



Crime and Justice in Australia

edited by David Biles



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Foreword

One of the more puzzling aspects confronting overseas visitors when they come to look at our criminal justice system is that in this matter our thinking is so compartmentalised.

Even those visitors who have some knowledge of the working of a federal system seem somewhat at a loss when they have to comprehend nine separate systems of criminal justice working under nine different sets of laws.

Frequently people write to me seeking information on the administration of criminal justice in Australia. To provide them with an answer which is both simple and accurate is an almost impossible task.

Now there is this work, produced by the Research Division of the Australian Institute of Criminology. It is the first serious up-to-date volume on the way the criminal justice system functions on a national basis and the problems we encounter arising out of our disparate State origins.

It is becoming increasingly important for us to look at our criminal justice system from a national point of view. State boundaries have long ceased to have any relevance where the impact of crime and the activity of criminals is concerned. Large corporate offences, for example, are rarely confined to only one State.

More and more, the forces to prevent and combat crime are working in close cooperation.

People are travelling interstate now as a matter of course. Inevitably this leads people to question seriously why we should not be working towards a system of uniform laws throughout Australia. They are now able to experience for themselves the complications which arise even from minor differences in the laws. It is a groundswell which is likely to become stronger.

It is most appropriate that this text should come from the

Australian Institute of Criminology. The Institute is an outstanding example of what can be done on a cooperative basis in a federal system when there is goodwill from all parties.

The Institute is able to take an overview of all aspects of the criminal justice system. It has the cooperation of the law enforcement and corrective facilities of all Governments as well as the cooperation of the universities and the voluntary organisations involved in the work of crime prevention and rehabilitation.

Already, under the direction of Mr William Clifford, the Institute has established a reputation for practical projects which can show some real return. It is able to assist Governments by dispassionately collating national figures and assessing what the implications are.

It is important for Governments to be able to call on this information. For instance, various estimates are made about the real cost of crime to the community. It is a basic factor to be considered when law reform projects are being undertaken; will the law reform measure with perhaps an additional initial cost factor produce a return which may offset the national cost of crime?

The Institute can also look at some of the more successful experiments whether with police, with corrective services or in court administration. This expert assessment is available for all to draw upon.

There is another reason why it is appropriate that this book should now become available.

In 1980 Australia will host one of the biggest and most important conferences to be held in this country. We shall be holding the Sixth United Nations Congress for the Prevention of Crime and Treatment of Offenders in Sydney.

From the time of the inaugural Congress in Geneva in 1955, Australia has always played an active role and has sought to make as constructive a contribution as possible to the successful outcome of the Congresses.

Delegates who come to Australia for the Sixth Congress will no doubt find this book a most helpful guide to our system of criminal justice in Australia.

I am also sure that it will provide Australian readers with the perspective needed to appreciate the criminal justice system from a national point of view. It provides a quick and authoritative

reference right across the whole range of our criminal justice system.

It is a well compiled, well researched and well documented volume. I wish it every success.

R.J. ELLICOTT
Attorney-General

Preface

This book is a first attempt by some members of the Research Division of the Australian Institute of Criminology to bring together the basic facts and figures on crime, police, courts and correctional practices in the six States and two Territories of Australia. Much of the information given in this book has been culled from government publications, particularly year books and annual reports, but some has been obtained directly from government officials. Care has been taken to check the accuracy of the information presented, but the authors recognise that it is possible that errors of fact or omission have been made. In view of this possibility, the authors invite comment and criticism which will help them to produce a better book, perhaps a revised edition, at a later date.

In the meantime, it is hoped that this book will serve a useful purpose as a basic reference in Australian criminology. It should certainly help to provide answers to the numerous questions about crime and criminal justice which are constantly being asked by journalists and members of the public. Furthermore, we are aware of the spectacular development which has taken place in the past five years of the teaching of criminology or related subjects in universities, colleges and secondary schools and we hope that this book will assist in those endeavours.

An additional incentive to the production of this book is the fact that Australia is to be the host country to the Sixth United Nations Congress on the Prevention of Crime and Treatment of Offenders which is to be held in Sydney in September 1980. This prestigious gathering will attract hundreds of senior government officials and experts on crime control from all parts of the world. These visitors will undoubtedly be given copies of official reports and statements of policy, but an updated version of this

book may also be useful in that context. Thus, this book aims to assist the student of criminology and the overseas visitor as well as the general public in gaining a deeper understanding of crime and justice in Australia, and it is hoped that this understanding will improve the quality of the constant debate which surrounds these issues.

The authors gratefully acknowledge the approval of the Board of Management of the Australian Institute of Criminology to undertake this project and the encouragement of the Institute's Director, Mr W. Clifford, in seeing it through. Thanks are also due to our colleagues Satyanshu Mukherjee, Peter Kay and Kandy Shepherd for their valuable comments on the manuscript, to the staff of the J.V. Barry Memorial Library for the preparation of the bibliography and index, to Sue Mayrhofer for the typesetting and John Widdicombe for the printing.

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A Senior Legal Research Officer at the Institute, he was formerly a Crown Prosecutor in Queensland and has held the position of Legal Adviser to the Administrator of Norfolk Island.

Ivan Potas, B.A., Ll.B.(A.N.U.), Barrister and Solicitor of the Supreme Court of the Australian Capital Territory and Solicitor of the Supreme Court of New South Wales.

Formerly a Legal Officer with the Commonwealth Public Service, he now holds the position of Senior Legal Research Officer at the Institute.

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A Senior Research Officer at the Institute specialising in police research, he has formerly held positions in the police forces of New South Wales, the United Kingdom, New Zealand and Papua New Guinea.

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1 Introduction to Crime and Criminology

David Biles

Crime and justice are the subjects of virtually continuous debate in Australia. Almost every Australian has views that he or she is more than willing to express on such diverse and complex questions as whether or not crime is increasing, how crime can be prevented or reduced, how police efficiency could be improved, how courts operate and whether prison systems should be more effective.

As these and other related questions are of vital concern to the total community, it is appropriate that members of the public should have views on them, but it is perhaps paradoxical that lay people with no direct involvement in crime control activities seem to have the strongest views on what action should be taken. It is noticeable that professionals — judges, lawyers, police and prison administrators, and even criminologists — are generally much more tentative in their proposals. But crime and justice are highly emotive subjects, and the carefully worded statements of the professionals are frequently over-simplified and distorted to make a good story in the media.

A random survey of newspapers throughout Australia, or even in one capital city, quickly reveals the extent of public interest in crime and justice. In a two-week period in October 1976, for example, the following issues were discussed in the major newspapers:

Prisoners' voting rights: The Government of one State is reported to have decided to allow prisoners to vote in all elections, thus reversing the long standing presumption that prisoners are virtually 'non-persons' with no civil rights.

Protection for rape victims: All States are planning or considering changes in court procedures which would disallow or severely restrict the questioning of rape victims about their prior sexual history, and in some jurisdictions plans are being made to allow

victims to give evidence by written statement in committal proceedings.

Juvenile justice: In one State headlines have been given to the case of a Juvenile Court Judge who resigned his post in protest about alleged interference with his judicial independence. His letter of resignation complained of inadequate government support for his court, and a Royal Commission has been established to investigate the matter.

Operation of the parole system: In another State, wide press coverage was given to the cases of two ex-prisoners on parole who were charged with murder. Newspaper editorials claimed that public confidence in the parole system has been lost and that a top level inquiry should be held.

Police working to regulations: In yet another jurisdiction the Police Association ordered all its members to work to regulations for two days as a protest against the report of an inquiry into police corruption which allegedly recommended that over 50 police officers should be charged with offences.

These stories could be multiplied many times with the press coverage of the New South Wales Royal Commission into the prison system, stories of dramatic increases in crimes and violence, and the endless newspaper space devoted to particular crimes and criminals. There is certainly no lack of public interest in these issues, but it is apparent that in some cases at least, there is a lack of factual information. While by no means aiming to provide all of the answers, this book is intended to give many of the basic facts about crime and the operation of criminal justice systems in Australia. As such, it may marginally raise the level of debate on these sensitive and emotional subjects.

In many areas, information that might be useful is not available, but succeeding chapters of this book summarise the basic facts about crime and justice on a national basis. The most serious gap in the information available relates to crime itself. We have fairly detailed information on Australian police, courts and prisons, but only the scantiest information on the incidence of crime. Such information as is available on a national basis is presented in Chapter 2, but the annual reports of all police commissioners also contain statistics on offences reported and offences cleared. These statistics, however, are not presented in

such a way as to enable comparisons to be drawn between jurisdictions.

This situation underlines the current applicability of a statement made in 1961 by an eminent jurist and criminologist, the late Sir John Barry. In that year, he wrote:

In this country there are no useful statistics relating to crime and juvenile delinquency on a national basis. Each state has criminal statistics of a sort, but no competent person would claim they are adequate. Further, the criminal statistics of any state are not capable of any but a crude and primitive (and often misleading) comparison with those of others.¹

It is perhaps inevitable that this should be the case in a federal system which provides for each State the responsibility for making criminal laws. Crime is most easily defined as behaviour which is proscribed by law, and it is only to be expected that where State Governments act independently of each other in their legislative functions they will not arrive at identical definitions of crime. Thus, for example, homosexual behaviour is defined as criminal in most Australian jurisdictions, but it is not in South Australia provided it is conducted in private between consenting adults. Similarly, public drunkenness is not an offence in the Northern Territory, but it is elsewhere, and there are significant differences between jurisdictions in the technical meanings given to such terms as theft and assault.

There are many other reasons, however, for the measurement of crime to be a cause of difficulty and chief among these is the problem of reportability. Offences that are committed can only find a place in the criminal statistics if they are reported to the police, and there is strong evidence to suggest that in many cases reports are not made. Reportability may also vary from time to time, thus causing artificial 'crime waves'.

This may be illustrated by reference to a decision taken in recent years by the Victorian Retail Traders' Association which advised its members to report all cases of shoplifting to the police. Prior to this decision, the general practice had been for the majority of shoplifting cases to be dealt with by the stores themselves, with only very serious or recalcitrant offenders being reported to the police. The policy decision taken by the Retail Traders' Association will undoubtedly be reflected in highly significant increases in the officially recorded levels of shoplifting, but these

increases may not reflect any real change in the actual level of this offence in the community.

Another problem associated with the statistics of crime is related to the recording systems used by police forces in their official reports. The fact that many offences reported to the police were not in the past officially recorded was shown in New South Wales in recent years when the installation of a computer-based system resulted in much higher crime figures than had been expected or were consistent with figures derived from previously operating manual systems.

There are also many other minor difficulties which cast doubt on the accuracy of any statistics of reported crime. For example, an offence may be reported to the police by a person believing himself to be a victim, but police investigation will reveal that no offence has taken place. Such an event is retained within the statistics of offences reported and is classified as 'cleared' even though no offence has actually occurred. The most serious difficulties, however, relate to the classification of offences into categories which are acceptable to all police forces, and this problem has not yet been resolved in Australia.

These and other problems are particularly acute with reference to statistics of minor crimes but are less likely to cause difficulty with serious offences. For this reason the police commissioners agreed in the early 1960s to set up a committee of police representatives, together with members of the Australian Bureau of Statistics, to establish uniform crime statistics for seven categories of serious crime. The work of this committee has been relatively successful and uniform data are available for selected serious crimes over the 10 year period 1964 to 1973, as is indicated in Chapter 2. These data for some categories, however, must be interpreted with considerable caution as uniform interpretation between jurisdictions has been difficult to effect.

But the compilation of accurate and comprehensive crime statistics is not the only activity undertaken by criminologists and some would not even rate it very highly in importance. Some criminologists argue that it is more important to study the nature of the law itself, or the operations of police forces, or the sentencing practices of judges, or the social structure of prison communities. Still others focus their attention on the offenders themselves in order to understand their motivation and attitudes. All of this

can be done without reference to statistics of crime and criminal justice.

This book is seen by the authors as essentially a reference source in Australian criminology, and an attempt will be made to define 'criminology' and to justify the orientation that is adopted, but before this is done it is probably necessary to explore in a little more detail what is understood by the word 'crime'.

The main point to be made here is that crime is a fluid concept, the meaning of which varies from place to place and time to time. Crime can be defined as any violation of the law, but this would be a far wider than normal usage of the term as few would want to regard parking violators and minor traffic offenders, for example, as criminals. The problem of overly-wide definition can be avoided by reserving the word 'crime' only for violations of the law which are proscribed by Criminal Codes, Crimes Acts or the common law. But this is not altogether satisfactory as many minor offenders, particularly those convicted of drunkenness or vagrancy, are sentenced to terms of imprisonment, yet these behaviours are generally proscribed in Police Offences Acts and are dealt with by summary, as opposed to specifically criminal, courts.

In popular usage the word 'crime' is reserved for only serious acts which are punishable by law but, as we have seen, this is not entirely satisfactory. To some extent the problem could be resolved by using the terms 'unlawful behaviour' and 'offender' instead of 'crime' and 'criminal', but this too is unsatisfactory as it evades the issue, and 'unlawful behaviour' includes tortious actions which are subject to the civil, as opposed to the criminal, law. The fact is that there is not even a theoretically acceptable definition of 'crime' let alone one which is universally acceptable. It is possible, however, to approach the issue pragmatically and indicate the types of unlawful behaviour that currently seem to be of concern to the Australian community.

There is clearly widespread concern about violence, particularly rape, armed holdup and, of course, homicide. These crimes are given wide publicity by the media, but any police annual report will reveal that these offences are comparatively rare when compared with larceny or theft in all its forms and the breaking and entering of buildings. An even larger group of offences reported and cleared found in any police report may be classified as 'social nuisance' behaviour, and includes drunkenness, vagrancy,

using indecent language and any other behaviour which is regarded as offensive to the legislator.

From this it may be inferred that the crime problem in Australia is essentially one of suppressing social nuisances and protecting property, but this is only partially true as the (comparatively rare) offences against persons attract both greater public indignation and longer prison sentences. Interpersonal violence in any form is generally regarded as much more serious and is much less acceptable than is, for example, housebreaking or car stealing. There are many people, including politicians, however, who require of the criminal law much more than the protection of people and property; they expect the law and its agents to uphold the moral standards of the community. Hence, in all Australian jurisdictions laws can be found which prohibit some forms of sexual activity, some forms of gambling and the consumption of substances which are widely accepted as being relatively non-injurious to health.

The 'over-reach of the criminal law' has been widely discussed in recent years² and has resulted in proposals for the abolition of 'victimless crimes' such as prostitution, abortion, homosexuality, vagrancy, public drunkenness, gambling and the possession of small quantities of marihuana. The advocates of these proposals do not claim that these behaviours should be condoned or encouraged, but that the criminal law is an inappropriate weapon to be used to control them. Thus it is argued that detoxification centres should be established for the short-term care of inebriated persons. For others of these behaviours, decriminalisation, or even legalisation, is advocated. Public debate on these questions may be expected throughout Australia in the coming years.

Discussion about 'victimless crime' and the appropriate scope for the criminal law is to be encouraged, as respect for the law and the effective operation of criminal justice services is dependent upon a fairly high degree of consensus as to which behaviours should be deemed unlawful. If, for example, large numbers of people regularly violate some parts of the law, it is likely that their general respect for the law will decline, with a consequent lowering of support for the police and other criminal justice agents. But, with the exception of drunkenness and vagrancy, the abolition of all 'victimless crimes' would make little difference to the total numbers of arrests, convictions and prison sentences imposed.

The bulk of the people who are subjected to the full rigours of the criminal law and eventually spend some time as prisoners, apart from persons convicted of drunkenness and vagrancy, are property and interpersonal offenders. Furthermore, they are almost exclusively male, generally young and from working-class backgrounds. By contrast, persons imprisoned for drunkenness and vagrancy are generally middle-aged and of even lower socio-economic status. Only a very small proportion, approximately 2.5 per cent, of the total numbers of people in prison are females.

There is some evidence to suggest that the average age of the young men who commit a large proportion of the numerous property offences in this country is declining. For example, over the period 1964 to 1972 the proportion of the total persons involved in motor vehicle theft offences cleared who were 16 years and under increased from 37 per cent to 48 per cent. Put another way, in 1964, 3,465 boys 16 years and under were charged with motor vehicle theft, whereas in 1972 this number had increased to 8,772. Over the same period the number of adult males charged with this offence increased from 1,504 to 3,053, a noticeably lower rate of increase. Data from other sources also illustrate the tendency towards lowering the age of offenders.

Another recent trend is the increase in female criminality. In 1964 females comprised 7.6 per cent of the total persons involved in serious crime (as defined in Chapter 2), whereas in 1972 they comprised 12.1 per cent. Over this nine year period the number of males involved in serious crime increased by 18.5 per cent but the number of females increased by 89.8 per cent. It is clear that the pattern of criminal behaviour has changed markedly in Australia, with regard to both adolescents and females, over recent years.

A number of other facts about crime in Australia are to be found throughout this book, but the reader will search in vain for any discussion of the 'criminal mind' or the 'causes of crime'. These omissions are deliberate as they reflect the authors' view of the meaning of criminology. There are many possible definitions of criminology ranging from Hermann Mannheim's dictum that criminology is the study of crime to Edwin Sutherland and Donald Cressey's proposal that it includes 'the processes of making laws, of breaking laws and of reacting toward the breaking of laws'.³

More precise is the statement of Marvin Wolfgang:

So long as theory and research of crime, criminals, and social reaction to both are based upon a normative orientation that is *scientific* and the goals of which constitute a description, measurement, analysis or interpretation of patterns, uniformities, causal relationships, and probabilities, we may assert that such theory and research comprise the field and our meaning of criminology.⁴

Without rejecting any of these statements, the definition of criminology which is adopted by the authors is: *the study of the definition and measurement of criminal behaviour, the effectiveness of crime prevention programs, and the functioning of law enforcement, court and correctional systems*. This rather wordy definition may need to be justified.

This definition is essentially pragmatic as it identifies the areas of inquiry that are capable of being explored by appropriately trained personnel with the necessary time, cooperation and resources. It excludes reference to the 'cause of crime' and the 'criminal mind' because these concepts, despite their common usage in popular speech, are incapable of precise definition and contribute nothing to the solution of the practical problems of crime and justice which are found in the modern world.

By inference, of course, much research is relevant to causation in that it seeks to identify factors which are correlated with, and are antecedent to, either criminal behaviour or recidivism, but the search for the holy grail of a single 'cause' is no longer widely pursued. Similarly, studies of persistent offenders may reveal common patterns of background, behaviour and attitude, but today these are unlikely to be seen as establishing the existence of a 'criminal mind'. Our concern is with the realities of crime and justice rather than with the metaphysical theories that have from time to time intruded into the field.

A consideration of criminal behaviour — the first part of the proposed definition — and the appropriate scope of the criminal law is an essential part of criminology. As the criminologist may be expected to have a fuller understanding than the average citizen of the workings of police, courts and prisons, he is entitled, in our view, to express opinions about which behaviours are likely or unlikely to be controlled effectively by the use of these agencies and therefore should or should not be proscribed by the criminal

law. Effectiveness is not the only test, however, as some behaviours, such as impulsive homicide, are intolerable to the community and therefore must be proscribed whether the criminal law is effective in these areas or not. Thus, decisions relating to the definition of criminal behaviour must take into account public attitudes as well as the operation of criminal justice agencies.

The second part of the proposed definition of criminology, the measurement of criminal behaviour, has been the subject of extensive research and discussion. Some aspects of this problem have been briefly mentioned, some examples of crime rates are given in the following chapter, and some of the technical difficulties will be considered in a later chapter on criminological research. Ideally, statistics should be available on a uniform basis that will not only indicate the actual levels of criminality in different parts of the country, but will also indicate public attitudes to the relative seriousness or dangerousness of different criminal acts. Public attitudes to crime are, of course, closely linked to the reportability of offences, and surveys are needed to determine the amount of unreported crime or the 'dark figure' as it is called. Official crime statistics, at best, only reveal a fraction of the totality of criminal behaviour in any community.

The third part of the definition, the effectiveness of crime prevention programs, is to a large extent dependent upon the availability of reliable crime statistics. These are not available in Australia and therefore little work of this type has been undertaken, but some attempts have been made at the local level to measure the incidence of crime or the attitudes of adolescents with a view to assessing the impact of improved recreational facilities and police household security campaigns. More work of this type may be expected in the future, and it is likely that efforts will be made to test the applicability to Australia of the thesis of Oscar Newman⁵, that certain styles of architectural design produce higher crime rates than others. This type of research has particular relevance to the development of growth centres such as Albury-Wodonga.

The remaining part of the definition may be summarised as the functioning of criminal justice systems because law enforcement, courts and corrections may be conceived of as the three interacting and interdependent sub-systems which together comprise a criminal justice system. Such a system represents virtually all

official action specifically aimed at controlling criminal behaviour. The sub-systems interact with each other and are interdependent as changes in one have consequences for the others. If, for example, police strengths increase and efficiency is improved, the workload of the courts and correctional services are also likely to increase. Similarly, the sentencing practices of the courts influence the work of prison and probation officers on the one hand and police practices on the other. Also, the effectiveness of correctional services in the maintenance of custody and the motivation of offenders' attitudes and behaviour affect the work of police and courts.

Even though interdependence of the elements within a criminal justice system may be demonstrated, it may be argued that it is not really a system as there is little or no overall planning or coordination between the elements. Decisions by the managements of law enforcement, courts and corrections are made independently of each other and communication between the three elements takes place infrequently or is non-existent. Governments seldom encourage or facilitate the development of coordinated criminal justice strategies and policies, and, in fact, there is strong traditional pressure for police, the judiciary and correctional authorities to remain completely independent of each other. To the extent that this remains the case, so-called criminal justice systems will be characterised by almost totally unsystematic policies and practices. In the interests of individual human rights, the separate operation of police, courts and corrections may be highly desirable, but it is possible that closer cooperation could be achieved without threatening those rights.

For example, if a police force and court system were both controlled by the same ministry, suspicion would immediately arise that they could be used as tools of government to suppress dissident or minority opinion. In Australia, however, the British tradition of an independent judiciary responsible only to the law and not subject to governmental direction is strongly supported, and thus accused persons have an unalienable right to fair and independent court hearings. On the other hand, coordination of the three criminal justice services could be greatly improved if a uniform terminology were used and each consulted with the others on matters of mutual concern. Perhaps a Crime Commission comprising the Chief Justice, Commissioner of Police and the head

of correctional services in each State and Territory could play a coordinating role.

Despite its doubtful validity, the term 'criminal justice system' is a useful one and will be used throughout this book. In Australia each of the six States has a complete criminal justice system as does the Northern Territory. The Australian Capital Territory has its own police force and court system, but only some of the necessary correctional services (probation, a remand centre, but no prison). Furthermore, the Federal Government has a police force and special courts but no correctional services. Thus, within Australia there are seven complete, and two incomplete, criminal justice systems, made up of nine police forces and court administrations and seven correctional services. As each jurisdiction is almost totally independent of the other, it is quite inappropriate to refer to the Australian criminal justice system. It is difficult to find anything systematic about it, but it is this conglomeration of agencies which is the subject of this book.

The Australian Institute of Criminology, a body established in 1973, is in a unique position to adopt a national perspective to crime and justice. Its orientation, as reflected in this book, is both national and comparative in that, as far as possible, information is presented in such a way as to indicate the total Australian picture and to allow comparisons between jurisdictions. Many differences in crime rates, police operations, court practices, sentencing options and the numbers of prisoners between jurisdictions have been found and are presented in this volume. Not all of these differences are explained, and such explanations as have been attempted are necessarily tentative and speculative.

With increasing sophistication of information, particularly with regard to the incidence of criminal behaviour, Australia offers an unusual opportunity for the social scientist to explore the relationship between social and economic conditions, crime control strategies and the levels of crime. Having a relatively homogenous population and eight independent jurisdictions with different policies and practices, this country may be seen as a natural social science laboratory which in the future may be expected to yield insights of relevance to criminal justice workers around the world. The basic data needed for such comparative analysis are as yet insufficiently accurate and comprehensive for many generalisations to be drawn from the Australian scene, but this book

represents a tentative beginning of the type of data-gathering which will hopefully become increasingly valuable in the future.

One area of inquiry for which reasonably accurate information is available concerns the costs of crime and criminal justice services. Even here some guesswork is necessary, but a study conducted by the Rural Bank of New South Wales⁶ in 1968 concluded at that time that crime cost the Australian community \$350 million per year. This includes 'amounts of money paid out in taxes to support the machinery of law enforcement and in insurance against burglary, and the transfer of money and property from law-abiding individuals to criminals as a consequence of criminal acts'.

A later study by Kononewsky⁷ in 1976 analysed the costs of police, courts and correctional services and found that for 1975-76 these services cost \$569 million. As the Rural Bank study had found that these services amounted to 59 per cent of the total costs, Kononewsky estimated that the cost of crime in Australia in 1975-76 was \$964 million, and he predicted that by 1977-78 the costs would exceed \$1,200 million.

In the light of these figures, even if the disruptive and threatening aspects of crime are set aside, it is clear that the subject of crime and justice in Australia is one that deserves to be taken seriously.

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2 Serious Crime Rates

David Biles

The inadequacy of crime statistics in Australia has been discussed in Chapter 1, and in this chapter the subject of serious crime will be reviewed.

All of the basic data used here are taken from the *Year Book Australia*, and apply to the 10 year period 1964 to 1973. The seven offences included in the series 'Selected Crime Reported or Becoming Known to Police' are: homicide, serious assault, robbery, rape, breaking and entering, motor vehicle theft, and fraud, forgery, etc. These are not, of course, the only crimes that could be described as 'serious' but they are the only ones for which statistics are available on a national basis. Each of these offences will be considered in turn and the incidence of the offence will be shown for each State and Territory for each year in a statistical table which shows the number of offences and the rate of offences per 100,000 of the general population.

Also, for each offence, a graph will show the total Australian rate per 100,000 of the population over the period 1964 to 1973, and another graph will show the mean rates over the same period for each State and Territory. Where necessary, factors which cast doubt on the reliability or comparability of the statistics will be mentioned in the text.

The key statistics used here are of 'Offences Reported or Becoming Known' and these are defined in the *Year Book Australia* as:

All incidents reported or becoming known to the police which are found to constitute offences within the scope of the crimes covered are included. Offences are shown as 'reported or becoming known' in the period during which it has been established that the incident constitutes a crime, not necessarily in the period when the incident occurred. However, the incident is included when the police are satisfied that a crime has been

committed, even though it may be established in subsequent proceedings that no crime or a crime of a different nature was committed. As far as possible, the offences are recorded in respect of the State in which the incident occurred, regardless of which police force undertakes investigations or prosecutions, or where an arrest is made. In the case of homicide, assault, robbery, and rape, one offence is counted in respect of each victim, regardless of the number of offenders involved. In the case of breaking and entering, and fraud, etc., one offence is counted for each act or series of directly related acts occurring at the same time and place, and under the same circumstances. Each motor vehicle stolen is counted as constituting a separate offence. Attempted crimes are counted as offences in the appropriate offence category.

On the basis of this definition consideration will now be given to each category of serious crime. The definitions of each of the crimes are as specified by the Australian Bureau of Statistics and do not necessarily correspond to legal definitions.

Homicide: Homicide is unlawful killing and includes murder, attempted murder (that is, acts done with intent to murder) and manslaughter. As from July 1973 this offence category includes manslaughter arising from motor traffic accidents and therefore 1973 figures are not strictly comparable with those for the preceding years. Table 1 indicates the numbers of offences reported or becoming known and the rates per 100,000 of the population for each State and Territory for the period 1964 to 1973.

Figure 1 shows the national trend in the rates of homicide per 100,000 of the population over the period 1964 to 1973. Excluding the year 1973 for the reason given above, it can be seen from this graph that there has been a tendency towards increase in the incidence of homicide in Australia over this period.

In Figure 2 the mean rates of homicide for the 10 year period under consideration are shown for each of the States and Territories and from these it can be seen that the Northern Territory clearly has a higher rate than all other jurisdictions. Excluding this perhaps atypical rate, this graph also shows that Queensland has the highest rate in Australia and Western Australia the lowest.

To place these figures in a relevant context, it must be pointed out that the total number of homicides in Australia each year is considerably fewer than the number of persons killed as a result of road traffic accidents. For example, it can be calculated from Table 1 that 423 people died as a result of homicide in 1972. In

the same year 3,422 people were killed on the roads and a further 89,766 people were injured. Also in the same year 1,625 people committed suicide and a further 3,474 people died of lung cancer. It is obvious from these comparisons that homicide, despite the tendency towards increase, is a relatively minor cause of death in Australia.

Table 1 Homicide, cases reported and rates per 100,000 of the population, by States and Territories, 1964-73

	<i>N.S.W.</i>	<i>Vic.</i>	<i>Qld</i>	<i>S.A.</i>	<i>W.A.</i>	<i>Tas.</i>	<i>N.T.</i>	<i>A.C.T.</i>
1964	109 2.7	72 2.3	56 3.5	14 1.3	10 1.2	4 1.1	6 11.6	1 1.2
1965	111 2.7	81 2.6	34 2.1	14 1.3	13 1.6	7 1.9	6 11.1	5 5.7
1966	113 2.7	106 3.3	62 3.7	13 1.2	14 1.6	3 0.8	8 14.1	2 2.1
1967	139 3.2	57 1.7	47 2.8	25 2.3	7 0.8	7 1.9	17 27.5	1 1.0
1968	140 3.2	52 1.6	51 2.9	18 1.6	14 1.5	10 2.6	12 17.8	3 2.7
1969	120 2.7	66 1.9	38 2.2	21 1.3	12 1.3	15 3.9	7 9.6	1 0.8
1970	125 2.8	107 3.1	36 2.0	34 2.9	15 1.5	10 2.6	9 11.3	3 2.3
1971	134 2.9	87 2.5	44 2.4	27 2.3	26 2.5	8 2.0	15 17.4	2 1.4
1972	134 2.9	133 3.7	66 3.5	28 2.4	32 3.0	16 4.1	10 10.9	4 2.5
1973	189 4.0	124 3.4	108 5.6	29 2.4	26 2.4	15 3.8	7 7.3	4 2.4

Figure 1 Homicide, Australian rates per 100,000 of the population, 1964-73

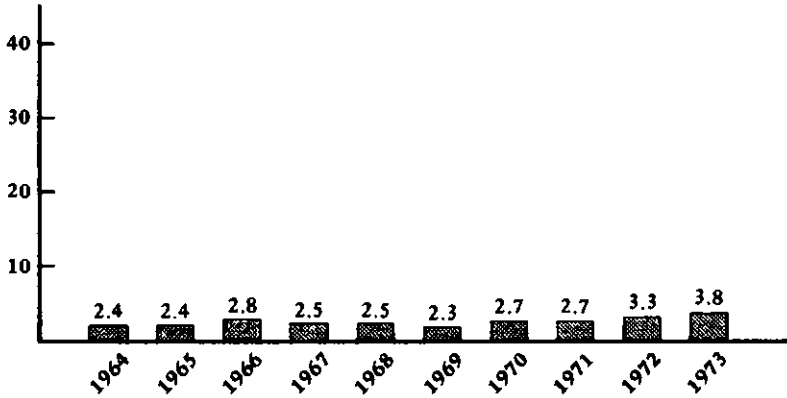
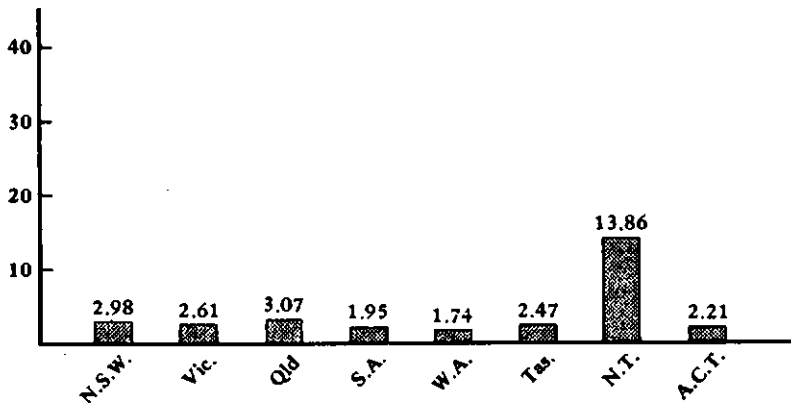


Figure 2 Homicide, mean rates per 100,000 of the population for each State and Territory, 1964-73



Serious assault: This offence is defined as 'unlawful attack by one person upon another for the purpose of inflicting severe bodily injury, usually accompanied by the use of a weapon or by other means likely to produce death or great bodily harm'. This offence category excludes attempted murder, robbery, sexual offences and other offences in which bodily injury results from negligent acts or omissions.

Table 2 Serious assault, cases reported and rates per 100,000 of the population, by States and Territories, 1964-73

	<i>N.S.W.</i>	<i>Vic.</i>	<i>Qld</i>	<i>S.A.</i>	<i>W.A.</i>	<i>Tas.</i>	<i>N.T.</i>	<i>A.C.T.</i>
1964	545 13.3	1,208 38.9	61 3.8	34 3.3	33 4.1	27 7.4	9 17.5	7 8.7
1965	484 11.6	1,243 39.3	49 3.0	53 5.0	13 1.6	19 5.2	13 24.0	21 23.8
1966	522 12.3	1,529 47.5	82 4.9	53 4.8	14 1.6	3 0.8	11 19.4	13 13.5
1967	547 12.7	1,338 40.8	119 7.0	71 6.4	20 2.3	11 2.9	39 63.1	13 12.6
1968	611 14.0	1,600 48.1	128 7.4	52 4.6	60 6.6	19 5.0	15 22.2	23 20.5
1969	626 14.1	1,460 43.1	134 7.6	92 8.1	77 8.1	47 12.2	30 41.0	17 14.0
1970	799 17.6	2,014 58.4	177 9.9	87 7.5	95 9.6	32 8.2	46 58.0	32 24.3
1971	724 15.7	2,457 70.0	212 11.6	115 9.8	156 15.1	32 8.2	120 138.9	46 31.9
1972	834 17.8	2,801 78.7	251 13.4	149 12.5	97 9.2	20 5.1	95 103.7	38 24.2
1973	929 19.7	1,307 36.3	266 13.9	167 13.9	139 13.0	21 5.3	67 69.9	41 24.3

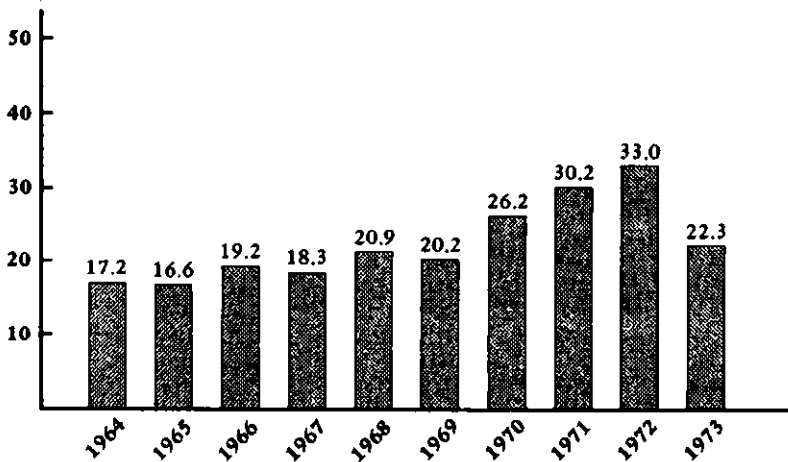
For each year that data have been published for serious assault in the *Year Book Australia* the following statement has appeared: 'Uniform interpretation of this definition between States is especially difficult to effect'. Clearly the data presented in Table 2 must be interpreted with the utmost caution if the reader is not to be led into making erroneous conclusions.

The apparent extremely high incidence of serious assault in both the Northern Territory and Victoria is almost certainly the result of differences in the interpretation of the definition of the offence. Despite its weakness, the information given above is the best that is available for this offence.

Figure 3 indicates the national trend in the rate for serious assault and this indicates a clear tendency towards increase over the period 1964 to 1972, with an apparent decrease in 1973. It is suggested that the decrease for 1973 is possibly due to efforts being made to ensure more uniform interpretation of the definition of this offence and therefore it would be unwise to conclude that the decrease is a real one.

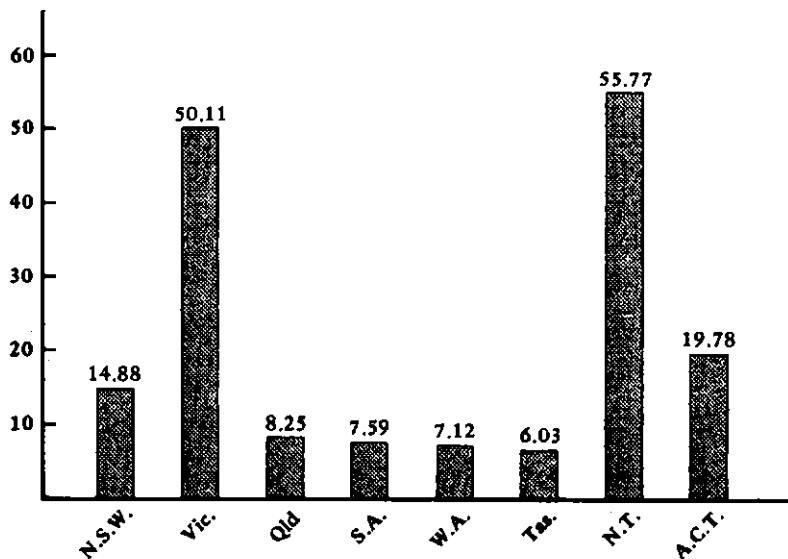
Figure 3

Serious assault, Australian rates per 100,000 of the population, 1964-73



For the reasons given above, the means for each State and Territory shown in Figure 4 should similarly be viewed with utmost caution.

Figure 4 Serious assault, mean rates per 100,000 of the population for each State and Territory, 1964-73



Robbery: This offence is defined to include 'situations where the offender uses or threatens to use violence, either immediately before, during or after the time of stealing, to any person or property in order to obtain the things stolen, or to prevent or overcome resistance to its being stolen'. The statistics include attempted robbery. Table 3 shows the basic data of offences and rates.

Figure 5 shows the national trend for the rates of robbery and this indicates a very significant increase over the 10 year period with a slight tendency towards decrease in 1973.

Interjurisdictional comparisons for the 10 year means are shown in Figure 6, from which it can be seen that New South

Wales, Victoria and the Northern Territory have almost uniformly high rates, these three being more than twice as high as the average for the other jurisdictions. It can be also seen that the lowest rate for robbery is to be found in Western Australia.

Table 3 Robbery, cases reported and rates per 100,000 of the population, by States and Territories, 1964-73

	<i>N.S.W.</i>	<i>Vic.</i>	<i>Qld</i>	<i>S.A.</i>	<i>W.A.</i>	<i>Tas.</i>	<i>N.T.</i>	<i>A.C.T.</i>
1964	211 5.1	252 8.1	53 3.3	37 3.6	22 2.7	17 4.7	— 0	— 0
1965	283 6.8	302 9.5	72 4.4	32 3.0	17 2.1	18 4.9	1 1.3	5 5.7
1966	346 8.2	457 14.2	92 5.5	50 4.6	20 2.4	17 4.6	4 7.1	6 6.2
1967	386 9.0	395 12.1	79 4.6	51 4.6	21 2.4	18 4.3	5 8.1	5 4.8
1968	544 12.5	480 14.4	88 5.1	79 7.0	48 5.2	23 6.1	8 8.9	12 10.7
1969	777 17.5	503 14.8	106 6.0	127 11.1	41 4.3	23 6.0	13 17.8	9 7.4
1970	867 19.1	744 21.6	124 6.9	140 12.1	69 6.9	33 8.5	11 13.9	11 8.3
1971	1,490 32.3	792 22.6	205 11.2	151 12.8	92 8.9	39 10.0	36 41.7	13 9.0
1972	1,484 31.8	941 26.4	259 13.8	162 13.6	97 9.2	52 13.2	27 29.5	23 14.6
1973	1,359 28.8	834 23.2	289 15.1	245 20.4	96 8.9	49 12.3	16 16.7	19 11.2

Figure 5 Robbery, Australian rates per 100,000 of the population, 1964-73

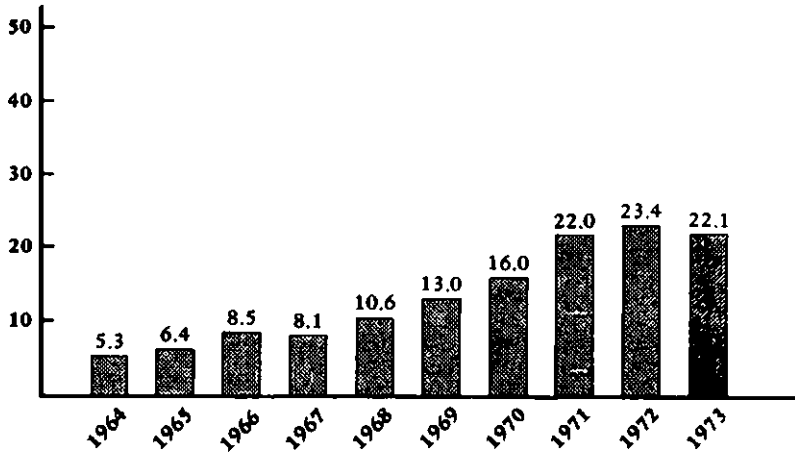
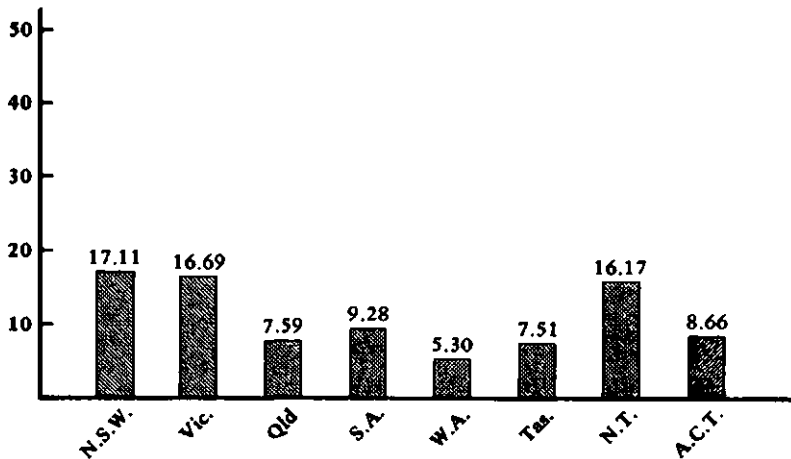


Figure 6 Robbery, mean rates per 100,000 of the population for each State and Territory, 1964-73



Rape: This offence includes attempted rape and assault with intent to rape, but excludes unlawful carnal knowledge and indecent assault. The basic data are given in Table 4.

Table 4 Rape, cases reported and rates per 100,000 of the population, by States and Territories, 1964-73

	N.S.W.	Vic.	Qld	S.A.	W.A.	Tas.	N.T.	A.C.T.
1964	91 2.2	94 3.0	33 2.0	21 2.0	6 0.7	11 3.0	2 3.9	4 5.0
1965	67 1.6	93 2.9	46 2.8	23 2.2	13 1.6	8 2.2	2 3.7	5 5.7
1966	72 1.7	107 3.3	38 2.3	16 1.5	7 0.8	2 0.5	8 14.1	1 1.0
1967	72 1.7	138 4.2	32 1.9	43 3.9	5 0.6	17 4.5	2 3.2	2 1.9
1968	95 2.2	168 5.0	34 2.0	43 3.8	5 0.5	7 1.8	7 10.4	4 3.6
1969	126 2.8	144 4.2	35 2.0	32 2.8	6 0.6	7 1.8	7 9.6	7 5.8
1970	136 3.0	160 4.6	42 2.3	21 1.8	6 0.6	17 4.4	29 36.6	5 3.8
1971	204 4.4	191 5.4	74 4.0	44 3.7	21 2.0	23 5.9	17 19.7	4 2.8
1972	172 3.7	180 5.1	59 3.1	57 4.8	42 4.0	21 5.3	8 8.7	5 3.2
1973	242 5.1	188 5.2	98 5.1	75 6.2	27 2.5	17 4.3	21 21.9	12 7.1

Figure 7 indicates the steady increase that has occurred in the rate of rape for Australia as a whole over the period 1964-1973. While some fluctuations can be seen in this graph, the general picture is one of a doubling of the rate over this period.

Figure 7

Rape, Australian rates per 100,000 of the population, 1964-73

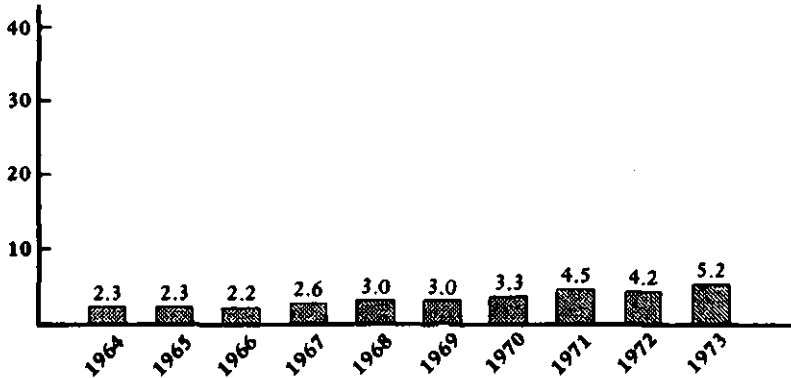
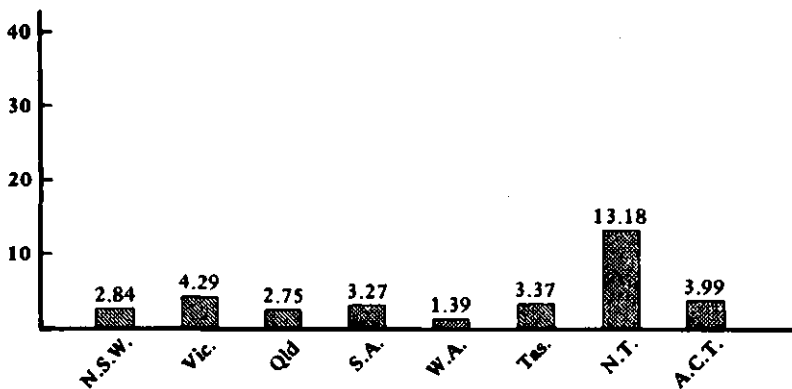


Figure 8 shows the mean rates for States and Territories, with the Northern Territory having by far the highest rate. The lowest rate is seen to apply to Western Australia.

Figure 8

Rape, mean rates per 100,000 of the population for each State and Territory, 1964-73



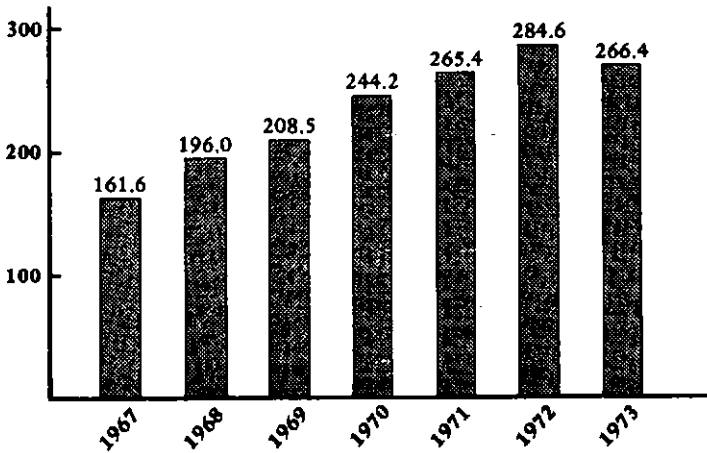
Breaking and entering: The definition of this offence is 'breaking and entering a building (or entering a building and breaking out) and committing or intending to commit a crime'. Burglaries are included in this category but attempted breaking and entering offences are excluded. The only offences included in the statistics shown in Table 5 involve property valued at more than \$100. This category does not include stealing where there is no breaking. Data shown in Table 5 cover only the seven year period 1967 to 1973 as prior to 1967 information was not published by the Australian Bureau of Statistics for individual States and Territories.

Table 5 Breaking and entering, cases reported and rates per 100,000 of the population, by States and Territories, 1967-73

	<i>N.S.W.</i>	<i>Vic.</i>	<i>Qld</i>	<i>S.A.</i>	<i>W.A.</i>	<i>Tas.</i>	<i>N.T.</i>	<i>A.C.T.</i>
1967	7,806 181.7	7,656 233.7	1,417 83.3	1,165 105.0	552 62.8	340 90.6	40 64.7	96 92.7
1968	11,026 252.7	8,069 242.4	2,841 106.4	1,181 105.2	883 96.4	422 111.1	54 79.9	86 76.7
1969	11,923 268.2	8,215 242.4	2,035 115.3	1,299 113.9	1,368 143.1	586 152.2	66 90.2	105 86.3
1970	13,879 306.3	9,870 286.0	2,538 141.4	1,727 149.1	1,825 183.6	492 126.7	68 85.7	192 145.6
1971	13,394 290.4	12,189 347.2	3,798 207.5	1,878 159.6	1,623 157.3	666 170.2	171 197.9	206 142.9
1972	13,904 297.5	13,284 373.4	4,332 231.2	2,480 206.8	1,960 185.5	637 162.0	174 189.9	225 143.1
1973	13,184 279.6	11,963 332.6	3,902 203.3	2,724 226.5	2,247 209.5	583 146.9	170 177.3	307 181.7

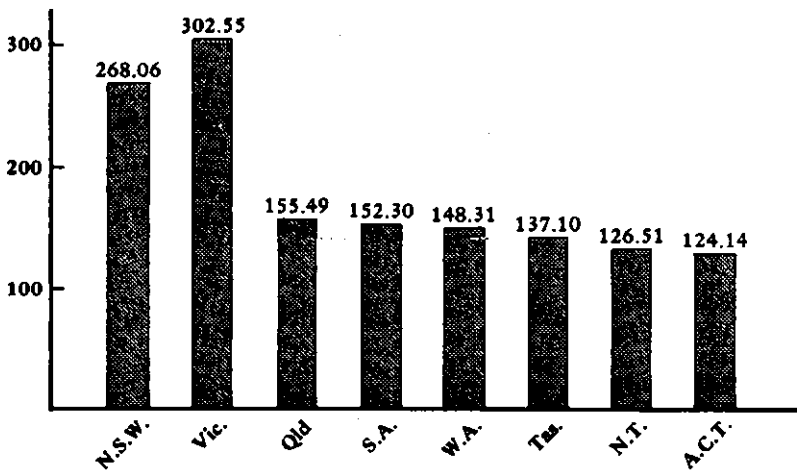
Figure 9 shows the general Australian rate of breaking and entering over the seven year period covered by Table 5 and this indicates a substantial increase until 1972 with a slight decrease thereafter.

Figure 9 Breaking and entering, Australian rates per 100,000 of the population, 1964-73



The State and Territory mean rates are shown in Figure 10 and it can be seen from this graph that Victoria and New South Wales have considerably higher rates than all other jurisdictions. The rates for the other jurisdictions are very similar to each other.

Figure 10 Breaking and entering, mean rates per 100,000 of the population for each State and Territory, 1964-73



Motor vehicle theft: This offence includes 'illegal, unlawful or unauthorised use, use without consent, unlawfully assuming control, etc., no matter under which legislation these offences are prescribed'. Cases where the vehicle is not actually driven away and attempts at illegal use are included in this definition but cases of 'interference' are excluded. This definition implies that the widely known term of 'joy riding' is covered by this definition.

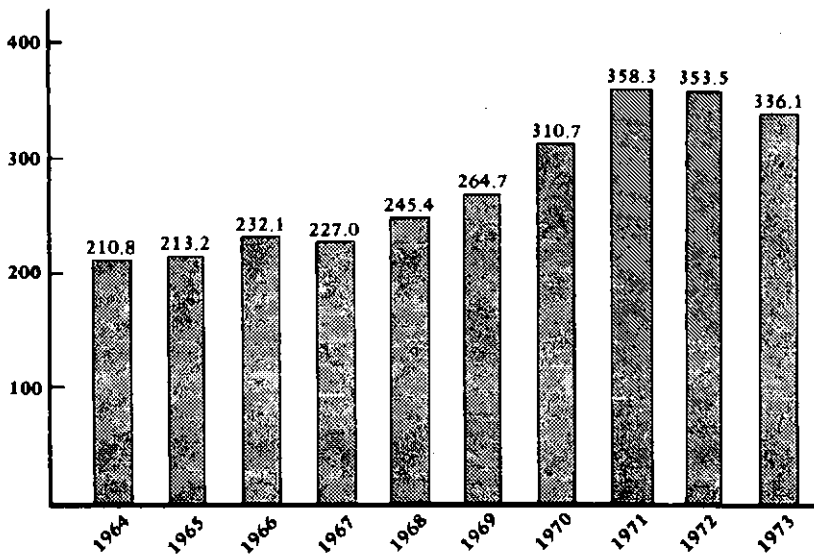
Table 6 Motor vehicle theft, cases reported and rates per 100,000 of the population, by States and Territories, 1964-73

	<i>N.S.W.</i>	<i>Vic.</i>	<i>Qld</i>	<i>S.A.</i>	<i>W.A.</i>	<i>Tas.</i>	<i>N.T.</i>	<i>A.C.T.</i>
1964	11,512 280.1	7,269 234.1	1,711 106.2	1,372 132.2	1,153 142.6	353 96.8	45 87.3	124 154.0
1965	12,214 292.4	6,967 220.1	1,792 109.0	1,472 138.0	1,141 138.1	424 115.2	83 153.3	192 217.2
1966	12,673 299.0	8,969 278.4	1,703 101.7	1,304 119.1	1,572 185.2	410 110.3	89 157.0	212 219.7
1967	12,558 292.4	8,348 254.8	1,544 90.8	1,701 153.3	1,707 194.2	603 160.7	119 192.6	211 203.8
1968	13,008 298.1	9,555 287.1	1,740 100.5	1,967 175.2	2,084 227.6	759 199.8	192 281.2	196 174.7
1969	16,082 361.7	9,343 275.7	2,295 130.1	1,741 152.7	1,895 198.3	658 170.9	228 311.7	250 205.5
1970	18,464 407.6	11,246 325.9	3,023 168.4	2,140 184.7	2,700 271.6	722 186.0	347 437.6	284 215.4
1971	20,756 450.1	12,688 361.4	4,090 223.4	2,746 233.4	3,645 353.3	1,012 258.7	482 557.7	376 260.9
1972	19,895 425.7	11,710 329.1	4,725 252.2	3,073 258.4	4,469 423.0	1,234 313.8	459 501.0	359 228.3
1973	18,392 390.1	10,725 298.2	4,743 247.1	3,791 315.2	4,431 413.1	1,106 278.7	571 595.5	501 296.4

In the view of the author, statistics relating to motor vehicle theft are probably the most accurate of all types of crime statistics and therefore are worthy of more detailed analysis and consideration. This higher level of accuracy is thought to result from the high levels of reportability and conscientious police recording of these offences.

Table 6 indicates the actual numbers of offences reported and the rates per 100,000 of the population for all States and Territories and Figure 11 shows the national trend as far as rates are concerned.

Figure 11 Motor vehicle theft, Australian rates per 100,000 of the population, 1964-73

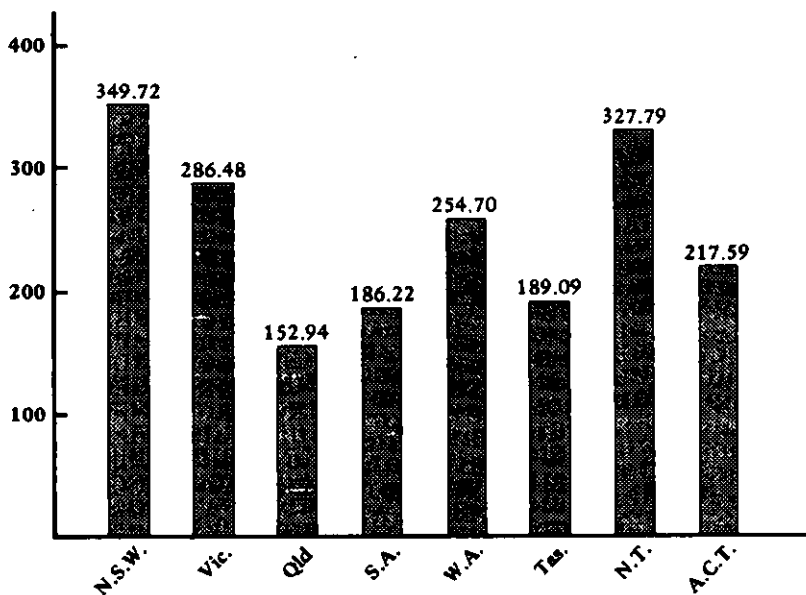


From this graph it can be seen that a peak was reached in 1971 which was followed by a slight decline in subsequent years. A detailed examination of Table 6 shows that this national trend is largely accounted for by the trends in New South Wales and Victoria which have both decreased significantly since 1971. In

some other jurisdictions, on the other hand, such as South Australia, the Northern Territory and the Australian Capital Territory, the tendency towards increase has continued through to 1973. Attention is also drawn to the remarkably rapid increase in the rate of motor vehicle theft for the Northern Territory from 87.3 offences per 100,000 of the population in 1964 to 595.5 offences per 100,000 of the population in 1973.

The mean rates for the 10 year period for each State and Territory are shown in Figure 12 and from this it can be seen that New South Wales and the Northern Territory have the highest rates, while the rate for Queensland is less than half of the highest two.

Figure 12 Motor vehicle theft, mean rates per 100,000 of the population for each State and Territory, 1964-73



An additional factor which may be considered in relation to motor vehicle theft is the motor ownership rate which has

increased more rapidly than population increase over the relevant period.

Table 7 shows the rate of motor vehicle theft for each State and Territory per 1,000 motor vehicles on the register.

Table 7 Motor vehicle theft, rates per 1,000 motor vehicles on the register, by States and Territories, 1964-73

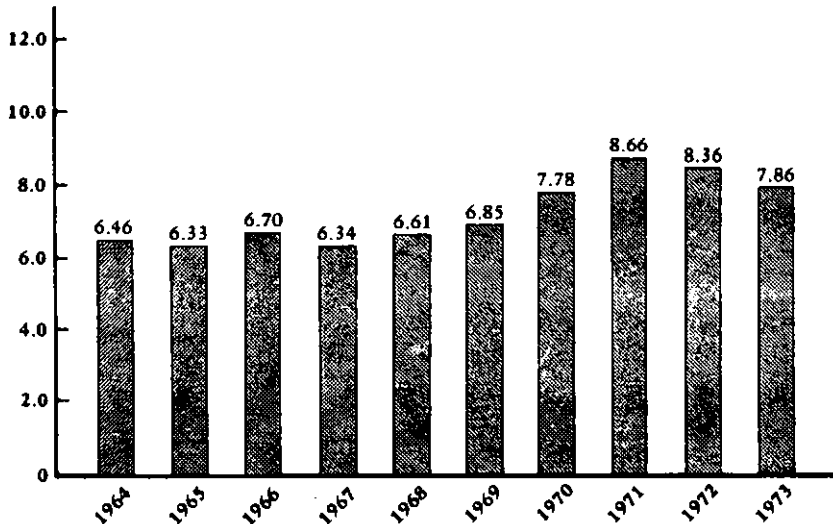
	<i>N.S.W.</i>	<i>Vic.</i>	<i>Qld</i>	<i>S.A.</i>	<i>W.A.</i>	<i>Tas.</i>	<i>N.T.</i>	<i>A.C.T.</i>
1964	9.02	7.13	3.29	3.62	4.06	2.97	3.21	4.13
1965	9.08	6.52	3.24	3.73	3.78	3.39	5.53	5.65
1966	9.03	8.08	2.94	3.18	4.81	3.08	5.56	5.58
1967	8.47	7.20	2.54	4.02	4.85	4.37	6.61	4.91
1968	8.30	7.82	2.73	4.49	5.47	5.16	9.14	4.08
1969	9.63	7.27	3.41	3.78	4.56	4.27	9.50	4.63
1970	10.47	8.29	4.25	4.44	6.09	4.48	12.85	4.66
1971	11.10	8.95	5.42	5.46	7.67	6.02	15.55	5.37
1972	10.38	7.95	5.83	5.73	9.33	7.17	13.50	4.66
1973	9.18	6.84	5.41	6.63	8.69	6.14	15.43	5.69

The national trend of motor vehicles stolen per 1,000 motor vehicles on the register is shown in Figure 13 and from this and from Table 7 it can be seen that the gradient of increase is not as high as was found with rates per 100,000 of the population.

It is clear that a partial explanation of the striking increases in the numbers of motor vehicles stolen shown in Table 6 is the fact that car ownership rates have increased in Australia. With more vehicles available, it seems that more are stolen.

The motor vehicle theft, it seems, is one major crime for which Australia has reliable evidence suggesting that the worst stages may be past.

Figure 13 Number of motor vehicles reported stolen per 1,000 motor vehicles on register, Australia 1964-73



Fraud, forgery, etc.: This offence category is defined to include 'all types of fraud, forgery, uttering, falsification of records, false pretences, secret commissions, imposition, fraudulent dealings in goods subject to hire purchase, obtaining credit by fraud, and offences involving false claims, deception, trickery, cheating or breaches of trust.

Also included are embezzlement, fraudulent misappropriation, fraudulent conversion and stealing by a bailee, servant or trustee, etc. Forgery and/or uttering of bank notes is excluded'.

This offence category may be assumed to cover the field popularly referred to as 'white collar crime'.

Table 8 indicates the number of offences and rates per 100,000 of the population for each State and Territory, while Figure 14 shows the national trend.

Table 8 Fraud, forgery, etc., cases reported and rates per 100,000 of the population, by States and Territories, 1964-73

	<i>N.S.W.</i>	<i>Vic.</i>	<i>Qld</i>	<i>S.A.</i>	<i>W.A.</i>	<i>Tas.</i>	<i>N.T.</i>	<i>A.C.T.</i>
1964	5,688 138.4	3,828 123.3	2,634 163.5	2,091 201.5	1,020 126.2	293 80.4	85 165.0	89 85.7
1965	6,311 151.1	4,132 130.5	3,331 202.6	1,617 151.6	1,075 130.1	371 100.8	104 192.1	258 291.8
1966	5,558 131.1	3,779 117.3	2,778 165.9	1,740 159.0	1,052 123.9	182 49.0	144 254.1	276 286.0
1967	5,438 126.6	3,367 102.8	2,872 168.9	2,185 196.9	1,256 142.9	292 77.8	143 231.5	270 260.7
1968	6,283 144.0	4,402 132.3	4,154 240.0	1,596 142.1	1,476 161.2	607 159.8	271 401.1	166 148.0
1969	8,940 201.1	5,988 176.7	4,681 265.3	3,221 282.6	2,199 230.1	972 252.4	187 255.7	357 293.5
1970	10,657 235.2	9,233 267.6	4,239 236.1	3,797 327.7	2,509 262.4	800 206.1	208 262.3	296 224.5
1971	12,769 276.9	8,065 229.7	5,207 284.5	3,788 322.0	2,383 231.0	783 200.1	265 306.6	297 206.1
1972	12,134 259.6	8,474 238.2	6,221 332.1	3,560 299.3	2,558 242.1	1,060 269.6	283 308.9	283 180.0
1973	14,989 317.9	7,525 209.2	5,101 265.8	3,555 295.6	2,735 255.0	809 203.8	396 113.0	810 360.9

Figure 14 shows that there has been a significant increase in this offence, particularly over the period 1967 to 1970, with a near plateau since that time.

Figure 15 shows the interjurisdictional comparisons of mean rates, with the Northern Territory having the highest rate and Tasmania the lowest. It is notable that the differences between States and Territories in regard to this offence are not as great as found for many other offences.

Figure 14 Fraud, forgery, etc., Australian rates per 100,000 of the population, 1964-73

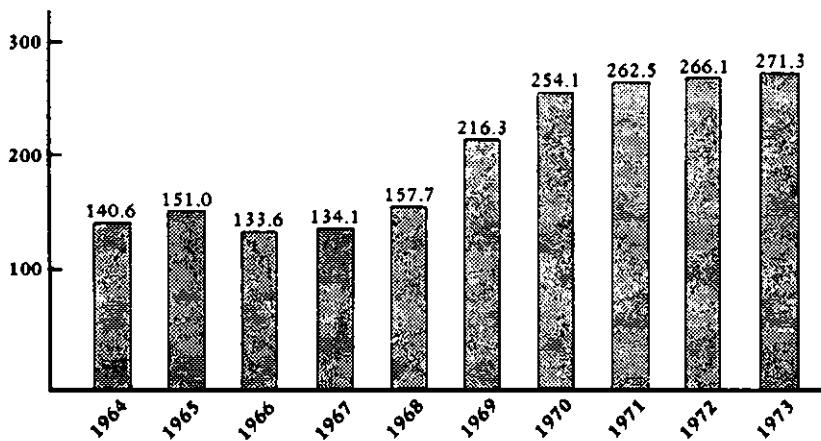
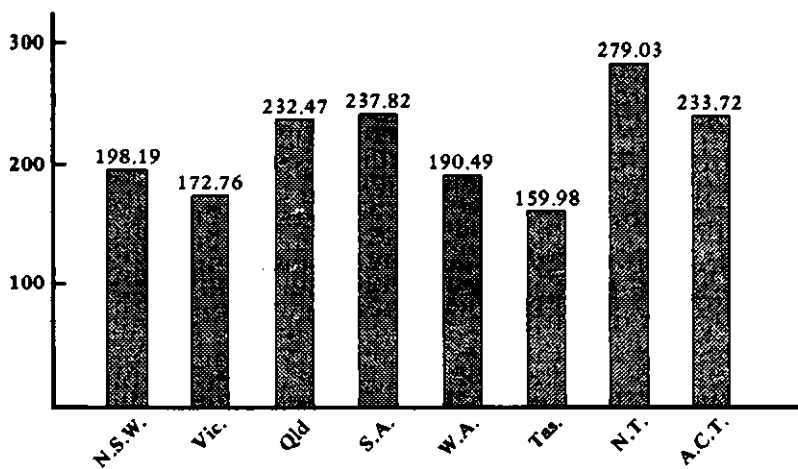


Figure 15 Fraud, forgery, etc., mean rates per 100,000 of the population for each State and Territory, 1964-73



Conclusion

If the seven categories of serious crime were combined to produce an 'Australian serious crime rate' it would be seen that this rate has increased from 554.3 offences reported in 1967 to 927.1 in 1973. This represents an increase of over 67 per cent in a seven year period, while the population has increased by only 11.5 per cent. With a declining birth rate and rate of immigration, Australia's changes in overall population cannot substantially explain the incidence of crime.

It is not claimed that the preceding material in this chapter represents a satisfactory analysis of the state of crime in Australia. Some of the statistics, especially those relating to serious assault, are notoriously unreliable for the reasons given in the text. Also, it is regrettable that the very common offence of larceny (theft) is not included in the national collection system, nor is the less common but very serious offence of arson. Furthermore, the lack of recent statistics seriously detracts from the value of the analyses that have been attempted.

Nevertheless, it is submitted, the data for homicide, robbery, breaking and entering, and motor vehicle theft may be accepted as reasonably reliable and it is clear that the rates for these offences have increased significantly over the period under review. It is too simplistic, however, to interpret these data as indicating support for the popular catch-cry that crime is increasing in Australia. It almost certainly is. But it must be noted that for three of these four offences, decreases in rates are discernible towards the end of the period, and it is particularly important to note that the rates of serious crime vary widely between different States and Territories.

It is suggested, therefore, that it is of little value to ask the general question of whether or not crime is increasing in this country. It is infinitely preferable to ask: which crimes in which jurisdiction are increasing at rates higher than the norm over what period of time? Only when we ask questions of this type will we get the basic information necessary for effective crime prevention planning on a national scale.

In answer to that question it is suggested that, on the basis of the limited information that is available, serious attention should be directed to the crime rates of the Northern Territory. For nearly every offence category, with the exception of breaking and

entering, the Northern Territory rates are at, or nearly at, the top of the list. Furthermore, the rates of increase in that jurisdiction have been remarkably high.

One other fact which stands out is that for some offences, notably robbery, breaking and entering, and motor vehicle theft, New South Wales and Victoria have much higher rates than the Australian averages. It is also interesting to ask why Victoria and Queensland have such differences in motor vehicle theft rates when their car ownership rates are almost identical.¹

A further matter of some interest is the fact that the Australian Capital Territory does not have the lowest rates of serious crime in this country. As one of the most affluent, and certainly the most carefully planned, population centres in Australia, it might have been expected that the Australian Capital Territory would have been relatively crime-free, but this is not the case.

Underlying the questions about particular crime rates for particular jurisdictions are the more difficult questions of why these differences exist and what corrective action should be initiated. No attempt to answer these deeper questions is made at this time, but it is stressed that more sophisticated analyses of more comprehensive crime statistics are urgently needed in Australia if we are to understand, let alone solve, our crime problem.

Attempts will be made in the future to undertake detailed analyses of the available information on crime collected by police forces and the Australian Bureau of Statistics, but problems are anticipated with the plotting of long-term trends due to a recent decision to change collection periods from calendar years to financial years. Some national figures, using financial years for the incidence and rates of six offences, have recently been published², but comparable figures are only available for separate jurisdictions over the period 1971-72 to 1973-74. Thus it will be a considerable time before we are able to plot long-term trends, of 10 years or more, on an interjurisdictional basis. There is clearly much further work to be done in this area.

1. D. Biles, *Car Stealing in Australia: Facts and Figures* (Australian Institute of Criminology, Canberra, 1975), p.18.

2. Australian Bureau of Statistics, *Social Indicators 1*, (1976), p.79.

3 Australian Police Forces

Bruce Swanton

Introduction

The aim of this chapter is to describe and comment on selected aspects of the police service and the role of police in criminal justice. Topics dealt with have been selected with a view to providing a balanced picture of the police service in Australia. There is, nevertheless, a degree of arbitrariness in their selection. Where available, quantitative data have been used. Elsewhere qualitative data, some of which are frankly impressionistic, have been used.

Areas considered are: objectives and roles of police; control of chief police officers; organisation of the police service; police entry; police duties; police unions and labour relations; and dealing with adult offenders.

Objectives and roles of police

The various Acts and Regulations governing police forces are not particularly explicit when it comes to saying what police forces are expected to do. One of the more enlightening statements in this regard is contained in the Rules made under the New South Wales Police Regulation Act, which refers to the Commissioner's responsibility:

... for the maintenance of peace and good order, and the security of life and property throughout the State.

This and other such references accord fairly closely with the aims, if not the priorities, stated by Charles Rowan and Richard Mayne in their instructions to London's 'New Police' in 1829:

It should be understood at the outset, that the object to be attained is the prevention of crime.

To this great end every effort of the police is to be directed. The security

of person and property, the preservation of the public tranquillity, and all the other objects of a police establishment will thus be better effected than by the detection and punishment of the offender after he has succeeded in committing the crime.¹

The maintenance of law and order is considered to be of supreme importance in the life of a nation. In fact, the 1962 British Royal Commission on the police felt that without the preservation of law and order by police there would be anarchy.²

An American survey of police administration commentaries and literature³ identified the following areas as being proper for police attention:

- | | |
|--|--|
| 1. Prevention of crime. | 8. Detection of crime. |
| 2. Maintenance of the peace (domestic tranquillity). | 9. Recovery of lost and stolen property. |
| 3. Protection of the security of persons and property. | 10. Preparation of cases for prosecution. |
| 4. Enforcement of laws. | 11. Regulation of traffic. |
| 5. Provision of miscellaneous public services. | 12. Protection and support of individual rights. |
| 6. Apprehension of offenders. | 13. Repression of crime. |
| 7. Regulation of non-criminal conduct. | |

This list contains a reasonably comprehensive mixture of purposes and long-range objectives which most Australian police, and probably a majority of the Australian public, would agree with. The point is an important one because the ability of a free society to police itself adequately is a vital requirement to its continued orderly existence.⁴

The first step in attaining adequate policing is establishing the broad purposes of police organisations. From such purposes, long, mid, and short-term operational objectives can be defined in respect of the various police functions. It is at the mid and short-term levels that agreement on the aims of police becomes less apparent.

Professor J.Q. Wilson of Harvard University has described three distinct policing styles – the 'watchman' style, the 'legalistic' style, and the 'service' style.⁵ These styles or roles are 'pure' types and no police force accords totally with any one of them.

The watchman style, in situations not involving serious crime, involves a police emphasis on order maintenance rather than law

enforcement. In the legalistic style, police favour an enforcement approach. The service style involves greater informality on the part of police in resolving complaints

It is not clear if this typology can be properly applied to the past⁶ but it appears that Australia's earliest police forces were primarily watchman in style. Today, greater emphasis seems to be placed on the legalistic style, an emphasis widely apparent in our urban areas.

A debate is slowly gathering concerning modern police roles. Community-oriented policing, consistent with the service style of policing, has been adopted by a number of American police forces. However the authors of evaluation studies have been cautious in declaring it more effective than other roles. Nevertheless, the idea of police performing a social, supporting role is growing in the United States, Canada and Great Britain.

In Australia at present, it is probably correct to say that all State and Territory police forces primarily emphasise the legalistic style of policing and that a majority of police favour that style. Proponents of the idea of police being a social/helping agency, such as Chief Victor Cizanckas of Menlo Park, California, see the social role of police growing during the remainder of this century.⁷ In Australia, the Governor-General, a keen observer of the police scene, has presented similar views to senior police officers.⁸ A scientist who has conducted a great deal of research into police operations, J.F. Elliot, of the General Electric Company, recommends that police should concentrate on two major areas only: crime and minor civil disorders.⁹

Both sides in the debate have compelling arguments which make comparison difficult. There is no easy way to define today's police roles¹⁰, although such a difficulty by no means relieves society of the responsibility for trying.

It does seem clear that the objectives and roles of police in modern Australia have been arrived at by an *ad hoc* process just as much as by the application of rational thought and planning. When one bears in mind the words of a former Attorney-General, Bill Snedden, it seems time for a fundamental examination of police objectives and roles:

In these latter days of the 20th century there is probably no more important function within society than that of police. There may be others of equal importance, but the freedom of the community, and the

sense of personal freedom of individuals who comprise the community, depend upon the capacity, authority, and responsibility of members of the police forces.¹¹

The Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders provided pointers to police by suggesting areas requiring maximum attention.¹²

Probably the best example of an examination of police purposes and operation is that of the Ontario task force on police. The task force's report, while far from being a fundamental reappraisal, does suggest certain principles to assist in defining police objectives and roles. With regard to objectives, it recommends that police aims — in relation to crime control, protection of life and property, and the maintenance of peace and order — should be defined in terms of community requirements.¹³

Both police and the community have a responsibility for determining police objectives and roles, difficult though implementation would inevitably be. There are signs that the Queensland police department is slowly moving toward a basic examination of its *raison d'être* and the South Australian police department exercises a deep and ongoing concern with its place in society. These two police forces, while a long way from actually utilising community participation in the determination of police long-range objectives, are certainly ahead of both public opinion and police forces in other States.

Control of chief police officers

Each of Australia's six States and two Territories has its own police force, created and regulated by statute. The various principal Acts and Ordinances regulating police forces detail the authorities responsible for appointing chief officers of police, the public officials exercising control over chief officers, and the circumstances in which chief officers may be dismissed. These provisions represent important controls over police. In all States the chief officer of police is appointed either by the Governor alone or by the Governor in Council. In the Territories, he is appointed by the responsible federal minister.

Police commissioners are usually subordinate to ministers responsible for police. This occurs in New South Wales, Queensland, Tasmania, and the Australian Capital Territory. In the

Northern Territory, the police commissioner is subordinate to the Administrator. Presumably, Statehood will see an automatic change in this respect. Victoria's Chief Commissioner of Police is subordinate to the Governor in Council and in South Australia the commissioner is subordinate to the Governor. Also in South Australia, copies of any direction from the Governor to the police commissioner must be laid before both Houses of Parliament and published in the Government gazette.

In Western Australia, the commissioner of police possesses a wider degree of autonomy than any of his counterparts in the other States and the Territories. The only statutory restrictions on his powers are that ministerial approval is required for the framing of rules, orders and regulations, and that commissioned officers must be appointed by the Government.

Organisation of the police service

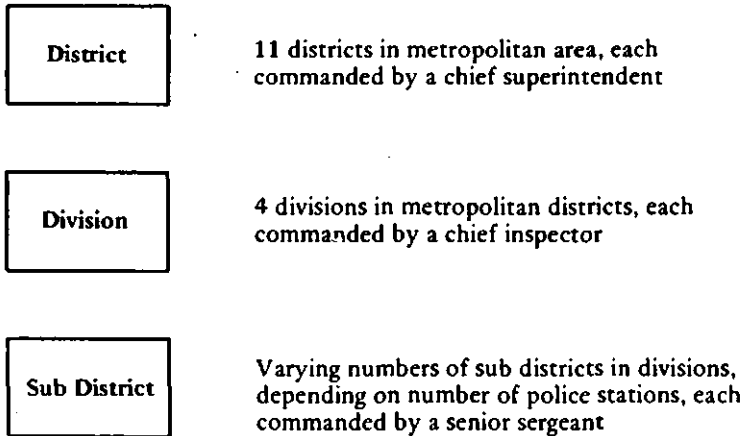
Within their various jurisdictions, police forces are divided into a number of geographical formations. These formations are naturally concentrated on population centres but every square inch of each State and Territory falls into one formation or another. The terminology applicable to these formations varies quite widely between forces. But they all conform to the same basic hierarchical pattern of small units aggregating to form larger units, which in turn aggregate to form still larger units. The real difference between forces is the way in which the various formations are determined.

In Victoria, for example, the State is divided into two major territorial areas — metropolitan Melbourne and country. Within each area in descending order are districts, divisions, and sub districts. Sub districts are areas for which a single police station is responsible and are normally commanded by a senior sergeant. Depending on the number of staff on strength, command may be exercised by lower ranks. A given number of sub districts aggregate to form a division. Metropolitan divisions are commanded by chief inspectors, while most country divisions are commanded by inspectors. Three or four divisions together form a district. Districts are commanded by a chief superintendent, although in the country some districts are commanded by superintendents. There are 11 districts in the metropolitan area (excluding Geelong)

which are coordinated by a commander. In the country, formations are generally similar but somewhat larger in area due to the lower population density.

An outline organisation table depicting the structure of a metropolitan police district is shown in Figure 1. These formations have developed as a result of tradition, informed judgments, natural barriers, attempts to spread work loads evenly, and in some cases policies of following local government areas. The old style beat and section formations have largely disappeared in the Victoria Police Force since the advent of personal portable radios. The Victorian organisation bears some resemblance to that of several other police departments, including New South Wales and Tasmania.

Figure 1 Formation organisation in Victoria Police metropolitan area



South Australia's geographical formations differ most from those of Victoria. South Australia has organised its metropolitan area, and much of its country area, into sectors. Sectors are aggregations of Australian Bureau of Statistics Census Collector's Districts (CDs). Police have adopted the CDs as their own data

collection units. As Deputy Commissioner L.D. Draper has commented:

Police statistical information becomes more useful in manpower deployment, the combating of crime and control of traffic if it can be related to population and other factors in relatively small and comparable areas. This is possible by accepting Collector's Districts as the base minimum unit of area for the collation of police statistics and their subsequent analysis.¹⁴

With such a comprehensive and detailed reporting base it is a relatively simple matter to combine CDs (or police Data Collection Units) into carefully tailored sectors. Evenness of workload is optimised in such a situation. These sectors are aggregated to form regions. Regions, commanded by chief superintendents, may be either metropolitan or country.

In personnel terms, police organisations are staffed by a hierarchy of ranks similar to those existing in other large bureaucracies such as the armed services, the public service, or private sector corporations. The commissioner, as chief officer, sits at the top of the pyramid while constables form the base rank and file. In between these two extremes are layers of supervisors, executives, and administrators in ascending order.

Two eternal questions of police organisation are: what is the optimal balance of the various ranks; and how many police should there be in total? Despite the fact that definitive answers to these questions have not yet been found, there is a surprisingly high degree of uniformity in rank distribution among the various forces.

Nationwide, constables, that is, rank and file police, comprise approximately 71 per cent of total police strength. Non-commissioned officers, that is, sergeants and senior constables first grade, form some 25 per cent. Commissioned officers constitute the remainder.

Despite the broad uniformity throughout the various jurisdictions, there are several interesting variations between police forces. Tasmania has traditionally had a relatively high percentage of commissioned officers. However, the Northern Territory Police Force, by the addition of 10 officers during the year 1974-75, has exceeded Tasmania's percentage. The post-Cyclone Tracy buildup of the force and the filling of previously vacant positions would

seem to account for this sudden growth. The other small police force, that is, in the Australian Capital Territory, also has a higher than average percentage of officers. Of the middle and large sized police forces, Victoria is ahead with 5.17 per cent of officers. The remaining four States are all below the national mean of 3.88 per cent commissioned officers, Western Australia having marginally the lowest percentage.

There is less variance in non-commissioned officer percentages, with only Tasmania and the Australian Capital Territory being well below the national mean. However, New South Wales, Western Australia and Northern Territory, are, to varying degrees, also below the national average. Victoria, Queensland and South Australia are all above the mean. Tasmania and the Australian Capital Territory have a high percentage of constables, as do Western Australia and New South Wales. Victoria has the smallest proportion of constables, followed by the Northern Territory, Queensland, and South Australia in that order.

Any eventual solution to the question of police strengths will of necessity be highly subjective. South Australia, Victoria, and Western Australia are trying to relate strengths to workloads. This approach holds promise in urban areas in some employment categories but seems problematic in rural and specialist areas. A case in point is that of a Western Australian police formation of approximately 126,000 square miles but containing only 650 persons.

The nature of policing can and does vary quite widely within police forces as well as between police forces. The variation in social and physical environment between, for example, Thursday Island and Brisbane, is as great as that between the Northern Territory and Victoria. Bearing in mind geographic and population distribution differences, the variation between police forces in the ratio of police to public is quite understandable. The ratios of police to public in the various police forces are shown in Table 1.

It is noticeable that not only do the smaller police forces tend to have ratios well above the national average but that the two highest rates occur in federally funded organisations. Tasmania, South Australia, and Western Australia are all significantly above the mean national ratio of one posted policeman per 561 citizens. New South Wales, like Queensland, is not far below the national mean. Victoria, however, is well below. This position no doubt reflects Victoria's relatively low expenditure on police.¹⁵

Nationwide, the overall range is considerable, varying from 4.25 police per thousand of population in the Northern Territory to 1.58 police per thousand of population in Victoria, making the highest rate more than two and a quarter times greater than the lowest. However, if the Northern Territory (a special case in view of its size and dispersed population) is excluded from consideration, a very much smaller range is apparent.

Table 1 Police-Public Ratios/Rates as at 30 June 1975

<i>Police force</i>	<i>Posted* strength</i>	<i>Estimated** population of jurisdiction</i>	<i>Ratio of police to public</i>	<i>Rate per 1,000 of population</i>
N.T.	372	87,584	1:235.44	4.25
A.C.T.	523	191,872	1:366.87	2.73
Tas.	890	406,123	1:456.32	2.19
S.A.	2,473	1,234,078	1:499.02	2.00
W.A.	2,135	1,132,559	1:525.79	1.90
N.S.W.	8,375	4,789,563	1:571.89	1.75
Qld	3,479	1,997,170	1:574.06	1.74
Vic.	5,802	3,673,368	1:633.12	1.58
Aust.	24,049	13,502,317	1:561.45	1.78

* Police population base – all sworn police less trainees.

** Public population base – all persons: ABS data.

As is the case with most large public bureaucracies, there are numerous employment categories in the police service. Journalists and others tend to divide police into two basic groups, uniformed personnel and plain clothes personnel, that is, general duty police and detectives. If one adds traffic personnel to the list, then the three most important (and visible) areas of police activity are accounted for. Organisation and deployment of personnel relates directly to the objectives and roles of an organisation. Some of the objectives traditionally attended to by police (indicated at p.36) are clearly assignable to one or other of the three employment groups mentioned above. Others, more general in application, for

example, enforcement of laws, are applicable across classifications. As in most other matters, there is a broad general uniformity apparent among Australian police forces concerning personnel deployment, particularly among forces of similar size.

With reference to data generally available in police departmental reports, it is not possible to distinguish between patrol and other general duty and administrative personnel. For present purposes they are grouped together. Most police forces employ a little over 70 per cent of their personnel in these employment areas. Distribution of personnel between detectives/plain clothes duties and traffic duties is fairly evenly divided. Minor variations reflect local needs and characteristics such as relatively small detective forces in the two Territories.

Police entry

Entry into the police forces discussed in this chapter is at the level of either cadet or adult recruit. Lateral entry at a level higher than recruit, with the exception of commissioner and deputy commissioner in some forces, is rare. All Australian police forces have minimum entry standards relating to physical characteristics, character and literacy, but they vary considerably between States and Territories. Some forces are more detailed and demanding in their requirements than others. Although in no case are those standards excessively demanding, the number of failed applicants is invariably high. For example, during the year 1974-75, 48 per cent of applicants to join the Australian Capital Territory police force were rejected due to their failure to meet prescribed entry standards. Most forces experience similarly high rejection rates.

Much thought has been paid in recent years to problems of recruit selection in a number of western countries, notably the United States, Canada and England. Most of this effort relates to not only making selection processes more efficient in themselves, but also more effective in the sense of matching entry standards to the presently evolving nature of the police. In the United States, equal employment legislation has had the effect of making the old, and often arbitrary, entry standards subject to legal rejection. In such cases, the need for empirically established entry standards becomes particularly important.

In Australia, such considerations have received little thought to date, the only apparent change being the raising of education levels in the case of some police forces. Standards appear to leave a lot to be desired when related to modern police tasks. It is probably true to say that fundamental review of entry standards represents one of the most important areas of reform required in Australian police administration. It is noted that the Victoria Police Force has recently completed a study aimed at detailing improved selection processes. Proposals contained in the study involve considerable emphasis on psychological testing.¹⁶

While it is a simple matter to advocate the need for more rationally based entry standards, it is more difficult to determine alternatives. A comprehensive and scientifically based inquiry to examine the subject is really needed.

Police duties

Police duties may be classified according to a number of differing criteria, for example, administrative and operational, plain clothes and uniform, generalist and specialist. For present purposes we shall consider police duties in terms of the three major operational duty classifications: criminal investigation; patrol; and traffic.

Criminal investigation: Criminal investigators have long been an important part of police forces. On average, they account for about 14.5 per cent of operational police. This figure includes, for the sake of convenience, detectives and plain clothes police. In some police forces, for example, New South Wales, plain clothes police and criminal investigators are all members of the Criminal Investigation Branch (CIB). In other departments, for example, Queensland, an organisational distinction is made in that plain clothes police do not fall within the ambit of the CIB but are organised as a separate body. Basically, detectives are concerned with the investigation of crime, provision of technical support to field investigators, and the gathering of information about criminals. Plain clothes (sometimes termed licensing or vice) police are concerned more with the laws relating to gaming, prostitution, and liquor. Regardless of organisational differences, these operational distinctions are universally maintained. For instance, in New

South Wales, police are specifically assigned to criminal investigation duties either at the Criminal Investigation Branch or at metropolitan and country stations throughout the State. Others perform plain clothes duties in various fields.

Detective branches of police forces are particularly interesting for a number of reasons. They generally enjoy high status within the police service, partly due to the greater autonomy permitted them. In some forces, brighter and more dynamic probationary constables have traditionally aspired to join their force's Criminal Investigation Branch after serving a prescribed period in uniform.¹⁷ It should not be concluded from this statement that the uniformed branch is in any way inferior to the detective branch in terms of benefit. Each branch provides a complementary and necessary contribution to the total police effort.

The tendency for probationary constables to aspire to the CIB has had two interesting effects. First, uniformed branches were deprived of some of their best managerial potential. Second, the upper administrative echelon of many police forces sometimes has undue representation of former detectives. This means that policy determination for uniform branches, the major components of police forces, may be dominated by those who least understand the problems involved. Some police forces, such as Victoria, try to offset the brain drain to CIB by requiring detectives to take certain promotions into uniformed branches. Other police forces, for example, New South Wales, prefer to let detectives pursue uninterrupted careers in the branch of their choice. In such cases, members may remain as detectives throughout their careers unless the most senior administrative ranks are achieved.

Because detectives are concerned almost entirely with crime and criminals, they tend to spend more time in the higher courts than do most uniformed personnel. Detectives accordingly need to have a comprehensive knowledge of criminal law and the rules of evidence. A heavy emphasis is naturally placed on these subjects in their training.

Detectives operating in the field are basically divided into generalists and specialists. The generalists are usually assigned in small groups to divisions or regions and attend to local complaints of crime. They perform routine investigations within their jurisdictions, take initial action quite often in relation to serious crimes, and keep an eye on criminals resident in and visiting their

locality. Specialist detectives are either attached to centralised squads which concentrate on particular categories of unsolved crime, for example homicides, breakings, armed holdups, stolen vehicles; or to support services.

Many field detectives have substantial contact with professional criminals. Opportunities for unethical conduct can and sometimes do occur under such circumstances. Thus a prime requirement for detectives is integrity. Patience and persuasiveness are two other essential qualities if a detective is to be successful.

Patrol: The most important function of uniformed police is patrol. At least one authority has described patrol as the basis of police work.¹⁸ The uniformed patrol provides a twenty-four hour coverage in all metropolitan areas, responding to the wide range of assistance and emergency calls normally directed to police. Patrols are often first in attendance at scenes of crime, injury, or other events that specialist police subsequently deal with.

The essence of good patrol is quick reaction. Lost children, house fires, family quarrels, jammed elevators, noisy parties, cruelty to animals, serious illnesses and death are all events to which police may be called. The variety of calls for police service is limited only by the human genius for becoming involved in situations beyond the ability of the actors involved to cope with. Only a relatively small minority of such calls are related to crime. A majority of situations encountered by patrol personnel involve the delivery of services or the resolution of non-criminal conflict.

A wide range of conflicting demands is placed on patrol personnel. Some demands require them to employ punitive sanctions, sometimes using force. Other situations require their help and sympathy. Thus, ideally, patrol personnel require high levels of social knowledge and a sound understanding of human relations. Certainly, high levels of individual initiative and general competence are required. In view of these diverse demands, it is surprising that the patrol task has not achieved the prestige it really warrants within the police community.

Traffic: Traffic personnel, like detectives, are very much involved with law enforcement. There are, of course, divisions of activity within traffic branches. Speed detection details, breathalyser squads, accident appreciation squads, driver education units and

traffic controllers all play their part in coping with the traffic problem. But the backbone of the traffic branch is the enforcement element which operates under a variety of titles. They are the personnel who operate on motor cycles or in four-wheeled vehicles with the very necessary aim of detecting and reporting motoring offences.¹⁹ As a result of the nature of their duties, traffic personnel spend a lot of time in the lower courts presenting evidence in cases of motorists reported by them for breaking the traffic laws. It should not be forgotten that traffic personnel also play an important part in law enforcement generally as motor vehicles these days are widely used in the commission of offences other than breaches of the traffic laws.

Although a necessary form of control, traffic enforcement is, not surprisingly, unpopular with many motorists – particularly those reported by police for committing offences. The friction created in such situations sometimes has the unfortunate effect of compounding the hostility felt by such drivers to police. In some cases, too, it reinforces negative attitudes to the motoring public among some traffic police. The entire process has an undoubtedly negative effect on police-public relations. So much so, that some governments, partly for this reason, provide separate organisations for the enforcement of traffic laws. New Zealand presents probably the best known example of separate traffic enforcement and control bodies in the southern hemisphere. During 1975, the Western Australian Government created a Traffic Authority to bear the brunt of traffic law enforcement in that State. It will be interesting to see if the move improves the popularity of the Western Australian Police Force with its public.

Police unions and labour relations

Industrial relations in Australia are generally conducted within an adversary framework and arbitrated by an industrial magistracy and judiciary. Considerable variation understandably exists within the collections of bodies and jurisdictions comprising the nation's industrial relations system.

Members of the police service are represented in industrial matters by a variety of associations and unions. These employee organisations either represent all members within a particular police force or certain ranks, that is, other ranks or commissioned

officers. Very different situations exist in Great Britain and the United States. In Great Britain, one police federation services all 43 police forces in England and Wales, another looks after the 20 Scottish police forces, and yet another looks after Northern Ireland. At the other extreme, in the United States, there are numerous employee organisations representing police, sometimes as many as five within the one force. Some of these organisations are composed purely of police, but some are not. In some instances, police labour organisations oppose each other within a single force.²⁰ The situation existing in each country represents its own unique combination of historical origins, political structures, needs, and attitudes.

The various organisations representing the industrial interests of police in Australia are shown in Table 2.

Table 2 Labour organisations representing police in Australia

<i>Police force</i>	<i>Other ranks</i>	<i>Organisation representing Officers</i>
N.S.W.	Police Association	Commissioned Officers' Association, and Professional Division, N.S.W. Public Service Association
Vic.	Police Association	Police Association
Qld	Police Union	Queensland Police Officers' Association
S.A.	Police Association	Commissioned Officers' Association, and S.A. Public Service Association
W.A.	Police Union	Police Union
Tas.	Police Association	Police Association
N.T.	Police Association	N.T. Police Officers' Association
A.C.T.	Police Association	Police Association

Two particular points of interest emerge from Table 2. First, an apparent distinction between police unions and police associations, and second, the fact that some forces have a single representative body, while others have two: one representing commissioned officers and the other representing other ranks.

Industrially, the distinction between police unions and associations has significance in certain jurisdictions. The two unions, that is, in Western Australia and Queensland, operate as a matter of routine within their respective Industrial Commissions, as do registered unions representing other occupations and industrial groups. Police associations, on the other hand, do not normally operate in the Industrial Commission, although some do have access, either unlimited or constrained.

All police labour organisations have a wide variety of objectives. There are two aims, however, that transcend all others in relative importance. One is to improve the financial lot of their members, and the other is to liaise and negotiate with police administrators concerning membership grievances. The importance of these aims may be appreciated when one considers the consequences to society of serious police industrial unrest. The Melbourne police strike of 1923, for example, reportedly resulted in two lives being lost, 500 persons being injured, and 78,263 pounds worth of recorded property damage.²¹ However the actual horror of the breakdown of social control in such circumstances is never adequately reflected in such statistics.

Because of the importance of the police task of maintaining law and order in society and protecting life and property, good labour relations are necessary to avoid circumstances reaching the stage where police are again tempted to strike, or even severely limit their activities. Police today, like most other employees, are becoming increasingly concerned for their industrial rights. Given the complex nature of modern society and its controls and pressures, it is reasonable to assume that police frustrations will increase. Continued, and indeed improved, police labour relations will undoubtedly be necessary to maintain police industrial stability at an acceptable level in the future.

Dealing with adult offenders

Police have three major courses open to them when dealing with adult offenders. First, in less serious cases, they can issue a caution; second, they can proceed by summons²²; third, they can make an arrest. Arrest may be either with or without a warrant, depending on the laws pertaining to the particular circumstances. These three courses of action, and the decision to take official

cognition of an offender's behaviour in the first place, require the exercise by police of a great deal of discretion.²³ It is by this exercise of discretion that police forces, and indeed criminal justice generally, are to a significant degree judged.

Caution: The exercise of discretion by police in deciding whether to take action with respect to offences committed has been the subject of a good deal of discussion and even litigation.²⁴ But, regardless of whether one has the right to ignore an offence or decline to prosecute an offender, sheer expediency demands the exercise of discretion in relation to cautions, despite there being neither legal nor common law basis for the practice. If police were to bring every suspected offender²⁵ before the courts, the courts as currently staffed could not cope. In addition, a great deal of additional police duty time would be spent on completing the necessary paperwork. More importantly, the public could well be outraged with what could be seen as oppressive law enforcement. This could in turn have an unbeneficial effect on police-public relations. For these and a variety of other reasons, police as a matter of policy quite often either ignore trivial breaches of the law or verbally caution offending citizens.

Although the police use of cautions helps prevent the judicial system from becoming overloaded, police can sometimes be embarrassed through their use. If, for instance, an offender's demeanour shows that he does not appreciate the opportunity offered by the caution, the police officer may well feel that the caution is wasted. In such an event, a police officer is faced with either consciously issuing a wasted caution and thereby losing credibility with both the offender and himself, or with withdrawing the caution and taking formal action. Offenders with superior social skills are more likely to take advantage of the caution than those lacking social sensitivity. Well-developed social skills tend to correlate well with income and class. As a result, it sometimes appears that police deal more leniently with middle-class than working-class offenders, particularly where juveniles are concerned. With regard to juveniles generally, cautions are widely employed regardless of class in the hope that by 'not treating the juvenile as a delinquent, he may in future be turned from delinquency'.²⁶

Summons: In those cases deemed by police as warranting formal legal action, provided there is no immediate likelihood of continuance of repetition, police will often choose to proceed by means of summons.²⁷ This is another area of discretion in which police are guided by fairly indistinct and sometimes conflicting criteria.²⁸ There is some evidence in England and Wales of a police trend to increasingly exercise this discretion in favour of arrest thereby saving both time and paperwork.²⁹

The equivalent position in Australia is not known and well warrants examination. Even where a power of arrest is provided in respect of all offences, for example, in New South Wales, departmental policy directs that proceedings be instituted by means of summons whenever reasonable to do so. Where a power of arrest is provided in relation to an offence but its exercise is clearly unreasonable in a given situation, the exercise of that power notwithstanding would quite possibly draw criticism from the bench. This in itself is something of a deterrent to police being overly reliant on arrests.

Where an offence such as a traffic or street offence, is dealt with by means of summons, the reporting police officer needs to obtain the name and address of the offender so that a summons may later be served. The offender is informed, usually immediately after the commission of an offence, of the basis for the action taken. It is not necessary for precise reference to be made to the specific section or regulation of the Act or Ordinance considered contravened. A reference to the act or omission complained of is sufficient. Normally, proof of name and address is required and in traffic matters relevant documentation, that is, a driver's licence, is checked.

Details of police and court procedures in relation to summons cases vary somewhat from jurisdiction to jurisdiction. In urban areas, the reporting police officer submits a breach report to a superior officer. A decision is subsequently made by an authorised officer or adjudication panel whether or not to prosecute. A decision not to prosecute may result in the offender being formally cautioned. A decision to prosecute will result in a summons being applied for. In smaller centres, the reporting member may well apply for a summons personally without reference to higher authority.

Summonses are issued by a justice or magistrate. In a

summons, the offender is nominated as is also the date, time and place of required attendance at court. The precise offence alleged is stated in the summons which is signed by the issuing justice or magistrate. Summonses may be served on alleged offenders either personally or by registered mail at their last known address.

Upon receipt of a summons, a defendant has two basic options. First, he may attend court and plead either guilty or not guilty as desired. Second, where a minor breach is involved and the outcome will most probably be a fine, he may write to the court admitting guilt. The case may then be dealt with in his absence (*ex parte*) should the magistrate agree. In more serious cases attendance is required. In *ex parte* cases, notice of penalty is normally sent to the defendant by mail.

Arrest: The decision to arrest is as much an exercise in police discretion as is the decision to proceed by means of a summons. Generally speaking, the decision to arrest without warrant (where permissible) is made on the basis of all or some of the following considerations:

- . The seriousness of the offence.
- . To prevent the continuance of the commission of an offence.
- . Inability to identify the offender subsequently.
- . Protection of the offender.
- . Where it is thought that the offender will abscond.

Decisions have on occasions to be made in extremely short periods of time and are sometimes complex in law. The number of dissenting decisions that occur in the ordered precincts of appeal courts shows the difficult legal decisions with which police are sometimes faced.³⁰ A comprehensive guide to decision-making in such situations is desirable as well as current police circulars and instructions. Canada has done some interesting work in this area during recent years.

In cases where offenders submit to arrest without resisting, the arresting police officer has few worries. Arrest should be signified to the offender, preferably by touching him on the arm. There is no agreement on this point among legal authorities as may be seen from looking at relevant judgments.³¹ Offenders should be told

why they have been arrested.³² Practices vary, but it is desirable that arrested persons be informed of the location to which they are to be taken. Once a policeman has made up his mind to charge a person with an offence, he is required to caution him to the following effect:

You are not obliged to say anything unless you wish to do so, but what you say may be put into writing and given in evidence.

This caution has no force in law. However, police personnel who when making an arrest fail to deliver a caution do so at their own risk. The caution referred to is one of the so-called Judges' Rules. Most Australian police forces comply with the Judges' Rules³³ which largely relate to the cautioning and interrogation of persons. However New South Wales has a set of Commissioner's instructions to guide police behaviour in such situations.

Arrested persons are not normally searched in the street except for the gaining of evidence relevant to the offence, such as stolen property, betting slips or if the arrested person is suspected of carrying a weapon.

In cases where an arrested person resists and/or is a known escapist, force may have to be employed and even handcuffs used. Sometimes, where only one obstreperous offender is arrested, a well-applied restraint hold may sometimes suffice. Police personnel engaged in violent struggles with offenders and in real and immediate fear of their life may resort to their firearm, always provided such use represents minimum necessary force. Escaping felons may be fired upon under certain circumstances. These circumstances are normally covered in police force general orders or instructions. Where property offences only are concerned, the use of firearms is generally discouraged. These are, however, very general comments concerning a most complex subject and many qualifications exist.³⁴

When arrested persons are brought to a police station they are usually charged. There are exceptions, for example, persons detained for breathalyser testing, and drunks who are detained for four hours and then released. In some jurisdictions, larger urban police stations have a duty officer who screens arrests prior to formal charging. If in his opinion the charge is not substantiated he has the discretion to refuse the charge. The law in this area is not precise and it would seem that the arresting officer could

proceed with a refused charge in a private capacity.³⁵ Such instances are understandably rare.

Before being charged, an arrested person is normally searched and evidence obtained from his person where appropriate. Should he resist such a search or the taking of fingerprints, police are generally empowered to use force to effect their purpose.³⁶ Medical examinations, if requested by the appropriate authority, must be performed by a medical practitioner. In all serious cases, arrested persons are photographed and fingerprinted after being charged. Sometimes a handwriting specimen is also obtained. All police agencies have rules prohibiting the searching of females by males.

During formal charge proceedings the precise wording of the charge is read to the arrested person. He is then cautioned in the following words or an authorised version thereof:

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

In most, if not all, jurisdictions arrested persons are permitted by police to make a telephone call to a legal adviser, friend, or other person able to arrange bail, if they so request. After charge proceedings are completed, the offender may be either released on bail or held in custody. The decision whether or not to permit bail is the responsibility, subject to certain constraints, of the officer for the time being in charge of a police station and, in some cases, police officers of a prescribed rank.

In Queensland, for example, police may grant bail only in cases capable of being heard before a magistrate. Despite such constraints, police bail represents an important area of police discretion. Criteria for granting police bail are generally not well-established and there is an argument for having such criteria formalised in uniform legislation. As the Australian Law Reform Commission has pointed out³⁷, persons arrested for breaching Commonwealth laws are dealt with for bail purposes in accordance with the practices of the State in which they are arrested. Because police bail criteria are either vague or conflicting, a situation can arise in which two persons arrested for the same Commonwealth offence but in different jurisdictions may be treated quite differ-

ently in relation to bail. Such a lack of uniformity seems clearly inequitable. The only practicable remedy would seem to lie in uniform legislation.

In minor cases, an arrested person may be bailed by police through being permitted to enter into a recognizance without the actual depositing of cash. In more serious cases he may be required to either deposit a cash bail and/or obtain a surety as to a stipulated amount. When bailed, an arrested person is normally presented with a bail notice which informs him of when and where to appear in court. Bailed persons not presenting themselves in court in accordance with the directions given in their bail notices may have a warrant issued for their apprehension and enforced attendance. In minor matters, however, such as drunkenness, bail is forfeited in the event of non-attendance by a defendant and no further action is taken. Sometimes, for example, in Victoria, persons arrested for drunkenness offences are merely detained for four hours and then released.

Statutory powers of arrest without warrant have greatly reduced the use of arrest warrants that existed in earlier times. Nevertheless, they are still utilised in cases where their use is either required by law or where an offender, but not his location, is known. Warrants are also used in some of the more complex criminal cases where a decision to prosecute is arrived at prior to the decision to arrest.³⁸

Arrested persons who are refused bail must appear before a justice or a magistrate. There are interesting differences between jurisdictions with regard to the despatch with which arrested persons must be placed before a court.³⁹ In South Australia⁴⁰, Queensland, and Western Australia arrested persons are required to be placed before a court 'forthwith'. In Victoria, persons taken into custody for an offence must be brought before a justice or a magistrate as soon as practicable after being taken into custody. In Tasmania, a person arrested for an offence must be presented without delay. New South Wales, on the other hand, makes no statutory provision concerning the time of appearance.

Even when cases are processed quickly, it can happen in some jurisdictions that an arrested person who is refused bail by police can remain in a lock-up or cells from Friday night to Monday morning. The use of night courts, and Saturday morning courts for the taking of pleas and bail applications are steps in the right

direction. But there is a long way to go yet before satisfactory reform of the law of bail is complete.

Conclusion

This chapter has reviewed the major features of Australian police forces, with particular reference to their structure and function. Several areas of debate have been identified and these may be linked to the speculations about the future of policing which are presented in the final chapter of this book.

The significance of police discretion has been mentioned several times in this chapter and it seems reasonable to assert that the quality of justice available to the public depends above all else on the integrity and professionalism of those who exercise this discretion. To a large extent, it is police discretion that determines which suspected offenders appear before the courts, and the treatment they receive in the courts. The treatment that these offenders receive in the courts is the subject of the next chapter.

1. Cited by Charles Reith, *British Police and the Democratic Ideal* (Oxford University Press, London, 1943).

2. *Royal Commission on the Police, Final Report* (HMSO, London, 1962), Cmnd. 1728.

3. J.D. Lohman & G.E. Misner, *The Police and the Community: The Dynamics of Their Relationship in a Changing Society* (USGPO, Washington DC, 1966), v.1.

4. T.A. Fleck & T.J. Newman, 'The Role of the Police in Modern Society', *Police* 13, 4, (March-April 1969), pp.21-27.

5. J.Q. Wilson, *Varieties of Police Behavior* (Harvard University Press, Cambridge, Mass., 1968).

6. J.J. Tobias, 'Police and Public in the United Kingdom', in G.L. Mosse (ed.), *Police Forces in History* (Sage Publications, London, 1975), pp.95-113.

7. Victor Cizanckas, 'A Profile of Tomorrow's Police Officer and His Organisation', *Police Chief* 42, 6, (June 1975), pp.16, 18, 86.

8. John Kerr, 'The Role of the Police in the Modern Community', *Australian Police Journal* 30, 1, (January 1976), pp.25-32.

9. J.F. Elliot, *The 'New' Police* (C.C. Thomas, Springfield, Ill., 1973).

10. R. Knight, 'The Police Role in our Permissive Society', *Australian Police Journal* 27, 3, (July 1973), pp.165-183.

11. J.D. Davies, *The Role of Police in a Changing Society* (Mimeographed, 1973).

12. See *The Emerging Roles of the Police and other Law Enforcement*

Agencies, with Special Reference to Changing Expectations and Minimum Standards of Performance. (Geneva, September, 1975).

13. Task Force on Policing in Ontario, *Report to the Solicitor General* (Ministry of Government Services, Toronto, 1974).

14. L.D. Draper, *Report of Planning Operations* (South Australian Police Department, Adelaide, 1971).

15. Anatole Kononewsky, *The Costs of Criminal Justice* (Australian Institute of Criminology, Canberra, 1976).

16. Victoria Police Force, *Future Development of the Victoria Police Selection Process* (Inspectorate & Future Plans, Victoria Police Force, Melbourne, 1976).

17. See Victoria Police Force, *The Future Role of Women Police in Victoria* (Inspectorate & Future Plans, Victoria Police, Melbourne, 1976). However, in some police forces there does seem to be some diminution in the desire for CIB service, owing in part at least to the attractive penalty rates that can be obtained on uniformed shift duties.

18. V.A. Leonard, *Police Patrol Organisation* (C.C. Thomas, Springfield, Ill., 1970).

19. The necessity springs in part from Australia's staggering road toll. In 1972, for example, 717 persons were either killed or injured per 100,000 of mean population.

20. S.C. Halpern, *Police-Association and Department Leaders* (Lexington Books, Lexington, Mass., 1974).

21. See Royal Commission Report of 1925; Jacqueline Templeton, 'Rebel Guardians', in J. Iremonger, J. Merrit, G. Osborne (eds) *Strikes* (Angus & Robertson, Sydney, 1973); Warren Perry, 'The Police Strike in Melbourne in 1923', *Victorian Historical Magazine* 43, 3, (1972), pp.826-935; F.A.J. King, 'Melbourne Police Strike', *Police Journal* (S.A.) 49, 10, (August 1968), pp.21-24.

22. A modern extension of the summons device with regard to traffic matters is the Traffic Infringement Notice. This and similar devices permit a recipient to pay a prescribed penalty without being summonsed. Admission of guilt is implicit in such cases.

23. For an interesting discussion on the subject see A.F.C. Clissitt, 'The Exercise of Discretion in the Enforcement of Law', *Police Journal* (UK) 42, 12, (December 1969), pp.564-571.

24. See, for example, W.R. La Fave, *Arrest: The Decision to Take a Suspect into Custody* (Little, Brown & Co., Boston, Mass., 1965); J. Goldstein, 'Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice', *Yale Law Journal* 69, 4, (March 1960), pp.543-593; most importantly, see *R v. Metropolitan Police Commissioner ex parte Blackburn* [1968] 1 All E.R.

25. The term 'offender' is used synonymously with 'misdemeanant' and 'felon'. Similarly, the term 'offence' as employed in this chapter includes 'misdemeanor' and 'felony'.

26. D. Steer, *Police Cautions, A Study in the Exercise of Police Discretion* (Basil Blackwell, Oxford, 1970).

27. In relation to certain offences in some jurisdictions there may be no power of arrest. In such cases, summonses are the only form of action possible.

28. In Tasmania, for example, s.55 of the Police Offences Act, provides powers of arrest for specified summary offences but requires action by summons unless there is reasonable cause to believe the offender will not comply with a summons. On the other hand s.27(9) of the Criminal Code Act states that it is the duty of police to arrest in all circumstances where it is lawful so to do.

29. L.H. Leigh, *Police Powers in England and Wales* (Butterworths, London, 1975).

30. For a typical case in point, see *R v. Djordjevic* [1970] Q.W.N. 43.

31. For example, *Alderson v. Booth* [1969] 2Q.B. 216; *Police v. Thomson* [1969] N.Z.L.R. 513; *R v. Inwood* [1973] 2 All E.R. 645, at 649.

32. See Enid Campbell & Harry Whitmore, *Freedom in Australia* (Sydney University Press, Sydney, 1966).

33. At the time of writing, the Victoria Police is reviewing its procedures concerning cautions, questioning of persons, taking of statements, etc. The reference itself is to the old Judges' Rules not the new ones.

34. A recent and more detailed discussion concerning these matters is contained in, Australian Law Reform Commission, *Criminal Investigation* (Australian Government Publishing Service, Canberra, 1975).

35. See K. Gillance & A.N. Khan, 'The Constitutional Independence of a Police Constable in the Exercise of the Powers of his Office', *Police Journal* 48, 1, (January-March 1975), pp.55-62.

36. See, for example, s.353, *Crimes Act*, 1900 (NSW); s.259, *Criminal Code* 1899 (Q).

37. See Australian Law Reform Commission, *op. cit.*

38. s.460(1) and (5), *Crimes Act* 1958 (Vic). s.303, *Criminal Code Act* 1924 (Tas); s.56 *Police Offences Act* 1935 (Tas). s.570, *Criminal Code* 1913 (WA). ss.271, 272, *Criminal Law Consolidation Act* 1935 (SA); s.78(1) *Police Offences Act* 1935 (SA). s.552, *Criminal Code* 1899 (Q). s.352, *Crimes Act* 1900 (NSW); Ray Watson & Howard Purnell, *Criminal Law in New South Wales (Vol.1)* (Law Book Co., Sydney, 1971), p.331. All Acts referred to are as amended to date. This listing is not exhaustive as a number of other Acts also have relevant references, see Australian Law Reform Commission, *Criminal Investigation, op. cit.* s.87.

39. Campbell & Whitmore, *op. cit.*

40. In South Australia an exception is made in the case of persons arrested for loitering at night and suspected of felony. Such arrested persons are required to be placed before a court 'as soon as reasonably may be'.

4 The Criminal Courts

Ivan Potas

Sources of law in Australia

With the colonisation of Australia by the British in the late 18th century, Australia received as much of the English law as was then reasonably capable of being applied in the colony. In 1828, the Australian Courts Act was passed by Imperial Statute, giving the colony of New South Wales the benefit of reforms in the English criminal law since the date of colonisation. In time, six separate Australian colonies were formed, each with its own constitution and parliament and each with power to make its own laws.

With Federation in 1901, a seventh governmental authority, the Commonwealth Government of Australia, was created. The colonies became States and an elaborate scheme providing for the sharing of legislative powers between the States and the Commonwealth was devised. With some exceptions, the power to legislate on criminal matters was left in the hands of individual States. The Commonwealth was given power to legislate over its own Territories, although the Australian Capital Territory and the Northern Territory were soon to have their own laws through a system of ordinances rather than by reliance on Acts of the Commonwealth Parliament.

Nevertheless a Commonwealth Crimes Act was passed in 1914, which dealt with offences against the Commonwealth itself. These included such matters as offences relating to the protection of the Constitution and the public service; offences relating to the administration of justice; coinage offences; offences by and against public officers; espionage and official secrets. The Commonwealth was also empowered to make laws with respect to matters incidental to the exercise of powers conferred directly on it under the Constitution. It could also make laws with respect to matters

referred to it by the States. Otherwise the power to legislate against crime fell and continues to fall principally within State jurisdictions.

Sometimes State and Commonwealth laws overlap, with the result that there is a direct conflict between them. However a principle of Constitutional law provides that where a law of a State is inconsistent with a law of the Commonwealth, the latter is paramount.¹

Sometimes laws of the State and of the Commonwealth may apply to the same subject matter, and may validly exist side by side. An example of such concurrent laws is found in relation to the control of drugs. All States have legislation prohibiting the possession, use and sale of certain drugs. However the Commonwealth also exercises power in this field under the *Customs Act* 1901 and the *Narcotics Drugs Act* 1967. Thus, in certain circumstances, the prosecutor may be faced with a choice between charging an offender with the breach of a Federal law or with the breach of a State law.

In some cases the question of jurisdiction is determined by whether the arresting officer is from a State or Federal agency. Where a Federal prosecution is conducted in a State court, the State court is vested with Federal jurisdiction. However, because of the manner in which our criminal law has evolved, it is not permissible to charge an offender under both sets of laws for the same offence, for this would subject him to double jeopardy.

Statutes are not the only source of criminal law. The other source is common law, which is created by the custom of the people (said to date from time immemorial), and the decisions of judges. This form of law is often referred to as 'case law' or 'judge-made law'. It is built up of innumerable recorded, and in many instances, reported, court decisions and operates on the principle that like cases should be decided alike. This process, referred to as the doctrine of precedent, is central to the understanding of the way in which our system of law operates. Precedents, or prior decisions of the courts, are followed, or distinguished, or overruled.

Decisions of higher courts are said to be 'binding' on lower courts if within the same jurisdiction, and said to be 'persuasive' on lower courts if there are no relevant decisions in the same hierarchy but there are relevant decisions from courts in other juris-

dictions. Thus with respect to the latter, a decision of the House of Lords (in England) for example, or a decision of a Supreme Court of another State or Territory, may still be cited and its arguments adopted even though it is outside the hierarchical structure of the courts before which a particular case comes to be considered. Ultimately however, the supreme law-making authority is vested in Parliament, which, at a single stroke, may modify or replace the common law, as well as amend or repeal its own former enactments. Further, the validity of Commonwealth or State Acts, including subordinate legislation (such as regulations, rules, by-laws, etc.), may themselves be challenged, or their meaning interpreted and declared by the courts. Thus, although Parliament is the supreme law-making authority the last word may be had by the courts, particularly by the High Court of Australia, or in rare cases by the Judicial Committee of the Privy Council.

Although Australia inherited English common law, it has since codified much of this in statutes so that most crimes are now found in Acts which define the offences and prescribe the penalties which may be imposed by the courts.

In New South Wales, Victoria, South Australia, the Northern Territory, the Australian Capital Territory and possibly also the Commonwealth of Australia, there is still room for the common law. This is in contrast to the situation in Queensland and Western Australia. These jurisdictions have Criminal Codes, intended to supersede the common law. Nevertheless, even the latter jurisdictions often look to the common law to interpret the meaning of the words used in their statutes. Tasmania also has a Criminal Code, but unlike those of Queensland and Western Australia, it leaves many common law principles in operation.

The principal Acts dealing with crime in each jurisdiction are as follows:

New South Wales	<i>Crimes Act, 1900</i>
Victoria	<i>Crimes Act 1958</i>
Queensland	<i>Criminal Code Act, 1899 to 1976</i>
South Australia	<i>Criminal Law Consolidation Act, 1935-1974</i>
Western Australia	<i>Criminal Code Act, 1913-1976</i>
Tasmania	<i>Criminal Code Act 1924</i>
Northern Territory	<i>Criminal Law Consolidation Act and Ordinance 1876-1974</i>

Australian Capital Territory	<i>Crimes Act, 1900</i> (N.S.W.)(as amended in its application to the Territory)
Commonwealth	<i>Crimes Act 1914</i>

Some criminal offences are found in other statutes, for example in Police Offences Acts, Summary Offences Acts, Motor Traffic Acts, Companies Acts and so on. Indeed, there are many sources of law and these may vary from jurisdiction to jurisdiction. For example, the law in force in South Australia consists of:

1. As much of the English common law and such English statute law as came into force on the original settlement of the colony in 1836.
2. Acts passed by the Parliament of the State of South Australia, together with regulations, rules, orders, etc., made thereunder.
3. Acts passed by the Commonwealth Parliament within the scope of its allotted powers, together with regulations, rules, orders, etc., made thereunder.
4. Imperial law binding South Australia as part of the British Commonwealth, as part of Australia or as a State – subject, since 1931, to the Statute of Westminster (which relates mainly to external affairs or matters of Imperial concern).
5. Case law since 1836 (this consists of judicial decisions of English, Australian, and State courts, respectively).

Sources such as these provide both the substantive and the procedural rules which make up the law today. Only a part of the law deals with crime, and similarly only some courts exercise criminal jurisdiction. In the following pages the structure of the Australian criminal court system will be briefly outlined.

The hierarchy of the courts

The courts which may exercise criminal jurisdiction in Australia may be ranked from the lowest to the highest in five distinct groups:

1. Courts of summary jurisdiction (here referred to as Magistrates' Courts).
2. Intermediate Courts (District or County Courts).
3. Supreme Courts.
4. High Court of Australia.
5. Judicial Committee of the Privy Council.

There are no courts at the intermediate level in Tasmania, the Northern Territory or the Australian Capital Territory, and cases which would otherwise be heard at the intermediate level in those jurisdictions, are heard in their respective Supreme Courts.

Decisions of higher courts are binding on lower courts in the same judicial hierarchy. For example, if a point of law is raised at the intermediate court level, and there is an earlier decision on the same point of law at the Supreme Court level, the intermediate court is bound to follow (and apply) the principle of law enunciated by the earlier Supreme Court decision. However, if at some later time, the same point of law is raised in the High Court of Australia, that Court is not bound to apply the law enunciated by the Supreme Court (or indeed the decision which the intermediate court followed) but may choose to substitute its own view of the law. By so doing it overrules the prior decisions and creates a new precedent to be followed by all courts below it in the hierarchy.

Thus, a 'binding judicial authority' is created which can only be displaced by a later decision of the High Court, a decision of the Privy Council, or by statutory intervention. It should be added that, except for the Full Court of the Victorian Supreme Court, Australian courts are not bound to follow their own prior decisions. Nevertheless such prior decisions are regarded as highly persuasive, and unless shown to be wrong in principle, are generally followed.

Each jurisdiction has its own superior court called the Supreme Court, but the names of the courts in categories 1 and 2 referred to above, vary from jurisdiction to jurisdiction. This may be seen from Table 1.

Table 1 Titles of courts dealing with criminal matters at lower and intermediate court levels

	<i>Inferior Court</i>	<i>Intermediate Court</i>
New South Wales	Court of Petty Sessions	District Court
Victoria	Magistrates' Court	County Court
Queensland	Magistrates' Court	District Court
South Australia	Court of Summary Jurisdiction	District Criminal Court
Western Australia	Court of Petty Sessions	District Court
Tasmania	Court of Petty Sessions	No Intermediate Court
Northern Territory	Court of Summary Jurisdiction	No Intermediate Court
Australian Capital Territory	Court of Petty Sessions	No Intermediate Court

The classification of crimes

There are many ways of classifying crimes but few are relevant to the practice and procedure of the courts. For example, one system involves classifying crimes in broad categories, such as offences against the person and offences against property. Another involves the breakdown of offences into a number of major groups, such as homicides, assaults (including sexual offences), robbery and extortion, and so on. A classification of this kind, examples of which are utilised throughout this book, is useful for analysing the prevalence of types of crimes and also as a basis for establishing uniform crime statistics throughout Australia.

Another form of classification is by way of seriousness of offence. Historically, criminal offences were divided into felonies and misdemeanours. The penalty for committing a felony was death or penal servitude, and the felon was deprived not only of his civil rights, but also of his property. A misdemeanant, on the other hand, suffered a fine or a term of imprisonment, which was less arduous in its nature than penal servitude. With time, this distinction became blurred.

Today there is no intrinsic difference for the purpose of custodial classification and treatment as to whether the offender is sentenced to a term of imprisonment or to a term of penal servitude. In any event, some misdemeanours may be more serious than some felonies, depending on the circumstances of the offence. Thus at common law, obtaining a dozen watches by false pretences, a misdemeanour, may be a more serious offence, all other things being equal, than the larceny of a single watch, which is a felony.

A more important classification from the point of view of the courts is whether the offence is triable summarily, or on indictment, because this classification has a direct bearing on the jurisdiction and procedure to be followed by the courts. Put simply, a summary trial usually indicates that the hearing is to be conducted by a court which has a summary jurisdiction and is presided over by a magistrate, whereas a trial on indictment means a trial by judge and jury. Summary hearings are generally quicker, cheaper and the penalties less severe than trials involving indictable offences. Indeed, there are strict limits on the duration of a prison sentence which a magistrate may impose, and also limits as to the maximum amount of a fine which he may impose.

Thus the classification of crimes into indictable and summary offences is really a broad reflection of the distinction between serious and minor offences. The most serious offences, such as murder and rape, are triable only on indictment, whereas the large majority of criminal offences, including most traffic offences, are heard before magistrates. Furthermore some offences, although indictable, are in certain circumstances triable summarily, at the option of the accused.²

The role of the Magistrates' Court

In Australia, as in other common law countries, the great bulk of criminal charges are heard and determined by the lower courts. This is only to be expected because there are many more minor offences than serious ones. The procedure of the Magistrates' Court is regulated by statute, and in most jurisdictions the principal statute is called the Justices Act.

As already seen in Table 1 the names of lower courts vary. They are called Courts of Petty Sessions, Magistrates' Courts or Courts of Summary Jurisdiction, depending on the jurisdiction. The term Magistrates' Court is used here for convenience, because as a general rule a court of summary jurisdiction is presided over by a stipendiary magistrate.³ Again, as a general rule stipendiary magistrates sit alone, although sometimes they sit with one or more honorary justices of the peace. In some jurisdictions, and usually only in remote areas, two or more justices of the peace may constitute the court. Sometimes statutes provide that only magistrates sitting alone may hear specific charges.

In the past magistrates were appointed from within the public service and often were without legal qualifications. Many acquired practical experience by working in the court system (for example, as clerks of the court) until promoted to the magistracy. In most jurisdictions the qualification requirements rest at the discretion of the Attorney-General, and the current trend is towards 'appointing' those persons who have formal training as well as practical experience.

Few jurisdictions can match the qualification requirements in Tasmania where by statute it is provided that a person must have at least five years standing as a legal practitioner before he may be appointed to the magistracy of that State.⁴

Most jurisdictions have adopted a compromise between requiring full legal qualifications and lesser qualifications which involve passing internal examinations conducted by the public service. However, with the promise of a plentiful supply of law graduates from Australian universities, it is anticipated that formal legal qualifications will be a minimum prerequisite in all jurisdictions for appointment to the magistracy.

As already mentioned, the jurisdiction of the Magistrates' Court is limited to the kind of offence it may hear and to the penalty it may impose. Indeed, the limit and extent of the jurisdiction of the Magistrates' Court is determined by statute.

In Victoria, for example, all summary criminal offences are tried in the Magistrates' Court where the maximum penalty is a fine of \$1,000 or a term of 12 months imprisonment. Where cumulative sentences (also called consecutive sentences) are imposed, (that is, where the offender has been convicted of more than one offence, and the sentences imposed in respect of each are added together) a maximum term of two years imprisonment may be imposed.

In New South Wales, the magistrate's power is wider, and although a magistrate is empowered to impose only one sentence of imprisonment to be served consecutively with any other, the total term may be as long as three years.⁵

Proceedings in Magistrates' Courts are less formal than those of higher courts. Charges are brought before the court by information or complaint and in most jurisdictions the prosecution is conducted by a police prosecutor on behalf of the Crown. Wigs and gowns are not worn by the court officials although the magistrate is usually addressed as 'Your Worship', and an air of formality prevails. Sometimes defendants conduct their own defence, while at other times they are represented by a solicitor or barrister. However, the majority of cases in Magistrates' Courts involve pleas of guilty by unrepresented defendants normally for the less serious traffic violations.

As well as dealing with the less serious crimes, magistrates also preside over Children's Courts. Only in South Australia is this jurisdiction shared with a judge under the terms of the Juvenile Courts Act which came into force on 1 July 1972.

The age at which a child or young person may be charged before a Children's Court varies from jurisdiction to jurisdiction.

In the code States (Queensland, Western Australia and Tasmania) the minimum age of criminal responsibility (that is, the age below which a child is deemed to be incapable of committing a crime) is seven years. In South Australia it is 10 years, but in all other jurisdictions it is eight years. The maximum age also varies. It is 17 years in Victoria, Queensland, Tasmania and the Northern Territory, and 18 years in all other jurisdictions. Between these age groups the Children's Courts have jurisdiction to deal with most crimes, including indictable offences.⁶ There are however some offences which the Children's Courts are not empowered to hear, the most notable exception being murder, which is generally tried in the Supreme Court.

The magistrate is also involved in the conduct of committal proceedings. The aim of these proceedings is to ensure that no one stands trial for an indictable offence until the committing magistrate is satisfied that there is sufficient evidence to warrant a trial by judge and jury. At this hearing, the Crown has the task of proving that there is a *prima facie* case against the accused. The accused is not required to plead at this preliminary hearing and need offer no evidence in defence. If the Crown is successful, then the accused will be committed for trial in a higher court, but if the Crown's evidence is not sufficient to support a case against the accused, the matter will be dismissed and the accused discharged.

There are many advantages of committal proceedings. They serve as a safeguard against speculative prosecutions. They give the offender notice of the case against him, and a transcript of the evidence of the proceedings (called a deposition) is made available to him. Committal proceedings enable witnesses to give evidence while it is fresh in their memories (trials are often scheduled many weeks or months after the event) and may also serve to allow the prosecution to discover weaknesses and generally test its own case. The committal procedure also saves time at the trial because it assists in the framing of the indictment, and helps to narrow the issue to be argued at the trial proper.⁷ In rare cases, however, the committal proceedings may be by-passed by the Attorney-General who is empowered to bring an indictment directly to a superior court without, or in spite of, a preliminary hearing in a Magistrates' Court.

Magistrates also preside over Coroners' Courts. The Coroner's main function is to hold an inquest into the manner and cause of

death of a person, or conduct an inquiry into the cause or origin of a fire. He inquires into deaths caused by some act of violence, to deaths brought about under suspicious circumstances, or caused by other than natural circumstances.

Like committal proceedings, the procedure of the court is quasi-judicial in nature although often many of the rules relating to adversary proceedings are in practice applied. The court is not bound by the strict rules of evidence which apply to criminal trials and hearsay evidence is frequently admitted. Coroners have a discretion to receive statements made by witnesses not on oath, and to admit opinion evidence, especially in the form of reports by medical practitioners and other experts. Where rights may be affected, legal representation is permitted, and cross-examination may also be permitted, although a witness may refuse to answer questions on the grounds of self-incrimination.

In some jurisdictions (for example, Victoria) in the case of a murder charge, the accused may be given weekly remands (usually in custody) until the death is investigated by a Coroner. If the Coroner finds that the accused murdered the victim, the accused will be committed to stand trial in the Supreme Court. In New South Wales and South Australia, however, the coronial inquest may not serve the purpose of a committal proceeding. In these jurisdictions, where criminal proceedings have already commenced, coronial inquiries may be interrupted or postponed until the outcome of the trial.

Another important power of the magistrate or justice of the peace is the power to release an offender on bail. Reference has already been made (in Chapter 3) to the power of the police to grant bail and higher courts also have this power.

Broadly speaking, bail is a procedure designed to ensure that an accused person will attend court to stand trial at a given time and place. He is normally required to enter into a bond with the Crown whereby he acknowledges a debt to the Crown and that debt is extinguished if he appears as required under the bond. Sometimes sureties are also sought, whereby other persons are required to guarantee the performance of the offender's obligations under the bond.

Bail only arises where the offender has been arrested and is held in custody. It may be granted at almost any time during the judicial process, particularly prior to summary hearings, during

committal proceedings where the hearing of any information for an indictable offence is adjourned, or where the offender has already been committed for trial or is on remand after conviction awaiting sentence. Courts have power to admit the accused to bail during the trial itself, or even on appeal after sentence, but such a course is taken in exceptional circumstances only.

As a general rule bail is granted unless the court is of the opinion that the offender is unlikely to appear at his trial.⁸ Other considerations include whether he is likely to commit other offences while on bail, whether he is likely to influence witnesses while at liberty, whether the crime itself is particularly serious, the likelihood of conviction and the severity of any likely sentence. Where bail is refused by a magistrate the offender may apply to a judge in chambers against the decision.⁹

It can be seen that magistrates play a vital role in the administration of criminal justice in Australia. To further illustrate the importance of the Magistrates' Court, Table 2 indicates the proportion of cases heard in Magistrates' Courts compared with those heard in higher courts.

Table 2 Cases dealt with at Magistrates' Courts and persons convicted at higher courts for the whole of Australia¹⁰

	<i>Cases* at Magistrates' Courts**</i>			<i>Higher courts</i>
	<i>Persons charged</i>	<i>Persons convicted</i>	<i>Persons committed to higher courts</i>	<i>Persons*** convicted</i>
1968	1,021,081	901,182	18,764	7,820
1969	1,072,011	932,117	19,793	8,618
1970	1,112,763	964,432	20,805	8,865
1971	1,173,141	1,016,138	23,668	9,844

* Includes individual offences for which persons were charged except for Queensland, where a person dealt with on several counts at the one hearing is counted only once.

** Excludes the Children's Court in Darwin, Northern Territory, prior to 1970.

*** A person convicted on several counts at the one hearing is counted only once.

Although the figures given are somewhat out of date, they are at the time of writing the most recent available for the whole of

Australia. Further, some jurisdictions have increased the power of magistrates to deal with criminal matters by increasing the class of indictable offences which are triable summarily. Thus the proportion of cases heard by magistrates is expected to have increased since the date of these statistics.

The trial

When one speaks of a criminal trial, reference is usually made to the more formal proceedings at the level of the intermediate or Supreme Court. Whereas at the inferior court level, the magistrate is the trier of both the law and the facts, at the higher level the task is shared by a judge, who has the responsibility of determining the law, and a jury of 12, which has the duty of determining the facts. The very selection and presence of a jury add to the technical rules and formality of the trial.

Judges are usually appointed from experienced barristers with many years of experience at the Bar. Unlike the majority of stipendiary magistrates in Australia, they enjoy judicial independence including independence from the public service. They may hold office until retirement, which is fixed at age 70 or 72, depending on the jurisdiction, although at the time of writing, High Court justices still have life tenure. The judges are usually addressed in court as 'Your Honour', and wear wigs and colourful robes. Counsel and other court officials are also traditionally attired, adding to the ritualistic atmosphere of the courtroom.

The police prosecutors of the Magistrates' Courts are replaced by Crown prosecutors, often called 'Mr Crown' in court, who are experienced barristers in the service of the Crown. As criminal trials at this level are particularly serious, defendants are usually represented by counsel. Where the accused is unable to employ a legal adviser because of his financial situation he may apply (and is usually encouraged to apply) for legal aid.

Throughout the trial the Crown is charged with proving 'beyond any reasonable doubt' that the accused is guilty of the crime as charged. Until the offender's guilt has been proved he is presumed innocent. By pleading 'not guilty' the accused is not necessarily saying that he did not commit the offence with which he is charged but that the Crown cannot prove that he did. This epitomises the adversary system of law which is not as much concerned with discovering the truth (that is, what actually happened)

as with questioning of whether the Crown can prove its case against the accused by the evidence it is able to place before the court.

The accused is not required to put up a defence if he does not wish to do so. His usual options are to plead guilty or not guilty. A jury trial is only required if he pleads not guilty to the charge. If he pleads guilty, the Crown gives its evidence and the accused is then asked if he wishes to produce any evidence or make any statements before sentence is to be passed on him.

Trials are normally held in open court, but the court has power to conduct proceedings *in camera*. Sometimes the jury may be excluded while the judge decides whether to include or exclude evidence, such as a confession, which may be prejudicial to the fair trial of the accused. Where this is done it is called a *voir dire* examination. When the judge rules as to the admissibility of such evidence, the jury is returned with or without the introduction of the fresh evidence.

The accused has a right to hear the evidence and cross-examine the witnesses. As a general rule, the accused cannot be questioned unless he consents to be sworn as a witness in his own defence. Until a conviction is recorded his character cannot be put in issue unless he gives evidence of his own good character or else he makes imputations relating to the character of a prosecution witness.

There are innumerable rules for the admission of evidence and the conduct of the proceedings which aim at protecting the accused person from receiving an unfair verdict. Throughout the trial the onus of proof is continually on the prosecution (with specific exceptions, such as cases where the accused raises the defence of insanity, when the burden of proof shifts, 'on the balance of probabilities', to the defence) and the Crown must prove all the elements which constitute the offence 'beyond a reasonable doubt' to the satisfaction of the jury before a conviction may be recorded.

If the offender is convicted, the judge may then proceed to impose the sentence of the court. At this stage the offender is called 'the prisoner' (or still 'the defendant') but he is no longer called 'the accused' because his status has changed. If the judge does not impose the sentence there and then, the offender may be remanded in custody or on bail to appear for sentence at a future date.

At this stage additional enquiries may be made as to the person's background. This may be done by obtaining a pre-sentence (or welfare) report, which is prepared by a social worker or probation officer. The report gives the court additional information concerning the offender's personality, his family background, his work record, his associates, and so on. Sometimes these reports contain recommendations relating to the suitability or otherwise of particular sentencing measures, although they are intended only as a guide to the sentencing court. It is usual at this stage for the offender's criminal record to be offered as evidence to form another important consideration for the court when determining sentence.

The intermediate courts

Intermediate courts deal with the bulk of indictable offences and when exercising original jurisdiction (that is, when hearing a case for the first time); they are presided over by a single judge and a jury of twelve. Only the most serious offences, such as murder or rape, and sometimes cases which involve large amounts of property are reserved to the jurisdiction of the Supreme Courts.

However, in those jurisdictions which do not have intermediate courts (see Table 1) all indictable matters, excluding those which are tried in Magistrates' Courts, are heard in their respective Supreme Courts. As a general rule the constitution, jurisdiction, and procedures of the intermediate courts are contained in Acts (or rules made under Acts) which bear the name of the courts (for example, District Court Act (N.S.W.), County Court Act, (Vic.), Local and District Court Act (S.A.)).

With the exception only of the South Australian District Criminal Court, intermediate courts also have an appellate function. They hear appeals from conviction or sentence of Magistrates' Courts, and are empowered to affirm, quash or vary the determinations of those courts.

Sometimes where a conviction has been recorded by a magistrate in a case involving a serious offence, the magistrate may remand the offender to the intermediate court for sentencing. Unlike magistrates, the judges of intermediate courts and above are not restricted to imposing sentences up to a blanket maximum. They may impose any sentence up to the maximum penalty

prescribed for the offence, although if the sentence imposed is excessive, the offender may seek leave to appeal to a higher court.

The Supreme Court

All jurisdictions have Supreme Court Acts which set out the constitution, powers, procedures and duties of the Supreme Court and its judges. The Supreme Court is a superior court of record and many of its judgments are reported and form legal precedents which are binding on courts below it in the same judicial hierarchy. Supreme Courts also have what is called 'supervisory jurisdiction', and are concerned with whether inferior courts are exercising their powers properly.

The Supreme Courts of the States and Territories may be divided into two groups: those exercising original jurisdiction and those exercising appellate jurisdiction.

Original jurisdiction is usually exercised by a single Supreme Court judge. However, unless the matter is particularly serious, the case will come before the intermediate court, where the majority of indictable trials are conducted. As Tasmania, the Northern Territory and the Australian Capital Territory do not have courts at the intermediate level, all cases in these jurisdictions, other than those triable summarily, are heard at first instance in their respective Supreme Courts.

The 'appellate' criminal jurisdiction of the Supreme Court is usually exercised by three judges and is called the Court of Criminal Appeal. At the time of writing the Territories do not have a similar appeal structure, so that an appellant's only recourse is to appeal to the High Court of Australia – a costly and time consuming process. However this is soon to be remedied by the creation of a new court, to be called the Federal Court of Australia, so that appeals will be heard by this Court in much the same way as appeals are now heard by the Full Court of the State Supreme Courts.

An appeal may best be described as 'the transference of a case from an inferior to a higher tribunal in the hope of reversing or modifying the decision of the former'.¹¹

A vast number of statutory provisions exist in all jurisdictions which prescribe procedures for appealing. Criminal law appeals invariably involve challenges to the conviction or to the severity of

the sentence or to both.

In New South Wales, for example, a person convicted on indictment may appeal to the Court of Criminal Appeal:

1. Against his conviction on any ground which involves a question of law alone.
2. With leave of the court, or a certificate of the trial judge, that it is a fit case for appeal against his conviction on any ground which involves a question of fact alone, or a question of mixed fact and law or any other ground which appears to the court to be sufficient ground of appeal.
3. With the leave of the court against the sentence passed on his conviction.^{1 2}

Unlike appeals to the intermediate court, appeals to the Court of Criminal Appeal are not conducted in the form of a re-hearing. Instead, the court sits without a jury and reviews the decision of the lower court. At this level new evidence is seldom introduced and unless the offender conducts his own appeal (an extremely rare occurrence) it is not usual for him to be present at the hearing. Occasionally a single Supreme Court judge may review a point of law from a lower court, and when he has determined it, the case may be remitted to the court with a direction as to the point of law considered.

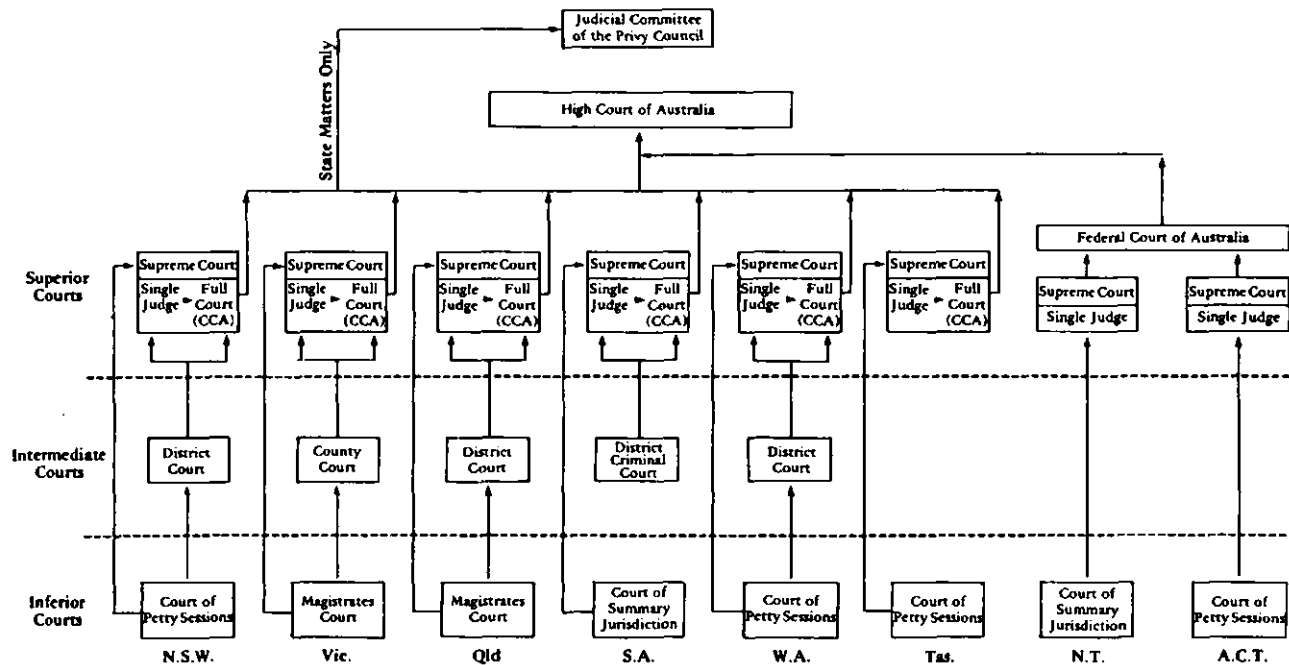
Table 3 shows the appeal structure of Australian courts. Note that it is possible to appeal from a single judge of the Supreme Court to the Full Court of the Supreme Court. On rare occasions only (in Victoria) a Full Bench of at least five judges may constitute the Court to review a decision of the Full Court.

Further, the High Court of Australia may also be constituted in various forms. For the sake of simplicity these have been omitted from Table 3. It should also be noted that recent legislation has restricted the number of appeals which may be brought to the High Court of Australia unless such appeals have been considered by the highest tribunal in the jurisdiction from which the appeal has come.

In particular, by virtue of the *Federal Court of Australia Act 1976 (Cth)* the Federal and Territorial Court systems have been substantially altered by the creation of the Federal Court of Australia. This new court, among other things, will have jurisdiction to hear appeals from judgments and orders of the Supreme

Table 3

Criminal appeal structure of Australian courts



Court of the Territories. (See section 24 of the Federal Court of Australia Act.)

The High Court of Australia

The High Court of Australia has limited original jurisdiction which is generally confined to cases involving Commonwealth laws or constitutional matters. The original jurisdiction of the High Court is generally exercised by a single justice. The Full Court may be constituted by two or more justices of the High Court to a maximum of seven. Although one justice may exercise appellate jurisdiction, it is more usual to find three or more justices doing so.

At the time of writing, five out of seven justices who sit in the High Court are former New South Wales judges. The main features of the appointment and tenure of High Court justices are that the Commonwealth Government advises the Attorney-General to make appointments, the tenure is for life, (although this may soon be changed) and the justices are required to have legal qualifications and experience. To date, no South Australian, Western Australian or Tasmanian judge has been appointed to the High Court, and this has had its critics who believe that the High Court should have representatives (as far as practicable) from the legal profession of each State. Further, the concept of life tenure has been criticised, and a compulsory retirement age of 72 has been recommended.¹³

The bulk of the work of the High Court is appellate. Appeals are heard not only in relation to Federal matters, but also from State courts exercising State jurisdiction.

The appellate jurisdiction of the High Court of Australia with respect to judgments involving criminal matters is contingent upon whether the High Court 'thinks fit to give special leave to appeal'.¹⁴

It is unlikely that special leave to appeal would be granted by the High Court unless the case had been heard by the highest court in the jurisdiction from which the appeal had come, and the matter involved a point of general public significance.

The High Court is itinerant, sitting from time to time in the capital cities, particularly Sydney and Melbourne. As a general rule, (and subject to the difficulties discussed in the next section)

it can now be taken that judgments of the High Court are final and conclusive. This is a recent development, for until 1975 it was possible, in relation to most matters, to appeal to the Judicial Committee of the Privy Council from decisions of the High Court.

The Judicial Committee of the Privy Council

Traditionally, the Judicial Committee of the Privy Council was the final court of appeal from the courts of the United Kingdom dependencies and certain member states of the Commonwealth including Australia. Technically it is not a court of law but is a committee which advises the Queen in relation to petitions to the Queen. Its decisions however have the force of law. The Judicial Committee still sits, invariably in London, and consists of members who have held high judicial office, such as judges who sit in the Court of Appeal or members of the House of Lords in England. Further, it is not uncommon to find Australian High Court Justices appointed as Privy Councillors. The Judicial Committee has a quorum of three.

Appeals go to the Privy Council either where a right of appeal has been specially created, for example, by statute, Orders in Council, or Letters Patent, or by special leave of the Sovereign in Council on the advice of the Judicial Committee.

In the past, appeals to the Privy Council from Australia have been rare, if for no other reason than the prohibitive costs involved in taking an appeal to London. In 1968, however, the *Privy Council (Limitations of Appeal) Act* (Cth) was passed. This Act limited the obtaining of special leave to appeal from the High Court to the Privy Council by effectively abolishing appeals which involved Commonwealth matters or decisions which emanated from Federal Courts (other than the High Court) or from the Supreme Courts of the Territories. In 1975, *The Privy Council (Appeals from the High Court) Act* (Cth) took this a step further by virtually abolishing all appeals from the High Court to the Privy Council.

In effect, appeals from the High Court to the Privy Council are abolished, although appeals may still go from State Supreme Courts when exercising State jurisdiction, direct to the Privy Council.

This situation raises a number of problems. Because appeals

from the High Court are effectively abolished, does it follow that the High Court is not longer bound by the decisions of the Privy Council? If so, are State courts in a similar position? Supposing there are two conflicting decisions, one of the High Court and one of the Privy Council, must a court exercising Federal jurisdiction follow the decision of the High Court, and one exercising State jurisdiction follow the decision of the Privy Council? Do relevant decisions of the Privy Council still bind all Australian courts, including the High Court, despite the abolition of appeals from the High Court?

From these questions it may be seen that an unsatisfactory position has been reached at this time in the development of the Australian court system. In order to avoid this uncertainty further legislation is required with a view to establishing the High Court of Australia as the final court of appeal in all matters.¹⁵

1. See *Constitution of Australia Act 1901* (Cth) s.109.

2. See for example *Crimes Act, 1900* (N.S.W.) s.476.

3. In South Australia, however, professional magistrates are known as special magistrates.

4. Note also that magistrates in Tasmania are independent of the public service, whereas in other jurisdictions they do not enjoy such autonomy.

5. See *Crimes Act, 1900* (N.S.W.) s.444(4).

6. In South Australia a child under the age of 16 years is not charged with an offence but a complaint is laid that the child is 'in need of care and control'. The matter is referred to a non-judicial body called a juvenile aid panel for consideration and only difficult cases are then referred to the juvenile courts.

7. See [1975] 49 A.L.J. 561.

8. The three main tests for the probability of the offender appearing at his trial (after committal) were discussed in *R. v. Watson* 64 W.N. (N.S.W.) 100. In that case Herron J. summarised the tests as an assessment of

The nature of the crime charged;

The probability of conviction; and

The severity of the punishment that may be imposed.

9. In New South Wales a special committee was set up in July 1976 to investigate the system of granting and withholding bail in New South Wales as a result of the concern over the case of Phillip Western. See (1976) 50 A.L.J. 385.

10. From *Quarterly Summary of Australian Statistics*, March 1976 no.299.

11. See *Edelsten v. London County Council* [1918] 1 K.B. 81 per Sankey J.

12. See s.5(1) *Criminal Appeal Act*, 1912 (N.S.W.) as amended.
13. See (1975) 49 A.L.J. 606.
14. See s.35 of the *Judiciary Act*, 1903 (Cth). However, note that at the time of writing the Judiciary Amendment Bill 1976 is before Parliament.
15. See Edward St John, 'The High Court and the Privy Council; The New Epoch' (1976) 50 A.L.J. 389.

5 Prisons and Prisoners

David Biles

With the near-total abolition of capital and corporal punishment in Australia, the most serious penalty that may be imposed on an offender is a sentence of imprisonment. This chapter aims to examine briefly what imprisonment means to the prisoner and to outline the main features of the seven prison systems in this country. Also, a more detailed examination will be made of the trends in the use of imprisonment in the different Australian jurisdictions over the past decade or more.

It is perhaps unnecessary to point out that imprisonment was not always the most severe penalty that could be imposed, as capital punishment was frequently ordered in our past and the last application of this penalty occurred as recently as 1967. Table 1 gives the essential facts about the operation of capital punishment in Australia.

Table 1 Capital Punishment in Australia 1901-1975¹

	<i>Date of abolition</i>	<i>Last execution</i>	<i>Number of executions</i>
New South Wales	1955 ²	1939	23
Victoria	1975	1967	21
Queensland	1922	1913	18
South Australia	1976	1964	18
Western Australia	—	1964	27
Tasmania	1968	1946	5
Northern Territory	1973	1952	2
Australian Capital Territory	1973	—	0
Total			114

As it must be regarded as unlikely that any State or Territory will reintroduce capital punishment, or that the last retentionist State will use it, there is no alternative to imprisonment for the most serious and dangerous offenders in our community.

The first permanent settlement in 1788, of the nation now known as Australia, was a penal colony. It was a prison for the misfits of England. After a short period, separate areas, or stockades, were developed as detention centres for trouble-making convicts. Some of these institutions for secondary punishment, such as Norfolk Island and Port Arthur in Tasmania, were constructed as elaborate and isolated penal colonies, the ruins of which are popular tourist resorts today.

These landmarks of our early history are not, however, typical of the major period of prison building in Australia, which occurred in the gold rush era of the 1850s and 1860s. It is salutary to note that many of the prisons in use today in Australia were built during that period, and it is almost certainly true that the majority of prisoners throughout the country are housed in buildings more than 100 years old. This fact, above all others, illustrates the major difficulty faced by our prison administrators: they are all committed to providing modern rehabilitative programs but are hampered by inappropriate and inadequate facilities. In some jurisdictions, notable progress has been made with the provision of modern buildings.

A number of generalisations can be made about Australian prisons. These are made possible by the relatively homogeneous nature of Australian society and by the similarity of the history of the originally independent colonies. However there is no national prison system.

Each State and Territory runs its own system and together they comprise more than 70 separate institutions which accommodate a daily average prison population of approximately eight and a half thousand men and women. The basic facts and figures about the numbers of Australian prisons and prisoners as at July 1976 are given in Table 2.

Some of the information in Table 2 will be analysed later in this chapter. However it is apparent that there is a wide range of institutions and their diversity is illustrated by the fact that they are variously named as prisons, gaols, detention centres, corrective centres, training centres, camps, rehabilitation centres, labour

prisons, training prisons and prison farms.

Table 2 Prisons and prisoners in Australia, July 1976

	<i>Prisons</i>	<i>Males</i>	<i>Females</i>	<i>Total</i>
New South Wales*	24	3,408	95	3,503
Victoria	11	1,524	36	1,560
Queensland	10	1,513	31	1,544
South Australia	8	697	16	713
Western Australia	13	929	46	975
Tasmania	4	278	4	282
Northern Territory	3	181	1	182
Australia	73	8,530	229	8,759

* Including A.C.T. prisoners. A small number of New South Wales prisoners included in these statistics are employed at the Parramatta Linen Service which is described in Chapter 6.

The administrators themselves are variously titled Controller, Comptroller-General, Director or Commissioner and there is also considerable variation between the States as to which Minister is responsible for prisons. There is a common pattern, however, in that most States have one large prison in the metropolitan area which is supplemented by smaller institutions in rural areas. Also, in all States there are many police gaols and lock-ups which hold small numbers of short sentence prisoners. The statistics for this type of imprisonment are not usually included in the annual reports of prison administrators.

The purposes of imprisonment

Many learned authors have written extensively on the purposes of imprisonment and the very volume of this output, if nothing else, illustrates the confusion which surrounds the topic. There is clearly no single purpose of imprisonment which is universally acceptable. If there were, there would be no debate, and the management of prisons would be a simpler task than it is now.

Without attempting to summarise the debate, it appears that nearly all discussion of purposes is directly or indirectly linked to the prevention or control of crime. Three themes recur. Imprisonment aims, it is claimed, to deter offenders, to rehabilitate them

and to incapacitate them. These aims will be briefly considered in sequence.

Deterrence: The concept of deterrence embraces two separate ideas. It can refer to **specific** deterrence, that is, the effect of influencing the actual offenders who have been imprisoned not to re-offend. But more often the term refers to **general** deterrence, that is, the notion that potential offenders will not commit crimes because of their belief that they may be punished by being sent to prison as has happened to others.

In this latter sense, it is undoubtedly true that the public imposition of all penalties for law breaking has some deterrent effect, but this effect is extremely difficult to measure. More importantly, it is difficult to assess the relative deterrent effect of different types of penalties. The conceptual and methodological difficulties of research into deterrence have been discussed in two recent books³ to which the reader is referred.

Rehabilitation: The idea that prisons should rehabilitate offenders has always had some appeal, but never more than in the 1950s and 1960s. Some disenchantment with this aim has become apparent in recent years due to the increasing evidence that treatment or rehabilitative programs in prisons have little effect on recidivism (return-to-prison) rates.

After a very detailed review of all 'available reports published in the English language on attempts at rehabilitation . . . from 1945 to 1967', Robert Martinson⁴ concluded that 'with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism'. This, and similar assessments of the effectiveness of rehabilitative programs in prisons, has led to a more modest aim which proposes that even if we cannot reform prisoners, we should take all necessary steps to prevent the prison experience from deforming them.

Incapacitation: This, the least ambitious of all aims, simply asserts that serious offenders should be held in secure institutions for the time fixed by the courts in order to give the public that limited degree of protection. Most prison systems are able to achieve this aim with a relatively high degree of success as prison escapes are comparatively rare, especially from the most secure institutions.

The aim of incapacitation may be linked to the underlying retributive basis of the functioning of the criminal law, which suggests that offenders should be punished, purely and simply to the extent to which their behaviour is intolerable to the community.

For a more extensive discussion on the subtle differences between the numerous words that are used to describe the function or purposes of prisons, the reader is referred to a very recent publication on this subject.⁵

Classification

Governors and superintendents and others involved with the management of prisons, as well as some prisoners, are deeply conscious of the theory and practice of classification. The theory is simple, but the practice frequently falls short of the ideal. Both prisons and prisoners may be classified. In most jurisdictions the institutions are classified at, at least, three levels; maximum, medium, and minimum security. There are also special categories for female offenders, prisoners needing psychiatric or medical treatment and persons undergoing work release.

Depending on the range of institutions available, the next step in the classification process is the assignment of all newly received prisoners to the appropriate category. A person undergoing a long sentence, for example, particularly if he has been convicted of an offence involving violence and has a previous record of escape attempts, will be assigned to a maximum security institution. These are the traditional prisons with high walls, watchtowers and secure single cells.

At the slightly less dangerous level a prisoner will be assigned to a medium security institution, which may also have high walls but will be generally administered in a more relaxed manner and will seldom be guarded by armed officers on watchtowers. The staff/prisoner ratios in medium security prisons are generally higher than they are in the well-guarded maximum security institutions.

Prisoners who represent no serious escape risk, either because their sentences are short, their offences did not involve violence or they are nearing the end of a long sentence, may be assigned to minimum security institutions which frequently have the appearance of work camps. Such institutions are not surrounded by walls

and, in some cases, do not require the prisoners to have their rooms or cells locked at night. In these centres the prisoners are generally employed in farming activities and are quite often allowed out to participate in local sporting activities.

In all prison systems, classification is an on-going process. The classification assigned to a prisoner may be upgraded or downgraded according to the particular circumstances of the case. For example, a prisoner who walks away from an open prison camp is highly likely to be reclassified, at least for a short period, to a maximum security institution. Conversely, the maximum security prisoner who is nearing the end of his sentence may have his classification downgraded to medium or even minimum security as a preliminary stage to his ultimate release.

All prison systems have one special classification category which deserves particular mention. This is the ultra-maximum rating which is applied to prisoners who have committed offences while in prison or have attempted daring escapes. To cater for this very small proportion of recalcitrant offenders, all prison systems either provide a special unit or special institution for their detention. The best known examples of these 'prisons within a prison' are Katingal in Long Bay and H Division in Pentridge. In recent years there has been much public discussion about the ethics and effectiveness of these special units but, whether they are really needed or not, it seems inevitable that prisoners who attack officers or other prisoners while serving their sentences will be the subject of some form of closer confinement.

A typical prisoner's day: The routines to which prisoners are subjected vary, of course, very greatly from prisoner to prisoner. In minimum security institutions the daily routine in many cases would not be noticeably dissimilar to that followed by a person employed in a construction or forestry camp, but in maximum security institutions the degree of regimentation and control is very great indeed.

A typical maximum security daily routine, as described to the New South Wales Royal Commission into Prisons by the Chief Superintendent of the Long Bay complex of prisons, Mr J.E. Nash, is as follows:⁶

- 6.45 am Rising bell rings; prisoners dress, make beds and tidy cells.
- 7.00 am General unlock; prisoners counted out of wings to adjoining

- exercise yards; all cells checked by officers who report anything unusual or any prisoner remaining in cell, for example, because of illness; central radio switched on.
- 7.40 am Wing muster and roll call; prisoners take breakfast to cells and are bolted in.
- 8.00 am General let-go from cells; prisoners go to labour musters and thence to work; radio off.
- 11.50 am Cease work and move to respective wing yards.
- Noon Muster and roll call; collect meal from servery, to cell and locked in; radio switched on.
- 1.15pm Unlock and let go from wings and proceed to work locations; radio off.
- 4.00 pm Cease work.
- 4.10 pm Labour musters and proceed to wing yards.
- 4.15 pm Wing muster and roll call; collect meal and to cells, bolted in.
- 4.30 pm Central radio system switched on.
- 4.35 pm Meal utensils collected from each cell. Evening search of about 12 – 15 cells and the occupants, selected daily by the principal prison officer on a random basis.
- 5.10 pm Cells locked by the wing officer after making physical check of the occupants. Cell lights switched on at nightfall.
- 10.00 pm Bell rings and cell lights switched off shortly afterwards.
- 11.00 pm Central radio switched off.

In some maximum security institutions the unlocking of the cells in the mornings might be slightly later and the locking in the evening slightly earlier in order to accommodate the prisoners' day within one normal eight hour tour of duty of the prison officers. In these cases it can be seen that prisoners spend more than 14 hours each day locked in cells. In other situations where the staffing levels and security requirements allow, prisoners may be permitted to mix freely in recreation rooms or to attend classes in the evenings until 9.00 or 9.30 pm.

Rules and regulations

Apart from the tedium of a strictly regimented daily routine, prisoners in all institutions are made aware of a large number of rules and regulations which aim to control their lives. The majority of these rules and regulations are designed to prevent 'trafficking' or the illicit taking in or out of materials from the prison and to facilitate control and administration. In maximum security institutions especially, the prison staff need to be alert to the possibility of weapons being smuggled into the prison or letters

being smuggled out which may contain plans for attempted escapes. Vigilance is also maintained to prevent the entry of drugs. Some of the particular matters controlled by rules and regulations and which are the subject of considerable discussion are listed.

Visits: In some maximum security institutions the friends and relatives of prisoners are only permitted to visit them for very limited periods and under closely restricted circumstances. The extreme would be one visit of 20 minutes duration being allowed each month, with the conversation being conducted through two glass and wire screens some three or four feet apart and in the presence of a prison officer.

This extreme would rarely be found in Australia today and for most jurisdictions 'contact' visits are becoming increasingly available. Some degree of staff supervision is normally maintained, and it is not uncommon for prisoners to be searched before and after visits in order to reduce the opportunities for trafficking. In exceptional circumstances prisoners may be allowed to leave the institution for home visits, extending perhaps over a weekend. This privilege is normally offered only in cases of special need, such as sickness or death in the prisoner's family.

For unconvicted prisoners remanded in custody awaiting trial, all jurisdictions allow relatively free access of the prisoner to his legal advisers. In these cases visits would never be supervised by prison staff but it may be necessary for the conversation to be conducted through a screen or grille. Also, the times allowable for legal or professional visits are usually fairly brief, for example, 10.00 am to 11.30 am and 1.30 pm to 3.30 pm each day, but it is not uncommon for legal visits to be conducted outside these hours.

Mail: In all prisons the regulations provide that both ingoing and outgoing mail may be censored by the staff, but in many cases this requirement is not rigorously enforced. Similarly, most jurisdictions provide for a limit on the amount of mail that a prisoner may send, for example one letter per week, but this again is seldom strictly enforced. In maximum security institutions all ingoing and outgoing correspondence is generally opened and read by the staff, but in some situations the mail is opened to locate possible illegal enclosures, such as drugs, without the contents of the letters being

read. If this is done in the presence of the prisoner, the confidentiality of the actual words that are written between the prisoner and his family is maintained.

Prisoners' pay: All Australian prison systems provide sliding pay scales for prisoners which vary from approximately 10 or 15 cents per day to a maximum of 75 cents or one dollar per day. In Western Australia the top rate of pay, which was one dollar per day for 1976, is adjusted annually in line with the Consumer Price Index, and in South Australia prisoners may qualify for an additional bonus of up to 10 cents per hour at the discretion of their supervising officers.

In addition, some prisoners in New South Wales earn considerably higher rates if they are employed in special workshops, and prisoners on work release (see Chapter 6) in the States where this applies, earn the normal wages that are paid in the community.

Much discussion has taken place on the suggestion that prisoners should be paid normal wages for the work that they do in prison and that the costs of their accommodation and food should be deducted. This would allow prisoners to continue to support their families while they serve their sentences. On the surface, this seems to be an attractive and simple proposition, but it would be difficult to implement in practice and may even be wrong in principle. Before normal wages were paid it would be necessary to ensure that normal hours and standards of work applied, and this is impossible in many maximum security prisons due to the restricted daily routine.

Furthermore, if the real costs of imprisonment were deducted, many prisoners would be paying more than they earned, and even if these problems were overcome, it might be argued that it is unfair for prisoners to be earning normal wages while there are unemployed people in the community who are worse off. The principle of 'lesser eligibility', that is, ensuring that overall it is better to be out of prison rather than in, must be borne in mind.

Remission: Prisoners in Australia are generally eligible to earn remissions for good behaviour with the effect that the sentences imposed by the courts may be shortened. The details of remission systems vary widely between the different jurisdictions, with short sentence prisoners being ineligible for remission in some cases. A

typical pattern would be for an offender sentenced to six months imprisonment to be released after four and a half months, having earned the maximum of one quarter remission for good conduct and industry.

In the past, regulations governing the earning of remissions were extremely complicated, with those in Western Australia, for example, being based on a system of marks awarded each day according to whether the prisoner was working or not, was in hospital or was awaiting trial or appeal. This has now been replaced by a remission system which automatically deducts one quarter from finite sentences and three days per month from minimum terms subject to adjustments for misbehaviour.

By contrast, the Tasmanian system is very simple, with all prisoners serving three months or more being eligible to earn remission of one third of the sentence imposed.

Victoria probably has the most generous system, with prisoners sentenced to three months or less being eligible for one third remission, and those sentenced to over three months being able to earn up to 15 days remission for each completed calendar month of the sentence, the latter being also applied to the minimum term for parole eligibility.

Prison administrators frequently argue that remission systems are a necessary aid to control, as they encourage good behaviour, but it is common practice for maximum remission to be granted in all cases except where prisoners have been charged with offences while in prison. In view of this, the Mitchell Committee in its first report⁷ has argued that one third of all sentences should be automatically deducted with additional time only being imposed by a visiting magistrate or other court.

Other regulations: In addition to the matters mentioned above, Australian prison systems all have regulations covering prisoners' clothing, haircuts and the availability of tobacco and canteen purchases. In the closed world of the prison, these matters can assume a significance out of all proportion to that which applies in the normal community. Resentment and antagonism may readily develop where prisoners are required to wear a uniform they dislike and where they are required to wear short hair. In some Australian prison systems long hair is no longer prohibited provided it is kept clean and is not a potential danger for prisoners

working with machines.

A source of tension in prisons, even more powerful than regulations governing clothing and haircuts, is the availability of tobacco. Prison riots, strikes and other disturbances have frequently been caused by disputes over tobacco, especially where the supplies are short. Tobacco is traditionally the standard currency within prisons and is used for buying favours and for gambling, generally without the direct knowledge of the staff.

Most Australian prison systems today have attempted to reduce the disruptive influence of a shortage of tobacco by allowing prisoners to purchase up to three ounces per week from their earnings, and in other cases a ration of tobacco is supplied free of charge. Prisoners who are non-smokers are generally allowed to purchase a small quantity of chocolate from the canteen, which also has toilet requisites for sale. The comparatively low level of prisoner earnings, however, places severe restrictions on prisoners' buying power.

Prison staff

The bulk of staff employed in prisons in Australia are custodial officers who wear uniforms, similar to those of police officers, and whose rank is indicated by insignia on the sleeves or shoulders. A typical rank structure would be: Prison Officer, Senior Prison Officer, Chief Prison Officer, Principal Prison Officer, Assistant Governor or Superintendent, Governor or Superintendent. The officers in charge of institutions, called either Governors or Superintendents, are not always required to wear uniforms.

All prison officers receive some training before taking up duty and this varies from three to 12 weeks between the different jurisdictions. All the training is concerned with acquiring a sound knowledge of the rules, regulations and routines that are to be followed, but time is also devoted to physical training and the learning of restraint holds and to lectures on basic law and human relations. Pre-service training of prison officers also includes the handling of firearms which are used on guard towers and escort duties. All prison administrations provide in-service training, either through classes or correspondence courses, for prison officers who are seeking promotion to higher ranks, and in all jurisdictions

except the Northern Territory such training is a necessary prerequisite to promotion.

A matter of some significance is the relationship between the total numbers of prison officers in each service and the total numbers of prisoners. This information is shown in Table 3.

Table 3 Custodial staff and prisoners, July 1976

	<i>Total custodial staff</i>	<i>Total prisoners</i>	<i>Ratio</i>
New South Wales	1,138	3,503	1:3.1
Victoria	719	1,560	1:2.2
Queensland	731	1,544	1:2.1
South Australia	269	713	1:2.7
Western Australia	526	975	1:1.9
Tasmania	142	282	1:2.0
Northern Territory	78	182	1:2.3
Australia	3,603	8,759	1:2.4

From this table it can be seen that on average there is one prison officer for every two to three prisoners, and if this seems lavish, it must be remembered that all prisons must have some staff on duty 24 hours a day, seven days a week for every week of the year.

It is also to be noted that staff/prisoner ratios are generally less favourable in minimum security institutions than in institutions where custody is of greater importance. For example, a prison camp with 40 or 50 prisoners may have a total staff of only eight or nine officers, with only three or four being on duty at the same time, while at the other extreme, in a special unit in a maximum security prison, the rules may require six officers to be present before a single prisoner is allowed out of his cell.

A recent innovation in the custodial staffing of prisons has been the employment of female prison officers in prisons for male offenders. The Victorian Social Welfare Department employs a small number of female prison officers in Pentridge and since August 1976 they have been assigned to most of the tasks, apart from tower duty, that were previously only undertaken by their

male counterparts. It has been suggested that the presence of women in male prisons has improved the tone and reduced tension. By contrast, male prison officers are generally employed at the main entrance of female prisons, but are rarely allowed to mix with the prisoners.

In addition to the uniformed custodial staff described above, all large prisons and some of the smaller ones employ non-uniformed or civilian staff who perform non-custodial duties. Some of these may perform routine clerical tasks, but they may also be chaplains, psychiatrists, psychologists, social workers, welfare officers, medical officers, nurses, education officers and trade instructors, although some trade instructors are uniformed custodial officers who have special skills and qualifications.

Many of these specialists are employed by other government departments and are seconded, on either a full-time or part-time basis, to work in prisons. One of the most striking features of Australian penology over the past 10 or 15 years has been the rapid increase in the number of these specialists working in prisons.

In Victorian prisons, for example, at June 1975, there were 19 education officers and seven trade instructors as well as two psychiatrists (soon to be increased to six) and a psychologist. Similar numbers of professional staff are to be found in other jurisdictions, with probably Western Australia having the highest number of psychologists and New South Wales having the highest number of medical officers and nurses.

Education and training programs

All major prisons in Australia offer education and training programs which aim to impart skills and knowledge which will be of value to prisoners after their release. These programs have also been shown to improve morale within prisons and therefore to assist in the maintenance of security.⁸ Details of the programs offered vary widely between institutions according to availability of education and training staff and according to the policy of the responsible department.

Generally, however, teachers are seconded to the correctional authority from the relevant education department, and within the prison setting they are usually referred to as 'education officers'

rather than 'school teachers'. The use of this terminology is intended to minimise the negative associations which many prisoners have with their earlier school experiences, and it also illustrates the proposition that educational activities in prisons are not directly comparable to those provided for children in schools.

A complete education and training program⁹ in a prison is one which offers to all prisoners, on a voluntary basis, an appropriate range of academic, vocational and social recreational activities. These will be briefly discussed in turn as will a number of other responsibilities which are undertaken by education officers in prisons.

Academic activities: This term is applied to all endeavours at improving prisoners' educational standards and ranges from teaching illiterates to read and write to assisting more able prisoners to pursue higher studies including college and university courses. At the lower levels, the education officer may himself teach small classes of six to 10 prisoners, but for more advanced work his task is primarily to provide materials, facilities, assistance and encouragement. At higher secondary school level and above, the actual instruction would be provided by correspondence courses with the education officer giving assistance when required.

Academic activities are probably not undertaken by more than 15 or 20 per cent of prisoners, and in most cases some time off work is allowed by the authorities for these small numbers to attend classes or to study. The psychological assessment of prisoners at reception, as part of the classification process, is generally used to determine the individual prisoner's need or capability for academic work.

Even though improving educational standards is very important, especially for illiterates, of whom there are approximately five per cent in most prison populations, the academic part of a prison education program must be given a lower priority than other parts which are more closely geared to the needs of prisoners and which have wider appeal.

Vocational activities: Vocational or trade training may be offered to prisoners either in the form of classes or correspondence courses, both of which have advantages and disadvantages which render neither completely satisfactory. Classes conducted by

qualified trade instructors with appropriately equipped workshops have the obvious advantage of providing a realistic learning experience in which practical skills as well as theoretical knowledge can be acquired. However, such training is very costly and the results may not be recognised by outside authorities and employers. It is also extremely difficult to organise trade classes over a period of time within the framework of a constantly changing prison population. Notwithstanding these difficulties the Western Australian Department of Corrections offers an apprenticeship trade training scheme to selected prisoners.

The alternative method of providing vocational training by correspondence courses has the advantage of being relatively cheap and flexible but it is appropriate only for the acquisition of theoretical knowledge without practical experience. For courses such as bookkeeping, salesmanship and some agricultural subjects, this is not a significant problem, but with others such as motor maintenance, concrete engineering, welding, carpentry, etc., the disadvantage becomes serious.

With careful planning it should be possible to effect a compromise between these two approaches by providing flexibly organised training workshops in which carefully graded series of tasks or experiences are designed to comprise a training course. This could be done so that prisoners could start at any time, thus allowing for the changing prison population, and also this arrangement should provide for the duration of the course to vary according to the ability and needs of the individual. This approach to trade training has not yet been explored in Australian prisons in any systematic way but developments of this type may be expected in the future.

Social-recreational activities: This term is used to describe a wide range of pursuits which may be followed in the prisoner's leisure time in the evenings or at weekends. In this sphere the education officer becomes an organiser or group leader rather than a teacher, and it is here that the greatest response to his efforts in terms of numbers may be expected. In some jurisdictions much of this work is undertaken by welfare officers or recreational staff, but in others it is done by education officers. A comprehensive evening activities program in a medium size prison would include weekly meetings of a current affairs discussion group, debating club, weightlifting or physical fitness group, music appreciation group,

and any number of hobby groups providing such activities as woodwork, bookbinding, leatherwork, lino cutting and oil painting. The actual choice of activities would vary according to the interests of the education officer and the availability of part-time instructors or group leaders who may attend the prison for one or two evenings per week.

Activities of this sort which do not involve any significant degree of intellectual or vocational achievement may well be criticised as trivial and time wasting, but they can be justified on the ground that they are likely to result in an almost immediate improvement in institutional atmosphere which makes management easier and also creates a climate in which more serious educational pursuits are likely to be encouraged. It is sometimes argued that as crime is largely a leisure time activity, hobbies which encourage prisoners to make constructive use of their leisure may have the effect of reducing their propensity for criminal activity. This is probably an overly optimistic claim and it is not necessary to use this argument to justify an adequate social-recreational program.

Other aspects of education programs: Libraries play a very important part in prison life and whether or not they are primarily intended for recreational or educational purposes they should be regarded as part of the educational facilities. In larger institutions, qualified librarians may form a part of the education staff, but in smaller institutions the management of libraries is the responsibility of the education officer(s) who may use prisoner assistants.

One offshoot of prison education programs in Australia and overseas has been the production of monthly magazines which provide an outlet for prisoners' literary efforts and act as an additional means of communication between the prison and outside interest groups. Many of these magazines have reached high standards of content and production and they are generally exchanged between prisons as a matter of mutual interest. A worldwide exchange program for prison magazines, known as the Penal Press, has been in operation for some years and many Australian prisons have been active contributors to this exchange.

A final matter of some significance within the framework of prison education programs has been the development of pre-release courses. These are designed to provide an intensive personal

experience for men who have served comparatively long sentences and aim at assisting prisoners to prepare for the problems that they will inevitably face after discharge. Pre-release courses of one to three weeks have been tried and have included detailed discussions on job seeking, parole obligations, budgeting, human relations and sexual adjustment. In many cases education officers have sought the assistance of more specialised staff with these courses and the prisoner response has been generally highly favourable. The development of pre-release courses is one aspect of prison education which is likely to be expanded in the future.

Long-term prisoners

One of the growing problems facing prison administrators throughout Australia is the apparently increasing number of long-term prisoners. Few hard data are available to document this increase, but it is a matter frequently referred to in the annual reports of correctional authorities.

Long-term prisoners include those sentenced to fixed terms, of say 10 years or more, together with those sentenced to indefinite terms, either 'life' or 'until the Governor's pleasure is known'. The latter group of prisoners is generally detained indefinitely following a verdict of 'not guilty on the grounds of insanity', whereas 'life' is most often imposed following a conviction for murder, or, in a smaller number of cases, for rape. The 'life' sentence is also the usual outcome from a commutation of a sentence of death, and the increase in long-term prisoners may be a cumulative result of the effective abolition of the death penalty since 1967 (see Table 1).

It is sometimes assumed by members of the general public that a 'life' sentence means what it says and that a prisoner given this sentence will stay in prison until he dies. This assumption is quite incorrect and virtually all 'lifers' are eventually released at the discretion of the relevant government, usually on the recommendation of a parole board. However a small number of 'lifers' commit suicide, are killed in prison or are transferred to mental hospitals.

A study conducted by the Australian Institute of Criminology¹⁰ analysed the average term served in prison by 'lifers' throughout Australia and found the following results.

Table 4 Average length of detention for commuted and
Life Sentence Male Prisoners, Australian States

	<i>Number</i>	<i>Average</i>	
		<i>Years</i>	<i>Months</i>
New South Wales (1932-1974)	156	13	7
Victoria (1928-1974)	55	13	1
Queensland (1900-1974)	106	12	11
South Australia (1918-1974)	30	11	0
Western Australia (1918-1974)	37	12	11
Tasmania (1951-1974)	5	11	2
Australia	389	13	0

This table shows that an average 'life' sentence in Australia for male prisoners is 13 years, but it should be noted that there is some variation between jurisdictions, and that in some jurisdictions there is a trend towards increasing this average while in others an opposite trend is to be found. It is also to be noted that female 'lifers' generally serve much shorter terms in prison as also do persons found not guilty on the grounds of insanity.

There are a number of problems for administrators caused by long-term prisoners, and many of these are related to the indefinite nature of the sentences which most are serving. Notwithstanding the averages shown in Table 4, neither an individual prisoner of this type nor an administrator is able to predict with any certainty when the prisoner is to be released. This uncertainty creates serious problems of planning for release, classification and education and training, and may increase tension and uncontrollability. Additionally, long-term prisoners may become 'stand-over' men in prison and have an unsettling effect on other prisoners.

In response to these problems it is sometimes suggested that long-term prisoners should be held in separate, maximum security institutions, but this would not solve all of the problems as for these prisoners, above all others, it is essential that discharge is effected in a graduated manner. It is highly desirable that these prisoners be transferred to less secure institutions before being given total freedom, but this cannot be arranged if the date of discharge is not known.

Another problem for long-term prisoners is the probability of physical and psychological deterioration taking place. This has been vividly discussed in a recent book¹¹, which illustrates the need for activities and programs which ensure that the individual prisoner does not come out of prison with an even more anti-social outlook than he had when he went in.

Trends in the use of imprisonment

In Table 2, the numbers of male and female prisoners held in each State and the Northern Territory were given for July 1976. These data should be related to the general population served by each prison system to calculate the imprisonment rates (the daily average number of prisoners per 100,000 of the population) for each jurisdiction. This has been done and the results are shown in Table 5.

Table 5 Australian imprisonment rates, July 1976

	<i>Prisoners</i>	<i>General population*</i> (in thousands)	<i>Imprisonment rate</i>
New South Wales**	3,503	5,034**	69.6
Victoria	1,560	3,699	42.2
Queensland	1,544	2,017	76.6
South Australia	713	1,244	57.3
Western Australia	975	1,144	85.2
Tasmania	282	410	68.8
Northern Territory	182	99	183.8
Australia	8,759	13,647	64.2

* Mean population estimates as at 30 June 1976 (provisional)

** Including A.C.T. prisoners and population

This table shows that there are great differences in imprisonment rates between the jurisdictions, with the rate for the Northern Territory being more than four times higher than the Victorian rate. Because of the special features of the Northern Territory, it probably should not be compared with the States on any social

criterion, but reference is made to the very high rates for serious crime in the Northern Territory shown in Chapter 2 of this book.

There may well be a causal connection between the crime and imprisonment rates for the Northern Territory, but it is difficult to establish this connection for the States. For example, Western Australia has an imprisonment rate twice as high as Victoria, but there is no comparable difference between these two States in their rates of serious crime. Overseas studies of differences in imprisonment rates¹² have also found that no such connection exists.

It would undoubtedly be of considerable interest to speculate about the reasons for differences in imprisonment rates, but this speculation will not be pursued here as other studies have examined this question closely.¹³

The most significant thing to note about Australian imprisonment rates is that they have shown a marked reduction in size over the past five or more years. As can be seen from Table 6, the imprisonment rates for all Australian States from 1959-60 to 1973-74 have shown considerable fluctuations but since the early 1970s all States except Queensland have shown a marked decline.

Table 6 Australian imprisonment rates 1959-60/1973-74

<i>Year</i>	<i>N.S.W.*</i>	<i>Vic.</i>	<i>Qld</i>	<i>S.A.</i>	<i>W.A.</i>	<i>Tas.</i>
1959-60	82.1	60.7	62.9	72.3	88.7	65.8
1960-61	79.3	64.9	59.6	73.0	89.7	61.2
1961-62	81.6	67.5	60.4	78.8	95.8	68.7
1962-63	78.9	66.0	59.9	77.9	106.7	68.4
1963-64	80.7	68.0	56.9	80.1	109.2	65.4
1964-65	74.6	64.3	55.9	77.2	107.2	64.3
1965-66	78.3	61.0	61.5	81.9	103.0	64.6
1966-67	80.5	65.0	64.6	81.0	117.8	78.1
1967-68	81.8	67.6	62.4	88.2	133.0	85.0
1968-69	81.1	69.0	61.2	88.8	145.3	86.3
1969-70	82.1	66.8	63.1	84.5	134.7	91.8
1970-71	83.0	68.6	68.3	78.2	143.9	97.5
1971-72	86.9	67.0	71.0	77.8	144.8	94.9
1972-73	85.5	58.8	79.9	72.7	121.5	93.8
1973-74	66.6	51.7	76.9	62.9	103.8	86.2

* Including A.C.T.

A comparison between the final line of Table 6 and the data given in Table 4 indicates that this trend has continued, with both the absolute and relative numbers of prisoners in Australia becoming smaller. One of the possible reasons for this trend is the increasing development of alternatives to imprisonment, the operation and significance of which are discussed in the next chapter.

1. S.W. Johnston, 'Criminal Homicide Rates in Australia', in D. Chappell and P.R. Wilson (eds), *The Australian Criminal Justice System* (Butterworths, Sydney, 1972) p.46, Table 6.

2. Except for treason and piracy: *Piracy Punishment Act, 1902* (N.S.W.) s.4.

3. F.E. Zimring & G.J. Hawkins, *Deterrence: The Legal Threat in Crime Control* (University of Chicago Press, Chicago, 1973); J. Andenaes, *Punishment and Deterrence* (University of Michigan Press, Ann Arbor, 1974).

4. R. Martinson, 'What Works? - Questions and Answers About Prison Reform', *The Public Interest* 35, (Spring 1974), pp.22-54.

5. R. Sommer, *The End of Imprisonment* (Oxford University Press, New York, 1976).

6. *The Sydney Morning Herald*, 29 July 1976.

7. *Sentencing and Corrections, First Report of the Criminal Law and Penal Methods Reform Committee of South Australia* (South Australian Government Printer, 1973), pp.71-74. Hereinafter referred to as the First Mitchell Committee Report.

8. D. Biles, 'Ten Years of Prison Education', *The Educational Magazine* 21, (1964), pp.204-207.

9. First Mitchell Committee Report, *op. cit.*, pp.117-124.

10. A. Freiberg and D. Biles, *The Meaning of 'Life': A Study of Life Sentences in Australia* (Australian Institute of Criminology, Canberra, 1975).

11. S. Cohen & L. Taylor, *Psychological Survival* (Penguin, 1972).

12. L.T. Wilkins, 'Crime Prevention and Costs in National Planning: A Discussion of Concepts and Issues', *International Review of Criminal Policy* 25, (1967), pp.21-27.

13. D. Biles, 'Who Goes to Prison?' in D. Edgar (ed.), *Social Change in Australia: Readings in Sociology* (Cheshire Publishing, 1974), pp.548-556.

6 Alternatives to Imprisonment

Ivan Potas

Introduction

This chapter aims to discuss a variety of non-custodial and semi-custodial measures that are available to the courts and correctional authorities for the treatment of convicted offenders.

These measures are alternatives to imprisonment, and except for the fine, the bond, and supervisory probation, many are developments of the last two decades. These new measures place a greater emphasis on community based correctional programs and reflect disenchantment with imprisonment on a number of grounds, including the use of imprisonment as a tool for rehabilitation of offenders. The measures to be discussed include fines, conditional discharge, bonds and supervised probation, suspended and deferred sentences, periodic detention, attendance centre and work orders, work release and parole.

It is important to keep in mind that not all jurisdictions, nor all courts in the same jurisdiction, necessarily possess the same kind or number of sentencing options. To differentiate between these, it would be necessary to examine and compare in laborious detail a multitude of statutory provisions and judicial and administrative practices as they exist in each jurisdiction. This approach has not been wholly adopted in this chapter. Instead emphasis has been placed on a general description of the types of alternative measures available to courts and to correctional authorities in Australia. Before discussing these measures individually, however, it is intended by way of introduction to consider the task faced by the sentencer in choosing the appropriate sentence and to consider the aims of non-custodial and semi-custodial measures generally.

Choosing the sentence

Most magistrates and judges would agree that their most diffi-

cult judicial task is the determination of the appropriate sentence. Strictly speaking, some dispositions handed down by the courts are not sentences, but are imposed instead of a sentence (as in the case of a probation order). However, the term 'sentence' is used here in a loose sense to describe the dispositions that may be imposed by a court after the offender has been found guilty of committing a criminal offence.

When the penalty is fixed by law the judge's duty is clear. For example, most jurisdictions have legislation which provides that the mandatory penalty for murder is imprisonment for life. However, mandatory sentences, or mandatory minimum sentences are not commonly found in the statute books. More often, the penalty prescribed by statute refers to the maximum sentence only and the court has a discretion to impose a lesser sentence, ostensibly on the principle that maximum sentences are reserved for the worst type of cases. Further, in considering maximum penalties, it should be remembered that there are usually provisions enabling courts to impose penalties of an entirely different type altogether.

Accordingly, courts are faced not only with the problem of determining the appropriate quantum of punishment, but also the appropriate type. This involves a consideration of the nature and seriousness of the offence and the personality and background of the offender.

Thus the court may consider such matters as: the legislature's view of the seriousness of the crime as reflected in the prescribed maximum penalties; society's attitude toward particular offences; the prevalence of such crimes; the offender's motives and degree of premeditation or deliberation prior to the act; the amount of provocation (if any); the offender's mental and physical health, age and family background; his police record; the existing facilities in the penal institutions where he may be sent; and so on.¹ Factors such as these may influence a court either to impose a prison sentence or to seek an alternative disposition.

Thus there is more to sentencing than simply imposing identical penalties for offences of equal seriousness. This practice is referred to as the 'tariff' system of sentencing. However, with the exception of minor offences, such as the less serious traffic infringements, the modern approach is to impose individualised or 'tailor-made' sentences, that is, sentences which have due regard

to individual differences in offenders as well as the seriousness of the offence itself.

At the same time there has been an increase in the use of pre-sentence or welfare reports – a service which is aimed at providing the courts with more information about the offender's background and suitability for certain dispositions. Apart from more information, these 'tailor-made' sentences call for a flexible range of dispositions beyond those of the more traditional ones of imprisonment, fines and good behaviour bonds.

The aims of non-custodial and semi-custodial measures

As each of these measures is designed for a specific purpose, each has its own specific function. In Chapter 5 reference was made to the claim that imprisonment aims to deter, rehabilitate and incapacitate offenders. If such a simple model were accepted for non-custodial measures, it might be assumed that the only aims were to deter as well as rehabilitate offenders (although rehabilitation does not apply to fines).

The aims of semi-custodial measures would be similar to those of imprisonment but concerned with partial, or periodic incapacitation with particular emphasis on allowing people to remain in the community in order to avoid the disruptive effect of total incarceration.

It is largely due to the failure of the prison system to rehabilitate offenders, the uncertainty of the deterrent effect of imprisonment, humanitarian considerations, and the high cost of the prison system itself, that alternative measures to imprisonment have been sought. By imprisonment, offenders are forced to live in the criminal sub-culture of the prison, often learning new and more sophisticated methods of committing crimes and acquiring anti-social values and attitudes. These new found contacts and patterns of learning have a negative effect on rehabilitation and may account for some offenders resorting to crime after release from prison. The high proportion of recidivists within the prison system itself tends to refute the view that imprisonment operates as an effective deterrent upon the individual offender.

Non-custodial measures aim at avoiding the adverse effects of imprisonment by limiting the disruption to the offender's ordinary life style. Similarly, in the case of offenders moving from the

prison system into the community, parole and other measures to be discussed are aimed at providing a degree of assistance to the offender returning to the community.

Apart from the economic advantage to be gained from punishing the offender in the community rather than sending him to gaol, there is little evidence to indicate that such treatment is either more or less effective or beneficial than imprisonment.²

However, non-custodial and semi-custodial measures certainly provide more humane forms of punishment and perhaps may, in the future, replace the short-term prison sentence. Indeed, if current thinking continues, it may be hoped that imprisonment will gradually become a sentence of last resort, reserved for the most serious crimes and dangerous criminals, and that the courts will adopt a policy of seeking to impose alternatives to imprisonment wherever practicable. Such a policy has been expressed in a number of judicial decisions, one of which is *R. v. Draper*, in which Hoare J. said:

It is now generally recognised by penologists that it is far better both in the interests of reformation of the offender and in the interests of the community that the court should, if possible, avoid sending an offender to prison.³

Given that such an approach is desirable, and because by far the majority of offenders in prisons are non-dangerous petty offenders, there is undoubtedly a need to discover as many less drastic alternatives consistent with justice, humanity, reformation of the offender and protection of the community as can be found.

The fine

The fine may be defined simply as a sum of money which an offender is ordered to pay as a punishment for an offence. Sometimes the fine exists as a sole penalty, sometimes as an alternative penalty (expressed in the form 'fined x dollars or y days imprisonment') and sometimes as an alternative sentence (expressed in the form 'fined x dollars in default y days imprisonment').⁴ Sometimes the fine is imposed in addition to other dispositions, and sometimes in substitution for other dispositions.⁵

In English law, the fine developed out of private damages or civil actions where the king would claim a part payment or an

additional payment for participation of the State in the trial and for the injury to the State for the disturbance of the peace. By about the twelfth century the victim's share in criminal matters began to decrease until the king took the entire payment. At this time imprisonment was used largely as a method of compelling the offender to pay the fine.⁶

The use of the fine has dramatically increased in the last 50 years so that today it is by far the most frequently used sanction.⁷ According to a Home Office publication, English statistics for the year 1967 indicate that 96 per cent of offenders who were found guilty of non-indictable offences were fined. For non-indictable motoring offences the figure rose to 98 per cent. However, in the case of indictable offences, 51 per cent of those convicted by magistrates and 21 per cent of those convicted by higher courts, were fined.⁸

Table 1 Minor traffic offences settled by payment of fines without court proceedings

	1968	1969	1970	1971	1972
N.S.W.	426,496	418,626	456,798	511,005	588,729
Vic.	410,857	443,222	477,332	544,663 ^(a)	611,106
Qld ^(b)	253,429	236,320	235,477	257,709	312,029
S.A. ^(b)	239,619	267,709	244,120	277,464	246,184
W.A.	83,146	117,436	154,397	176,994	200,723
Tas.	55,677	56,076	62,408	76,062	107,457
N.T. ^(c)	N.A.	N.A.	8,438	10,444	7,574 ^(d)
A.C.T.	4,430	4,340	5,282	7,229	12,580
Total	1,473,654	1,543,729	1,644,252	1,861,570	2,086,382

(a) Includes 7,022 fines paid direct to the Victorian Railway Commissioners, the Albert Park Committee of Management and several tourist area management authorities, for which details are not available for previous years.

(b) Year ended 30 June.

(c) No provision for settlement of parking and minor traffic offences by payment of fines without court proceedings existed in the Northern Territory prior to 1970.

(d) During 1972 the duties of Darwin's Council Municipal Inspectors were expanded; in addition there was an alteration to Council By-Laws; these changes resulted in a decrease of minor traffic offence fines for that year.

Although figures for Australian courts are difficult to obtain, it is probable that the percentage of those fined in the lower courts would approach the same proportions as those fined in England if account is taken of fines paid for minor traffic offences settled without court proceedings.⁹ The 1974 *Year Book Australia* lists the statistics which alone indicate the extensive use of the fine for minor matters (see Table 1).

The imposition of fines as a sole penalty for indictable offences tried in the superior courts is relatively rare, and fines are more likely to be imposed in combination with a bond, a probation order or an order that the offender pay monetary compensation or restore property to the victim. The latter power is in addition to the court's ordinary sentencing powers.

Often the offender, because of his financial circumstances, is not in a position to pay full or even partial compensation to his victim. For this reason government funded criminal compensation schemes have been established in all States, the first of which was set up in New South Wales under the *Criminal Injuries Compensation Act, 1967* and the most recent of which was established in Tasmania, under the *Criminal Injuries Compensation Act 1976*. The amounts payable under such schemes vary from jurisdiction to jurisdiction from a low maximum of \$2,000 in South Australia to a more realistic figure of \$10,000 in Tasmania. In Tasmania, for example, an unlimited amount of compensation is payable also where the victim is injured as a result of assisting a police officer.

The aim of compensation (and indeed the aim of ordering restitution of property) is based on the idea that the State (and the offender) have a responsibility for mitigating the injury or damage suffered by the victim as a result of the offence. At present the amounts payable under many of the compensation schemes are inadequate and there is a constant need to review legislation so that account may be taken of the effects of inflation.

In all jurisdictions in Australia it is common practice for courts to impose a fine in addition to an order that the offender be disqualified from driving for a stated period of time. For the calendar year 1974, the New South Wales Bureau of Crime Statistics and Research showed that the most common penalty imposed by the New South Wales Court of Petty Sessions for drinking and driving was a combination of a fine and disqualification from driving. More than eight out of 10 (85.3 per cent) defendants were dealt

with in this way, whereas for the other defendants approximately half (48.8 per cent) were fined, while one in 15 (6.8 per cent) were sent to gaol.¹⁰

The Australian Law Reform Commission, in its Fourth Report, recommended, *inter alia*, that the maximum penalty for a first offender convicted of an offence under the breathalyser provisions of the Australian Capital Territory should be a fine of \$1,000 and automatic suspension from driving for three months. Where, however, the offender is convicted of the more serious offence of driving under the influence of intoxicating liquor, the Commission recommended that the maximum fine should be \$2,000 for a first offence. In the case of a second offence, it believed that the fines should be increased to a maximum of \$2,000 for breathalyser offences and \$4,000 for driving under the influence of intoxicating liquor.

These penalties, the Commission recommended, should be coupled with mandatory suspension of driving licences, in some cases with cancellation of licences and in more severe cases with imprisonment.

Although these recommendations reflect a belief in the effectiveness of heavy fines to deter potential offenders, they also raise the problem of the offender's ability to pay the fine.

The main principle governing the use of the fine is that the offence is not one which calls for a custodial sentence.¹¹ The more serious the offence, the higher the fine up to the statutory maximum, although commentators, and sometimes the courts, recognise the need to adjust heavy fines to the means of the offender.¹²

At present however, there is no statutory requirement for courts to consider the offender's means, and as the traditional sanction for non-payment of fines is imprisonment, many offenders are eventually sent to prison even though their original offences were considered not to warrant such treatment. Indeed, one commentator has said that annually, about one third of all admissions to prison are for non-payment of fines.¹³

Despite this gloomy picture, some courts are loath to impose fines of unrealistic amounts and often give offenders time to pay, or order some alternative method of enforcement, such as a warrant of distress which authorises seizure and sale of the offender's property; or attachment of earnings, which is an order

directed to the offender's employer to deduct certain sums of money from the offender's earnings.

However there can be no doubt as to the flexibility of the fine. Its utility is justified on a number of grounds. It can be adjusted to the offender's means and to the gravity of the offence. It can be reversed if an injustice has been done because it can be repaid. It is economical because it is not expensive to impose and produces revenue, and it keeps the offender in the community.¹⁴

Conditional discharge, bond and supervised probation

Most courts in Australia which exercise criminal jurisdiction have power to discharge an offender without imposing any punishment but, generally speaking, such a course is not adopted unless the crime is of a trivial nature. A conditional discharge simply means that an offender is released on certain conditions, expressed in a bond, to which he must adhere for a stated period of time. If the offender does not re-offend during the period of his bond he is automatically discharged from his obligations. If he does re-offend, he becomes liable to further sentence for the offence for which he was conditionally discharged and also to sentence for any new offence he may have committed.

One of the conditions which may be imposed in a bond is supervision by a probation officer. As the Mitchell Committee pointed out, most jurisdictions refer to this arrangement simply as probation.¹⁵

However, in South Australia 'probation' signifies discharge on a bond which includes conditions although not necessarily a condition of supervision. In this chapter the word 'probation' is taken in its narrow sense to mean supervised probation.

A bond may be expressed in the following manner:

Sentence deferred on the accused entering into a recognisance himself in the sum of \$. . . (with a surety in the sum of \$. . . or two sureties in the sum of \$. . . each — if required) to be of good behaviour for . . . years and to appear and receive sentence if called upon to do so at any time during that period.

Such a bond is often referred to as a common law bind-over. Money does not necessarily change hands, for the court may accept an oral undertaking by the offender to abide by its terms. It is only when conditions of supervision attach to the recognis-

ance that the disposition becomes a probation order. Examples of the type of conditions which may attach to a recognisance include the requirement that the offender pay compensation, restore certain property, seek medical treatment, and seek and remain in employment. There is also the requirement that the offender place himself under the supervision and guidance of the adult probation service and obey the directions of the service.¹⁶

Indeed, long before probation was thought of English courts made use of their powers to bind offenders over to come up for judgment if called on and the idea of placing offenders under supervision flowed naturally though gradually from this practice.¹⁷

Legislation exists in all Australian jurisdictions for the placing of offenders on probation and in some cases the probation operates as a direct order rather than as a condition attaching to a recognisance or bond.¹⁸ Like most forms of dispositional measures which permit the offender to enjoy conditional liberty, the consent of the offender is a pre-condition to the granting of probation. If the offender does not consent to the terms of the recognisance or order, he will be sentenced to imprisonment.

There are considerable similarities among the States and Territories regarding the criteria laid down for the court's exercise of discretion. Depending on the precise terms of the empowering section, the courts in determining whether to place an offender on probation consider such matters as the character, antecedents, age, health or mental condition of the person charged, or the nature of the offence, or other extenuating circumstances. The decision must be well founded in law and the courts have been careful to point out that the terms of the empowering section are 'not mere pegs to hang leniency dictated by some extraneous and idiosyncratic considerations'.¹⁹

The legislation restricts the time for which an offender may be placed under supervision when the power is exercised under the relevant legislative provisions (see footnote 18 p.131). Table 2 shows the maximum period, and in some cases the minimum period, of the permissible duration of probation.

After the fine, and often in combination with it, probation orders and bonds are the measures most often imposed by the courts.²⁰ Reference has already been made to the prevalent use of the fine in the lower courts in New South Wales.

Table 2 Permissible statutory duration of probation in years
by States and Territories

<i>Jurisdiction</i>	<i>Minimum period</i>	<i>Maximum period</i>
New South Wales		3
Victoria	1	5
Queensland	0.5	3
South Australia		3
Western Australia	1	5
Tasmania		3
Australian Capital Territory		3
		(but may be longer in certain circumstances)*
Northern Territory		3
		(but may be longer in certain circumstances)*
Commonwealth		3

* In the Australian Capital Territory and the Northern Territory courts of summary jurisdiction are restricted to imposing a maximum term of three years where such courts have not proceeded to conviction. However, where such courts do proceed to conviction, in theory at least, there appears to be no maximum length of time that an offender may be placed on probation in these two jurisdictions.

However in the higher courts bonds outnumber all other dispositions. According to the Bureau of Crime Statistics and Research, of 4016 distinct persons who were tried in the higher courts in New South Wales in 1974, one in 18 (5.5 per cent) were acquitted; more than half (52.6 per cent) were found guilty and placed on a bond; and in a little over half of these probation was also imposed. In one case in four the bond was accompanied by a fine. Further, more than two in five (40.9 per cent) of those whose trials were completed were imprisoned.⁴⁴

Table 3 gives a broad indication of the number of persons under supervisory probation at a particular date. The figures tend to indicate a gradual increase in the use of this disposition, both on an absolute and on a per head of population basis.

It can also be seen from this table that there is considerable variation between jurisdictions in the relative use of probation.

These rates may be compared with the imprisonment statistics given in the preceding chapter. Furthermore, it is of interest to note that the Victorian 'probation rate' seems to be declining (as is the Victorian imprisonment rate) but that for all other jurisdictions it is apparently increasing.

Table 3 Adult persons under supervisory probation as at 30 June by States, 1970 to 1974(a)

(The figures shown in brackets are the number of adult persons under supervisory probation per 100,000 of the estimated mean population as at 30 June each year.)

	<i>N.S.W.</i>	<i>Vic.</i>	<i>Qld</i>	<i>S.A.(b)</i>	<i>W.A.</i>	<i>Tas.(c)</i>
1970	4,487 (99.93)	2,153 (62.94)	1,500 (84.27)	N.A.	1,202 (123.27)	1,165 (301.27)
1971	4,640 (101.40)	2,181 (62.65)	1,634 (90.16)	1,650 (141.26)	1,211 (119.49)	1,224 (314.09)
1972	5,121 (110.20)	2,326 (65.78)	1,843 (99.57)	1,747 (147.59)	1,160 (110.84)	1,300 (331.29)
1973	5,702 (121.43)	2,392 (66.83)	1,821 (96.01)	2,094 (175.14)	1,260 (118.40)	1,372 (347.43)
1974	6,117 (129.12)	2,224 (61.46)	1,888 (97.09)	2,122 (175.24)	1,400 (129.07)	1,554 (389.47)

- (a) The figures for each State were obtained from the annual reports of the respective State departments.
- (b) A total of 1,512 persons were on probation or parole in South Australia as at 30 June 1970. However, as the figures for probation and parole were not recorded separately until 1971, the numbers on probation in South Australia at 30 June 1970 are not available. The figures for South Australia should not be compared with other States because they include those who received suspended sentences and also those placed under supervision. As indicated earlier such a disposition is not within the narrow definition of 'probation' as used here.
- (c) The figures for Tasmania should not be compared with those of other States because of its use of probation in combination with other measures including the 'split sentence'. The latter is a form of judicial parole, whereby the court, rather than the paroling authority, determines when the offender is to be released from prison and placed under supervision. However, with the creation of the Parole Board in 1975, it is expected that less use will be made of this form of sentence in the future.

The aims of probation are to some extent reflected in the criteria for deciding when it is appropriate to place an offender on probation. According to the Report of the United Kingdom Inter-departmental Committee on the Probation Service²² there is an *a priori* case for probation when the following four conditions are fulfilled:

1. The circumstances of the offence and the offender's record are not such as to demand, in the interests of society, that some more severe method be adopted in dealing with him.
2. The risk, if any, to society through setting the offender at liberty is outweighed by the moral, social and economic arguments for not depriving him of it.
3. The offender needs continuing attention (otherwise if condition 2 is satisfied, fine or discharge will suffice).
4. The offender is capable of responding to this attention while at liberty.

Whether such conditions should be set out in legislation for the guidance of sentencers is open to debate.²³

The advantages of probation are summed up by the American Bar Association Project on Standards for Criminal Justice, as follows:

1. It maximizes the liberty of the individual, while at the same time vindicating the authority of the law and effectively protecting the public from further violations of law.
2. It affirmatively promotes the rehabilitation of the offender by continuing normal community contacts.
3. It avoids the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community.
4. It greatly reduces the financial costs to the public treasury of an effective correctional system.
5. It minimises the impact of conviction upon innocent dependants of the offender.²⁴

Although it is somewhat optimistic, if not inaccurate, to suggest that probation 'effectively protects the public from further violations of law', the other points listed are, as a general rule, accurate reflections of the advantages of probation, even if they may also be shared with other non-custodial dispositions.²⁵

The suspended sentence

There are many ways of suspending the imposition of a prison sentence.²⁶ One method is by imposing a probation order, another

by imposing a common law bind-over. In such circumstances, the offender is liable to be sent to prison if he is in breach of the conditions attaching to these forms of conditional release.

However, the term 'suspended sentence' refers to a special kind of sentence. It refers to a sentence of imprisonment which is imposed for a particular offence (for example, 12 months imprisonment) but which is not activated (that is, the execution of the sentence is suspended) and the offender is permitted to be at large on conditions similar to those which might apply to a probation order or bond.

Most courts exercising criminal jurisdiction in Australia have had at one time or another a power to impose this form of suspended sentence. However, with the abandonment of 'first offender' legislation, many States have also abandoned this form of sentence.²⁷

Queensland and Western Australia still retain first offender legislation, under which suspended sentences are granted to first offenders only when the maximum imprisonment permitted for the offence does not exceed three years.²⁸ However, in the case of Western Australia, the power extends only to the suspension of the imposition of the sentence and therefore is a statutory bind-over power rather than a suspended sentence in the sense used here.²⁹ In Tasmania, South Australia and the Australian Capital Territory the use of the suspended sentence is commonplace and is not restricted to apply to first offenders.³⁰

In *Wood v. Samuels*³¹ Walters J., in the Supreme Court of South Australia, considered the circumstances in which a sentence of imprisonment should be suspended. In his view a suspended sentence is aimed primarily at the offender whom it is not appropriate to send to prison for the first time but who is most likely to benefit from an exercise of the court's clemency. His Honour pointed out that there are no comprehensive specific criteria which tell a court when a suspended sentence should be used. However, the gravity of the offence and any element of persistence serve as important restraints on the choice of a suspended sentence. However, if further criminal behaviour cannot reasonably be assumed, the offender may well be given a suspended sentence.

Although the factors to be taken into account vary according to the circumstances of each particular case, his Honour consid-

ered that the ultimate questions which the court must decide are those postulated in the statement of Lord Parker L.C.J. in *R. v. O'Keefe*, [1969] 2 Q.B. 29. In that case His Lordship said:

It seems to this Court that before one gets to a suspended sentence at all, the court must go through the process of eliminating other possible courses such as absolute discharge, conditional discharge, probation order, fines, and then say to itself: this is a case for imprisonment and the final question, it being a case for imprisonment, should be: is immediate imprisonment required, or can a suspended sentence be given?

In South Australia a proven breach of the conditions attaching to a suspended sentence entails mandatory revocation of the suspension and automatic activation of the prison sentence.³² It may be argued that such a provision is too harsh and that the courts ought to retain a discretion as to whether or not to activate the sentence, particularly if the breach is of minor nature or if the offender's circumstances have changed for the better. Nevertheless it would appear that the South Australian courts are satisfied with the present situation and have faith in the deterrent value of such a disposition.

The distinction between a breach of an ordinary bond and a breach of a suspended sentence in South Australia was considered by majority of the Full Court in *R. v. Lock*.³³ The majority observed as follows:

... in the case of an ordinary bond under the *Offenders Probation Act* the offender, if he breaks the bond, is liable to be sentenced for the original offence but the nature and duration of that sentence is not known in advance and the court in imposing it can legitimately take into account any mitigating circumstances relating to the breach of bond. The bond breaker will not necessarily be sent to gaol for his original offence. In contrast, in the case of a suspended sentence the operation of that sentence is automatic on the defendant being brought before the Court and proved to have broken the bond, either by committing some other offence or by failing in any of its other conditions. The Court in such a case has no discretion. It must decree the automatic operation of the suspended sentence.³⁴

Often the suspended sentence is combined with other sanctions such as a fine or probation. Table 4 indicates the use of the suspended sentence combined with a condition of supervisory probation in South Australia.

Another form of suspended sentence is the so called 'split-sentence'. This form of sentence originated in Queensland, but was

soon abandoned in that State.³⁶ It was adopted, however, by the Australian Capital Territory and Tasmania.

Table 4 Persons given suspended sentences with an order for supervision (South Australia) 1 July to 30 June 1969-70 to 1973-74

	Male	Female	Total
1969-70	52	9	61
1970-71	242	39	281
1971-72	439	49	488
1972-73	481	59	540
1973-74	450	60	510

Broadly, the split sentence enables the court to sentence an offender to a term of imprisonment, but release him on a recognisance before the expiration of the prison sentence. It is really a form of judicial parole, and there appears to be little justification for its use where a comprehensive system of parole operates.

With the newly created systems of parole in Tasmania and the Australian Capital Territory³⁷, the use of the split sentence may be substantially reduced. However, where short-term sentences are involved (less than six months in Tasmania, and less than 12 months in the Australian Capital Territory), the offender may not be eligible for release on parole, and the courts in these jurisdictions may continue to impose split sentences.³⁸

However, Rinaldi has claimed that arguments in favour of the split sentence are completely lacking. He argues, *inter alia*, that:

As substitutes for parole they are highly undesirable, as a decision to release on parole should be based on 'parole readiness' which cannot be determined at the moment of sentence. As devices for securing short-term imprisonment for offenders who cannot derive any benefit from such imprisonment but who would be better served by the imposition of a non-custodial sentence, the very availability of these sentences is an indictment against the morality of the government which permits them.³⁹

Parole will be discussed later in this chapter.

Another form of suspended sentence is the 'deferred sentence'. The term is often confused with the bind-over power which has

already been discussed. As the name suggests, it is a measure whereby the court may defer or postpone the determination of a sentence for a fixed period of time. The aim of such a sentence is to enable the court to observe the offender's conduct for a stated period before imposing sentence. Such a power exists in England under Section 1(1) of the *Powers of Criminal Courts Act, 1973* which provides that:

... the Crown Court or a Magistrates' Court may defer passing sentence on an offender for the purpose of enabling the court to have regard in determining his sentence, to his conduct after conviction (including, where appropriate, the making of reparation for his offence) or any change in his circumstances.

Except in Queensland, no equivalent power is conferred on Australian courts.⁴⁰ Thus, for example, although s.558 of the *Crimes Act, 1900* (N.S.W.) is often referred to as a deferred sentence, the New South Wales Court of Criminal Appeal has held that the substance of an order under that section is that if the offender fulfils the conditions of his release, he will not go to gaol. Under that section therefore, the court is not permitted to adopt a 'wait and see' attitude before deciding whether or not, even if the offender fulfils all the prescribed conditions, it will order a gaol term.⁴¹ Basically, therefore, s.558 is really a statutory form of the common law bind-over.

The Queensland provision, inserted into the Criminal Code as s.19(9A), by s.3 of the *Criminal Code and Justices Act Amendment Act, 1975*, No.27, relates to persons convicted of property offences. It empowers the court to adjourn sentence for a period of not more than six months from the date of conviction. Further the court may discharge the offender upon his entering into a recognisance conditional that he shall appear and receive sentence:

... at the place date and time to which the matter of sentence has been adjourned, or when called upon prior to that date with a view to the offender taking such steps as may be necessary —

- i. to restore the property to which the offence relates to the person aggrieved by the offence;
- ii. to reinstate that property to the satisfaction of the court or justices or the person aggrieved by the offence;
- iii. to compensate the person aggrieved by the offence for the injury caused to his property; or
- iv. to comply in all respects with any other order the court or justices may make,

as the case may require.

When sentencing the offender under this section the court may take into account whether he has taken the necessary steps referred to above. However, should the offender fail to comply with the terms of the section he is liable to forfeiture of his recognisance and may be arrested and brought before the court.

The Queensland form of deferred sentence can be seen as a valuable tool in encouraging the offender to make reparation for his offence, and in recognising the plight of his victim. In addition the conduct of the offender between the date of conviction and the date of sentence becomes an important guide in the determination of sentence. However, whether this form of sentence spreads to other jurisdictions remains to be seen.

Periodic detention

Most jurisdictions in Australia either have, or plan to have, some form of semi-custodial scheme which is an alternative to ordinary imprisonment. Periodic detention, or weekend detention as it is sometimes known, originated in New Zealand in the early 1960s.⁴² It was soon copied or adapted by many overseas countries including Australia.

Its primary aim is to provide a penalty which constitutes more of a deterrent than a fine or probation (which incidentally may be imposed in addition to a sentence of periodic detention) but which does not disrupt an offender's life to the extent of a sentence of continuous custody. The community work (or service) order, which will be considered separately, may be distinguished here on the basis that the work order does not require the offender to be locked up in an institution.

Periodic detention should not be confused with work release (also variously called 'release to work' or 'work furlough') which denotes a scheme under which selected offenders who are serving prison sentences are permitted to leave the prison during the day so that they may attend normal employment in the outside community. A second form of work release, known as Work Release No.2 in New South Wales, enables some prisoners to live at home with their families during the evenings, but work in the prison during the day. These forms of work release schemes are administratively imposed by the correctional authorities and will be considered in more detail below.

Periodic detention was first introduced into Australia in Queensland, under the *Weekend Detention Act* of 1970, and in New South Wales under the *Periodic Detention of Prisoners Act*, 1970. Victoria also had provisions for introducing periodic detention as an alternative sentencing measure, but by section 7 of the *Social Welfare Amendment Act* 1975, it amended its legislation by replacing periodic detention with attendance centre orders. These orders are similar to the sentence of periodic detention and will be considered separately.

Speaking generally, periodic detention is seen as a punitive measure, the severity of which is intended to be equivalent to a relatively short term of imprisonment. Its aim is to reduce the prison population rather than reduce the number of offenders who might otherwise be given some form of non-custodial treatment. Whether or not this aim has been achieved is debatable because a high proportion of those who receive periodic detention may not have otherwise qualified for imprisonment.⁴³

In New South Wales 'periodic detention' means detention for such number of consecutive weekends as there may be in a period of imprisonment to which the person has been sentenced. 'Week-end' is defined as meaning:

... the number of consecutive hours commencing at seven o'clock in the evening on a Friday and ending at half-past four o'clock in the afternoon on the following Sunday or such other hours on such days as may from time to time be prescribed but does not include a weekend during which Christmas Day or Easter Sunday falls.⁴⁴

Limitations are placed on those who may be sentenced to a term of periodic detention. Thus in New South Wales a person must be male and must be sentenced for a term of imprisonment of not less than three months nor more than 12 months. The court must be satisfied that accommodation is available for the offender, that the offender is over 18 years of age and that he has not served a sentence of continuous imprisonment for more than one month.⁴⁵

Statistics for New South Wales for the year ending 30 June 1975 show that a total of 196 persons were received into the periodic detention program. Of the offences they were charged with:

Driving and traffic offences constituted 55 per cent of the total.

Offences against the person – 20 per cent.

Drug offences – 9 per cent.

Fraud offences – 3 per cent.

Minor offences against the person – 11 per cent.

The remaining three per cent of offences included breach of recognisance, indecent assault, conspiracy, and assault and rob. The most frequent sentence was for three months, constituting 32 per cent of the total sentenced, while 12 per cent received the maximum sentence of 12 months.⁴⁶ Although an 86 per cent success rate is cited in the annual report of the Department of Corrective Services, this cannot be taken as indicating that those who were sentenced to the program were rehabilitated or would be deterred from future criminal activity. The most this figure indicates is that that proportion of offenders completed their terms of periodic detention satisfactorily.

There are many benefits attributed to periodic detention.⁴⁷ These include first, that the offender's family is not such a burden to the State or to the ordinary taxpayer to the extent that it might otherwise be if he were sentenced to total incarceration. Second, the offender's family life is not unduly disrupted. Third, the family and the offender himself are not stigmatised to the same extent. Fourth, the offender may contribute to community projects and is given the opportunity to make a useful contribution to society. Fifth, periodic detention may act as a useful deterrent. Sixth, there is little disruption, if any, to employment or apprenticeships. Seventh, it avoids the adverse effects of total imprisonment.

Many of these positive attributes may be offset when it is considered that had not the alternative of periodic detention been available, the offender might have received another disposition which was an alternative to imprisonment, such as a fine or probation. In such a case many of the above advantages would be minimised.

Victorian attendance centres

In Victoria another alternative to that of sentencing the offender to imprisonment is that of sending him to attendance centres. These alternatives are imposed by the courts but at the time of writing the only centres are at Thornbury and Geelong.

Each centre can cater for up to 40 offenders, so that at present this form of alternative is unlikely to cause a drastic reduction in the prison population in Victoria. However, if the attendance centre project is successful, new facilities of the same kind will soon be made available in other areas of the State to expand the potential use of this disposition.

The aim of these centres is to encourage 'attendees' to overcome their problems and form constructive habits of conduct which will assist them to remain law-biding. The measure may be imposed on offenders who are subject to a term of imprisonment for up to 12 months and therefore, like periodic detention, persons who are convicted of serious or violent offences are excluded.

As with many other dispositions which require the cooperation of the offender, his consent is obtained before he is sent to one of these centres. In deciding whether to impose the measure, the offender's past criminal record is considered and also whether he has recently been released from prison. If he has a long history of previous convictions he is not eligible for the sentence. Further conditions are: that he should come from an area near to one or other of the centres, that he should come from a settled home and that he should be in employment.

The disposition requires that the offender attend the centre for 18 hours each week, being for two evenings during the week (spent in discussions, training or counselling) and for one full day at the weekend doing unpaid work for the community. The work involves a service to hospitals, handicapped people, schools and other institutions – the type of work often performed by volunteers. Cooperation with local service clubs in providing assistance to needy members of the community is one of the aims of the centres.

As with all other measures which allow the offender conditional liberty, the penalty for breaching its terms are fairly severe. Offences include failing to be punctual and regular in attendance, arriving drunk, disrupting sessions and the like. The penalty for breaching these terms is that the offender must return to the court, and in turn, the court may order that he spend the remainder of his sentence in prison. He may also be subjected to a further sentence of 12 months imprisonment.

Where the offender commits a criminal offence during the

period in which he is required to attend the centre he will be liable to the above penalty as well as to an additional sentence on account of the new offence. Even where the offender is not in breach of the conditions, the offender or the Director General of Social Welfare may apply to the court to vary the attendance order so that the offender will be required to serve the remainder of his sentence in prison.

At the time of writing, each centre had a small full-time staff of four: a superintendent, a welfare officer, a program supervisor, and a receptionist-typist. To assist with the overall task of conducting the attendance centres, volunteers from the community with special skills were invited to assist with discussion groups and weekend work.

The work order

Tasmania was the first Australian jurisdiction to have a work order scheme and it was introduced on 1 March 1972. Western Australia has only recently followed suit and a similar scheme may soon be implemented in the Australian Capital Territory. As the Tasmanian scheme has been established the longest, it is considered below.

As already mentioned, the work order (sometimes called the community service order) is a modified version of periodic detention. The main difference is that the former measure does not require that the offender should sleep at an institution, although it does require that he should spend a proportion of his leisure time working on specified community projects.

A further benefit of the work order is that it is available throughout the State, although before making a work order the court must be satisfied that work is available within seven miles of the offender's residence.

Initially, the *Probation of Offenders Act 1973* (Tas.), the authorising Act for the making of work orders, did not provide for the work to be carried out except on Saturdays. Thus, the work order was sometimes referred to as the Saturday Work Order. However, courts are now empowered to order offenders to work on any day of the week.

Section 11(1) of the authorising Act provides:

Instead of sentencing a person to undergo a term of imprisonment, the Supreme Court and the courts of summary jurisdiction may, with the

person's consent, adjudge that he, for his offence, attend at such places and times as shall be notified to him in writing by a probation officer or a supervisor, on so many days, not exceeding twenty-five, as the court may order, and thereafter to do such things for such times as may be requested of him . . .

Provision is made in the Act so that courts can impose substantial penalties for failure to observe the terms of the work order. This power includes fining the offender, ordering imprisonment for up to three months, or increasing the number of days specified in the order provided that the number of days does not exceed an additional 25 days. In certain circumstances the court may also vary or revoke a work order.

The offender is also required to undertake 'such kind or class of work or activity as a work order committee has approved' and that work should 'not be continued for more than eight hours, exclusive of any time allowed for lunch, on any one day'.⁴⁸

The work order committee, which consists of a member of the Tasmanian Trades and Labour Council, a member of the community and the Principal Probation Officer, have the task of authorising the type of work to be undertaken. The work chosen is intended to be economically sound, yet not contributing to unemployment. At the same time it is intended to be of benefit to the community, and have incorporated in it an element of reparation to the community.

Work is performed at institutions, hospitals, old people's homes, children's homes, community centres, gardens, parks and cemeteries.

According to J.G. Mackay and M.K. Rook, blanket approval has been given to certain projects relating to unskilled work in and around such places as geriatric units, pensioners' homes, sheltered workshops and certain civic projects, so much so that the need for regular meetings of the committee has gradually fallen away.⁴⁹

Because the work order scheme makes substantial use of volunteers and, unlike other custodial and semi-custodial measures, does not require that offenders sleep at an institution, the cost of running it is claimed to be remarkably low. Mackay and Rook have concluded:

A comparison of the operating costs of the work order scheme with the cost of imprisonment shows that work orders cost \$4.95 per man per week, compared to \$117.11 per man per week for imprisonment . . .

Regardless of how it is calculated, the cost of placing an offender on a work order is [therefore] much cheaper than the cost of imprisonment.⁵⁰

The authors also refer to additional cost-benefit factors of the scheme, many of which are shared by other non-custodial or semi-custodial measures referred to in this chapter. These include:

- . Retention of family units.
- . Maintenance of employment.
- . Dependants not on social security benefits.
- . Less damage to self-esteem.
- . Reduced exposure to undesirable elements.
- . Contribution to the community.
- . Increased sense of personal achievement.⁵¹

As a general rule, vandals, traffic violators, and persons who may not be identified as 'real' criminals are most likely to be given the benefit of the work order scheme in Tasmania. As it appears to be working well, it is little wonder that Mackay and Rook conclude their assessment of the Tasmanian scheme by unreservedly recommending it for adoption in other Australian States and Territories.⁵²

However a word of caution must be added. As with periodic detention, there is always the possibility that offenders who would otherwise not have been sentenced to imprisonment, may be given a work order. Sheila Varne has concluded that work orders are being given to offenders who would not, prior to the legislation, have received a prison sentence. Further, she suggests that as probationary supervision is often given with work orders, the latter are not replacing probation either. She shows that, from the limited sample studied, only about 17 per cent of the total work orders were given as genuine alternatives to imprisonment.⁵³

Clearly, care should be taken to ensure that the intention of the legislature is carefully adhered to if community work orders are to be a useful alternative to imprisonment.

Work release

Work release was introduced first into Queensland in 1969, and in 1970 New South Wales and Western Australia adopted similar schemes. Unlike periodic detention, or community work orders, work release is not a disposition available to the courts. As

it relates only to those already serving a prison sentence, it does not lead to an increase in use of prison accommodation. Other terms used for work release or variations of the work release concept include 'release-to-work', 'work furlough', 'part-time prisoners', 'day parole', 'intermittent gaoling' and 'pre-release employment'.

The offender is only at liberty during working hours and as a condition of his release he is required to be at his place of employment. In certain circumstances a work release program may be extended to allow the offender time with his family, until eventually there is a smooth transition from custodial to non-custodial supervision (that is, parole) and thence to unconditional liberty.

Work release has been distinguished from parole in the following terms:

A parolee is still serving a prison sentence but, as long as he adheres to the conditions of his parole order, institutional supervision is neither required nor used. A prisoner granted work release, on the other hand, is still serving the institutional part of a sentence and would become eligible for parole or discharge in the normal way. Thus, work release is to be seen as an intermediate stage between complete institutional control of the offender and parole with minimal supervision in the community.⁵⁴

The value of such a scheme tends to increase in proportion to the length of time that an offender has been in prison. As well as providing a rehabilitative program which eases the transition of the prisoner into the community, it is an economical measure which permits the prisoner to earn wages, to contribute to his keep in the institution, to provide for his family and to pay income tax.

Before an offender is included in a work release program, he must qualify under a fairly stringent selection process. In New South Wales, the applicant and a member of his family may be interviewed and factors considered may include length of sentence, expiry date of non-parole period, offence and criminal record, employment and family history. The prisoner's behaviour may be observed in a holding centre for about three months and if satisfactory he may then be admitted to the work release program.⁵⁵

The work sought is of a kind that may be continued after the offender's sentence has expired. He is encouraged to participate in community work programs and in some circumstances is offered counselling services.⁵⁶

As a variation of the normal work release system, the New South Wales Government on 19 March 1976 introduced a system of home release for first offenders with stable family backgrounds. Under this scheme, known as Work Release Scheme No.2, the selected prisoner is allowed to live at his home but is required to report each day to the Parramatta Linen Service where he works from 3.30 pm until 11.30 pm each day for normal award wages; this period of time being one of high risk as far as crime is concerned.

The prisoner on home release may receive unscheduled visits at his home from an official of the Department of Corrective Services to ensure that he is complying with regulations.

In August 1976, 13 prisoners were taking part in this scheme and the Department aims to increase this to fifty. The New South Wales home release scheme is the converse of normal work release, as under this arrangement the individual goes to prison to work but lives a relatively normal life for the remainder of the time. With the passing of time he is allowed to leave his home for short periods and the degree of control is graduated so that the transition to parole supervision is achieved without significant and abrupt change.

At present this scheme may be described as experimental, and whether it is permanently adopted, or spreads to other jurisdictions, remains to be seen.

Parole

To those unfamiliar with the law, it must come as a surprise to see an offender who has recently been sentenced to a lengthy term of imprisonment walking down the street, ostensibly free.

Consider a person who has been sentenced to a term of six years imprisonment. Depending on his conduct in prison and the remission rules which may apply to his case, he may be eligible for release after serving only four years. However, chances are he will be released before this date, on parole. Again, depending on circumstances and the jurisdiction from which he comes, he may be released after serving (say) two years of the six year sentence. In such a case he will probably be serving the next four years on parole.

Parole may be described as a method of selectively and condit-

ionally releasing offenders from gaol before the expiration of their sentences for the purpose of assisting and controlling them during the period of transition from the prison environment to the community. The court is not involved in deciding when the offender is to be released on parole, although in most jurisdictions it may specify a non-parole period. The non-parole period is the minimum sentence which the offender must serve before he may be considered for parole.

In most cases the decision to release on parole is made by a parole board. It involves a balancing of the interests of the prisoner and those of the public. Factors considered relevant in deciding whether the offender should be released may include such matters as: the likelihood of the offender committing further offences while on parole; the offender's response to prison treatment; the offender's needs; and especially the nature and gravity of the offence for which he was imprisoned.

All jurisdictions have parole boards. The most recent parole boards to be established are those of Tasmania (under section 5 of the *Parole Act 1975*) and the Australian Capital Territory (under section 9 of the *Parole of Prisoners Ordinance 1976*). Until Tasmania had a parole board, the paroling authority was the Governor of that State. The paroling authority for the Australian Capital Territory (and also the Northern Territory) was the Governor-General, who acted in the same capacity with respect to federal offenders. Although parole boards vary in constitution, a judge or retired judge is generally the chairman of each.

At present there is no equivalent in federal law to the State parole boards. The release of prisoners who have committed federal offences is by way of licence. Except for the Northern Territory, all federal prisoners are required to serve their prison sentences in State prisons. Nevertheless, it is the Governor-General who authorises the release of such prisoners at the rate of about 20 each month upon the recommendation of the Commonwealth Attorney-General.

A recent example of a licence being granted to an offender by the Governor-General is that of Miss Barrett. Miss Barrett, who was an air hostess, was sentenced by the Brisbane District Court to six months imprisonment for having imported and being in possession of a prohibited import, namely, cannabis. She was released from a Brisbane gaol on licence after having served only

half her sentence in prison.⁵⁷

Sometimes work release is dovetailed with parole. For example, if it appears that a prisoner is a possible subject for parole but it is desirable to observe his reactions when given work outside the prison, how better to gauge his behaviour, as well as prepare him for unconditional liberty, than by allowing him to participate in a work-release program? In such circumstances he will progress from a full custodial system (imprisonment), to a semi-custodial system (work-release), to a non-custodial system (parole), and then to ultimate freedom.

Where the offender has been given an indeterminate sentence (such as a sentence of imprisonment for life), this does not imply that he will never be released. In such circumstances he may be released by way of licence⁵⁸, which, broadly speaking, is a power vested in the State Governors, or in the case of those convicted in the Territories, and for federal prisoners generally, in the Governor-General. The parole boards act in an advisory capacity only, although in South Australia the parole board is vested with the power to release life sentence prisoners.⁵⁹

The main difference in the parole systems of the several jurisdictions of Australia is the manner in which the time for eligibility of the offender to be placed on parole is determined. As already stated, some jurisdictions place this power in the hands of the sentencing judge. Indeed in some jurisdictions the judge may have a statutory duty to specify the minimum as well as the maximum term of imprisonment.

Another system involves the use of a statutory formula, by which an offender may not be considered for release on parole until he has served a specific proportion of his sentence in prison, usually being one third of the sentence.⁶⁰

It is important to note that the non-parole period, although representing the minimum term that an offender is required to spend in prison, is not necessarily the time at which the offender will be released. Indeed, the prisoner must satisfy the criteria that the various parole boards set before release on parole is granted.

As with probation, release on parole is conditional, and the parolee is subject to the supervision and guidance of a probation or parole officer. The parolee can also be recalled if he does not comply with the terms of his release.

Ultimately, parole offers the prisoner hope of earlier release,

inducement to reform and guidance from experienced parole officers. It is considered to be a valuable correctional measure.

Table 5 gives a broad picture of the number of persons on parole at 30 June of each year on a State by State basis.

Table 5 Persons under parole supervision as at 30 June by States 1970 to 1974(a)

(Figures shown in brackets are the number of persons per 100,000 of the estimated mean population as at 30 June each year)

	<i>N.S.W.</i>	<i>Vic.</i>	<i>Qld</i>	<i>S.A.</i>	<i>W.A.</i>	<i>Tas.(b)</i>
1970	840 (18.71)	748 (21.87)	77 (4.33)	N.A.	384 (39.38)	21 (5.43)
1971	1,058 (23.14)	759 (21.80)	75 (4.14)	76 (6.51)	420 (41.44)	20 (5.13)
1972	1,224 (26.34)	822 (23.25)	104 (5.62)	115 (9.72)	440 (42.04)	19 (4.84)
1973	1,494 (31.82)	830 (23.19)	144 (7.59)	131 (10.96)	542 (50.93)	25 (6.33)
1974	1,955 (41.27)	893 (24.68)	184 (9.46)	107 (8.84)	560 (51.63)	30 (7.52)

(a) The figures for each State were taken from the annual reports of the respective State departments.

(b) As previously mentioned, Tasmania did not have a parole board until 1975. Accordingly the parole figures represent those released by the State Governor — a fairly complicated procedure. Those released from prison on probation — a form of judicial parole — are not included here, although they are included in Table 3 and help to account for the high probation and low parole figures for Tasmania. However, the numbers placed on parole in Tasmania may be expected to increase dramatically in the next few years.

Table 5 shows that there are very great differences between jurisdictions in the use of parole. The low Tasmanian figures are explained in the footnotes, but the other differences seem to need explanation.

Some insight may be gained by comparing the 'parole rates' with those for probation given earlier and also with the imprisonment rates shown in Chapter 5, even though the latter are not strictly comparable as they are based on daily averages of pri-

soners. From these three sets of figures it can be seen that the jurisdictions with the highest parole rates, Western Australia and New South Wales, also have relatively high imprisonment rates. Conversely, the lowest paroling jurisdictions, South Australia and Queensland, both have relatively low imprisonment rates.

These comparisons are especially interesting as it might be expected that the wide use of parole would reduce prison numbers and result in a negative correlation between the two rates. This expectation is not, however, supported by the evidence.

When the probation figures are included in the analysis, the comparisons are even more puzzling. Some jurisdictions, notably Western Australia and New South Wales, seem to have high rates on all three measures. South Australia, on the other hand, has the highest probation rate (a figure which includes some suspended prison sentences) but low use of prison and parole. Full interpretation of these figures will be dependent upon more detailed research than is possible in this context.

Conclusion

This chapter has reviewed the main trends in the development of alternatives to imprisonment in Australia which have taken place mainly in the last decade. Further developments may be expected in the years to come and it is predicted that wider use will be made in the future of non-custodial measures such as the Tasmanian work order scheme and the Victorian attendance centre scheme. An extension of work release for prisoners is also likely.

These forecasts are based on the assumption that governments in the future will become increasingly concerned with the cost effectiveness of correctional measures. If this is shown to be true, the economic attractiveness of non-custodial measures and work release of prisoners will be a powerful influence.

If the effects of different penal measures are found to be little different from each other, as judged by recidivism rates, the policy-makers will be more concerned with costs. It is relevant to note that it has been stated that it costs \$104 per day to keep a prisoner in maximum security in New South Wales as compared with \$3.28 to supervise an offender under periodic detention.⁶¹

Semi-custodial, and more intensive non-custodial, measures

may be expected to cost more than probation or parole but they will nevertheless be much less expensive than imprisonment and are therefore likely to become increasingly popular.

1. See Sir Leslie Herron, 'The Science of Sentencing', in Ray Watson & Howard Purnell, *Criminal Law in New South Wales* (vol.1) (Law Book Co., Sydney, 1971), p.1189.

2. See Leslie T. Wilkins, *Evaluation of Penal Measures* (Random House, 1969), pp.14-15 and Chapter 6 *ibid.* See also Nigel Walker, *Crime and Punishment in Great Britain* (1968), Chapter 12.

3. 1970 Q.W.N. 20. See also *McGregor v. Steel* (1973) 5 S.A.S.R. 222 at 223-224.

4. For the distinction between the fine as a penalty and as an alternative sentence, see F. Rinaldi, *Imprisonment for Non-Payment of Fines* (Australian National University Law School, Canberra, 1973), pp.48-49.

5. See R.G. Fox, 'The Fine, Restitution and Reparation as Effective Sentencing Measures', in *Modern Developments in Sentencing* (Australian Institute of Criminology, Canberra, 1974), p.217.

6. See Edwin H. Sutherland and Donald R. Cressey, *Criminology* (9th edn, Lippincott, Philadelphia, 1974), p.316.

7. *ibid.*, at p.317. The authors claim that probably more than 75 per cent of the penalties imposed in the United States are fines.

8. Home Office, *The Sentence of the Court* (Home Office, London, 1970), p.4.

9. See Fox, *op. cit.* at pp.219-220.

10. See New South Wales Bureau of Crime Statistics and Research, *Statistical Report 6 (Series 2)* (Sydney, December 1974), at p.4.

11. D.A. Thomas, *Principles of Sentencing* (Heinemann, London, 1970), pp.219-220.

12. See M. Daunton-Fear, 'The Fine as a Criminal Sanction', 4 *Adelaide Law Review* 307 at pp.317-319. See also *R. v. Lewis* (1965) Crim. L.R. 121.

13. Rinaldi, *op. cit.*, p.1.

14. See Criminal Law and Penal Methods Reform Committee of South Australia, *First Report: Sentencing and Corrections* (Government Printer, Adelaide, 1973), p.146. (Hereafter referred to as the Mitchell Committee.)

15. Mitchell Committee, *ibid.*, p.136.

16. See K.J. McKimm, *Criminal Procedure and Practice in New South Wales* (2nd edn, Butterworths, Sydney, 1972), p.61.

17. See Report of the Departmental Committee on the Social Services in Courts of Summary Jurisdiction (United Kingdom, 1936) para 49.

18. The key legislative provisions, excluding those which apply to juveniles, which are relevant to the power of the courts to place offenders on probation are as follows:

Crimes Act, 1900-1974 (N.S.W.) s.556A(1)

Crimes Act, 1958-1973 (Vic.) s.508 (1)

- Offenders Probation and Parole Act*, 1959-1974 (Qld) s.8(1)
Offenders Probation Act, 1913-1971 (S.A.) s.4(1); s.4(2)
Offenders Probation and Parole Act, 1963-1971 (W.A.) s.9(1)
Probation of Offenders Act 1973 (Tas.) s.7(1); s7(3)
Crimes Act, 1900 of the State of New South Wales as amended in its application to the A.C.T. by Ordinances of the Territory (A.C.T.) s.556A(1); s.556B(1)
Criminal Law (Conditional Release of Offenders) Ordinance, 1971 (N.T.) s.4(1); s.5(1)
Crimes Act, 1914-1973 (Cth) s.19B

For a comparison of these provisions see I. Potas *The Legal Basis of Probation* (Australian Institute of Criminology, Canberra, 1976), at p.18 ff.

19. *Cobiac v. Liddy* (1969) 43 A.L.J.R. 257 at 264 per Windeyer J.

20. See, for example, New South Wales Bureau of Crime Statistics and Research, *op. cit.*, p.10.

21. *ibid.*, p.23

22. Published in 1962. Although this was a United Kingdom Committee looking at the English position, it is submitted that the considerations listed are equally applicable to Australian courts.

23. See Sir Rupert Cross, *The English Sentencing System* (2nd edn, Butterworths, London, 1975), p.21. The author also refers to and quotes Article 7.01 of the American Law Institute's Model Penal Code, entitled Criteria for Withholding Sentence of Imprisonment and for Placing Defendant on Probation.

24. See American Bar Association, *Standards Relating to Probation* (1970), p.10.

25. For further discussion of the relationship of probation to imprisonment, see M.B. Hoare, C.R. Bevan and W.D. Simpson, 'Alternatives to Imprisonment and Progressive Variations in Current Practice', *Australian and New Zealand Journal of Criminology* (1972), p.15.

26. See D.G.T. Williams, 'Suspended Sentence at Common Law', (1963) *Public Law* 441 and also F. Rinaldi, *Suspended Sentences in Australia* (Australian National University Law School, Canberra, 1973).

27. Broadly, first offender legislation refers to the power of the courts to impose that form of sentence on 'first offenders' only.

28. *Criminal Code* (Qld) s.656, *Criminal Code* (W.A.) s.669(1)(b).

29. M. Daunton-Fear, *Sentencing in Western Australia*, (in press).

30. See *Criminal Code* (Tas.) s.386 *Offenders Probation and Parole Act* 1913-1971 (S.A.) s.4 and *Crimes Ordinance* 1971 (A.C.T.) s.556B.

31. (1974) 8 S.A.S.R. 465.

32. See *Offenders Probation Act* 1913-1971 (S.A.) s.9(4)(b).

33. (1973) 6 S.A.S.R. 298.

34. *ibid.*, at 301.

35. From: Annual Report 1969-70 S.A. Adult Probation Service; Annual Reports 1970-71 to 1972-73 of the Comptroller of Prisons and Chief Probation Officer; Annual Report 1973-74 Director, Department of Correctional Services.

36. Criminal Code s.19(7) and s.656(2A) repealed by Act No.41 of 1971.
37. See *Parole Act 1975* (Tas.) and *Parole Ordinance 1976* (A.C.T.).
38. See *Parole Act 1975* (Tas.) s.16 and *Parole Ordinance 1976* (A.C.T.) s.7(2).
39. Rinaldi, *Suspended Sentences in Australia*, *op. cit.*, at pp.71-72.
40. Although there is power to remand offenders for various reasons, for example, to obtain pre-sentence reports etc., such power is not intended as a means of deferring consideration of the sentence itself.
41. See *R. v. Griffiths* (1975) 1 N.S.W.L.R. 229 at p.232.
42. Although the concept of detention centres was founded on the British prototype, the latter did not permit detainees to perform community service. However, for a brief description of the New Zealand scheme see R. Te Punga, 'Periodic Detention' in *Proceedings of the Seventh National Conference of the Australian Crime Prevention and After-Care Council* (1973) at p.G1.
43. See the findings of one commentator with respect to community work orders: S. Varne, 'Saturday Work: A Real Alternative', *Australian and New Zealand Journal of Criminology* (June 1976).
44. See *Periodic Detention of Prisoners Act 1970* (N.S.W.) s.2.
45. *ibid.*, s.3. It is anticipated that the legislation will be amended soon to allow women to participate in the scheme.
46. Annual Report of the Department of Corrective Services for the year ended 30 June 1975 at p.42.
47. See M.S. Dewdney, *Periodic Detention in N.S.W. 1973 - A Statistical Report* (N.S.W. Department of Corrective Services, Sydney) p.1.
48. S.12(7) of the Act.
49. J.G. Mackay and M.K. Rook, 'The Work Order Scheme - An Evaluation of Tasmania's Work Order Scheme', a report to the Criminology Research Council at p.20. Also *ibid.*, at p.55 ff.
50. *ibid.*, at p.113-114.
51. *ibid.*
52. *ibid.*, p.117.
53. See Varne, *op. cit.*, at p.102. Also see N.F. Hills, 'Community Service Orders: A pseudo-alternative to imprisonment', *Alternative Criminology Journal* 3, (March-June 1976) at p.46.
54. D. Biles, 'A Proposal for Work Release of Prisoners in Victoria', *Australian and New Zealand Journal of Criminology* 3, 3, (September 1970), p.156.
55. See E. Barnett, 'Release to Work', *Proceedings of the Seventh National Conference of the Australian Crime Prevention and Correction and After-Care Council* (1973) at p.J2.
56. *ibid.*
57. *The Australian*, 20 Aug. 1976.
58. See A. Freiberg and D. Biles, *The Meaning of 'Life': A Study of Life Sentences in Australia* (Australian Institute of Criminology, Canberra, 1975).
59. *ibid.*, at pp.136-138.
60. To illustrate these systems compare the *Parole Ordinance 1976* (A.C.T.) s.7(1) with the *Offenders Probation and Parole Act* (Qld) s.32.
61. *Canberra Times*, 13 July 1976.

7 Aborigines and the Criminal Justice System

John Newton

Introduction

The basic assumption underlying the relationship between the Aboriginal population and the Australian legal system has been that Aborigines are bound to the same extent as the general community by the law of this country. To permit otherwise, it was argued, would be to inevitably impose an inferior legal status upon one section of the community.¹ However, this assumption has tended to overlook the fact that in practice two distinct legal systems have operated with respect to Aborigines since the white settlement of Australia took place.

As may be expected where two systems of law purport to govern the rights and obligations, powers and duties of people, conflict between the two is not uncommon. Unfortunately, the solution to this problem is not simple. On one hand the Australian legal structure has often been shown to be entirely inappropriate in cases involving Aborigines, and, on the other, the traditional Aboriginal law may be largely irrelevant for those Aborigines who are experiencing or have experienced changes in their traditional way of life.²

The conflict of these two legal systems in many ways reflects the conflict of culture between blacks and whites; a conflict whose source lies in the historical dealings between the two cultures:

Aborigines are the remnants of an invaded people, whose land and sources of foods have been almost entirely expropriated by the whites. Though the land and its resources were not exploited by the indigenous inhabitants in the same manner as they are now, their loss represents the deprivation of an economic asset and means the pauperisation of modern Aborigines.³

Because of increased contact with whites, conventional Aboriginal behaviour may be expected to alter. Traditional

Aboriginal law, however, has altered little to meet new problems.⁴ Similarly, there has been a marked absence of special legislative action on the part of the whites for the urbanised black population and for Aborigines who are less constrained by traditional tribal values. It is only recently that some attention has been paid to imposing penalties to the circumstances surrounding an offence committed for tribal reasons.⁵

The conflicts arising from the simultaneous operation of two distinct legal systems are unlikely to be resolved by the exclusion of either system in favour of the general application of the other. A brief examination of some aspects of the ways in which the white system of criminal justice has operated with respect to blacks may suggest reforms intended to overcome some of the problems stemming from such conflicts.

Problems of communication

Difficulties of communication are often encountered in cases involving Aborigines in any role within the Australian criminal justice system. Many Aborigines are able to speak English sufficiently to be understood in general conversation. However in a court room, technical terms and legal constructions are encountered which are not comprehended by some. In the report of the Laverton Royal Commission, numerous examples are given of problems with the evidence of Aborigines.

Dates: Terms of reference involving dates are unlikely to be known or remembered by Aboriginal witnesses. It is likely that if a certain emphasis in the mention of a date by counsel is detected by a witness, that date will be accepted as being relevant.

Time of day: If an Aboriginal witness is unfamiliar with clock reckoning it is useful to relate a question concerning the time of day to periods of time, such as after dark or morning. A comparison of the time in question with that of the time of giving evidence may also assist in establishing this point.

Family members: In the case of witnesses with adequate comprehension of English, 'family' will often be understood as comprising spouse, children and parents. In the context of Aboriginal

culture, the term 'family' has a wider connotation and Aborigines with a limited knowledge of English may tend to include members of their 'family' who are more distantly related than is usually considered relevant in Australian usage.

How many: The term 'how many' is virtually meaningless to some Aborigines when used in isolation. Clear comparisons should be used to elicit approximations of numbers.

More than: The use of such expressions as 'more than one', 'more than three', etc., may not be a suitable method of indicating a total number when addressing an Aboriginal witness. Approximations of numbers in comparison, for example, to the number of people present in the court room at the time may be a more suitable way of establishing this fact.

Alternatives: If a series of questions or a series of alternatives is put at the one time, an Aboriginal witness is likely to confine his reply to that part which concludes the interrogatory without including in his answer consideration of any other part of the series.

Relative age; Such terms as 'young man', 'old man', etc., may refer in Aboriginal society to social and ceremonial progress or status. It is possible that a 40 year old man could be referred to as a 'child' if he has not been initiated. Relative age is not simply a matter of chronological age as it often is in Australian society. Again, a comparison of the age of a witness with that of another person present at the time may be the best form of elucidation.⁶

Such problems of communication are attempted to be met by the Aboriginal Legal Service which provides Aboriginal and Islander staff members to help clients to communicate with their solicitors.

The problem of communication may, indeed, extend more deeply than language difficulties. Many Aborigines may not have the knowledge to be able to refer a problem to the Legal Service or, particularly if in police custody, may be too shy or afraid to ask to be referred to the service. It is the task of Aboriginal field officers to be constantly visiting police stations and courts and mixing in Aboriginal communities so that, if at all possible, any

Aborigine who may need legal representation or advice has every opportunity to receive it.

The importance of this role is emphasised by the following remarks of an Aborigine with respect to the language problem:

Aboriginal people are severely limited in their understanding of English. Court language is very hard to understand, and most of the people don't understand the charges against them. Sometimes it is hard even for the interpreter to understand or to put in the Aboriginal language. The same problem applies in the police station. This lack of understanding of what is going on leads to considerable fear.⁷

The problem of alcohol

The incidence of crime among Aborigines has been shown to be greatly influenced by the consumption of alcohol. One report indicates that in the Northern Territory, where the Aboriginal population is the highest in Australia, 75 per cent of all prisoners are gaoled for public drunkenness and the percentage is even greater when persons who have been convicted of drink-related offences are included.⁸ However, there is no evidence to indicate that the relationship of drunkenness to other offences is any more marked for Aborigines than for others who, for any reason, are particularly addicted to the use of alcohol.⁹ Nor is there any solid evidence that excessive drinking is more prevalent among Aborigines than in the general Australian population.¹⁰

It has been suggested that one significant reason for many Aborigines' abuse of alcohol has been the long-standing restrictions on Aboriginal drinking. Indeed, it has been in only comparatively recent times that Aborigines have obtained the right to drink, even in areas other than Aboriginal institutions and reserves. Table 1 shows the dates on which legislation in four States was introduced to remove prohibitions on Aboriginal drinking. Despite the introduction of such legislation, prohibitions on Aboriginal drinking remained in respect of reserves and Aboriginal institutions.

In attempting to account for the high rate of convictions of Aboriginal defendants for liquor offences Dr Eggleston has suggested that the figures do not represent an accurate reflection of the incidence of heavy drinking among Aborigines and that the conviction rate depends considerably upon other factors, including police harassment.¹¹

Table 1¹²

Removal of prohibitions on Aboriginal drinking

New South Wales	March 1963	Aborigines Protection (Amendment) Act.
Queensland	1965	The Aborigines' and Torres Strait Islanders' Affairs Act. Note: the 1966 Regulations made the Act effective.
South Australia	1965 Note: a progressive removal of prohibition occurred.	Last restrictions removed by an Executive Council Proclamation which withdrew prohibitions imposed under ss.172, 173 of the South Australian Licensing Act.
Western Australia	1964 Note: a progressive removal of prohibition occurred.	Western Australian Licensing Act, ss.150, 151 made the supplying or receiving of liquor an offence for Aborigines in proclaimed areas. Successive proclamations deleted proclaimed areas.

The wide discrepancy in the figures for Western Australia between the number of persons charged with the two offences of 'native receiving liquor' and 'supplying liquor to native', and the marked contrast between police enthusiasm for enforcing the liquor legislation against Aborigines and their lack of enforcement of other sections of the Licensing Act, both tend to support this contention.¹³

Regardless of the reasons for the dominant part played by alcohol in the incidence of Aboriginal crime, the courts are continually faced with the problem of considering the relationship between crime and the consumption of liquor by Aborigines.

There are, broadly, two discernible approaches by the courts to this matter. The first is exemplified by the case of *Lovegrove*¹⁴, where a married woman was forcibly dragged at night into some bushes by the defendant, a 28 year old Aborigine. The victim was grasped around the throat and raped. The Northern Territory Supreme Court sentenced the defendant to imprisonment with

hard labour for four years and eight months and stated that:

Your counsel tells me, and this I must accept, that you are addicted to liquor, that you habitually drink during most of your spare time and that you have to some extent been brutalised by your roving type of life and by the necessity of depending entirely on your own resources. I accept the fact that you would not have committed this crime but for the effect of the liquor you consumed but I am afraid that the law would cease to be a protection to the public if this was regarded as an excuse rather than an explanation.

The second type of approach by the courts to the problem of Aboriginal crime and alcohol is illustrated in the case of *Lee*¹⁵, where the defendant was sentenced for attempting to murder his tribal wife after having consumed a quantity of liquor. The judgment of Forster J. contained this passage:

I regard the over-use of alcohol as being much more the mitigating circumstances in the case of Aboriginal people than in the case of white people: for two reasons, one, of course, is that until comparatively recently in (Aboriginal) history (they) had no experience of intoxicants at all. And secondly, I think that Aboriginal people are often led out of despair into drinking.

This apparent willingness by some judges to recognise the sadly disadvantaged social and domestic background of some Aboriginal defendants finds expression in the minority judgment of the Chief Justice of South Australia in the case of *Kiltie*.¹⁶ There the defendant was a full-blood Aborigine aged 19, of retarded intelligence, who had pleaded guilty to a charge of attempted rape. The facts of the case showed that he has used a considerable degree of violence in his attempt to rape a nursing sister at an outback hospital, and that the consumption of alcohol played no small part in the commission of the offence. Although the trial judge and two of the judges of the appellate court considered that the nature of the defendant's crime and the necessity to protect women in remote areas justified a sentence of five years' imprisonment, the South Australian Chief Justice was prepared to look beyond these factors and to consider what allowance should be made in view of the defendant's background and retarded intelligence. Bray C.J. stated that:

If the community has failed to make proper provision for the care and oversight of people like the applicant it is not for the criminal law to attempt to fill the gap. To do so confuses the functions of a gaol and an

asylum, and of a judge and a psychiatrist. Imprisonment in gaol is a punishment in itself and one which the applicant, by reason of his race and temperament, may be expected to feel severely.

At present, only a minority of the members of the judiciary and magistracy share the approach of Bray C.J. and Forster J. discussed above. It may be expected, however, that courts will increasingly accept more readily a sentencing role that involves an examination of subjective factors relating to the social background of a defendant.

The relationship between police and Aborigines

The relationship between police and Aborigines is of major importance in considering the functioning of the criminal justice system with respect to Aborigines. One reason for the significance of police contact with Aborigines is the multiplicity of functions which police officers are required to perform as representatives of the legal system. In many cases the duties of prosecutor, process server, bailiff, gaoler and clerk of the court are performed by police, thus ensuring frequent and prolonged contact with many Aborigines. Furthermore, the conflicting requirements of these various functions are capable at times of leading to abuse and injustice.¹⁷

In examining the relationship between the police and Aborigines one factor that is immediately apparent is the paucity of Aboriginal members of the police forces. Very few Aborigines are employed in the police forces on any basis other than that of casual employees. The annual report of the Chief Commissioner of the Victoria Police for 1959 recorded that one Aborigine was employed permanently as a tracker by the Victoria Police.

Until recently in South Australia and Western Australia local requirements for trackers determined the extent of Aboriginal service for the police. The *Melbourne Herald* of 26 June 1968 reported that an Aboriginal police cadet who graduated to the South Australian Police Force in 1968 was in fact the first Aboriginal police cadet in Australia.¹⁸

The segregation of police and Aborigines in terms of the administration of justice is reinforced by the fact that police officers in country towns are likely to reside and mix socially among white citizens rather than among the blacks, who, generally

speaking, endure a much lower social and economic status than the white population.¹⁹

It is important to realise that despite the various factors that tend to separate the roles of police and Aborigine in the criminal justice system, it is incorrect to assume the existence of a unified police attitude towards Aboriginal people or, indeed, a similar regard towards police by Aborigines. As will be seen later, some police recognise on an informal basis in instituting proceedings, that tribal custom may, in certain circumstances, act as a mitigating factor.

However, evidence exists which reveals a general police attitude towards Aborigines which is based on prejudice. Dr Eggleston has concluded, following extensive research, that:

Many policemen tend to generalise about the Aborigines as a group and to ascribe to its members inferior standards of intelligence, morality and behaviour. They are prejudiced against the race. 'Prejudice' here is used in the sense defined by Simpson and Vinger (1965:10): 'a rigid emotional attitude towards a human group.' Prejudice involves prejudgment and misjudgment of the members of a supposed human group. This attitude appeared to be more common amongst police in country and outback towns than in the cities.²⁰

In a case study of Aborigines in Western Australia, the uniform low social and political status, low educational achievement and low income of Aborigines in Australian society, has been compared with the much broader spectrum of status, education and income covered by the non-Aboriginal section of the community.

Socio-cultural economic and personality factors may well be important components of any explanation of deviant behaviour. But my study of the process of law enforcement and administration of justice has convinced me that the expectations of Aboriginal behaviour held by agents of law enforcement and administration of justice are actually instrumental in bringing about the so-called 'criminal behaviour' exhibited by those Aborigines who are eventually convicted of criminal offences.²¹

In the report of the Laverton Royal Commission²², a number of recommendations were made designed to overcome the problems of separation of the police and Aborigines in police work and the resulting police attitude of prejudice towards blacks. The first of these recommendations was that the appointment of Aborigines in the police force and as police aides should be effected as a matter of urgency. The advantages of such a move

were seen by the Commission as lessening discriminatory practices and fostering racial harmony.

It was also recommended that a unit be established within the police department capable of giving expert and intensive instruction in Aboriginal society and culture as well as in the economic and social problems that Aborigines commonly face. Such a unit was seen as being used not only for instruction in the course of training cadets but also in instructing officers in the field.

The Commission specifically recommended that suitably qualified Aborigines should participate in any training programs that may be introduced in the police department and that Aboriginal advisers should be part of a small committee established to advise the Commissioner on all aspects of the training program. Joint discussions between police officers and Aborigines were seen by the Commission as likely to produce among police officers a better understanding of the life of the Aboriginal population and its problems as well as producing among Aboriginal organisations and people an understanding of the functions and problems of police officers.²³

The West Australian newspaper of 8 September 1975 reported that the first group of eight Aboriginal police aides had completed their training in July of that year and had all been appointed to the Kimberleys. According to the Minister for Police, the aides had been accepted by both the black and the white communities.²⁴ To this extent, then, the recommendations of the Laverton report have been accepted and have resulted in beneficial change in police staffing.

If the expectations of Aboriginal behaviour held by police officers can be modified by measures such as those recommended in the report of the Laverton Royal Commission, some lessening of general prejudice towards Aborigines by police may result.

So far, this section has been primarily concerned with looking at the attitudes of police to Aborigines. Before leaving this general topic of the relationship between the two groups, some attention should be paid to the attitudes of Aborigines towards police.

Again, the attitudes of individual Aborigines towards police vary, and most Aborigines are well able to distinguish between police officers who have treated them fairly and those who have harassed them. This factor is illustrated by a comparison of Aboriginal behaviour in two situations, one involving respect and trust

for police, the other expressing resentment against the police generally.

The first example involves an Aboriginal woman who, having killed her husband and having taken an overdose of sleeping tablets, proceeded to the local police station, with a note requesting the police to care for her children. The second example is seen in the incidence of Aboriginal assaults on police. This may be interpreted as indicating a widespread degree of hostility towards police. However care must be taken not to ignore the possibility that the available figures indicate Aboriginal liability to assault charges generally, rather than a more specific aggression directed principally at police officers.²⁵

Tribal law and custom in the Australian criminal justice system

The conflict between tribal law and Australian law:

... arises because Australian law enforcement agencies (police and courts) assert jurisdiction over actions by Aborigines which constitute crimes under Australian law but which are not considered as such by tribal law, in fact, they may even be the legitimate actions of Aboriginal law enforcement agencies.²⁶

Although the general policy of the criminal law in Australia has traditionally been opposed to the granting of any formal recognition of tribal law²⁷, there have been a number of cases where the existence of tribal customs has been responsible for mitigating sentence.

Tribal custom has operated as a factor in mitigation of sentence in two classes of case. First, it may be treated as a mitigating circumstance that the defendant has acted in accordance with the custom of the tribe in performing the act upon which the criminal charge is based. Second, mitigation may be founded upon the defendant's ability to demonstrate to the court that his action would result in pay-back or disapproval on the part of his own community.

In each class of case it is the tribal community's attitude which is the relevant factor in considering mitigation. On one hand, the community has demanded or at least encouraged the conduct which has led to the criminal charge being laid. On the other hand, the community has condemned or disapproved of the defendant's action.²⁸

Courts have not been the sole agency in the criminal justice system to extend informal recognition to the mitigating effect of tribal custom. The various police forces have exercised discretion in commencing prosecution in cases where tribal law has been involved, as for example in cases of assault committed in the course of an initiation ceremony. The policy of informal recognition of tribal custom in such cases may partly be due to the difficulties involved in obtaining sufficient evidence on which to base a prosecution, and may partly result from the view held by some police that insufficient recognition of tribal law is granted by Australian law and courts.²⁹

The difficulties facing judges and magistrates in cases where tribal law or custom is involved are many. If the court accepts that tribal law may have been a factor in the commission of an offence, it is then necessary to establish precisely what that particular tribal law is.

This is a practical problem but one which is difficult to solve. There is no code of tribal law and no recognised method for the courts to obtain anthropological information from experts. There is a lack of qualified interpreters to assist where Aboriginal defendants or witnesses do not speak fluent English. There may be a desire for secrecy on the part of Aborigines. Finally, there is a lack of official sanction for the research, which must limit the extent to which it can be pursued.³⁰

Clearly it is unjust to subject to criminal punishment in white courts an Aboriginal defendant who is ignorant of white law and who acts in accordance with the requirements of his own tribal law. Even where some knowledge of white law may be presumed in respect of an Aboriginal defendant who acts according to tribal law, it may be equally unjust to ignore his legal responsibility under his own law. Despite such apparent injustice, arguments resisting the recognition of tribal law abound.

Dr Eggleston has referred to several of these arguments which are purportedly based on the interests of society. First, there is the desire to deter the Aboriginal people from adhering to customs considered undesirable by the general community, thereby utilising the educative functions of the criminal law. Second, there is the view that to recognise more than one legal system in the Australian community would be divisive. Third, there is the desire to protect the white community from crimes committed by Aborigines.³¹

Despite a general acknowledgement of the limitation on recognition of tribal law based upon the perceived need to accord ultimate credence to the principles of natural justice or morality, the advantages of accommodating tribal law and custom in the criminal justice system with respect to Aborigines are compelling. In fact it has been persuasively argued that a separate system of tribal courts should be established to help overcome the problems of Aborigines currently subjected to a legal system that is often inappropriate to their needs. In this regard it is argued that no matter what accommodations are made by the centralist system with regard to indigenous law, the metaphysical viewpoints of the two societies are too removed from each other to enable comfortable adoption by one or the other. In such a situation the result may well be confrontation on the part of those who experience the inappropriate remedies of the system.³²

The outcome of criminal proceedings against Aborigines

A number of studies have shown that the conviction rate for Aborigines is higher than for white defendants, and conversely that white defendants are either acquitted or have the charges dismissed in a higher proportion of cases than Aboriginal defendants.³³ Furthermore, Aborigines are subjected to imprisonment proportionately more often than are whites.

The New South Wales Bureau of Crime Statistics and Research has recently compared penalties imposed in country communities with substantial Aboriginal populations with those imposed in other country towns and in Sydney in respect of five different offence categories.³⁴ In all categories the proportion of cases resulting in imprisonment in Aboriginal towns exceeded that in other country areas and in Sydney. The results of this survey were as follows:

Offensive behaviour: A defendant in an Aboriginal town was seven times more likely to receive a prison sentence than defendants in other country towns and six times more likely to receive a prison sentence than his counterpart in Sydney.

Unseemly words: Here, the imposition of a prison sentence was four times more likely in Aboriginal towns than in other country areas and seven times more likely than in Sydney.

Common assault: Here, the defendants in Aboriginal towns were respectively three and four times more likely to receive a prison sentence than those in other country areas and in Sydney.

Vagrancy: Ninety per cent of defendants in Aboriginal towns convicted of vagrancy received prison sentences, while the figures for other country areas and for Sydney were 70 per cent and 40 per cent respectively.

Drunkenness: For this offence a fine with a period of 24 or 48 hours imprisonment in default was ordered in other country areas nine times more frequently than in Sydney and was thirty four times more frequently used by courts in Aboriginal towns than in Sydney.

This disproportionate subjection of Aboriginal defendants to sentences of imprisonment is starkly illustrated by reference to Western Australia, where, at the beginning of this decade Aboriginal males comprised in excess of 30 per cent of that State's prison population although representing only three per cent of the total population. Female Aborigines comprised over 80 per cent of the imprisoned female population.³⁵

The position in South Australia reveals a similar degree of discrimination against Aborigines in that disproportionately large numbers are sentenced to periods of imprisonment.

The number of Aborigines in South Australia is estimated at approximately 9,100, which means that they comprise less than one per cent of the total State population. In 1968-69 Aborigines (males and females) comprised approximately 25 per cent of all admissions to prisons in South Australia.³⁶

It is important to realise that the fact that there are large and increasing numbers of Aborigines who are being imprisoned does not necessarily mean that a high proportion of the Aboriginal population is prone to committing serious criminal offences. Many cases that result in the imprisonment of Aborigines involve offences that may be considered trivial, such as drunkenness, the use of indecent language, or having insufficient means of support.³⁷ The same offences committed by whites are less likely to result in orders of imprisonment. Furthermore, it has been suggested that the high incidence of cases involving imprisonment

of Aboriginal defendants may be particularly due to the fact that a small number of offenders are reimprisoned on several occasions during a year.

Of the 223 adult Aborigines who were in gaol (in Adelaide) at some time during the period from 1 July 1962 to 1 July 1965, sixteen had each served more than ten sentences in one year. The charges were drunkenness, drinking methylated spirits, begging, or disorderly conduct. The sentences varied from seven to twenty-eight days. One Aboriginal had nearly one hundred such convictions to his name.³⁸

The question may legitimately be asked whether the criminal justice system is adequately equipped to deal with such petty, prevalent Aboriginal offences, or indeed, whether it should be concerned at all with such matters.

This point arose for the consideration of the Full Court of Western Australia in three related cases: *Murphy v. Watson*; *Davidson v. Watson* and *Ward v. Watson*.³⁹ The appellants in all three cases were Aboriginal women charged with disorderly conduct who had been sentenced by justices of the peace to the maximum term of imprisonment prescribed for the offence, namely six months. The three appellants had all been under the influence of liquor at the time of the most recent offences and had screamed obscenities outside a hotel in a country centre. Such behaviour was, in the court's view, a normal manifestation of the appellants' addiction to alcohol, and none of the available sentencing options was seen as being able to lead to the cure of the three women in their alcoholism.

Because female offenders could not be made the subject of an order under legislation aimed at rehabilitating convicted inebriates, the court's sentencing options were in effect restricted to the alternatives of imprisonment or a fine. The Full Court said that:

Imprisonment may commend itself to some on the ground that during the period of custody the appellant will not have access to alcohol – the 'drying-out' approach – and also that during that period she will not be able to annoy the public by her disorderly conduct. But this . . . reflects a very superficial understanding of the case, and one consequence of its acceptance must be faced, it being that . . . upon release from custody (she) will immediately offend again, and in the same way, so that if a custodial sentence is thought to be right, she will spend her life in gaol with, as the conveyancers say, weekly or monthly rests according to the terms of imprisonment. That is, we think, too high a price to pay to

protect the ears of the public from hearing obscenities and it leads us to conclude that a custodial sentence in a prison or a gaol as distinct from an institution within which treatment can be obtained, is not appropriate. This leaves the fine. To fine such a person in an amount within her means to pay may not be thought to be a very constructive thing to do. For ourselves, we are sure that it is not but it is a penalty which the law prescribes and judges and magistrates must administer the law as best they can, whatever their personal views about its effectiveness might be and within the range of the available sentences or penalties . . . and in cases such as these, a fine is, we think, the only penalty which should be imposed. Each case is a tip of a deep and serious social problem, the solution to which must be found outside the criminal law. In the meantime the law as presently equipped can make no useful, that is to say constructive contribution towards the solution of individual cases.

All of the three appeals were accordingly upheld, the custodial sentences in all cases were set aside and fines of \$10 substituted. The frank statements by the Full Court in these cases clearly indicate one direction in which the criminal law may move to meet this type of problem.

Aboriginal legal services

The greatest single problem facing the legal services established to assist Aborigines is that most of the black population has little or no confidence in the entire Australian legal system, including the legal profession. Magistrates, prosecutors and even defence lawyers are regarded as merely arms of the police.⁴⁰

The development of legal assistance schemes generally stemmed from an increasing awareness that although, in principle, all people were equal before the law, in practice the availability of justice was reserved only for the economically favoured. Access to the Australian criminal justice system is not adequate in itself to protect the rights, person and property of the Aborigine. As mentioned previously in this chapter, the legal system which prevails in Australia has evolved over many centuries in coordination with social, political and economic systems designed to regulate a European society. In many respects such a system is totally inappropriate to the needs of Aborigines and their reluctance to become part of that system must be viewed in this light.

A further problem in providing legal assistance to Aborigines is the inadequacy of schemes that do not involve Aboriginal

participation to cater for the needs of black clients. One employee of the Queensland Aborigines and Torres Strait Islanders Legal Service has illustrated the fear and suspicion of a potential Aboriginal client at the moment of contact with a legal assistance scheme designed for white clients:

Picture the problems of a barefooted Aborigine who lives in a shanty visiting the lush, carpeted office of a city lawyer entirely staffed by well groomed Europeans. The Aborigine, if he has not already fled, is then led in to meet a highly educated and articulate professional who is accustomed to dealing with clients whose every standards are worlds apart from the Aborigine. The difference between the two is so vast that any significant communication between the two would be highly unlikely, particularly in view of a fairly widespread lack of proficiency in English amongst Aborigines.⁴¹

By providing Aboriginal and Islander staff members to assist orientation and communication, the Aboriginal legal services are able to achieve much where other legal assistance schemes have failed. Aboriginal field officers are continually visiting police stations and courts as well as mixing in Aboriginal communities to ensure that as far as possible Aboriginal people are given the necessary assistance to protect their rights under the law. It is important for the clients to see members of their own race employed in, and often controlling, the Aboriginal Legal Service, as this indicates that there is a place for them within that service.

One significant advantage enjoyed by the Aboriginal Legal Service in comparison with their counterparts in the white community is the economical scale of operations of the former, mainly achieved through the provision of free legal aid to all Aborigines rather than only to those who qualify under a means test. It is true that a very high percentage of Aborigines would pass the means test applied by such services as the Australian Legal Aid Office, but by having a separate service for Aborigines and by not applying the means test, considerable saving of costs in administration charges can be made.

The effectiveness of the Aboriginal Legal Service cannot be measured simply by reference to the number of cases which end either in acquittal or the dismissal of the charges. Social as well as legal goals are legitimate aims of such services and merely by defending cases which previously involved pleas of guilty, the

service can focus on some of the problems relating to Aboriginal defendants and witnesses.

The Victorian Aboriginal Legal Service Cooperative Limited has established a legal service half-way house which is able to offer accommodation and to help provide employment and any necessary medical treatment to offenders who are released by courts instead of being imprisoned.

Those who are released from prison after having served a sentence are also enabled to survive without recourse to further criminal activity through the services offered by the half-way house. Here again the legal service staffed by Aborigines has demonstrated its ability to meet the social as well as the legal needs of its clients.

In her report to the annual general meeting of the service, the Matron of the half-way house pointed out that on a number of occasions the centre had been approached by police officers seeking accommodation for persons who but for this alternative would have been charged and convicted.⁴² The underlying lesson from this is that legal representation alone, regardless of how effective or successful, can never be a solution in itself for the basic social and economic inequalities that face Aboriginal people.

1. F. Gale, 'Urban Aborigines', *Aborigines in Australian Society*, vol.8, (A.N.U. Press, Canberra, 1972), p.13.

2. *ibid.*, p.13.

3. E. Eggleston, 'Fear, Favour or Affection — Aborigines and the Criminal Law in Victoria, South Australia and Western Australia' *Aborigines in Australian Society*, vol.13, (A.N.U. Press, Canberra, 1976), p.10.

4. D.J. Meggitt, *Desert People* (Angus and Robertson, 1974), p.254.

5. F. Gale, *op. cit.*, p.223.

6. *Report of the Laverton Royal Commission, 1975-76*, Appendix B6, notes concerning giving of evidence by Aborigines, pp.242-245.

7. G. Nettheim, (ed.), *Aborigines, Human Rights and the Law* (Australia and New Zealand Book Company, 1974), p.47.

8. M.W. Daunton-Fear & A. Freiberg, "' Gum Tree " Justice: Aborigines and the Courts', in D. Chappell & P.R. Wilson (eds), *The Australian Criminal Justice System* (2nd edn, Butterworths, 1977), p.73.

9. C.D. Rowley, 'Outcasts in White Australia: Aboriginal Policy and Practice (II)', *Aborigines in Australian Society*, vol.6, (A.N.U. Press, Canberra, 1971), p.357.

10. E. Eggleston, *op. cit.*, p.214.

11. E. Eggleston, *op. cit.*, p.215.

12. C.D. Rowley, *op. cit.*, p.358.
13. *ibid.*, p.215.
14. Unreported decision of the Northern Territory Supreme Court, S.C.C. no.99 of 1974 cited in J.E. Newton, *Factors Affecting Sentencing Decisions in Rape Cases* (Australian Institute of Criminology, Canberra, 1976), p.17.
15. Unreported decision of the Northern Territory Supreme Court S.C.C. no.221 of 1974 cited in M.W. Daunton-Fear & A. Freiberg, *op. cit.*, p.74.
16. Unreported decision of the South Australia Court of Criminal Appeal no.31 of 1974.
17. E. Eggleston, *op. cit.*, p.17.
18. *ibid.*, p.20.
19. D. Biles, 'Aborigines and Prisons: A South Australian Study', *Australian and New Zealand Journal of Criminology* (December 1973), p.246. 'Aboriginal people in South Australia and in all other mainland States, are typically socially under-privileged and economically deprived. The reasons for this lie deep in Australia's history and their general conditions have not been significantly improved by measures taken in recent years by State and Federal governments and numerous private organisations.'
20. E. Eggleston, *op. cit.*, p.18.
21. D. Parker, *Social Agents as Generator of Crime. Case Study: Aborigines in Western Australia, 1973*, p.5.
22. Laverton Report, *op. cit.*, p.11.
23. *ibid.*, p.208.
24. *The West Australian*, 8 September 1975: 'Ten Aborigines will be added to West Australia's new police aide force.
'The Minister for Police, Mr O'Connor said yesterday that the aides would start training as soon as possible.
'Some would be appointed to towns and Aboriginal communities in the Murchison. Others would go to the Kimberleys.'
25. E. Eggleston, *op. cit.*, p.20.
26. *ibid.*, p.283.
27. *ibid.*, p.284.
28. M.W. Daunton-Fear & A. Freiberg, *op. cit.*, p.64.
29. E. Eggleston, *op. cit.*, p.288.
30. *ibid.*, p.298.
31. *ibid.*, p.300.
32. M.W. Daunton-Fear & A. Freiberg, *op. cit.*, p.89.
33. E. Eggleston, *op. cit.*, p.170.
34. *Minor Offences - City and Country*, Statistical Report 18, published by the New South Wales Bureau of Crime Statistics and Research. The report notes that: 'As yet data has not been collected on the penalties imposed on Aborigines compared with other groups of offenders. The most direct and satisfactory method of examining this issue would involve establishing the "nationality" of each defendant. It is hoped that such data will shortly be collected.
'Meanwhile, a useful interim measure involves comparison between penalties imposed in those country communities with substantial Aboriginal popul-

ations and those imposed in communities which have not. However, as we have already seen, penalties for minor offences are generally more severe in the country than in the city. Therefore, it is more appropriate to compare the penalties imposed in "Aboriginal" communities with those imposed in other country towns as well as Sydney (inner-Sydney and suburban courts)'.

35. Davies, A.F., and Encel, S. (eds), *Australian Society: A Sociological Introduction*, 2nd edn, p.409.

36. D. Biles, *op. cit.*, p.246.

37. F. Gale, *op. cit.*, p.227.

38. *ibid.*, p.228.

39. Unreported Decisions of the Western Australia Full Court, nos.26, 28 and 29 of 1974.

40. G. Nettheim, *op. cit.*, p.62.

41. Author unknown, *Autonomy of Legal Services* (paper prepared to explain the existence of Aboriginal Legal Services), p.5.

42. Victorian Aboriginal Legal Service Co-operative Ltd, 1975 Annual General Meeting, Report by Matron M.A. Berg.

8 Current Criminological Research

David Biles

The study of criminology as an academic discipline has only become possible in a few Australian universities over the past 20 years, and consequently criminological research, which was initially almost exclusively carried out by university teachers, is in its infancy in Australia.

The field has expanded considerably in recent years, however, with the establishment of the New South Wales Bureau of Crime Statistics and Research in 1972 and the Australian Institute of Criminology and the Criminology Research Council in 1973. The Criminology Research Council is of particular significance to the subject matter of this chapter as it has provided funds for a wide range of research projects undertaken by universities, government departments, private organisations and individuals. This chapter presents an overview of criminological research recently completed or currently being undertaken in Australia. No attempt is made to provide a fully comprehensive coverage.¹ Rather, it is intended to illustrate the work being done by citing examples of research projects of particular interest or significance.

It is first necessary, however, to define the field being reviewed, and, as discussed in Chapter 1, it is suggested that criminological research may be described as research into the definition and measurement of criminal behaviour and the functioning and effectiveness of crime prevention programs and the law enforcement, court and correctional systems. Put more simply, this means the study of crime and the community's reaction to it.

Even if these long or short definitions of criminological research are accepted, and some differences of opinion are to be expected, it is also necessary to define what is meant by 'research'.

No one would want to exclude large-scale studies of juvenile delinquents, armed robberies or prison populations, but it is

doubtful whether the administrative tasks of preparing statistics for annual reports of police or prisons administrations should be included within the concept of criminological research.

Similarly doubtful would be law reform activities, important though they are; the preparation of literature reviews; and the routine, even though scientific, investigation of criminal offences.

Clearly, no firm boundaries can be drawn, but, in general, the position adopted here is one which suggests that research aims at adding to the body of knowledge available in the world rather than the solving of particular problems. Thus it is the ends rather than the means which determine whether or not a particular activity should be described as research.

Another approach to the definitional problem is to clarify the range of topics covered by criminological research and set the maximum limits for inclusion. This has been done by the Criminology Research Council which has adopted as a guide the classification system shown in Table 1.

However this approach needs to be supplemented by a consideration of the purposes of the research and an analysis of the type of project to be undertaken. Indeed, it would be possible to extend Table 1 by adding a second dimension indicating the method to be adopted for each project. For example, research projects may be descriptive/comparative (and it is suggested that much research of this type needs to be done in Australia), experimental, evaluative or based on simulation or model building. Projects may also make use of prediction techniques, futuristic projections or may be more theoretical and speculative than empirical.

Most of the criminological research undertaken in Australia is descriptive or comparative and therefore relatively unsophisticated, but much of it serves a useful purpose in that it highlights trends and problems needing attention.

In some research, use is made of the fact that the eight jurisdictions in Australia may be compared, as was done in Chapter 2, and to a lesser extent in Chapters 3, 5 and 7. This approach may lead to the formulation of hypotheses which stimulate further inquiry.

For the organisation of this chapter, the classification of research projects shown in Table 1 will not be followed as it is too complex for this purpose, nor will any attempt be made to classify projects in terms of type or style.

Table 1 **Classification system for research projects as used by the Criminology Research Council**

- | | |
|---|--|
| <p>1. Community attitudes
 1.1. Seriousness of offences
 1.2. Opportunity for crime
 1.3. Victim survey
 1.4. Offender survey</p> <p>2. Criminal law
 2.1. General
 2.1.1. comparative
 2.2. Specific offences
 2.2.1. comparative</p> <p>3. Criminal behaviour
 3.1. General
 3.1.1. adults/total
 3.1.2. juveniles
 3.1.3. females
 3.1.4. migrants
 3.1.5. Aborigines
 3.2. Specific offences
 3.2.1. adults/total
 3.2.2. juveniles
 3.2.3. females
 3.2.4. migrants
 3.2.5. Aborigines
 3.3. Prediction
 3.4. Crime prevention
 3.5. Theories of criminality
 3.5.1. general
 3.5.2. psychological
 3.5.3. sociological
 3.6. Criminogenic factors
 3.6.1. alcohol
 3.6.2. drugs
 3.6.3. motor vehicles</p> | <p>4. Police
 4.1. Administration
 4.2. Operations
 4.3. Selection, training
 4.4. Criminalistics (forensic science)</p> <p>5. Courts
 5.1. Procedure, evidence
 5.2. Sentencing</p> <p>6. Corrections
 6.1. Non-custodial
 6.1.1. adults/total
 6.1.2. juveniles
 6.1.3. females
 6.1.4. migrants
 6.1.5. Aborigines
 6.2. Semi-custodial
 6.2.1. adults/total
 6.2.2. juveniles
 6.2.3. females
 6.2.4. migrants
 6.2.5. Aborigines
 6.3. Custodial
 6.3.1. adults/total
 6.3.2. juveniles
 6.3.3. females
 6.3.4. migrants
 6.3.5. Aborigines
 6.4. After-care</p> |
|---|--|

Current and recently completed research will be reviewed under the five sub-headings of: the incidence and opportunity of crime; juvenile delinquency; police research; the law and the courts; and correctional institutions.

The incidence and opportunity for crime

The major need in this area, which has been widely discussed for a number of years, is the development of a national system of uniform crime statistics for Australia. The achievement of this goal is more an administrative task than it is research, but it has profound consequences for research in many areas. It is only possible, for example, to assess the impact of primary crime prevention programs if accurate data are available on the incidence of crime. Some data are, of course, available, and these have been considered in Chapter 2, but they exclude such important offences as larceny and arson as well as all minor offences.

The Australian Institute of Criminology is required by section 5 of the *Criminology Research Act 1971-73* 'to give advice in relation to the compilation of statistics relating to crime', but it is the Australian Bureau of Statistics which is responsible for the collection and publication of statistics. The Institute and the Bureau thus work together in this field, and from 1974 to 1976 have called a number of meetings of expert representatives of police, prison administrators and child welfare authorities. The Bureau of Statistics has also conducted a 'user survey', the results of which will clarify the precise needs of research workers as far as statistics of crime and criminal justice are concerned.

The results of this survey are not available at the time of writing, but it is clear that many research projects require accurate statistics which indicate the operation of criminal justice systems (that is, police, courts and corrections) more than they require statistics of the incidence of reported crime.

Greater progress has been made in the areas of criminal justice statistics than has been made with crime statistics themselves, as was illustrated earlier in this book. For example, in Chapter 2 it was only possible to present data on serious crime until the year 1973, but in Chapter 5 statistics of Australia's prison populations were presented up until July 1976. The prison figures are available because all prison administrators in the country are cooperating with the Institute of Criminology to forward monthly returns to the Institute, thus enabling the precise plotting of changes and trends in these statistics. The Institute has also initiated a system whereby child welfare administrators provide monthly returns indicating the numbers of children and young persons held in correctional residential care in each jurisdiction.

Research into the incidence of crime in Australia has also been conducted by the Bureau of Statistics in the form of a victimisation survey. This survey, the results of which are not yet available, was conducted in early 1975. It sought to determine by the use of confidential interviews the extent to which victims of criminal behaviour did not report offences to the police. The survey also asked the victims to indicate the reasons for non-reporting where this was applicable.

Victimisation surveys of this type may be used to calculate the 'reportability rates' for each type of offence and are an extremely useful adjunct to the official published statistics on offences reported or becoming known to the police. A great deal of work of this type has been conducted in the United States of America, but to date the only victimisation surveys completed in Australia are those of Congalton and Najman² and Wilson and Brown.³ These surveys however were comparatively limited in scope, and it is anticipated that the larger survey conducted by the Australian Bureau of Statistics will provide more valuable information when the results are published.

One other research project which is highly relevant to the opportunity for crime rather than its incidence is that currently being conducted by Associate Professor R. Harding and Associate Professor G. Hawkins into gun ownership in Australia.

The report of the pilot stage of this project has been published⁴, and when the final results are available they should provide a useful basis on which the debate about firearms control legislation could be conducted. Experience in the United States of America has clearly shown that where the total number of firearms in the community is high, the dangers of death or serious injury through the accidental or deliberate use of firearms are also similarly high, and therefore there is considerable value in having precise knowledge of the level of gun ownership in the community.

A further major research project of significance to the incidence and opportunity for crime is that being conducted in Tasmania by Dr E. Cunningham Dax on multi-problem families. In this research project Dr Dax and his colleagues have located a small number of families which have accumulated extremely high records of criminal behaviour, imprisonment and dependence on social welfare agencies.⁵ The study has also analysed the

total expenditure on these families and the results suggest that, at least in these cases, intensive preventive work by social workers and welfare officers would prove to be less costly than the repeated costs of court appearances and imprisonment.

A particularly important research project, which could either be mentioned in this section or the following one, was that conducted by Dr T. Vinson and Mr R. Homel in the New South Wales city of Newcastle.⁶ In this research, the authors identified the neighbourhoods or 'minor-suburbs' which have abnormally high rates of medical and social problems as well as high delinquency rates. They also show that positive correlations exist between the rates of mental hospital admissions, unemployment, truancy, divorce/separation, school exemption, use of social agencies, prematurity, perinatal mortality, notifiable disease and delinquency.

From this research they have planned a program of intervention 'which involves conceptualising the neighbourhood as "client" and treating it as a social entity with its own functional requirements'. They have since extended this research to the whole of New South Wales⁷, and it is possible that the techniques used could be applied in the future to the challenging task of crime prediction.

Juvenile delinquency

The general problem of juvenile delinquency probably has wider appeal than any other area of criminology and hence has prompted a comparatively large volume of research. Much of this has occurred in the last five or 10 years and even though mostly descriptive in nature, some evaluative and experimental work is being undertaken.

Possibly the foremost Australian researcher in the field of delinquency in Australia is Dr John Kraus of the New South Wales Department of Youth and Community Affairs and he has published many of his findings in the *Australian and New Zealand Journal of Criminology* and the *British Journal of Criminology*. The reader's attention is drawn to these publications.⁸ It is of some interest to note that Dr Kraus is the only researcher in Australia to date who has calculated recidivism rates for different types of young offenders subjected to different types of treatment.

Considerable work on juvenile delinquency has also been conducted by the Criminology Department of the University of Melbourne, the staff of which started collecting information from the Victorian Children's Courts in the late 1960s. This initial work resulted in some publications in educational journals⁹ which described the pattern of offences committed by juveniles, their family backgrounds and educational status.

This work showed, for example, that larceny, breaking and entering and motor vehicle theft accounted for over 55 per cent of all cases and that care and protection applications accounted for a further 21 per cent. Offences involving physical violence comprised only a small minority of the total. This research also demonstrated that educational under-achievement, the type of school attended, truancy and the age of leaving school were all highly correlated with delinquency. It was found however that broken homes were not especially relevant to the incidence of delinquency as the overwhelming majority of children appearing before the courts were living at home with their two natural parents.

This early work conducted at the University of Melbourne was later extended and refined by Dennis Challinger, with particular reference to the geographical distribution of delinquency.¹⁰ Challinger found that juvenile offenders in the Melbourne metropolitan area were predominantly located in the rapidly developing new suburbs to the north and north-east of the city, but that when the numbers of juvenile offenders were seen as rates per thousand young persons in each suburb, the rates were highest in the inner suburbs, thus confirming the earlier American work of Shaw and McKay.¹¹

Another interesting study of delinquency has been conducted in South Australia by Adam Jamrozik and this comprised a detailed analysis of delinquency rates over the period 1954 to 1971.¹² This study showed that the number of offences reported against property had increased 3.18 times and even when adjusted for population increase the rise was 2.2 times. It was also found that less serious offences had apparently increased at the highest rates, whereas some of the very serious offences such as robbery had actually decreased over this time.

This South Australian study is especially valuable as it indi-

cates the difficulties of drawing conclusions from officially recorded data and the author offers a number of possible explanations for his findings in which the validity of the basic data is seriously challenged.

In 1973 the Criminology Research Council made grants to three States for parallel studies of delinquency or juvenile crime. These studies, in Queensland, Victoria and South Australia, were intended to provide comparisons between these jurisdictions and also to offer a basis for the uniform collection of delinquency statistics throughout Australia. These ambitious aims were not fulfilled but useful information was nevertheless gathered.

The report of the South Australian research¹³ confirmed the well known facts of the influence of socio-economic class, mobility, poor school achievement and truancy, and the Victorian report¹⁴ included an analysis of the increasing significance of police warnings as an alternative to appearance before Children's Courts. This study also indicated that juvenile offenders generally came from families that were considerably larger than average and thus confirmed an earlier research finding on this subject.¹⁵ This work has shown that not only are juvenile offenders very likely to be members of large families but also that the middle children are significantly more at risk than are the first or last children in these families.

The Queensland survey funded by the Criminology Research Council is still underway and is not strictly comparable to the completed South Australian and Victorian projects. The Queensland research is based on the intensive interviewing of a comparatively small sample of juvenile offenders and their families and has thus not attempted the large analyses which were the bases of the other surveys.

This project is of particular interest, however, as it looks behind the statistics to the reality of the lives of the children who are in trouble with the law and how they and their families cope. Information on health, diet, levels of communication and emotional stability of the children and their families is included and, when this project is completed, it will undoubtedly provide a solid basis for the planning of delinquency prevention and correction programs.

The West Australian Department for Community Welfare has for some time maintained an active research program and much of

this research has been conducted in the Nyandi Treatment and Research Centre for Adolescents under the direction of the former superintendent, Mr R. Sanson-Fisher. Using behaviourist principles, Mr Sanson-Fisher and his colleagues have endeavoured to measure all aspects of the behaviour of delinquent girls and their relationships with the staff. This research has resulted in detailed training programs for institutional staff working with young offenders.

Another recent research development by the West Australian Department for Community Welfare is the evaluation of a community based program of delinquency prevention. The treatment offered is known as the SOFTLY program, the word being derived from Social Options For Teenagers Like You, and consists of 10-week courses of discussion and activities arranged by the teenagers themselves with the aid of an adult facilitator. The research which is now being undertaken aims to assess whether or not this program is effective in reducing delinquency. It is designed to compare matched groups of adolescents who are equally risk prone and for only half of whom the program is offered. This and the earlier Nyandi studies have been funded by the Criminology Research Council.

Police research

All police forces in Australia have a planning and research unit, and some forces have more than one unit with research responsibility. Many of the tasks undertaken by these units are of primarily administrative or management concern, but others have a wider orientation and are focused on the incidence of criminal behaviour and appropriate methods of dealing with offenders.

In Victoria, for example, the Inspectorate and Future Plans unit is undertaking research on the reasons for police resignations, methods of assessment of police personnel and the court disposal of drinking drivers. Work is also being done on patrol workload analysis and the simplification of *modus operandi* documentation.

The South Australian police Systems Research Branch is also studying patrol workloads; manpower planning models; development of a crime seriousness scale and an offence coding system; a staff appraisal scheme; and an evaluation of speed detection activities.

In New South Wales, the police Research Branch has developed a number of sophisticated computer techniques, including a central warrant index, on-line crime and intelligence information, a property tracing system and various internal management procedures.

The smaller police forces in the other jurisdictions are unable to match the research sophistication outlined in the three States mentioned above, but all nevertheless devote manpower to research and planning tasks and all contribute to the recently established *Police Research Digest*, a journal designed to improve communication between the police forces with regard to research. All Australian police forces also maintain contacts with research units in American, Canadian and English police forces, all of which have undertaken very advanced projects.

The law and the courts

Whether or not it should strictly be referred to as research, some mention must be made of law reform in Australia. All States have law reform commissions or committees and in 1973 the Federal Government established the Australian Law Reform Commission under the chairmanship of Mr Justice Kirby. This body to date has published reports on complaints against police, criminal investigation, and alcohol, drugs and driving. In addition to preparing reports on the laws of the Commonwealth and Territories, the Australian Law Reform Commission produces a quarterly journal, *Reform*, which summarises the work being undertaken by all law reform bodies in Australia.

One of the better known State bodies is the Criminal Law and Penal Methods Reform Committee of South Australia which is chaired by Justice Roma Mitchell and is hence generally referred to as the Mitchell Committee. This Committee, which was established in December 1971, has produced three major reports: *Sentencing and Corrections*, July 1973; *Criminal Investigation*, July 1974; and *Court Procedure and Evidence*, July 1975, as well as a special report, *Rape and Other Sexual Offences*, March 1976. The Committee is currently considering its final report which will deal with the substantive criminal law. In the course of its work the Mitchell Committee, like most other law reform bodies, has undertaken a number of research projects of both a legal and

statistical nature.

One of the critical areas for research in relation to the law and the courts is that of sentencing, and to this end the Australian Institute of Criminology has devoted much of its research effort. On the initiative of Miss Mary Daunton-Fear, the Institute's legal staff have conducted detailed analyses of the reasons for sentence enunciated by Australian appeal courts in order to identify the principles that have been applied. This project is being conducted on a State by State basis. The work on Western Australia has been completed and is soon to be published¹⁶, while that for New South Wales, Queensland, Tasmania and South Australia is currently underway.

Another research project on sentencing, of a totally different style, which is currently being conducted in New South Wales, is a statistical analysis of sentences imposed on alcohol-affected drivers and drug offenders in the lower courts. This project is being conducted by Ross Homel, formerly of the New South Wales Bureau of Crime Statistics and Research, and aims to establish the extent to which various factors such as age, sex, occupation and prior record influence the sentences imposed and to reveal the interactive effects of these factors.

One matter which is undoubtedly of considerable influence on sentencing, particularly in the higher courts, is the extent to which pre-sentence reports are used. The significance of pre-sentence reports has been discussed in a number of articles¹⁷ and is currently being studied in Tasmania in a project funded by the Criminology Research Council being conducted by Mrs Catherine Warner. This project is primarily concerned with psychiatric reports and aims to assess the extent to which psychiatric advice is seen to be of assistance to the courts in determining sentences.

Another research project concerned with sentencing is one being conducted by Mr M. Farquhar, the Chairman of the Bench of Stipendiary Magistrates in New South Wales. This project aims to assess the effectiveness of an alternative disposition that the courts in that State may impose on drinking drivers. In the place of fines or prison sentences the New South Wales Government has given courts the opportunity of inviting offenders to participate in a driver re-education scheme, and the research is designed to assess its impact.

Correctional evaluation

Studies of the personalities, intelligence and family backgrounds of prisoners have been popular for many years but have generally failed to produce results of practical significance. However, surveys of prison populations have been found to be of value in the planning of new correctional facilities. Such surveys, in the form of an annual census, have been regularly conducted in Victoria and New South Wales. Also of significance in the development of new programs are studies of the history of prison systems and the Criminology Research Council has provided funds for such historical research to be conducted in New South Wales and Western Australia. These projects, however, can only be regarded as evaluative in a broad sense.

One study which is undoubtedly evaluative has been conducted in Tasmania and it aimed to assess the value of the work order scheme which operates in that State. The report of this research¹⁸ indicated that the work order scheme, as an alternative to imprisonment, had represented a very significant financial saving to the government and also had proved to be generally acceptable to the offenders themselves. The study showed, however, that work projects of a personal nature, such as working for pensioners or disabled people, were more likely to be associated with low absenteeism and high performance than were projects of an impersonal nature.

Another significant research project funded by the Criminology Research Council was a film made by Professor S.H. Lovibond of the Psychology Department, University of New South Wales. The film portrayed the results of an experiment in which three prison management styles were simulated and their effects assessed. The experiment, and the film, vividly demonstrated the practical value of humane and democratic prison management.

Another research project concerned with the internal dynamics of the prison society is currently being conducted by Frank Hayes of New South Wales and uses sociometric techniques to identify the patterns of leadership that develop in three different types of prisons. The results of this study are also likely to be of considerable significance to persons concerned with the effective management of persons in prison.

The task of providing opportunities for the rehabilitation of

offenders does not cease, of course, with the end of a prison sentence and various after-care agencies provide services and support for ex-prisoners. One prominent body in this field is the Civil Rehabilitation Committee of New South Wales and a research project assessing the value of this organisation's work has recently been completed. Another study in this field is being conducted in Victoria and aims to assess the effectiveness of a post-release hostel for young offenders being run by the Jesuit Order in Hawthorn. This project has only recently commenced and therefore will not produce results for some time.

Even though the examples given in this chapter may be taken as showing that a reasonable breadth of criminological research is currently underway in Australia, it must be pointed out that very little systematic evaluation of the effectiveness of correctional programs has been attempted. This is particularly apparent in view of the highly sophisticated projects which have been conducted on this question in the United States of America.

1. However an effort to provide such coverage is being made by the Australian Institute of Criminology through its quarterly *Information Bulletin of Australian Criminology*. The Bulletin includes sections on Current Research, Recently Completed Research, and Recent Publications.

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3. P.R. Wilson & J.W. Brown, *Crime and the Community* (University of Queensland Press, 1973).

4. R.W. Harding, 'Firearms Ownership and Accidental Misuse in Western Australia', *University of Western Australia Law Review* xii, 2, (December 1975), pp.122-138.

5. L. Davies & E. Cunningham Dax, 'The Criminal and Social Aspects of Families with a Multiplicity of Problems', *Australian and New Zealand Journal of Criminology* 7, 4, (December 1974), pp.197-213.

6. T. Vinson & R. Homel, 'Crime and Disadvantage - The Coincidence of Medical and Social Problems in an Australian City', *British Journal of Criminology* 15, 1, (1975), pp.21-31.

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8. J. Kraus, 'A Comparison of Corrective Effects of Probation and Detention on Male Juvenile Offenders', *British Journal of Criminology* 14, (1974), pp.49-62.

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J. Kraus, 'The Response of Male Juvenile Offenders to Court Caution', *Australian and New Zealand Journal of Criminology* 6, (1973), pp.75-82.

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10. D. Challinger, 'Distribution of Victorian Juvenile Offenders', *Australian and New Zealand Journal of Criminology* 4, (1971), pp.27-34.

11. C.R. Shaw & H.D. McKay, *Juvenile Delinquency in Urban Areas* (University of Chicago Press, 1969).

12. A. Jamrozik, *The Delinquent and the Law* (The Flinders University of South Australia, 1973).

13. K. Meschemberg, *Juvenile Offenders in South Australia 1972-1973* (Department for Community Welfare, 1974).

14. D. Challinger, *The Juvenile Offender in Victoria* (Criminology Department, University of Melbourne, 1974).

15. D. Biles, 'Birth Order and Delinquency', *The Australian Psychologist* 6, (1971), pp.191-195.

16. M.W. Daunton-Fear, *Sentencing in Western Australia* (University of Queensland Press, St Lucia, in press).

17. For example, A.A. Bartholomew & D.E. Lord, 'The Pre-Sentence Report: Another Look', *The Howard Journal of Penology and Crime Prevention* xiv, 2, (1975), pp.23-30; M.W. Daunton-Fear, 'Social Inquiry Reports: Comprehensive and Reliable?' *The British Journal of Criminology* 15, 2, (1975), pp.128-139.

18. J.G. Mackay & M.K. Rook, *Tasmania's Work Order Scheme* (1976).

9 The Future of Criminal Justice in Australia

David Biles and
Bruce Swanton

Introduction

'Today's problems are vastly different and more complex than those of yesterday; tomorrow's will be more so. We can prepare for change only if one has some idea, however vague, of what the future holds'.¹ The broad aim of this chapter is to speculate upon the future of criminal justice in Australia with a view to identifying issues and problems of future importance. Areas considered are: crime and the law, police, courts, and corrections. The topics presented within this framework were mainly selected because they have been commented upon elsewhere in the literature. The chapter ends with a brief summary and statement of conclusions.

Ever since the days of the old testament prophets, and perhaps even before, man has displayed a penchant to foretell the future. Among other things, knowledge concerning future outcomes is important to the possessor because it permits a degree 'of control over what otherwise would be less manageable circumstances'.² In addition to the divine inspiration of the prophets, forecasters over the years have employed an assortment of techniques and materials such as animal entrails, palmistry, astrology, tea leaves, tarot cards, crystal balls, etc. None of these approaches, which in the main are concerned with personal futures in the form of fortune telling, were successful, but during the 20th century, social scientists have developed new and more rigorous ways of looking at the future. Scientists engaged in futures research tend to emphasise alternative future states³ as opposed to the wide ranging predictions of the biblical prophets or the individualistic prognostications of the soothsayers.

So great has interest in futures and forecasting research become that a substantial body of academic work has been done on the subject. Whether it actually constitutes a new discipline or

should remain under the heading of operations research is still open to debate.⁴ The scope of the field is substantial and has already become fragmented with substantive distinctions being drawn between futurology, futures, futuribles, forecasting, and long-range prediction. Regardless of such matters, scientific interest in the future is here to stay.

Conceptualisations of the future vary from researcher to researcher according to 'a variety of parameters such as the nature of the fundamental projected factors that are considered, the humanistic qualities that are incorporated, the degree of optimism or pessimism with which the future is viewed'⁵, and so on. Despite such complexity, forecasting is intended to provide us with sufficient detail about possible future states to permit the taking of precautionary measures. It provides the necessary 'lead time' in which to prepare.

Relatively few results to date arising from what may be loosely termed 'futures' and 'forecasting' research have achieved a great deal of accuracy. Many, though, have been useful to policy-makers and planners. Complete accuracy (where such is the aim) in futures and forecasting research is possible only in an entirely static society⁶, and whatever else may be said about Australian society today, it cannot be said to be static. Thus, imperfection is common to all futures research. In dynamic societies, problems of quantifying behavioural variables inevitably produce less than desirable levels of predictive accuracy. Most researchers in the criminological field, accepting the certainty of imperfection even when employing the most rigorous of futures methodology, ease their task by relying in varying degrees, on informed speculation.⁷ For commentators, the approach is necessarily totally speculative, and this chapter is a case in point. It is, in fact, a selection of conjectural statements and musings about what we think relevant to the future of criminal justice in Australia. Accordingly, it lays no claim to be an example of futures research, but may nevertheless provoke others to adopt a more systematic approach.

Crime and the law

For the purposes of this chapter it is axiomatic that crime will always be with us.⁸ The law will thus always be with us as, in an important sense, criminal behaviour is defined by the law. If patterns and styles of crime change, we can expect to see imper-

fect reflections of that change in the law.

At the present time our criminal law is partly symbolic, that is, it is normative concerning what we should or should not do in society. In certain areas such as unlawful killing, wounding, robbery, larceny, and arson a broad societal consensus still exists concerning the prohibition of such behaviours. However, in areas where neither individuals nor society are clearly shown to suffer, for example the purchase and provision of sexual services, certain aspects of abortion, certain modes of sexual behaviour including homosexuality and nudity, and the consumption of cannabis, the same consensus does not exist. The values inherent in our criminal law concerning such matters primarily reflect Judaic-Christian morality.⁹

During a time when religious observance is declining in Australia and public tolerance of certain so-called 'victimless' crimes is growing, those laws reflecting religious ethics only as opposed to rational or empirically supported forms of social control have decreasing importance. In short, it is anticipated that the law in the future will cease to be used as an instrument for regulating religiously based public morals. One of the apparent consequences of the decrease in moral consensus in our society is an increasing polarisation of views on issues such as abortion law repeal, legalisation of gambling, extension of liquor licensing hours, uranium mining, and cannabis legalisation. Opposing arguments are often put vocally and convincingly. Not only are their respective merits difficult to assess but so also is the weight of opinion attaching to each argument. Changes in public opinion compound the difficulty of ever having the law accurately reflecting public opinion.

All Australian States and the Commonwealth either have organisations or individuals known respectively as Law Reform Commissions or Law Reform Commissioners. These bodies play an important role in maintaining the relevance of law to contemporary conditions by recommending (usually upon request of the chief law officer) areas requiring development, reform, modernisation, or simplification. Law Reform Commissions also aim to eliminate defects in the law and suggest new and more effective methods.¹⁰ As with all human organisation, some bodies are more effective than others, and some are either more successful or more fortunate than others in having their recommendations implemented. The role of such bodies in Australia is still developing

and, in some jurisdictions at least, we can expect to see them having greater influence upon the law.¹¹

With or without the influence of law reform bodies, politicians themselves, of course, can effect significant changes in the criminal law and are sometimes committed to reform by election promises. A number of important changes in the criminal law have taken place in Australia during recent years. One State, South Australia, has taken the lead in relation to several sensitive matters¹², such as abortion, homosexual behaviour and rape in marriage. Improvement of our criminal laws is also effected from time to time by important judgments and jury decisions.¹³

In addition to amending and improving old laws, an important area of legal change is the creation of new laws. A legal area that can reasonably be expected to blossom in the future is that of environmental law. In enforcement terms, environmental offences represent a wide range of behaviours involving a variety of materials or other physical phenomena. Some of these offences require considerable scientific investigative expertise while others, due primarily to ease of measurement, involve relatively little technological knowledge. An example of the former is the disposal of plutonium waste, while littering public places is an example of the latter case. Areas of environmental enforcement such as detection of radiation, gaseous emissions from vehicles and industrial plants, waste materials in natural waterways, etc., are presently undertaken by technicians and scientists. As emphasis on environmental protection grows, special enforcement bodies will be formed to regulate both private and public performance in such matters, identify offenders and place them before the courts.

The United States has had its Environmental Protection Agency for some years. On a much smaller scale the New South Wales Government has created an enforcement element in its Department of Environment, Housing, and Community Development. In areas requiring less technical expertise, such as littering and noise pollution, it seems possible that enforcement will be carried out by existing agencies. In Queensland, at the time of writing, the Noise Abatement Bill 1976 is under consideration. At an early stage in the Bill's existence it was intended that police would enforce its punitive provisions. Deeper consideration saw the responsibility assigned to local government health agencies, although powers of arrest for police remain. We may well see an

even greater increase in the enforcement role of local health inspectors and health surveyors in the radiation and pollution fields.

With the introduction of a plutonium society at some stage of the future, the question of security will pose considerable problems with respect to civil rights. A recent report estimates that by the year 2000 Britain will have a special constabulary of some 5,000 persons. Because of the dangers that may result from leaked information, a situation could well come about in which security will necessarily take precedence over democratic controls.

In attempting to achieve greater equity and balance in criminal law enforcement it seems possible that the increased investigative interest in so-called 'white collar' crime may be sustained and even broadened.¹⁴ Police company and fraud squads can be expected to expand significantly. There is a great need for more formally trained police personnel in this field, particularly accountants. However, unless police forces are prepared to pay acceptable allowances, the retention of professionally qualified personnel will remain a problem. An alternative personnel policy is for police agencies to employ qualified civilian investigative staff. This is a growing practice overseas.¹⁵ The practice is fraught with industrial problems and seems unlikely to develop further to any great extent in Australia within the next two decades.

As white collar crime has achieved an increasing degree of political interest, governments are placing greater emphasis on the enforcement activities of their Corporate Affairs Commissions. All States and Territories have either a Corporate Affairs Commissioner or a Registrar of Companies who performs similar functions. Under the uniform legislation provided by the Companies Acts and Ordinances, corporate affairs officers possess certain proactive powers in addition to their more usual reactive powers. A powerful preventive tool is thus available.

There is always the possibility that new agencies may be formed to centralise fraud and corruption investigation activities. At the time of writing, this appears to be a possibility at the federal level.¹⁶ Although the Australia Police Bill 1975 was not proceeded with, there is still enthusiasm in certain quarters for the combining of federal investigatory bodies. No doubt such moves will receive little support from the States, most of which are eternally suspicious of central government activities. However, at

the very least, more cooperation between federal and State bodies is expected in the future.

Criminals, whether professional or part-time, or whether life long or 'one-time' offenders, are no less inventive than those who abide by the criminal law. New circumstances create new opportunities. Opportunities may be exploited both legally and illegally. Accepting that we live in a dynamic society and that crime will always be with us, new and dishonest behaviours can be expected to continue. Examples are not hard to imagine. Leslie Wilkins thought about the subject in 1975 and came up with some interesting possibilities.¹⁷ Future developments in organ, limb and muscle transplants could conceivably lead to people being mugged or killed for parts of their body to be used in clandestine transplant operations. A supporting industry to maintain such activities could conceivably arise, rather in the style of traditional 'fences'. Another, and less remote, possibility relates to the demonetisation of our economy. Credit cards will almost certainly make cash largely redundant in Australia by the end of the century. The theft, forgery and uttering of such items is already a serious problem and, as money is gradually withdrawn, it will approach enormous proportions. Conversely, robberies of cash from individuals can be expected to decrease. Bullion robberies will no doubt continue.

Criminal events of an extended nature, particularly where fraud is involved, are most effectively obscured beneath a maze of complex and confusing transactions or events. Typically, attempts at confusion and obstruction will increasingly take a transnational perspective. Divided authorities, national jurisdictions, ideologies, extradition problems, and lack of supranational courts of criminal justice, all make international crime a most attractive prospect to large-scale criminal operators.¹⁸ Simple counter measures are not possible in the prevention and combatting of complex crimes. This in itself will pose greater problems of selection, training, organisation, administration and operation for enforcement agencies. International law enforcement cooperation must improve in terms of both scope and quality and forms of supranational authority and cooperation will need to grow. This latter course cannot be expected to develop universally until well into the 21st century when current global ideological conflicts will, hopefully, have largely resolved themselves.

Certain political extremists believe that social and political change can and should be effected outside the parliamentary system. Should this viewpoint gather significant support we can expect among other things, in the years ahead to see more political terrorism, that is, politically motivated acts of violence.¹⁹ Even without major acts of terrorism it is thought by some that crime in the years ahead will become more political.²⁰ There have been relatively few politically motivated criminal acts in Australia to date but, should our parliamentary system of government lose credibility beyond a critical point, the incidence can be expected to increase. In the light of overseas experience, we can expect in such circumstances kidnappings for ransom, sabotage, aircraft hijacking and even assassinations. These behaviours may be indulged in by extremists of both the left and right. They are unacceptable to the vast majority of Australians, regardless of political persuasion.

Should there be an outbreak of terrorist activity, or even reasonable apprehension of such by governments, civil authorities will be forced to adopt restrictive counter security measures. Such measures are capable of causing considerable public inconvenience and, past a certain level of tolerance, public dissatisfaction. The personal searches at Australian airports which started in 1973 (for domestic flights) received little opposition from the travelling public, but a whole battery of such measures, such as compulsory carrying of identification cards, dwelling searches without warrant, and detention without trial, could in their cumulative effect create grave public dissatisfaction and seriously impair the quality of life. But, as with nuclear security, a situation could conceivably occur in which the need for public security will override the demands of human rights.

The combatting of crime frequently requires restrictions on law abiding citizens as well as criminals. It is not always easy to determine the cut-off point in such situations when the loss of public support and sympathy outweighs gains made against criminals and criminal activity.²¹ In situations of political terrorism it is one of the aims of insurgents to provoke the authorities into counter productive levels of control. Violent outrages by terrorists or widespread public disturbances have great impact on police organisation and operations. This point will be pursued in the following section which deals with police.

With regard to traditionally motivated, individual criminal behaviour, all is not dark in the future. The rate of growth of Australia's population, in common with that of most affluent societies²², is decreasing. Indeed, at the time of writing, Australia's fertility rate is just about at replacement level. Our population figure for the year 2000 AD is projected at about 17,000,000. Migration could account for some 2,000,000 persons more, giving the nation an approximate population total of 19,000,000 at the end of the century.

This low rate of population increase is of great significance to the nation's future crime statistics. The age group 15 - 24 years is expected to peak in 1980 and decline thereafter. In 1980, it is projected that 15 - 24 year old males will constitute just over nine per cent of our entire population or 18 per cent of the male population. From then on this percentage is expected to decline until, by the year 2000, the 15 - 24 year old male element will amount to 7.7 per cent of the population or 15.39 per cent of the male population.²³ A majority of offenders (quantitatively, not necessarily qualitatively) are in the 15 - 24 year age group. This phenomenon is unlikely to change. Thus, if this age group decreases proportionately in society, we may hopefully look forward to a reduction in the rate of increase of traditional crime.

However, in relation to the more serious crime categories of homicide, serious assault, rape and fraud the impact of this population trend will, it is expected, be considerably less than in the categories of stealing, breaking, robbery and motor vehicle theft.²⁴ Additionally, the age distribution of Australia's population at the end of the century is expected to show a proportionately greater element of elderly people.²⁵ This phenomenon will also help to reduce the rate of increase in crime but it is possible that we may find more offences being committed by elderly people.²⁶ But, more significantly, the increasing proportion of old people in the community is providing a growing and profitable pool of victims for fraudsters, robbers and burglars.²⁷

Any overall reduction in the level of traditional crime that may result from the predicted changes in the population structure is likely, however, to be more than compensated for by an increase in female criminality. Some indication of changes in female crime patterns has been given in Chapter 1, and we see no reason to believe that the trend will not continue. The pattern and style of

crime in the future will be significantly different from today but the total volume is likely to be greater rather than smaller.

Police

Most police tend to think that there will be little change in their role in the future. But even slow change over a decade or two can lead to a substantial change overall. For example, the change from foot patrol in the early 1960s to the almost fully mobile general patrol system of the early 1970s was considerable.

Change at such a pace tends to be viewed not so much as change but rather as an accepted form of progression. Therefore, the police view that there will be little change seems to be rather poorly based. This unimaginative outlook of some police and others (the view is by no means confined entirely to police) possibly reflects in part the conditioning processes that occur in disciplined organisations. It may also reflect general levels of education at the rank and file level.

Nevertheless, outstanding individuals emerge from time to time who transcend the organisation and its pressures. They are, however, unable to effect change unless they achieve positions of influence. Promotion processes generally tend to screen out original and innovative minds before they achieve administrative rank. However, independently minded police officers do occasionally obtain senior positions while they are in their prime and still capable of achieving reforms. Such men, no females have yet reached senior rank, are gifted not only by virtue of their own talents but also by their ability to harness the originality and enthusiasm of others. Several such men are visible on the Australian police scene at the time of writing, and several more are on their way up the promotion ladder. Upon these men rests much of the potential for change in the police service.

Other agents of change within police forces are lateral entrants and police unions. Because most Australian police commissioners are selected from 'acceptable', serving members, the potential for substantial change or even modest innovation is not normally great. The possibility of promotion within any organisation to its highest office, while theoretically attractive, has a number of drawbacks. Lack of pension portability as well as industrial opposition make lateral movement at intermediate levels between

Australian police forces impossible. Occasionally, a senior officer moves from his parent force to assume the commissionership of another, which makes for a welcome transfusion of new methods and experiences. However such movement is not great, and does little to reduce the commitment to the status quo that prevails in most police forces. Occasionally, non-police personnel are appointed to positions of chief police officer. Not all such appointments are successful but two have been outstandingly so. We refer to Commissioner McKinna of South Australia and Chief Commissioner Porter of Victoria.²⁸ These two men are arguably the finest police commissioners Australia has produced. Both did much to bring their respective forces into the mid-twentieth century.

Generally, the appointment of outsiders is to be deprecated, despite their occasional brilliant performances, as levels of professional status and satisfaction must suffer from such appointments, to say nothing of organisational and operational deterioration where they are not successful. But at intermediate levels lateral movement seems desirable in ways that are not achievable by means of interchange.

Police unions are also agents for change within the police service. More than most other occupations, police have a deep commitment to their job. Police employees, by means of their unions and associations are able to voice their needs, wants, concerns and ideas to their administrators. The view from the top of an organisation is very different from that at the bottom. While administrators tend to take the broad, strategic view, union perspectives are usually narrower and more specific. Often, the different positions are in conflict as, for example, in the case of an administrator wishing to extend mobile patrol coverage by having one person car crews and a union insisting on a minimum of two person crews for safety purposes. On other occasions, unions can make the running in situations where administrators either cannot, or do not wish to be seen to do so.

In fact, Australian police administrators of former years, in common with many of their overseas colleagues, were completely unsuccessful in improving the financial lot of their employees. The arena has now been left completely to the unions to fight pay and allowance claims. The impact of police unions generally upon the performance of their respective forces has yet to be measured.

Despite this lack of measurement, it can be reasonably expected that unions do have, and will continue to have, considerable impact.

In realistic and fairly short-range terms, an area of high change in police operations lies in the development of a community service orientation.²⁹ Such a move seems likely to be based on some sort of a team policing model adapted to Australian requirements. Victor Cizanckas, the Chief of Police at Menlo Park, California, suggests that in the United States by the year 2000 many police forces will have changed into departments of police services.³⁰

If a service orientation model is implemented in Australia, there will be a need for higher levels of education among personnel performing such roles. Far greater levels of personal discretion would be required and a wider range of psychological and social skills would be necessarily employed by community police. They would in fact be para-professionals with the autonomy that attaches to such status. Aspirations for semi-professionalisation of police could well become reality in the full course of such a policy. Again, the impetus for such innovative approaches would emerge from enlightened individual administrators. No popular movement is expected to develop in the first instance. Police picked for the necessary pilot projects would have a heavy responsibility in bringing about the general acceptance of such measures.

As indicated at Chapter 3, not all police agree with a social service orientation. Many see themselves in the narrow role of regulators only. For them, the present police service is burdened with many unnecessary tasks. According to this viewpoint, juvenile diversion is wrong, and public relations unnecessary except where associated with regulatory functions. School lectures, search and rescue teams, public information, assistance and advisory facilities are similarly considered superfluous. The view has much to recommend it but it ignores the question: who would take up the slack left by police withdrawal from such functions?

Present police services have extremely limited resources with which to fulfil their functions and if, as was said earlier in this chapter, we see deteriorating public order in this country, then para-military police bodies will be required. If a community service orientation is implemented in future, a para-military police

role would be in direct conflict with it and would cause considerable stress for community police officers. Community police officers are integrated with the community and interdependent with it. Para-military personnel come and go, often in circumstances of violence without consideration for local communities.³¹ Even if a strictly regulatory orientation were adopted, there would be insufficient personnel to staff para-military units. If reduced to a purely regulatory role, police strength could be reduced by more than 50 per cent, thereby making it necessary for governments to consider the formation of militarised police units, possibly on the model of France's CRS or Italy's Celere Battalions. Such considerations are fraught with political difficulties and will need deep thought in the future.

Two other areas of high change involve police technology and police operations. With regard to technology, a variety of hardware is becoming available not only directly to aid police in the field but, equally importantly, to reduce reaction times in all situations. It is pleasing to note that the New South Wales and Victoria Police Departments are placing heavy emphasis on computerisation of data for such purposes. Other aids include audio-visual recorders, link radios, rotary winged aircraft, in-car digital communications, instant evidence analysers and satellite communications.³²

Regardless of whether a community or regulatory emphasis emerges in the future, or even if current roles persist, mobile patrol will remain a constant police responsibility. Indeed, patrol is the very core of police work.³³ Much of the electronic and other hardware is of direct and extreme importance to the improved efficiency of patrol operations, but it is the programming of patrol operations that is of prime importance in improving patrol performance. This realisation has been slow to develop in Australia, with the exception of South Australia. However, it is expected that considerable innovation will take place in this area during the next decade, with particular emphasis on proactive measures. Such programs, where applicable, will need to be coordinated with community police and crime control activities. Changing patterns of mobility and behaviour will require great flexibility in future patrol programming and a willingness to change according to circumstances. It is probably this last attitude more than any other that will distinguish the police officer of the 21st century.

The courts

There is probably less likelihood of dramatic changes taking place in the operation of the criminal courts than there is in police and correctional administration. The court procedures followed in Australia today evolved very slowly over many years and are therefore unlikely to change quickly in the future. Some trends may be detected, however, and these may be expected to continue.

In the first place, there is increasing interest in the provision of special training for judges and magistrates. This is most commonly in the form of conferences, but greater use of more specialised sentencing seminars may be expected in the future. In these, judges and magistrates, either individually or in small groups, are asked to 'sentence' cases presented to them in the form of either case histories or videotaped simulations of court appearances. Differences in the 'sentences' imposed are then discussed with a view to reaching a consensus as to what is most appropriate in each case.

Another development which may be extended is the increasing accessibility of courts to the public. This is best illustrated by the provision in some jurisdictions of so-called 'night courts' which allow defendants and witnesses to appear without having to take time off work. In the civil jurisdiction, a similar development is the establishment of small-claims courts. Related to this is the increasing tendency for the jurisdiction of Magistrates' Courts to be increased by reducing the number of indictable offences that are triable only by a judge and jury. This change is necessary to reduce the high costs of jury trials and is also more convenient to accused persons as long delays are avoided.

The possibility of the jury system being abolished has been canvassed from time to time but we see this as a most unlikely development. It is possible, however, that juries of 12 will be retained for Supreme Courts and that juries of six will be introduced for intermediate courts. It is also likely that majority verdicts (ten out of twelve, or five out of six) will be more widely acceptable in the future.

A highly contentious matter that is likely to be increasingly challenged in the future is the right of accused persons to remain silent in court. The right to silence has a long history but the frustration it causes to police and prosecutors, especially when the

number of acquittals is high, is likely to result in strong pressure for the right to be waived or at least modified so that juries may draw their own conclusions about the reasons why accused persons choose not to speak in their own defence. It is not probable, but the debate surrounding this issue may bring our adversary system under challenge with demands for an inquisitorial system which is solely aimed at seeking the truth.

A factor that will lengthen rather than reduce the time taken with court cases is the increasing availability of legal representation. This has been largely brought about by the establishment of the Australian Legal Aid Office in 1974 and the Aboriginal Legal Service in 1970 which supplement the work of various aid schemes which operate at the State level. With the large numbers of lawyers graduating from universities, it is predictable that in the near future no person in Australia will, as a matter of choice, face an imprisonable charge without legal representation.

A possible area of development which will in the future be of great significance to the operation of the courts is related to the concept of 'diversion'. It is predicted that increasing numbers of accused persons will be diverted from the criminal justice system by the establishment of procedures that are alternatives to formal court appearance. These alternatives are already to some extent available to juvenile offenders, in the form of official warnings or appearance before juvenile aid panels, but similar developments for adult offenders are predicted for the future. It has been commonly found in the past that philosophies and practices developed for the handling of juvenile offenders have later been adapted for use with adults.

The types of diversionary programs that may be developed for juveniles are outlined in a working paper of the Law Reform Commission of Canada in 1975³⁴, but this paper has been trenchantly criticised for recommending practices which might have the effect of limiting the legal rights of the child.³⁵ In particular, it is argued that there is a danger that innocent young people may be induced to agree to undertake treatment or counselling in order to avoid a court appearance, even though they have not committed any offence. This danger would be less apparent with adults, but in either case pre-court diversionary programs represent an increase in the discretion of police, probation officers and social workers, with some possibility of abuse. The pressure of court

work, however, is likely to lead to the extension of these programs in the future.

Possibly, the most important likely development in Australian court systems will be an increased range of sentencing options that will be available. Wider use of non-custodial and semi-custodial measures is to be expected, but there may also be innovation in the form of increasing use of restitution paid by offenders to victims and also, perhaps, the development of 'contracts' which require the offender to perform a service which is particularly suited to the victim's needs. In these ways, the victims of crime may be expected in the future to play a more positive role in court hearings than has been the case in the past.

Quite possibly, courts in the future will be required to exercise some degree of control over correctional practices resulting from the sentences they have imposed. This prediction is based on the supposition that offenders sentenced to both institutional and non-institutional programs will demand a greater say in the operation of these programs and that many aspects of the treatment to which they are subjected are currently controlled by correctional officials in the exercise of their discretion. Thus, potential conflict exists and the courts are likely to be required to arbitrate. Matters such as the type of work to be done by offenders sentenced to community service orders, the appropriateness of psychiatric or other treatment, and many aspects of prison regimes are likely to be raised in the courts in the future. In some cases the courts may even require progress reports on offenders in order to ensure that sentences imposed are being carried into effect. The concept of a 'right to treatment' for offenders is likely to be widely debated in the near future.

Corrections

The most likely and important development in correctional practice in the future is the continued decrease in the total number of persons in prison. As has been shown earlier, Australia in late 1976 had a daily average of just over 8,500 persons in prison at any one time. In the next 20 to 30 years it is possible that this figure could fall to as low as 2,000 or 3,000 and this will be largely brought about by the increasing development of altern-

atives to imprisonment and the realisation that imprisonment has failed to reform criminal offenders.

These alternatives will probably take the form of non-residential, and therefore non-custodial, penalties such as the Tasmanian work order scheme and the Victorian attendance centre program. Different styles of probation may also be expected whereby intensive supervision is offered to selected offenders by specially trained probation officers. Probation in the future is likely to be more legalistic and control-oriented than it is today with less emphasis being placed on welfare or therapy. Further developments are also predicted in the use of work release, not only for long-term prisoners nearing the end of their sentences, but also for short-term offenders who have been imprisoned due to their failure to comply with the conditions of non-custodial orders that have been previously imposed by the courts.

If prisons cannot rehabilitate offenders to any significant extent they can at least punish and isolate them.³⁶ Imprisonment will ultimately be utilised as a means of insulating society from intractable offenders. It seems that this ultimate sanction will always be with us. As Professor J.Q. Wilson of Harvard University has succinctly commented:

... some persons will shun crime even if we do nothing to deter them, while others will seek it out even if we do everything to reform them. Wicked people exist. Nothing avails except to set them apart from innocent people. And many people, neither wicked nor innocent, but watchful, dissembling, and calculating of their opportunities, ponder our reaction to wickedness as a cue to what they might profitably do.³⁷

The beginnings of further development in correctional practice can also be seen in the proposal that prisoners be allowed to vote in all elections. The legal status of persons serving any type of sentence is likely to be clarified so that they are not deprived of any civil rights apart from those which are inherent in the actual sentence. Thus, legal representation of prisoners appearing before judicial and administrative tribunals may be expected as a right in the future and this may have profound consequences for the administration of parole systems. If prisoners seeking parole may obtain legal assistance to argue their cases before parole boards, they may also demand the right to appeal against adverse decisions to independent judicial authorities. If this development takes place, and parole boards become an adjunct to the formal court

structure, the administrative nature of parole board decision-making will become quasi-judicial. The next step would be for parole to be determined solely by the courts in a manner recommended by the first report of the Mitchell Committee.³⁸

Summary and conclusions

This chapter began with a brief outline of the general nature, advantages, and problems of futures research, after which the writers indicated their intention to rely on speculation for their purposes.

The relationship, albeit imperfect, between crime and the criminal law was mentioned, and reference was made to the Judaic-Christian moral legacy inherent in our criminal law. It was suggested the criminal law will eventually cease to be the guardian of the public's morals.

Various agents for legal change were noted, including Law Reform Commissions, public opinion, and politicians. The effect of appeal judgments and jury decisions were mentioned. Difficulties caused by problems of assessing public opinion in relation to the creation of responsive criminal laws in the normal process of government were also noted.

Reference was made to future trends in crime. A major crime growth area is undoubtedly fraud, a crime category which easily lends itself to international applications. The fairly rapid demonetisation of our economy creates a further favourable environment for fraud. The rate of growth of certain crime categories can be expected to decrease after 1980, due to the projected lower incidence of 15–24 year olds. Another important crime category of the future was thought to be politically motivated violence. This category is of particular importance because of its possible adverse impact on civil rights. Another area of future concern is the growing proportion of elderly people in the community. They are particularly vulnerable to criminal violence and exploitation generally.

The police area was one which was considered due for moderately high change. Broad trends in police operations are likely to be either towards increased community service or regulatory orientations. Both courses have much to recommend them but in either case, any substantial future public violence will require the formation of militarised police units.

It was thought that the most powerful agents for change within the police service would be independent and originally minded persons who manage to achieve policy-level rank. Unions were thought to have a lesser but nevertheless important part to play in achieving change. In the short-term, the greatest changes to police will occur in the areas where technological advances, particularly in the communications field, may be utilised. Communications are closely linked with patrol, which is probably the area of greatest future innovation.

The courts are less change-oriented than the police and the potential for rapid or widespread change does not seem as great. However, an area the courts will necessarily become more involved with will be the administration of sentences by correctional authorities. Consistency in sentencing is another area that is exercising the minds of jurists because lack of consistency is likely to result in a lowering of respect for the total court system. This realisation may represent a necessary impetus for court reform, and one possible area of reform is the abolition or modification of the right for an accused to remain silent. Debate on this issue may even challenge the adversary basis of our court system.

With recognition of the fact that prison fails to rehabilitate, we may anticipate fewer persons being gaoled in the future. This will be associated with an increasing development of alternatives to imprisonment. If such a situation develops, prisons will be used almost exclusively for the punishment and isolation of prisoners. At the same time, there may be an effort to involve prisoners more in their obligation as citizens, for example, by giving them the right to vote. Such measures may well extend to the provision of counsel before parole boards, and making parole boards part of the judicial structure.

Overall, the future of criminal justice in Australia appears to be dynamic but not radical. Crime and the law will reflect changing social, political, and economic circumstances. Police will develop greater technical expertise and response capacity, and their organisational structures will change substantially over a period of decades. Major operational innovations in the police field will most probably be in the areas of social service and patrol. Courts, corrections, and associated agencies will adjust their operations broadly in terms of lower rates of imprisonment, greater community-based sentences, and greater equity in terms of

prison conditions. Whether all these future changes will satisfy public demand is difficult to say, but one thing is certain: criminal justice will become far more complex in the future and all aspects will require far greater intellectual and financial inputs than have been the case to date.

1. Venugopal Rao, 'Police Futurology', *Indian Police Journal* 22, 1, (July - September 1975), pp.2-3.

2. K.F. Schuessler, 'Prediction', in D.L. Sills (ed.), *International Encyclopedia of the Social Sciences* 11 & 12, (Macmillan, New York, 1968), pp.418-425.

3. John McHale, 'Forecasting and Futures Research', *Society* 12, 5, (July - August 1975), pp.22-28.

4. See Olaf Helmer, 'Futures Orientation at the Universities', *Futures* 8, 3, (June 1976), p.21.

5. Stanley Lesse, 'Psychodynamic and Psychological Problems in Our Future Society', *American Journal of Psychotherapy* 30, 2, (April 1976), pp.206-217.

6. Bertrand de Jouvenel, *The Art of Conjecture* (Basic Books, New York, 1967).

7. See L.T. Wilkins, *Crime and Crime Control: The Next Ten Years* (Mimeographed, September 1975).

8. Richard Quinney, *The Problem of Crime* (Dodd, Mead & Co., New York, 1973), p.191.

9. For an interesting treatment of this and related matters, see L.T. Wilkins, 'Crime and Criminal Justice at the Turn of the Century', *Annals of the American Academy of Political and Social Science* 408, (July 1973) pp.13-20.

10. See s.6 *Law Reform Commission Act 1973* (Cth).

11. See Anthony Mason, 'Where Now?' *Australian Law Journal* 49, (October 1975), pp.570-576.

12. (a) Abortion: See s.3, *Criminal Law Consolidation Act Amendment Act 1969* (S.A.) (109/69), which provides that a pregnancy may be terminated if two medical practitioners are of the opinion made in good faith that continuation of a pregnancy would involve greater risk to the life of the pregnant woman or greater risk of injury to her physical or mental health than if the pregnancy were terminated. The same section also makes provision for pregnancy termination in cases where a child if born would suffer from such physical or mental abnormalities as to be seriously handicapped.

(b) Homosexual behaviour: See s.3, *Criminal Law Consolidation Act Amendment Act 1972* (S.A.) (94/72), which provides protection for certain forms of homosexual behaviour between consenting persons over the age of 21 in private.

(c) Rape in marriage: See s.4, *Criminal Law Consolidation Act Amendment Act 1976* (S.A.) (55/76), which provides *inter alia* that a person who

has sexual intercourse with another person without the consent of that person and knowing the other person does not consent is guilty of the felony of rape. Note that a wife is not excluded from the provisions of this section. This section, however, must be read in conjunction with s.12(5) of the same Act which qualifies circumstances under which rapes or indecent assaults may be committed.

13. Examples of the amelioration of the criminal law are: (a) The ruling by Mr Justice Menhennit in the Supreme Court of Victoria in *R. v. Davidson* (1969) V.R. 667-672, that an abortion is legal if there is a serious threat to the life, or physical or mental health of the woman and (b) The finding of not guilty, at the Sydney Quarter Sessions in October 1971, of three doctors, a nurse, and a property owner, who had been charged in relation to criminal abortions. The trial judge, Judge Levine, was apparently influenced by the case of *Davidson*, cited above. As a result of this case, it is claimed, more abortions are now performed in New South Wales.

14. For example, see D.W.A. Kelly, *The Criminal Investigation Branch — Its Role In: A. Investigation, B. Prosecution* (paper delivered to a seminar on corporate crime at the Institute of Criminology, University of Sydney, 21 July 1976). According to the author, New South Wales fraud squad investigations increased 250 per cent between 1974 and 1975.

15. See A.I. Schwartz, A.M. Vaughn, J.D. Waller, J.S. Wholey, *Employing Civilians for Police Work* (National Institute of Law Enforcement and Criminal Justice, Washington, D.C., 1975); M.A. Hill, 'Civilianisation in the Police Service', *Police College Magazine* 13, 1, (1974), pp.22-30.

16. See Robert Milliken, 'Civil Liberties in the Plutonium Society', *National Times*, 7 February 1970, pp.37, 39.

17. L.T. Wilkins, *The Impact of Developing Technology on Crime and its Control* (Mimeographed, October 1975).

18. William Clifford, 'New Dimensions in Criminality — National and Transnational', *Australian and New Zealand Journal of Criminology* 8, 2, (June 1975), pp.67-85.

19. See *Canberra Times*, 22 October 1976, p.1.

20. Quinney, *op. cit.*, p.191.

21. K.L. Milte, 'Terrorism and International Order', *Australian and New Zealand Journal of Criminology* 8, 2, (June 1975), pp.101-111.

22. David Biles, 'Population Movements and Crime', *Australian and New Zealand Journal of Criminology* 9, 3, (September 1976) pp.143-151.

23. Data provided by Australian Bureau of Statistics in *Population Projections: Australia 1974-2011* (Government Printer, Canberra, 1974). It is appreciated that a very complex matter has been treated with great simplicity. Those readers wishing to obtain a better understanding of the subject are referred to: Geraldine Spencer, 'Projecting Australia's Fertility', *Australian Journal of Social Issues* 9, 4, (November 1974), pp.273-284; Geraldine Spencer, 'Projecting Australia's Fertility — Postscript', *Australian Journal of Social Issues* 10, 2, (May 1975), pp.147-150; W.D. Borrie, 'Zero Population Growth: Fact or Fiction?', *Search* 7, 7, (July 1976), pp.299-306; W.D. Borrie, *First Report of the National Population Inquiry* (Government Printer, Canberra, 1975).

24. See Australian Bureau of Statistics, *Year Book Australia* (Government Printer, Canberra, 1974), pp.481-483.

25. Spencer, *op. cit.*

26. For an interesting account of the deviant behaviours of some elderly people, see Joyce Stephens, *Elderly People as Hustlers: Observations on the Free Deviant Work Situations of SRO Tenants* (Mimeographed, August, 1976).

27. See C.M. Kelley, 'Message from the Director . . .', *F.B.I. Law Enforcement Bulletin* 45, 1, (January 1976), pp.1-2.

28. Commissioner J.G. McKinna, C.B.E., D.S.O., M.V.O., E.D., K.St.J., of South Australia, 1957-72; Chief Commissioner S.H.W. Porter, C.B.E., D.S.O., M.V.O., E.D., J.P., of Victoria, 1955-63.

29. See Ellen Mintz & G.B. Sandler, 'Instituting a Full-Service Orientation to Policing', *Police Chief* 41, 6, (June 1974), pp.4-45, 48-50.

30. Victor Cizancas, *The Police Role in the Year 2000 (Pt 1)* (Center for the Study of Democratic Institutions, Santa Barbara, California, 1976). (Audiotape).

31. For example, see M.E. Cain, 'Role Conflict Among Police Juvenile Liaison Officers', *British Journal of Criminology* 8, 4, (October 1968), pp.366-382.

32. See N.C. Chamelin, V.B. Fox, P.M. Whisenand, *Introduction to Criminal Justice* (Prentice-Hall, Englewood Cliffs, N.J., 1975).

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Crime and justice are the subjects of constant debate in Australia. Almost every Australian has views that he or she is more than willing to express on such complex questions as whether or not crime is increasing, how police efficiency can be improved, how courts should operate, and how prisons could be made more effective.

But much of this debate is expressed in highly emotive terms and often without any factual basis or real understanding of how criminal justice systems work.

This book is the first serious attempt to provide the facts on crime, police, courts, and correctional practices in the six States and two Territories of Australia.

The authors — all members of the Research Division of the Australian Institute of Criminology — have combined their practical experience of police, court and correctional work with their academic training in law, psychology, sociology, and criminology to produce this readable and informative volume.

In his foreword, the then Commonwealth Attorney General, the Hon. R. J. Ellicott, Q.C. described this book as '... a well compiled, well researched, and well documented volume' that '... provides a quick and authoritative reference right across the whole range of our criminal justice system'.

While this book does not attempt to provide a solution to all of the problems of crime and justice in Australia, it does provide a means of improving the quality of debate on these subjects, and will be equally valuable to students and to concerned members of the public.

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