example, the possession of and dealing in narcotics, and social security fraud) criminal responsibility is being imposed independently of mens rea, or criminal guilt. In view of the serious consequences, it is recommended that legal counsel not employ the insanity defence on behalf of clients, particularly mentally retarded clients whose

39. Potas, note 9 above, pp. 57ff.
40. See, for examination of the argument, J. Petrila, "The Insanity Defense and Other Mental Health Dispositions in Missouri", *Int. J. Law Psychiatry,* 1982, 5, pp. 81-101; A. A. Stone, "The Insanity Defense on Trial", *Hospital and Community Psychiatry,* 1982, 33(8), pp. 636-640; J. Arboleda-Florez, "Insanity Defence in Canada", *Can. Psychiatr. Assoc. J.,* 1978, 23, pp. 23-27; N. M. Burton and H. J. Steadman, "Legal Professionals' Perceptions of the Insanity Defense", *J. Psychiatry and Law,* 1976, 6, pp. 173-187.

condition is not going to improve as a consequence of medication or psychiatric treatment.

PLEADING GUILTY

The responsibility of pleading guilty or not guilty is taken by the defendant. In theory, it is the ethical duty of the defending counsel to assist the defendant by explaining the various alternative ways of meeting the charge, so that the defendant is aware of their ramifications and can make an informed choice.[41] Where the prisoner is undefended, the court should take care to ensure that he understands the elements of the offence to which he is pleading guilty.[42] The guilty plea does not have to be accepted by the Crown or the court.[43] A plea of guilty constitutes an admission of all essential elements of the crime and, therefore, proof of these is unnecessary.[44] If the judge is doubtful whether evidence can be produced on all essential points of the charge, he is entitled to advise the prisoner to withdraw the plea of guilty.

It has already been noted (Chapters 2 and 3) that mentally retarded prisoners plead guilty more frequently than do other prisoners. The pitfalls in accepting a confession from a retarded suspect have been discussed at length (Chapter 3). Often the guilty plea results from "plea bargaining" or pre-trial manoeuvres between the police and the accused, or between the Crown and the accused–"if you plead guilty to this lesser offence, you'll get off more lightly than if you plead not guilty and give the court the trouble of a trial and conviction." Sometimes, this form of arrangement might work to the benefit of both parties–the Crown obtains a conviction where it might have been difficult to prove all the elements of the more serious crime; the prisoner is convicted for a lesser offence and receives a lesser sentence; and the court's time is saved. This process, however, presumes guilt, a valid confession, and an understanding of the charge and the criminal process on the part of the mentally retarded offender. Any or all of these elements may be lacking.

Whilst safeguarding a mentally retarded accused from pleading guilty when he is not, it is important not to place too many difficulties

41. *R. v. Michael Hall* (1968) 52 Cr. App. R. 528.
42. *R. v. Griffiths* (1933) 23 Cr. App. R. 153; *R. v. Le Comte* [1952] N.Z.L.R. 564.
43. *R. v. Broadbent* [1964] V.R. 733; *R. v. Cole* [1965] 2 All E.R. 29; [1965] 2 Q.B. 388; 49 Cr. App. R. 199.
44. *R. v. Henry* [1917] V.L.R. 525; *R. v. Inglis* [1917] V.L.R. 672.

in the path of the mentally retarded person who wishes to plead guilty. It has been suggested that if a retarded person pleads guilty, in fairness the court should order an evidentiary hearing into the defendant's ability to plead guilty.[45] This system would constitute a reversion to "fitness to plead", with all of its hazards and injustices. There seems to be no reason why a retarded defendant should not be allowed to plead guilty if he is able to comprehend what is involved. Nevertheless, in Arizona the Court of Appeals held that the standard of competency to plead guilty is higher than the standard of competency to stand trial. This has not been consistently upheld.[46] It has been argued that

> "Just as mental capacity is one factor in the totality of circumstances determining the voluntariness of a confession, mental capacity should be only one factor in the determination of the competency to plead guilty."[47]

The issue in the Australian criminal justice system would not be expressed as whether the retarded offender has the "right" to plead guilty, but rather, in terms of preventing such a plea being entered inappropriately, or without due safeguards. Approximately 85 per cent of criminal cases, particularly in the lower courts, are disposed of by way of a guilty plea.[48] Apart from the dangers of the court mistakenly accepting such a plea, the guilty plea can be counter to the benefit of a retarded defendant because it does not allow admittance of circumstances of aggravation, although some circumstances of mitigation are accepted.[49]

Undoubtedly, the courts would be burdened by the extra load imposed if retarded offenders were closely examined on the advisability of pleading guilty. Nevertheless, given the numbers of retarded offenders passing through criminal courts, particularly lower courts, justice dictates that particular attention be paid to a guilty plea by a retarded offender. Courts have accepted the extra burdens necessitated

45. D.P. Biklen and S. Mlinarcik, "Criminal Justice", in J. Wortis (ed.), *Mental Retardation and Developmental Disabilities* (X, Brunner/Mazel, N.Y., 1978), pp. 172-195.
46. For discussion of this decision, see J. D. H. Hays and S. A. Ehrlich, "The Ability of the Mentally Retarded to Plead Guilty", *Arizona State Law Journal,* 1975, pp. 661-676 at 671.
47. Hays and Ehrlich, ibid., p. 674.
48. R. G. Fox and B. M. O'Brien, "Fact-finding for Sentencers", in D. Chappell and P. Wilson, *The Australian Criminal Justice System"* (2nd ed., Butterworths, Sydney, 1976), pp. 277-315.
49. Fox and O'Brien, ibid., p. 293.

by delivering justice to non-English speaking, Aboriginal, or juvenile defendants, instances which parallel the situation of the retarded accused because of the possibility of lack of understanding on the part of the accused. The extra financial costs can be weighed against the costs of imprisonment, or even probationary supervision of a person who is, in fact, innocent. The costs to an innocent person who is wrongly convicted are, of course, inestimable.

OTHER DEFENCES

Diminished responsibility

The defence of diminished responsibility exists in Queensland[50] where the criminal law has been codified, and in New South Wales[51] (alone of the common law States), only for the crime of murder. This defence reduces what would otherwise be wilful murder or murder to manslaughter. According to the Queensland Code, if the person

> "is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair his capacity to understand what he is doing, or his capacity to control his actions, or his capacity to know that he ought not to do the act or make the omission, he is guilty of manslaughter only."[52]

A major issue is how this defence is distinguished from the insanity defence, because the former allows the defendant to be acquitted of murder but convicted of manslaughter, whereas the insanity defence allows a verdict of "not guilty" by reason of insanity.

"Abnormality of mind" has been interpreted to mean

> "a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal."[53]

A plea of guilty to manslaughter on the ground of diminished responsibility should not be accepted, as this is an issue which must be left to the jury to determine.

50. *Criminal Code* 1899 (Qld.), s. 304A.
51. *Crimes Act* 1900 (N.S.W.), s. 23A.
52. See note 50.
53. *R. v. Byrne* [1960] 2 Q.B. 396 at 403; [1960] 3 All E.R. 1 at 4; 44 Cr. App. R. 246 at 252.

The defence was recognised in 1867 in England,[54] and in 1876 was described as

> "without being insane in the legal sense, so as not to be amenable to punishment, a prisoner may yet labour under that degree of weakness of intellect or mental infirmity which may make it both right and legal to take that state of mind into account, not only in awarding punishment, but in some cases even in considering within what capacity of offences the crime shall be held to fall."[55]

In both New South Wales and Queensland, the defence is based upon the *Homicide Act* 1957 (U.K.). All three pieces of legislation recognise the concept of retardation in their definition; nevertheless, most cases which attempt to distinguish between the insanity defence and diminished responsibility are concerned with defendants who are suffering from mental illness rather than retardation. It has been stated that diminished responsibility incorporates the notion of inability "to exercise will-power to control physical acts";[56] that it invokes the "broad popular sense" of insanity rather than the narrower M'Naghten Test;[57] that it "goes definitely beyond the limits marked out by the varied types of people met day to day";[58] that a person may know what he is doing and intend to do it, yet still be substantially impaired in terms of mental responsibility;[59] and that while the mental responsibility need not be totally impaired, "substantial" does not mean trivial or minimal.[60]

There are obviously problems in directing a jury, in (a) distinguishing diminished responsibility from insanity, (b) distinguishing it from sanity, and (c) determining whether the impairment is "substantial".[61]

Statistics in the United Kingdom indicate that use of the insanity defence has declined since abolition of the death penalty in 1965, and that use of the defence of diminished responsibility has dramatically increased.[62] The replacement of the insanity defence by that of

54. *H. M. Advocate v. Dingwall* (1867) 5 Irv. 466.
55. *H. M. Advocate v. McLean* (1876) 3 Coup. 334.
56. *R. v. Byrne,* see note 53 above.
57. *Rose v. The Queen* [1961] A.C. 496; 45 Cr. App. R. 109.
58. *R. v. Rolph* [1962] Qd. R. 262, Hanger J.'s direction to a Queensland jury, which tended to narrow the operation of the defence in that jurisdiction.
59. *Rose v. The Queen,* see note 57 above.
60. *R. v. Lloyd* [1967] 1 Q.B. 175.
61. Howard, note 9 above, pp. 96ff.
62. I. L Potas, *Diminished Responsibility and Sentencing* (unpub. LLM thesis, A.N.U., July 1982), pp. 58ff.

diminished responsibility appears to have occurred because the latter is a broader concept and therefore easier to prove, because the sentencing judge may make a hospital order rather than inflict upon the accused the uncertainty of detention at Her Majesty's pleasure, and because of the possibility of a lesser sentence for manslaughter (although disordered offenders who have committed particularly grave offences may still receive a sentence of life imprisonment).[63]

Where the defence of diminished responsibility is available, it would certainly be preferable to the insanity defence for a mentally retarded accused because it enables avoidance of the "no man's land" of sentencing at the Governor's pleasure. Although data from Victoria show that Governor's pleasure detainees who are acquitted of murder on the ground of insanity spend on average shorter periods in incarceration than do convicted murderers,[64] this would only be so where the offender's mental illness is of a temporary nature and unlikely to recur, and where the offender is not seen as dangerous. As stated elsewhere, a retarded offender is not going to be "cured" of his retardation and thus is unlikely to be released after a short period of time.

Many of the difficulties associated with selecting a defence for a retarded offender would be overcome by adopting the Butler Committee's recommendations[65] for abolition of both the mandatory life sentence for murder (as has already happened in New South Wales[66]) and of the defence of diminished responsibility. Thus, the court would have the option of giving a lesser sentence than "life" if there were mitigating circumstances (such as diminished responsibility). The Committee rejects the notion that adopting these recommendations would involve merging the offences of manslaughter and murder, arguing that, for example, manslaughter and infanticide remain two distinct offences although the penalty is the same.

Intoxication

Intoxication is not a defence in itself, but rather, is a constituent of an offence, a means of assigning a cause to a person's incapacity.

63. Potas, ibid., pp.68ff.
64. Potas, note 9 above, p. 64.
65. *Report of the Committee on Mentally Abnormal Offenders,* Cmnd. 6244, (HMSO, London, 1975) (Chairman, Lord Butler), pp. 246ff.
66. The *Crimes (Homicide) Amendment Act* 1982 (N.S.W.) inserts a phrase into s. 19 of the *Crimes Act* 1900 (N.S.W.) allowing s. 442 (permitting a judge to pass a sentence of less duration) to be utilised where "it appears to the Judge that the person's culpability for the crime is significantly diminished by mitigating circumstances".

A defendant may claim he was insane while intoxicated;[67] or, alternatively, that intoxication prevented him from forming the intention to commit the crime. The voluntary nature of self-induced intoxication, whether by drugs or alcohol, does not deprive the defendant of the claim that his conduct was involuntary, and therefore not criminal.[68] These are important concepts in the context of mental retardation where excessive or incorrectly prescribed medication may result in abnormal, unpredictable or violent behaviour.

In employing this defence, the retarded defendant is in substantially the same situation as the non-retarded offender, except that it could be argued that in some circumstances intoxication more substantially and readily affects the retarded defendant; and that if the intoxication is a consequence of prescribed medication, the claim that the conduct was involuntary and therefore not criminal would be persuasive.

Automatism

Automatism refers to conduct which is involuntary because it is physically uncontrollable—"an involuntary act . . . which is done by the muscles without any control by the mind".[69] It is important that the distinction between insanity and automatism be drawn clearly because acquittal for automatism results in the defendant's release, and there are no powers to detain him in a prison or mental institution.[70] Actions performed while sleepwalking; suffering from a cerebral tumour leading to unpredictable violence; and under the effects of concussion have been accepted as automatism, while in some jurisdictions, hypoglycaemia and epilepsy have also been accepted.[71] Automatism would be a viable defence for a mentally retarded defendant in certain circumstances—for example, if the person suffered from epilepsy; metabolic disorders leading to temporary bouts of unconsciousness; such severe retardation that the mind could not be said to control the body; or brain damage, resulting in involuntary muscular action despite messages from the mind.

It must be emphasised, however, that

> "[t]he irony of the plea of automatism is the promulgation of the mind-body dichotomy, not only by lawyers, but apparently by

67. *R. v. Connolly* (1959) 76 W.N. (N.S.W.) 184.
68. *R. v. O'Connor* (1980) 54 A.L.J.R. 349.
69. Roulston, note 9 above, p. 53.
70. Howard, note 9 above, pp. 317ff.
71. Howard, note 9 above, p. 320.

expert medical witnesses. The notion of 'an involuntary act ... done by the muscles without any control by the mind' relegates the concept of the 'mind' to the pre-scientific era. Does the 'mind' equal 'brain functioning', or is the term only used to include the conscious mind, that is, the thoughts and actions which are consciously recognised and remembered? If mind is used to mean the same as brain functioning, then involuntary acts such as circulating blood and digesting food, are being 'controlled' by the mind all the time. If at the other extreme, the mind only includes conscious, recognised and remembered thoughts and actions, the work of Freud (who first introduced the concept of the unconscious) and post-Freudians, is rendered ridiculous. All of us repress thoughts and actions which are unacceptable to our conscious mind; some desires and thoughts are so abhorrent to our carefully socially-conditioned minds that they can only arise during sleep or hypnosis. Nevertheless, since these abhorrent thoughts are repressed by the 'mind', does that mean that unconscious repression is a definition of automatism? Modern medical scientists recognise that there is no physiological occurrence which does not have psychological sequelae (even poor digestion leads to psychological distress); and no psychological phenomenon which does not have physiological sequelae (for example, the raised pulse and blood pressure associated with viewing pornography). The artificiality of the definition of 'automatism' indicates yet another area in which medical advances have left the law in a quandary."[72]

Mistake

The defence of mistake is relevant to those offences which require a "guilty mind".

"It is a general defence in the criminal law for D to prove affirmatively that he committed the conduct charged against him owing to a mistake of fact, based on reasonable grounds, of such a nature that had the facts been as he believed he would be innocent."[73]

If a retarded person enters a house illegally, believing it to be his home, or mistakenly takes goods from a shop, believing them to be his own, he lacks the requisite intent to commit a crime. If the accused has intercourse with a woman, in the mistaken belief that she con-

72. Hayes and Hayes, note 13 above, p. 404.
73. Howard, note 9 above, p. 364.

sented, the jury should acquit if they are left with a reasonable doubt as to whether his intention was to have intercourse with the woman regardless of her consent.[74] In New South Wales, there is the double requirement for a defence based upon mistake of honest belief on *reasonable grounds.*[75] This may result in injustice, for example, in the case of a retarded man who honestly and genuinely believed the woman consented, whereas a person of average intelligence would not have thought so. In such an instance, the "reasonable mistake" of the retarded offender is assessed according to criteria pertinent to the reasonable person of average intelligence.

Mistake must be distinguished from ignorance, for in order to establish reasonable mistake of fact the defendant must prove more than mere ignorance of the fact in question. Mistake is one particular form of ignorance, namely that "the mind is occupied by a positive although incorrect belief about some fact",[76] whereas simple ignorance means the absence of any belief at all on the subject, whether right or wrong. It has been argued that the difference between mistake and simple ignorance is only a degree of consciousness, and for this reason the defence of mistake of fact should be inclusive of simple ignorance.[77]

If a retarded person successfully raises the defence of mistake, he may be found innocent of the offence–although he could still be regarded as having offended against another branch of the law.

Provocation

It is a partial defence to murder that the accused was provoked. If established, provocation reduces murder to manslaughter. The accused's reaction to provocative conduct is evaluated by reference to the standard reaction of the mythical reasonable man. As with the mistake rule, this rule may do serious injustice to a retarded person who lacks the self-control and perception of typical people living in the community. A mentally retarded person residing in an institution where the disciplinary system is negative, yet disruptive and aggressive behaviour is a successful method of gaining attention,[78] will probably

74. Roulston, note 9 above, pp. 124ff.
75. *R. v. Sperotto* (1970) 92 W.N. (N.S.W.) 223.
76. Howard, note 9 above, p. 365.
77. Howard, note 9 above, p. 367.
78. B. A. Rowan, "Corrections", in M. Kindred, J. Cohen, D. Penrod and T. Shaffer, *The Mentally Retarded Citizen and the Law* (Free Press, New York, 1976), p. 655.

develop an abnormal pattern of behaviour where aggression is met by aggression. Retarded people are not innately more aggressive than non-retarded people, but may be unable to curb expression of such impulses, and grasp the significance of their actions.[79]

REFORMING THE LAW

There are a number of *competing* principles to be taken into account when ensuring that a mentally retarded offender has a fair trial encompassing consideration of the concept of fitness to undergo trial, as well as examination of the relevance of the various defences available. These principles include the following:

- the accused should not be subjected to trial unless he has the capacity to understand the charge, the court processes, and the essentials of participation in his own defence;
- persons who are not criminally responsible should not be dealt with as if they are criminally responsible;
- a person should not be detained in a mental institution unless he is mentally ill;
- an accused who is unfit to plead should be detained in custody until he is found fit to plead;
- society needs to be protected from accused persons who are violent or dangerous;
- an accused person who is unfit to plead should receive appropriate treatment and rehabilitation.

Simply stated, the conflict is between the views that no-one should be deprived of his liberty unless due process of law has been followed, but on the other hand, some people who have not committed crimes or are acquitted because of insanity should be deprived of their liberty because they are a danger to themselves or society; and that where there is some doubt about whether or not an accused is guilty, if he seems unfit to plead, he should be detained until he is fit to plead. The pendulum seems to be swinging towards the view that no person should be deprived of liberty unless due process of law has occurred, whether it be a criminal trial, or involuntary commitment under mental health legislation. As a consequence, various proposals have been put forward in an attempt to ensure that this is the overriding, although not necessarily the sole, principle.

79. B. S. Brown, T. F. Courtless and D. Silber, "Fantasy and Force: A Study of the Dynamics of the Mentally Retarded Offender", *J. Criminal Law*, 61, 1970, pp. 71-77.

The Butler Committee[80] recommends that the term "fitness to plead" be replaced by the phrase "under disability in relation to the trial". Where there is a prospect of early recovery the judge should be able to adjourn the trial for up to three months with a renewal of a month at a time for a maximum period of six months. If the defendant recovers within that period, the trial should be held immediately. A trial of the facts should occur as soon as disability has been found if there is no prospect of the defendant recovering (as in the situation of a mentally retarded defendant) or as soon during the six-month period as he may prove unresponsive to treatment. If, after a trial of the facts, a finding of not guilty cannot be returned, the jury should be directed that the defendant should be dealt with as a person under disability. The new verdict should not count as a conviction, nor should it be followed by punishment, although the court should have a discretion as to disposal, whilst excluding an overtly penal disposition. These recommendations have formed the basis for amendments to the New South Wales system of dealing with an accused who is unfit to plead (see above).

The Canadian Law Reform Commission[81] recommends that disposition of the unfit accused should not always be detention, and the least intrusive form of disposition should be required unless there are compelling reasons (for example, violence, dangerousness) for doing otherwise.

In Queensland, reforms to legislation concerning mentally ill offenders are being considered.[82] Although in draft form, it is proposed that determination of criminal responsibility and fitness to be tried and to plead be in some cases made by the Executive arm of government, and in other cases decided by a Supreme Court Tribunal consisting of a Supreme Court judge assisted by two psychiatrists.

> "[I]t would only be appropriate for the Supreme Court Tribunal to determine criminal responsibility if there was no substantial disagreement as to the facts of the case."[83]

80. Butler Report, note 65 above, pp. 158ff.
81. Law Reform Commission of Canada, *A Report to Parliament on Mental Disorder in the Criminal Process* (Information Canada, Ottawa, 1976), pp. 44ff.
82. G. Urquhart and P. K. Mulholland, *Proposed Queensland Legislation Concerning Mentally Ill Offenders,* Paper presented at Aust. Inst. of Criminology Seminar, June 1982; see also, Ch. 4, note 42.
83. Urquhart and Mulholland, ibid., p. 7.

Given the unreliability of police questioning, evidence, and confessions from mentally retarded suspects (see Chapters 3 and 4) a situation where there was no substantial disagreement as to the facts could be interpreted to mean an uncontested acceptance of police statements, leading to a Tribunal decision in a framework which denies natural justice. Whilst the Queensland proposals are still in draft form, it is essential that the provisions of the *Mental Health Act*[84] and the *Criminal Code*[85] be examined closely, to ensure that proposed revisions in the mental health area do not cut across existing provisions in the code, requiring fitness to be determined by jury.[86]

A difficulty which plagues attempts to reform the law is that mentally ill and mentally retarded offenders are not clearly differentiated—the term "mentally abnormal offender" is a catch-all phrase, the prevailing belief apparently being that one law can cover every mentally abnormal offender. This is not a desirable situation from the point of view of the retarded offender. There is little point in having regular reviews of competence enshrined in legislation unless there is the hope that the review process will lead to an alteration of status. It is not good enough to decide "No change—still mentally retarded—detain in custody and review again in six months to see if he is fit to plead/fit to be transferred to prison/fit to be released". The Butler Committee proposals and New South Wales amendments[87] go part of the way towards dealing with this dilemma, by suggesting a trial of facts in the absence of likelihood of improvement in mental condition.

Other reforms of the law must occur with respect to the questioning of, and admissibility of statements of retarded suspects. It has been established that other vulnerable groups, such as children and Aborigines, should have special protection during questioning. In the United Kingdom, the Judges' Rules[88] establish procedures to be followed in police questioning of mentally handicapped persons (see Chapter 3).

Courts have shown awareness of the issues associated with admissibility of statements by the mentally retarded accused, particularly with respect to whether the individual foresaw the consequences of his

84. *Mental Health Act* 1974 (Qld.).
85. *Criminal Code* 1899 (Qld.).
86. *Criminal Code* 1899 (Qld.), ss. 613 and 645.
87. Butler Report, note 65 above; N.S.W.: note 30 above.
88. S. Mitchell (ed.), *Archbold—Pleading, Evidence and Practice in Criminal Cases* (40th ed., Sweet and Maxwell, London, 1979), p. 902, "Interrogation of Mentally Handicapped Persons".

statement. Several cases have held that it is wrong to admit a confession where the accused was not possessed of his faculties to a sufficient extent that he could appreciate the consequences that would flow from the statement.[89] The Supreme Court of Ontario has found the confession of a mentally retarded juvenile to be inadmissible due to an aura of compulsion.[90]

The other major area of potential law reform with respect to retarded persons at trial concerns the defences which are available to them. Much has been written about the defects in the defences of insanity and diminished responsibility in particular.[91] The defence of diminished responsibility, where it exists, is one which (despite its flaws) is applicable to the retarded accused. The usefulness of the insanity defence for a retarded offender is a different matter, however. The prospect of indeterminate incarceration at the Governor's pleasure as a consequence of being acquitted on the ground of insanity is horrendous. It is even more horrendous given the fact that the retarded offender is not going to "recover"; that psychiatric care in a security patients' hospital is likely to be inappropriate, and to hinder rehabilitation; and furthermore, that in some States, the retarded Governor's pleasure detainee may not even be transferred from prison to a security patients' hospital because under mental health legislation, he may not be regarded as mentally ill.

Given the present state of the law, counsel representing a retarded offender would be acting in the best interests of the client if the issue of fitness were never raised, and the offender underwent trial (even if it meant admitting a statement or confession clearly beyond the capacity of the accused), pleaded "guilty" or "not guilty" as for a typical offender (given the waiting lists in criminal courts, a "guilty" plea may sometimes be preferable), was sentenced, and sent to gaol. This strategy is simple and straightforward, with perhaps the possibility of a miscarriage of justice every so often, but infinitely preferable to the Pandora's box of fitness to plead, insanity defence and indeterminate detention.

89. A. G. Henderson, "Mental Incapacity and the Admissibility of Statements", *Criminal Law Quarterly*, 1980-1981, 23, pp. 62-87 at 72.
90. *R. v. Yensen* (1961) 130 C.C.C. 353; 36 C.R. 339; 29 D.L.R. (2d) 314; [1961] O.R. 703.
91. See notes 40 and 62 above.

Chapter 6

Sentencing: Non-Custodial and Semi-Custodial Options

Punishment for a crime is carried out for a number of reasons–

- as retribution (or revenge) upon the criminal;
- as a means of subjecting the criminal to rehabilitation programmes so as to reduce the likelihood of re-offending;
- as protection for society, by removing dangerous criminals from the community; and
- as a deterrent to others who may be tempted to commit crimes.

The latter three reasons can be described as having a preventive function, whereas the first, administered as it is after the event, has no preventative flavour, but instead satisfies other societal needs. Van den Haag, psychoanalyst and social critic, quotes Sir James Fitzjames Stephen's statement:

> "the criminal law stands to the passion of revenge in much the same relationship as marriage to the sexual appetite."[1]

Marriage and the criminal law both act as institutions of social control for passions which might otherwise be gratified in socially destructive ways. If the criminal law fails to impose retribution when a wrong has been done, or imposes retribution which public opinion evaluates as insufficient in relation to the magnitude of the wrong, the public control falters and there is a tendency for people to "take the law into their own hands". A subtle process of conditioning of the expectations of both sides occurs, as forms of punishment evolve over time. Courts take into account factors such as public reaction, dangerousness of the

1. J. F. Stephen, *A History of the Criminal Law in England* (Macmillan, London, 1963), II, p. 80, quoted in E. Van den Haag, *Punishing Criminals* (Basic Books, New York, 1975), p. 12.

criminal, and the degree of unacceptability of the crime.[2] On the other hand, processes of social debate, often led by well-known jurists, alter society's attitudes so that less extreme forms of punishment disappear from our courtrooms and our statute books. In 1757, Damiens stabbed (not fatally) King Louis XV and drew a little royal blood. His punishment was as follows:

> "His legs were placed in iron 'boots', and at fifteen-minute intervals wedges were inserted and tightened . . . His hands were dipped in flaming sulfur, various parts of his body were pinched by red-hot tongs, molten lead and boiling oil were poured on the open wounds, and finally, to the delight of a crowd . . . Damiens was torn limb from limb by four giant horses whipped to a frenzy by his executioners. He remained alive until nothing but a bleeding torso was left."[3]

Seven years later, the first treatise against capital punishment was written:

> "It seems an absurdity that the laws, which are the expression of the public will, which abhor and which punish murder, should themselves commit one; and that, to deter citizens from private assassinations, they should themselves order a public murder."[4]

Thus, the pendulum swings away from cruel and inhumane punishment in one century or under one regime, then back towards toleration of new and horrendous punishments under regimes which exist today.

Five factors have been described as providing the main barriers to devising better ways of dealing with the criminal in our society:

1. Public apathy, which is only briefly transformed into interest, usually following a particularly brutal crime (either in the community, or in the prison);

2. See, for example, press comments on the attempt at pleading insanity by Reid and Luckman, two soldiers convicted of the brutal and sadistic murder of a 13-year-old boy; Sydney Morning Herald, "Soldier Knew Killing Wrong, Court Told", 23 November 1982, p. 9; Sydney Morning Herald, "Soldiers Had Killed Boy 'For Kicks', Court Told", 12 August 1982, p. 9. The concept of dangerousness, and the unreliability of attempts to predict dangerousness, is discussed in Chapter 8, "Into the Community", because of its relevance to legislation pertaining to release on parole.
3. A. Neier, *Crime and Punishment: A Radical Solution* (Stein and Day, New York 1976), p. 132.
4. C. Beccaria, *Essay on Crimes and Punishments* (1764), quoted in Neier, ibid., p. 132.

2. The inertia created by existing facilities;
3. Population increases, and increases in the crime rate which mean that the present criminal justice system has to run very hard to stay in the same place;
4. Reluctance to experiment because of fear of public reaction (for example, the publicity given to an escape);
5. The persistence of a punitive attitude on the part of the general public towards the criminal—an eye for an eye; let the punishment fit the crime; he should pay his debt to society—all aphorisms which sum up society's desire for revenge against the criminal who has "deliberately chosen" to break the rules.[5]

The notion of retribution as an aim of punishment has been soundly rejected by some correctional authorities,[6] even though public opinion still accepts it as valid. Retribution is not antithetical to rehabilitation, nor to prevention of crime or recidividism. Of all the philosophies or aims of punishment, however, that of rehabilitation is the most important to the "punishment" of the mentally retarded offender. The deterrent effect of punishment is probably meaningless to an offender who lacks the intellectual and cognitive ability to foresee the consequences of his action; and who cannot compare his own actions with those of similar offenders, and thus be deterred by the punishments meted out to them. Retribution is morally doubtful when the offender may not comprehend the wrongness of his actions; and, further, it could be argued that society is acting very unfairly in exacting retribution from mentally retarded offenders when it has already effectively pilloried that group through lack of provision of adequate services and resources. Retribution as a justification for the punishment of mentally retarded offenders can be placed in perspective by comparing this group with child offenders. Society does not revenge itself upon children who commit crimes, for a number of reasons, including their immaturity, lack of experience, lack of understanding of sophisticated moral codes, and lack of awareness of the nature and consequences of their action. The sense of responsibility for members of society who are not yet fully functioning adults tends to negate any retributive aim of sentencing,

5. G. M. Sykes, *Crime and Society* (2nd ed., Random House, New York, 1967), pp. 192ff.
6. R. J. Gerber and P. D. McAnany, "The Philosophy of Punishment", in N. Johnston, L. Savitz and M. E. Wolfgang (eds.), *The Sociology of Punishment and Correction* (John Wiley and Sons, New York, 1972), pp. 337-361.

and emphasises care, nurturance and rehabilitation One of the other aims of sentencing, namely, the protection of society, is certainly a relevant concept if the mentally retarded offender is violent or dangerous, but most are not (Examples given in this chapter and elsewhere, of cases involving mentally retarded offenders frequently involve violent offences, but this reflects the fact that only serious and unusual offences give rise to appeals, or law reports, rather than reflecting a propensity on the part of retarded people to commit violent crimes) Therefore, if rehabilitation remains as the major reason for punishing retarded offenders, it is essential to evaluate how effectively the current criminal justice system meets this objective In order to do this, one must examine sentencing of mentally retarded offenders, particularly with regard to

- characteristics of the mentally retarded offender which may influence the sentencing process,
- mitigating factors,
- sentencing options available to judges and magistrates (with respect to length of sentence, type of sentence, and place of detention), and
- whether sentencing is and should be affected by the person's disability

These areas will be discussed in this and the following chapter.

PRE-SENTENCE REPORTS

A pre-sentence report is one which is prepared at the direction of the court concerning an offender who has pleaded guilty or been found guilty In most instances, the report is prepared by probation officers at the request of the court, and is not mandatory for every offender,[7] as it is in England[8] If the offender is already under the supervision of the probation service, the service may initiate preparation of the

7 See, for example, *Crimes Act* 1900 (N SW), s 560A, *Offenders Probation and Parole Act* 1959-71 (Qld), s 6(1), *Offenders Probation Act* 1913-1971 (S A), s 6, *Probation of Offenders Act* 1973 (Tas), s 5, *Offenders Probation and Parole Act* 1963-1971 (WA), s 8, *Crimes Act* 1958 (Vic) s 507(6), and for juvenile offenders *Juvenile Courts Act* 1971-1972 (S A), s 41, *Children's Court Act* 1973 (Vic), s 11(1)(b), *Petty Sessions Ordinance* (A C T), ss 70, 84

8 *Powers of Criminal Courts Act* 1973 (U K), ss 19, 20, 45, *Criminal Justice Act* 1961 (U K), s 12(3)

report.[9] Nevertheless, it has been held that failure by an Australian court to exercise its power to obtain a pre-sentence report on a defendant may vitiate the exercise of its sentencing discretion.[10] The pre-sentence report includes details about the social background of the offender, and can include medical or psychiatric information.

Pre-sentence reports have been shown to have a significant effect upon sentencing decisions,[11] although they have received serious criticism because of the possibility of gross factual errors, and the inclusion of hearsay reports which would not otherwise be admissible. These problems are exacerbated where the offender is unable to gain access to the documents and challenge adverse statements.[12] Some safeguards against adverse and unfair or untrue statements have been established by case law—for example, that the offender should be given an opportunity to explain or deny any detrimental statements, and that in situations of conflict over the truth of a statement, proof of the allegation should be given in court and tested by cross-examination.[13]

Specific data about the offender have been suggested for inclusion in a pre-sentence report on a developmentally disabled individual:

> "Where the offender may be developmentally disabled, it is important that the study include certain kinds of information that a judge needs in order to make an intelligent sentencing decision. Two kinds of information should be included that might not otherwise be in a presentencing report. First, it is important to know whether the offender is in fact developmentally disabled and, if so, whether or not the disability may have been causally related to the commission of the offence. For example, it could be significant that the defendant's disability made him or her particularly subject to manipulation by others and thus a follower rather than a leader in the criminal enterprise. Or it could be significant that

9. D. Cameron, F. De Silva, G. Errey, M. Hyams and P. Torda, *An Insight into Criminal Behaviour in Women and the Role of a Probation Service in the Criminal Justice System, Particularly at the Point of Sentencing* (Paper presented at Women and the Law Seminar, Sydney University, 1978).
10. *Murray v. Harris,* Tasmanian Supreme Court, unreported, 8 July 1974, No. 33/1974; *R. v. Eckhardt* (1971) 1 S.A.S.R. 347 at 353.
11. R. G. Fox and B. M. O'Brien, "Fact-finding for Sentencers", in D. Chappell and P. Wilson (eds.), *The Australian Criminal Justice System* (2nd ed., Butterworths, Sydney, 1976), pp. 277-315.
12. Fox and O'Brien, ibid., p. 309.
13. Fox and O'Brien, ibid., pp. 310-311.

aggressive behaviour of the defendant was the result of frustration at an inability to find satisfactory employment. Second, it is important to know what treatment is available in alternative sentencing placements . . . Being subjected to an evaluation itself can be a real burden to a defendant, and this burden might not be justified where the offence and sanction are minor. Thus, one might place a limit on the situation in which such a report is required, and require it only where the offence is of a certain degree of seriousness or as a prerequisite to a penalty of imprisonment."[14]

A strong argument has been put (by a psychiatrist) justifying the place of the psychiatrist in the pre-sentence stage and in the sentencing process.[15] The parole officer preparing the report has a discretion whether to include psychiatric and other medical information. Clearly such information would be included where relevant. In New South Wales at least, no requests for medical or psychiatric histories are made without the written consent of the offender.[16] The role of the psychiatrist in the pre-sentencing or sentencing stage has been criticised, one ground for criticism being that the discipline of psychiatry has not reached the level of competence where it can predict human behaviour.[17] The Model Statute prepared in the United States for establishing standards and procedures for handling persons with a development disability who come into contact with the criminal justice system recommends pre-sentence evaluation by a multi-disciplinary team; and suggests that the report include information about the offender's mental, emotional, physical and educational condition, adaptive behaviour and social skills, details of the tests and assessments used, and an opinion regarding the habilitative services which would assist the defendent to become a self-reliant, law-abiding citizen.[18] Such information goes well beyond a typical psychiatric report.

While pre-sentence reports on mentally retarded offenders can be of value to the court in the sentencing decision, there remains the dif-

14. B. D. Sales, D. M. Powell, R. Van Duizend, et al., *Disabled Persons and the Law: State Legislative Issues* (Plenum Press, New York, 1982), p. 675.
15. A. A. Bartholomew, "Psychiatry and Sentencing", in Chappell and Wilson, note 11 above, pp. 316-336.
16. Cameron, et al., note 9 above.
17. Bartholomew, note 15 above, quoting the Ontario Association of Corrections and Criminology Working Group 5.
18. Sales, et al., note 14 above, pp. 759ff.

ficulty that the court may not recognise the need for a pre-sentence report if it fails to recognise the presence of retardation (particularly in the rapid courtroom process when a defendant pleads guilty). A further difficulty lies in obtaining a comprehensive evaluation of the offender. The responsibility lies with the parole officer to go beyond the narrow information provided by medical/psychiatric reports, and to obtain a multi-disciplinary evaluation of the offender.

It has been established that a judge must read a psychiatric report with a view to the public interest, that is, placing the responsibility of crime upon he who committed it, and being concerned with the imposition of an appropriate penalty, whereas this is inconsistent with the purpose of the psychiatric report which is directed towards the cure of the patient.[19]

THE OFFENDER'S MENTAL STATE

Research determining public opinion has demonstrated that most people feel that a retarded offender should receive a lighter sentence than a non-retarded offender regardless of the type of crime, because of the feeling that the retarded offender would have been coerced into committing the crime and also into confessing to it.[20] Whilst the court may not necessarily accept this reasoning, mental condition has been firmly established as a relevant factor in determining sentence. Specifically, a psychiatric abnormality falling short of insanity, where connected to the criminal conduct, is a relevant factor in determining sentence.[21] On the other hand, it was held in a leading case that a sentence imposed is to be in respect of and related to the offence committed–it is not to be used for the purpose of protecting the community, even when, by reason of mental illness, the prisoner is a menace when at large.[22] This means that a prisoner cannot be given a longer sentence than would be appropriate for the crime, because his mental condition makes him dangerous to society. The criminal law must impose criminal sanctions, and beyond its boundaries, mental health

19. *R. v. Lindeman* [1973] 1 N.Z.L.R. 97.
20. F. X. Gibbons, B. N. Gibbons and S. M. Kassin, "Reactions to the Criminal Behaviour of Mentally Retarded and Nonretarded Offenders", *Amer. J. Mental Deficiency*, 1981, 86(1), pp. 235-242.
21. *Channon v. R.* (1978) 20 A.L.R. 1.
22. *R. v. Gascoigne* [1964] Qd. R. 539.

authorities may intervene if the individual is a danger to himself or society. This principle has been upheld in subsequent cases.[23]

In one case,[24] a 43-year-old man was convicted of one count of buggery and three counts of indecent assaults on a male, and sentenced to eight years' imprisonment with a non-parole period of three years. The offences were committed with the same boy, who was aged 15 years and 9 months, and who was described by the judge as at least a casual, if not a regular, male prostitute. The boy was a willing participant, and it was alleged that he was paid by the accused for his participation in the offences. The psychiatric reports showed the accused to be a non-violent man, with a predisposition towards seeking sexual gratification from males. (He had a record of earlier involvement in sexual crimes of a similar nature involving males.) He was described as limited in both his intellectual development and his physical appearance, having a poorly repaired harelip. This resulted in a severe speech impairment which isolated him from adult company. His early life was characterised by a significant degree of emotional deprivation and hardship. The case went to the N.S.W. Court of Criminal Appeal after the appellant had already been in custody for 18 months. The Court found that the offences did not involve major criminality and that there was no evidence of detriment to the boy, and accordingly quashed the sentence. A shorter sentence was substituted, which resulted in the appellant's release within a few weeks of the appeal being heard, and he was placed on a good behaviour bond for a three-year period. The Court stated that the appellant plainly needed assistance, guidance and help in redirecting his life; and that these objectives would be met by placement under the guidance and supervision of the Probation and Parole Service, rather than by being detained in prison. This case illustrates many of the difficulties facing an intellectually impaired person who commits a relatively harmless and minor crime, yet can receive a lengthy prison sentence. It is to the credit of the Court that it recognised that the aim of rehabilitation should take preeminence in this case, and that rehabilitation might not be most effectively achieved by imprisonment.

Whilst it is inappropriate for the court to give a sentence which would be heavier than usual because of the defendant's disturbed mental condition, a sentence may be reduced on that ground, below that

23. *R. v. Nell* [1969] 2 N.S.W.R. 563; *R. v. Edghill* [1969] 2 N.S.W.R. 570.
24. *R. v. Balmer,* N.S.W. Court of Criminal Appeal, 27 August 1982, No. 325 of 1981 (unreported).

objectively appropriate, but not where the crime is one of serious violence and his condition is a continuing one so that if he remains at large he is potentially a continuing danger to himself and society.[25] An ex-pugilist with chronic brain damage producing a confusional state of mind was successful in having his sentence reduced from six to three years, on the grounds of his mental condition.[26] On the other hand, a young man who was described as having "a degree of mental subnormality, not to the point of amounting to retardation, but to the point where the appellant is clearly deficient as against other members of the community",[27] was not successful in an appeal against a sentence of 12 years with a non-parole period of four years five months, the charges being two indecent assaults, an assault with intent to rape, and indecent assault on a girl under 16, and setting fire to a dwelling and a motor car. The court stated that the offences were of a grave nature, and there was nothing to suggest that the appellant was not fully aware of the seriousness of his conduct.

It has been clearly established, therefore, that insanity or mental illness or abnormality short of legal insanity may be taken into account by the sentencing judge as a mitigating factor.[28]

DISMISSAL WITHOUT CONVICTION

Although not technically a sentence, the options of dismissing the proceedings without recording a conviction, or discharging the offender without inflicting any punishment are included here for the sake of completeness. In South Australia, the court is empowered to dismiss the proceedings without recording a conviction on the ground that the offence proved trifling.[29] A similar power occurs in the Commonwealth jurisidiction.[30]

In Queensland, when a person is summarily convicted of any offence relating to property, the justices may discharge the offender without inflicting any punishment, if he makes payment of damages to the person aggrieved.[31] When this occurs, the offender is not liable in any civil action arising out of the facts on which he was charged.

25. *R. v. Kocan* [1966] 2 N.S.W.R. 565.
26. *R. v. Smith* (1958) 75 W.N. (N.S.W.) 198.
27. *R. v. Halls,* N.S.W. Court of Criminal Appeal, 30 April 1982, No. 365 of 1981 (unreported).
28. *R. v. Anderson* [1981] V.R. 55; 2 A. Crim. R. 379.
29. *Justices Act* 1921-1972 (S.A.), s. 75(2)(a).
30. *Crimes Act* 1914 (Cth.), s. 19B.
31. *Criminal Code* 1899 (Qld.), s. 657.

In New South Wales, under s. 556A of the *Crimes Act* 1900, where any court thinks that a charge is proved but considers that the offender should not be punished, or only nominally punished, because of his character, antecedents, age, health or mental condition, or because of the trivial nature of the offence, or extenuating circumstances, the magistrate may without proceeding to a conviction, make an order either dismissing the charge or discharging the offender on a good behaviour bond.[32] Such a finding does not have the effect of a conviction, an important point because of the curtailment of some social privileges and civil liberties which can follow as a consequence of a conviction.[33] A separate provision of the *Crimes Act* allows a magistrate to dismiss a summary assault charge on the basis that the assault was justified, or so trifling as not to warrant punishment.[34]

Because the N.S.W. legislation uses the term "*any* court" (emphasis added), the section may be applied not only in Magistrates' Courts, but also in the District and Supreme Courts. The provisions are, therefore, significantly different from those in other jurisdictions (see above) which only pertain to summary offences. Whilst not specifically mentioning mental retardation, the section of the Act specifies that the court can have regard to the mental condition of the person charged. This section offers an opportunity for mentally retarded offenders to be dealt with in an appropriate way. Even if the court decides not to dismiss the charge completely, it may discharge the offender on the condition that he enter into a recognizance (commonly known as a "bond") to be of good behaviour. The bond "shall be conditioned upon and subject to such terms and conditions as the court shall order".[35] Presumably, in the case of a retarded offender, the court may order, for example, that he live in appropriate residential accommodation, or attend a suitable vocational training programme.

Legislation exists in other States which gives the court flexibility similar to s. 556A, but "mental condition" is not expressly mentioned, although other factors applicable to a retarded offender (such as

32. *Crimes Act* 1900 (N.S.W.) s.556A.
33. See M. Mobbs (ed.), *Legal Resources Book* (*N.S.W.*) (Redfern Legal Centre, Sydney, 1978), p. 16-71; see also F. Rinaldi, "Civil Consequences of Conviction in Australia", in Chappell and Wilson, note 11 above, pp. 355-363.
34. *Crimes Act* 1900 (N.S.W.), s. 498.
35. Ibid., s. 556A(1A).

personal history, health, antecedents, or extenuating circumstances) are mentioned.[36]

The mental condition of the offender as a factor which the court may take into account is mentioned in the legislation of other jurisdictions, including the Australian Capital Territory (in courts of petty sessions);[37] South Australia (courts of summary jurisdiction);[38] Tasmania (courts of summary jurisdiction)[39] and the Commonwealth (courts of summary jurisdiction).[40]

CONVICTION AND DISCHARGE WITHOUT PENALTY

An example of legislation which specifically mentions "mental condition", and which provides for the offender to be convicted but discharged without penalty is the South Australian *Offenders Probation Act*.[41]

CONDITIONAL DISCHARGE ON RECOGNIZANCE

Instead of dismissing the charge absolutely, or recording a conviction without imposing a penalty, a third and intermediate course of action may be open to the court, that is, to discharge the offender conditionally upon his entering a recognizance. This option is available in New South Wales, the Australian Capital Territory, the Northern Territory, South Australia, and the Commonwealth.[42] All jurisdictions except the Northern Territory specifically mention the mental condition of the offender as a reason for considering this option. In all except New South Wales, the relevant statutory provision applies only to courts of petty sessions or summary jurisdiction.

36. These include: *Magistrates Summary Proceedings Act* 1975 (Vic.), s. 80; *Crimes Act* 1958 (Vic.), s. 508; *Offenders Probation and Parole Act* 1980 (Qld.), s. 17; *Offenders Probation and Parole Act* 1963-1971 (W.A.), s. 9.
37. *Crimes Act* 1900 (N.S.W.), in its application to the A.C.T., as amended by the *Crimes Ordinance* 1971 (A.C.T.), s. 556A.
38. *Offenders Probation Act* 1913 (S.A.), s. 4(1), as amended by, inter alia, s. 6 of the *Offenders Probation Act Amendment Act* 1981 (S.A.).
39. *Probation of Offenders Act* 1973 (*No.* 2) (Tas.), s. 7(1)—courts of summary jurisdiction.
40. *Crimes Act* 1914 (Cth.), s. 19B.
41. *Offenders Probation Act* 1913 (S.A.), s. 4—as amended by, inter alia, s. 6 of the *Offenders Probation Act Amendment Act* 1981.
42. N.S.W: *Crimes Act* 1900, s. 556A(1)(b); A.C.T.: N.S.W. *Crimes Act* 1900, in its application to the A.C.T., as amended by the *Crimes Ordinance* 1971, s. 556A; N.T.: *Criminal Law (Conditional Release of Offenders) Act,* s. 4; S.A.: *Offenders Probation Act* 1913, s. 4 as amended by, inter alia, s. 6 of the *Offenders Probation Act Amendment Act* 1981; Cth.: *Crimes Act* 1914, s. 19B.

The legislation may specify conditions which the court *must* set, such as conditions that the offender be of good behaviour, and that he must appear before a court for conviction and sentence when called upon. In the Northern Territory, the legislation lists specific conditions which the court may set if it so chooses. These provisions give a very wide discretion to the court as to types of conditions which may be imposed upon an offender. Theoretically, they enable a court to impose conditions which would be very appropriate for a mentally retarded offender, for example, attendance at a sheltered workshop, or a special social skills programme. With this sentencing option and other similar options mentioned elsewhere in this chapter, where the problem of inappropriate disposition arises it is not because of legislative restrictions, but because of lack of knowledge on the part of the court and counsel as to suitable options; lack of existing appropriate programmes; or waiting lists for appropriate programmes.

DEFERRED SENTENCE

A further category of legislative provision enables the court to defer passing sentence upon a person and order his release upon his entering into a recognizance, with or without sureties, to be of good behaviour for a set period and to come up for sentence if called upon. The legislation usually refers to a deferred sentence (for example, New South Wales), or a suspended sentence (for example, Tasmania). Whilst not specifying that the court take into account external factors such as mental condition, the provisions allow the court to follow given options "if it thinks fit". Thus the discretion given to the courts as to when they may apply the legislation may be even wider than those options described above which specify mental condition and other factors. Certainly, this category of legislative provision could readily apply to the mentally retarded offender, and would enable courts to set a wide range of conditions which would be appropriate to such offenders. Such legislative provisions exist in all States except Victoria and South Australia.[43]

43. N.S.W.: *Crimes Act* 1900, s. 558; *Justices Act* 1902, s. 96; A.C.T.: N.S.W. *Crimes Act* 1900, in this application to the A.C.T., as amended by the *Crimes Ordinance* 1971, s. 556B; N.T.: *Criminal Law (Conditional Release of Offenders) Act*, s. 5; *Justices Act* s. 75; Tas.: *Criminal Code Act* 1924, s. 386; *Justices Act* 1959, s. 74C(1), both as amended by the *Parole Act* 1975, s. 34 and the Schedule; Qld.: *Criminal Code* 1899, ss. 19(7), 19(8), 19(9), 656, 657; W.A.: *Criminal Code* 1913, ss. 18(6), 18(7), 18(8); Cth.: *Crimes Act* 1914, s. 20.

PROBATION ORDER

A probation order is particularly appropriate for a mentally retarded offender, because it offers the opportunity of avoiding imprisonment. Other orders may be made in conjunction, which require a convicted person to perform unpaid work. Such orders may be known as community service orders, and will be discussed in a separate section below. In Western Australia, a probation order may require the offender to attend such educational programmes as the Director of Probation and Parole directs.[44]

In Western Australia and Queensland, where a person is convicted of an offence punishable by a term of imprisonment, and the court is of the opinion, after having regard to certain factors, that it is expedient to do so, the court may make a probation order for a certain period.[45] The requirement of a probation order may include specific conditions, including that the probationer submit himself to such medical, psychiatric or psychological treatment as the court considers necessary for securing the good conduct of the probationer and for preventing a repetition by him of the offence, or the commission of other offences.[46] Similar provisions exist in other States.[47]

In Western Australia, Tasmania, Victoria, South Australia and Queensland, an interesting legislative provision exists requiring the court to explain any order it makes in simple, ordinary language likely to be readily understood by the person who is subject to the order.[48] Also, the court shall not make such an order unless the offender is willing to comply with it. A court would be unwise to make a probation order unless it seemed that the offender would comply with its provisions, but under the Tasmanian *Probation of Offenders Act* 1973, for example, there is a legislative requirement necessitating the consent of the offender when a work order is imposed.

Statutory provisions granting power to order probation usually apply to summary courts[49] (with some exceptions—see above, "Deferred Sen-

44. *Offenders Probation and Parole Act* 1963-1971 (W.A.), s. 20B.
45. W.A.: Ibid., s. 9(1); Qld.: *Offenders Probation and Parole Act* 1980, s. 17(1).
46. W.A.: Ibid., s. 9(6)(a); Qld.: Ibid., s. 21(b)(ii).
47. E.g. *Crimes Act* 1958 (Vic.), s. 508(1) and (3).
48. In "simple language" in S.A. and Tas.; "ordinary language" in Vic. and Qld.; "language likely to be readily understood by the offender" in W.A.
49. I. L. Potas, *The Legal Basis of Probation* (Aust. Institute of Criminology, Canberra, 1976), pp. 16ff.

tence") There is a presumption that superior courts possess an inherent power to bind an offender over to come up for sentence when called upon, the development of the probation system having arisen out of this power Although there have been some challenges to the superior court's powers to do this, in the Australian context, the weight of opinion inclines to the view that this power does exist in Australian common law jurisdictions [50]

Victoria and Western Australia have provisions which require the courts to use probation orders in preference to bonds [51] It has been held that a court can exercise its power to order either course of action, but could not exercise power under both sections simultaneously [52] The fact that a court has to order probation in preference to a bond is curious because in many instances an unsupervised bond would be considered as a lesser sentence, and therefore one to be given priority Furthermore, it is less costly to the State if the offender does not need supervision, and certainly would provide some relief to over-worked probation services The statutory provisions giving priority to probation doubtless provide the reason why, after the fine, probation orders are one of the most frequently used non-custodial measures [53]

Pre-requisites for a probation order

The pre-requisites for making probation orders may be set out in detail in legislation, and commonly include the character, antecedents, age, health or mental condition of the offender, the trivial nature of the offence, or extenuating circumstances under which the offence was committed [54] In other instances (including superior courts) the criteria are predicated upon the phrase "if the court thinks fit to do so", permitting the courts a wide discretionary power If a case goes on appeal, and it is found that a court has not abused its discretion, the appellate court will not substitute its discretion, even where it would have exercised the discretion differently [55]

Courts have exercised their discretion to release offenders on probation on a number of grounds, including the medical situation of the

50 Ibid , p 9
51 Vic *Crimes Act* 1958, s 509, WA *Offenders Probation and Parole Act* 1963-1971, s 10
52 *R v Walker, Ex parte The Minister for Justice and Attorney-General* [1969] Qd R 39
53 Potas, note 49 above, p 1
54 E g *Offenders Probation Act* 1913-1971 (S A), s 4
55 *Cobiac v Liddy* (1969) 43 A L J R 257

offender and lack of appropriate medical care in gaol, an offender's mental illness aggravated by the birth of a baby, and an offender's domestic situation whereby if he were imprisoned, his wife and dependent children would be gravely affected.[56]

Length of probation

In New South Wales, Queensland, South Australia, Tasmania, and courts of summary jurisdiction exercising jurisdiction under Commonwealth legislation, courts are restricted to imposing a maximum term of probation of three years. In the Australian Capital Territory and the Northern Territory, the maximum term is three years where courts have not proceeded to a conviction. Where courts do proceed to a conviction, the period is that which is specified in the order to be of good behaviour. As there does not seem to be a limit on the length of time an offender may be ordered to be of good behaviour, theoretically, in these two jurisdictions, there is no maximum length of time for probation.[57] In Victoria and Western Australia the maximum period of probation is five years. Some States have a minimum period of probation–one year in both Victoria and Western Australia, and six months in Queensland.

Both excessively short and very long periods of probation give rise to associated difficulties. Very short periods may not give time for rehabilitation–or if the person is rehabilitated, there is the question of whether that person needed supervision to help him achieve that end. An unsupervised bond may have been more appropriate. Very long periods of probation have the drawback of increasing the caseload of the probation service. At the time of the trial it is difficult to predict what length of time will be necessary in which to achieve the desired aims of probation. It has been suggested that one way of overcoming this difficulty would be to have a fixed period of parole for all offenders, with the option of terminating the order should the parole service feel it is justified.[58] Most States have a provision for early termination of probation, by application to the court. The sentencing process is difficult enough as it is without introducing new problems–the problems presented by bureaucracies, human error, the different values of probation officers, and the possibility of non-assertive probationers being forgotten in the melee are all factors which it would be wise to avoid.

56. See cases described in Potas, note 49 above, pp. 28ff.
57. Potas, note 49 above, pp. 30ff.
58. N. Walker, *Sentencing in a Rational Society* (Pelican, 1972), p. 162.

Use and effectiveness of probation orders

The Australian Law Reform Commission,[59] and academic writers,[60] recommend that wherever possible, non-custodial sanctions should be used in preference to custodial ones. Whilst there is a dearth of information about the effects of various sentencing options,[61] it is fair to say that some of the advantages of probation include the opportunity for a mentally abnormal offender to receive appropriate treatment and attend appropriate programmes (which are unlikely to be available in gaol); the fact that the individual's life is less disrupted (an important consideration for the retarded person who takes a long time to adjust to a new environment with new routines); and the fact that the offender is not necessarily exposed to a criminal population. One of the major considerations from society's point of view is that probation is a less expensive form of sentencing than imprisonment. The personal implications for the retarded offender are significant:

> "Its psychological implications are important because it requires both the agreement of the offender, to enter into a bond, and manifests some degree of trust on the part of authority by releasing the offender back into the community at once ... Supervised probation is therefore indicated typically where the offender has not yet manifested a high degree of criminality but does show signs of personal inability to cope with stress."[62]

Thus, the already fragile self-image of a retarded person is not further abused under this sentencing option, for he can have a sense of responsibility for his own actions.

The Butler Committee does not report optimistically on the value of what it terms "psychiatric probation orders", that is, a probation order with a condition of psychiatric treatment.[63] Offenders under such

59. J. A. Scutt, *Probation as an Option for Sentencing* (Sentencing Research Paper No. 8, Australian Law Reform Commission, Sydney, 1979). See also Law Reform Commission, *Sentencing of Federal Officers* (Report No. 15, Aust. Govt. Printing Service, Canberra, 1980), pp. 222ff.
60. For examples I. L. Potas, *Just Deserts for the Mad* (Australian Institute of Criminology, A.C.T., 1982), pp. 141ff.
61. Criminal Law and Penal Methods Reform Commission of South Australia, "Semi and Non-Custodial Sentences", in Chappell and Wilson, note 11 above, pp. 364-388.
62. Ibid., p. 366.
63. *Report of the Committee on Mentally Abnormal Offenders* Cmnd. 6244 (H.M.S.O., London, 1975) (Chairman, Lord Butler), pp. 203ff.

orders are sometimes found to be not highly motivated towards co-operating with treatment; and the psychiatric treatment does not seem to decrease the likelihood of reconviction. Other studies are less pessimistic, particularly where a team approach is adopted by the professionals (including the probation officer) involved in the case. The Butler Report stresses the need for *all* probation officers to receive appropriate training in dealing with mentally abnormal offenders, because of the impracticality of having a special group of "psychiatric" probation officers, and the likelihood of many probationers exhibiting signs of mental illness at some stage. Although the medical model attendant upon psychiatric probation orders is inappropriate for retarded offenders, the general conclusions of the Butler Report are applicable to this latter category, specifically:

- closer co-operation of courts, health professionals and probation officers,
- careful pre-selection of offenders for the success of "treatment" orders, and
- the court obtaining a social inquiry report on the defendant as a matter of normal practice before instituting a "treatment" condition in a probation order.

In recognition of the difficulty of identifying retarded probationers, attempts have been made in some jurisdictions to develop screening tests which briefly and simply identify those probationers who are possibly retarded, so that they can be referred for more extensive testing and evaluation.[64] This sorting process is predicated on the assumption that unless the differences between retarded and typical offenders are recognised and dealt with, any rehabilitative endeavour is almost certainly doomed to failure. It has been found that a retarded person often cannot even comprehend probation conditions or counselling instructions which are imparted in a "normal" manner. At the most basic level, if a probationer cannot understand the conditions of his probation, he cannot begin to comply with them. It is also more difficult for a probation officer to establish and maintain a relationship with a retarded client, primarily because of communication difficulties, and the unrealistic expectations of the retarded person.[65]

64. A. Talent and R. E. Keldgord, "The Mentally Retarded Probationer", *Federal Probation,* September 1975, pp. 39-42.
65. Ibid., p. 41.

COMMUNITY SERVICE ORDERS

Whilst technically a form of probation, the community service order warrants separate mention as a sentencing option because of the specific nature of the order, and because of the publicity (both positive and negative) which such schemes have received.

As the Australian Law Reform Commission points out, the idea that offenders should be required to work as part of their punishment is not new.[66] Prison farms, road gangs, imprisonment with hard labour, female prisoners being used as household servants (as in early convict days), and the rehabilitative emphasis placed upon prison workshops are examples of the way in which work has been harnessed to punishment. One feature of community service orders which renders them different from some of the schemes mentioned above is that the offender remains in the general community. He continues a normal lifestyle, but is obliged to give up some leisure time to assist in community or charitable projects. Such work is not in contravention of the International *Covenant on Civil and Political Rights*[67] because the Covenant specifically excludes a sentence of hard labour made by a competent court, and any work or service required of a person under detention as a consequence of a lawful order of a court or during conditional release from detention. The individual's human rights are further safeguarded by the requirement of consent to a community service order (although there has been debate as to the voluntariness of consent in such instances).[68]

Since the first establishment in Australia of community service orders, in Tasmania in 1973, most other jurisdictions have followed suit or are contemplating doing so.[69] Limitations exist as to the amount of time which can be spent working in any one day, and the maximum length of time for which the penalty can be imposed. For example, under the Bill for the *Supervision of Offenders (Community Service Orders)*

66. Australian Law Reform Commission, note 59 above.
67. *United Nations Covenant on Civil and Political Rights* Article 8, 3(c)(i).
68. *R. v. Marquis* [1974] 2 All E.R. 1216.
69. Australian Law Reform Commission, note 59 above, p. 241—This Report indicates that all Australian jurisdictions had established or were intending to establish community service orders, with the exception of Queensland—Queensland has now established a scheme, and is evaluating it; see S. Leivesley, *Community Service Orders: Issues in Evaluation* (*Qld.*) (Paper presented at Aust. Institute of Criminology Research Seminar, Canberra, February 1983).

Ordinance 1977 (A.C.T.) a limit of 26 days of eight hours each was proposed. Limits are also typically placed upon the distance to be travelled by the offender to the work place. Sometimes a community service order operates in conjunction with a sentence of imprisonment at an attendance centre. In Victoria, a court may order that a sentence of imprisonment between one and 12 months be served at an attendance centre,[70] of which six exist in Victoria.[71] Under the system, offenders spend up to 18 hours a week comprising two week nights and all day Saturday at the Centre. The normal procedure is for offenders to engage in various courses on the two week nights and in community service projects on Saturday. A similar provision exists in Northern Territory legislation.[72]

Advantages of community service orders

A number of advantages of community service orders have been cited,[73] one being that community based corrections are less costly than custodial sentences. In Victoria in October 1982 it reportedly cost $13,000 a year to keep a prisoner in gaol, compared with $2,500 a year for offenders going to an Attendance Centre.[74] Furthermore, offenders continue to pay taxes and contribute to the support of their families, so that dependents are not forced to seek welfare benefits. Offenders are able to maintain their normal lifestyle, retaining family and friendship support systems, and their employment. They are less likely to suffer psychological damage because they are able to maintain their self-esteem and may even feel an increased sense of personal achievement. Offenders may look forward to the opportunity to contribute to the community.

It appears that the recidivism rate amongst community service offenders is less than that for imprisoned offenders, although the selection process and culling out of offenders convicted of violent, drug-related or sex offences may boost the rehabilitation rate.[75] English data do not support a lower recidivism rate.[76] In New South Wales, in nearly

70. *Crimes Act* 1958 (Vic.), s. 476.
71. "New Attendance Centre", *Reporter*, December 1982, 4(2), pp. 3-4.
72. *Criminal Law (Conditional Release of Offenders) Act* 1980 (N.T.), Part IV.
73. J. A. Scutt, *Community Work Orders as an Option for Sentencing* (Sentencing Research Paper No. 4, Australian Law Reform Commission, Sydney, 1979), pp. 10ff.
74. See note 71 above.
75. See note 71 above.
76. Scutt, note 73 above, p. 13.

three years of operation, only 9 per cent of orders were breached or revoked.[77]

Another important advantage of community service orders is the fact that the offender is not necessarily in continual contact with a "criminal" population, and does not suffer the effects of institutionalisation, with the possibility of modelling anti-social behaviours.

In some States (for example, New South Wales and Western Australia) community service orders are available for juvenile offenders.

Effectiveness of community service orders

The evidence as to the effectiveness of community service orders is equivocal, and further research in the area is needed. Nevertheless this sentencing option appears to provide a number of important benefits for the retarded offender. In most jurisdictions, appropriate institutional programmes are not available for retarded offenders in corrective services facilities. A "special" prison for retarded young male offenders in New South Wales, the Yawarra institution (jointly administered by Corrective Services, and Youth and Community Services) has been closed. Leaving aside the debate as to the desirability of integrated or specialised prison systems for retarded offenders, the most forceful argument for the use of community service orders lies in the fact that appropriate special education, psychological, social skills and vocational training programmes are more likely to be found in the community than in the prison system. The service order also provides the opportunity for maintenance or boosting of self-esteem, for preservation of normal social skills rather than the acquisition of a set of "institutional" habits and routines, and modelling upon typical, non-criminal individuals rather than exposure to anti-social or criminal behaviour.

The success of service orders depends very much upon matching the retarded offender with a suitable training or work programme, the extent of supervision, and the availability of appropriate community resources. Most authorities emphasise that service orders should not replace other non-custodial sentences, such as fines, probation with or without supervision, or bonds.[78] Given the tendency of the retarded person towards concrete operational thought, the service order should, however, be considered as having considerable advantages over these

77. A. Gorta, R. Rutherford, M. Miner and N. Mills, *Community Service Orders in N.S.W.: An Evaluation* (Paper presented at Aust. Institute of Criminology Research Seminar, February 1983).
78. Scutt, note 73 above; Australian Law Reform Commission, note 59 above.

other options. The retarded offender is able to measure his punishment in a personal and meaningful way, whereas a fine (particularly if paid out of a bank account or trust fund) may mean nothing. The work may take the form of restitution, if not to a specific individual or property, then at least to a similar category—a basic form of "making the punishment fit the crime". The offender may have cause to consider the specific consequences of his crime.

HOSPITAL AND GUARDIANSHIP ORDERS

A hospital order or a guardianship order may be made by a court in addition to or in lieu of exercising any other powers it has in respect of a person convicted of an offence punishable by imprisonment. A hospital order authorises the detention of the person in a specified institution; and a guardianship order places the individual under the guardianship of a Guardianship Board (if one exists) or the person named in the order.

In the United Kingdom, a number of conditions must be satisfied before a hospital order can be made.[79] The offender must have been convicted of an offence; the court must be satisfied on the evidence of two medical practitioners that the offender is suffering from mental illness, psychopathic disorder, subnormality or severe subnormality; the court must be satisfied that the nature or degree of the mental disorder is such as to warrant detention of the person in a hospital for medical treatment; the court must be satisfied that this is the most suitable method of disposing of the case; and the hospital must be willing to accept the offender. The Butler Report recommends that where the hospital order is proposed for a subnormal offender, one of the medical practitioners should be a specialist in subnormality.[80] Under the same section of the United Kingdom Act, a mentally disordered offender may be placed under a guardianship order, according to the conditions outlined above, provided a local authority or other guardian is prepared to receive him. Unlike a probation order, a guardianship order has no sanction (such as, return to the court for sentencing) if the order is breached. It can be used in cases where the offender does not consent. The limitations placed on the person are more restrictive than those entailed in a probation order because the guardian has the powers exercisable by a parent over a child of less than 14 years of age. For example,

79. *Mental Health Act* 1959 (U.K.), s. 60.
80. Butler Report, note 63 above, p. 187.

a person under guardianship cannot make a valid legal contract The Butler Committee concluded that such orders were particularly suitable for mentally handicapped offenders, enabling them to reside in the community rather than in hospital, and receive help in managing their affairs The Committee felt his valuable form of disposal should be more frequently utilised [81]

Tasmania has a system of both hospital and guardianship orders, and New South Wales has guardianship orders, similar to those in the United Kingdom [82] A court may make such an order either before or after convicting the person A Supreme Court may make the order in addition to or in lieu of exercising any other powers it has in respect of a person convicted of an offence punishable with imprisonment, whereas a court of petty session which makes such an order shall not pass a sentence of imprisonment, or use its powers of probation Certain requirements must be met, which parallel those in the United Kingdom, mentioned above

Hospital orders or some form of hospital order exist in Victoria, Queensland, South Australia, Tasmania, Western Australia and the Northern Territory [83] Whilst the conditions and requirements of hospital orders vary between jurisdictions, some being more draconian than others,[84] the attitude of the judiciary is that the hospital order is a valuable sentencing option because it allows incarceration of an offender in a hospital or treatment environment rather than a prison [85]

Benign and helpful though the objectives of hospital orders may appear, strong reservations must be expressed

> "To assume that a hospital order is not punitive is to misconceive the object of this sanction It shares with imprisonment the con-

81 Butler Report, note 63 above, Ch 15, "Guardianship Orders"

82 *Mental Health Act* 1963 (Tas), s 4(1A) defines hospital and guardianship orders, ss 49(1) and (2) provide for a court to make such orders, either before or after conviction, *Community Welfare Act* 1982 (NSW), s 264(1), see also s 273 where the court may recommend to the Minister for Youth and Community Services that control of the person be transferred to the Minister for Corrective Services, who can order transfer of the person from a prison to a training centre

83 Vic *Mental Health Act* 1959, s 51, *Alcohol and Drug Dependent Persons Act* 1968, s 13, Qld *Mental Health Act* 1974, ss 32-39 , S A *Criminal Law Consolidation Act* 1935-1978, s 77a, Tas see note 82 above, and *Alcohol and Drug Dependency Act* 1968, s 30(1), WA *Convicted Inebriates Rehabilitation Act* 1963, N T *Mental Health Act* 1979, ss 24, 25

84 Potas, note 60 above, pp 155ff

85 Australian Law Reform Commission, note 59 above, Appendix B

> sequences of depriving an individual of his or her liberty. Like imprisonment it affords protection to the community by separating inmates from normal societal intercourse. Unlike imprisonment however, the aim of this disposition is to provide remedial action in the form of medical or psychiatric treatment ... It is ... imperative that adequate provision be made for ensuring that the potential for abuse of such a sanction is minimised."[86]

It is vital that use of hospital orders, and the administration of treatment or medication be strictly controlled, monitored and reviewed, and that due process of law be observed at every step which may infringe upon the individual's liberty. Mechanisms for review and release should be designed to ensure that while the punitive component of the sentence is observed, it does not exceed the punishment which the offender would have received under any other sentencing option.

Guardianship orders are less open to abuse because the individual is in the community, where normal checks and balances operate against inhumane, illegal, or unnecessary interference with an individual's personal integrity. Nevertheless, the severe curtailment of civil liberties which occurs under a guardianship order necessitates stringent supervisory and review mechanisms. A guardianship order is in many ways a more desirable option than a hospital order for a retarded offender. It avoids the voluntary aspects of probation or community service orders, enabling the court to impose certain treatment, supervision and residential conditions. On the other hand, the retarded offender need not be incarcerated in a psychiatric institution, which may prove a damaging and retrograde step.[87]

SUMMARY AND CONCLUSIONS

It has been established at common law that an offender's mental condition must be taken into account when passing sentence. Pre-sentence reports are a valuable aid to the court in determining a suitable sentence; they can prove even more valuable if they are mandatory for all offenders (not just those selected on the basis of an unusual or noticeable characteristics), and if the information pertaining to disabled

86. Potas, note 60 above, pp. 13-14.
87. For further discussion on hospitalisation of mentally retarded people, see S. C. Hayes and R. Hayes, *Mental Retardation: Law, Policy and Administration* (Law Book Co. Ltd., Sydney, 1982), Ch. 3—"Issues in the Medical Care of Retarded People", and Ch. 5—"Living and Working".

offenders goes beyond psychiatric and medical evaluation to encompass multi-disciplinary evaluation, and opinions regarding the habilitative services which would be of most value and benefit to the offender.

A wide variety of options are available to the court when dealing with a mentally retarded offender. If the offence is trivial and the mental condition or other characteristics of the offender are such that the court is of the opinion that the offender should not be punished, the magistrate may dismiss the charge without recording a conviction. A range of sentences exist which involve a conviction being recorded, but without the offender being imprisoned. The offender may be bound over on recognizance, with or without certain conditions being imposed; or the court may defer sentence, or make a probation order, or community service order. In most jurisdictions, the hospital order exists as an option, and in Tasmania and New South Wales, a court may make a guardianship order. Any of these options may prove suitable for a retarded offender under certain circumstances. There is no need for the provision of a special "defective offender" category of sentence. To the greatest extent possible, mentally retarded offenders should be handled in the same manner as non-retarded offenders. They should neither be excused nor receive extra punishment or deprivation of liberty for the crimes which they have committed.

Whilst the sentencing options are comprehensive enough to provide for the special needs of retarded offenders, the problem of inappropriate disposition may arise not because of legislative restrictions, but because of the court or counsel not recognising that the offender is retarded, or not being aware of suitable options; because the specialised habilitative services do not exist in correction or community services; or because of delays in the retarded offender entering suitable programmes, and likelihood of further deterioration of mental condition or social and adaptive skills occurring.

The American Bar Association's Commission on the Mentally Disabled, in developing a model criminal code for adult offenders, states:

> "In sentencing a defendant who is developmentally disabled, the court shall impose the least restrictive alternative consistent with the needs of the defendant, and of public safety."[88]

Adoption of such a policy places a responsibility upon corrective services to make available the personnel and programmes necessary for the habilitation and rehabilitation of retarded offenders.

88. Sales, et al., note 14 above, p. 760.

Chapter 7

Sentencing—Custodial Options

The aims of sentencing (which have been extensively discussed in previous chapters) include retribution, deterrence, rehabilitation and punishment. The rehabilitation goal tends to be de-emphasised and the other goals highlighted when a custodial sentencing option is employed, whether the offender is detained in a prison, prison farm or security patients' hospital.

> "The social control functions of punishment include crime prevention, sustaining the morale of conformists, and the rehabilitation of offenders. All of the empirical evidence is not in, but it is quite possible that punishment contributes to some of these and interferes with others. Suppose, for example, that punishment is necessary for crime prevention and to maintain the morale of conformists but is generally an obstacle to the rehabilitation of offenders. Since the proportion of deviants is small in any viable system as compared with the proportion of conformists, the failure to rehabilitate them will not jeopardize the social order. Therefore, under these assumptions, sociological counsel would favor the continued employment of punishment."[1]

This rather pessimistic view sums up the widely held attitude that imprisonment is justified even if it serves no rehabilitative function, indeed, even if it is counter-productive to rehabilitation.

The failure of corrective institutions to reduce crime rates is incontestable.[2] Not only do the institutions fail, they do so in a spectacularly costly way, irrespective of whether the cost is measured in economic, social or psychological terms.[3] Because prison does not function as a deterrent or rehabilitative agency, its primary function of punishment

1. J. Toby, "Is Punishment Necessary?" in N. Johnston, L. Savitz and M. E. Wolfgang, *The Sociology of Punishment and Correction* (Wiley, N.Y., 1970), pp. 362-369 at 368.
2. Law Reform Commission of Canada, *Imprisonment and Release,* W. P. 11, 1975, p. 10.
3. Ibid.

should only be imposed as a last resort,[4] when no other sanction can achieve the desired objectives. Despite the obvious drawbacks of prisons, they are still considered "essential to the operations of criminal justice".[5]

The prison environment, its impact and effects upon inmates, particularly those who are mentally retarded, will be discussed in more detail later in this chapter. First, the use of imprisonment, the legal guidelines for imprisonment, and the special category of indeterminate detention will be examined.

THE USE OF IMPRISONMENT

Imprisonment is far from being the most widely used sentence in Australian courts. Although there is a dearth of data, that which is available shows that about 6 per cent of convicted offenders in magistrates' courts in New South Wales received a prison sentence.[6] (This figure may not be representative of sentencing for more serious offences.) There may well be differences in sentencing between the States, because rates of daily average numbers of persons in prison as a proportion of the general population reveal that the Northern Territory has an imprisonment rate more than eight times greater than the Australian Capital Territory, and twice as high as the next highest rate, which occurs in Western Australia.[7] Overall, there was a trend towards the declining use of imprisonment as a sanction until 1977, but it now seems to be rising.[8]

Data indicate that female offenders receive more lenient sentences than males. Assuming that the rate of conviction of males and females brought to trial is roughly comparable, it is noteworthy that while 12 per cent of persons proceeded against for serious crimes are female, they formed only 2.6 per cent of the overall prison population in 1973-1974, and now the proportion is 3.4 per cent of prison population.[9] Western

4. Law Reform Commission, *Sentencing of Federal Offenders* (Report No. 15, Aust. Govt. Printing Service, Canberra, 1980) pp. 105 ff.
5. D. Biles, "Prisons and Prisoners in Australia", in D. Chappell and P. Wilson, *The Australian Criminal Justice System* (Butterworths, Sydney, 1977), pp. 337-354 at 337.
6. Law Reform Commission, note 4 above.
7. Biles, note 5 above, pp. 347ff.
8. Biles, note 5 above, p.348; and Law Reform Commission, note 4 above, p. 109.
9. J. Walker and D. Biles, *Australian Prisoners 1982* (Australian Institute of Criminology, Canberra, 1983), p. 16.

Australia has the highest proportion of female prisoners (5.6 per cent in 1973-1974), which may reflect the high numbers of Aborigines of both sexes in the community and the prison population.[10]

The length of imprisonment, even for offences dealt with by higher courts, is usually not more than five years. Nearly two thirds of prisoners held in Australian gaols at 30 June 1982 were serving sentences of less than five years.[11] Only 12.5 per cent of offenders sentenced in higher courts in New South Wales in 1977 received a sentence of five years or longer, mainly for offences against the person (other than assault), or extortion and robbery.[12] In the Australian Capital Territory almost two thirds of all prison sentences imposed by higher and lower courts were for a period of less than six months.[13] Overall, the Australian use of imprisonment is low when compared with the other common law jurisdictions, such as the United States of America and Canada, but higher than some European countries, such as the Netherlands, Denmark and Sweden.[14] Referring to the overall rate of imprisonment in Australia, however, disguises the important differences between States. The Australian Capital Territory rate is similar to that occurring in the Netherlands, whereas the rate in other States is much higher. Furthermore, there are marked differences between rates of imprisonment in various European countries, with the rates in France and Italy more closely parallelling the Australian rate.

Explaining the disparities in imprisonment rates between different jurisdictions is not an easy task. Explanatory hypotheses include

- differences in prevalence of crime,
- differences in the effectiveness of various police forces,
- use of other non-custodial sanctions,
- different prison populations, for example, more recidivists, or Aborigines in some States' populations,
- use of mental hospital beds as an alternative disposition,
- social and geographical isolation leading to more vigorous reaction to deviance,
- variation in rates of serious offences,
- level of concern for public safety, and

10. Biles, note 5 above, pp. 352ff.
11. Walker and Biles, note 9 above, p. 42.
12. Law Reform Commission, note 4 above, pp. 107-108.
13. Ibid.
14. Law Reform Commission, note 4 above, pp. 109-110, quoting D. Biles, "Crime and the Use of Prisons", *Federal Probation,* 1979, 43, p. 39.

- differing judicial attitudes, reflecting both the personal values of judges and community attitudes towards imprisonment as a sanction.[15]

No definitive explanations for the disparities have yet been identified. The likelihood is that multiple variables contribute to the disparities, and this is an area in which further research would be useful.

About one in four magistrates and judges indicate that they favour more use of imprisonment generally.[16] Magistrates tend to be more frequently in favour of this. Even in jurisdictions which have already high imprisonment rates, such as Western Australia, a considerable proportion of judicial officers favour increased imprisonment rates.

Guidelines for imprisonment

Whilst no legislative guidelines for the imposition of sentences of imprisonment exist in Australian jurisdictions, other common law countries (for example, the United Kingdom and New Zealand) have such guidelines.[17]

The guidelines in the United Kingdom specify that the court must be of the opinion that no other method is appropriate for dealing with the offender, and in making this decision the court shall obtain information about the circumstances, and take into account information about the offender's character, and physical and mental condition. In magistrates' courts, the reason for making the decision for imprisonment must be stated, specified in the warrant of commitment and entered into the register.

The Law Reform Commission of Canada has formulated principles concerning imprisonment,[18] the important points in this context being that the presumption that rehabilitation would be best effected in custody does not justify resort to imprisonment, but once sentenced, an offender should be entitled to the benefit of social and health services similar to those available to a free citizen. The Australian Law Reform Commission is in favour of legislative guidelines for the use of

15. See, generally, Biles, note 5 above; and Law Reform Commission, note 4 above, p. 111.
16. Law Reform Commission, note 4 above, p. 127.
17. *Powers of Criminal Courts Act* 1973 (U.K.), s. 20; also *Criminal Justice Act* 1972 (U.K.); *First Offenders Act* 1958 (U.K.); *Criminal Justice Act* 1954 (N.Z.), s. 13B.
18. Law Reform Commission of Canada, *A Report on Dispositions and Sentences in the Criminal Process, Guidelines,* p. 26.

imprisonment, one of its reasons being that present forms of guidance for sentencing, including statutory penalties prescribed by legislatures, have resulted in a confused situation.[19] The Commission found vast inconsistencies in maximum periods of imprisonment prescribed by Commonwealth Acts for similar conduct. The length of imprisonment compared to the alternative sentence of a fine also reveals startling anomalies—some statutes specify three months' imprisonment as an alternative to a fine of $80, whereas in others the fine is $2,000 in lieu of three months' imprisonment.[20]

The law mostly fixes a maximum penalty of imprisonment, and a judge prescribes the penalty he thinks fit, up to the maximum. The decisions which have to be made by the judge are:

- if the law permits a non-custodial sentence, or imposition of no penalty, should these options be taken in this case?
- if not, how severe should the sentence of imprisonment be?

Factors which are taken into account include

- the gravity of the crime,
- the motive,
- premeditation or deliberation,
- provocation,
- the state of mind of the offender,
- the offender's age, physical condition, and background,
- the offender's criminal record,
- the existing facilities of the penal institution to which he may be sent—and
- the frequency of and public reaction to the crime.[21]

In summary, while the option of imprisonment is established by legislative provisions, the final decision is taken by the judge on the basis of information he has received during court proceedings. The fact that an offender is mentally retarded may operate as a mitigating factor, inclining the court to choose a non-custodial option, or a semi-custodial option (such as a hospital order), or periodic detention in

19. Law Reform Commission, note 4 above, p. 131.
20. Law Reform Commission, note 4 above, Appendix E.
21. L. Herron, Chairman's Opening Address: Factors and Considerations affecting the carrying out of a Judge's Sentencing Responsibilities, *Proceedings of the Institute of Criminology* (University of Sydney, Report No. 1, 1967).

prison[22] rather than incarceration in prison for a prolonged and continuous period. On the other hand, if the retarded offender has committed previous offences and has been in the hands of welfare and probation services to no apparent avail, the court may decide to use the ultimate sanction of imprisonment despite any future detrimental effects it may have on the retarded offender. The court may decide that "something *must* be done". A third alternative is that the court opts for imprisonment in the absence of information that the offender is retarded, unaware that imprisonment may have a grave effect upon him because of the presence of retardation, more grave than in the case of a non-retarded offender (see below for discussion of effects of imprisonment).

INDETERMINATE SENTENCES

Indeterminate sentences of imprisonment and parole form part of an individualised approach to punishment, which takes into account the needs (particularly psychiatric treatment needs) of offenders. In some instances a life sentence may be regarded as the equivalent of an indeterminate sentence when it allows for flexibility with regard to release which in a suitable case may be granted earlier than would be possible under the determinate sentence which would otherwise have been imposed for the offence.[23] In some legislation, provision is made for the imposition of indeterminate sentences, not necessarily life sentences.[24]

The reasoning behind indeterminate sentencing encompasses both extremes of the rehabilitation-punishment dichotomy. They may be imposed in the belief that they assist the treatment or training of individuals whilst in prison, a compassionate objective. Or they may be imposed because they are the heaviest penalty available to the court. Indeterminate sentences have been criticised on the grounds that the uncertainty created tends to militate against effective treatment,[25] that the criteria for release are unclear, and that the circumstances of the

22. See, for example, *Periodic Detention of Prisoners Act* 1981 (N.S.W.); and the *Periodic Detention of Prisoners (Domestic Violence) Amendment Act* 1982 (N.S.W.). Queensland also has an option for periodic detention. See *Weekend Detention Act* 1970 (Qld.)
23. *Report of the Committee on Mentally Abnorml Offenders* (Chairman, Lord Butler) Cmnd. 6244 (HMSO London, 1975), p. 71.
24. E.g. *Criminal Code* 1913 (W.A.), ss. 19(6a)(a), 662 and 661.
25. B. McInnes and W. Bennett, "Indeterminate Sentences in Western Australia", (1981) 6 *Legal Service Bulletin* 63, p. 99.

crime, not simply the apparent rehabilitation of the prisoner, affect the decision as to whether the person has been detained for a sufficiently long period of time.[26]

Prisoners serving indeterminate sentences are usually those who are regarded as dangerous and who present a history of mental disorder, but for some reason are not involuntarily admitted to a mental hospital; or those who are regarded as habitual criminals.[27] The protection of the public is viewed as a most important consideration.[28]

In effect, indeterminate sentences are similar to detention during the Governor's pleasure (see below). The Butler Report proposes that many of the disadvantages can be removed if the sentence is subject to obligatory review at regular intervals (for example, two years).[29] The review would enable account to be taken of factors such as susceptibility to treatment, changes in circumstances which precipitated the crime, and increased maturity. When the offender is released he should be under compulsory supervision and subject to regular review.

As things stand, mentally retarded offenders could readily be recipients of indeterminate sentences, particularly as the nature of their mental abnormality is such that they may not appropriately be dealt with under mental health legislation, or may be specifically excluded from treatment under mental health legislation, as is the situation in Western Australia. It is undesirable that such sentences be imposed upon retarded offenders unless there is substantial probability of commission of a further offence involving grave harm to another person. If indeterminate sentences are imposed rarely and only as a last resort on non-retarded offenders, the court should use them even more sparingly for retarded offenders because of the probability that the treatment and/or training available in reformatories or prisons is unlikely to effect the rehabilitative aim of the sentence. Futhermore, it has been argued that preventive detention is an overreach of the criminal law, treatment being the function of health or welfare agencies.[30]

> "If the protection of society requires [the offender] to be confined when his imprisonment ends, because he is dangerous, it should

26. Butler Report, note 23 above.
27. As provided for in the *Criminal Code* 1899 (Qld.), s. 659A.
28. *R. v. Hawkins* [1949] Q.W.N. 34.
29. Butler Report, note 23, above, p. 72.
30. I. Potas, "Sentencing the Mentally Disordered Offender in Australia", *Int. J. Law Psychiatry,* 1981, 4. pp. 107-122.

only be done (if it can be done lawfully) by the methods outside the criminal justice system."[31]

DETENTION AT THE GOVERNOR'S PLEASURE

Some discussion of detention at the Governor's pleasure has taken place earlier (Chapter 3). An expanded examination of this sentencing option is presented here.

In most Australian jurisdictions, detentions at the Governor's pleasure (or equivalent terminology, see below) are made, if at all, where the accused has been found unfit to plead, unfit to be tried, or not guilty on the ground of insanity. An order for detention at the Governor's pleasure is unlikely to be made in respect of an offender who has been found guilty of the charge. An exception is found in Western Australia, where the *Criminal Code* provides that the court may make certain orders after having regard to a number of external factors (including the mental condition of the offender)–one of the orders the court may make is sentencing the offender to be committed forthwith to a prison, and to be detained during the Governor's pleasure.[32] Similarly, a sentence of detention at the Governor's pleasure after the accused has been found guilty may occur through the "habitual criminal" provisions of the Queensland *Criminal Code*,[33] and in New South Wales, under the *Mental Defectives (Convicted Persons) Act*[34] (see further below).

An important facet of statutory provisions relating to Governor's pleasure is that this option may be used by the court even when the offender originally pleaded not guilty, unlike general pleas in mitigation, which may only be raised when the accused pleads guilty.

The terminology varies between States, as follows:

Governor's pleasure

New South Wales: *Mental Health Act* 1958, s. 23(3); *Mental Defectives (Convicted Persons) Act* 1939, s. 4(3).

Victoria: *Crimes Act* 1958, ss. 393, 420.

South Australia: *Criminal Law Consolidation Act* 1935, ss. 292(2); 293(1); 293(2).

Western Australia: *Criminal Code* 1913, ss. 18; 19(6a); 653; 662.

31. *Veen v. R.* (1979) 53 A.L.J.R. 305 at 320, per Murphy J.
32. *Criminal Code* 1913 (W.A.), s. 662 as amended by, inter alia, s. 6 of the *Acts Amendment (Prisons) Act* 1981 (W.A.)
33. See note 27 above.
34. *Mental Defectives (Convicted Persons) Act* 1939 (N.S.W.).

Tasmania: *Criminal Code* 1924, s. 392(2).
Australian Capital Territory: *Lunacy Act* 1898 of New South Wales, s. 65(3).

His or Her Majesty's pleasure

South Australia: *Criminal Law Consolidation Act* 1935, ss. 77a(3); 77a(4).
Queensland: *Criminal Code* 1899, s. 647; *Criminal Law Amendment Act* 1945, ss. 18(3)(a); 18(6)(a); 18(6)(b); 18(6)(c); 18(6)(d).

Administrator's pleasure

Northern Territory: *Criminal Code* 1983, s. 382.

Governor-General's pleasure

Commonwealth: *Crimes Act* 1914-66, s. 20B.

There are also legislative differences with respect to the place of detention. In most jurisdictions, a rather vague statement is found. For example, in Western Australia and Queensland, it is a "place of confinement", in Victoria "a place designated", in South Australia "a place thought fit", and under Commonwealth legislation "a place specified". Northern Territory legislation refers to "a hospital, prison or other place", and the A.C.T. legislation refers to "a gaol, or other place of confinement". In New South Wales, the place of detention is "a prison", and in order to transfer the offender to a mental hospital, the Governor must obtain two medical certificates. Another form of disposal of insane persons occurs in New South Wales under s. 439 of the *Crimes Act* 1900, which states:

> "Where a person, indicted for any offence, is acquitted on the ground that he was insane at the time of committing such offence, or is on arraignment found to be insane, he shall be dealt with in the manner in such case provided by the Lunacy Act or Acts in force for the time being."

These provisions are duplicated in the *Mental Health Act*[35] which repealed the *Lunacy Act* 1898. Thus, s. 439 of the *Crimes Act* is irrelevant because the same disposal options exist under mental health legislation; and indeed, in recognition of this duplication, the Crimes (Mental Disorder) Amendment Bill 1982 which is cognate with the Mental Health Bill 1982 would repeal s. 439 of the *Crimes Act.*

At 30 June 1982, one female and 113 male prisoners serving sentences in gazetted prisons for adult offenders were being detained at

35. *Mental Health Act* 1958 (N.S.W.), ss. 23(1) and (2).

the Governor's pleasure [36] The National Prison Census included prisoners temporarily absent from prison, who remained the responsibility of correctional agencies Detainees who had been transferred to psychiatric institutions and were the responsibility of health authorities were not included and therefore, these figures must be regarded as an underestimate Most of those prisoners (40) were held in Victorian gaols, probably the insanity defence being chosen in order to avoid capital punishment, which was not abolished in that State until 1975 Nevertheless, the percentage in the prison population of Governor's pleasure detainees was similar in Victoria (2 6 per cent), Western Australia (2 3 per cent), and South Australia (2 7 per cent), whereas in the other States, the percentage was less than 1 per cent Overall, Governor's pleasure prisoners formed 1 3 per cent of the prison population

Mental Defectives (Convicted Persons) Act

This N S W Act [37] warrants special mention because it is the only piece of legislation specifically providing for mental defectives to be detained at the Governor's pleasure Section 4(3) provides as follows

> "If upon examination such magistrate is satisfied that such prisoner is a mentally defective person within the meaning of this Act, he may order that the prisoner be detained in an institution during the Governor's pleasure
> The period of such detention shall run concurrently with but may exceed any term of imprisonment, penal servitude, or detention to which the prisoner has been sentenced"

The person must have been convicted of a certain type of offence, viz offences in respect of which a penalty of death[38] or penal servitude with or without hard labour for a term of two years or upwards may be imposed, or wilful and obscene exposure of person

Mental defectiveness is described in s 2 of the Act as

> "a condition of arrested or incomplete development or a degeneration of mind from whatsoever cause arising"

but not being an insane person

A certain chain of events takes place before the person is detained at the Governor's pleasure A report as to the offender's apparent mental defectiveness is made by the judge or magistrate (if the condition is

36 Walker and Biles, note 9 above, p 38
37 See note 34 above
38 The death penalty has since been abolished in New South Wales

apparent to the court), or by the Comptroller-General of Prisons (now the Chairman of the Corrective Services Commission) after examination by the prison's visiting surgeon. The report is made to the Minister (the responsible Minister being the Attorney-General), who then asks the Inspector-General of Mental Hospitals for two independent medical reports. The Inspector-General reports back to the Minister, who *may* direct that the person be brought before a magistrate for inquiry into his condition. The prisoner has the right to call evidence, examine and cross-examine witnesses, personally or by his counsel, and to receive legal aid. It is ironic and contradictory that these provisions presume *that the person has the capacity to instruct counsel.*

If upon examination, the magistrate is satisfied that the person is mentally defective he *may* order that the person be detained in an institution during the Governor's pleasure. "Institution" is defined in s.2 as "a place appointed as an institution pursuant to this Act". There has never been an institution so appointed. Consequently, when prisoners have come before the court under this Act in the past the court has hesitated because there is no place of disposition. In practice, Corrective Services transfer the person to the Department of Health and they are placed in a mental hospital.

The situation exists, under this Act, whereby a person may be deprived indefinitely of his liberty, despite having been given a determinate sentence by a court, solely on the grounds of mental defectiveness. This is an astonishing example of discrimination against retarded people, as well as of the misuse of the criminal law objective of preventive detention.

Happily, it is proposed that this Act be repealed by cl. 4 and Schedule 1 of the Miscellaneous Acts (Mental Health) Repeal and Amendment Bill 1982, which is cognate with the N.S.W. Mental Health Bill 1982.

Length of detention

Conflicting results emerge from studies of the length of time that Governor's pleasure prisoners are detained. A South Australian study found the periods of detention to be considerably longer than those served by offenders who were found guilty and given a determinate sentence.[39] In Tasmania, New South Wales and Victoria, Governor's pleasure detainees appear to serve shorter periods than convicted

39. T. S. George, "Commitment and Discharge of the Mentally Ill in South Australia", (1972) 4 *Adelaide Law Rev.* 330.

offenders.[40] In Western Australia, an interesting situation is reported, where persons found not guilty of an offence on the ground of unsound mind are likely to spend less time in detention if they are in prison, rather than if they are in mental health facilities.[41] On the other hand, the persons in mental health facilities who are acquitted of wilful murder on the grounds of insanity spend less time in detention than prisoners convicted of wilful murder but with death sentences commuted to life imprisonment.

Release from detention

The vagueness of the rules guiding release of Governor's pleasure detainees have been criticised.[42] In New South Wales, if a detainee is no longer considered mentally ill, he is transferred to a prison (if he is in a mental hospital), and the decision concerning release is made by the Governor on the advice of the Executive Council. The Minister of Justice, who refers the matter to the Executive Council is advised by the Life Sentence and Governor's Pleasure Review Committee, a purely administrative body within the Department, each case being reviewed at least once a year and sometimes at six-monthly periods. This Committee usually requests the Minister to refer the case to the Parole Board. The Nagle Report rejects the notion that criteria for release should include considerations of a retributive or deterrent nature, because the accused has been acquitted of the offence. It concludes that the only relevant factor, indeed the dominant factor, to be considered is dangerousness. The situation in New South Wales will probably not improve under the proposed Mental Health Bill 1982 and the Crimes (Mental Disorder) Amendment Bill 1982. The latter inserts cl. 428S into the *Crimes Act* 1900 (N.S.W.) which states that a person acquitted on the grounds of mental illness will be detained in "such place and in such manner as the Court thinks fit until the Governor's pleasure is known". Eighty-two years after the *Crimes Act* was made law, the same vague and antiquated terms persist, along with the implication of preventive detention. A small ray of light is

40. See discussion in I. L. Potas, *Just Deserts for the Mad* (Australian Institute of Criminology, A.C.T., 1982), pp. 63ff.
41. J. Hartz-Karp, "The Mentally Ill in the Criminal Justice System in Western Australia: Definition and Disposition", *Aust. J. Social Issues,* 1981, 16(3), pp. 226-240.
42. *Report of the Royal Commission into New South Wales Prisons* (the Nagle Report) (N.S.W. Govt. Printer, Sydney, 1978), pp. 321ff.

introduced by the Mental Health Bill, in which cl. 113 enables the Mental Health Review Tribunal to make recommendation to the Minister as to the person's release, if the Tribunal is satisfied that the safety of the person or any member of the public will not seriously be endangered by the person's release. The Governor *may* then make an order, unconditionally or subject to conditions, for the person's release. These proposed legislative provisions have the doubtful advantage of enshrining the concept of dangerousness as the relevant factor. It is not clear, however, whether the Governor's decision will be based only on the recommendation of the Tribunal, or whether other executive bodies, with or without appropriate expertise in mental illness, will have an influence. The proposed Bill provides for a regular review of forensic patients, at least at six-monthly intervals. The person may still be detained in prison, however, as well as in hospital or "any other place".

The Queensland *Mental Health Act* 1974 is also currently undergoing review. It is proposed that s. 647 of the *Criminal Code* pertaining to acquittal on the ground of insanity be altered so that the phrase, "until Her Majesty's pleasure is known" is omitted, and the words "until he is dealt with pursuant to the *Mental Health Services Act* 1974-83"[43] be substituted. If there is reasonable cause to believe a person was mentally ill at the time of the alleged offence, the matter may be referred to the Mental Health Tribunal for determination. If the Tribunal finds that the person was of unsound mind at the time of the alleged offence, proceedings against the person shall be discontinued[44] and he shall be treated as a restricted patient,[45] and reviewed as if he were such a patient. The Patient Review Tribunal will review such patients and determine whether they can safely be released into the community. These proposed amendments have the advantage of removing a mentally ill person from the prison system into the mental health system. The major disadvantage lies in the denial of due process of law-the Tribunal will have the power to divert people from the criminal justice system before they undergo trial, and make a determination of the facts according to the rules of the Mental Health Tribunal,

43. Mental Health Act and Criminal Code Amendment Bill 1983 (Qld.), cl. 56.
44. Ibid., cl. 28, repealing ss. 29 to 43 of the *Mental Health Act* 1974-1978, and inserting new sections in lieu, including s. 35A: "Consequences to proceedings of findings of Mental Health Tribunal".
45. Ibid., cl. 28, inserting new s. 35 into the *Mental Health Act* 1974-1978. If the Bill were passed, the *Mental Health Act* would be known as the *Mental Health Services Act* 1974-1983.

which are determined by the Tribunal and may not be equivalent to the procedural and evidentiary rules necessary in a court. The other relevant Tribunal, the Patient Review Tribunal

> "is judicial body but it is not a Court. It is based on the . . . principles of an inquisitorial model and not on the basis of an adversarial system."[46]

Implications for retarded detainees

The disadvantages of detention at the Governor's pleasure–uncertainty of criteria for release, punitive rather than treatment functions, pressures of public opinion, inadequate review procedures, and the negative psychological effect of an indeterminate sentence–render this form of sentencing an undesirable option for any mentally abnormal offender. A mentally ill offender may at least recover, however, and satisfy the reviewing body that he is suitable for release. A mentally retarded person will not recover from his retardation. Upon review, in all probability his condition will be found to be unaltered, and so he will not be released. In most States he will be held in a prison or a mental hospital, and will therefore be unlikely to receive habilitative and rehabilitative programmes appropriate to his condition. The New South Wales and Queensland proposed mental health legislation amendments have moved towards specifying dangerousness as the foremost criterion in consideration of release, and do not state that the person must have recovered from his mental illness, but the concept of dangerousness (see Chapter 8) is fraught with difficulties.

Nevertheless, the opinion expressed above (Chapter 4) that legal counsel would be unwise to try for an acquittal on the grounds of insanity in the case of a retarded client is reinforced. Unfortunately, in Queensland even this option may be taken out of the hands of counsel, for referral to the Mental Health Tribunal for determination of whether the person was mentally ill at the time of the alleged offence may be made by a Crown Law Officer, or the Director of the hospital if he has been admitted for treatment of mental illness.[47] It is time that corrective and mental health services decided who is going to accept responsibility for the mentally abnormal offender. If it is to be correc-

46. The Hon. B. Austin, Minister for Health, speech to the Queensland Parliament introducing the Bill to amend the *Mental Health Act* and the *Criminal Code*, March 1983.
47. See note 43 above, cl. 27, inserting new s. 28D into the *Mental Health Act* 1974-1978.

tive services which assume responsibility, then preventive detention and indeterminate sentences must be abolished, for the criminal law has no role in prediction of future criminal or deviant behaviour. If the responsibility is to be assumed by mental health services, then the main criteria for release should be those which apply to other restricted or involuntary patients. Detention in a mental hospital solely because the person committed a crime (albeit being acquitted on the ground of insanity) is a punitive function and should not be assumed by mental health services.

The Model Statute developed by the American Bar Association rejects the notions of a special "defective offender" category or indeterminate sentencing procedures for defendants with developmental disabilities.[48]

> "The concept of indeterminate treatment-oriented correctional programs . . . is being increasingly rejected by legislatures, courts, and commentators around the country because of the failure of special institutions to provide the treatment and the negative impact of indeterminate sentences on offenders . . . As negative as the results are for the non-retarded segment of the population, they are that much more damaging for the retarded . . . [T]hey should be handled in the same manner as non-disabled offenders except when their added vulnerability to abuse and need for specialized habilitative services require otherwise."[49]

TRANSFER BETWEEN PRISON AND HOSPITAL

Mental health and crimes Acts make provision for the transfer of mentally ill prisoners to hospital. The proposed Mental Health Bill 1982 (N.S.W.), in cll. 118, 119, permits the transfer to hospital of mentally ill prisoners or prisoners suffering from a mental condition for which treatment is available in hospital, on the advice of two psychiatrists. Similar provisions exist in the Queensland *Mental Health Act*,[50] except that the transfer requires the recommendation of one medical practitioner. Whilst in hospital prisoners are dealt with as security patients rather than as prisoners under the supervision of corrective services. In

48. B. D. Sales, D. M. Powell, R. Van Duizend et al., *Disabled Persons and the Law* (Plenum Press, N.Y. 1982), pp. 760ff.
49. Ibid., p. 761.
50. Mental Health Act and Criminal Code Amendment Bill 1983 (Qld.), cl. 43.

some instances, corrective services and mental health services have joint responsibility for a security patients' hospital,[51] which may lead to difficulties owing to differences in therapeutic and custodial emphases. When a prisoner recovers from his mental illness he may be returned to prison. Mental health legislation also commonly provides for transfer between hospitals.

This method of transfer is preferable to that which exists in the United States of America, in some States, where medical practitioners may be bypassed, thus:

> "[if] it shall appear to the satisfaction of the warden and the Board of Charities and Corrections, that any person confined in the penitentiary ... has become mentally ill ... the board may order that [he] be confined and treated in one of the state hospitals for the mentally ill."[52]

Even when a psychiatric examination is part of the pre-transfer process, however, American commentators have criticised the lack of due process. In one case,[53] a prisoner was convicted of stealing $5 worth of candy and sentenced to ten years in prison. After one year in prison, he was certified insane by the prison staff physician, transferred to a state mental asylum without any notice or hearing, and spent 24 years in institutional custody.

> "[T]he transfer of a prisoner to a mental institution constitutes much more than a mere administrative relocation of that prisoner within the penal system. Criminal commitment engenders severe deprivations of individual liberty. Freedom from bodily constraints, from mental and emotional oppression, and from damage to reputational interests is jeopardized. Thus, due process necessitates the observance of procedural safeguards in criminal commitment proceedings to ensure that the commitment determination is not arbitrarily and erroneously made ... [T]hese procedural safeguards (should) be at least as stringent in their protection of the rights of the individual as the procedures utilized in the civil commitment process."[54]

51. E.g. Wacol Security Patients Hospital, near Brisbane.
52. J. F. Look, "Transfer of Prisoners to Mental Institutions", *J. Crim. Law and Criminology*, 1978, 69(3), pp. 337-352, referring to the South Dakota criminal commitment statute.
53. *Denison v. State* 49 Misc. 2d 533, 267 N.Y.S. 2d 920 (Ct. cl. 1966).
54. Look, note 52 above, p. 352.

No one would argue that a mentally ill prisoner should not be transferred to hospital where he can receive appropriate psychiatric care. Nevertheless, apart from problems related to due process requirements (outlined above), another problem arises from the definition of mental illness. Following the notorious escape and violent rampage in the community of two prisoners from the maximum security unit at Morisset Hospital in New South Wales in 1979, the number of prisoners suffering from mental illness who were held in mental hospitals was more than halved.[55] Mentally ill prisoners were suddenly found to be sane and were returned to prisons, as a reaction to public fear of dangerously psychotic prisoners being able to escape. On the other hand, sometimes a large proportion of those referred from prisons have consciously manipulated their transfer in order to do "soft time".[56]

In the United Kingdom, the number of prisoners transferred to hospitals has declined markedly. Between 1961 and 1977, the number dropped by two-thirds. A failure rate of 25 per cent of applications made for transfer to hospital by prison medical officers has been recorded.[57] The major reason appears to be the reluctance of hospitals to accept forensic patients.

A further difficulty in transfer to hospital occurs in jurisdictions (such as New South Wales) where a person has to be found mentally ill in order to be transferred–but not all psychiatrists agree that retarded people are mentally ill. On the other hand, when intellectually handicapped people are specifically *not* included in mental health legislation (for example, in Western Australia), the retarded prisoner may have to remain in prison because he *cannot* be admitted to a mental hospital, and other more appropriate facilities may refuse to admit him because of a lack of security facilities.

While on the surface, the transfer of mentally ill prisoners to mental hospitals appears a humane and rational step, it may in fact be arbitrary, lacking in due process requirements, subject to whims of governmental

55. L. Darcy, *Where Should Mentally Ill Offenders be Treated?*, Paper presented at the Australian Institute of Criminology Conference on "The Mentally Abnormal Offender–Whose Responsibility?", Canberra, June 1982.
56. E. J. Mikkelsen, "The Bridgewater 100: An Analysis of Admissions to Hospital for the Criminally Insane", *Psychiatric Quarterly*, 1980, 52(3), pp. 190-200.
57. G. Robertson and T. C. N. Gibbens, "Transfers from Prisons to Local Psychiatric Hospitals under Section 72 of the 1959 Mental Health Act", *Brit. Med. J.*, 25 May 1980, pp. 1263-1266.

policy, and above all for the retarded prisoner, an inappropriate or even inaccessible placement option.

The final difficulty occurs if a suitable placement option simply does not exist. Nader J. recently made an order in the Northern Territory Supreme Court, giving the Government six months to find proper accommodation for an Aborigine considered to be grossly mentally ill.[58] Mr Jabanardi had been in prison for two-and-a-half years because there was nowhere else to send him. He was charged with murder in 1980, but found unfit to plead. It is unlikely that he will ever be fit to plead. Counsel for Jabanardi accused the Northern Territory Government of denying his client his human rights under international conventions. A similar case is reported from Victoria's medium security Turana Youth Training Centre. A youth, aged 17, who suffered brain damage following a near-fatal drowning six years ago, allegedly is held there although he has not been charged with a crime. He suffers from a mild mental retardation, motor impairment, temporary memory loss and outbursts of violence. His case has been brought up for referral to a more appropriate facility more than 70 times, but none is willing to cope with his unpredictable violence.[59] Discussion of the legal issues associated with transfer between hospital and prison facilities seems pointless when the facilities are non-existent.

IMPRISONMENT

> *"Every study that has been made of the prison system has indicated that while prisons may be dehabilitating, dehumanizing, and exasperating for most of the offenders they are infinitely more so for the retarded who cannot profit even by the meager programs of education and rehabilitation that are there for the so-called 'normal resident'. A retarded person is likely to be exploited and more bitterly dehumanized than his* [or her] *intellectually normal* [colleagues]."[60]

58. P. Innes, "Mentally Ill Black Should Not be in Jail, Judge Tells N.T.", *Age,* 13 April 1983, p. 5.
59. G. Mitchell, "Innocent Youth, 17, Put in Jail", *Daily Mirror,* 18 May 1983, p. 3.
60. Sales et al., note 46 above, p. 760, quoting R. Allen as quoted in Krause, *The Retarded Citizen and The Criminal Justice System* in M. Santamour (ed.), *The Mentally Retarded Citizen and the Criminal Justice System* (1975), p. 26.

Not all studies have reached such pessimistic conclusions. A study of the effects of indeterminate detention (conducted in the Federal Republic of Germany) found a lack of conclusive evidence pointing to the impairment of prisoners' personalities.[61] It was thought that a counter-effect against the harm of incarceration was the fact that almost all the prisoners studied took part in leisure activities or therapy programmes, had contacts with the outside world, and an outside support system. The study also pointed out that many assumptions about the mental effect of long sentences stemmed from psychiatrists, and were mainly based on observations of individual cases, general impressions, or unscientific inquiries.

The weight of opinion, however, is that prisons are not environments conducive to mental health. The Board of Directors of the National Council on Crime and Delinquency (U.S.A.) in its policy statement said:

> "Prisons are destructive to prisoners and those charged with holding them. Confinement is necessary only for offenders who, if not confined, would be a serious danger to the public."[62]

Its policy was formulated on the basis of a number of studies in the United States of America which showed that:

1. Imprisonment is very little protection to society because virtually all prisoners are ultimately released, and the longer the term of imprisonment, the more likely it is that the ex-prisoner will return to crime;
2. Abominable conditions exist in many prisons, including prison rules which have humiliating and degrading effect upon inmates;
3. Prisons are "schools of crime", and more violent crimes are committed in prison than in any other community;
4. The prison destroys the keepers as well as the prisoners.[63]

A detailed examination of the prison community and the corrosiveness of prison life will not be undertaken here, as such studies exist in

61. W. Rasch, "The Effects of Indeterminate Detention—Study of Men Sentenced to Life Imprisonment", *Int. J. Law Psychiatry,* 1981, 4, pp. 417-431.
62. Board of Directors, National Council on Crime and Delinquency, "The Nondangerous Offender Should Not Be Imprisoned", *Crime and Delinquency,* 1973, 19(4), pp. 449-456.
63. Ibid., pp. 450-453.

profusion.[64] The major focus here is the examination of the effect of prisons on the mentally retarded prisoner. The imprisoned mentally retarded offender is said to be more susceptible than typical prisoners to the harshly negative aspects–including rape, extortion, physical brutality and victimisation.[65] Paradoxically, the retarded prisoner is out of step with the average inmate population, yet his yearning to be accepted leads him to model his behaviour on that which is accepted in prison culture, and consequently his general social skills become more maladaptive. His needs, personal characteristics, level of sophistication, and ability to revert to non-institutional patterns of behaviour upon release probably differ greatly from non-retarded inmates.

An example of the vulnerability of the retarded prisoner occurred in a study of rape in maximum security men's prisons. Rape victims were usually the physically weak, the young, first offenders and others not wise in prisoners' lore, the mentally handicapped, and the timid.[66] Sometimes prisoners who are seen as being potential victims are segregated by confining them to the "front yard" of the prison; or the prisoner mutilates himself in order to be removed from the prison. Other alternatives are violence, submission, or a liaison with a "heavy" prisoner.

The effect of imprisonment upon mentally retarded prisoners can be further evaluated by examining the effects of other types of institutionalisation upon mentally retarded inmates. Studies indicate that institutionalised retarded people score lower on tests of intelligence and social development than comparable non-institutionalised groups, and that in particular, use of abstract terms in vocabulary, and conceptualisation of different types of emotion are poorly developed.[67] These difficulties would pose problems in prison environment, in terms of understanding the nuances of interaction with other prisoners and with prison officers. Females tend to suffer less cognitive deficits from insti-

64. See, for example, chapters on the prison community, in Johnson, Savitz and Wolfgang, note 1 above, pp. 383ff.
65. D. P. Biklen and S. Mlinarcik, "Criminal Justice", in J. Wortis (ed.), *Mental Retardation and Developmental Disabilities* (X, Brunner/Mazel, N.Y. 1978), pp. 179ff.
66. M. Robertson, *Rape and Sexual Aggression in Maximum Security Men's Prison* (unpublished study, N.S.W. Corrective Services Commission, 1979).
67. E. Zigler and D. Balla, "Motivational Aspects of Mental Retardation", in R. Koch and J. C. Dobson (eds.), *The Mentally Retarded Child and his Family* (Brunner/Mazel, New York, 1976), pp. 377-399.

tutionalisation than males, and institutionalised retarded males have been found to have higher expectancies of failure than females.[68] The effects of institutionalisation are less when the environment of the institution is resident-oriented rather than institution-oriented, and when frequent visits from family and friends maintain responsiveness to normal social reinforcement.[69] A less resident-oriented environment than prison could hardly be imagined; and in many prisons, frequent visits from family and friends are either not permitted, or are precluded by distance and cost. The prison environment has few, if any, redeeming features which could reverse the negative effect on retarded people of institutional life.

The regression in verbal and social skills which occurs with mentally retarded prisoners, combined with their inability to learn the formal and informal rules of prison life results in a situation where they may be perceived by prison officers as troublesome or abnormal. When this occurs, prison officers request that the prisoner be removed from the prison environment. Rarely, however, does the removal process recognise that institutional life may be a contributing factor to the "trouble", and so the retarded prisoner is not placed in a community-based corrective programme, but rather, is transferred to another prison or mental hospital.

Identification

Prison officers may not be aware of the fact that a prisoner is retarded, unless they are particularly skilled in identifying such persons (despite their lack of training). Even if the prisoner's mental condition has been raised in court, generally the prison authorities do not receive transcripts.[70] A prisoner, upon reception, is usually seen by a medical orderly, and subsequently by a visiting medical officer, neither of whom may have any special expertise in recognising and assessing intellectual handicap.

> "Many prisoners on reception to a prison look so far below average, that no accurate assessment can be made of their mental condition at that time."[71]

68. Ibid.
69. Ibid.
70. R. F. Smith, former Senior Superintendent of Prisons, Queensland 1957-1971, and currently a Deputy Sheriff of the Supreme Court of N.S.W., personal communication, December 1982.
71. Ibid.

The problem of identification of the retarded prisoner is exacerbated in prisons which have a rotating shift, as a consequence of which officers do not consistently spend time in any single wing of the prison, and do not get to know the prisoners, or the patterns of relationships between them.[72]

The identification of mental retardation is rendered more difficult by the deprived social background of some prisoners. An example is the case of a young man[73] who lived in a poor, poultry farming area about 30 miles from a large city. He went on a shooting rampage, killing animals and people, and was subsequently convicted of murder and sentenced to life imprisonment. He appeared retarded and socially deprived, the prison issue footwear being the first he had ever worn. In prison, he engaged in simple work, but following a confrontation with an unfamiliar prison officer over a signature in an order book, he attacked and killed the officer. After an inquiry, he was subsequently transferred to a security patients' hospital where he is still detained. Prison officers are unwilling to have him transferred back to a prison. He currently appears to be functioning in the borderline-mildly retarded range and is regarded as not mentally ill by at least one prison psychiatrist.

Situations wherein a prisoner's violent behaviour is provoked could be avoided if prison staff were trained in the identification and management of mentally retarded prisoners, or (less ideally) if prisoners could be transferred to a specialist facility for the management of retarded or developmentally delayed prisoners. It was pointed out earlier (Chapter 2) that not all prisoners undergo psychological testing on admission to prison, and therefore the responsibility for identification of mentally abnormal offenders lies very heavily in the hands of prison officers.

Prison officers

The perception, attitudes, training and skill of prison officers can have an important effect upon the prison experience of a retarded prisoner, as indicated above. Data pertaining to officers' personal and occupational characteristics and backgrounds appear to indicate that it is unlikely that they would be well-qualified in the area of mental abnormality, particularly mental retardation.

72. Ibid.
73. Ibid.

A study of Victorian prison officers[74] found that this was not the first occupational choice of 83 per cent of officers surveyed, and that previous occupational experience was most commonly as a skilled tradesman (30 per cent), member of another uniformed service (20 per cent), or clerk (12 per cent). The officers viewed crime as individually based rather than attributable to sociopolitical causes. The majority indicated that imprisonment was necessary for the protection of society or for punishment, with only 6.7 per cent seeing the main reason being rehabilitation. These findings were echoed in a study of Western Australian prison officers,[75] with officers' attitudes towards prisoners including beliefs that inmates would behave vindictively towards uniformed staff if the opportunity arose, that they are unrepentant and will continue to break the law, and that they are morally inferior to other members of society. It was further found that antagonism towards non-custodial staff existed on the part of the officers. Officers' suspicion of treatment-oriented methods and unfamiliarity with the work and methods of social workers, psychologists, and psychiatrists led to a belief that non-custodial tasks weakened officers' control over prisoners. Attitudes such as these are unlikely to be conducive to high motivation by officers to recognise and rehabilitate mentally retarded prisoners.

A study of corrective services staff in Missouri[76] found that those who worked with juvenile offenders were more likely to have received training in mental retardation than those who worked with adults—but at least half of those working with juveniles and 80 per cent of those working with adults had had no specific training. The overwhelming majority felt that the mentally retarded inmate is taken advantage of, and easily led. Juvenile corrective services officers had more favourable attitudes than those working with adults towards incorporating retarded offenders into work programmes, and the disciplinary problems which might be encountered.

74. J. Van Groningen, *Victorian Prison Officers—Some Opinions and Attitudes* (Paper presented at Aust. Inst. Criminology Research Seminar, February 1983).
75. T. A. Williams, "Custody and Conflict: An Organizational Study of Prison Officers' Roles and Attitudes", *Aust. N.Z. Journal of Criminology*, 1983, 16, pp. 44-55.
76. Missouri Association for Retarded Citizens, *The Mentally Retarded Offender in Missouri, with recommendations for a state-wide system of services* (mimeo), August 1976.

Another study conducted in the United States of America[77] states that two of the reasons for the failure of the system to identify the retarded person are hard to separate—they are failure to recognise the accused's retardation, and indifference to it. One prosecuting attorney, discussing a subject with a recorded IQ of 57, stated:

> "[W]e all thought he was dumb, but he was a mean -----, and we were all a little afraid of him."[78]

The dual factors of failure to recognise retardation and indifference to it are probably relevant to Australian prison officers.

Training of criminal justice personnel

In the criminal justice system, not only prison officers are in need of training in the field of mental retardation. It is apparent from preceding chapters that personnel in all sections of the system could benefit from training. In the United States, this need has been recognised, and met in the publication of a brief but comprehensive training manual for criminal justice personnel.[79] The manual discusses the problems and issues of the mentally retarded offender, problems of identification, the mythical link between retardation and criminal behaviour, habilitative programme development (including programmes for activities of daily living, human relationships, vocational development and job placement, academic skills, and for counselling for retarded offenders), and the legal rights of retarded offenders. Clearly, training programmes and manuals for criminal justice personnel in this country would be of enormous assistance, not only to the retarded offenders, but also to the staff, in averting the feelings of frustration and helplessness that arise when the retarded offender is seen as a misfit in the system, rather than as a person with great habilitative potential.

Legal problems of prisoners

Analysis of the legal issues associated with mentally retarded prisoners has identified the following problem areas:[80]

77 R. C. Allen, "The Retarded Offender: Unrecognized in Court and Untreated in Prison", *Federal Probation,* September 1968, pp. 22-27.
78 Ibid., p. 25.
79 M. B. Santamour and B. West, *Retardation and Criminal Justice—Training Manual for Criminal Justice Personnel* (New Jersey Association for Retarded Citizens, Septemper 1979).
80 S. J. Brakel, "Legal Problems of People in Mental and Penal Institutions: An Exploratory Study", *American Bar Foundation Research Journal,* 1978, 4, pp. 565-645.

- visitation/communication rights;
- work, education and recreational opportunities;
- respect for privacy of inmates;
- disciplinary problems;
- racial, religious and sexual discrimination;
- problems with fellow inmates and staff;
- medical treatment and consent; and
- privileges.

In Australia, prisoners' action groups are now beginning to focus attention upon treatment of prisoners, and the prison is no longer a totally segregated institution within the walls of which there is a law unto itself. In New South Wales, the Ombudsman's office investigates complaints made by prisoners about prison conditions, and instances of alleged abuse.[81] It has been announced that official visitors from outside the Corrective Services Commission are to be appointed to inspect New South Wales prisons,[82] to provide an outlet for complaints from both staff and inmates.

Allegations of poor conditions in prisons and mistreatment of prisoners are as old as the prison system. With the move away from the idea that it is legitimate to deprive prisoners of all civil rights as part of their punishment, there have developed more channels of communication with community bodies which can ensure that prisoners' complaints are investigated. Prisoners would probably argue that the existing channels are inadequate, and sometimes biased against prisoners.

The effectiveness of outside "watchdog" agencies to protect retarded prisoners' rights is an even more unlikely proposition, however. Retarded prisoners tend to be victimised by other prisoners. They may lack the verbal or writing skills to convey complaints to outside bodies or prison officers. Their evidence may seem less reliable even than that given by fellow prisoners. They probably do not have the knowledge of social institutions necessary to take full advantage of complaint mechanisms, and may be suspicious of further "government" involvement. Furthermore, they may not realise that they have legitimate

81. M. Steketee, "Ombudsman Calls Parklea Oppressive, Unjust", *Sydney Morning Herald*, 26 August 1982, p. 3, S. Armstrong, *Report of the Assistant Ombudsman Under Section 27 of the Ombudsman Act, 1974 concerning Assault on Madria Jason at Mulawa Training and Detention Centre for Women*, 9 June 1982.
82. R. Dunn, "Outsiders Will Inspect N.S.W. Jails", *Sydney Morning Herald*, 26 August 1982, p. 3.

complaints, particularly if the "harm" being done to retarded prisoners lies in the lack of appropriate educational or work training or social skills programmes, or lack of protection from exploitation and victimisation All of the factors which discriminate against the retarded person at every stage of the criminal justice process operate to ensure that retarded prisoners are less likely to have their complaints aired, or their needs met in the prison system

Psychiatric services for prisoners

The United Nations Standard Minimum Rules for the treatment of prisoners state that

> "At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry The medical services should be organised in close relationship to the general health administration of the community or nation They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality"[83]

Other countries' forensic psychiatry services have come under criticism The Canadian services have been described as lacking integration and continuity, and failing to provide follow-through of recommendations for offenders, so that the safety and security of the community may actually be compromised [84]

The British system is likewise imperfect Institutions for mentally retarded people are unwilling to admit retarded offenders, and as they are not seriously affected enough to be admitted to special mental hospitals, they remain in prison Separate facilities for mentally subnormal offenders have been suggested [85] More mentally abnormal offenders are remaining in British prisons, not, it is claimed, because the forensic psychiatry net is insufficiently wide or discriminating, but because hospital places are not forthcoming [86]

83 United Nations, Department of Economic and Social Affairs, *Standard Minimum Rules for the Treatment of Prisoners and Related Recommendations,* 1977

84 J Arboleda-Florez, "Forensic Psychiatry Services in Canada, Strengths and Weaknesses", *Int J Law and Psychiatry,* 1981, 4, pp 391-399

85 D A Spencer, "Placement of Subnormal Offenders" (letter), *Brit Med J*, 8 December 1979, p 1511

86 J H Orr, "The Imprisonment of Mentally Disordered Offenders", *Brit J Psychiatry,* 1978, 133, pp 194-199

A survey of correctional staff in the United States of America has found that perceptions and expectations of staff have changed with respect to psychiatric care for prisoners.[87] They tend to perceive more inmates as being mentally abnormal, but contrary to the expectations of staff, psychiatric treatment goals do not provide solutions for a wide variety of social and community problems, and do not lower the recidivism rate. If a former inmate who has been receiving psychiatric treatment is arrested, the failure is often attributed to the mental health treatment. Whilst United States Supreme Court rulings on sentencing procedures could be interpreted as requiring psychiatric evaluations of all prisoners; and court rulings on the adequacy of medical care in prisons could be construed as requiring therapy for all prisoners suffering from major mental illnesses,[88] the State is not obliged, nor would it be possible to invest unlimited resources in psychiatric care for prisoners. It has been suggested that adherence to the standards of care recommended by the American Correctional Association would correct problems of administering psychiatric care, including the problems of limitations imposed by prison architecture, inadequate staff, medication prescription and distribution by unlicensed and untrained personnel, and a punitive rather than a therapeutic attitude.[89] It is argued that psychiatrists cannot ignore the existence of prison conditions which lead to mental illness, particularly overcrowding, abuses of solitary confinement, and inadequate programmes for inmates who are mentally disturbed but not overly psychotic.[90]

It is probable that forensic psychiatry services in Australia face some of the problems outlined above. In New South Wales, the standard of care can be summed up by the statement

> "[P]atients referred from prisons . . . are treated for their psychiatric problems in much the same way as non-offenders with the exception that they are not exposed much to group discussions and don't have private conversations with therapists."[91]

87. H. J. Steadman and S. A. Ribner, "Changing Perceptions of the Mental Health Needs of Inmates in Local Jails", *Amer. J. Psychiatry,* 1980, 137(9), pp. 1115-1116.
88. A. F. Leuchter, "The Responsibilities of the State for the Prevention and Treatment of Mental Illness Among Prisoners", *J. Forensic Sciences,* 1981, 26(1), pp. 134-141.
89. E. Kaufman, "The Violation of Psychiatric Standards of Care in Prisons", *Amer. J. Psychiatry,* 1980, 137(5), pp. 566-570.
90. Ibid.
91. L. Darcy, *The Care of the Mentally Ill Offender in New South Wales* (Paper presented at Aust. Institute of Criminology Seminar)—see note 55 above.

Apart from detention, medication and electroconvulsive therapy, there would be few other therapeutic options.

Where possible, mentally ill prisoners are transferred from a prison to a psychiatric hospital, and the time spent in any institution is deducted from any sentence. Difficulties arise when correctional staff perceive recurrent socially unacceptable behaviour (such as assault, self-mutilating behaviour, complaints by prisoners of hearing voices in the absence of other signs and symptoms) as mental illness,[92] yet medical staff disagree with this perception, and the prisoner is not transferred. Correctional staff find it difficult to deal with abnormal prisoners on a 24-hour basis, without expert psychiatric back-up. One method for catering for the needs of prisoners who are mentally abnormal but who remain in the prison system is the establishment of special care units within the prison. One such unit is being established at Long Bay, in Sydney.[93] The purposes of the Unit are observation of prisoners considered to be psychiatrically disturbed, treatment, and retention of prisoners needing long-term psychiatric care. One difficulty has been inappropriate referrals to the Unit by Corrective Services staff. Included in the category of inappropriate referrals are retarded prisoners who have "constant problems relating to staff and inmates and must bear the brunt of their practical jokes".[94]

In general, psychiatric care for prisoners is not entirely satisfactory. Problems include the process of transferring of prisoners to hospital and back to prison; a dearth of programmes and a lack of treatment options for mentally abnormal prisoners who remain in prison; the perceptions of corrective services staff differing from those of psychiatrists; lack of high security psychiatric facilities in some regions; security problems in health institutions; and the extent and type of therapeutic programmes available for the prisoner/patient. Standards of care for retarded prisoners are in an even more parlous state. As far as can be determined, no specialist therapeutic programmes exist for retarded prisoners in corrective institutions in Australia. They may receive appropriate treatment if they are transferred to a security patients'

92. G. Murugesan, *Care of the Female Mentally Ill Offenders in Custody, N.S.W.* (Paper presented at Aust. Institute of Criminology Seminar)—see note 55 above.
93. A. V. Bailey and D. M. Schwartz, *The Special Care Unit and its Contribution to Mental Health in the New South Wales Correctional System* (paper presented at Aust. Inst. of Criminology Seminar)—see note 55 above.
94. Ibid., p. 14.

hospital—but they may not. Psychiatric care and treatment is often highly inappropriate for retarded people, even those who exhibit what could be interpreted as psychiatric symptoms.

In some prisons in the United States of America, special treatment centres for retarded prisoners have been established. Nine States have developed statutes which create such special treatment centres, and their creation has also found support from case law.[95] A survey of correctional institutions in the United States in 1972 found at least 27 correctional systems which provided group special education programmes for retarded offenders.[96]

Several States in the United States have enacted defective delinquent statutes under which mentally deficient persons who commit crimes or demonstrate propensity towards criminal activity are subject to involuntary hospitalisation, usually for an indeterminate period. The most well-known is the Maryland statute[97] and the Patuxent Institution through which it operates. It is not designed solely for mentally retarded offenders, and also treats dangerous offenders who are emotionally disturbed. Patuxent uses a graded tier system of four levels, for developing behavioural controls. Only the courts can refer individuals to Patuxent after conviction and sentence. Despite the wide range of rehabilitative programmes, even within this special facility, retarded inmates (who form about 27 per cent of the population) do not fare well. Staff express pessimistic views about the likelihood of their rehabilitation and reintegration into the community; they are held back on the lower levels of the programme, and not given the same opportunities for parole as nonretarded inmates; they remain incarcerated for longer periods of time; and if paroled, they are often returned to the institution solely because suitable community placements cannot be found.

> "It seems they are, even in this 'treatment' facility, once more low men on the totem pole."[98]

Even "special" institutions may not offer specialised or effective services.

95. Biklen and Mlinarcik, note 65 above, pp. 172-195.
96. D. Kirkpatrick and J. Haskins, *The Mentally Retarded Offender within U.S. Correctional Institutions,* Texas Dept. of Mental Health and Mental Retardation, quoted by B. A. Rowan, "Corrections", in M. Kindred, J. Cohen, D. Penrod and T. Schaffer (eds.), *The Mentally Retarded Citizen and the Law* (Free Press, N.Y., 1976), pp. 650-675.
97. Md. Ann. Code art. 31B, s. 5 (1971).
98. Rowan, note 96 above, p. 667.

Largely because of the failure of such special services, strong arguments have been put against the creation of separate institutions or programmes for retarded offenders. The following reasons have been advanced:

- That mentally retarded offenders do not constitute a "class" any more so than mentally retarded persons.[99] Therefore, a homogeneous treatment/correctional approach will fail to meet the needs of many retarded offenders;
- That the history of separate retardation programmes even for non-offenders has been questionable, and certainly would not support a segregationist stance with respect to correctional facilities;[1]
- That it is grossly discriminating to prevent mentally retarded people from interacting with their age peers, and has the consequence of depriving them of appropriate age models;[2]
- That the history of segregated correctional services for retarded people has been one of custodial, not treatment oriented care;[3]
- That segregated correctional facilities do not conform to the principle of normalisation.

> "For the mentally retarded offender, the problem remains of choosing the lesser of two evils: placement in prisons or in institutions for the mentally retarded."[4]

Imprisonment does not always prove to be such a negative alternative. Mentally retarded prisoners, when matched with retarded people of the same age, sex and IQ, institutionalised in retardation facilities, are more competent, and acquire adaptive behaviour skills from their fellow prisoners.[5] It is the criminal or deviant behaviour which needs to be treated, not the retardation. There is a dearth of data supporting the view that the experience of retarded people in prisons is so much worse than the non-retarded that it justifies the labelling and transfer out of the criminal justice system, particularly if the alternative is an indeterminate sentence in a segregated institution. Habilitation, rehabilitation, special programmes, and reforms should occur within

99. H. C. Haywood, "Corrections—Reaction Comment", in Kindred et al., note 96 above.
1. Ibid.
2. Ibid.
3. Biklen and Mlinarcik, note 65 above.
4. Haywood, note 99 above, p. 678.
5. Ibid.

the existing correctional services, and not as part of a system to bring retarded offenders into an "exceptional offender" category.[6]

This is not to say, however, that retarded prisoners should not receive better designed and more choice of programmes within the correctional system. No-one would argue that vocational training, social skills, and therapy programmes within prisons could not be improved to meet more effectively the needs of all prisoners, including those who are retarded. A necessary correlate to the provision of appropriate programmes is the right of the prisoner to opt not to participate, without reprisal.

As with many aspects of mental retardation, a dilemma presents itself with respect to imprisonment, namely, the need for specialised programmes, services and protection, without overbalancing towards segregation and overprotection.

CONCLUSION

The debate as to whether mentally retarded offenders should be imprisoned in gaols, or in special facilities, or detained in institutions outside the correctional system has strong arguments on both sides. Even the generally accepted and overriding principle of normalisation for retarded persons finds only qualified support when it comes to imprisonment.

> "Normalization of a mentally retarded individual is not possible within the abnormal situation of the penitentiary."[7]

To accept that prison is a poor placement option for retarded offenders because of the dearth of appropriate rehabilitation programmes, the possibility of victimisation and violence perpetrated by officers or inmates, the likelihood of acquiring more deviant behaviour, the fear that retarded offenders will serve longer sentences than equivalent nonretarded prisoners, or that they will be incarcerated for life because of indeterminate sentencing provisions, is to accept that prison reform will never occur. The reforms needed to cater effectively for retarded prisoners are precisely those which would enhance the rehabilitative potential of the prison system generally. The creation of special facilities for retarded prisoners is merely a "band aid" approach. Given the detrimental aspects of segregated facilities for retarded persons

6. Biklen and Mlinarcik, note 65 above.
7. Missouri Association for Retarded Citizens, note 76 above, p. 57.

generally, retarded prisoners are probably better off in a situation where more activist or verbally fluent fellow prisoners can be outspoken about prison conditions generally, rather than in a back-water removed from the mainstream of prison life and prison reform. A segregated facility may offer better programmes and more effective treatment–but it may not.

Within the correctional system, it is important that general principles guide decisions about retarded offenders:

1. Courts should impose the least restrictive alternative consistent with the needs of the offender and of public safety.
2. Indeterminate sentencing, and particularly the "Governor's pleasure" category should be removed because of the lack of demonstrated advantages either to the prisoner or to society, and the potential for abuse.
3. Mentally retarded offenders sentenced to imprisonment should be handled in the same way as nonretarded offenders. If they are mentally ill, they should be transferred to a mental hospital.
4. Mentally retarded prisoners should receive habilitative services which will assist them to adapt to life in the community. Many services will not differ from those which should be offered to nonretarded prisoners, although the structure and manner of presentation may vary. Other services may relate specifically to the retarded offender's disabilities.
5. Unless necessary for protection against physical abuse, retarded offenders should not be segregated from other prisoners.
6. Mentally retarded offenders should not be transferred to mental health or mental retardation facilities other than through a formal commitment procedure in which the offender is represented by legal counsel.

It is clear that professionals concerned about the conditions of mentally retarded offenders in prisons cannot confine their efforts to this category of inmate, but must look towards ameliorating the dehumanising, harsh, and dehabilitating aspects of prisons in general.

Chapter 8

Into the Community

Involvement of corrective services and other government and non-government agencies does not cease when an offender is released from prison, or given a sentence which can be served in the community Community placement occurs in two contexts–the first concerns the offender who is not sentenced to imprisonment, but who receives a non-custodial sentence (these options have been discussed in detail in Chapter 6), and the second, the offender who is released from detention in a prison or mental institution

This chapter will focus upon issues relevant to release of a retarded offender from detention, namely parole, criteria for release, assessment of the dangerousness of the offender, and the support services and rehabilitation programmes which facilitate the ex-prisoner's re-entry into the community

PAROLE

The major issue is the impact that a person's mental disability may have upon parole decisions The concept of parole can be traced back to convict times in Australia, when the "ticket of leave" system allowed convicts to take employment before their sentences expired [1] Similar programmes of assistance and supervision of prisoners released before completion of their sentence but subject to recall for misbehaviour originated in Ireland in 1846, England in 1853, and the United States of America in 1876 [2] The present parole systems in Australian States were introduced comparatively recently, first in Victoria in 1957, and most recently in the Australian Capital Territory in 1976 [3]

1 Law Reform Commission, *Sentencing of Federal Offenders* (Interim Report No 15, Aust Govt Printing Service, Canberra, 1980)

2 F Rinaldi, *Parole in Australia* (Penology Monograph No 5, Law School, Australian National University, 1974)

3 Vic *Crimes Act* 1958, and now the *Community Welfare Services Act* 1970, Qld *Offenders Probation and Parole Act* 1959, consolidated and amended in 1980, WA *Offenders Probation and Parole Act* 1963, Cth *Commonwealth Prisoners Act* 1967, S A *Prisoners Act* 1936 amended in 1969 to introduce parole provisions, N T *Parole of Prisoners Act*, Tas *Parole Act* 1975, A C T *Parole Ordinance* 1976

Aims of parole

The major aim of parole is enhancement of opportunities for rehabilitation, by providing an opportunity for greater flexibility in sentencing. The system allows the individual's personal characteristics and conduct to be considered. It also has the advantage of decreasing the time spent in the prison environment. From the community's viewpoint, parole provides for supervised release of the prisoner, and is therefore a method of protecting the community.

Numbers of parolees

At 1 July 1982 there were 4,715 persons on parole under supervision in Australia,[4] the majority of whom were in New South Wales. There are large differences between the States with respect to the rate of parolees per 100,000 of the general population. The Northern Territory has the highest rate (71.5), followed by Western Australia (45.6) and New South Wales (44.7). The lowest rates occur in Tasmania (13.5), Queensland (14.6) and the Australian Capital Territory (14.3). There seems to be little or no relationship between rate of imprisonment and rate of parole as some of the "low parole" States (such as Queensland) have relatively high imprisonment rates, whereas others (notably Western Australia and the Northern Territory) have high rates in both areas.[5]

Parole eligibility

In most Australian jurisdictions, non-parole periods are fixed by the court at the time of sentencing,[6] but in some, the non-parole period is prescribed by statute as a fixed proportion of the length of a prison sentence imposed.[7] There are other differences between the States with respect to minimum non-parole periods.[8] Sometimes a non-parole period need not be specified if this is considered inappropriate in view of the nature of the offence and the antecedents of the offender. In New South Wales when a sentencing court declines to set a non-parole period, it is required to set out the reasons in writing. Recently, this

4. I. Potas, "Probation and Parole", *Reporter*, September 1982, 4(1), p. 14.
5. Ibid.; see also D. Biles, "Australian Prison Trends", *Reporter*, September 1982, 4(1), p. 14, and D. Biles, "Prisons and Prisoners in Australia", in D. Chappell and P. Wilson (eds.), *The Australian Criminal Justice System* (Butterworths, Sydney, 1976), pp. 337-354.
6. The A.C.T., the Northern Territory, New South Wales, Victoria, Western Australia and South Australia.
7. Queensland and Tasmania.
8. Law Reform Commission, note 1 above, p. 185.

has occurred in cases involving sex offences, and terrorism.[9] When the court declines to specify a non-parole period, in the words of Mr Justice Lee, "parole is out".[10]

Non-parole periods are also not specified when a sentence of life imprisonment is imposed because theoretically the prisoner is intended to be detained for the term of his natural life. In fact, the majority of "lifers" are released, most serving less than 20 years.[11] In South Australia, two-thirds of "lifers" are released after serving ten years or less.

While minimum non-parole periods may be established, there are no criteria set out in the legislation to guide the court in determining the length of non-parole period. Factors which appear to influence the length of the period include the severity of the offence, the character, antecedents, sex and health of the offender, and prospects for the offender's rehabilitation.[12] With the exception of the two States wherein the length of the non-parole period is a fixed proportion of the sentence, there is evidence that these periods vary greatly between jurisdictions, within jurisdictions, and between ostensibly similar cases.[13] The United States Supreme Court has recently affirmed that parole decisions are highly discretionary, and often made on a very individual and subjective basis.[14]

Remissions

A separate but related issue is that of remissions, which are reductions in the length of the prison sentence for good conduct. Prisoners can be punished for bad conduct by loss of remissions, and this provides a form of discipline. General remissions are automatically granted to prisoners, and special remissions are awarded at the discretion of prison administrators. They are awarded for good behaviour, industry and training, and are an incentive to prisoners to undertake rehabilitation programmes while in prison.[15] Remissions are deducted from the length of non-parole periods in Victoria, South Australia, and Western

9. Ibid., pp. 186ff.
10. *R. v. Anderson, Alister and Dunn* (unreported decision, N.S.W. Supreme Court, Lee J., 8 August 1979, p. 4).
11. A. Frieberg and D. Biles, "Time Served by Life Sentence Prisoners in Australia", *Aust. and N.Z. J. Criminology*, 1976, 9, pp. 77-87.
12. Law Reform Commission, note 1 above, pp. 187ff.
13. Ibid.
14. B. D. Sales, D. M. Powell, R. Van Duizend, et al., *Disabled Persons and the Law* (Plenum Press, N.Y., 1982), p. 678.
15. Law Reform Commission, note 1 above, pp. 188ff.

Australia, but not in other States. This advances the date at which a prisoner may be considered for parole in the States named above.

Whilst remissions may not be taken into account when sentencing, the sentencing court can only impose significant non-parole periods if it takes remissions into account in some cases. A prisoner may be released unconditionally by earning all his remissions before his case could be considered by a Parole Board. This would result in the prisoner being released without supervision by a parole officer.[16] The likelihood of this occurring may be particularly relevant to the court in sentencing a mentally retarded person who may benefit from and need parole supervision upon release from prison.

Granting parole

> "It is one thing to satisfy the pre-requisites demanded by a court for prescribing parole eligibility. It may be quite a different thing to satisfy the criteria demanded by a parole board before it will authorize release . . . [A]lthough a prisoner might be eligible for parole he does not necessarily obtain it."[17]

Parole boards in Australia and the United Kingdom do not give reasons for denial of parole. Parole boards in the United States of America are tending to adopt the practice of giving prisoners a statement of reasons for an adverse decision, the federal parole board having done so for more than ten years.[18]

Not only do problems arise because of the secrecy surrounding parole board decisions, but there are also difficulties owing to the lack of statutory guidelines with respect to factors which are relevant to the parole decision. The New Zealand Prison Parole Board (an advisory board without decision-making power) is required to consider factors such as the safety of the public, the safety of any person who may be affected by the release of the prisoner, and the welfare of the offender.[19] Notably, no mention is made directly of the mental condition of the offender as a factor working for or against release on parole.

The secrecy and uncertainty surrounding parole board decisions is exacerbated by the fact that a prisoner has no right to appeal to a court for a review of the decision.[20] It should be possible to list here the fac-

16. Ibid.
17. Rinaldi, note 2 above, p. 127.
18. Ibid., p. 135.
19. *Criminal Justice Act* 1954 (N.Z.), s. 37(6).
20. Law Reform Commission, note 1 above, p. 197.

tors which the parole boards take into account when making a decision, to examine whether or not sufficient attention is paid to a prisoner's mental retardation, and determine whether such prisoners are the object of discrimination in the parole granting process. This is not possible because of the lack of information about how parole boards make decisions. That it is not possible is, in itself, reason for reform of the parole system. Prisoners, their families, prison officers, parole officers, and the judiciary are entitled to know which prisoner characteristics are considered. The Australian Law Reform Commission states that the decision is "likely" to be influenced by information known at the time of the sentence—including prior convictions, prior terms of imprisonment, any previous parole revocations, drug usage, and level of education—as well as information gathered during the time of imprisonment, such as the prisoner's behaviour, and reports about the prisoner's social and family situation, health, age and employment prospects.

> "Yet all the evidence shows that parole authorities, even when they have full knowledge of a prisoner's situation, can not predict with any degree of accuracy what the prisoner's behaviour following release on parole is likely to be ... A decision to release or not to release on parole can be no more than an informed guess."[21]

What information there is about conditions for granting parole indicates a strong likelihood that mentally retarded prisoners could be worse off than other prisoners. Their behaviour in prison may have been unpredictable, not only because of the difficulty of adapting to a new environment, and victimisation by other prisoners or staff, but also because of failure to realise that likelihood of release on parole is increased if they co-operate and behave themselves. Levels of education amongst retarded prisoners are likely to be low. Participation in training programmes whilst in prison will be poor. Employment prospects are not positive. It may be difficult to locate suitable residential accommodation. If the prisoner is interviewed by the parole board, inadequate verbal skills may inhibit his chances of influencing the board to grant parole. All in all, parole prospects do not seem rosy for a retarded prisoner.

The parole system under review

The parole system in Australia has received much criticism over the past decade. The Australian Law Reform Commission's view is that

21. Ibid., pp. 198-199.

it should be abolished altogether.[22] On the other hand, supporters of the parole system state that it allows an element of flexibility in the sentencing process.[23] Judges at the time of sentencing have only a limited amount of material on which to decide a proper sentence. A prisoner's family or employment circumstances could alter dramatically after sentence is passed.

Criticisms of the parole system include the following:

- review procedures by parole boards are secret, and arbitrary;
- the uncertainty about parole and lack of feedback about why parole is not granted is unsettling and unfair to prisoners;
- there are disparities between jurisdictions as to the use of parole and parole eligibility requirements;
- individual parole boards adopt different practices;
- there is no evidence that parole increases the likelihood of rehabilitation;
- parole weakens the impact of the remission system, which is designed as an incentive to training programmes and good behaviour;
- the prisoner's family suffers unnecessarily because of the uncertainty of granting parole;
- lack of appeal about parole decisions increases the attendant uncertainty;
- prisoners and their families have no access to the files and records upon which a parole board bases its decision and therefore cannot correct any unfair, misleading or untrue statements or assessments;
- parole does not have any impact on reducing the prison population;
- it is based upon prediction of human behaviour, which is difficult and arbitrary, particularly in the artificial environment of a prison;
- there are often long delays before prisoners hear the outcome of applications of parole; and
- parole board decisions do not follow the normal requirements of natural justice.[24]

22. Ibid., p. 211.
23. Anon., "Parole on Trial at Seminar", *Reporter,* September 1979, 1(1), pp. 6-9, quoting an address by Mr. Justice Blackburn.
24. See generally notes 1 and 23 above.

Short of the total abolition of parole, a number of reforms to the current system have been proposed. These include standardisation of non-parole periods and remissions; improved administrative procedures which recognise the requirements of natural justice and privacy; statutory guidelines for parole release decisions; parole release decisions being made by courts, not by "lay" boards; and appeals from parole board decisions. Of greatest significance to the mentally retarded offender would be the establishment of guidelines for parole decisions, which would incorporate factors such as personal and social background, and medical, social-adaptive and psychiatric history.[25]

Summary

A number of studies have shown that incarcerated offenders who are mentally retarded tend to serve longer sentences for the same crime than non-disabled offenders and are less likely to be released on parole.[26] Prison programmes and services should be provided which will assist retarded offenders to overcome the difficulty of preparing release plans and in adjusting to prison rules, factors which have hindered parole in the past. Where assistance is not available, however, retarded prisoners should not be discriminated against solely because of the presence of retardation. Parole decisions should be made on the basis of the same factors for retarded and non-retarded offenders. Furthermore, retarded prisoners who are placed in special facilities or security patients' hospitals should not be denied the opportunity for parole release, or have such a decision contingent upon their return to a correctional facility.

Clearly there is a strong need either for reform of the parole system, or abolition of the system. Any improvement made for the benefit of the general prison population will have positive repercussions for retarded prisoners. Nevertheless, their chances of obtaining parole will still be inhibited unless appropriate prison programmes are provided which will assist in preparation for release.

THE CONCEPT OF DANGEROUSNESS

The concept of dangerousness is of great significance to mentally retarded people involved in the criminal justice system, for two important reasons. First, it is likely to be a factor taken into consideration when a decision to grant or deny parole is taken. Secondly, the concept is relevant to detention in a prison or mental hospital when a person

25. Law Reform Commission, note 1 above, p. 209.
26. Sales et al., note 14 above, p. 769.

is found unfit to plead, or is acquitted on the ground of mental illness.

In two States where changes to mental health legislation are proposed (Queensland and New South Wales), dangerousness is to be enshrined in the legislation as the criterion for making certain decisions about forensic patients. In New South Wales, the Mental Health Review Tribunal shall consider the case of a person acquitted on the ground of mental illness and make a recommendation to the Minister as to the person's release

> "where the Tribunal is satisfied ... that the safety of the person or any member of the public will not be seriously endangered by the person's release."[27]

The proposed Queensland legislation states:

> "The Tribunal that has reviewed a patient's mental condition [under s. 647 of the *Criminal Code*—not guilty on the ground of unsoundness of mind] shall make its recommendation to the Parole Board as to whether the patient can be released with safety to himself and other persons ... The Parole Board shall not release a person who is or was a patient referred to in this section *unless* a Tribunal has recommended to it that the person can be released with safety to himself and other persons" (emphasis added).[28]

Specifying that the person must not be a danger to himself or others at first glance would appear to be an improvement upon the existing situation, where the conditions for release of Governor's pleasure detainees, or factors to be taken into account by parole boards are unspecified, secret, and possibly arbitrary. Where conditions for release are not specified, variations may occur over time, between jurisdictions, or within one jurisdiction if more than one board or committee is considering applications for release. This arbitrariness and secrecy has been severely criticised (see above). There is, however, considerable debate about whether using dangerousness as a criterion is a step forward.

A number of misconceptions surround the concept of dangerousness. It is assumed, for example, that criminal behaviour and mental

27. Mental Health Bill 1982 (N.S.W.), cl. 113(1)(b)(ii); see also cl. 112 where dangerousness is made a criterion for release of an accused person under s. 428I(2)(b) or 428L(1)(b)(i) of the *Crimes Act* 1900 (N.S.W.).
28. Mental Health Act and Criminal Code Amendment Bill 1983 (Qld.), cl. 28, inserting new s. 39(5)-(6) into the *Mental Health Act* 1974-1978 (which, as amended, would be cited as the *Mental Health Services Act* 1974-1983).

abnormality are linked, and as a corollary, when the person is cured of his mental disorder, he will no longer commit crimes. This nexus has not been established.[29] Furthermore, the majority of offenders convicted of violent offences are not again convicted of violence, although a person who has committed a *number* of violent offences is more likely to commit another. Dangerousness is rarely characteristic of the individual's psychopathology, but instead is a consequence of the personality of the individual and the circumstances in which he finds himself. Many people are capable of violent or dangerous acts if they find themselves in a situation which triggers such a reaction, the trigger mechanism perhaps being drugs, alcohol, jealousy or feeling cornered. Domestic violence is a prime example of a situation wherein so-called typical citizens can suddenly be motivated to act in a violent and possibly uncharacteristic fashion. The difficulties of isolating and recognising the trigger mechanisms further confuse the concept of dangerousness.

Assessing and predicting dangerousness

Studies demonstrate that the assessment and prediction of dangerousness are not simple tasks, nor tasks at which psychiatrists or psychologists are particularly competent. Clinicians clearly and consistently over-predict dangerousness, and arrive at many "false positives", that is, people who are predicted to be dangerous but who do not display such behaviour.[30] The incidence of false positives means that many people are detained who do not need to be, or who could be detained in less restrictive environment.

Despite a voluminous literature on the subject of dangerousness, few empirical studies have attempted to assess the success of clinical predictions concerning dangerous offenders.[31] In the United States, the result of increased legal challenges and judicial scrutiny has been a move beyond the generalised statutory language of "a danger to self and others" such as is to be part of mental health legislation in New South Wales and Queensland. The precision of statutory definitions has increased—for example, the Arizona civil commitment code states:

29. *Report of the Committee on Mentally Abnormal Offenders* (Butler Report) Cmnd. 6244 (HMSO, London, 1975)—see generally Ch. 4—"Dangerous Mentally Disordered Offenders".
30. Sales et al., note 14 above, pp. 740ff.
31. See generally, S. A. Shah, "Legal and Mental Health System Interactions, Major Developments and Research Needs", *Int. J. Law and Psychiatry*, 1981, 4, pp. 219-270, particularly pp. 235ff.

> " 'Danger to others' means behaviour which constitutes a danger of inflicting substantial bodily harm upon another person based upon a history of having inflicted or attempted to inflict substantial bodily harm upon another person within twelve months preceding the hearing."[32]

The Supreme Court of New Jersey emphasised that dangerous conduct was not to be equated with *any* criminal conduct, but had to involve significant physical or psychological injury to persons or substantial destruction of property.[33] The task of predicting dangerousness is made simpler by these more precise definitions. Efforts have also been made by mental health professionals to develop check lists and improved screening tests and instruments.[34] There has also been a trend towards establishing brief out-patient assessments, rather than lengthy and costly in-patient observations and evaluations. Prediction of behaviour can also be improved by taking better account of the environmental and situational factors which appear likely to influence the behaviours of concern.

The assessment and prediction of dangerousness is further complicated by external societal changes and pressures upon the boards or individuals making the assessment. A study of a Texas review board for determining the dangerousness of mentally ill offenders[35] found that as time went on, a conservative atmosphere began to prevail. This was brought about by at least four factors:

1. After a series of uneventful releases, board members began to feel that future releases would cause serious problems;
2. Members of the board became concerned about the board's legal liability;
3. Newspapers gave extensive coverage to crimes committed by criminally insane people, and the general public began to believe that mentally ill persons were more dangerous than other people; and
4. The State legislature was in session, and several legislators expounded views to the effect that the review boards were "releasing murderers, rapists, arsonists and other fiends back out into the streets".

32. *Arizona Rev. Stat. Ann.*, Ch. 36-50, 3(1974).
33. *State v. Krol,* 344 A. 2d 289 (N.J. 1975).
34. Shah, note 31 above.
35. H. K. Dudley, "A Review Board for Determining the Dangerousness of Mentally Ill Offenders", *Hospital and Community Psychiatry,* 1978, 29(7), pp. 453-456.

Thus, even when legislation contains precise and clear definitions, and review boards are established with the aim of striking a balance between community and individual needs, the composition of the boards, and professional "burn out" can lead to a situation wherein boards find it easier to make cautious decisions.

Because of the inherent difficulties of assessing and predicting dangerousness, objective, scientific evaluations tend to give way to, or at least be influenced by subjective expectations held by a particular psychiatrist, including his own estimate of the prevalence of psychopathic behaviour, the school of psychiatry to which he pays allegiance, his own estimate of the accuracy of his prediction, and his personal values.[36] Psychiatrists express discomfort about the kinds of predictions they are called upon to make, because such predictions involve a great deal of speculation without adequate clinical evidence to back it up.[37] One of the factors complicating accurate clinical prediction is that it is almost always based upon observation of institutional performance. A further difficulty is that there are significant differences between the criminal acts committed by patients coming within different diagnostic categories. Patients with psychiatric diagnoses tend to be significantly more likely to have committed offences against persons (murder and assault), whereas those diagnosed as personality disordered are more likely to have committed theft. Patients with schizophrenic diagnoses have higher rates for violent crimes than control populations; and specifically, paranoids, paranoid schizophrenics and undifferentiated schizophrenics tend to commit more violent crimes than patients with other psychiatric diagnoses including the diagnosis of mental retardation.[38]

In a recent case, the High Court cited criminological literature which demonstrates that there exists grave doubt about the ability of psychiatrists to make predictions about future violent behaviour.[39] Stephen J. referred to a study which found that psychiatric evaluations often included the current alleged offence, and histories of assaults, arrests

36. R. R. Price, "Mentally Disordered and Dangerous Persons Under the Criminal Law", *Canadian Journal of Corrections,* 1970, 12, pp. 241-264.
37. Ibid.
38. M. Benezech, M. Bourgeois and J. Yesavage, "Violence in the Mentally Ill—A Study of 547 Patients at a French Hospital for the Criminally Insane", *J. Nervous and Mental Disease,* 1980, 168(11), pp. 698-700.
39. *Veen v. R.* (1979) 23 A.L.R. 281.

and hospitalisations as *psychiatric* justifications for expecting future violence.[40] Yet, of all the variables examined, the only one found to be statistically significantly related to an evaluation of dangerousness was the current alleged offence. If the offender was charged with a violent offence, there was a strong possibility that he would be judged dangerous in the psychiatric evaluation. The High Court expressed grave reservations about the concept of dangerousness and its prediction.[41]

Whilst research on the prediction of dangerousness continues, it is hampered by a number of methodological problems, not the least of which is obtaining a sample of randomly released patients. Parole boards are justifiably hesitant about releasing potentially dangerous offenders in order that long-term follow-up studies can determine whether or not they proceed to commit violent crimes. The follow-up process is also limited, because only those offenders who are released are followed up. Those who remain in custody are seldom evaluated to see if they commit violent acts. The catch is that if they do not commit violent acts while detained, it can be attributed to the close supervision rather than failure of prediction.

Recent research into prediction of dangerousness has been conducted in the fields of predictions from demographic data, psychometric assessments, operant conditioning, ward behaviour, and psychophysiological studies of sex offenders' arousal to inappropriate sexual stimuli.[42] Results have been patchy, in part owing to methodological problems outlined above, and also because of the coarseness of predictive variables, and small sample sizes. Greatest progress has been made in the area of psychological assessment of sex offenders' sexual preferences, perhaps because sexual arousal, deviant behaviour and deviant object choice are more readily quantifiable than many other variables relevant to dangerousness.[43] Nevertheless, impressionistic case studies, lacking scientific methodological rigour, continue to be reported and to be influential in persuading professionals and the public that certain

40. H. J. Steadman and J. Cocozza, "Psychiatry, Dangerousness and the Repetitively Violent Offender", *J. Crim. Law and Criminology,* 1978, 69, p. 226.
41. For examination of *Veen's* case, see P. Sallman, " 'Dangerousness', A Deceptive Idea", *Legal Service Bulletin,* October 1979, pp. 208-211.
42. V. L. Quinsey, "Assessments on the Dangerousness of Mental Patients Held in Maximum Security", *Internat. J. Law and Psychiatry,* 1979, 2, pp. 389-406.
43. Ibid.

"types" of criminals are dangerous.[44] In the absence of adequate research into prediction of dangerousness it is a small wonder that parole boards tend to be conservative in their release decisions.

Summary

In the Australian context, introduction of the concept of dangerousness as the major criterion for determining release of prisoners on parole, or release of Governor's pleasure detainees could be seen as a step forward. In lieu of the veil of secrecy surrounding release decisions by parole and mental health boards, there is now (in some States) a clear concept which guides the board to seek certain types of information about the prisoner. Where there are no criteria established through legislation, such boards can flounder round in a morass of unorganised information and opinion, unclear as to whether public safety, the prisoner's good behaviour, the type of offence and the public reaction to it, punitive-deterrent or rehabilitative functions of imprisonment, or a number of other considerations are to be taken into account.

As the North American experience has demonstrated, however, broad definitions of dangerousness are not adequate to guide parole boards. Statutory definitions in the United States have tended to become more specific and detailed over the past decade. Hand in hand with the move towards clearer statutory definitions of dangerousness has been the growing awareness of the problems of assessing and predicting dangerousness. The dilemma is that while no-one would disagree with the proposal that dangerous and violent criminals should not be released, because of the high rate of false positives, for every person who may accurately be detained on a preventive basis as dangerous, anywhere from five to 99 or more non-dangerous individuals would also be confined.[45]

Mentally retarded individuals are under the same disadvantages as other mentally abnormal offenders when assessments of dangerousness are made, and may be further prejudiced by lack of exposure in prison to social skills programmes designed to help them cope appropriately

44. For example, A. A. Bartholomew, K. L. Milte and F. Galbally, "Aggression, 48 XYY and Cerebral Pathology: A Disease of the Mind?", *Aust. & N.Z. J. of Criminology*, 1981, 14(1), pp. 20-22—a case study of attempted murder by a man known to have 47 XYY karyotype and who had previously stood trial for murder and successfully pleaded insanity. He also had low intelligence, and old skull fracture and the possibility of temporal limbic epilepsy.
45. Sales et al., note 14 above, pp. 740ff.

with frustration. Since good behaviour during imprisonment is also a factor considered by parole boards, mentally retarded offenders who are not able to learn the prison rules quickly may appear to be unpredictable or even violent.

The problems of the numbers of false positives, and the conservatism of mental health professionals and parole boards could be greatly reduced if detention at the Governor's pleasure and other indeterminate sentences were abolished, and if parole was either abolished or made automatic after a certain proportion of the sentence had been served. Those prisoners who were due for release or parole would not be detained. No prisoner would be denied parole or release on the basis of arbitrary and perhaps erroneous assessments of dangerousness. Persons who were released from prison and were a danger to themselves would be dealt with under mental health legislation.

There would still remain the problem of a small number of prisoners serving determinate sentences who have to be released when their sentence expires even though they were thought to be dangerous. The Butler Committee[46] proposed a new form of sentence for dangerous offenders who present a history of mental disorder which cannot be dealt with under mental health legislation and for whom a life sentence is not appropriate. This reviewable sentence would be applied at the time of sentencing by the court. The prisoners would be subject to statutory review at regular intervals, release being dependent solely on the issue of dangerousness. Such a sentence could be imposed only after strict conditions were met. On release, the offender would be under compulsory supervision.

Criteria for detaining a dangerous offender proposed by the American Bar Association are that the person must have been found beyond reasonable doubt to have engaged in an offence involving serious bodily harm or substantial risk therof, there must be clear and convincing proof that the person remains a threat to community safety, that treatment and rehabilitation programmes must be available at the facility in which the person is placed, and that no less restrictive alternative would adequately protect the public.[47]

The community has a right to be protected from violent and dangerous individuals. On the other hand, offenders have a right to be protected against the over-use and over-cautious use of the nebulous concept of dangerousness as a reason for continued deprivation of liberty.

46. Butler Report, note 29 above.
47. Sales et al., note 14 above, pp. 753-754.

HABILITATION AND REHABILITATION

Habilitation has been defined as

> "the process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental, and social efficiency. Habilitation includes but is not limited to programs of formal, structured education and treatment."[48]

The term differs from "rehabilitation" in that it emphasises the acquisition of skills of daily living in persons who have previously been without such skills, whereas rehabilitation implies the person has lived a normal life and for some reason (such as a physical accident or illness, mental disease, or imprisonment) can no longer do so and needs to be assisted to regain the lost skills.

There are strong arguments for differential programming for mentally retarded offenders, many of whom would never have acquired social, personal, adaptive and academic skills necessary for survival in the community. The treatment, therapy and rehabilitation programmes available to mentally ill offenders are unlikely to be appropriate for those who are mentally retarded. The vocational, educational and training programmes for non-retarded prisoners are also unlikely to be appropriate for retarded offenders, particularly as there is a low rate of participation by retarded offenders in prison programmes.

A study of mentally retarded juvenile offenders demonstrates the importance of differential programming. The retarded juvenile offenders when compared with non-retarded delinquent peers were found to have lower self-images, were more concerned about ease and comfort than about opportunity to learn, looked to the peer group for approval, were less likely to feel in control of their lives, were more disruptive and more frequently disciplined, exhibited inadequate attentional skills, became easily flustered and confused, were behind in academic achievement, had a history of progressive failure and alienation within the school system, had rarely been placed in special education classes despite strong indications of the need for this, and had a high degree of cultural deprivation at home.[49] Few of the delinquents

48. *Wyatt v. Stickney,* 334 F. Supp. at 395.
49. F. Dennis, *The Retarded Juvenile Offender Research and Demonstration Project* (Tennessee Department of Correction, 1971).

had been placed in alternative community programmes, yet averaged more than one commitment to correctional institutions

The study concluded that a vast number of mentally retarded youths who would otherwise become juvenile offenders could avoid this fate if they acquired sufficient skills to meet the complexities of daily living It also found that social training at the state school for delinquents was least effective with respect to the mentally retarded youths

The needs of retarded offenders are greater than those of the non-retarded Retarded inmates have been found to require an undue amount of staff time In attempting to manage and treat this minority, corrective services administrators are faced with the problem of inadequate staff numbers to cope with the remainder of the offender population [50] Retarded offenders also have a higher rate of violation of prison rules

The right to treatment in mental or correctional institutions in the United States of America has been established in the courts [51] This has occurred because the U S Constitution establishes basic rights including the rights of due process and equal protection under the law, and also because of the existence in some States of statutes which promise treatment, hospitalisation or rehabilitation Of great significance is the recognition that society has the obligation to provide for its members the special assistance they may need in exercising their rights [52]

In Australia, rights to treatment and appropriate programmes similar to those in the United States have not been established by the courts, and it is unlikely that they would or could be, because of differences between our legal system and that of the United States [53] This is unfortunate because it is easier to persuade governments to direct funds into areas when there is legal compulsion to do so, but even in the United States it has been found that commitment of retarded persons to specialised facilities does not ensure treatment, irrespective of the sincerity of legislative or judicial intentions [54]

50 B A Rowan, "Corrections", in M Kindred, J Cohen, D Penrod and T Shaffer (eds), *The Mentally Retarded Citizen and the Law* (Free Press, New York, 1976), pp 650-675

51 Ibid , pp 669ff

52 M B Santamour and B West, *Retardation and Criminal Justice, A Training Manual for Criminal Justice Personnel* (New Jersey Association for Retarded Citizens, 1979), p 44

53 See generally, S C Hayes and R Hayes, *Mental Retardation Law, Policy and Administration* (Law Book Co Ltd , Sydney, 1982)

54 Rowan, note 50 above, pp 669-670

Apart from legal rights, another strong force motivating criminal justice systems to provide appropriate programmes for offenders is money. Corrective services are extremely expensive to run, consuming huge quantities of public funds for what many members of the public would view as very little return. If corrective services prove unresponsive to moral arguments concerning the need to provide appropriate habilitative programmes for retarded offenders, they may be more responsive to economic arguments flowing on from use of less restrictive alternatives, lower recidivism rates, and assistance to the offender to become competent to function in the community as a self-reliant, law-abiding citizen to the extent and within the shortest time possible.

Habilitative programme development[55]

The essence of planning habilitative programmes for retarded offenders lies in thorough and continuous assessment of the person's skills and development. It is as unsuitable to commence all retarded offenders at the same step in a programme as it is to combine retarded and psychiatric participants in a programme. A testing programme will include assessment of intellectual functioning, adaptive behaviour and vocational aptitude. Of necessity, comprehensive testing and assessment of retarded offenders will involve a multidisciplinary team approach, using professionals with expertise in fields such as psychology, education, occupational therapy, physical therapy, speech pathology and mental health.

Academic and vocational training programmes must be placed in context, the context being the individual's ability to live in the community as independently as possible. An important component is training in activities of daily living including:

- personal hygiene and general appearance,
- washing and ironing,
- food preparation and menu planning,
- housekeeping tasks,
- budgeting and money management, including banking and shopping,
- human sexuality, relationships and family planning,
- drug and alcohol education,
- social studies, including current events and the structure of society,

55. See generally and for more detail, Santamour and West, note 52 above, pp. 25ff.

- awareness of civil and legal rights,
- community resources, and
- recreational activities.

Vocational training and job placement for retarded people is an area in which there is a great deal of expertise. Some of the most notable programmes are the Work Preparation Centres funded by the Federal Department of Social Security (for example, at Granville and Marrickville, in Sydney). Not all sheltered workshops achieved such high standards and success in placing trainees in open employment.[56] A comprehensive vocational training programme is designed not only to teach the individual how to perform the tasks, but includes other work-related skills such as using public transport to get to work, being punctual, and forming relationships with co-workers.

Retarded offenders who are on probation or parole may be able to enter a sheltered workshop specifically designed for retarded workers in the community.

One difficulty is the dearth of high standard facilities, particularly in isolated country areas. A retarded offender in prison is unlikely to receive appropriate vocational training from which he will be able to benefit, because prison workshops are aimed either at training non-retarded prisoners, or at keeping all prisoners occupied, sometimes doing boring and repetitive tasks. The retarded prisoner may be given undemanding tasks, such as acting as messenger, or cleaner. He will not have the opportunity to learn anything by performing such tasks, and it may have the effect of isolating him from the rest of the prison community.

Retarded defendants or offenders who are detained in security patients' hospitals are unlikely to fare much better. Rehabilitation and occupational therapy which is appropriate for mentally ill people do not fulfil the voctional training requirements of retarded people who may never have held a job.

The learning of academic skills is vitally important if the retarded person is to acquire the basic literacy and numeracy skills necessary to independent living. Reading is also an important leisure time activity which will help alleviate boredom and frustration. (Severely retarded

56. For discussion of sheltered employment and vocational training for retarded people, see Hayes and Hayes, note 53 above, pp. 172ff., and S. C. Hayes, *Current Issues in Sheltered Employment in Australia* (International Year of Disabled Persons National Committee of Non-Government Organizations, Discussion Paper, 1981).

persons who are unable to acquire any academic skills are unlikely to be encountered in corrective services.) Mildly retarded or borderline offenders who may not have been provided with special education services during school years will almost always be able to acquire some basic reading, writing and arithmetic. The task of providing these special education programmes has been made considerably easier by the development of carefully structured instructional programmes which do not require special education expertise on the part of the instructor, and relieve the instructor of having to design a programme from the beginning.[57]

The retarded offender needs ongoing support and counselling from probation and parole officers and correctional personnel. Support for the offender who is living in the community may be able to be phased out over time, particularly if other resource people (such as family, friends and mental retardation professionals in the community) are available. Ongoing support is most likely to be required by retarded persons who have resided in institutions (mental retardation institutions, "homes" for state wards or delinquents, or prisons) for most of their lives. Such persons need assistance in building up and maintaining a network of community resources, including access to legal aid facilities.

Personnel training

There is an ongoing debate about whether specialised services for retarded offenders should be provided by segregated facilities, or whether they are most appropriately handled in an integrated prison system. Proponents of normalisation for retarded people argue against segregated services, saying that retarded offenders are as likely to receive substandard treatment there as in prison, and that at least in the mainstream they will not be forgotten or ignored. As general reforms are made in corrective services, the lot of retarded offenders will also improve. The proponents of segregated placement emphasise that "normal" opportunities do not exist in the prison setting for anyone, and therefore it is inappropriate to apply the principle of normalisation in this setting.[58] It is said that

> "[U]ndifferentiated handling has resulted not only in neglect of retarded offenders but in positive damage to them."[59]

57. For example, the Distar Arithmetic, Language and Reading Instructional Programs, published by Science Research Associates, Chicago (local Australian outlets exist).
58. Santamour and West, note 52 above, pp. 11-12.
59. Rowan, note 50 above, p. 673.

The balance of the argument probably comes down on the side of allowing mentally retarded citizens the right to be treated as nearly as possible like other citizens. This does not mean that specialised programmes for retarded offenders should not be provided by correctional services. The corrections system must improve present habilitative procedures, incorporating programmes for retarded offenders in a non-segregated environment.

Provision of more adequate services for mentally retarded offenders necessitates training of personnel. Retarded offenders will sometimes be in contact with professionals expert in the field of retardation, but more frequently they will not. Criminal justice personnel need to receive training which will enable them to recognise and deal with retarded offenders effectively. At present, such training is piecemeal, ad hoc, and variable over time and between jurisdictions. As a consequence, personnel regard the mentally retarded offender as a misfit in their system of services,[60] and experience frustration at their inability to achieve anything with this group of offenders.

SUMMARY

Mentally retarded offenders tend to serve longer sentences than their non-retarded counterparts, are less likely to be released on parole, are more likely to breach parole conditions (particularly if an overworked parole agency has insufficient time for proper supervision), and may be further discriminated against because of fears that this type of offender is more aggressive or dangerous. The irony is that they have good potential to benefit from appropriate programmes, yet suffer in the correction system (and probably have suffered previously in the educational and community welfare systems) from lack of appropriate habilitative services. The correctional service is likely to be the "end of the road". Following failure to receive special education, and a series of minor delinquencies, finally the court will adopt the stance that "something must be done", and the retarded offender will be consigned to correctional services. In the interests of morality, community benefit and economy, it is important that the retarded offender be entitled to receive habilitative services—medical, mental, health, social, vocational, educational, physical therapy, counselling and other services—which will assist him to the extent and within the shortest time possible to function in the community as a self-reliant, law abiding citizen.[61]

60. Santamour and West, note 52 above, p. 11-12.
61. Sales et al., note 14 above, p. 762.

Chapter 9

Blueprint for Action

The discrimination, misunderstanding, and mistreatment which befalls a mentally retarded person who becomes involved in the criminal justice system can be ameliorated. In some areas, reforms in the law which lead to improvement of the lot of any person suspected, accused or convicted of a crime will concurrently improve the situation of the mentally retarded person. In other areas, mentally retarded persons are significantly worse off than their non-retarded peers, either because other groups have won reforms which have not been applied to the mentally retarded group, or because the adverse effects of the system upon a retarded person are much greater. In the latter situation, specific reforms must be enacted.

Appearing as a common thread through consideration of the need for change and reform, are two major philosophies which are the touchstones of modern thinking about mental retardation, the concepts of normalisation and integration. *Normalisation* means making available to mentally retarded persons patterns and conditions of everyday life which are as close as possible to the norms and patterns of the mainstream of society. *Integration* involves putting the principle of normalisation into operation, so that mentally retarded people are educated in typical schools, reside in the community, work in open employment, receive health care from the same facilities as non-retarded persons, and are accorded the civil rights, liberties and obligations which are accorded to non-retarded citizens. Integration does not, however, imply denying retarded people the extra assistance and resources which are required if they are to achieve their full potential, nor does it imply dumping them into situations in which they will be unable to cope. Just as other sections of our society—for example, children, physically disabled people, elderly people, non-English speaking people, and mentally ill people—need and receive extra resources in certain areas or at certain periods of their lives, so mentally retarded people deserve similar consideration, administered in a non-intrusive and non-restrictive manner.

Mental retardation differentiated from mental illness

Mental retardation is a term describing persons with significantly sub-average intellectual functioning, usually manifesting itself early in life, and being characterised by inadequacy in social and adaptive behaviour. Whilst the level of functioning may be raised through exposure to stimulating educational and social environments, the condition is irreversible, and cannot be "cured".

Mentally ill people are those suffering from a psychiatric illness. The onset of the illness may occur at any time during the life-span. The condition can be alleviated by treatment options which include medication, group or individual therapy, and other therapies, such as electroconvulsive shock. Frequently, the psychiatric illness is temporary in nature. Mentally ill persons usually only come to the attention of the law when they become a danger to themselves or others, or if they commit a crime and their mental condition at the time is thought to be relevant to the level of culpability.

Mental abnormality and the law

In almost every situation where a retarded person's mental condition is relevant to the law, he will be regarded as if he were insane or mentally ill. With very few exceptions, the law does not differentiate between the two conditions, and as a consequence a retarded person may be subjected to treatment, management, detention, medication, or institutional placement which is suitable for a psychiatric patient but totally unsuitable for a mentally retarded person.

The significance of the mentally retarded offender

Conservative estimates reveal that there are probably two or three times the proportion of retarded people in the prison population as there are in the general population. The proportion of offenders who receive fines or are sentenced to non-custodial forms of correction has not been assessed, but is possibly higher than the proportion in prison because many mentally retarded offenders commit minor crimes and are not sentenced to imprisonment. Mental retardation and/or educational backwardness is also prevalent in the juvenile offender population, with a *minority* of juvenile offenders being in a class of average standard for their age.

Low socio-economic status, poor employment opportunities, deprived family background, and lack of availability of remedial educational facilities are factors which are relevant to both retarded and non-

retarded prisoners. Adult retarded offenders have frequently been known to correctional agencies as juveniles, and imprisonment is likely to be a last resort when other avenues have failed. Prison is, however, an expensive and personally destructive last resort. Much of the criminal behaviour evidenced by retarded adults could be prevented if funds and resources were available to the agencies of first contact (usually schools and youth welfare departments) rather than to the agency of last resort, the prison.

Mentally retarded suspects and the police

Many police officers are unskilled in recognising a suspect who is mentally retarded, and the need for police training in this area has been recognised, but inadequately implemented. Case histories demonstrating grave miscarriages of justice on the basis of "confessions" obtained from mentally retarded suspects, and research evidence showing that confessions are obtained in two thirds of cases involving retarded offenders, indicate that there is an urgent need for the establishment of safeguards during police questioning of retarded suspects. For the guidance of police officers, rules must be established which necessitate the presence of a third person (who is not a police officer) during the questioning of a suspect who is mentally retarded. Furthermore, even if a confession is obtained, further inquiries to obtain evidence corroborating the confessional statement should be undertaken; care should be taken in administering the official caution; questions should be formulated in such a way that the person can comprehend; and the interview should not continue for an unreasonably long time, nor should the suspect be denied food, drink, and comfortable surroundings.

Police should have the option of taking the retarded person to an admission centre, if a decision is taken not to proceed with the charge. The admission centre should be separate from that used for psychiatric patients, and provisions should exist for the mentally retarded person to be detained for assessment and assistance, should it appear necessary.

Police training in the areas of the recognition and questioning of mentally retarded suspects, and their knowledge of appropriate community resources is not sufficient, given the frequency with which they encounter this problem. It is imperative that police training be improved.

Fitness to plead

A mentally retarded accused who is judged unfit to plead is unlikely to "regain his senses" and become fit to be tried. It is unfair that such

a person be held in strict custody indefinitely, without ever having undergone trial. If it appears unlikely that the accused will become fit to be tried within six months, a trial of the facts should be held to determine the accused's guilt or innocence. If the accused is found to be innocent, he should be released from custody and, if necessary, dealt with under legislation pertaining to mentally ill or intellectually handicapped citizens who are in need of care and protection. If the person is found guilty, the court should have a variety of sentencing options at its disposition, including discharging the person into the community, or releasing him on an undertaking that he attend an appropriate hospital or institution or programme, or making any other orders it considers appropriate.

The retarded accused in court

As is the case with police officers, court personnel should have training in recognising a retarded accused, and evaluating the extent to which that person may be able to give evidence.

The insanity defence

An accused found not guilty on the grounds of insanity will be sentenced to be detained in strict custody at the Governor's pleasure. A person so found should not be held in a prison or any other correctional institution but should be transferred to an institution administered by mental health authorities. The court should have the power to order an absolute discharge of the person, if there is no danger to himself or society.

Because a retarded person will not "recover" from his retardation, it would be unwise for legal counsel to employ the defence of insanity, for the result may be indeterminate incarceration in prison or security patients' hospital. A determinate sentence, even if served in prison, is the preferable alternative.

Diminished responsibility

The defence of diminished responsibility, where it exists, is relevant to a mentally retarded person accused of murder. The definition of diminished responsibility recognises the concept of mental retardation, thus obviating the necessity of forcing the retarded person artificially into the mould of insanity. The effect of this defence is to reduce the charge to manslaughter, and the court sentences the offender accordingly. The perils of the No-man's-land of detention at the Governor's pleasure are avoided.

Non-custodial sentences

The range of non-custodial sentences available to the court when considering the fate of a mentally retarded offender is wide. It is firmly established that the offender's mental condition is relevant in determining sentence. The major limitations do not lie in a lack of available or suitable sentencing options, but rather, an inappropriate disposition is likely to be related to the court's lack of awareness of the presence of mental retardation, or because specialised habilitative services are not available from correctional services or in community agencies. The court should be required to impose the least restrictive alternative consistent with the needs of the defendant and of public safety.

Indeterminate sentences

Indeterminate sentences (such as detention at the Governor's pleasure) should be subject to review at regular intervals (of one or two years). They should be imposed upon any offender only as a last resort, but should be used even more sparingly for retarded offenders because of the probability that the treatment and training available in prisons is unlikely to effect the rehabilitative aim of the sentence.

Transfer between prison and mental hospital

Transfer between prison and mental hospital should take place only when the requirements of due process of law have been fulfilled. There should be safeguards in criminal commitment proceedings to ensure that this decision is not arbitrarily or erroneously made. The transfer should not be made in the case of a retarded prisoner unless it can be shown that facilities in the hospital are appropriate for his rehabilitation.

Imprisonment

Institutionalisation per se tends to have a negative effect upon the abilities, social and adaptive skills, and emotional stability of retarded persons. Institutionalisation in prison is likely to have at least as negative an effect, but nevertheless may be preferable to even more inappropriate placement in a mental hospital. The fact that prisons are not environments conducive to mental health should not be used as an argument for creating segregated "special" prisons for retarded prisoners, as such institutions are likely to suffer from the lack of funds and of energetic habilitative programmes which characterise many special purpose facilities for retarded citizens. General improvement of

prison conditions will have the effect of improving conditions for retarded prisoners also. In addition, special programmes should be available within the prison system. Retarded prisoners should be segregated from other prisoners only when it is necessary for protection against physical abuse. Furthermore, prison officers should receive training in the recognition and management of mentally retarded prisoners. It is the moral and ethical obligation of psychiatrists, lawyers and other professionals working in prisons to look towards ameliorating the dehumanising, harsh, and dehabilitating aspects of prisons in general.

Parole

Under the present parole system, statutory guidelines should be established, outlining factors relevant to parole decisions, and making it compulsory for prisoners to receive a statement of reasons for adverse decisions. Appeal mechanisms need to be established.

Criticisms of the parole system are so serious in nature, and go so directly to the heart of the issues of due process and natural justice, however, that the parole system as it stands should be abolished. Under the current situation, mentally retarded prisoners are doubly disadvantaged, for while their mental condition is probably a factor militating against parole, prison programmes assisting them in preparation for release rarely exist.

Dangerousness

The problems of assessing and predicting dangerousness result in its enormous over-prediction. If the concept of dangerousness is to be enshrined in legislation pertaining to the detention or release of prisoners, the definition should be narrow, and based upon a clear history of previous violent criminal behaviour. The difficulties inherent in assessing dangerousness form yet another argument for the abolition of indeterminate sentences, and parole.

Habilitation and rehabilitation

Mentally retarded offenders are possibly one of the groups most responsive to rehabilitative programmes. Just as force of circumstance is a contributing factor to their involvement in criminal behaviour, force of circumstances exerted in the opposite direction can have significant and rewarding effects. Far from being a lost cause, retarded offenders or potential offenders should be regarded as likely to respond positively to preventive measures.

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At every stage of the criminal process the retarded person is at a significant disadvantage, at arrest, in the police station, courtroom or penal institution. If a suspect or offender is recognised as being "different" — and very often even this isn't noticed — he will usually be classified as mentally ill, and quite inappropriate procedures and treatment will follow. And even if he is correctly diagnosed he may benefit little; all too often and all too easily the law lumps together the mad and the simple.

This cross-disciplinary book, co-authored by a psychologist and a lawyer, lays bare the problems and proposes answers. It examines for the first time in Australia what does, could and should happen. The result of extensive research, it uses real examples to provide practical advice and sensible solutions.

It is essential reading for all whose work brings them into contact with the mentally retarded and the criminal law and of wide interest to all those concerned that the criminal justice system will provide justice.

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