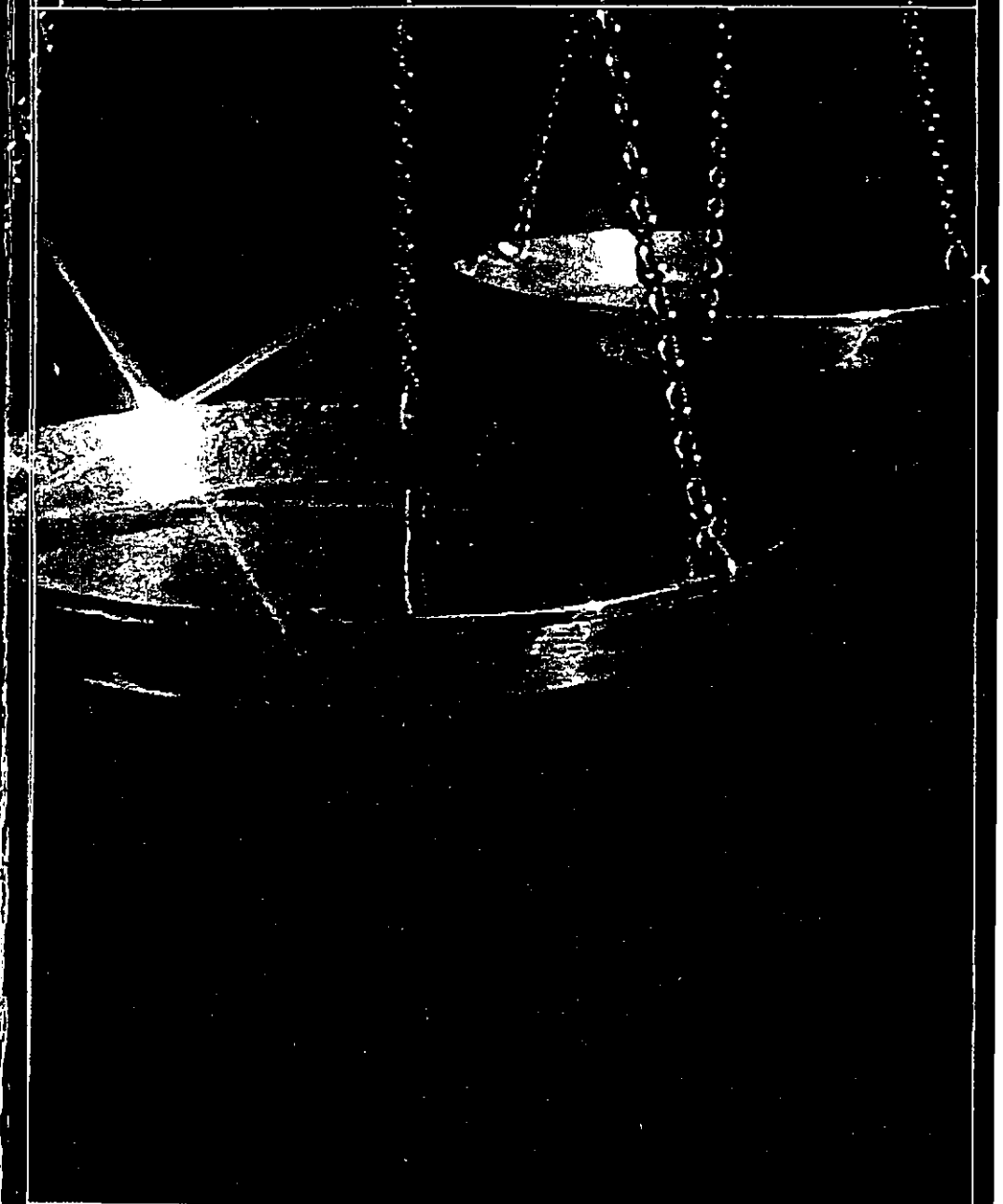
SENTENCING IN WESTERN AUSTRALIA

MARY W. DAUNTON-FEAR



University of Queensland Press in association with the Australian Institute of Criminology.

MARY W. DAUNTON-FEAR

SENTENCING IN WESTERN AUSTRALIA

Sentencing in Western Australia provides a record of reported and unreported sentencing decisions of Western Australian appellate courts between the years 1900 and 1975. The decisions are considered in relation to their statutory framework and a substantial portion of the book is devoted to a discussion of the legislative provisions on which the decisions are based.

While it is recognized that sentencing is a field in which discretion is of central significance and that precedent and discretion are uneasy bedfellows, the book is based upon the assumption that those involved in the sentencing process can only benefit from a knowledge of prior decisions that relate to like cases.

Sentencing in Western Australia, it is hoped, will provide a tool rather than a blue-print for those involved in the sentencing process and will promote discussion both in the courts and in academic circles on points that hitherto have been little canvassed.

Sentencing in Western Australia is the first volume in the series "Australian Studies in Criminology" and is published in conjunction with the Australian Institute of Criminology. The author, Mary W. Daunton-Fear, LL.B. (Tas.), LL.M. (Tas.), wrote this book whilst Head of the Legal Affairs Section of the Institute. She is currently with the Institute of Advanced Legal Studies in London.

ISBN 0 7022 1423 X

Jacket design by Ted Poulter.
Photograph by Rod Leiper. Scales from the Queensland Museum's Collection.

Sentencing in Western Australia

Sentencing in Western Australia

Mary W. Daunton-Fear

University of Queensland Press
in association with the
Australian Institute of Criminology

Typeset by Academy Press Pty. Ltd., Brisbane
Printed and bound in Hong Kong

Distributed in the United Kingdom, Europe, the Middle East, Africa, and the Caribbean by Prentice-Hall International, International Book Distributors Ltd., 66 Wood Lane End, Hemel Hempstead, Herts., England

National Library of Australia
Cataloguing-in-Publication data

Daunton-Fear, Mary W.
Sentencing in Western Australia.

(Australian studies in criminology ; 1).
Index.
ISBN 0 7022 1423 x.

1. Criminal courts – Western Australia. 2. Sentences (Criminal procedure) – Western Australia. I. Title. II. Australian Institute of Criminology. (Series).

345.941077

To my former supervisor, E.M.B., but
for whom I might never have been
interested in sentencing

Foreword

In recent years, and especially in the last decade, there has been an increasing awareness of the problems involved in sentencing an offender, and greater concern for his treatment and rehabilitation. This has been fostered by and perhaps is largely due to the studies and reports of those engaged in the field of criminology, which now finds an increasing place in our Law Schools. The establishment of the Institute of Criminology in Australia has given impetus to this trend. This Report on sentencing in Western Australia has been prepared and written by Miss Daunton-Fear in the course of her work as a senior criminologist with the Institute. It is the first study ever to have been made of sentencing problems and policies in this state and it will, without doubt, succeed in achieving the author's purpose of providing, as she says, a tool for courts, lawyers, prosecutors and public servants who are confronted with sentencing problems.

The Report has been conveniently divided into chapters relating not only to sentencing policies and factors that influence courts in their decisions in this field but also to special problems in regard to available forms of treatment, and to particular classes of people who fall to be considered, such as children, Aboriginal natives and mentally afflicted persons. Of particular interest are the Appendices, with details of the various institutions and establishments for the reception or detention of offenders, and the nature of available treatment at each place.

This is a comprehensive and learned research report, which has the added virtue of compelling interest to the reader. Its publication will earn for its author the gratitude and appreciation of the many people in this state who are directly or indirectly concerned with the problems of sentencing offenders.

L.W. JACKSON
Chief Justice of Western Australia
November 1975

Contents

Acknowledgements

From time to time, I have wondered whether this list of acknowledgements would exceed the length of the Report itself. To spare the reader, I hope that the many people to whom I am deeply indebted for professional help and personal encouragement will forgive me if the tributes I now pay them are grossly inadequate to register the degree of my gratitude.

Significantly, my first acknowledgement must be to the Chief Justice of Western Australia, Sir Lawrence Jackson, who has not only made available the materials on which much of this Report is based but has given valuable time to prepare detailed comments on the text. My thanks are also due to Mr Justice Lavan, Mr Justice Wickham, Mr Justice Burt, Mr Justice Jones, Mr Justice Wallace and Judge Heenan for their help and interest. Mr M. Murray, Chief Crown Prosecutor, has assisted me by reading the text and giving me his comments.

Most of the statistical material that is presented here has been taken from the Annual Reports of the relevant departments. I am grateful to the Director for Community Welfare, Mr Keith Maine and Mr D. Fogarty, Chairman at the Juvenile Panel, for their assistance in the preparation of Chapter 7. The Chief Probation and Parole Officer, Mr Ivan Vodanovich; the Deputy Chief, Mr Joseph George; the Senior Clinical Psychologist with the Department of Corrections, Mr Percy Boyes; and Mr Alex Bromilow of the same Department have drawn attention to the grosser errors in the drafts of Chapters 3, 4 and 5. Mr Roy Christie, Under-Secretary for Law, supplied the information concerning the *Criminal Injuries (Compensation) Act* 1970.

The late Dr Elizabeth Eggleston gave me the benefit of her views on Chapter 8, shortly before her sad and untimely death. Mr Fiori Rinaldi and Mr Stephen White, respectively Senior Lecturer in Law and Research Fellow at the Australian National University, and Mr

Brent Fisse, Senior Lecturer in Law at the University of Adelaide, have toiled through the whole Report and have given me invaluable help.

Of my colleagues at the Australian Institute of Criminology, special mention must be made of Mr Arie Freiberg, Senior Research Officer, who has assisted me continuously and conscientiously from the early stages of drafting. Mr John Vagg, Research Assistant, has undertaken the substantial task of collating the statistical material and Mr Anatole Kononewsky, Senior Research Officer, has unleashed the mighty resources of the computer to prepare the figures. Mr John Newton and Mr Ivan Potas, Senior Research Officers, have also helped me by their comments and encouragement.

Just as the first acknowledgement is significant, so also is the last. My secretary, Mrs Eileen Kreibig, has far exceeded her ordinary duties to assist me at every stage in the production of the Report. Without her, I doubt that it would have been completed.

Notwithstanding the wide support I have been given, undoubtedly there are still errors in the text. They are all mine.

Index of Cases

* Barristers' Board Library, Supreme Court Building, Perth.

Table of Statutes and Regulations made thereunder

Introduction

In this Report, an attempt is made to define the principles of sentencing as enunciated by appellate courts in Western Australia. A few decisions, in exceptional cases, are those of courts of first instance. The unreported cases on which the Report is based date from 1962 and they are drawn from a number of different sources: the writer is greatly indebted to Sir Lawrence Jackson, the Chief Justice, for making available his Sentencing Book and also that of the previous Chief Justice, Sir Albert Wolff. Other unreported decisions that were considered are among the collection maintained in the Barristers' Board Library. The reported decisions are few, but go back to 1900. Some of the cases contain principles of general application, others turn upon particular legislative provisions or particular social circumstances that exist in Western Australia. Because it is hard to divorce cases from their statutory framework, a brief analysis of the relevant legislative provisions is included, to set the context for the discussion of the decisions. Where possible, recent statistics are also included that indicate the use by the courts of their sentencing powers. Furthermore, material appears that relates to the operation of the Parole Board. The present writer felt that to exclude such material would be to distort, by over-emphasis, the significance of imprisonment as a sanction in criminal cases.

The purpose of the Report is to provide a tool for Judges, Magistrates, Justices of the Peace, Crown and Police Prosecutors and legal practitioners who are confronted by sentencing problems. Although the present writer has been tempted to include comparative materials, particularly where questions that are unresolved in Western Australia have been the subject of debate or decisions elsewhere, it is only in exceptional circumstances that reference has been made to cases from other jurisdictions. The reason for this is twofold. Firstly, there is already available a comprehensive text on English sentencing decisions, namely D.A. Thomas's *Principles of*

Sentencing.[1] Also the Australian Institute of Criminology is currently engaged upon the exercise of compiling other Reports for the Australian states and territories. When this task has been completed, it may be desirable to publish an overview of sentencing in Australia, which would evaluate different approaches to common problems. Secondly, to include decisions from other jurisdictions in the present Report would have caused a considerable extension of the material because cases can rarely be considered independently of their legislative framework. Such an extension would not only have constituted a duplication of other research but it would have reduced the visibility of the Western Australian decisions. However, it is not anticipated that those concerned with sentencing in Western Australia will confine their attention to cases from their own jurisdiction: indeed, it is far from desirable that they should do so. With the increasing mobility of offenders from one jurisdiction to another, particularly in Australia, it is becoming of growing importance that well-defined and sound principles are of wide application. State variations are not generally to be encouraged unless there are particular local conditions that merit them or they represent novel attempts to seek new remedies for social problems. For instance, one would expect that fresh principles would emerge as new measures are introduced, such as the Tasmanian Work Order Scheme.

While the primary emphasis of this Report is descriptive rather than evaluative, the present writer does not necessarily endorse the views expressed in cases upon which she has refrained from comment. Rather, she has felt it is appropriate that evaluation be deferred until comparative unreported material is available from the other states.

RIGHTS OF APPEAL

As so many principles are derived from appellate decisions, the cases can only be considered in the light of the rights of appeal against sentence. A person convicted on indictment in Western Australia has a right of appeal to the Court of Criminal Appeal, under Section 688(1) (c) of the Criminal Code against any sentence passed upon him of detention in a reformatory prison, such as sentences under Sections 661 and 662 of the Code. There is a further right of appeal by a defendant, with the leave of the Court of Criminal Appeal, against any other sentence passed on his conviction, unless the sentence is one fixed by law.[2] A probation order in Western Australia is not a sentence and in *Satchell* v. *Cross*,[3] Mr Justice Burt

held that there is no right of appeal in relation to a probation order imposed by a court of summary jurisdiction. The point is an interesting one because if the appeal had been taken to the Court of Criminal Appeal, then the definition of "sentence" as contained in Section 703 of the Code would have applied and that specifically states that a sentence "includes any order of the Court made on conviction with reference to the person convicted". However, the Judge also doubted that there could be an appeal against a probation order because of the so-called consensual nature of the order. This objection presumably still holds whatever court constitutes the appellate tribunal.

At the time of writing the present Report, Section 688(2) (d) of the Code had just been amended to allow the Crown a right of appeal "against any punishment or order imposed or made on the conviction of a person on indictment".[4] This does not restrict the Crown's right by limiting it to a sentence, nor would the Crown be precluded from appealing against a probation order on the ground that it had consented to it. It remains to be seen whether the new provision will be interpreted widely to include a Crown right of appeal in a case where the lower court has declined to make an order against a defendant who has pleaded or has been found guilty.

Section 689(3) of the Criminal Code confers on the Court of Criminal Appeal wide powers if it thinks that a different sentence should have been passed. The Court must "quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict or which may lawfully be passed for the offence of which the appellant or an accused person stands convicted (whether more or less severe) in substitution therefor as they think ought to have been passed".

It is clear from the cases that the Court of Criminal Appeal is reluctant to form the conclusion that a different sentence should have been passed at the trial. It should, of course, be observed that all of the cases were decided before the Crown had a right of appeal under the terms of the Code, and it remains to be seen whether policies in relation to Crown appeals will emerge that are similar to those that have developed where an accused person has appealed. There appears to be no reason why the Crown should not appeal against severity as well as leniency. A leading and often quoted decision on appeals by the accused against severity is *Gibbs and Jones* v. *R.*, in which Chief Justice McMillan said:

> The [Court of Criminal Appeal] is not likely to interfere with the sentence imposed by the judge at the trial, who has [had] much better op-

portunity of arriving at a just conclusion as to the nature of the sentence which the case requires than we have sitting in this court. It is not enough for us to be able to say that the sentence does seem somewhat severe, but we must come to the conclusion that there has been some mistake or some wrong principle adopted, or something which we can say renders it inequitable that the sentence should be allowed to remain.[5]

Another widely accepted authority on the same point is *Reynolds* v. *Wilkinson*. That case concerned an appeal by way of an order to review a decision of a court of summary jurisdiction, but Dwyer C.J. referred to principles of general application:

Even if members of an appellate Court have the opinion that they would have inflicted a somewhat different penalty, that is not in itself a reason for modification of the penalty inflicted. Reasons for review should be more cogent. Without suggesting that the function of the appellate Court should be limited, or that the general exercise of its power of review should be in any way restricted, I suggest that substantial grounds, beyond the dissatisfaction of an aggrieved party, must be advanced to justify the grant of an order to review sentences. Examples of cases where reconsideration by an appellate Court is called for are such as those where (1) the sentence imposed is not in accordance with the law; (2) the sentence is manifestly excessive, on account of the [triviality] of the offence actually committed, or manifestly inadequate, when regard is had to the malignity of the offender and the harm done; (3) irrelevant material has been taken into consideration in arriving at a quantum (this involving not only prohibited matter, such as records from the Children's Court, but also extrinsic matter having no connection with the crime, such as religious or political beliefs); (4) there has been a real misunderstanding of the case, either in a substantial misapprehension of the elements constituting the offence or in an evident mistake relating to the offender's previous history; (5) there has been a misapplication of principle in assessing the penalty, e.g. a consideration of the prevalence of a particular offence does not extend to making an offender a scapegoat for others who have avoided conviction; a consideration of an offender's previous record does not justify an unduly severe sentence for a very trivial offence, and so on. There are doubtless other instances which would amount to a miscarriage of justice, and call for remedial action, but where the trial Judge or Magistrate has fairly exercised his discretion his decision should not be lightly interfered with.[6]

Recently, however, there has been an interesting departure from *Gibbs and Jones* v. *R.* and *Reynolds* v. *Wilkinson*. In *Leary* v. *R.* and *Compt* v. *R.*,[7] the majority of the Court of Criminal Appeal found expressly that the sentences imposed on the applicants were not "in themselves in any way excessive", but because lower sentences had been imposed before a retrial, different sentences should have been passed on the second conviction.[8]

Although Section 689(3) gives the Court of Criminal Appeal authority to pass a more severe sentence than that imposed by the trial Judge, this power was not invoked in any of the cases considered for the purposes of the present Report, and it is indeed doubtful that similar powers in other Australian jurisdictions are frequently used.[9]

In an important article published more than a decade ago, it was observed that little attention has been given in Victoria to the statutory provisions relating to appeals against sentence.[10] For material purposes, the Victorian provisions are identical with those in Western Australia: both provide that the Full Court must quash the sentence of a lower court "if it thinks that a different sentence should have been passed."[11] The question is not whether the Judge who passed the sentence was guilty of error. The author of the article argued that in view of the terms of the statutory provision, the cases, which, in effect, say that the Full Court will only upset a sentence if the lower court has proceeded on "wrong principles", are to be regarded as containing statements of policy only. Further, a tendency to construe "manifestly excessive" as "grossly excessive" or "so excessive as to show that there must have been some error vitiating the original exercise of discretion" is to be resisted, on the ground that such a construction cannot provide even a rough working rule for the exercise of the court's discretion. The author contended that the Full Court is not invested with an appellate jurisdiction in the strict sense, but rather, the court has a general judicial discretion that permits it to accept fresh evidence as to the appropriate penalty. Even so, one of the important factors to be taken into account by the Full Court must be the decision of the Judge who passed sentence. The weight to be attached to the sentencing Judge's decision will vary with the circumstances, but where he has had the benefit of personal observation of the full circumstances surrounding the offence, his special advantage will commonly prevent the court from deciding on appeal that a different sentence should have been passed. On the other hand, there are cases where the sentencing Judge has not had a superior chance of determining the appropriate penalty in which case the weight to be attached to his decision will be less. This may arise, for example, where the defendant has pleaded guilty.[12] And in the cases where fresh evidence is admitted by the Full Court, it may be the case that the court is in a better position than the sentencing Judge to determine the appropriate penalty.

A person aggrieved about a sentence passed by a court of summary jurisdiction may have two ways in which he can challenge the

decision. Under Section 183 of the *Justices Act* 1902-1972, there is a right of appeal to a Judge at Perth by a person who has pleaded not guilty, or has not admitted the truth of the complaint made against him, but who has been summarily convicted and has been sentenced to imprisonment without the option of paying a fine. On the application of one of the parties to the appeal, the Judge in Perth may order that the appeal be made to a Judge in a Circuit District. If the appeal court so orders, or the parties agree to it, the appeal takes the form of a rehearing. Otherwise, the appeal is heard and determined on the evidence brought before the court of summary jurisdiction.[13] Enquiries indicate that Section 183 is rarely, if ever, used.

In addition to the limited right of appeal that exists in the defendant under Section 183, there may be an appeal by way of order to review under Section 197. This Section provides:

> when—
> (a) a person who feels aggrieved as complainant,[14] defendant, or otherwise by the decision of any Justices shows, or the Attorney-General shows by affidavit to a Judge sitting in Court or chambers, a *prima facie* case of error or mistake in law or fact on the part of the Justices, or that the Justices had no jurisdiction in giving the decision or exceeded their jurisdiction in giving the decision, or that the penalty or sentence imposed was, according as the person aggrieved or the Attorney-General may allege, inadequate or excessive in the circumstances of the case ... the Judge may ... grant the ... applicant ... an order calling upon the party interested in maintaining the decision ... to show cause ... why the decision should not be reviewed.

Under Section 198(1), an order to review may be returnable before the Supreme Court sitting as the Full Court or before a single Judge. However, in an extra-judicial statement at a Magistrates' Conference in Perth on 28 May 1975, the Chief Justice, Sir Lawrence Jackson, announced that it had recently been decided that all motions that appear to involve questions of principle would henceforth be referred to the Full Court.

Under Section 205, on the return of the order to review, the court has wide powers both with regard to the admissibility of fresh evidence and as to disposal of the case. It is provided that the court may admit further evidence, either oral or by affidavit. The court's powers as to the disposal include the power to discharge the order or to "confirm, vary, amend, rescind, set aside or quash the decision appealed against". The court may remit the case to the Justices for hearing or rehearing, with or without any direction in law. It is of interest to note that Section 205 gives the court authority to exercise

the powers it has with regard to *certiorari*, *mandamus*, prohibition and *habeas corpus*.[15] The Section contains an express provision that the court's powers include the power to vary, reduce or increase the penalty or sentence.

Section 2061 states that a person who appeals by way of order to review shall be taken to have abandoned any other right of appeal.

There does not appear to be a substantial difference between the views the courts are taking as to the grounds that suffice for an amendment of the sentence of a court of summary jurisdiction, following an appeal by way of order to review, and those that are considered adequate by appeal courts in relation to indictable offences.

GENERAL PRINCIPLES OF SENTENCING

Reynolds v. *Wilkinson*[16] is not only widely cited in Western Australia in relation to the proper exercise by appellate courts of their discretion to vary sentence, it is also quoted constantly concerning general principles of sentencing, particularly a passage in which the Chief Justice claimed to describe the practice of Judges and Magistrates in imposing sentence. He said they consider:

> the type of offence, the harm done, the elements of misconduct involved, the presence of deliberation, and other such circumstances; also the history and antecedents of the offender, the prevalence of like offences, and any mitigating circumstances, such as provocation, temptation, and so forth. It is therefore, improbable, and indeed undesirable, that uniform sentences will or should be imposed for similar offences.[17]

(a) Disparities in sentencing

There have been other cases since *Reynolds* v. *Wilkinson* in which the question of disparities between sentences has been raised. In *Letica* v. *Mann*, D'Arcy J. resisted the contention of the appellant's counsel that there is a need for penalties to be standardized and said: "The comparison of offences having different elements and aspects from that under review and a comparison of punishments imposed for different offences is seldom a helpful guide."[18] His Honour left no doubt that he considered each case must be considered on its own merits and he drew attention to the infinite variety of circumstances that may accompany the commission of offences. Also in *Holtom and Marriott* v. *R.*[19] the Court of Criminal Appeal, consisting of Virtue S.P.J., Nevile and Hale JJ., held that disparity of sentence and the desirability of avoiding an appearance of injustice cannot require

a court to impose a wholly inappropriate sentence for a particular crime.

If one co-offender is a juvenile, the court may well feel justified in dealing with an adult co-offender quite differently. This point was made in *Lewis* v. *R.*, where the applicant committed an indictable offence with three juveniles. The Chief Justice, with whom the other Judges concurred, said:

> it is not in my view a material consideration before a judge upon sentencing for a conviction of an indictable offence to be concerned as to what orders have been made with regard to other persons who may be implicated in the offence but who were juveniles at the time.[20]

Another factor that has been held in *Frame* v. *R.*[21] to justify a difference between co-offenders who were charged, *inter alia*, with conspiracy, was that one of them initiated the plot and enticed the other to join by the payment of money.

On the other hand, it has been stated in the Supreme Court that:

> It is recognised that when several persons are charged with offences similar in nature arising out of the same incidents, then in the absence of special circumstances, uniformity in the sentences imposed is highly desirable.[22]

Indeed, in *McIntosh* v. *Grover and Edwards*, Mr Justice Lavan cited with approval a passage contained in *Attorney-General for Western Australia and Another* v. *Williams, King and Ramsey*,[23] in which the Full Court said:

> It is in the interests of the orderly administration of criminal justice that there should not be too great a disparity, without apparent reason, in the penalties imposed on all ... offenders.

No doubt, the members of the Court of Criminal Appeal who decided *Frame* v. *R.* would maintain that the differing roles that the co-offenders played in the conspiracy amounted to an apparent and sound reason for distinguishing between them.

Thomas has examined the principles developed by the English Court of Appeal in relation to disparities in sentencing and has observed that as a general rule the sentence passed on each offender should show a proper relationship to the sentence passed on others.[24] If all relevant considerations are the same in each case, similar sentences should be passed. However, there are factors that will justify discrimination and usually these fall into one of two groups. Factors that relate to one offender and not to the other may justify discrimination between them. This category covers, for instance,

cases where one offender has a different degree of responsibility from the other for the crime that was committed. It also covers situations in which a mitigating circumstance, such as youth, exists in one offender and not in the other. The second group of factors covers cases where the character and history of one offender calls for the use of a special individualized measure. Usually, this situation arises where in the case of one offender, but not the other, the aim of rehabilitation prevails over the aim of general deterrence. In considering disparity as a ground of appeal, Thomas observed that the Court of Appeal will not usually reduce a sentence merely because a co-offender has received one that is unjustifiably low. However, in some cases, the difference may be so extreme that interference on appeal is required. This would arise in a case where the offender with the heavier sentence would be likely to suffer for the rest of his life with a justified sense of grievance over the disparity.[25]

(b) **The quantum of punishment**

There has recently been an interesting discussion in Western Australia relating to the quantum of punishment and one of the particular issues that has arisen in this context concerns the weight to be attached to prior convictions. The classic statement on quantum again comes from *Reynolds* v. *Wilkinson*, in which Chief Justice Dwyer commented:

> It may be said that it is the policy of the law that the [statutory] maxima are intended for the worst cases of the sort, and that first offenders should, in the absence of special malignity, be treated with greater leniency than others. But how far the punishment should recede from the maximum in any particular case is a matter for the discretion of the tribunal of trial, and a wide discretion is left to that tribunal.[26]

In relation to the weight to be attached to prior convictions in determining quantum, Chief Justice McMillan, in *Grayson* v. *R.*, said as long ago as 1920:

> it is not right to be guided merely by previous convictions, and if the offence for which punishment is to be awarded does not indicate a deliberate return to crime, and there are circumstances which do not show that the offence was planned beforehand, less weight is to be given to previous offences. More weight should be given to previous convictions for offences of the same character as that for which the offender is to be punished than to convictions for offences of a different character.[27]

However, in *Cameron* v. *Josey*,[28] Wickham J. said that to increase a sentence because of the defendant's bad record involves danger of

punishing him again for something for which he has been punished before and cannot be too strongly deprecated. It is best, in his Honour's view, to begin with a punishment that fits the crime, without regard to the defendant's antecedents, and only look to these to see if there are mitigating circumstances, for example, of being a first offender. Such circumstances would justify a reduction in the "just maximum", this being a sentence appropriate to the circumstances and itself being less than the statutory maximum, except in a very bad case.

In the recent decision of *Rizidis* v. *Chippington*, the Full Court had occasion to consider the views of Wickham J. in *Cameron* v. *Josey*. It was argued by the appellant's counsel that the Magistrate in the court below had taken into account the appellant's only prior conviction, which was of the same offence, namely, being in unlawful possession of cannabis, and had regarded it as aggravating. The appellant's counsel claimed that *Cameron* v. *Josey* was authority for the proposition that the Magistrate should have considered the present offence in isolation, should have decided what was the "just maximum" for that offence and then should have considered the whole matter in the light of the prior record, to see if it had an ameliorating effect.

The Full Court rejected the argument after referring to the already cited passage contained in *Grayson* v. *R*. The Full Court continued:

> the decision in *Cameron* v. *Josey* does not lay down any principle of general application in the process of arriving at a just sentence. Its importance is in emphasizing that in exercising its discretion as to sentence the Court should be careful when giving weight to the deterrent aspect of punishment, not to impose on an offender of bad character or unsatisfactory antecedents a punishment in excess of that justified by the quality of the act or omission constituting the offence, taking into account the surrounding circumstances. This can be guarded against by the sentencing authority, without any conscious effort to arrive at a "just maximum" in the case.[29]

On the particular circumstances before it, the Full Court found that the Magistrate had properly adverted to the prior conviction and that it was open to him to comment on the appellant's apparent unconcern following that conviction.

FACTORS IMMATERIAL TO PUNISHMENT

It is hardly surprising that courts have found it a good ground of appeal against sentence that the court below allowed itself to be influenced by evidence adduced on the hearing of other charges that did not involve the appellant but that arose from the same disturbance that gave rise to the appellant's charge.[30] It is perhaps even more obviously a good ground for appeal, but often difficult to prove, that the court below has allowed itself to be influenced by other cases of a much more serious nature than that against the appellant.[31] On the other hand, it is a well-established principle that prevalence of a particular offence may be an aggravating factor.[32]

An interesting argument was recently advanced in *Recica* v. *Kjellgren*. The appellant had been convicted of conducting premises as a common gaming-house, contrary to Section 86 of the *Police Act* 1892-1972 and he was sentenced to fourteen days' imprisonment by a Magistrate. The Magistrate, in his reasons for sentence, observed that the legislature had evidently regarded the offence "not lightly but as rather serious", and he expressed the view that the appellant's case constituted a very serious breach of the Section and described it as deliberate, regular, organized crime that was on a large scale and was, no doubt, profitable. One of the main arguments by the appellant's counsel was that for the past fifty years, no Magistrate had sentenced any first offender (as the appellant was) to a term of imprisonment for gaming and that the new "policy" had only been adopted since a Royal Commission on gambling had indicated the law enforcement had left something to be desired. The Full Court dismissed the appeal, saying:

> [a] pattern of sentencing in the past is a material consideration, but to be compelling it would be necessary to know that such a pattern did not reflect an approach based on circumstances no longer applicable, or otherwise erroneous as applied to the present offence.[33]

It is interesting to speculate how the courts would react to an appeal against sentence based on the ground that the police had virtually turned a blind eye to a particular offence, such as prostitution, and the public had been lulled into a sense of security that the law would never be enforced.

A further but unrelated factor that has been held to be immaterial to sentence is that there has been an increase in penalties between the time of the commission of the offence and the date of conviction. In *Richardson* v. *Brennan*,[34] it was held by Wolff C.J. that the words "whichever is the less" are to be implied at the end of the part of

Section 11 of the Criminal Code, which reads:

> If the law in force when the act or omission occurred differs from that in force at the time of the conviction, the offender cannot be punished to any greater extent than was authorised by the former law or to any greater extent than is authorised by the latter law.

THE FACTUAL BASIS OF SENTENCING

One important issue that has yet to be thoroughly explored by Western Australian courts is the relationship between the establishment of certain facts at the adjudication stage of criminal proceedings and those that exist at sentencing. Richard Fox and Bernard O'Brien, in a recent paper, have considered the Australian cases that have concerned this issue, but they observe that the courts are only gradually working out the rules.[35] The authors point to the rapidly increasing complexity of the sentencing task, which is due at least in part to the expanding range of sentences. The manner in which courts exercise their discretion depends ultimately upon their possession and use of a number of facts. Some of these facts concern the offence of which the defendant has been found or to which he has pleaded guilty. Others concern the offender himself, such as his prior convictions, allegations of his antecedent or subsequent criminality and his social, medical and psychiatric history. Facts about his personality and character are also relevant. There are further facts that are important but that defy neat categorization. These include the prevalence and nature of the particular crime of which the defendant has been convicted, facts relating to policies adopted by administrative agencies concerning parole and release from prison and facts relating to treatment facilities to which the defendant may be referred as part of his proposed sentence. Although these facts are of crucial importance to the exercise of the court's discretion, the means of establishing them are often defective. Fox and O'Brien consider a range of circumstances in which the factual basis for sentencing may be obscure. One problem arises from the interpretation of the jury's verdict. It may be the case, for instance, that the jury's verdict supports more than one hypothesis of fact. Fox and O'Brien cite manslaughter as the most difficult problem at common law, but observe that statutory offences that proscribe more than one form of behaviour under a single description also carry considerable potential for ambiguity. Similar problems arise in a situation where insufficient facts are implied in a verdict and in a situa-

tion where the defendant pleads guilty but the sentencer requires other facts concerning the crime to enable him to evaluate the defendant's culpability and assess the penalty. Facts surrounding the offender, which are relevant to sentence, may also be difficult to establish. Often the defendant lacks adequate opportunity to contest the truth of allegations relating to such matters as his prior convictions, his other criminality and his social, medical and psychiatric background.[36]

Fox and O'Brien argue persuasively that courts should acknowledge the adversarial nature of the sentencing inquiry and insist upon minimum procedural safeguards in respect of all disputed matters. These protections should resemble those that are available at the adjudicatory stage of criminal proceedings and should be in line with the *Woolmington* principle, which requires that the prosecution's case against the defendant be proved beyond reasonable doubt.

The cases considered for the purposes of the present Report include a few in which Western Australian courts have been confronted by problems of the nature discussed by Fox and O'Brien. In *Laporte* v. *R.*, the Court of Criminal Appeal said:

> Once the jury have convicted an accused person, it is solely for the judge to decide what sentence to impose. For this purpose he must form his own view of the facts, providing that he does not form a view which conflicts with the verdict. He may give such weight as he thinks proper to any recommendation the jury has made.[37]

In *Musca* v. *R.*,[38] the argument was raised by the defendant's counsel that the trial Judge had imputed to him, on sentencing him for receiving, precise knowledge of the offences of larceny and that the trial Judge had regarded this knowledge as aggravating. In the event, the Court of Criminal Appeal did not accept counsel's contention, but it seemed sympathetic to the proposition that if such knowledge had been imputed to the defendant, it would have constituted a good ground for appeal.

One of the older reported cases espouses a policy that Fox and O'Brien deprecate, but it seems unlikely that the case would now attract support from the Full Court. In *Gifford* v. *R.*,[39] the appellant argued that the trial Judge had considered a police report on his character and activities that was unfavourable to him. He contended that the report was inaccurate and that he was not given an opportunity to challenge it. Furthermore, he claimed that the trial Judge had imposed a more severe sentence than he would have done otherwise because of the contents of the report. On the hearing of the

appeal, the trial Judge was a member of the Court of Criminal Appeal and he informed the court that the report had not affected the quantum of the sentence. However, the Court of Criminal Appeal adverted to the prevailing practice of permitting the defendant to pass to the Bench written testimonials of character and found nothing untoward in allowing the Crown to submit a police report, with the intention of presenting an opposing view. The Court of Criminal Appeal said, "It is not necessary that such testimony should be given on oath and comply with strict rules of legal evidence."

Although no recent cases have concerned the accuracy of police reports, in two cases, the Court of Criminal Appeal has accepted argument by the defendants that pre-sentence reports prepared by the probation service have been unreliable.[40] In the circumstances, it seems improbable that *Gifford* v. *R.* would now be followed. However, it could be argued that the policy adopted in *Gifford* v. *R.* is authorized under Section 656 of the Code, which provides that "The Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be passed." According to the Crown Prosecutor, the practice has never been to construe Section 656 as requiring sworn or formal evidence.[41]

In Chapters 1 and 2 brief consideration is given first to the circumstances that Western Australian courts generally accept as aggravating and then to those that are regarded as mitigating. Next, in Chapters 3 to 6, individual penalties are considered and issues arising from the practice of calling for pre-sentence reports are discussed. The concluding chapters concern particular groups of defendants in respect of whom special consideration is required owing to the existence of unique cultural conditions or legislative provisions that are especially relevant to them.

NOTES

1. D.A. Thomas, *Principles of Sentencing* (London: Heinemann, 1970).
2. Criminal Code, Section 688(1)(d). The phrase "fixed by law" is not defined in the Criminal Code, but presumably it applies to the death penalty and life imprisonment when it is mandatory.
3. Unreported decision, No. 121 of 1972.
4. Letter to the present writer from the Crown Prosecutor dated 24 November 1975. The Act had not been printed at the time of writing the present Report, so detailed comment on it was not possible.

5. [1917] W.A.L.R. 12, at 16. See also *Reynolds* v. *R.* [1925] W.A.L.R. 5; *House* v. *R.* (1936) 55 C.L.R. 499, 504; *Harris* v. *R.* (1953) 90 C.L.R. 652, 655; *Giele* v. *R.* (Unreported decision of Jackson C.J., Hale and Lavan JJ.), No. 9 of 1972; and *Thompson* v. *R.* (Unreported decision of Jackson C.J., Wickham and Wallace JJ.), No. 45 of 1972.
6. [1948] W.A.L.R. 17, at 18.
7. Unreported decisions of Jackson C.J., Burt and Jones JJ., Nos. 41 and 42 of 1975.
8. See Chapter 2 of this Report.
9. F. Rinaldi, "Crown Appeals against Sentence", Penology Monograph no. 1, roneoed (Canberra: Faculty of Law, Australian National University, 1973), p. 4. See also F. Rinaldi, "The Commencement Date of Prison Sentences in Australia" (Paper read at 1975 Conference of the Australian Universities Law Schools' Association, University of New South Wales, 25-28 August 1975). Sir Lawrence Jackson advised the present writer that he could only recall one instance in Western Australia when the Court of Criminal Appeal imposed a more severe sentence than the trial Judge.
10. "Appeals against Sentence. Jurisdiction of Full Court under Crimes Act (Vic.)", *Res Judicatae* 6 (1952-4): 90-110.
11. Following the introduction of the Crown's right of appeal under the Code, the question arises as to whether, on appeals against orders, as opposed to appeals against sentences, the Court of Criminal Appeal will merely have to be satisfied that the court below should have undertaken a different course.
12. On the other hand, there have been cases where an Appeal Court has taken the view that on an order to review, a *prima facie* error must be established and that it is extremely difficult to show that such an error has been made in imposing sentence on a defendant who has pleaded guilty. In *Brennan* v. *Loxton* [1947] W.A.L.R. 95, at 96, Dwyer C.J. gave some examples of the sorts of errors that he thought would justify interference with the discretion of a Magistrate. Dwyer C.J. said:

    > I think that it must be proved that the Magistrates took into account some entirely irrelevant material (such an instance being the case quoted at the Bar, where a fine imposed on one man was calculated in its amount, because other men on other occasions had committed the same sort of offence on the same premises ...), or it must be shown that there has been some real misunderstanding of the facts of the case by the Magistrate, or that some wrong principle has been applied in the consideration of the penalty to be inflicted, or, perhaps, that the sentence imposed was so palpably excessive by reason of the triviality of the offence as, in the words quoted by counsel for the respondent, to shock the conscience. If none of these matters is present, and if in fact the sentence imposed is not the maximum, I find it difficult to appreciate the argument that there has been an error in law.

    In the same case, the Chief Justice went so far as to say that he doubted whether the order to review procedure was designed for the mitigation of sentences.
13. Section 191.
14. In *Attorney General for Western Australia and Another* v. *Williams, King and Ramsey* (Unreported decisions of Jackson C.J., Hale and Burt JJ.), Nos. 51, 52 and 53 of 1971, it was held that the Attorney General could be complainant under Section 197 as the section was drafted in 1971. However, since the decision, the section has been amended to its present form, which leaves no doubt that the Attorney General may act as complainant.
15. Rinaldi observes that orders to review were originally statutory alternatives to the prerogative remedies. See Rinaldi, *Crown Appeals against Sentence*, p. 61.

16. [1948] W.A.L.R. 17.
17. At 18-19.
18. Unreported decision of D'Arcy J., No. 38 of 1964, at 6.
19. [1970] W.A.R. 85
20. Unreported decision of Jackson C.J., Burt and Jones JJ., No. 23 of 1975, at 3.
21. Unreported decision of Lavan, Wickham and Jones JJ., No. 27 of 1974; and see also *Engel* v. *R.* (Unreported decision of Wolff C.J., Virtue and Negus JJ.) 21/7/64.
22. *McIntosh* v. *Grover and Edwards* (Unreported decision of Lavan J.), No. 83 of 1974, at 6.
23. Unreported decisions of Jackson C.J., Hale and Burt JJ., Nos. 51, 52 and 53 of 1971.
24. Thomas, *Principles of Sentencing*, pp. 64-70.
25. *R.* v. *Jeavons* [1964] Crim. L. R. 836.
26. [1948] W.A.L.R. 17, at 18.
27. (1920) 22 W.A.L.R. 37, at 38.
28. [1970] W.A.R. 66.
29. Unreported decision of Jackson C.J., Virtue S.P.J. and Lavan J., No. 163 of 1974, at 5.
30. *Carter* v. *Beatty* [1900] W.A.L.R. 151.
31. *Di Camillo* v. *Wilcox* [1964] W.A.R. 44.
32. See p. 25 of this Report.
33. Unreported decision of Virtue A.C.J., Lavan and Wickham JJ., No. 89 of 1974, at 3.
34. [1966] W.A.R. 159.
35. Richard Fox and Bernard O'Brien, "Fact-finding for Sentencers" (Paper read at a Seminar for Magistrates organized by the Australian Institute of Criminology, Canberra 9-11 May 1975). See also D.A. Thomas, "Establishing a Factual Basis for Sentencing" Criminal Law Review (1970): 80-90; and Michael McConville, "Sentencing Issues: Judge and Jury", University of Western Australia Law Review 11, no. 3 (1974): 230-44.
36. However, the strength of this assertion, at least insofar as it relates to Western Australia, has been doubted by Mr. M. Murray, the Crown Prosecutor. In a letter to the present writer dated 24 November 1975, Mr Murray said, "My experience has been that a defendant has only to raise a doubt about a matter such as his record or about a psychiatric assessment to place the onus upon those who allege to the contrary to confirm their information, if necessary, by strict proof."
37. [1970] W.A.R. 87, at 89. See also *Millar* v. *R.* (Unreported decision of Wolff C.J., Jackson and Virtue JJ.), 23/4/64, in which the Court of Criminal Appeal stated that the sentencing Judge must be bound by the jury's verdict.
38. Unreported decision of Jackson C.J., Hale and Burt JJ., 16/8/71.
39. (1947) 49 W.A.L.R. 97.
40. *Patterson* v. *R.* (Unreported decision of Jackson C.J., Burt and Lavan JJ.), 21/6/71, and *Smith* v. *R.* (Unreported decision of Jackson C.J., Hale and Lavan JJ.), No. 20 of 1971. Both cases are considered in more detail in Chapter 5. It should be observed here, however, that in *Patterson* v *R.*, the probation service was in no way to blame: the lower court had used an out-of-date report.
41. Letter to the present writer dated 24 November 1975.

1

Aggravating Factors

1. CIRCUMSTANCES SURROUNDING THE VICTIM

It seems clear that if the defendant has knowingly taken advantage of the victim, who is in some way especially vulnerable, the courts will regard the circumstances as aggravating. Thus the courts consider it aggravating if the defendant has been in a particular relationship of friendship with the victim or has been trusted by him. In *Russo* v. *R.*,[1] the Court of Criminal Appeal viewed it as aggravating that the victim, an elderly defenceless woman, had previously befriended the applicant by allowing him, as a boy, to come and watch her television. In *Walsh* v. *R.*,[2] a female employee of the victim was given a term of five years' imprisonment, with a minimum term of two and a half years, for stealing the sum of $16,000 over a period of four and a half years. Bank clerks and tellers obviously fall into the category of holding positions of trust. In *Pavlinovich* v. *R.*,[3] an accountant-teller, with no previous record, was sentenced to three years' imprisonment, with a minimum term of twelve months, for having uttered a bank cheque for $20,500. Although the Court of Criminal Appeal clearly regarded it as a serious crime, particularly as it had been committed by a person holding a responsible position of trust, the aggravating factors in the particular circumstances were to some extent offset by the applicant's youth and previous good character.

One might perhaps anticipate that another obvious situation in which the vulnerability of the victim might be perceived as an aggravating factor is where white-collar crime has been committed. However, it is perhaps significant that few of the decisions considered for the purposes of the present Report could be described as instances of white-collar crime. There seems little doubt that much conduct that should, as a matter of justice, fall into that category is not criminal at all, and even where it is deemed criminal, the dark

figure of unreported and undetected offences is probably high. The sentencing of white-collar criminals is, of course, particularly difficult, especially in view of the fact that much of this crime is committed corporately and it is hard to prevent monetary penalties being borne ultimately by the very people against whom the crime was committed in the first place, namely the consumers.

As might be expected, the physical vulnerability of the victim is viewed by the courts as a relevant factor in sentencing. The age of the victim is clearly a circumstance that may give rise to physical vulnerability. In *Cameron* v. *R.*,[4] the offence of attempting to have carnal knowledge of a girl aged nine, who was abducted by the applicant from her home, attracted a penalty of fourteen years' imprisonment and a whipping, although the applicant's previous record only consisted of "minor offences". No mention was made of a minimum term. In *Thorpe* v. *R.*,[5] the fact that the victim of an offence of rape was a girl of thirteen, who was likely to suffer serious long-term consequences from the attack, was clearly regarded as an aggravating circumstance. Similarly, in *Mitchell* v. *R.*,[6] the victim of incest was only 10 years old when a series of offences commenced and Wolff C.J., who was presiding in the Court of Criminal Appeal, obviously took a serious view of the fact that she was a child and was "incapable of making up her own mind". In *Williams* v. *R.*,[7] the Court of Criminal Appeal imposed two cumulative sentences of ten years' imprisonment on an applicant who was convicted on two counts of rape of a victim aged eleven. No minimum term was set. The victim was described by the Chief Justice as "immature" and although it was said that the effects on the child could not really be gauged, the trial Judge took note of the probability that she already had suffered and would continue to suffer psychologically from the act. The trial Judge did not claim there were aggravating circumstances, but observed that in his view there were no mitigating ones. The Court of Criminal Appeal saw no reason to disagree with the trial Judge's views and the appeal was dismissed. While it seems clear, then, that the courts will regard the defendant's knowingly taking advantage of the victim's vulnerability as aggravating, it is less clear what attitude they adopt if the victim's vulnerability is concealed from the defendant. At least one author of an Australian text on criminal law states that it is an established principle of the substantive law that the defendant takes the risk that his victim has less resistance to ill-health or injury than the next man.[8] The question arises, do courts concerned with sentencing take the same view? None of the cases considered for the purposes of the present Report

threw light on this problem, although it must be one that confronts the courts quite frequently, especially in cases involving crimes against the person. What attitude, for instance, do courts take if a rape victim is already in the early stages of pregnancy at the time of the assault and suffers psychological harm or even a miscarriage as a result? What attitude do courts take if a rape victim becomes pregnant as a result of the assault? So far as the writer is aware, these questions have not yet been thoroughly articulated by Western Australian courts.

2. CIRCUMSTANCES SURROUNDING THE OFFENCE

Obviously, brutality is aggravating: in *Cutting* v. *R.*,[9] the applicant broke into a dwelling-house at night and attempted to rape two women, one elderly and the other middle-aged. Serious injuries were inflicted on the older woman. The trial Judge took an even more severe view than the Court of Criminal Appeal and imposed a sentence of ten years' imprisonment on the applicant and directed that, at the expiration of that term, he be detained indeterminately in a reformatory prison. The Court of Criminal Appeal, however, found that there were some mitigating circumstances and made allowances for the fact that the applicant was drunk, that he voluntarily desisted from fulfilling his original objective and he showed some contrition for his crimes afterwards. He was also described as a psychopath, which the Court of Criminal Appeal evidently felt in some way diminished his responsibility for the crime and rendered him a particularly suitable person for preventive detention under Section 662 of the Criminal Code. Weighing up all the factors, the Court of Criminal Appeal reduced the finite term to seven years' imprisonment, but directed that the applicant be detained indeterminately under Section 662 after the expiration of the finite term. Similarly, in *Warrie* v. *R.*,[10] a sentence of ten years' imprisonment was imposed, with a minimum term of four years, on a full-blood Aborigine for committing the offence of sodomy on a three-year-old Aboriginal girl. Although the applicant was only eighteen, the Court of Criminal Appeal refused the application, noting the crime involved much more than a mere "offence against the order of nature", and that the applicant had taken a small child from her parents' protection so that she suffered heavy and permanent injuries. Both *Cutting* v. *R.* and *Warrie* v. *R.* also stand as authorities, of course, for the proposition that the vulnerability of the victim is treated by the courts as aggravating.

It is clear from the decisions that premeditation of the offence is generally perceived as an aggravating factor.[11] It seems that premeditation may be assumed from prior knowledge of particular premises. In *Ajster* v. *R.*,[12] the applicant stole clothing and blankets from a house of which he had gained knowledge while working as a bread roundsman. From the remarks made by the Chief Justice on sentencing, it seems likely that such knowledge was treated as an aggravating circumstance. Certainly, the applicant suffered a severe penalty. The trial Judge, noting that the applicant had twenty-one previous convictions for offences involving dishonesty, imposed a sentence of two years' imprisonment, at the end of which he was to be detained indeterminately as an habitual criminal. The Court of Criminal Appeal refused the application for leave to appeal. Similarly, in *Trew* v. *R.*,[13] an application was refused where the applicant had been sentenced to eighteen months' imprisonment, with a minimum term of nine months, for breaking, entering and stealing £14 6s 3d. The Chief Justice, on appeal, said, "I suppose we must have some regard to the fact that he broke into a place where he was formerly employed and took advantage of some knowledge that he had of the layout of the place and where to go to get money."

As one might expect, courts differentiate between the leader and the follower in determining penalty: the defendant who has been the initiator or the instigator may expect to receive a higher penalty than the one who has been led.[14] The fact that an offence was committed "in company" may in itself be an aggravating circumstance. Indeed, under Section 393 of the Criminal Code, the legislature has distinguished between robbery, which renders the defendant liable to a maximum term of fourteen years' imprisonment, and robbery that is committed "in company", which carries the maximum penalty of life imprisonment, with or without a whipping. From *Bradbury* v. *R.* and *Cannon* v. *R.*,[15] it is clear that the courts are following the lead of the legislature and are generally regarding as aggravating the fact that the crime has been committed "in company". If the offence was committed by a gang, the probability is that all the members of it will receive a more severe penalty than if they had acted individually. In *Blackmore and Owen* v. *R.*,[16] two youths, aged eighteen and nineteen respectively, received sentences of four and a half years' imprisonment, with minimum terms of two and a half years, for attempted robbery. The record of the case suggests that both applicants had a number of prior convictions for offences involving dishonesty. Although on the particular facts of the case the Court of Criminal Appeal reduced the minimum term to eighteen months, it

pointed out that heavy penalties were required to deter persons from committing crimes of personal violence, particularly where the offence is one of a pack or group against one individual. The decisions available from Western Australia did not include one where it had been argued or accepted by a court that the defendant's gang membership was a mitigating rather than an aggravating circumstance. This argument might be appropriate where, as a gang member, the defendant engaged in criminal activities that were entirely out of keeping with his ordinary code of conduct and there is evidence that his will was overborne by more dominant members of the gang.

It may be an aggravating circumstance that the offences together constituted a "criminal spree". In *Taylor* v. *R.*,[17] the applicant was charged with seven house-breaking offences, which had been spread over a period of three months. The Court of Criminal Appeal, in refusing the application for leave to appeal against a sentence of two and a half years on each charge (the first two of which were concurrent and the remainder, cumulative), followed by an indeterminate sentence under Section 662 of the Criminal Code, evidently regarded the fact that the applicant engaged upon a planned "criminal spree" as an aggravating circumstance. In *Chesters* v. *R.*,[18] the Chief Justice apparently took an unfavourable view of the fact that the applicant, who was charged with four offences of burglary and breaking and entering, had recently committed numerous other offences for which he received "lenient" treatment because summary proceedings were taken against him although the offences were indictable. The Court of Criminal Appeal refused the application for leave to appeal against four sentences of two years' imprisonment each (which were to be served cumulatively), with a nine months' minimum term on each. The Chief Justice did not purport to punish the applicant in respect of the offences that had been dealt with summarily, but the "lenient" treatment he had received in respect of them appears to have been one reason why his application for leave to appeal was refused. If this were the case, there may well have been a miscarriage of justice. For a court to take into account conduct that is not the subject of present proceedings means not only that the offender may in effect suffer double punishment but also that he is deprived of the opportunity of bringing to the notice of the court all the relevant factors that related to the earlier offence.

In *Adamini* v. *R.*,[19] however, it seems to have been to the applicant's advantage that he was charged at one time on eight counts of offences that involved breaking and consummated or attempted

entering, instead of being charged on each count individually. The applicant received a sentence of four years' imprisonment on a burglary charge, twelve months on each of five breaking and entering charges, the first of which was to be cumulative with the four years, but concurrent with the other sentences of twelve months. In addition, he received six months on two attempted breaking and entering charges, which term was concurrent with the other sentences. The total effective sentence was five years, and two and a half years was fixed as a minimum term. In delivering the judgment of the Court of Criminal Appeal in refusing the application, the Chief Justice said:

> seeing the number of offences with which the [trial] Judge was faced, we think that he quite rightly imprisoned the applicant. He pointed out that if he had dealt with each offence separately, the total imprisonment which would have been awarded would have been very great.

The trial Judge was apparently ignoring the fact that a court may impose a sentence to run concurrently with one that is already being served, or has been ordered. Even if the applicant had been dealt with separately for each offence, all those offences after the first could have attracted sentences of imprisonment that were concurrent with a term imposed in respect of the first.

If an offence is difficult to detect,[20] or there has been some specific effort on the part of the defendant to delay detection, the court may regard the circumstance as aggravating. Problems of detection are especially common with offences relating to drugs, but they are not confined to them. In *Woskanjan* v. *Rothnie* and *Woskanjan* v. *Glossop*,[21] Virtue J. (as he then was) explicitly stated that he regarded the fact that the appellant had driven 300 miles from the scene of the crimes, in an effort to avoid early detection, as an aggravating factor.

As might be expected, an assault on a policeman during the execution of his duty is viewed very seriously by a sentencing court. In *Thomson* v. *R.*, the Chief Justice said:

> [Unlawfully doing grievous bodily harm to a police constable] was indeed a most serious [crime], involving as it did the intentional shooting, at very close range, of an unarmed uniformed constable. ... For such a crime this court should ensure that severe punishment follows conviction, for it is of the greatest importance that other persons who might be tempted to act similarly may be deterred by the knowledge that heavy penalties are invariably meted out for serious and dangerous attacks upon police officers.[22]

Some offences, such as drug trafficking, are invariably regarded seriously by the courts. *Upton* v. *R.*[23] was an example of a case in which the Court of Criminal Appeal expressed strong views about the culpability of the applicant, who had been convicted of having 990 grams of cannabis with intent to sell it to others for substantial profit. The trial Judge had sentenced him to five years' imprisonment, with a minimum term of two and a half years, together with a fine and a default term of two years' imprisonment. The Court of Criminal Appeal only granted the application for the purpose of amending the default term to 400 days, in accordance with the scale contained in Section 167(1) of the Justices Act. However, in *Bridge* v. *R.*, *Moir* v. *R.* and *Biesiekierski* v. *R.*,[24] Jackson C.J. drew a distinction between selling for profit and selling, or intending to sell merely to recoup expenditure. He believed that the trial Judge had dealt too severely with the three applicants when he sentenced them to four years' imprisonment, with minimum terms of twelve months—in the case of Bridge, for supplying lysergic acid diethylamide, and in the cases of the other two, for possession with intent to supply the drug. None of the applicants had been previously convicted. All had a record of steady employment. The Chief Justice took the view that fines of $2000 each would be a more appropriate penalty than that imposed by the trial Judge.

Offences other than drug trafficking may be regarded seriously merely for reasons of quantum, for example, where a large quantity of goods are concerned or particularly serious damage is suffered by the victim. In *Rajalingham Siva Prahasam* v. *R.*,[25] both the quantity of cannabis resin and the fact that it was to be sold for gain were circumstances that the Court of Criminal Appeal took into account in rejecting an application for leave to appeal against a sentence of four years' imprisonment, with a minimum term of twenty-one months.

There is no indication from the Western Australian cases that are the subject of the present Report, that the courts are treating offences involving hard drugs as more serious than the offences involving soft drugs. It was in fact argued by the appellant in *Rizidis* v. *Chippington* that the Full Court should distinguish between cannabis in a crude form and one of the recognized hard drugs. This argument was rejected by the court in the following terms:

> The legislature has made it abundantly clear that the purpose of S. 94B [of the Police Act] is to control the possession or sale of any narcotic drug therein defined, including cannabis, and seeks to achieve this by providing heavy penalties for any breach thereof.[26]

Unusual circumstances of the case may cause the court to take a more serious view of it than it might have done otherwise. For instance, in *Borowicz* v. *Mott*,[27] Virtue J. took an unfavourable view of the appellant, a man of forty-four who had no previous record, but had been involved, with two youths, in plundering motor vehicles in an isolated part of the state. Both the isolation and the fact that the appellant was a parent of one youth, and might reasonably be regarded as being *in loco parentis* to the other, were evidently regarded as aggravating circumstances.

There have been cases in which the Court of Criminal Appeal has appeared to take an unfavourable view of the defendant's associates, but there is no clear statement that the penalty imposed has been more severe as a result.[28] The fact that the defendant has no acceptable leisure activity may possibly militate against him[29] and so may the fact that the defendant has athletic prowess and yet he commits crime.[30] Sometimes homilies that are delivered on sentencing include statements that indicate that the Judge does not approve of motor vehicles being so readily available to certain members of society. One such case was *Thorpe* v. *R.*,[31] where Chief Justice Wolff said: "Young men with weak heads and cars which they ought not to possess are constantly committing this sort of offence [rape] and if they are caught they must pay the penalty."
Another case was *Horn, Bennett and Bushell* v. *R.*,[32] where Chief Justice Wolff referred to a car as a "medium for evil" for young men.

It is hardly surprising to find that the actual degree of intoxication is relevant to sentence in such offences as driving a motor vehicle with an excess concentration of alcohol in the blood. In dealing with an offender who was convicted of an offence under Section 32AA of the previous Traffic Act, having been found to have a concentration of 0.126 percentage of alcohol in the blood, Virtue S.P.J. said:

> The circumstances particularly to be taken into account in fixing a penalty in cases of an offence of this type are firstly of course the actual concentration of alcohol in the [defendant's] blood ... If it is over .15 per cent, one would expect him to be charged under S. 32. [in respect of which incapacity to drive a motor vehicle as well as indulgence in liquor has to be proved]. If he is very close to that figure, it might be regarded as a circumstance of aggravation, which the concentration of .126 per cent ... would not be.[33]

The circumstances of intoxication, as well as the degree of intoxication, may sometimes be relevant to penalty. For instance, in the case of *Cutting* v. *R.*,[34] the Court of Criminal Appeal evidently

treated it as aggravating that the applicant, who was described as a psychopath, had contributed to his condition at the time of the crime by voluntarily drinking to excess, "well-knowing, as he must have done, that the likely consequence was that he would commit some offence". It is consistent with the decision in *Cutting* v. *R.* that in *Hales* v. *R.*,[35] the Court of Criminal Appeal regarded it as a mitigating circumstance that the applicant, who had been convicted of negligent driving causing death, had not been intoxicated at the time of the accident.

However, intoxication is not always treated by courts as aggravating to penalty: sometimes it is mitigating.[36]

In many cases, there is little doubt that the court has imposed a more severe sentence than it would have done otherwise because of the reported prevalence of the offence.[37] However, it is likely that when the courts refer to prevalence, they are referring to a situation in which particular offences, during a relatively short space of time, have been common in a particular neighbourhood. They would probably distinguish prevalence of that kind from a situation in which crimes of a particular nature have traditionally been associated with particular premises. In *Payne* v. *Wyatt*,[38] the Full Court, consisting of Northmore C.J. and Dwyer J., held that, in sentencing the appellant, the Magistrate was not entitled to take into consideration the fact that previous occupants of the appellant's premises had also been convicted of using it as a common gaming-house.

Heavy penalties are often imposed in an effort to deter both the defendant from repeating a particular crime and potential defendants from committing it. *Blackmore and Owen* v. *R.* was one such case. In *Taylor* v. *Kiernan*, Mr Justice Wallace expressed an opinion that probably underlies a great many sentencing decisions. He said:

> In my view, Parliament intended that the courts should be empowered to impose heavy punishment upon offenders where the facts justified such application, both from the point of view, somewhat old-fashioned today, that such punishment should act as a deterrent to the offender and also to all [potential offenders].[39]

NOTES

1. Unreported decision of Jackson C.J., Virtue S.P.J. and Hale J., 20/9/71.
2. Unreported decision of Jackson C.J., Lavan and Wickham JJ., No. 23 of 1972.
3. Unreported decision of Wolff C.J., D'Arcy and Negus JJ., 20/6/67.

4. Unreported decision of Wolff C.J., Virtue and D'Arcy JJ., 16/8/66.
5. Unreported decision of Wolff C.J., D'Arcy and Negus JJ., 20/6/67.
6. Unreported decision of Wolff C.J., D'Arcy and Negus JJ., 24/10/67.
7. Unreported decision of Wolff C.J., Jackson and Virtue JJ., 16/3/65.
8. Colin Howard, *Australian Criminal Law* (Sydney: Law Book Co., 1970), p.38.
9. Unreported decision of Jackson C.J., Hale and Wickham JJ., 20/1/70. See also *Frederichs* v. *R.* (Unreported decision of Jackson C.J., Burt and Wallace JJ.), No. 9 of 1975.
10. Unreported decision of Jackson C.J., Virtue S.P.J. and Jones J., No. 8 of 1974. See also Chapter 8 of this Report, regarding Aboriginal offenders and Aboriginal victims.
11. *Gee* v. *R.* (Unreported decision of Wolff C.J., D'Arcy and Hale JJ.), 20/11/62; *Engel* v. *R.* (Unreported decision of Wolff C.J., Virtue and Negus JJ.), 21/7/64; and *Schweikert* v. *R.*, *Habib* v. *R.* and *Briscoe* v. *R.* (Unreported decisions of Jackson C.J., Virtue S.P.J. and Wallace J.), Nos. 47, 48 and 49 of 1972.
12. Unreported decision of Wolff C.J., Jackson and Virtue JJ., 16/3/65.
13. Unreported decision of Wolff C.J., Virtue and Nevile JJ., 21/4/65.
14. For example, see *Engel* v. *R.* (Unreported decision of Wolff C.J., Virtue and Negus JJ.), 21/7/64.
15. Unreported decisions of Wolff C.J., Jackson S.P.J. and Negus J., 18/9/62.
16. Unreported decision of Jackson C.J., Virtue S.P.J. and Lavan J., No. 10 of 1971.
17. Unreported decision of Wolff C.J., D'Arcy and Negus JJ., 20/9/66.
18. Unreported decision of Wolff C.J., Jackson and Virtue JJ., 16/3/65.
19. Unreported decision of Wolff C.J., Virtue and D'Arcy JJ., 17/9/68.
20. *Schweikert* v. *R.*, *Habib* v. *R. and Briscoe* v. *R.* (Unreported decisions of Jackson C.J., Virtue S.P.J. and Wallace J.), Nos. 47, 48 and 49 of 1972; and *Rajalingham Siva Prahasam* v. *R.* [1972] W.A.R. 137
21. Unreported decisions of Virtue J., Nos. 68 and 69 of 1966.
22. Unreported decision of Jackson C.J., Wickham and Wallace JJ., No. 45 of 1972, at 4.
23. Unreported decision of Virtue A.C.J., Lavan and Jones JJ., No. 33 of 1974.
24. Unreported decisions of Jackson C.J. (one member of the Full Court), Nos 17, 18 and 19 of 1975.
25. [1972] W.A.R. 137. See also *Monim* v. *R. and Osman* v. *R.* (Unreported decisions of Jackson C.J., Lavan and Wickham JJ.), Nos. 11 and 12 of 1972; and *Schweikert* v. *R.*, *Habib* v. *R. and Briscoe* v. *R.* (Unreported decisions of Jackson C.J., Virtue S.P.J. and Wallace J.), Nos. 47, 48 and 49 of 1972.
26. Unreported decision of Jackson C.J., Virtue S.P.J. and Lavan J., No. 163 of 1974, at 5.
27. Unreported decision of Virtue J., No. 44 of 1966.
28. *Hanks* v. *R.*, *Groves* v. *R. and Bousfield* v. *R.* (Unreported decision of Wolff C.J., Jackson and Virtue JJ.), 23/4/65.
29. *Howell* v. *R.* (Unreported decision of Wolff C.J., Jackson and Nevile JJ.), 19/9/67.
30. *Kerr* v. *R.* (Unreported decision of Wolff C.J., Jackson and Nevile JJ.), 19/9/67.
31. Unreported decision of Wolff C.J., D'Arcy and Negus JJ., 20/6/67.
32. Unreported decision of Wolff C.J., Jackson and Negus JJ., 16/11/65.
33. *McShane* v. *Commissioner of Police* (Unreported decision of Virtue S.P.J.), No. 31 of 1971, at 6-7.
34. Unreported decision of Jackson C.J., Hale and Wickham JJ., 20/1/70.
35. Unreported decision of Jackson C.J., Lavan and Jones JJ., No. 6 of 1975.

36. See p. 33 of this Report.
37. See, for example, *Russo* v. *R.* (Unreported decision of Jackson C.J., Virtue S.P.J. and Hale J.) 20/9/71; *Schweikert* v. *R.*, *Habib* v. *R.*, *and Briscoe* v. *R.* (Unreported decisions of Jackson C.J., Virtue S.P.J. and Wallace J.), Nos. 47, 48 and 49 of 1972; and *Ugle* v. *Ruthven* and *Williams* v. *Ruthven* (Unreported decisions of Jackson C.J.), Nos. 46 and 47 of 1973.
38. [1936] W.A.L.R. 13
39. *Taylor* v. *Kiernan* (Unreported decision of Wallace J.), No. 30 of 1973, at 5.

2

Mitigating Factors

1. THE ATTITUDE OF THE DEFENDANT

(a) At the time of the offence

There is some evidence from the cases that courts are treating voluntary desistance during the commission of the crime as a mitigating circumstance, at least where sexual offences are concerned. In *Cutting* v. *R.*,[1] the applicant was charged with burglary with intent to commit rape, and the Court of Criminal Appeal made express reference to the fact that an allowance was made in respect of a number of matters, including the applicant's voluntary desistance. Similarly, in *Cameron* v. *R.*,[2] Chief Justice Wolff told the applicant that it was "fortunate" for him he desisted after a time from his endeavours to have intercourse with the victim, a girl under the age of thirteen. There can, of course, be a variety of motives for voluntary desistance. It may be that the defendant experiences a "change of heart", he may feel his criminal purpose is too hard to achieve or is not worth achieving. He may experience a sudden fear of detection. The courts have yet to indicate whether voluntary desistance is only mitigating in circumstances in which the defendant appears to be contrite.

It may well be the case that courts feel that genuine contrition during the offence should be a strong mitigating circumstance, particularly as the amount of harm done to the victim may be substantially less than if the defendant had pursued his original course of action to complete fulfilment. And it has already been observed that in *Reynolds* v. *Wilkinson*,[3] Chief Justice Dwyer stated explicitly that the amount of harm done is a matter that is relevant to sentencing in Western Australia.[4] However, it should be observed that the amount of harm done to the victim may also be less in a case where the defendant has voluntarily desisted, not because of contrition, but merely because he finds that his criminal purpose is too hard to

achieve in entirety or is not worth achieving. Furthermore, in the case of a defendant who fears detection, not only may the harm done be less than if he had continued in his criminal pursuit but there is also evidence that the criminal justice system has, for him at least, some deterrent value. It is submitted that if the amount of harm done to the victim is one factor to be taken into account in sentencing, it is hard to assert that voluntary desistance should be other than mitigating, whatever its cause may be. If this argument should be accepted by the courts, it would still be open to them, of course, to distinguish in terms of quantum between the defendant who has desisted because of genuine contrition and the defendant who desisted for some other reason.

(b) After the offence

In *Datson* v. *R.*,[5] the Court of Criminal Appeal referred to remorse as a mitigating circumstance where the applicant had been convicted on three charges of rape and one of attempted rape. However, in a recent extra-judicial statement at a Magistrates' Conference in Perth on 28 May 1975, Mr Justice Lavan stated that remorse is irrelevant to a plea in mitigation. If his Honour's view is widely accepted, it seems clear that Western Australian courts are avoiding a dilemma that has sometimes been experienced in other jurisdictions, arising from a perceived need to distinguish between true remorse and a mere plea of guilty. Interestingly enough, in the recent case of *Mead* v. *R.*,[6] the applicant, who had been convicted on two counts of rape and one of indecent assault, argued that the trial Judge had failed to take into account in sentencing him the mitigating circumstance that he had pleaded guilty and thus had saved the victim from the distress of having to give evidence at the trial. While the majority in the Court of Criminal Appeal did not express their views in the matter, Wallace J. stated the opinion that weight should be given to a plea of guilt in such circumstances, but felt the trial Judge had taken the plea into account. With respect, it is suggested that it is inappropriate that possible stress to the victim should affect the plea of the defendant or that a plea of guilty of itself should be regarded as mitigating. Rather than incline a defendant to plead guilty where he would not otherwise have done so, the potential stress of a criminal trial to the victim calls for procedural changes with regard to the admissibility of evidence and the circumstances in which it is taken.

Another interesting issue arises in connection with those who have manifested a co-operative attitude towards the police. Under what circumstances, if any, is co-operation to be reflected to the defen-

dant's credit in the criminal sanction? Is the man who readily confesses his offence at an advantage from the point of view of penalty over the man who makes the police rely entirely upon other sources of information? Does a police informant receive a more lenient penalty than his co-offenders? It may well be that the co-operative defendant and the police informant reap an advantage by having less serious charges made against them than would otherwise be the case, but the present issue concerns the attitude of the courts rather than the attitude of the police.

2. LOW INTELLIGENCE OF THE DEFENDANT

It may be an advantage to a defendant on being sentenced that he was of lower intelligence than normal. Certainly, this impression is conveyed by the remarks of the Chief Justice in *Jameson* v. *R.*[7] In that case, the Court of Criminal Appeal reduced to six years, with a minimum term of three years, a sentence of twelve years, with a minimum term of six years, which had been imposed on a full-blood tribal Aborigine who had been convicted of manslaughter. The Chief Justice observed that:

> The sentence [imposed by the trial Judge] does not give weight to the appellant's make-up and the effect of liquor on a man who up to 1954 was a bush native and is of limited intelligence even when measured against normalcy for one of his race.[8]

While one may wish to question his Honour's implicit opinion that Aborigines tend to be of lower intelligence than Europeans, the fact remains that in *Jameson* v. *R.*, the Chief Justice appears to have treated the appellant's condition as one of the mitigating circumstances. But the fact that a defendant is of lower intelligence than normal may militate against him in terms of the actual length of a gaol sentence. In *Schmidt* v. *R.*, the applicant, who was described as being "of very limited mental capacity", was convicted of manslaughter and was sentenced to two years' imprisonment, with a direction that at the expiration of that term he be detained under Section 662 of the Criminal Code. A sentence under Section 662, while not involving a declaration that the offender is an habitual criminal, authorizes his detention indeterminately. In dismissing the appeal, the Court of Criminal Appeal said:

> The applicant was not only not insane within the meaning of that term in the Code, but furthermore was not of such mental incapacity as to be likely to benefit from treatment in any mental hospital or like institution;

> the probation service is unlikely to be really of any benefit to him; a fine would obviously have been most inappropriate, so that the trial Judge had a most difficult task in deciding the proper sentence. Unless he was in effect to release him without subjecting him to any punishment and without placing him under any effective supervision and control, imprisonment seems to have been obligatory. In those circumstances, a term of two years' imprisonment cannot be said to be wrong and the circumstances of this case and particularly the age and mental condition of the applicant seem to be typical of those for which Section 662 of the Criminal Code was designed.[9]

The sentence under Section 662 of course, may involve the offender in serving a very long term of imprisonment and, in practice, it may impose upon him the extreme stress associated with uncertainty concerning his release date.[10] In *Bello* v. *R.*[11] also, Section 662 of the Criminal Code was invoked in respect of a mentally disordered applicant who had been convicted of breaking, entering and stealing approximately $134. The Court of Criminal Appeal apparently gave its approval to the proposition that imprisonment is a necessary evil for mentally disturbed offenders as long as the security afforded by hospitals is inadequate. An application for leave to appeal against an order made by the trial Judge that the applicant be detained under Section 662 was refused.

3. SOCIAL CIRCUMSTANCES OF THE DEFENDANT

The cases do not give any clear indication of the courts' attitude towards defendants who come from particularly deprived backgrounds. There are a couple of cases in which the courts have taken an unfavourable view of the fact that the defendants had the advantage of good homes and yet have been convicted of crimes,[12] and it may be that such circumstances were in fact regarded as aggravating. It would be consistent with such an attitude that some allowance be made in respect of defendants who have suffered deprived circumstances. Indeed, it appears to have been of some advantage in terms of sentence to Jameson, in *Jameson* v. *R.*, that he was, until 1954, a "bush native". However, there is no reason to suppose that in Western Australia, as elsewhere, socio-economic privilege generally does other than militate in favour of the individual rather than against him. Certainly, this appears to be the case from the available statistics relating to the incidence of Aborigines in penal institutions and from the fact that Aborigines are over-represented before Western Australian Children's Courts and under-represented before the panels.[13]

Probably socio-economic privilege is of special benefit to the individual in determining such matters as whether a criminal charge, in respect of a minor infringement of the law, should be laid against him in the first place, and if such a charge be made, in relation to the range of legal representation available to him. Those of privileged status can usually employ skilled legal help, which may not be available to those with less privilege. However, there has been at least one case in which the prominence of a defendant in the community has been taken into account at another level, namely in determining what penalty should be imposed upon him. In *McGibbon* v. *Tuckey, Huysing and Tuckey*,[14] Wolff C.J. dismissed the appeals by the prosecutor against fines of $20 that had been imposed on two respondents, and the fine of $40 that had been imposed on the third. The facts were that the first two respondents were employees at a hotel in Carnarvon and the third was the licensee and the mayor of the town. The respondents were convicted of assault, which was accompanied by some violence, the extent of which was in dispute between the parties. However, it was common to both the prosecution and the defence that the victim had previously caused trouble at the hotel, during which he had struck one member of the Tuckey family, another customer and his wife. It seems that the respondents were anxious to ensure that there was no recurrence of the trouble. The first two respondents had held the victim while the third respondent struck him. The Magistrate who imposed the fines observed that the third respondent had already suffered considerably because of the publicity given to the case and it was in his favour that he had done a "tremendous amount of good for Carnarvon with his energy and drive". On appeal, the Chief Justice accepted the proposition that one of the principal objects of punishment is to deter the offender and that the third respondent had probably already been deterred by the adverse publicity. Of course, it would have been possible for the court to take quite a different view and to say that because the third respondent held such a responsible position in Carnarvon, he had a weighty obligation to behave with decorum. After all, it could be argued that other people looked to him for leadership and were ready to emulate his behaviour.

4. PROVOCATION BY THE VICTIM

There was no express reference in the record of *McGibbon* v. *Tuckey, Huysing and Tuckey* that the lower court or the Supreme Court took into account the apparent provocation that the victim

had previously given, at least to some members of the Tuckey family. However, in *Vawser* v. *R.*, the attitude of the Court of Criminal Appeal was made clearer concerning the relevance to sentence of provocation by the victim. In that case, the applicant was convicted of the manslaughter of the victim, who had provoked him. The applicant had evidently consumed "a great deal of liquor", but it is not clear whether the victim was inebriated. The parties had become involved in an argument while driving a station vehicle some 122 kilometres from Marble Bar, in the north-west of the state. During the course of the argument, the victim struck the applicant and inflicted facial injuries upon him. The trial Judge had imposed a sentence of six years' imprisonment on the applicant and the record of the case contains no reference to a minimum term. On the application for leave to appeal, the applicant's counsel based his case partly on the contention that, to the applicant, in his intoxicated condition, the facial injuries were especially provocative. However, the Court of Criminal Appeal was not satisfied that six years' imprisonment was too long a sentence, even after making allowance for the mitigating factors. The Chief Justice, evidently with the other Judges concurring, said:

> While individual views may well vary, it cannot be said that [the sentence] is by any means severe for an unlawful killing by means of a lethal weapon, even where the accused's mind is confused by liquor and he has been provoked by an assault upon him, such as occurred in this case.[15]

5. INTOXICATION OF THE DEFENDANT

The attitude of the Court of Criminal Appeal in *Vawser* v. *R.* towards the relevance of intoxication to sentence is interesting. There is a clear implication that in manslaughter charges at least, the fact that the defendant was intoxicated may be mitigating with regard to sentence.[16] There are several decisions in which a similar attitude seems to have been taken.[17] However, there are other cases, apart from those where intoxication is relevant to the charge itself,[18] in which the opposite attitude has been taken regarding intoxication. One such case is *de Goumois* v. *R.*,[19] in which the Chief Justice said that to regard the fact that the applicant had been drinking as an excuse to a charge of unlawful wounding "could lead to very serious consequences". And if the defendant is addicted either to alcohol or to drugs, a special sentence may well be imposed on him, in the hope

of effecting a cure.[20] Often an indeterminate sentence is seen by the courts as appropriate where the primary purpose of punishment is to provide curative treatment.

6. ILL-HEALTH OF THE DEFENDANT

The cases examined for the purpose of the present Report include one[21] in which the trial Judge expressly stated that he had taken into consideration the fact that one applicant, a man of fifty-seven, was suffering from tuberculosis and heart trouble. There is no indication that the Court of Criminal Appeal viewed these factors as irrelevant to sentence. Although the application for leave to appeal was dismissed, the Court of Criminal Appeal added a rider recommending that after twelve months of a two-year sentence, the applicant and his co-defendant were to be considered for release under Section 705 of the Criminal Code. However, in *Wilson* v. *R.*,[22] the applicant was convicted of incest and had been sentenced to seven years' imprisonment, with a minimum term of five years. The applicant claimed to be suffering from an ailment that was rapidly progressing and would necessitate his being confined to a wheel-chair within a short period. The Court of Criminal Appeal did not grant the application, but added a rider to the sentence suggesting that the prison authorities should transfer the applicant to a more equable climate in the event of his condition deteriorating as predicted.

7. YOUTH OF THE DEFENDANT

As might be anticipated, youth is generally regarded as a mitigating factor and appellate courts show a strong reluctance to sentence young offenders to prison, unless no other alternative is available to the court. In *Milling* v. *Kucera and Braby* and *Puzio* v. *Kucera and Braby*, the Chief Justice dealt with appeals by two youths of sixteen from decisions of the Children's Court. The appellants had pleaded guilty to charges of breaking, entering and stealing goods to the value of $30. They had also been convicted of unlawfully using a motor vehicle. The second appellant was further convicted of dangerous driving and driving without a licence. Both appellants had prior convictions. The Children's Court had sentenced them both to effective terms of imprisonment of six months and they were disqualified from applying for driving licences, though the period of the disqualification did not appear in the reports of the cases. Jackson C.J. accepted the argument put forward by the appellants' counsel

that juveniles like them should not be sent to prison, except as a last resort. He noted that although Section 34A of the Child Welfare Act permits courts when sentencing children to imprisonment to direct that the term be served in a special institution established by the Department for Community Welfare for such purpose, there was no such institution. He added:

> It does not appear to me that the appellants have reached the stage where there was nothing else that could be done except to imprison them, and in my view a sentence of imprisonment at all and certainly the maximum sentence permitted under S.34A of the Child Welfare Act should not be resorted to, except for very serious offences committed by children who already have a bad record and for whom there is no real alternative. The intention of Parliament, as appears from the legislation, seems to be that youths of this age should not in general be imprisoned, but should be dealt with in one of the methods prescribed by S. 34 of the Child Welfare Act. It is clearly the purpose of the legislation that the department now called the Department for Community Welfare should have the responsibility for the treatment and training of youthful offenders. It is not for the courts, in my view, to question what the department does once the children have been committed to them. That is a matter for the Department and its qualified officers to decide ... [23]

However, the reluctance of the appellate courts to sentence young offenders to prison is by no means confined to children, within the meaning of the Child Welfare Act. In *Winder* v. *Milner*,[24] the appellant was aged twenty and the Chief Justice expressed strong disapproval of a penalty of imprisonment that had been imposed by the lower court. On the particular facts, the appellant's youth was only one of a number of mitigating circumstances. It also appeared that he was a first offender, he had held regular employment and he was regarded as a good worker. While it was undoubtedly a combination of the circumstances that led the Chief Justice to quash the sentence of imprisonment, it seems that the Chief Justice's obvious reluctance to imprison a young man for trivial offences may have led him to adopt the same course of action even if the other mitigating circumstances had not existed. Certainly, he cited with approval decisions from other jurisdictions that express strong distaste for the imposition of short terms of imprisonment on young offenders. In similar vein, Mr Justice Virtue, in *Abraham* v. *Slater*, said that generally gaol is not an appropriate place for juvenile offenders and, at an impressionable age, they should not be compelled to rub shoulders with hardened criminals and be "exposed to the pernicious and debasing influences with which they are likely to come into contact during a substantial stay in an adult penal establishment".[25]

8. HARMLESSNESS OF THE DEFENDANT

Courts generally adopt a lenient policy towards those they deem to be "harmless" offenders. Unfortunately, the cases do not afford a basis for a consideration of different conceptions of harmlessness. It is interesting, however, to reflect upon the contrasting attitudes of Justices of the Peace and a Supreme Court Judge towards a semi-tribal full-blood Aborigine who had pleaded guilty to two charges of being drunk in a public place. In *Green* v. *Josey*, the appellant had apparently been convicted at least three times during the preceding twelve months, because he was deemed idle and disorderly under Section 65(6) of the Police Act. The Justices had imposed a sentence of twenty-one days' imprisonment in respect of the first charge and imposed a sentence of six months' imprisonment in respect of the second. Wickham J. allowed the appeal and *in lieu* of the term of six months on the second charge, he imposed a sentence of six weeks, which was to be concurrent with the twenty-one days. As the appellant had already served more than six weeks on remand while he was waiting for the appeal to be heard, he was released immediately. On the subject of the appropriate sentence, Wickham J. said:

> The sentencing of a man convicted three times of drunkenness within the previous 12 months to a maximum period of six months with hard labour as a cure is wrong in principle, however well intentioned such a sentence might be. I have every sympathy for the police, the justices and the people of Meekatharra in the apparently insoluble predicament in which they are placed by behaviour such as this, but in the administration of the law and in the sentencing of offenders principle cannot be allowed to give way to expediency.[26]

Wickham J. went on to point out that the appellant was comparatively harmless and amiable. There were no elements of vicious or violent behaviour. The appellant was merely a nuisance to himself and to others.

9. OTHER CIRCUMSTANCES SURROUNDING THE DEFENDANT

It has already been observed that in *Winder* v. *Milner*, the appellant was not only young, he was a first offender and he had been in regular employment. Clearly, these factors were collectively considered to be mitigating. Furthermore, it seems that in spite of the Full Court's disapproval in *Rizidis* v. *Chippington*[27] of certain implications that might have been drawn from *Cameron* v. *Josey*,[28] that case still stands as authority for the proposition that the lack of a

prior record may justify a court in reducing the "just maximum" for the offence. Certainly, many legislative provisions, particularly those that relate to road traffic, prescribe penalties that are graduated according to the defendant's prior record for similar offences.[29]

10. CIRCUMSTANCES SURROUNDING THE TRIAL

In *Leary* v. *R.* and *Compt* v. *R.*, a most interesting point arose. The applicants, whose appeals were dealt with together, had been convicted on one charge of stealing, five of breaking, entering and stealing and one of house-breaking. On their original trial, they had been sentenced to total effective terms of six years' imprisonment, with minimum terms of three years. Following conviction, they appealed to the Court of Criminal Appeal and retrials were ordered. On the retrials, the applicants were again convicted and this time, total effective full terms of imprisonment of seven years were imposed. Minimum terms were attached—in the case of Leary, the minimum term was three and a half years; in the case of Compt, it was three years. On the present application, the applicants argued that their sentences should be reduced because on the original trial, the terms imposed were shorter. This contention found favour with the majority of the Court, Jackson C.J. and Burt J., and although they were unable to find that the sentences imposed on the second occasion were in themselves excessive, they were constrained to grant the application for leave to appeal against sentence. In the words of the Chief Justice:

> unless there is some strong ground there should not be a disparity ... between the sentences imposed upon persons convicted on the second occasion after a retrial compared with those that were imposed upon them on the first occasion.[30]

NOTES

1. Unreported decision of Jackson C.J., Hale and Wickham JJ., 20/1/70.
2. Unreported decision of Wolff C.J., Virtue and D'Arcy JJ., 16/8/66.
3. [1948] W.A.L.R. 17 at 18. See also p. 7 of this Report.
4. It should be noted, however, that the courts are not entirely consistent in their view that the amount of harm done should be reflected in penalty. In *Horn* v. *R.*, *Bennett* v. *R.* *and Bushell* v. *R.*, the Court of Criminal Appeal imposed on each of the applicants four sentences of one year's imprisonment, three of which were cumulative and one of which was concurrent. The sentences related to four counts

of breaking, entering and stealing, and yet the spoils derived from each count were disparate. From one offence, the spoils were goods to the approximate value of £90 and yet for another, the spoils from a butcher's shop were only 2s 3d. It appears that the Court of Criminal Appeal rationalized its failure to impose different sentences of imprisonment by saying that each breaking and entering had been made for the purposes of stealing and that more than 2s 3d would have been taken by the applicants if it had been there. (Unreported decision of Wolff C.J., Jackson and Negus JJ.), 16/11/65. On the general subject of the relationship between the amount of harm done and the penalty imposed, see Stephen J. Schulhofer, "Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law", *University of Pennsylvania Law Review* 122 (1974): 1497-1607.

5. Unreported decision of Jackson C.J., Wickham and Wallace JJ., No. 61 of 1972.
6. Unreported decision of Jackson C.J., Burt and Wallace JJ., No. 34 of 1975.
7. Unreported decision of Wolff C.J., (apparently giving the decision of the Court of Criminal Appeal), 7/4/65.
8. At 2. It is beyond the scope of this Report to enter into the controversy concerning the possible association between ethnic origin and intelligence.
9. Unreported decision of Nevile, Hale and Burt JJ., 2/5/69, at 3-4.
10. See M.W. Daunton-Fear "Sentencing Habitual Criminals", in *The Australian Criminal Justice System* eds. D. Chappell and P. Wilson (Sydney: Butterworths, 1972) p. 571 at 590 *et seq.*; and see pp. 84-86 of this Report.
11. Unreported decision of Wolff C.J., Virtue and Nevile JJ., 5/12/67.
12. *Horn* v.*R. Bennett* v. *R. and Bushell* v. *R.* (Unreported decision of Wolff C.J., Jackson and Negus JJ.), 16/11/65; and *Taylor* v. *R.* (Unreported decision of Wolff C.J., D'Arcy and Negus JJ), 20/9/66.
13. See pp. 177; 186-87 of this Report.
14. Unreported decisions of Wolff C.J., Nos. 84, 85 and 86 of 1967.
15. Unreported decision of Jackson C.J., Hale and Wickham JJ., 20/1/70, at 2.
16. Intoxication, of course, often affects the charge laid or the verdict reached because the defendant's condition has negated the requisite *mens rea* for murder.
17. *Milling* v. *Kucera and Braby* and *Puzio* v. *Kucera and Braby* (Unreported decisions of Jackson C.J.), Nos. 119 and 120 of 1972; *Rich* v. *R.* (Unreported decision of Jacksn C.J., Hale and Burt JJ.), 16/8/71; *Jameson* v. *R.* (Unreported decision of Wolff C.J.), 7/4/65.
18. For example, where the defendant is charged, under the Road Traffic Act, with having an excess concentration of alcohol in his blood.
19. Unreported decision of Wolff C.J., Nevile and Hale JJ., 18/5/65.
20. See p. 82 of this Report.
21. *Vojvodic* v. *R. and Orlich* v. *R.* (Unreported decision of Wolff C.J., Jackson and Virtue JJ.), 25/5/64.
22. Unreported decision of Wolff C.J., D'Arcy and Hale JJ., 21/6/66.
23. Unreported decisions of Jackson C.J., Nos. 119 and 120 of 1972, at 4.
24. Unreported decision of Jackson C.J., No. 158 of 1973; see also *Pavlinovich* v. *R.* Unreported decision of Wolff C.J., D'Arcy and Negus JJ.), 20/6/67.
25. Unreported decision of Virtue J., No. 35 of 1967, at 4.
26. [1970] W.A.R. 70, at 71-2.
27. Unreported decision of Jackson C.J., Virtue S.P.J. and Lavan J., No. 163 of 1974.
28. [1970] W.A.R. 66.
29. See p. 149 *et seq.* of this Report.
30. Unreported decisions of Jackson C.J., Burt and Jones JJ., Nos. 41 and 42 of 1975, at 3.

3

Imprisonment and Release

1. INTRODUCTION

The general pattern that has been adopted in the Western Australian Criminal Code is to define each offence and then to state the penalty to which the offender "is liable". Often the penalty is a fixed term of imprisonment, but there may be prescribed an alternative or an additional penalty, such as a fine. Usually, the named penalty constitutes the maximum that may be imposed, although in the case of murder (as opposed to wilful murder) there is a mandatory provision that life imprisonment be imposed.[1] Where the legislature has, in effect, indicated only the maximum penalty, there resides in the court considerable discretion concerning the actual sentence to be imposed. The court is not bound to impose even the type of sentence named in the section creating the offence: its discretion usually exists as to quantum within the named maximum and, in appropriate circumstances, as to type of sentence. Alternatives to imprisonment are dealt with in later chapters of this Report: the present chapter is concerned only with imprisonment and release. Firstly, statistics relating to imprisonment and release will be considered. The next sections will contain an analysis of relevant statutory provisions and lastly, there is a brief survey of sentencing policies that are developing around those provisions. The text of the present chapter does not relate to the imprisonment and release of juveniles. That topic is considered in Chapter 7. Appendix A to the present Report consists of an official statement published by the Western Australian Department of Corrections concerning its structure and functions. It shows, *inter alia*, where the penal institutions are located in Western Australia and what facilities are available at each of them.

2. STATISTICS RELATING TO IMPRISONMENT AND RELEASE

For some years, Western Australia has had a higher rate of imprisonment, per 100,000 of the general population, than any other state. This information is borne out by Table 1, which was presented by the South Australian Criminal Law and Penal Methods Reform Committee in its First Report.[2]

Although the statistics referred to in Table 1 relate to the daily average numbers in gaol and are not strictly comparable with statistics based on prison populations on one particular day, it is perhaps of some interest that on 1 March 1974 at least, there appears to have been a decline in the use made of imprisonment by Western Australian courts.[3] Table 2 shows that as at 1 March 1974, the imprisonment rate in Western Australia per 100,000 of the general population was substantially lower than in 1970-71.

Figure 1 indicates graphically the use of imprisonment in Western Australia, based on the daily average numbers of prisoners, for each financial year, from 1 July 1960 until 30 June 1974.

It is beyond the scope of the present Report to account for the general increase in the use of imprisonment up to 30 June 1969 and the general decline since that time.[4] However, it should be observed that daily average imprisonment rates reflect not only the admissions to prisons but also the length of the terms served by the inmates. It follows from this proposition that the recent decline shown

Table 1. Western Australia: Rate of Imprisonment per 100,000 of the General Population, 1959–60 to 1970–71

Year	N. S. W. (including A.C.T.)	Vic.	Qld.	S.A.	W.A.	Tas.
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

Table 2. Western Australia: Rate of Imprisonment per 100,00 of the General Population, as at 1 March 1974

State	Number of prisoners	General population ('000)	Imprisonment rate (%)
N.S.W. [a]	3298	4913.3[a]	67.1
Vic.	1963	3615.7	54.3
Qld.	1457	1946.6	74.9
S.A.	746	1211.1	61.6
W.A.	1056	1084.4	97.4
Tas.	322	399.1	80.7
N.T.	219	98.1	223.2
Aust.	9061	13268.3	68.3

a Including A.C.T.

in Figure 1 could flow from any one or more of a number of factors, including the greater use by courts of alternatives to imprisonment, the imposition of shorter terms and the earlier or more widespread or successful use of parole.

Table 3 shows that in relation to the total number of male persons released from gaol, the number of men released on parole is relatively small.[5] Even in 1973-74, the percentage of male prisoners who were released on parole was only 8.2 per cent and this was the highest percentage since the relevant part of the Offenders Probation

Table 3. Western Australia: Male Prisoners released on Parole or Discharged, 1964–65 to 1973–74

Year	Paroled[b]	Discharged	Total released[c]
1964–65[a]	144 (3.5%)	3,959	4,103
1965–66	226 (5.9%)	3,585	3,811
1966–67	232 (5.2%)	4,251	4,483
1967–68	280 (5.6%)	4,753	5,033
1968–69	348 (6.6%)	4,918	5,266
1969–70	337 (6.1%)	5,158	5,495
1970–71	401 (6.3%)	5,914	6,315
1971–72	419 (5.7%)	6,977	7,396
1972–73	491 (7.0%)	6,570	7,061
1973–74	482 (8.2%)	5,424	5,906

a Nine months only.
b Includes re-paroles and releases by order of the Governor.
c Does not include debtors; includes those released on parole.

Data from Margaret Martin, Department of Corrections, Western Australia.

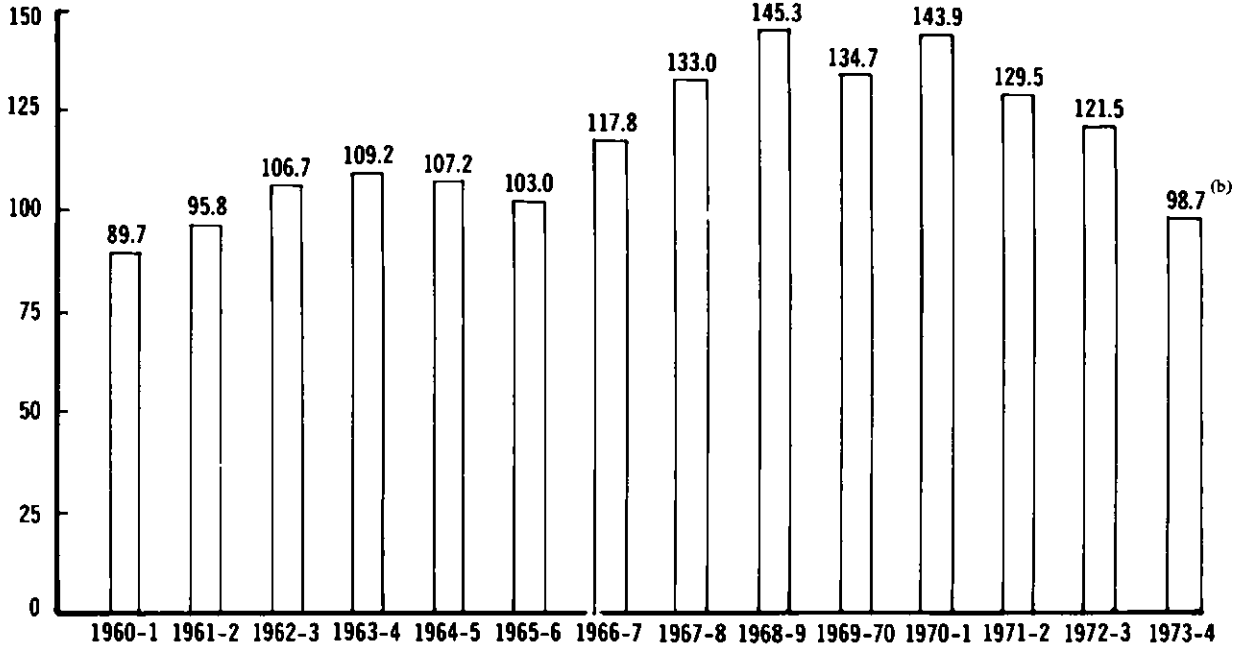


Fig. 1. Western Australia: Imprisonment Dates: Daily Average per 100,000 General Population, 1960–61 to 1973–74 (a)

(a) Does not include persons detained in Police Lock-ups
(b) Taken from the general population figure for 1972.

and Parole Act came into operation on 1 October 1964. In the circumstances, it seems unlikely that the use of parole has made an appreciable impact on the daily average numbers of persons detained in Western Australian gaols.[6] Indeed, it seems more probable that the fluctuations shown in Figure 1 have occurred quite independently of the gradually increasing use of parole, as shown in Table 3.

It is not very likely that the declining use of imprisonment can be explained, in whole or in part, by reference to the length of parole periods. Table 4 shows the length of the parole periods upon which male parolees have been released. Although in the early years of the present scheme, the most popular parole period was between six and twelve months, and in more recent years it has been between one and two years, the tendency to impose longer parole periods has been relatively slight. There has been a considerable drop in the percentage of parolees who have been released for periods between two and three years. Although there has been some increase in the use of parole periods of three years or more, this increase is not so great that it bears a directly inverse relationship to the drop in the use of periods between two and three years.

Furthermore, it seems unlikely that the incidence of parole cancellation has had more than a negligible effect upon imprisonment rates in Western Australia. Although, as shown on Table 5, there has been some fluctuation in the percentage of parolees who have completed their terms successfully, the fluctuation is too slight to have more than a minor effect upon imprisonment rates.

While it seems fairly clear, then, that the introduction of the present system of parole in Western Australia has only had a minimal part to play in contributing towards the declining prison population, it would be a fallacy to assume that the minimal part flows solely from the fact that only a marginal group of prisoners is granted parole. In theory, it would be possible that the granting of parole were confined to a small percentage of the total number of prisoners, but yet that their release had a substantial impact on daily average imprisonment rates because they were released at an early stage in their sentences and none of their parole periods was cancelled. Just because a low percentage of prisoners are released on parole, it cannot be assumed that the impact of the system on daily average imprisonment rates will be minimal only. Information is also required concerning breach rates and the stage at which parole is granted in relation to the full sentences of those who receive it.

Table 4. Western Australia: Male Offenders Released on Parole and Length of Parole, 1964–65 to 1973–74

Length of parole	1964–65[a]	1965–66	1966–67	1967–68	1968–69	1969–70	1970–71	1971–72	1972–73	1973–74
Under 6 months	5	16	22	24	24	21	17	21	26	54
(%)	(3.5)	(7.1)	(9.7)	(8.6)	(7.0)	(6.3)	(4.3)	(5.0)	(5.3)	(11.4)
6 months under 12 months	48	95	69	92	112	108	133	135	141	107
(%)	(33.3)	(42.5)	(30.6)	(33.1)	(32.6)	(32.6)	(33.6)	(32.4)	(29.0)	(22.6)
1 year under 2 years	43	59	67	93	108	102	149	120	188	187
(%)	(29.9)	(26.3)	(29.6)	(33.4)	(31.5)	(30.7)	(37.6)	(28.8)	(38.6)	(39.5)
2 years under 3 years	46	51	59	58	74	72	69	105	94	80
(%)	(31.9)	(22.8)	(26.1)	(20.9)	(21.6)	(21.7)	(17.4)	(25.2)	(19.3)	(17.0)
3 years and over	2	3	9	11	25	29	28	36	38	45
(%)	(1.4)	(1.3)	(4.0)	(4.0)	(7.3)	(8.7)	(7.1)	(8.6)	(7.8)	(9.5)
Total[b]	144	224	226	278	343	332	396	417	487	473
	(100)	(100)	(100)	(100)	(100)	(100)	(100)	(100)	(100)	(100)

a Nine months only.
b Does not include those offenders released on order of the Governor.

Table 5. Western Australia: Parole Cancellations and Completions, 1964–65 to 1973–74[a]

Year	1964–65[b]	1965–66	1966–67	1967–68	1968–69	1969–70	1970–71	1971–72	1972–73	1973–74
By board	13	15	32	33	33	27	44	51	54	59
(%)	(35.0)	(9.4)	(13.8)	(16.7)	(11.0)	(9.3)	(12.1)	(12.8)	(13.9)	(12.7)
By reconviction	10	41	49	39	72	75	110	108	112	113
(%)	(27.0)	(25.8)	(21.1)	(19.7)	(24.0)	(26.0)	(30.1)	(27.0)	(28.8)	(24.4)
By expiry	14	103	151	126	195	187	211	240	223	292
(%)	(38.0)	(64.8)	(65.1)	(63.6)	(65.0)	(64.7)	(57.8)	(60.2)	(57.3)	(62.9)
Total	37	159	232	198	300	289	365	399	389	464
(%)	(100)	(100)	(100)	(100)	(100)	(100)	(100)	(100)	(100)	(100)

a Does not include female offenders.
b Nine months only.

3. GENERAL STATUTORY PROVISIONS RELATING TO TERMS OF IMPRISONMENT FIXED BY THE SENTENCING COURT

(a) The imposition of the fixed term

(i) Reduction of quantum

Section 19 of the *Criminal Code* 1913-1973 contains several provisions relating to statutory construction that are relevant to imprisonment and that apply unless it is otherwise expressly provided. Subsection (1) states that a person liable to imprisonment, either with or without hard labour, for life or for any other period, may be sentenced to similar imprisonment for a shorter term. Although a section may state that an offender is liable to imprisonment with hard labour, the court may impose the sentence without hard labour.[7] Similar powers exist under the *Justices Act* 1902-1972. Section 166 authorizes Justices to reduce the length of a prescribed term of imprisonment and to order that it be served without hard labour. In practice, the distinction between sentences with hard labour and those without is of no importance.

(ii) Imprisonment as a default penalty

Following a conviction on indictment, some rather unusual provisions may be invoked by a court by virtue of Subsections (5) and (6) of Section 19 of the Code. A court that, as a whole or part of a penalty, has imposed a fine or has ordered that an offender enter into a recognizance, may also order that until such time as the fine be paid or the recognizance be actually entered into, the offender be imprisoned. In the case of the fine, the term of imprisonment may not exceed two years and in the case of the recognizance, the term may not exceed one year. In neither case may the term of imprisonment, together with any fixed term that may be imposed, exceed the term that could be imposed if the subsection were not invoked. Subsections (5) and (6) are curiously drafted. It is not clear whether the phrase "whichever be the less" should limit the terms that can be imposed, so that, for example, in the case of the fine, the maximum term of imprisonment is two years unless the maximum term, which could have been imposed directly for the offence, is less than two years, in which case, that lower term is the maximum. Further, it is not clear whether the offender's obligation to pay the fine or enter into the recognizance still remains in the event of his having served the maximum term in default. As a matter of practice, the present writer has been advised that once a default period has been served,

the offender is regarded as free from any other obligation.[8]

When Justices impose a fine or make an order for the payment of compensation or costs, they are obliged, under Section 155 of the Justices Act, to specify what shall happen in the event of default. They may direct that the sum shall be recoverable by execution against the goods and chattels of the offender and direct that in the event of the value of the goods and chattels being inadequate, the offender shall be imprisoned. Alternatively, the Justices may, in lieu of directing that the offender's goods and chattels shall be subject to execution, direct simply that the offender be imprisoned in default of payment. Whether imprisonment be the only or the ultimate consequence of default, the term of it shall be calculated in accordance with Section 167 of the Justices Act and under that section, the standard rate is one day's imprisonment for every $5 payable and for any fractional part of $5. However, the Justices who issue the warrant of commitment have, under Subsection (5), power to reduce the term of imprisonment. It is fortunate that Subsection (5) introduces at least a measure of flexibility into Section 167. Without it, inflation would create a situation in which default terms would increase proportionately to a tendency on the part of the courts to impose higher fines.

There are provisions in Subsection (4) for the abatement of the term of imprisonment in proportion to any payment that is made by the offender.

(iii) Concurrent and cumulative sentences

Section 20 of the Code authorizes a court to impose on the same occasion sentences that run concurrently or cumulatively with one another.[9] The same section also authorizes a court to impose a sentence or sentences that are to commence at the expiration of a term or terms then being served. However, Section 38(3) of the *Offenders Probation and Parole Act* 1963-1971 contains a provision that should be read in conjunction with Section 20. Section 38(3) states that if an offender has been released on parole and during the parole period, commits another offence in respect of which a term of imprisonment is imposed, that term shall be served cumulatively upon the unexpired part of the sentence in respect of which the offender was paroled, unless the court otherwise orders. There is a differently worded provision in Section 150 of the *Justices Act* 1902-1972 that authorizes Courts of Petty Sessions also to impose a sentence that is cumulative with one already being served or is

simultaneously imposed. The wording of Section 150 has been the subject of judicial interpretation in *Beaton and Another* v. *McGinty*,[10] which is considered later.

(iv) The commencement date of sentence

The general rule in Western Australia is contained in a provision in Section 20 of the Criminal Code that states that the commencement date of sentences, whether imposed following summary conviction or on indictment, shall be the date the offender is received into custody under the sentence. One exception to the general rule arises where a cumulative sentence is imposed. Another exception may occur if a convicted person appeals against sentence. The latter case will be considered further below. A third exception exists in respect of an indeterminate sentence, which must, under Section 665 of the Code, be served after the expiration of any other sentence that the convicted person is undergoing or is sentenced to undergo. However, the general rule has given rise to certain difficulties, because on a strict interpretation, it does not appear to allow that a sentence can be antedated to include a period of pre-sentence custody. In a recent paper, Rinaldi has observed that both unconvicted and convicted persons may be held in custody prior to sentence.[11] Unconvicted persons may be held where they have not been granted bail or could not raise it. Convicted persons may be detailed on remand, pending sentence. This may occur, for instance, if a pre-sentence report has been requested.

Whereas it may have been the case in the past that the lot of the prisoner on remand was preferable to that of the sentenced offender, it seems unlikely that those who have not been sentenced now enjoy privileges that outweigh the crowded conditions and lack of facilities that they endure on remand. It would appear reasonable, then, that prison sentences should be antedated so that they take effect not merely from the date that sentence was imposed but rather from the date when the offender was actually received into custody.

Although a strict interpretation would appear to suggest that Section 20 does not permit antedating to include pre-sentence detention, Rinaldi observes that, in practice, Western Australian prison authorities are giving a more liberal interpretation. He asserts that they are construing the section without reference to the two last words of the provision, namely "under sentence". In doing this, Rinaldi claims that the prison authorities are at least in accord with the intention of Parliament, as it appears from the debate on the second reading of the Bill that led to the enactment of the provision. It

seems from the debate that the purpose of the provision was to make uniform the commencement date of sentences following conviction on indictment with commencement date of sentences following summary conviction. Whereas the latter dated from the time the offender had first been received into custody,[12] the former only dated from the beginning of the session at which sentence was passed, and the offender may well have been imprisoned for some time prior to the commencement of the session. However, it appears that Rinaldi was misinformed when he was advised that prison authorities are giving a liberal interpretation to Section 20. The present writer has been told: "The practice ... except with cumulative sentences, is to date every sentence from the day it is given, or, if the person is not in custody, from the day the warrant is executed on him and he is taken into custody on that sentence."[13] In the circumstances, it is clear that there is need for the amendment of Section 20 and that the provision would accord with parliamentary intention if the words "under sentence" were deleted.

The argument is often advanced that provided courts are prepared to take into account time served by an offender as an unconvicted prisoner, a power to antedate sentences is unnecessary. However, Rinaldi claims that there are several substantial objections to the practice of reducing sentences in this way. He says that, firstly, justice requires that proper sentences be imposed as these appear in the offender's "antecedents". Secondly, the prisoner may lack assurance that every day actually served has been taken into account, particularly where a sentence is "rounded-off" into months. Thirdly, reduction of a sentence may have the effect of denying the offender certain benefits, such as that of being classified by the prison authorities, and fourthly, the reduction of sentence may remove the prison term from the category where a minimum term is generally attached to the full term and place it in the category where the court merely has a discretion to fix a minimum term. Paradoxically, this could result in the offender actually serving a longer period in prison than if he had not been given a reduced sentence.

(v) Forfeiture of time spent in custody pending an appeal

It has already been observed that there may be an exception to the general rule about the commencement date of sentence if the convicted person appeals against sentence. The relevant passage of Section 20 is as follows:

> The time during which a convicted appellant, pending the determination

> of his appeal, is admitted to bail and, subject to any directions which the Court of Criminal Appeal may give to the contrary on any appeal, the time during which the appellant if in custody is specially treated as an unconvicted prisoner, shall not count as part of any term of imprisonment under his sentence, and in the case of an appeal under this Code any imprisonment under the sentence of the appellant, whether it is the sentence passed by the Court of trial or the sentence passed by the Court of Criminal Appeal, shall, subject to any directions which may be given by the Court as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into prison under the sentence.

This provision gives the Court of Criminal Appeal authority to direct that the period on appeal shall count towards the sentence. The cases that are relevant to this issue and that were considered for the purposes of the present Report are discussed below.

As it can no longer be argued convincingly that prisoners treated as appellants fare better in gaol than other sentenced prisoners, the only ground, according to Rinaldi, on which Australian courts support the forfeiture of appeal time is that it acts as a deterrent to frivolous appeals. There are, however, a number of problems associated with this view. Firstly, there is no clear way of identifying a frivolous appeal with certainty. This uncertainty is caused partly because it is not resolved whether the court is concerned with the good faith of the appellant. If the appellant considered he had genuine cause for grievance about his sentence (perhaps after taking legal advice), does that negate frivolity? Or is the court solely concerned with its own determination of whether an appeal were frivolous? Secondly, there is an even more fundamental problem, which is noted by Rinaldi, namely the injustice caused to a frivolous appellant who is in custody, compared with the frivolous appellant who is on bail. Rinaldi observes that:

> the most elementary principles of justice require that it should be possible to impose [the same] penalty upon every person who abuses the business of the courts by bringing such an appeal; arbitrary matters such as whether or not the appellant happens to be in prison awaiting the outcome (perhaps because of indigency alone) should be of no relevance.[14]

It is submitted that Rinaldi's argument is compelling.

(b) Release following a term fixed by the sentencing court

Release from prison after service of a fixed term may be affected by a variety of factors. It has already been mentioned that if the term

was imposed by Justices in default of payment of a sum ordered to be paid, the term of imprisonment may be reduced by payment of part of the sum, or indeed, extinguished, if the whole sum be paid. Other factors that may affect the release date are the Regulations relating to remissions, provisions for parole and the exercise of the royal prerogative. There may also be leave of absence on a variety of grounds, the most prominent of which is that the prisoner is admitted to work release.

(i) Remissions relating to sentences where no minimum term has been set

The system of remissions has been considerably simplified by the new *Prison Regulations* 1974. Regulation 72 now provides:

> 72. (1) Subject to good conduct and industry, every prisoner sentenced to a finite term of imprisonment of four days or more, shall be entitled to remission of sentence, amounting to one quarter of the sentence, except where otherwise provided in the Act and these regulations, and except where limited by section 39 of the *Offenders Probation and Parole Act* 1963.
>
> (2) In calculating remission, the term of the sentence shall be reduced to days and divided by four, and any fractional parts of days shall be disregarded.
>
> (3) The period during which a prisoner is absent from custody without leave, and any term directed by the Court as not to count as part of his sentence in respect to a prisoner on appeal, shall not be included in calculating the amount of remission due.
>
> (4) If a prisoner who, in accordance with regulation 67, is reported for any breach of the regulations, or of orders, pleads guilty, or is found guilty, before the Superintendent and the Superintendent deems the offence not sufficiently serious for the offender to be taken before a Visiting Justice, he may, as a lesser penalty, award the offender, in respect to each offence, from one to four demerit points, as he thinks fit, but shall report having done so, in writing, to the Director.
>
> (5) A prisoner shall have the right of appeal against the award of demerit points, to a Visiting Justice, who may confirm, modify or remit the penalty or make such other order as he may think fit, in accordance with section 34 of the Act and in all such cases the Visiting Justice's decision shall be final.
>
> (6) The imposition of demerit points shall be recorded on the prisoner's remission and gratuity card, which shall be kept for the purpose, and the accumulation of each four demerit points during the prisoner's sentence shall result in the reduction of his remission by one day.
>
> (7) The prisoner's remission and gratuity card shall be maintained

by the Superintendent, or a person detailed by him to do so, and the information thereon shall be available to be seen by the prisoner at any time convenient to the person keeping the record.

The earlier system, which Regulation 72 replaced, operated in theory not on the loss of marks or points for poor conduct or industry, but rather on the earning of marks for good conduct or industry. However, the new system is undoubtedly easier to operate from an administrative point of view and it probably accords with the *de facto* situation before the recent Regulations were passed.

It should be noted that the remissions system under Regulation 72 does not apply to prisoners serving terms of less than four days and it does not apply to those in respect of whom minimum terms have been fixed, unless there are special circumstances.[15]

There appears to be a conflict between the terms of Section 20 of the Criminal Code and Prison Regulation 72(3). Whereas Section 20 merely empowers the Court of Criminal Appeal to order that time spent in custody pending an appeal, during which the appellant has been specially treated as an unconvicted prisoner, shall count towards any term of imprisonment, and in the absence of such an order, such period shall not so count, Regulation 72(3) implies that the situation is in reverse. The regulation is drawn apparently on the assumption that time spent in custody pending an appeal will count towards any term of imprisonment, unless the court makes a contrary order. The conflict between the provisions could well lead to serious misunderstanding on the part of prisoners and administrative officers within the Department of Corrections and the situation needs to be rectified, presumably by amendment of the regulation.

(ii) Parole

Parole under the *Offenders Probation and Parole Act* 1963-1971 is a relatively recent innovation in Western Australia. The relevant provisions are contained in Part III of the Act. The sentencing court plays a significant role in the parole system because of the legislative provisions relating to the determination of the minimum term. Subject to certain exceptions, the sentencing court is bound, by Section 37, to fix a minimum term of imprisonment in respect of an offender upon whom it imposes a full term of twelve months or more. If the full term is less than twelve months, the sentencing court has discretion to set a minimum term. Although the sentence is for twelve months or more, a sentencing court may refrain from setting a minimum term if it deems it inappropriate, having regard to "the

nature of the offence and the antecedents of the convicted person". Furthermore, a sentencing court may not set a minimum term in respect of a sentence of imprisonment imposed upon a person whom it directs to be detained, at the expiration thereof, at the Governor's pleasure. This provision could apply to persons upon whom a sentence is passed under Section 661 or under Section 662 of the Criminal Code. Still further, a sentencing court may not impose a minimum term in respect of an offender who is ordered to serve a life sentence.

The significance of the minimum term is apparent when the powers of the Parole Board[16] are considered. The principal provision is contained in Section 41(1) (a) of the Offenders Probation and Parole Act, which is as follows:

> The Board may in its discretion by order in writing direct that—
> (a) a prisoner undergoing a sentence of imprisonment in respect of which a minimum term has been fixed be released from prison on parole at the time specified in the order, being a time that is after the expiration of the minimum term.

The Parole Board also has power, within certain legislative limitations, to make an order in respect of habitual criminals and has wider discretion in respect of persons detained indeterminately under Section 662 of the Criminal Code.[17] However, the general position is that if an offender is to be released on parole following the imposition of a fixed term of imprisonment, it is a prerequisite that the sentencing court has fixed a minimum term.[18] It is a qualification of the general rule though, that failure to fix a minimum term, or the incorrect fixing of a minimum term, may be remedied by application of the Director of Corrections to the Court of Criminal Appeal in respect of a sentence by any other court.[19] And there is a further qualification to the general rule by virtue of Subsections (5) and (6) of Section 37. If a Court of Petty Sessions has failed to fix a minimum term in respect of an offender whom it has sentenced to twelve months' or more imprisonment, and has failed to endorse the court record with a note of its decision not to fix such minimum term, the court shall be deemed to have fixed the minimum term at one-half of the full term or one-half of the aggregate of the full term it has imposed. It appears that in making this qualification to the general rule, the legislature recognized the possibility that lower courts, which undoubtedly shoulder much of the burden of sentencing, may well forget to set minimum terms in circumstances in which they are appropriate.

Section 38 sets out provisions that apply to offenders upon whom

multiple terms are imposed. Subsection (1) provides that if an offender is already serving a sentence in respect of which a minimum term was fixed and is sentenced to another in respect of which a minimum term also is fixed, the minimum term in respect of the latter shall be concurrent or cumulative with the minimum term in respect of the former, depending upon whether the full terms are concurrent or cumulative. Subsection (2) contains provision with regard to the order in which sentences shall be served. The rule is that the first term or terms to be served are those in respect of which no minimum term was fixed. Secondly, any minimum term or the aggregate of minimum terms must be served. Thirdly, the offender must serve the balance between the minimum term or terms and the full term or terms. It is during the third period, of course, that the offender becomes eligible for parole. In the event of a further term of imprisonment being imposed before the offender has gone through the cycle referred to above, the cycle must, if necessary, be suspended to accommodate the new sentence so that it fits into the prescribed order.

Special remission regulations apply in respect of prisoners for whom minimum terms have been set, instead of those already referred to. By virtue of Regulation 28 under the Offenders Probation and Parole Act, a maximum of three days' reduction from the minimum term so fixed shall be made for each month actually served by the prisoner. The reduction is subject to the discretion of the Director of Corrections, who may grant it if he is satisfied that the good conduct and industry of the prisoner throughout the term merits it. However, Section 39(3) of the Offenders Probation and Parole Act contains an exceptional provision for an offender who is eligible for parole in respect of part of a term of imprisonment and who has not previously been released in respect of that term. If he has not been released by the date on which he would have been, had he been subject to Regulation 72 of the Regulations under the Prisons Act, he must be released forthwith, or as soon as practicable, unless, of course, he is liable to serve any other term.

The Regulations under the Offenders Probation and Parole Act stipulate that the parole order shall be in the form set out in the Schedule to the Regulations.[20] Form F in the Schedule contains the following conditions:

(a) that the offender abstains from violation of the law;
(b) that he does not frequently consort with reputed criminals or persons of ill-repute;
(c) that he carries out the lawful instructions of the parole officer;

(d) that he is available for interview by a parole officer at such time and place as directed by the parole officer; and
(e) that he notifies the parole officer within forty-eight hours of any change of address or employment during the parole period.

The standard form also advises the parolee that:

(a) he is still under sentence and the Board may cancel his parole at any time;
(b) if he is sentenced to another term of imprisonment, his parole is automatically cancelled; and
(c) in other circumstances his parole will expire on a date stated in the order.

Section 41(3) of the Offenders Probation and Parole Act also confers on the Parole Board power to attach to the order "such other requirements as the Board considers necessary in any particular case". There is a specific provision in Section 41(3a) of the Act that the parole order may include requirements relating to residence within Western Australia, or, if the offender consents, in another state or territory. Unless the parole order permits or requires the parolee to reside elsewhere, it is a requirement, under Subsection (3b), that he shall not leave or remain out of the state, except with the permission of the Parole Board or the Chief Parole Officer. Table 6 shows the type of requirements that are commonly attached to parole orders and the incidence of attachment. Certain interesting trends are apparent from Table 6. Firstly, it is now very unusual for orders to contain conditions that the parolee shall abstain from drinking alcohol. No doubt the reason for this trend is that such conditions are extremely hard to police. Secondly, there has been a marked increase in the number of orders that contain conditions as to employment. Thirdly, there has recently been a decline in the proportion of orders that have included conditions relating to deportation.[21]

Parole is only a conditional release from prison and there is a specific provision in the Offenders Probation and Parole Act that states that those released on parole "shall be regarded as being still under sentence".[22] It is perhaps consistent with this statement that the Parole Board enjoys wide discretion with regard to the cancellation of parole and, in fact, the discretion is unfettered under Section 44(1) and may be exercised merely upon an order signed by two members of the Board. There is also power in the Board, which may be similarly exercised, to suspend parole either for a fixed or an indeterminate period.[23]

Commission of an offence during the parole period for which the offender is ordered to serve another term of imprisonment (unless

Table 6. Western Australia: Special Conditions imposed on Male Parolees by the Parole Board, 1964–65 to 1973–74

Year	Total Prisoners Granted Parole[a]	Number of Parolees Conditioned	Total no. of Conditions	Misc.	Alcohol	Psychiatric, Psychological or medical treatment	Gambling	Specific Area or place of residence	Hire Purchase	Employment[b]	Visiting	Associates	Deportation	Drugs
1964–65[c]	144	43	56	3	28	10	3	5	2	1	–	3	–	1
(%)	(100)	(29.9)	(100)	(5.4)	(50.0)	(17.8)	(5.4)	(8.9)	(3.5)	(1.8)		(5.4)		(1.8)
1965–66	226	51	77	9	30	10	3	8	1	2	2	–	12	–
(%)	(100)	(22.6)	(100)	(11.7)	(38.9)	(13.0)	(3.9)	(10.4)	(1.3)	(2.6)	(2.6)		(15.6)	
1966–67	232	41	46	2	21	7	–	–	2	5	2	2	5	–
(%)	(100)	(17.7)	(100)	(4.4)	(45.6)	(15.2)			(4.4)	(10.8)	(4.4)	(4.4)	(10.8)	
1967–68	280	52	61	4	18	10	3	7	–	6	3	3	7	–
(%)	(100)	(18.6)	(100)	(6.6)	(29.5)	(16.4)	(4.9)	(11.5)		(9.8)	(4.9)	(4.9)	(11.5)	
1968–69	348	54	69	4	15	11	–	11	–	9	8	5	6	–
(%)	(100)	(15.5)	(100)	(5.8)	(21.7)	(16.0)		(16.0)		(13.0)	(11.6)	(7.2)	(8.7)	
1969–70	337	78	101	9	24	13	–	16	–	22	6	6	5	–
(%)	(100)	(23.2)	(100)	(8.9)	(23.8)	(12.9)		(15.8)		(21.8)	(5.9)	(5.9)	(5.0)	
1970–71	401	76	87	1	13	8	–	17	–	28	3	6	11	–
(%)	(100)	(19.0)	(100)	(1.1)	(15.0)	(9.2)		(19.5)		(32.2)	(3.4)	(7.0)	(12.6)	
1971–72	419	134	146	2	6	16	–	14	–	83	1	7	17	–
(%)	(100)	(32.0)	(100)	(1.4)	(4.1)	(11.0)		(9.6)		(56.8)	(0.7)	(4.8)	(11.6)	
1972–73	491	143	162	1	2	18	–	9	–	106	1	10	15	–
(%)	(100)	(29.1)	(100)	(0.6)	(1.2)	(11.1)		(5.6)		(65.4)	(0.6)	(6.2)	(9.3)	
1973–74	482	167	179	2	4	13	–	7	–	144	–	4	5	–
(%)	(100)	(34.7)	(100)	(1.1)	(2.2)	(7.3)		(4.0)		(80.4)		(2.2)	(2.8)	

a Includes those persons released by Order of the Governor in Executive Council.

b These are conditions that the parolee shall not change his employment without the consent of the parole officer. Often such a condition is imposed on the parolee who has obtained employment while on work release.

c Nine months only.

the offence is merely one of failing to comply with the terms of the parole order)[24] leads to automatic cancellation of parole.[25] As it has already been seen,[26] most cancellations in Western Australia are in fact mandatory. Cancellation of parole, however, does not necessarily result in the offender serving the unexpired term of imprisonment. Under Section 44(3), the Parole Board may order, by warrant signed by two if its members, that the offender be returned to prison to serve the unexpired term, but alternatively, it may order that the offender appear before the Board. Once the offender has been brought before the Board, it has the discretion either to direct his further release on parole or his return to prison.[27] If, following cancellation of parole, the offender is returned to gaol, subject to the Parole Board's ability to grant him further parole, he has to serve the unexpired term of imprisonment as at the date of his release: no part of his period on release can be credited towards the unexpired term.[28] Somewhat anomalously, however, if the Parole Board has exercised its discretion under Subsection (3b) and has directed that the offender be released again on parole, the whole or part of the previous period on parole may be credited towards the full sentence. It is difficult to see good reason for conferring wider discretion on the Board in the case where it decides to release the offender again on parole than in the case where it orders his return to prison. There may well be circumstances in which the offender has committed an offence towards the end of his parole period and, for reasons of public policy, the Board can see no alternative but to return him to prison. However, the Board's inability to credit the offender with his "clean" time on parole may cause him undue hardship.

(iii) The royal prerogative

The royal prerogative migrated to Western Australia by virtue of Letters Patent passed under the Great Seal of the United Kingdom constituting the Office of Governor and Commander-in-Chief of the Colony of Western Australia and its Dependencies, dated 29 October 1900.[29] There are a number of sections in the Western Australian Criminal Code that concern the exercise of the royal prerogative. Some of these are of specific relevance to capital cases and will be dealt with below: others are more relevant to the present discussion. Section 21 states that nothing in the Code shall affect the royal prerogative, but the Attorney-General, on the consideration of any petition for the exercise of the prerogative, may at any time refer the whole case to the Court of Criminal Appeal, or any specific point arising from it. The pardon that is given by the Governor may be ab-

solute,[30] in which case the offender is discharged from the consequences of conviction. Section 705 implies that it may also be conditional. Section 705 provides:

> In any case in which the Governor is authorised, on behalf of Her Majesty, to extend the Royal mercy to an offender under sentence of imprisonment with or without hard labour, she may extend mercy upon condition of the offender entering into a recognizance conditioned to keep the peace and be of good behaviour for a period from date of the sentence equal to the term of the sentence or for any less period or upon condition of the offender submitting to his release on parole, under the Offenders Probation and Parole Act, 1963, for any period not exceeding five years. Upon complaint being made on oath before any Justice of any breach of the condition of recognizance, such Justice may issue his warrant for the apprehension of the offender, and for his detention in custody until he can be brought before a Justice to be dealt with hereunder, and any Justice, on such offender being brought before him, may on due proof of such breach, declare the recognizance forfeited, and commit the offender to prison to serve, as under the sentence aforesaid, any unexpired balance of the term of such sentence, which, for this purpose, shall be deemed to be revived.
>
> The provisions of the Offenders Probation and Parole Act, 1963, apply to every person released on parole pursuant to this section, as if he were released from prison on parole under that Act.

However, there are considerable doubts concerning the constitutional validity of the exercise of a conditional pardon without the consent of the offender having first been obtained. As this issue is relevant also to attempts to commute the death sentence, the matter is discussed further in relation to Section 679 of the Criminal Code.[31]

4. STATUTORY PROVISIONS RELATING TO SPECIAL TYPES OF IMPRISONMENT

(a) Life Imprisonment[32]

(i) Imposition of a term of life imprisonment

A wide range of offences is punishable by life imprisonment in Western Australia. In all, forty-six offences are so punishable and these include incitement to mutiny,[33] aiding pirates,[34] counterfeiting current gold and silver coins[35] and the personation of the owner of shares.[36] In practice, according to Freiberg, the use of life imprisonment is confined to a few offences, and in Western Australia, these are murder, wilful murder and rape.

Although the death penalty may still be imposed in Western Australia for treason,[37] piracy[38] and wilful murder,[39] there have only been eighteen executions between 1901 and 1974, and the last occurred in 1964. Usually, the death penalty is in practice commuted to life imprisonment.[40] Section 679 of the Criminal Code states:

> In any case in which the Governor is authorised to extend the Royal mercy conditionally to an offender under sentence of death, he may extend mercy on condition of the offender being imprisoned, with or without hard labour, for life or, in the case of a child or young person under the age of eighteen years, on condition of his being detained, during the Governor's pleasure, in safe custody in such place or places as the Governor may, from time to time, direct.
>
> Any such extension of mercy is to be signified in writing to the Chief Secretary, and the Chief Secretary is required thereupon to allow the offender the benefit of a conditional pardon, and to make an order that he be imprisoned with or without hard labour or be detained in safe custody according to the direction of the Governor. Such allowance or order has the effect of a valid sentence passed by the Court before which the offender was convicted.
>
> The Parole Board established under the Offenders Probation and Parole Act, 1963, shall, as the Governor may from time to time require, report to him as to the place in which a child or young person detained in safe custody pursuant to an order made under this section should be so detained.
>
> The Governor may order that a child or young person detained in safe custody pursuant to an order made under this section be released from the place in which he is then detained, on parole, for any period not exceeding five years, and the child or young person shall thereupon be so released under, and be subject to, the provisions of the Offenders Probation and Parole Act, 1963 as if he were released from prison on parole under that Act and sections forty-two and forty-four of that Act shall apply, with such adaptations as may be necessary.

Although it is not perhaps immediately apparent, Section 679 relates to a conditional pardon. The death sentence is commuted, allegedly on the condition that the prisoner, being a person of eighteen years or over, shall undergo life imprisonment instead. In an article on "Conditional Pardons and the Commutation of Death Sentences", Brett, after an examination of the history of the royal prerogative, casts considerable doubt on the constitutional validity of conditional pardons without the consent of the offender.[41] In particular, he argues that Section 69 of the English *Criminal Justice Act* 1948 did not touch on the question of the validity of a conditional pardon without the prisoner's consent. Section 69 was not unlike

many of the existing Australian provisions:

> Where His Majesty pardons any person who has been sentenced to death on condition that he serves a term of imprisonment, that person shall be deemed to have been sentenced by the court before which he was convicted to imprisonment for the said term.

Brett argues that it is surely beyond question that in saying that a person who has been conditionally pardoned is deemed to have been sentenced to a term of imprisonment, the section is referring only to a person who has received a *valid* constitutional pardon. The section is silent as to when a conditional pardon is valid, and in Brett's view, it was already established law by 1948 that such conditional pardon was only valid if the offender's consent had been given.

The Western Australian provisions that imply that the Governor may grant a conditional pardon without the consent of the offender are Sections 705 and 679. Yet both of these sections beg the question concerning the constitutional validity of the pardon by using the phrase "[i]n any case in which the Governor is authorised to extend the Royal mercy".

In the recent South Australian case of *Ex parte Lawrence*,[42] the issue of the validity of a conditional pardon arose. The facts were that Lawrence had been sentenced to death for murder and the Governor in Council commuted or purported to commute the sentence to imprisonment for life. Lawrence's counsel argued that he had neither requested nor consented to any commutation of the death sentence and that he would like that sentence to be applied.

After the alleged commutation had occurred, the South Australian legislature took steps to ensure that the death sentence should not be applied by the enactment of Section 301a of the Criminal Law Consolidation Act, which provides:

> Where sentence or judgment of death has been pronounced by a court or recorded by order of a court upon or against a person and the Governor, acting with the advice and consent of Executive Council—
> (a) has granted or grants a pardon to that person in respect of that sentence or judgment; or
> (b) has made or makes an order or direction commuting or purporting to commute that sentence or judgment to a sentence of imprisonment,
>
> and, at the time of granting the pardon or making that order or direction commuting the sentence or judgment, has made or makes an order or a direction that that person shall serve a sentence of imprisonment for life or for a specific term, that last mentioned order or direction shall, for all purposes, be deemed to have been lawfully made by the court and to be

> the sentence of the court and shall have full effect as such as from the day on which the sentence or judgment of death was pronounced or recorded, as if the court had, by operation of this Act, full power and authority to impose and, by virtue of that power and authority, did impose on that person that sentence of imprisonment in lieu of the sentence or judgment of death.

Two main issues arose before the Court of Criminal Appeal. Firstly, did the section validate a commutation of a death sentence to life imprisonment and secondly, if so, did it have retrospective effect? Both the Chief Justice and Mr Justice Hogarth referred to Brett's article, but took the view that Section 301a avoided the difficulties that the article had referred to. Further, it was held that if the commutation were defective, the provision was retrospective in effect and validated Lawrence's commutation.

It is submitted that further research is required into the validity of the conditional pardon. It does not appear that the matter was considered exhaustively by the Court of Criminal Appeal in *Ex parte Lawrence* and it may well be that a further challenge to the constitutionality of provisions like Section 301a would produce different results. On the other hand, if Section 301a is generally held to have validated conditional pardons, other Australian jurisdictions would do well to emulate the South Australian lead.

Where life imprisonment is available to the courts as a penalty, it is generally discretionary rather than mandatory. An exceptional provision is contained in Section 282(b), which provides:

> A person who commits the crime— ...
> (b) of murder is liable to imprisonment with hard labour for life and shall not be sentenced to imprisonment for any shorter term.

The fact that this statutory provision states specifically that imprisonment shall not be for any shorter term suggests that murder constitutes an exception to the general rule expressed in Section 19 of the Criminal Code that the expression "is liable to" sets a maximum rather than a mandatory penalty.

(ii) Release from life imprisonment

Freiberg's statistics indicate that between 1930 and 1974 a total of thirty-six offenders serving life sentences were released from imprisonment in Western Australia. The average length of time served by them was 12 years 11 months. The longest term served was 31 years 5 months and the shortest was 1 year 8 months. Those serving life sentences are excluded from eligibility for remissions under the

Prison Regulations 1974.[43] Under the marks system, which existed before 1974, the Governor in Council could take into account marks for the purposes of determining whether the royal prerogative should be exercised in respect of "lifers". The terms of Section 705 of the Criminal Code, as already mentioned,[44] permit the Governor to release offenders from prison conditionally on their entering into good behaviour bonds or being on parole under the Offenders Probation and Parole Act for up to five years. It is not specifically stated whether the Governor's power under this section extends to those who are serving life sentences, but there are no grounds for assuming that such prisoners are excluded.

Even if Section 705 does not apply, the Governor has clear authority under Section 42(1) of the Offenders Probation and Parole Act to order the release of those serving life sentences:

> The Governor may, by order in writing, direct the release from prison on parole at the time specified in the order on such terms and conditions and for such parole period, not exceeding five years, as the Governor thinks fit a prisoner undergoing a sentence of imprisonment, either with or without hard labour, for life and the provisions of this Act relating to release of prisoners on parole, with such adaptations as are necessary, apply to a prisoner released upon parole under this section.

If an offender has been released on parole under this subsection and his parole has subsequently been cancelled, the Parole Board may thereafter release the offender again on parole for such period, not exceeding five years, as the Board thinks fit.[45]

The Parole Board has certain statutory obligations to make reports to the Minister in respect of those undergoing life imprisonment.[46] In the case of those in respect of whom the death penalty has been commuted to life imprisonment, a report must be made as soon as practicable after ten years from the date of the sentence and thereafter as soon as practicable after each period of five years. In the case of a life penalty that has not been so commuted, a report must be made as soon as practicable after five years from the date of the sentence and thereafter at intervals of five years. As Freiberg comments, there is no apparent justification for the distinction between those whose sentences have been commuted to life imprisonment and those upon whom life sentences have been imposed.[47] Indeed, the obligation on the Parole Board to report at five-yearly intervals hardly seems adequate to ensure that the information that the Executive receives on those serving life sentences is up to date. It is submitted further that in view of the expertise that can be expected of the Parole Board, there is no substantial reason why it

should not exercise an executive rather than an advisory function in relation to "lifers", or why it should not be under a statutory obligation to review their progress at, say, annual intervals.[48]

(b) Other terms of imprisonment with no fixed maximum

(i) The imposition of indeterminate sentences[49]

There are two provisions in the Criminal Code that authorize the imposition of indeterminate sentences on adult offenders.[50] These are Sections 661 and 662. Under Section 661, the offender must be apparently of the age of eighteen or more, he must have been convicted of an indictable offence not punishable with death and he must have been previously so convicted on at least two occasions. The court before whom such an offender is convicted may declare that he is an habitual criminal, in which case the offender will have to serve a fixed term of imprisonment in respect of the offence of which he has been convicted and thereafter be detained during the Governor's pleasure in a reformatory prison. The interesting features of this section are that it contains no reference to previous terms of imprisonment served by the offender, it contains no guidelines for the court to decide whether it should be invoked and it is exclusively "dual track", i.e. the indeterminate sentence can only operate in conjunction with and at the end of a fixed term.

In one sense, Section 662 confers an even wider discretion on the sentencing court, although there are some minimal guidelines to indicate circumstances in which the legislature evidently thought the sentence appropriate. Under Section 662, it is not necessary for the offender to have had any prior convictions or to be declared an habitual criminal. The section may be invoked in respect of any offender who has been convicted of an indictable offence not punishable by death, provided the court thinks the sentence is fit having regard to the antecedents, character, age, health or mental condition of the person convicted, the nature of the offence or any special circumstances of the case. The sentence under Section 662 may be pronounced to operate either at the end of a fixed sentence or instead of a fixed sentence, i.e. the sentence may be "dual track" or "single track".

There is a general provision in Section 665(1) that an indeterminate sentence shall commence and be operative on the expiration or sooner determination of any sentence involving deprivation of liberty that the convicted person is sentenced to undergo. Whether the other sentence has been imposed previously or is imposed at the

same time as the indeterminate sentence, the indeterminate sentence must be served last.

Although Section 663 stipulates that whether an offender should be declared an habitual criminal or whether he should be detained in a reformatory prison shall be determined by the court on such evidence as it thinks fit to hear, neither Section 661 nor 662 states the actual purpose of the indeterminate sentence. However, perhaps this is implied by the reference in the legislation to the fact that detention must in either case be in a "reformatory prison".[51] It is somewhat ironical that no special reformatory prison has ever been available for prisoners serving sentences under these sections. In practice, they are detained in the same institutions as other prisoners, albeit in different areas.

There are no published statistics available that indicate the respective commitments under Sections 661 and 662. During the period 1962-7 the number of commitments made collectively under the sections were as shown in Table 7.

Table 7. Western Australia: Total Commitments of Adult Offenders under Sections 661 and 662 of the Criminal Code, 1962–63 to 1966–67

Year	No. of Commitments
1962–63	22
1963–64	30
1964–65	15
1965–66	18
1966–67	15

(ii) Release following an indeterminate sentence

Between 30 June 1965 and 30 June 1970, twenty-three habitual criminals were released from Western Australian prisons. As at 30 June 1970, six of these were still on parole, six had been returned to prison for breach of parole and eleven had completed their terms on parole successfully. The average period those offenders served on parole was one year and seven months. Table 8[52] shows the number of releases of prisoners held under Section 662 and the aggregate periods served in prison, both on finite and indeterminate sentences prior to release. Without current information concerning the commitments to prison under Sections 661 and 662 respectively, it is impossible to discern any particular trends from the figures shown on Table 8. Certainly, in relation to the commitments shown in Table 7,

it seems that there is a remarkably high number of releases of prisoners who have served sentences under Section 662. It may be the case that Section 662 has been invoked frequently since the last year referred to in Table 7, namely 1966-7. It may also be the case that Table 8 includes not only those who are released for the first time having served sentences under Section 662 but also those who have been re-released following a recommitment to prison.

The Regulations under the Prisons Act explicitly state that the remissions system created by the Regulations applies only to those serving finite sentences. It seems, then, that the finite part of a sentence under Section 662 could attract remission of up to 25 per cent, but otherwise the system created by the Regulations under the Prisons Act does not apply to those serving indeterminate sentences. Furthermore, the Regulations under the Offenders Probation and Parole Act only apply to offenders in respect of whom a minimum term has been set, so it would appear that they also have no application to those serving indeterminate sentences.

Release from prison of those sentenced under Sections 661 and 662 is governed by Section 41 of the Offenders Probation and Parole Act. Under that section, the Parole Board may, at its discretion, order than an habitual criminal be released at any time after the expiration of two years since the offender was detained at the Governor's pleasure, or such lesser period as the Governor on the recommendation of the Board orders. The Parole Board may order the release of an offender upon whom a "dual-track" sentence has been imposed at any time after the commencement of the indeterminate part of his sentence. In the case of a "single-track" sentence under Section 662, the Parole Board may order the release of the offender at any time after the commencement of the sentence. A period on parole following the imposition of an indeterminate sentence, either under Section 661 or 662, is for such term, not exceeding two years, as the Parole Board thinks fit.[53]

Section 41 (1a) contains a provision that relates to a situation in which an offender, who is undergoing or has been sentenced to a fixed term of imprisonment in respect of which a minimum term has been set, is also subject to an indeterminate sentence. In such case, the indeterminate sentence is deemed to commence upon the expiration of the minimum term.

Table 8. Western Australia: Release of Prisoners held under Section 662 of the Criminal Code and Periods served in Prison, 1964–73

Time served in prison before release under Section 662	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	Total
Under 3 months	1	7	2	–	3	10	3	2	1	–	29
(%)	(25)	(25)	(20)		(16)	(48)	(19)	(9)	(8)		(20)
3 months but under 6		4	1	2	7	4	7	12	4	2	43
(%)		(14)	(10)	(15)	(37)	(19)	(44)	(59)	(30)	(40)	(28)
6 months but under 12	2	11	6	6	7	7	5	3	7	2	56
(%)	(50)	(39)	(60)	(46)	(37)	(33)	(31)	(13)	(54)	(40)	(38)
12 months and over	1	6	1	5	2	–	1	4	1	1	22
(%)	(25)	(22)	(10)	(39)	(10)		(6)	(19)	(8)	(20)	(14)
Total	4	28	10	13	19	21	16	21	13	5	150
(%)	(100)	(100)	(100)	(100)	(100)	(100)	(100)	(100)	(100)	(100)	(100)

5. WORK RELEASE

Section 64R of the *Prisons Act* 1903-1971 provides that the Director of the Department of Corrections may, with the approval of the Minister, grant leave of absence "for a prescribed purpose and on prescribed conditions to a prisoner of a prescribed class". The 1974 Regulations that relate to work release do not create any restrictions on the class of prisoner who shall be eligible to take part in the scheme, but merely provide that the Director shall "satisfy himself that the prisoner is a suitable subject for leave for the purpose of employment, and that employment suitable to him is available".[54] However, from the official statement concerning the structure and functions of the Department of Corrections,[55] it appears that the criteria used in practice to determine eligibility are as follows:

(a) the inmate should serve six months in prison before he is included in the programme;
(b) unless there are special circumstances, work release should only be for a maximum of three months; and
(c) preference is given to inmates with family responsibilities.

The work release programme came into operation in Western Australia in March 1970, and its purpose is described by the Department of Corrections as twofold:

1. to allow for the gradual return to, and establishment in, the community of those individuals who have served reasonably long periods of imprisonment; [and]
2. to attempt to cut across the offending-re-offending patterns of behaviour of a large segment of the prison population who have or are developing extensive criminal histories.

While the prisoner is on work release, all his wages are paid direct to the gaoler, from which $2 per day may be utilized to offset the costs of detention.[56]

Rinaldi has described three systems of work release that exist in the world's penal systems and that he has designated respectively as the European, the Minnesota and the Canadian systems.[57] The European system operates on administrative selection of work releasees and it is this system that has been adapted for use in Australia.

Under the Minnesota scheme, however, work release is a sentence that may be imposed by the courts and is usually seen as an intermediary type of sentence that avoids total confinement but is used where probation or a fine is inappropriate.

The Canadian system is similar to the European scheme in that administrative rather than judicial authorities determine the selec-

tion of the work releasees, but under the Canadian system, it is the National Parole Board that makes the decision. The rationale of the Canadian system is that prison inmates sometimes require a more gradual readjustment to community life than that which can be afforded by the supervision of a parole officer. Further, the Parole Board is in the best position to determine who is or is not ready for parole.

Rinaldi expresses the view that there is scope for the use of all three systems in Australia, and he hails work release as offering "the most logical and most promising means of solving most problems associated with work in Australia's archaic prison system".[58] In particular, Rinaldi rues the fact that at present no Australian courts can use work release as a sentence and claims that this is "one of the ... deficiencies in Australian sentencing laws".[59] He sees a work release sentence as being appropriate in cases where the offender is ineligible or unsuitable for a non-custodial sentence and yet where total imprisonment must result in more harm than good being done. Provided the offender is not dangerous, the work release sentence has, in his view, both penological and economical advantages, to the offender and to the community as a whole. This view is further developed by Rinaldi in his paper "Day Parole as a Sentence".[60]

6. DECISIONS RELATING TO IMPRISONMENT

(a) When a sentence of imprisonment is appropriate

There are a number of recent Western Australian cases that suggest that the courts are reluctant to impose imprisonment and will not do so if there is an alternative. The fact that until recently Western Australia had a high rate of imprisonment per 100,000 of the general population leaves open the possibility that the lower courts were less able or willing to find alternatives than the higher courts. One of the strongest statements of principle is contained in the already cited case of *Winder* v. *Milner*,[61] in which the present Chief Justice showed considerable distaste for the use of short-term prison sentences for young first offenders. In making these remarks, the Chief Justice was expressing similar views to those he espoused in *Hill* v. *Katich*.[62] Comments in the same vein have also been made by Wickham J. in *Cherry* v. *Whyte*,[63] Virtue S.P.J. in *Morgan* v. *Boath*[64] and Lavan J. in *McIntosh* v. *Grover and Edwards*.[65]

The fact that an offender has a long criminal record does not of itself mean that a court will necessarily impose a sentence of imprisonment. Recency is also relevant. In the 1973 case of *Pye* v.

Foster, the appellant pleaded guilty to the offence of driving a motor vehicle while under the influence of alcohol or drugs, to such an extent as to be incapable of exercising proper control, contrary to Section 32 of the Traffic Act. His intoxicated condition had caused him to run into the back of a stationary vehicle. The Magistrate in the court below had imposed on the appellant a sentence of three months' imprisonment and had disqualified him from driving for six months. In allowing the appeal, Wickham J. noted that although the appellant had a long criminal record involving many different types of offences, he had committed only three offences since 1965. There had been no traffic offence since 1969 and apparently no traffic offence prior to that. The present offence was the first of its kind. Wickham J. quashed the sentence of imprisonment and in view of the fact that the appellant had spent thirteen days in custody awaiting the appeal, he imposed a fine of $75 instead of imprisonment. It is not clear whether Wickham J. would have imposed a short term if the appellant had not been in custody pending the appeal, but he obviously did not think the sentence of three months was appropriate. He said:

> The only explanation for the sentence of imprisonment ... is that [the Magistrate] must have been unduly influenced by the long criminal record of the appellant, but this is a record which spans a period from 1939 and, apart from the matters which I have mentioned, comes to an end in 1965, after which it appears the appellant was well on the way to rehabilitation, and there have only been since then the breaches of the law which I have referred to, resulting in substance in no more than a probation order.
>
> In any case, a criminal record of itself does not and cannot have the effect of increasing a sentence in a particular case. If that attitude is adopted, it simply means that a man who has already been punished for offences which he has committed in the past is being punished for them again, and I have said before in this court that is something which cannot and ought not to be done and, if it is done, is a departure from principle and must be corrected.[66]

However, it may be that since the decision of *Rizidis* v. *Chippington*,[67] his Honour's remarks now carry less weight with regard to the significance to be attached to a prior record. In any event, a somewhat different attitude from that of Wickham J. was expressed by Wallace J. in *Taylor* v. *Kiernan*[68] when dealing with an appeal by a 22-year-old appellant who had pleaded guilty to a charge of reckless driving contrary to Section 31 of the Traffic Act. *Taylor* v. *Kiernan* was also decided in 1973. Although the appellant had no prior traffic convictions, a sentence of three months' imprisonment

had been imposed by the court below and he had been disqualified from driving for six months. He appealed only against the sentence of imprisonment, but his appeal was dismissed. Wallace J. distinguished the case from *Hill* v. *Katich* and said:

> [it] is not the principle to be taken therefrom that the public interest is best served by endeavouring to ensure that the commission of crime by minors is prevented by occasioning the rehabilitation of the offender as opposed to his degradation in prison. Surely the legislature would have worded the graduated penalties in sub s. 3 of s. 31 differently in the year 1965, when such penalties were inserted for what is a quasi-criminal offence, if the law applicable to punishment for breaches of that section was laid down in *R.* v. *Ball* [[1951] Cr. App. R.164]. ... In my view, Parliament intended that the courts should be empowered to impose heavy punishment upon offenders where the facts justified such application both from the point of view, somewhat old-fashioned today, that such punishment should act as a deterrent to the offender and also to all drivers of motor vehicles.[69]

The fact that a defendant is a first offender may incline the court not to impose a sentence of imprisonment, even though the offence itself is quite a serious one of its type.[70] In *Holmes* v. *R.*, the applicant had pleaded guilty to stealing $810 from an unoccupied house and in the court below he had been sentenced to a term of two years' imprisonment.[71] However, having considered a pre-sentence report, the Court of Criminal Appeal said:

> we have decided there are reasonable grounds for believing that this first offender may not offend again, and that to assist in his reformation a term on probation is more appropriate than a prison sentence.[72]

But the Court of Criminal Appeal has not always shown such reluctance as it did in *Holmes* v. *R.* to sentence first offenders to imprisonment. In 1965, in *Horn, Bennett and Bushell* v. *R.*,[73] three young applicants with no prior convictions had been sentenced by a lower court to effective terms of three years' imprisonment, with a minimum period of eighteen months, for four counts of breaking, entering and stealing from shops and a garage. The goods that were stolen were valued at approximately £137 and there was evidently a small sum of money taken as well. The applications for leave to appeal to the Court of Criminal Appeal were dismissed.

While a number of other factors might account for the difference between the disposition of the two cases, *Holmes* v. *R.* and *Horn, Bennett and Bushell* v. *R.*, it also seems likely that the dates of the two applications were significant and that in 1971, there was a greater reluctance in the higher courts to use imprisonment for first

offenders than there was in 1965. However, there are circumstances in which the Court of Criminal Appeal, as presently constituted, can evidently see no alternative to imprisonment of a young first offender. *Mounsey* v. *R.* illustrates the situation. In that case, the 19-year-old applicant pleaded guilty to stealing two cars. After stealing the cars, the applicant committed two other offences, which were dealt with summarily. The applicant was then brought before the District Court in relation to the cars. The sentence imposed by the District Court was two and a half years on each charge, to be served concurrently, with a minimum term of nine months. In dismissing Mounsey's application for leave to appeal to the Court of Criminal Appeal, the Chief Justice said:

> It is not a general or acceptable proposition that persons who appear before a superior court on indictable offences should be regarded in any way as entitled not to be imprisoned in respect of those offences ... Not only are the offences of car stealing becoming increasingly prevalent, so that the courts should take what steps they can to endeavour to stamp out these offences by providing proper penalties ... but the circumstances of these two offences were indeed very serious. They disclosed a premeditated plan ... and a degree of wanton destruction of the first vehicle ... and in each case they deprived the owners of these vehicles of valuable motor cars without the slightest consideration for them.[74]

In *Mounsey* v. *R.*, then, the fact that the applicant was a first offender when he stole the cars was offset by a number of other factors, namely the serious nature of the offence, the fact that it was premeditated and its current prevalence.

There is some evidence that the Court of Criminal Appeal takes the view that in certain circumstances imprisonment can actually be beneficial to an offender. In *O'Shea* v. *R.*,[75] the Court of Criminal Appeal considered that an 18-year-old applicant required remedial treatment in a reformatory prison and the Court was obviously impressed by a report given to it that he was already making some progress in the school at Fremantle Gaol. Accordingly, the Court of Criminal Appeal substituted an indeterminate sentence under Section 662 of the Criminal Code for one of two years' imprisonment, with a minimum of twelve months. On the other hand, there is recognition, at least by some members of the Bench, that long terms of imprisonment may be harmful, especially for young offenders. In a dissenting judgment in *Thomson* v. *R.*, Wickham J. took the view that a ten-year sentence, with a minimum term of six years, was too long for a 19-year-old applicant who had been convicted of unlawfully doing grievous bodily harm to a policeman. He went so far as to

say that sentences that are too long are not only purposeless but may be harmful in that:

> the prisoner might become hopeless, aggressive and otherwise intractable, and thus one of the purposes of punishment will be defeated through making it more rather than less likely that he will eventually offend again.[76]

(b) When a cumulative sentence is appropriate

It has already been observed that under Section 20 of the Criminal Code, a sentencing court that is dealing with a convicted person on more than one criminal charge may order that terms of imprisonment be served concurrently or cumulatively. There is a similar power in Justices under Section 150 of the Justices Act, which was the subject of interpretation in *Beaton and Another* v. *McGinty*." A Police Magistrate had sentenced the two appellants to cumulative terms of imprisonment in respect of each of six charges, which had been laid against them jointly. On appeal against a refusal to grant an order *nisi* to review the sentences, it was argued that Section 150 did not confer upon Courts of Petty Sessions the discretion to impose more than one cumulative sentence. The argument was based on the difference in wording between Section 150 and Section 20 of the Criminal Code. The latter section was said plainly to allow cumulative sentences in respect of any number of offences, whereas Section 150 contained certain words that were singular rather than plural and this was claimed to imply that only one sentence could be cumulative with another. Section 150, which is still substantially the same, was as follows:

> (1) When Justices, upon making a conviction for a simple offence, adjudge the defendant to be imprisoned, and the defendant ... is adjudged at the same petty sessions to be imprisoned for any other offence, the Justices may, if they think fit ... adjudge that the imprisonment for such subsequent offence shall commence at the expiration of the term of imprisonment which the defendant is then undergoing or is liable to undergo, or ... to which he is sentenced at the same petty sessions.

On the wording of Section 150, it may be thought that the appellants' argument was persuasive. However, the Full Court, after misquoting the section by referring to "subsequent offences" instead of "subsequent offence", ruled that Courts of Petty Sessions have power to impose more than one cumulative sentence.

Certainly Section 20 of the Criminal Code is interpreted by the courts as authorizing the imposition of more than one cumulative

sentence. Indeed, in *Cruttenden* v. *R.*,[78] the Court of Criminal Appeal refused an application for leave to appeal by an applicant who had been sentenced to eight terms of six months' imprisonment and ten terms of one year, all to be served cumulatively. The minimum term was seven years. The applicant had been convicted of obtaining a total of $48,000 from one person by eight separate false pretences, and of stealing a total of $123,000 from six people, some of them more than once.

Although Western Australian courts are clearly taking the view that they may impose a series of cumulative sentences, there are some signs of reluctance to do so where offences are closely related and are prosecuted simultaneously. This was the view of Wallace and Jones JJ. in *Pennial* v. *R.*,[79] where the applicant had been convicted on three counts of receiving. Although the goods had all come into the applicant's possession through contacts made and interests developed during the course of his employment, the goods were of a different nature and included, on the one hand, a valuable camera, and on the other, books and textbooks. In a later application for leave to appeal, the same applicant sought to have a further sentence, which had been imposed in respect of an earlier offence of unlawful possession of cannabis resin, made concurrent with those imposed on the receiving counts.[80] One of the grounds of the unlawful possession application was that, through no fault of the applicant, there had been a substantial delay in having the matter dealt with by the District Court. However, the majority of the Court of Criminal Appeal saw no reason in the delay that justified the granting of the application. And predictably, the majority evidently found no relationship that rendered concurrent sentences appropriate between the receiving offences on the one hand and the unlawful possession offence on the other.

It is perhaps worth noting that Thomas says that in England, powers to impose cumulative sentences are subject to two generally limiting principles.[81] The first is that sentences imposed for what is essentially one incident or transaction must be ordered to run concurrently, and the second is that the aggregate of the sentences must bear some relationship to the gravity of the individual offences. While it is unlikely that even in England, Cruttenden would have succeeded in an argument that his offences should really be viewed as one transaction (or perhaps two), it is somewhat surprising that in none of the decisions considered for the purposes of the present Report, except in the two cases of *Pennial* v. *R.*, were statements made about the existence of any principles that limit the courts'

powers to impose multiple cumulative sentences. However, in an extra-judicial statement at a Magistrates' Conference in Perth on 28 May 1975, Mr Justice Lavan expressed the view that cumulative sentences should not be imposed in respect of offences that arise from the same set of circumstances. His Honour also suggested to Magistrates that if they do impose cumulative sentences, they should guard against the practice of attaching short minimum terms to them because an offender's chances of "survival", with a long term on parole, is low.

It has been observed by White that unlike the other Australian states, neither Western Australia nor Queensland has any procedure, informal or statutory, for taking offences into account.[82] It is possible that this fact has influenced Western Australian courts in their comparative readiness to impose a series of cumulative sentences in respect of those offences of which the defendant has been found or has pleaded guilty.

(c) When the maximum statutory sentence should be imposed

It is generally the case that for indictable offences, the statutory maxima are very high in relation to the actual penalties that are imposed by the courts. Indeed, it has already been mentioned that for forty-six offences in Western Australia, it is statutorily possible for courts to impose the life sentence. In practice, Freiberg has found it is only imposed for murder, wilful murder and rape.[83]

As it was observed in the Introduction to the present Report, it is a well-accepted principle of sentencing in Western Australia that the statutory maximum sentence should be reserved only for the worst type of case and how far the court should recede from that maximum is a matter for the discretion of the sentencing court.[84]

The fact that a lower court has dealt summarily with an indictable offence is itself, according to Virtue J. (as he then was), an indication that the court did not consider the particular case the worst one of its sort. In *Borowicz* v. *Mott*,[85] Virtue J. said that the mere fact that a Magistrate had imposed the maximum sentence, which he had power to impose, in respect of an indictable offence dealt with summarily, did not justify the conclusion that he regarded the case as the worst one of its sort.

(d) When it is appropriate to take into account time already spent in custody awaiting appeal

It has already been observed that Section 20 of the Criminal Code contains a provision that unless the Court of Criminal Appeal

directs to the contrary, periods in custody awaiting appeal during which special treatment is given do not count towards any sentence that that Court may see fit to impose.[86]

The cases considered for the purposes of the present Report include several in which the Court of Criminal Appeal has made such a contrary direction. Two which dealt with the principle are of interest. One such case was *Hicks* v. *R.*,[87] where the applicant sought leave to appeal against a sentence of eight years' imprisonment, with a four-year minimum, which was imposed on him for rape. Although the application was refused, the court noted that Hicks had spent over five months awaiting the hearing of the application. The delay had been for several reasons, but partly to enable the applicant to obtain legal aid. In these circumstances, the Court of Criminal Appeal directed that the time spent in custody should count towards the total sentence.

By contrast, in the case of *Banks* v. *R.*,[88] an applicant who claimed he had been awaiting the appeal for eight months and that his application for leave to appeal had been made "on the advice of a Judge", was not allowed to treat the period on remand as part of his sentence. The Chief Justice told the applicant that Judges did not give the advice claimed to have been offered. Unfortunately, no transcript of the proceedings in the trial court was available, to determine whether there was any basis for the applicant's contention. Even if there had been no such basis, it would still be interesting to know why such a long period elapsed before the application came on for hearing.[89]

(e) Minimum terms

Although the cases examined for the purposes of the present Report did not include many that contained a reference to the courts' perception of the purpose of the minimum term, a couple of decisions suggest that the Court of Criminal Appeal sees it as a means of affording the defendant a chance of showing that his behaviour has improved and of being released early. In *Blackmore and Owen* v. *R.*,[90] the Court of Criminal Appeal reduced the minimum terms of two and a half years to terms of eighteen months, but left unchanged full terms of four and a half years that had been imposed on two 19-year-old applicants who had been convicted of attempted robbery. The Court of Criminal Appeal took the view that armed robbery is a serious offence and one that requires a heavy penalty, to deter others from committing crimes of personal violence. Accordingly, the court saw no grounds for reducing the full terms imposed by the court

below, but felt justified in reducing the minimum terms, in the hope that the applicants would have some prospect of reformation while under guidance on parole.

In *Puzas* v. *R.*, the Court of Criminal Appeal was even prepared to reduce minimum terms on the basis that the applicant's attitude at the date of the application was encouraging. The Chief Justice, giving the decision of the court, said:

> It will be for [the applicant] to take advantage of the opportunity by demonstrating to the satisfaction of the Parole Board that he is worthy of a trial period on parole ... [he] must understand that the reduced minimum term does not mean release forthwith, but merely offers him the chance, by his own efforts, to qualify for parole at a time earlier than was previously set by the District Court.[91]

It follows, perhaps, from the court's perception of the purpose of the minimum term that it believes it should be sufficiently lower than the full term, to allow the defendant incentive to reform. In two cases, *Stott* v. *R.*[92] and *Datson* v. *R.*,[93] the Court of Criminal Appeal, consisting each time of the same Judges, was called upon to consider the suitability of six-year minimum terms being attached to full terms of eight years. The applicants had both been convicted of rape, Stott on one charge and Datson on three charges of the consummated crime and on one charge of attempted rape. In each case, the Court of Criminal Appeal took the view that:

> a minimum term equal to three-quarters or more [of the full term] was in general wrong in principle, because it really afforded no opportunity to the person sentenced to show prospects of rehabilitation and reform such as to encourage the Parole Board to allow him to be on parole at a time earlier than he would otherwise have left prison after normal remission for good conduct.[94]

On the other hand, in *Cruttenden* v. *R.*[95] the Court of Criminal Appeal said that half of the full term was quite frequently fixed as a minimum term and evidently the court approved the practice. However, in *Garlett* v. *R.*, Burt J. indicated a somewhat different perception of the minimum term.[96] He saw it, quoting *Lyons and Others* v. *R.*,[97] as being designed "to provide for mitigation of punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a Judge determines justice requires that he must serve having regard to all the circumstances of the offence." On this view of the minimum term, it is certainly reserved for those who have good chances of eventual rehabilitation in the community, but its primary purpose is punitive.

A still further approach to the minimum term appears from the comments of two Supreme Court Judges upon sentencing traditionally oriented Aborigines. The Judges' views are of considerable interest. In *R. v. Ferguson*,[98] Burt J. attached a low minimum term of one month's imprisonment to a full term of two years, apparently because he was aware that the defendant, who had been convicted of the manslaughter of his wife, would be dealt with according to tribal law on his release.[99] Enquiries have revealed that on his return to his place of origin, the defendant promptly received tribal punishment in the form of a spear wound through his thigh. In *R. v. Fazeldean*, Mr Justice Wallace sentenced an Aborigine for manslaughter and he attached a minimum of six months' imprisonment to a full term of five years. In sentencing the defendant, Wallace J. said:

> I am not unaware of the pay-back law which you must ultimately face from your tribal elders and peers.
>
> To apply for the appropriate punishment in this knowledge is therefore not easy, for in effect you will be punished twice. In the end I have decided to place your fate in the hands of those far more skilled in such matters than I, and I refer to the parole service. I am conscious of the fact that you have already been in prison for almost five months.[100]

These two cases represent an apparently novel approach to the application of the minimum term. The cases are discussed further in Chapter 8.

As already mentioned, a court that imposes a sentence of twelve months or more has a discretion not to set a minimum term, under Section 37(2) (a) of the Offenders Probation and Parole Act, if it considers it inappropriate, having regard to the "nature of the offence and the antecedents of the convicted person". In *Ugle v. Ruthven* and *Williams v. Ruthven*, the meaning of the subsection was considered by the present Chief Justice. He observed that the provisions required that both the nature of the offence *and* the antecedents of the offender must together lead to a conclusion that, as an exception to the general rule, it is inappropriate to fix a minimum term. It is not sufficient that such a conclusion be justified by one or other of the conditions. Thus it is not enough that the offender has a bad record, or has previously broken parole, or has otherwise shown himself to be undeserving of parole or a "poor parole prospect". There must also be something in the nature of the offence that renders the minimum term inappropriate. His Honour said:

> By [the nature of the offence], I think Parliament must be taken to refer to the circumstances of the particular offence rather than to a class or type of offence; so that if the circumstances suggested there was a real risk to the community or to a class of the community (e.g. women or children) if the offender were granted parole, that might justify no minimum term being fixed ... But even then, before that could be done there would also need to be something personal to the offender which would lead to the same conclusion.[101]

In an extra-judicial statement at a Magistrates' Conference on 28 May 1975, Mr Justice Lavan interpreted these cases as meaning that the denial of a minimum term in respect of sentences of twelve months or more is a discretion that should rarely be exercised. However, in *Garlett* v. *R.*, two days after the statement by Lavan J. the Chief Justice had occasion to reconsider his views in *Ugle* v. *Ruthven* and *Williams* v. *Ruthven* and decided that he had previously given too narrow an interpretation to the phrase "the nature of the offence" and said "that upon its true meaning this phrase should be accepted as including not only the circumstances of an offence but also the class or character of the offence". The effect of this interpretation, of course, is to widen the category of cases in which courts are justified in not setting a minimum term. Furthermore, in the same case, Burt J. said that the term "antecedents" should have "as wide an interpretation as can be conceived", but it refers primarily, in the present context, to the offender's "previous history and past record."[102]

It appears that there is some pressure from members of the probation service for the amendment of the terms of Section 37(2) (a) of the Offenders Probation and Parole Act so that the sentencing court may decline to set a minimum term if either the nature of the offence or the antecedents of the convicted person render such action appropriate. The pressure seems to emanate from a belief that courts not infrequently set minimum terms in cases in which it would have been better if they declined. Whether or not the position will be ameliorated by the wider interpretation that is now given to the existing provision remains to be seen.[103]

It will be recalled[104] that the legislature prohibits the setting of a minimum term in certain cases, and one such instance is created by Section 37(2) (b) (ii) of the Offenders Probation and Parole Act:

> The Court—
> shall not fix a minimum term in respect of a term of imprisonment imposed—
> on a person if, on the expiration of that term of imprisonment, he is to be

> ... detained [during the Governor's pleasure] otherwise than as an habitual criminal.

In both *Wright* v. *R.*[105] and *Sotet* v. *R.*,[106] the question has been raised whether this subsection prevents a court from setting a minimum term where the defendant, at the date of conviction and sentence for the present offence, is already serving an indeterminate sentence in respect of a prior offence. In *Wright* v. *R.*, the issue did not have to be determined, because the Court of Criminal Appeal held it inappropriate that the applicant should have the advantage of a minimum term because of the length of his prior record. He had in fact eleven previous convictions for offences of dishonesty during the preceding three and a half years. The two present offences were both for breaking, entering and stealing and the value of the goods stolen and the money taken came to a total of £427. In *Sotet* v. *R.*, however, the issue of whether the court could have set a minimum term arose directly and Jackson C.J. said:

> in our view, a strict construction (which we think is proper to give to the section) indicates that it is only when at that time an indeterminate sentence is being passed that the court is directed not to fix a minimum term. But in a case such as that now before us where there is already an existing indeterminate sentence, then it is still the duty of the court to fix a minimum term unless ... the nature of the offence and the antecedents of the convicted person render a minimum term inappropriate.[107]

It is not clear from the report of *Sotet* v. *R.* how many prior convictions there had been or the period during which they had occurred, but there was certainly a previous record. The offences that had given rise to the applicant's present convictions were breaking, entering and stealing goods valued at $320.

The cases considered did not include many where it was a ground of appeal that the court below should have set a minimum term and yet it failed to do so. However, one such case was *Monim and Osman* v. *R.*[108] The applicants had been convicted under Section 233B of the Customs Act (Commonwealth) of being in possession of opium, cannabis resin and cannabis and of importing cannabis resin. Full terms of three years' imprisonment had been imposed on each applicant, but minimum terms were not set.

The trial Judge had declined to set minimum terms on three grounds:

(a) that the applicants were domiciled in Egypt;
(b) that it was likely that soon after release from prison each applicant would either be deported or would leave Australia of his own volition; and

(c) that in the trial Judge's view, the general background of each applicant made it unlikely that parole supervision would be practicable.[109]

The trial Judge's reasons for declining to set minimum terms are interesting insofar as they are related to the likelihood of deportation and consequent probable avoidance of supervision. On the assumption that supervision after imprisonment tends to be a crime-reducing factor that justifies release before the expiration of the full term, it is quite reasonable for courts to adopt the view that in the absence of supervision, the aims of retribution and crime prevention during the period of the full term prevail over any other purpose of punishment. On the other hand, it is conceivable that some courts might take the view that the likelihood of deportation is itself a good reason for setting a minimum term, in the hope that the Parole Board will order an early release and thereby save the state the cost of incarceration during the full term. In the event, the applicants sought leave to appeal both against the full terms and the trial Judge's decision not to set minimum terms.

While the Court of Criminal Appeal refused the applications for leave to appeal against the full term, it granted the applications in relation to the minimum terms, thereby apparently rejecting the trial Judge's view that the likelihood of deportation disqualified the applicants from parole. The Court of Criminal Appeal drew attention to the fact that although the applicants were convicted under a Commonwealth Act, the state law was applicable to them in relation to imprisonment by virtue of Section 4 of the *Commonwealth Prisoners Act* 1967. Furthermore, in the opinion of the court, the case did not fall into one of the exceptional categories in which a sentencing court, under Section 37(2) of the Offenders Probation and Parole Act, need not or may not set a minimum term. Accordingly, the Court of Criminal Appeal set a minimum term of twelve months.

It has already been observed that if the full term of imprisonment be less than twelve months, courts have a discretion as to whether to set a minimum term. None of the cases considered for the purposes of the present Report indicated how that discretion should be exercised, but Mr Justice Lavan, in an extra-judicial statement at a Magistrates' Conference on 28 May 1975, suggested that very short terms of parole are useless because there is inadequate opportunity for the development of a satisfactory relationship between the offender and his parole officer. From this, it follows that his Honour considers it inappropriate that minimum terms should be set at all in respect of really short terms of imprisonment.

Some interesting facts emerge from a study of the Annual Reports of the Parole Board concerning the relationship between minimum terms set by sentencing courts and actual release dates on parole. Table 9 represents an extension of one such study presented by Rinaldi,[110] and from it, it will be seen that by far the vast majority of parolees have consistently been released within one month from the date of the minimum term.

Table 9. Western Australia: Minimum Terms set by Sentencing Courts and Actual Release Rates on Parole, 1969–73

Release on parole	1969	1970	1971	1972	1973
Within 1 month of minimum	234	230	253	266	318
Within 3 months of minimum	4	10	16	20	20
Within 6 months of minimum	7	5	6	5	9
Within 12 months of minimum	8	1	1	1	3
After 12 months from minimum	2	–	2	–	–
Total	255	246	278	292	350

From this information, the conclusion may perhaps be drawn that from the point of view of the defendant, the role played by the sentencing court in determining his release date is a most significant one. Indeed, it may well be desirable that more appeals be taken in relation to minimum terms so that the principles of fixing them could be more clearly stated.

(f) Indeterminate sentences

(i) Declarations under Section 661 of the Criminal Code

In only two of the cases considered was a declaration made that the offender was an habitual criminal and a sentence passed on him under Section 661 of the Criminal Code. The declarations were made in 1963 and 1965 respectively and the records of the cases are scant and defy evaluative comment.

In *Banks* v. *R.*,[111] the appellant was sentenced to two years' imprisonment and was then ordered to be detained as an habitual criminal under Section 661. He had been convicted of breaking and entering a dwelling-house, but the record of the case contains no indication of his previous convictions or of his age. His appeal was dismissed. In *Ajster* v. *R.*[112] the applicant had been convicted of stealing two pairs of trousers and two blankets to the value of £40. He had

fifteen prior convictions on indictment. The trial Judge had sentenced him to two years' imprisonment with hard labour and directed that he then be detained as an habitual criminal. The Court of Criminal Appeal did not interfere with the sentence and the Chief Justice, in delivering the judgment of the court, obviously took an unfavourable view of the applicant's prior record and the fact that he had used information gained during the course of his employment to enable him to commit the present offence.

It is perhaps significant that the declaration was used in only two of the considered cases and there appear to have been no particularly distinguishing features of those cases. Quite commonly, the indeterminate sentence in its application to so-called habitual criminals has been criticized on the grounds that its use has been arbitrary.[113] Few offenders are declared habitual criminals and this tends to increase the feeling of discrimination amongst those of whom a declaration is made. The detention of habitual criminals with other prisoners and the use of the "dual-track" system are other factors that appear to militate against rehabilitation or long-term crime prevention. There are other unfavourable facets of the indeterminate sentence, but as these are equally applicable to sentences passed under Section 662, they are discussed below.

(ii) Sentences under Section 662 of the Criminal Code

It was observed earlier that Section 663 provides that a court may hear such evidence as it thinks fit in determining the issues of whether an offender should be declared an habitual criminal or whether he should be detained in a reformatory prison. There was only one case amongst those considered that threw light on the courts' attitude as to what constitutes "such evidence". In *Novakovic* v. *R.*,[114] the Court of Criminal Appeal quashed the indeterminate part of a sentence on the grounds that before an order is made under Section 662, evidence must be called because of the terms of Section 663. While the court conceded that a psychiatric report could constitute "evidence" for the purposes of Section 663, it would not be adequate if there were "no clear and convincing evidence that the defendant was suffering from any mental illness and no clear indication of the need for psychiatric treatment".

Novakovic v. *R.* is interesting because it suggests one reason for which Section 662 may be invoked, namely that the defendant is suffering from some type of mental disorder. Several of the other cases considered indicate that the section may be perceived as useful if the defendant be mentally abnormal, but there is no consistent line of

authority that indicates the significance of the defendant's susceptibility to psychiatric treatment. In one case, the fact that the applicant was unsuitable for hospital treatment seems to have been an influential factor in persuading the Court of Criminal Appeal to allow an order under Section 662 to stand. In *Schmidt* v. *R.*, the Court of Criminal Appeal was considering an application for leave to appeal against sentence by a young offender who had been convicted of manslaughter. In the court below, a sentence of two years' imprisonment had been imposed on him, to be followed by an indeterminate period under Section 662. The applicant's counsel had argued that the sentence was inappropriate in view of the applicant's "very limited mental capacity". The Court of Criminal Appeal refused the application and said:

> the applicant was not only not insane within the meaning of that term in the Code, but furthermore was not of such mental incapacity as to be likely to benefit from treatment in any mental hospital or like institution; the probation service was unlikely to be really of any benefit to him; a fine would obviously have been most inappropriate so that the trial Judge had a most difficult task in deciding the proper sentence. Unless he was in effect to release him without subjecting him to any punishment and without placing him under any effective supervision and control, imprisonment seems to have been obligatory. In those circumstances, a term of two years' imprisonment cannot be said to be wrong and the circumstances of this case and particularly the age and mental condition of the applicant seem to be typical of those for which Section 662 of the Criminal Code was designed.[115]

On the other hand, there are several cases that refer to the mental disorder of the defendant and in which the courts have invoked Section 662, in the hope that it will afford the opportunity of psychiatric treatment being available. It is hard to imagine that courts consider that psychiatric treatment within the prison environment can be superior to the type of treatment available to in-patients in mental hospitals. One of the cases in which the Court of Criminal Appeal evidently held hopes of prison psychiatric services was *de Goumois* v. *R.*[116] In rejecting an application for leave to appeal against sentence, the Chief Justice, apparently expressing the view of the court, said:

> As to the indeterminate part of the sentence, that was given to you on account of your mental trouble, in the hope that something might be achieved in effecting a cure for some of these things which exercise your mind.

Similarly, in *Bello* v. *R.*,[117] the Court of Criminal Appeal described the object of an indeterminate sentence under Section 662 as being "to deter the applicant from offending and to afford him some degree of treatment". There had been evidence before the court that the applicant was mentally disordered and he had been an inmate for some years in a mental institution.

It should be noted that both *de Goumois* v. *R.* and *Bello* v. *R.* are older decisions than *Schmidt* v. *R.*, and it may well be that there has been a shift from the former view of the Court of Criminal Appeal that offenders sentenced under Section 662 may be afforded an opportunity in prison of cure of mental disorders. Certainly, the court as presently constituted seems reluctant to delineate the purposes for which Section 662 should be invoked. In *Patterson* v. *R.*, the present Chief Justice said:

> It is idle, I think, to attempt to lay down general principles as to the application of Section 662 because it can be applied in so many different circumstances, but undoubtedly in the case of a young offender there are instances where a relatively short period of detention can be followed by a relatively long period of parole under Section 662 which could not otherwise be accomplished by a finite sentence which, from the nature of the offence could not itself be a long sentence.[118]

In *Patterson* v. *R.* then, there was a rejection of the idea that there can be a comprehensive definition of the purposes of Section 662, but the court indicated that it may be desirable to invoke it, to ensure there is an adequate parole period following imprisonment.

Other perceived purposes in the sentence are apparent through a study of the cases. In *O'Shea* v. *R.*,[119] it was seen as the best available means of affording "proper remedial treatment" and it is clear from the case that educational facilities were considered to some extent "remedial". In *McInnes* v *R.*,[120] the applicant was described as a danger to the community and being in need of prolonged custodial care of a preventive nature. Section 662 was seen as suitable to meet the case so far as the community and the applicant were concerned. In *Cutting* v. *R.*, the Court of Criminal Appeal said:

> Having regard to the applicant's history of crime and addiction to liquor and to his psychopathic disorders ... and to the nature of his present offence [burglary with intent to rape] this was a proper case, we might almost say a classic case, for the making of an order ... under section 662 to follow a finite sentence. It would be idle and perhaps impossible to predict the applicant's state of mental health when his term of imprisonment expires. Much may depend on whether he can be successfully

> treated for alcoholism and upon the results of such hospital treatment, either psychiatric or psychological, as he may receive during his imprisonment. The Comptroller General has power under section 54 of the Prisons Act to order his removal for treatment to an approved hospital under the Mental Health Act. When his finite sentence comes to an end, it will be then for the Parole Board to receive reports as to his health and to decide whether he can, without undue risk to the community, be released from detention. This Court has no reason to doubt that the Board will then act with due regard to the safety of the public.[121]

In *Cutting* v. *R.*, then, the court saw the sentence as a possible means of affording the applicant a cure from alcoholism and psychopathy, albeit bearing in mind the power of the prison administrators to transfer him to a mental hospital. The sentence was also seen as a means of community protection, because it would ensure that the applicant could not be released until the Parole Board exercised its discretion in his favour.

Some of the cases indicate a quite different attitude on the part of the courts: they suggest that a sentence under Section 662 may be an incentive to reform. One such case is *R* v. *Cabalt*,[122] where the defendant was told: "You can do a lot towards your own salvation by behaving yourself and trying to learn something while you are under the charge of the authorities." And in *Hanks, Groves and Bousfield* v. *R.*,[123] the Court of Criminal Appeal approved the use of the sentence on three young men under the age of twenty who had been convicted of breaking, entering and stealing, although the conviction appears to have been the first by an adult court in respect of two of them. The Court of Criminal Appeal was convinced that once in prison the young applicants would be separated from hardened criminals. The court also confirmed the opinion of the trial Judge that in imposing indeterminate sentences, in two cases after short finite sentences, he was really treating the offenders with "some leniency".

Criticisms of the indeterminate sentence vary depending upon the purpose that it is sought to achieve. The criticisms are, perhaps, most vigorous where it is invoked in the hope of reformation or cure, and it is significant that in jurisdictions where the indeterminate sentence is available, the incidence of reference to reformation as an aim of the sentence is declining, both on the part of legislatures and on the part of members of the judiciary.[124] More frequently, the sentence is perceived as a means of achieving at least short-term crime prevention.

There are a number of factors at work in relation to the growing disenchantment with the indeterminate sentence. Firstly, it is clear

that for many offenders, anti-social patterns of behaviour are firmly established by the time the first gaol sentence is imposed. By the time an offender is eligible for declaration as an habitual criminal, it is especially difficult to provide an incentive to reform. Secondly, segregation in Australian prisons of those serving indeterminate sentences is rare if not non-existent. In practice, offenders sentenced indeterminately are detained in the same gaols as those serving fixed terms. Bitterness is rife, and as Eidelberg commented: "When external punishment stimulates defiance, it loses its value as a crime-preventing method."[125] If this be correct, reformation is an even more forlorn hope than crime prevention. Thirdly, it seems improbable that the indeterminate sentence nurtures the maintenance and growth of the defendant's vital contacts with the law-abiding community. Certainly in England, where completely indeterminate sentences (apart from life sentences) have never been available measures, it was found that offenders whose dates of release were uncertain tended to lose contact with their families more readily than those serving ordinary sentences[126]. It seems probable that the stronger the element of indeterminacy, the higher are the chances of family disruption. Neither the prisoner nor his relatives can make realistic plans for the future, and the uncertainty would appear to threaten marriages, parent-child relationships and the chances of employment. Fourthly, there is some evidence that the way in which an offender perceives the indeterminate sentence depends upon his individual psychopathology. Miriam Reich maintains that:

> [Prisoners] do not automatically accept the implication that their own efforts can affect their release date, for they impute their own symbolic meaning to the power invested in the Board.
>
> Because the majority of the prison population consists of people who have problems in the area of impulses and relationship to authority, the tendency ... to have a distorted perception of the system and its administration, is probably present to some extent in all inmates. Furthermore, the very process of incarceration and the prison situation which divests the prisoner of his individuality and self-esteem, tend to elicit or strengthen hostile and negative reactions towards those responsible for the administration of the system ... Because the inmates come before the Board for a yearly review and evaluation, and therefore nearly all have experiences of a "denial", their sense of injustice and their anger towards this authority is constantly reinforced.
>
> The hope which is built up between appearances, followed by denial, places a heavy strain on the inmate's psychic equipment. Thus, this procedure does seem to make the inmate more prone to feelings of resentment and defiance, concerning his sentence, than a fixed term as it

> necessitates a constant readjustment to disappointment, or a blanket assumption of injustice and arbitrariness from the beginning. Such an attitude operates in contradiction to the rehabilitative goals of the prison sentence as a crime-preventing method.[127]

Certainly, these factors militate against the reformative potential of imposing on habitual criminals a sentence without a maximum, and they may aggravate rather than reduce anti-social tendencies.

Of course, it may well be argued that even if the indeterminate sentence is not reformative or, in the long term, in the interests of crime prevention, at least it keeps the offender away from the community during the currency of his sentence. But are short-term gains worthwhile if the long-term losses to the safety of the community are likely to be even greater? And perhaps an even more significant question involves the ethics of incarceration for the purposes of crime prevention. Is the community entitled to disregard altogether the limitations of a tariff system of measurement, which would seek to relate the severity of the crime actually committed to the length of the sentence that the offender serves?

It seems that in many cases in Western Australia where Section 662 is invoked, its purpose is to afford the offender a chance of being cured of some mental disorder or addiction. Obviously where Section 662 has been invoked for this purpose, the defendant has not been found insane within the meaning of the Criminal Code and it follows that the court has attributed to him at least some degree of responsibility for the crime of which he has been convicted. That being the case, it is logically consistent that some sanction should be imposed upon him, such as a fixed term of imprisonment. It is also understandable that if his disorder or addiction has played some part in his offence, the court should wish to make at least a recommendation that he should undergo some treatment for his condition. Indeed, it will probably be in the community's interests as well as in the defendant's interests that such treatment is available to him. But is the treatment likely to be successful in prison, or by invoking the provisions for temporary transfer from prison to another appropriate institution? Is it not likely that any benefit that such treatment may afford will be offset by the undesirable features of the indeterminate sentence? Can treatment be successful if the defendant faces complete uncertainty about his eventual release from prison, and worse still, probably harbours a feeling of deep resentment towards prison authorities and society generally, which attitude is hardly compatible with rehabilitation? These are weighty problems that are easier to express than to solve. The present writer in no way

minimizes the dilemma that faces the legislature and the judiciary, but she respectfully suggests that the indeterminate sentence is not likely to afford an opportunity for the cure of mental disorder and addiction. Rather, the court might impose a prison sentence that is commensurate with the degree of responsibility that it finds to exist in the defendant for the crime he has committed, and if the court feels that the interests of the community are inadequately protected thereby because of the defendant's mental condition or addiction, civil commitment to an appropriate institution should be possible. It may well be the case that such commitment must be to a maximum security mental institution, but at least the commitment should be civil rather than criminal.

(g) The relationship between long sentences, indeterminate sentences and life sentences

The cases considered included only two in which a Supreme Court Judge specifically addressed his mind to the relationship between long sentences, indeterminate sentences and life sentences. The first case was *Thomson* v. *R.* and in a dissenting judgment on sentence, Wickham J. made some helpful observations on an issue that is rarely explored. The facts were that a 19-year-old applicant had been convicted of unlawfully doing grievous bodily harm to a police constable. The crime involved shooting at short range, an unarmed uniformed constable who was acting in the course of his duties.

It seems to have been undisputed that if the victim had not been given prompt medical help, he would have died. The applicant had a Children's Court record and had committed several offences for which he had been dealt with by an adult court, including one for which a six months' prison sentence had been imposed. The trial Judge had imposed on the applicant a ten-year prison sentence, with a minimum term of six years, and had recommended that the applicant should be afforded guidance and counselling while in prison and on parole.

On the application for leave to appeal, the Chief Justice, with whom Wallace J. concurred, said:

> It is clear that the learned trial judge did not err in his appreciation of the relevant facts either as to the offence itself or as to the applicant's character and antecedents. It is not enough to say that the sentence was somewhat severe, or even that the members of this court might individually have imposed a different or lesser sentence. In the absence of any specific or demonstrable error, the sentence must stand unless it is so unreasonable that it is clear that the trial judge's discretion miscarried.[128]

Accordingly, the majority of the Court of Criminal Appeal refused the application. However, Wickham J. considered it relevant to consider the interrelationship between a long fixed-term sentence, an indeterminate sentence and a life sentence. He said:

> Because of Section 34 (2) (ba) (ii) of the [Offenders Probation and Parole] Act, if the applicant had been convicted of murder, and received a mandatory life term, his case would have been reported on by the Parole Board to the Governor as soon as practical after five years and in the event of parole, it could not exceed five years (Section 42). The report might not recommend parole but neither might parole be ordered at the expiration of the present minimum term. Also with habitual criminals they *can* be released after 2 years of an indeterminate sentence and the parole period may not exceed 2 years.[129]

The implication, then, was that the applicant might fare worse with his ten years' full term and six years' minimum, than if he had been given an indeterminate sentence or had actually killed the constable. On the length of the term imposed by the trial Judge, Wickham J. thought that ten years was longer than necessary: "to meet the various requirements of sentencing involved in the ideas of retribution, temporary prevention, individual and general deterrence and reformation."[130] On the facts before him, Wickham J. thought a more suitable sentence would have been a six years' full term and a three years' minimum. He added:

> I am mindful of persuasive authority which warns a sentencing judge against being "weakly merciful", but in sentencing in a particular case it is also necessary not to be "weakly severe", which latter mistake is as easy to make as the former.[131]

The relationship between life sentences, indeterminate and long sentences was considered further by Wickham J. in *R* v. *Fraser*. In his Honour's view, the differences between a life sentence and one under Section 662(a) of the Criminal Code are that in the former case ultimate responsibility rests with the Governor in Council, whereas in the latter, it rests with the Parole Board. Further, those serving life sentences are not eligible for remissions, whereas the finite part of a sentence under Section 662(a) can attract remissions of up to 25 per cent. Lastly, the supervision period following an indeterminate sentence is two years, whereas the period of release on parole following a life sentence may extend for up to five years.

His Honour proceeded with an argument that both life sentences and those under Section 662(a) share certain characteristics with a fixed sentence of ten years, with a minimum of five years. However,

in the latter case, remissions on the minimum term may not exceed 10 per cent. Wickham J. concluded "a prisoner could therefore be rather better off with a finite term (with 25 per cent remissions) followed by an indeterminate [term], than with a finite term with a minimum (10 per cent remission on the minimum and 25 per cent on the maximum)."

Mr Justice Wickham then went one step further and said:

> These comparisons indicate that the maximum sentence of life imprisonment is likely to be very similar in effect to a finite term of about 6⅔ years (5 years after remissions) followed by an indeterminate [term], and depending upon the Governor's pleasure or the view of the Parole Board as the case may be, also very similar in effect to a sentence of about 11 years, with a minimum of 5½ years, except that in the last case the possible period available for continuing supervision is longer than in the second case.[132]

It appears from his Honour's remarks thus far that his comparison between the different types of sentence was intended to be of a mathematical nature. His primary concern was to establish the likely periods of incarceration and parole to be experienced by those serving life sentences, those sentenced under Section 662(a) and those sentenced to long fixed terms carrying minima. If it is possible to perform it, this sort of exercise is, of course, of great value and is of particular significance to those upon whom the respective sentences may be imposed. However, in the absence of clear statistical information concerning the past practices of administrative authorities relating to terms actually served by those undergoing the different types of imprisonment, and the parole periods on which they were released, his Honour faced a daunting task.

Having attempted the mathematical comparison between the sentences, his Honour proceeded to somewhat firmer ground. He observed that one possible effect of the indeterminate and the life sentence is that the prisoner does not know where he stands, and clearly, his Honour did not consider such uncertainty constructive. Further, he did not favour the responsibility for releasing offenders resting with the Governor in Council "unless there are convincing reasons for it".

In the circumstances, Wickham J. imposed a fixed sentence of eight and a half years' imprisonment, with a minimum term of three years.

It is respectfully submitted that his Honour's misgivings concerning the adverse effect of indeterminate sentences were well founded.

Indeed, this particular issue is one to which the present writer has already devoted considerable attention.[133] Furthermore, it is submitted that Mr Justice Wickham was entirely justified in his view that the responsibility for the release of prisoners should only rest with the Governor in Council in exceptional circumstances. While there are clearly cases that call for the exercise of this discretion, it must be recognized that to reserve to the Executive sole authority to release certain categories of prisoners is to remove the procedural safeguards that are attached to the judicial process, and to a lesser extent, to the functions of administrative tribunals such as the Parole Board.

(h) Recommendation for the use of the royal prerogative

The cases examined included only one in which a court had recommended that the royal prerogative might be appropriately used. The case was *Vojvodic and Orlich* v. *R.*[134] The first applicant was a migrant labourer who had been in Australia for five or six years, but who had not learned to read English. The second applicant was a retired farmer who was described as "well-to-do" and "quite affluent". He suffered from tuberculosis and heart trouble. The ages of the applicants were forty and fifty-seven respectively. Together they had been convicted of forgery and uttering hire-purchase documents. The first applicant had posed as the owner of a motor vehicle and had purported to sell it. The trial Judge, although evidently concerned as to whether the first applicant fully understood the court proceedings, sentenced them both to effective terms of two years' imprisonment with hard labour. In passing the sentences, the trial Judge had evidently considered relevant the following factors:

(a) the possibility that the first applicant did not know that forgery was wrong (although he was assured that he did);
(b) the fact that good character reports were made in respect of each applicant;
(c) the fact that neither applicant had a prior record; and
(d) the age and medical condition of the second applicant.

The Court of Criminal Appeal was not disposed to interfere with the sentences on the grounds that it considered that forgery and uttering are "serious" and said: "If the community cannot rely on the genuineness of documents ... trade and business relations would be thrown into confusion." However, in recognition of the fact that neither applicant had previously been in trouble with the police, the Court of Criminal Appeal was prepared to add a rider recommending that after the expiration of twelve months, the applicants might be released under Section 705 of the Criminal Code.

NOTES

1. Criminal Code 1913-1972 Section 282 (b).
2. Criminal Law and Penal Methods Reform Committee of South Australia, First Report, *Sentencing and Corrections* (Adelaide: Government Printer, 1973), p. 71.
3. Editorial, *Australian and NewZealand Journal of Criminology* 7 no.2 (1974): 67.
4. Statistics up to 30 June 1968 are thoroughly analysed by David Biles in his thesis, "The Use of Prison in Australia" (1971), which was submitted in partial fulfilment of the requirements for the degree of M.A. at La Trobe University. For further general information, see Catherine E. Dengate, "Prison System of Western Australia", Penology Monograph no.6, roneoed (Canberra: Faculty of Law, Australian National University, 1975).
5. Releases of female prisoners are not shown: the total number of female prisoners is too small to make more than a negligible difference to the total picture.
6. These figures, of course, must be interpreted in the light of Section 37 of the Offenders Probation and Parole Act. The fact that the Parole Board releases a relatively low percentage of prisoners on parole is related to the length of imprisonment terms. If the sentence is less than twelve months, the sentencing court merely has a discretion as to whether it will set a minimum term.
7. Section 19(2).
8. Letter from the Crown Prosecutor to the present writer dated 24 November 1975.
9. See p. 71 *et seq*. of this Report, concerning decisions relating to concurrent and cumulative sentences.
10. [1939] W.A.L.R. 2.
11. F. Rinaldi, "The Commencement Date of Prison Sentences in Australia" (Paper read at 1975 Conference of the Australian Universities Law Schools' Association, University of New South Wales, 25-28 August 1975).
12. *R. v. Chin Gee* [1907] W.A.R. 161.
13. Information from Mr A. Bromilow, Administrative Assistant with the W.A. Department of Corrections, 6 November 1975.
14. Rinaldi, "The Commencement Date of Prison Sentences in Australia", p. 31.
15. See p. 74 *et seq*. of this Report.
16. Under Section 21(2) of the Offenders Probation and Parole Act, the Parole Board consists of five members:
    (a) a judge nominated with his consent by the Chief Justice of the Supreme Court either generally or for a specified term;
    (b) the Director of the Department of Corrections; and
    (c) (i) three men appointed by the Governor, where a general matter or a matter affecting a male prisoner is to be dealt with by the Board; and
    (ii) two women appointed by the Governor and one of the members appointed under subparagraph (i) of this paragraph, nominated by the Governor at the time of his appointment as member, where a matter affecting a female prisoner is to be dealt with by the Board.
17. See p. 64 of this Report.
18. Section 41(1) (a).
19. Section 40(2).
20. Regulation 21.
21. According to the Chief Probation and Parole Officer, deportation conditions are inserted into the orders relating to prisoners in respect of whom the Commonwealth Immigration Service has already initiated deportation proceedings. A deportation order itself acts as a warrant for the offenders to be held in custody.

The Parole Board may then release the offender on parole, subject to a deportation condition, and the parolee will remain on conditional liberty until the deportation order is actually implemented. If the deportation relates to a British Commonwealth country, the process may be speedy, but it may be much more protracted if the offender is to be deported, for instance, to a continental European country. (Letter from Mr I. Vodanovich to the present writer dated 11 April 1975.)

22. Section 43.
23. Section 44(1a).
24. Section 41A(1).
25. Section 44(2).
26. See Table 5, p. 44 of this Report.
27. Section 44(3b).
28. Section 44(4), but see Subsection (6).
29. Clause X of the Letters Patent is as follows:

> When any crime or offence has been committed within the State, against the Laws of the State, or for which the offender may be tried therein, the Governor may, as he shall see occasion, in Our name and on Our behalf, grant a pardon to any accomplice in such crime or offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders, if more than one; and further, may grant to any offender convicted in any Court of the State, or before any Judge, or other Magistrate of the State, within the State, a pardon either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence for such period as the Governor thinks fit; and further, may remit any fines, penalties, or forfeitures due or accrued to Us. Provided always that the Governor shall in no case, except where the offence has been of a political nature unaccompanied by another grave crime, make it a condition of any pardon or remission of sentence that the offender shall absent himself or be removed from the State.

The present writer is indebted to the State Librarian for supplying her with a copy of the relevant part of the Letters Patent.

30. Sections 706 and 707. See also the *Justices Act* 1902-1972, Section 170.
31. See p. 58 *et seq.* of this Report.
32. The author is especially indebted to Mr Arie Freiberg for his assistance with this passage. Mr Freiberg is the senior author, with David Biles as the junior author, of "The Meaning of 'Life': A Study of Life Sentences in Australia" (Canberra: Australian Institute of Criminology, in press).
33. Criminal Code 1913-1972, Section 41.
34. Section 80.
35. Section 153.
36. Section 511.
37. Section 37.
38. Section 78 and Section 79 (the latter section relates to attempted piracy with personal violence).
39. Section 282(a).
40. See Freiberg and Biles, "The Meaning of 'Life'".
41. Peter Brett, "Conditional Pardons and the Commutation of Death Sentences", *Modern Law Review* 20 (1957): 131-47.
42. (1972) 3 S.A.S.R. 361.
43. Regulation 72.

44. See p. 57 of this Report.
45. Section 42(3).
46. Section 34(2)(ba).
47. Freiberg and Biles, "The Meaning of 'Life'", p. 138.
48. According to Mr J. George, Deputy Chief Probation and Parole Officer, reports on lifers are in practice requested more frequently than required under the Act. (Letter to the present writer dated 25 November 1975.)
49. For a comparative study of English and Australian legislative provisions relating to the indeterminate and allied sentences, see M.W. Daunton-Fear, "Sentencing Habitual Criminals", in *The Australian Criminal Justice System*, eds. D. Chappell and P. Wilson (Sydney: Butterworths, 1972), p. 571.
50. See Chapter 7 of this Report, concerning the power of courts to impose sentences of imprisonment on juveniles.
51. Section 665(2). According to Mr A. Bromilow, Administrative Assistant with the Department of Corrections, those who were detained in reformatory sections of prisons originally enjoyed better conditions than other prisoners. However, with the gradual introduction of improved conditions generally, the distinction has become negligible, except that those in "reformatory prisons" are still entitled to temporary release to test reform under Section 64K of the Prisons Act. (Information to the present writer in a letter dated 6 November 1975.)
52. Information supplied to the present writer in a letter dated 6 November 1975 from Mr J. George, Acting Chief Probation and Parole Officer.
53. Section 41(3).
54. Regulation 99(a).
55. See Appendix A in this Report.
56. Regulation 103.
57. F. Rinaldi, "Prison Labour in Australia", Penology Monograph no.4, roneoed (Canberra: Faculty of Law, Australian National University, 1973), p. 82.
58. Rinaldi, "The Commencement Date of Prison Sentences in Australia", p. 84.
59. Rinaldi, "Prison Labour in Australia", p. 90.
60. F. Rinaldi, "Day Parole as a Sentence" (Paper read at conference on "The Future of Corrections in the A.C.T.", May 1975, Australian National University, Canberra).
61. Unreported decision of Jackson C.J., No. 158 of 1973.
62. [1973] W.A.R. 11.
63. Unreported decision of Wickham J., No. 7 of 1973.
64. Unreported decision of Virtue S.P.J., No. 73 of 1971.
65. Unreported decision of Lavan J., No. 83 of 1974; and see also *Hales* v. *R.* (Unreported decision of Jackson C.J., Lavan and Jones JJ.), No. 6 of 1975.
66. Unreported decision of Wickham J., No. 61 of 1973, at 3.
67. See p. 10 of this Report.
68. Unreported decision of Wallace J., No. 30 of 1973.
69. [1973] W.A.R. 11, at 4-5.
70. *Reynolds* v. *Wilkinson* [1948] W.A.L.R. 17, 18.
71. No mention was made in the record of the case of any minimum term being set by the court below.
72. Unreported decision of Jackson C.J., Virtue S.P.J. and Hale J., 24/9/71, at 2.
73. Unreported decision of Wolff C.J., Jackson and Negus JJ., 16/11/65.
74. Unreported decision of Jackson C.J., Virtue S.P.J. and Jones J., No. 17 of 1974, at 2-3.
75. Unreported decision of Virtue S.P.J., Lavan and Wickham JJ., No. 14 of 1971.
76. Unreported decision of Jackson C.J. and Wallace J., with Wickham J. dissenting as to penalty, No. 45 of 1972, at 3.

77. [1939] W.A.L.R. 2.
78. Unreported decision of Jackson C.J., Lavan and Jones JJ., No. 5 of 1975.
79. Unreported decision of Burt, Wallace and Jones JJ., No. 27 of 1975.
80. Unreported decision of Jackson C.J., Burt and Jones JJ., No. 39 of 1975.
81. D.A. Thomas, *Principles of Sentencing* (London: Heinemann, 1970), p. 47.
82. S. White, "Taking Offences into Account in Australia", *Criminal Law Review* (forthcoming).
83. See Freiberg and Biles, "The Meaning of 'Life'", p. 7.
84. *Reynolds* v. *Wilkinson* [1948] W.A.L.R., 17 at 18.
85. Unreported decision of Virtue J., No. 44 of 1966.
86. See p. 47 of this Report.
87. Unreported decision of Jackson C.J., Wickham and Wallace JJ., No. 62 of 1972.
88. Unreported decision of Wolff C.J., D'Arcy and Negus JJ., 16/7/63.
89. It has been suggested to the present writer that the delay was caused by a loss of the relevant correspondence between the Court and the prison. (Information from Mr A. Bromilow in a letter dated 6 November 1975.)
90. Unreported decision of Jackson C.J., Virtue S.P.J. and Lavan J., No. 10 of 1971.
91. Unreported decisions of Jackson C.J., Lavan and Wickham JJ., Nos. 27 and 29 of 1972, at 4.
92. Unreported decision of Jackson C.J., Wickham and Wallace JJ., No. 6 of 1972.
93. Unreported decision of Jackson C.J., Wickham and Wallace JJ., No. 61 of 1972.
94. *Stott* v. *R.* (Unreported decision), No. 6 of 1962, at 4.
95. Unreported decision of Jackson C.J., Lavan and Jones JJ., No. 5 of 1975.
96. Unreported decision of Jackson C.J., Burt and Jones JJ., No. 22 of 1975.
97. (1974) 48 A.L.J.R. 297 at 299.
98. Unreported decision, 8/4/1970.
99. Letter from Judge Heenan to the present writer dated 26 September 1975.
100. Unreported decision, 21/12/73, at 3.
101. Unreported decisions of Jackson C.J., Nos. 46 and 47 of 1973, at 4. In *Loo* v. *R.* (Unreported decision of Burt, Wickham and Wallace JJ.), No. 43 of 1974, the members of the Court of Criminal Appeal considered that the two criteria under Section 37(2)(a) were satisfied. The applicant, aged eighteen, was convicted of manslaughter following a "mugging" attack on an elderly man. He had been sentenced to five years' imprisonment, with no minimum term. Since 1966, he had 110 prior convictions, mainly for offences of dishonesty. A pre-sentence report contained a statement that a senior probation officer believed that if he were placed on probation, he would be in breach of the conditions. He had already been on "trial release" from institutions on five previous occasions and each time he had committed further offences while on release.
102. Unreported decision of Jackson C.J., Burt and Jones, JJ., No. 22 of 1975, at 1.
103. Letter from Mr J. George to the present writer dated 4 December 1975.
104. See p. 52 of this Report.
105. Unreported decision of Wolff C.J., D'Arcy and Negus JJ., 17/5/66.
106. [1973] W.A.R. 178.
107. At 179.
108. Unreported decision of Jackson C.J., Lavan and Wickham JJ., Nos. 11 and 12 of 1972.
109. Letter from Judge Heenan to the present writer dated 26 September 1975.
110. F. Rinaldi, "Parole in Australia", Penology Monogram no.5, roneoed (Canberra: Faculty of Law, Australian National University, 1973), p. 160.
NOTE: The figures in Table 9 do not correspond with the total number of parolees, but show only those in respect of whom minimum terms have been set.

111. Unreported decision of Wolff C.J., D'Arcy and Negus JJ., 16/7/63.
112. Unreported decision of Wolff C.J., Jackson and Virtue JJ., 16/3/65.
113. See Daunton-Fear, "Sentencing Habitual Criminals", p. 592.
114. Unreported decision of Jackson C.J., Burt and Lavan JJ., 16/8/71.
115. Unreported decision of Nevile, Hale and Burt JJ., 2/5/69, at 13-14.
116. Unreported decision of Wolff C.J., Nevile and Hale JJ., 18/5/65.
117. Unreported decision of Wolff C.J., Nevile and Virtue JJ., 5/12/67.
118. Unreported decision of Jackson C.J., Burt and Lavan JJ., 21/6/71, at 2.
119. Unreported decision of Virtue S.P.J., Lavan and Wickham JJ., No. 14 of 1971.
120. Unreported decision of Virtue S.P.J., Lavan and Wickham JJ., No. 54 of 1972.
121. Unreported decision of Jackson C.J., Hale and Wickham JJ., 20/1/70, at 5-6.
122. Unreported decision of Wolff C.J., Virtue and Negus JJ., 21/7/64.
123. Unreported decision of Wolff C.J., Jackson and Virtue JJ., 23/4/64. And in *Curley* v. *R.* (Unreported decision of Jackson C.J., Burt and Wallace JJ.), No. 35 of 1975, the Court of Criminal Appeal thought a sentence under Section 662 was appropriate for a young man of seventeen who had been convicted of the rape of an elderly woman. He had a prior record of over fifty offences, many of them being "very serious indeed".
124. See Daunton-Fear "Sentencing Habitual Criminals", p. 591.
125. L. Eidelberg, "When Is Punishment Effective?", Symposium, *Journal of the Association for the Psychiatric Treatment of Offenders* 3, no. 2 cited by M. Reich, "Therapeutic Implications of the Indeterminate Sentence", *Issues in Criminology* 2, no.1 (1966): 7-28, at 7.
126. Report of the Advisory Council on the Treatment of Offenders, *Preventive Detention* (London: H.M.S.O., 1963), pp. 13-14, para. 35.
127. Reich, "Therapeutic Implications of the Indeterminate Sentence", p. 25.
128. Unreported decision of Jackson C.J., Wickham and Wallace JJ., No. 45 of 72, at 4.
129. At 4.
130. At 3.
131. At 5.
132. Unreported decision of Wickham J., 25/9/75, at 10.
133. See p. 84 *et seq.* of this Report, and Daunton-Fear "Sentencing Habitual Criminals".
134. Unreported decision of Wolff C.J., Jackson and Virtue JJ., 25/5/64.

4

Probation

1. INTRODUCTION

For practical purposes, most attention in this chapter is given to probation as available under the terms of the *Offenders Probation and Parole Act* 1963-1971, the relevant part of which came into operation on 1 January 1965. Consideration will first be given to the statistics published by the Chief Probation Officer in the Annual Reports of the Probation and Parole Service and then to the legislative provisions in the Offenders Probation and Parole Act that relate to the granting of probation, the supervision of probationers and breach of probation. Finally, some of the decisions will be examined that have arisen under the Act. However, in passing, it should be mentioned that the provisions contained in the Offenders Probation and Parole Act are not the only ones that relate to the supervision of offenders: Section 660 of the Criminal Code provides for police supervision for periods of up to two years. There are several notable features of Section 660. Firstly, it relates only to persons who have been convicted on indictment, having already had a previous conviction, which presumably may have been either summary or on indictment. Secondly, the section may not be invoked instead of another penalty; it may only be invoked in addition to another penalty. Thirdly, it seems to envisage that the police supervision shall take effect after a sentence of imprisonment, since it refers to "the expiration of the sentence passed on him for the last of such crimes". Fourthly, the section contains complex provisions about notifying the police of a change of address, which seem to suggest that the purpose of the section is mainly to ensure that the police are able to keep close track of the defendant rather than offer him any kind of counselling service. Enquiries have revealed that Section 660 has been invoked only rarely and not at all since the Offenders Probation and Parole Act came into operation.[1]

2. STATISTICS RELATING TO THE USE OF PROBATION AND BREACH UNDER THE OFFENDERS PROBATION AND PAROLE ACT

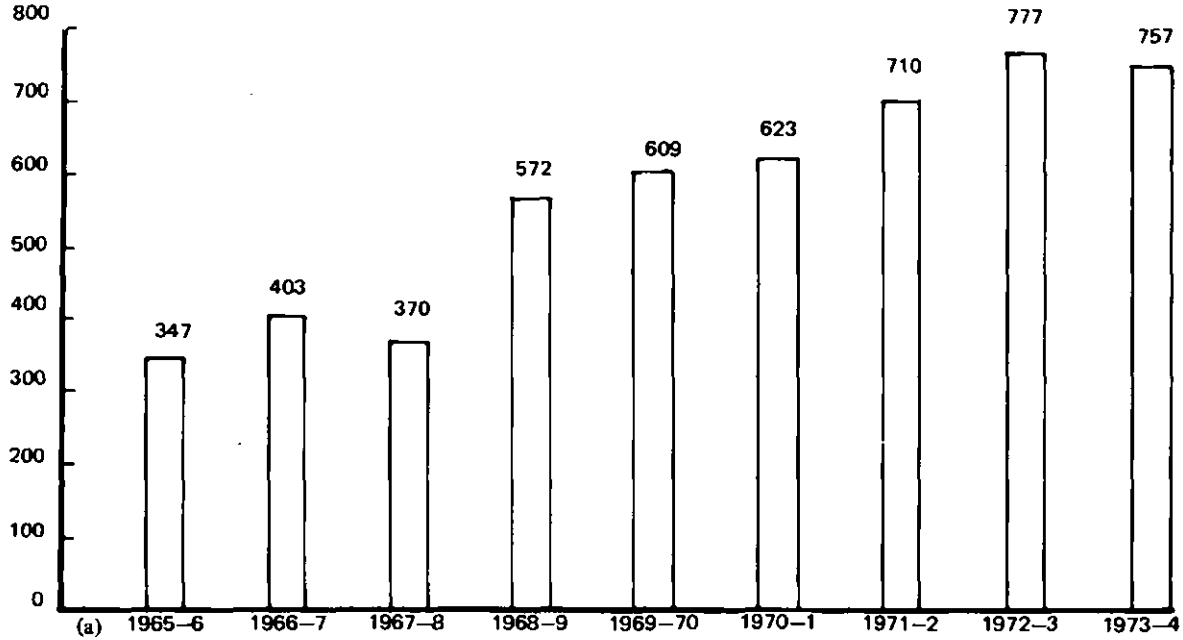
Figure 1 shows graphically the fairly steady growth that has occurred in the number of probation orders that have been made by the courts since the first full year that the Offenders Probation and Parole Act came into operation. Table 1 indicates the periods for which probation orders have been made. Two years has generally been the most popular period. Two years has been followed, and sometimes exceeded, by three years. Although it is not observable directly from Table 1, the Annual Reports of the Probation and Parole Service reveal that apart from an early tendency to impose one-year periods, courts have only placed offenders on probation for one year in less than one-fifth of the cases. At one stage, approximately one-tenth of the offenders were placed on probation for one year. It is interesting that although Western Australia is one of the few states in which courts have jurisdiction to place offenders on probation for more than three years, the power is rarely invoked.

Although the Annual Reports of the Probation and Parole Service contain figures relating to the offences in respect of which offenders have been placed on probation, they are only of limited value for two reasons. Firstly, the categories have changed over the years, and drug offences, for instance, have only been included as a separate category since 1971. Secondly, offenders are only placed under one category in the records, whereas quite often it must be the case that an offender is placed on probation simultaneously in respect of several offences. Bearing those two caveats in mind, it is in order to comment that the statistics indicate that the vast majority of probationers have committed crimes of dishonesty, but it appears that probation orders are being made increasingly in relation to assault, robbery, motor vehicle offences and drug offences.

Table 2 shows the number of breaches each year from 1965-6 that were considered serious enough by the Chief Probation Officer to warrant referral to the Crown Prosecutor. They comprise some where there was merely a breach of a condition contained in the probation order and others where there was a breach constituted by the reconviction of the probationer during the probation period.

It will be seen from Table 2 that the general breach rate was relatively low. The overall percentage between 1965 and 1974 of those against whom breach proceedings were taken was 6.89 per cent. Unfortunately, the statistics do not record information concerning the point in time during the probation period at which breach proceedings are initiated.

Fig. 1. Western Australia: Number of persons admitted to Probation during the years 1965–66 to 1973–74



(a) 120 offenders were admitted to Probation between 1 January 1965 and 30 June 1965 after Part II of the Offenders Probation and Parole Act came into operation.

Table 1. Western Australia: Persons placed on Probation and Length of Probation, 1965 to 1973–74

Period of Probation	1965[a]	1965–66	1966–67	1967–68	1968–69	1969–70	1970–71	1971–72	1972–73	1973–74
Less than 2 years	46	71	66	53	74	131	164	156	169	172
(%)	(38.3)	(20.5)	(16.4)	(14.3)	(12.9)	(21.5)	(26.3)	(22.0)	(21.7)	(22.7)
2 years	50	155	122	134	226	278	306	365	383	333
(%)	(41.7)	(44.6)	(30.3)	(36.2)	(39.5)	(45.6)	(49.1)	(51.4)	(49.3)	(44.0)
3 years	20	102	186	169	235	185	143	174	201	237
(%)	(16.7)	(29.4)	(46.1)	(45.7)	(41.1)	(30.4)	(23.0)	(24.5)	(25.9)	(31.3)
More than 3 years	4	19	29	14	37	15	10	15	24	15
(%)	(3.3)	(5.5)	(7.2)	(3.8)	(6.5)	(2.5)	(1.6)	(2.1)	(3.1)	(2.0)
Total	120	347	403	370	572	609	623	710	777	757
(%)	(100)	(100)	(100)	(100)	(100)	(100)	(100)	(100)	(100)	(100)

a Six months only.

Table 2. Western Australia: Number of Probationers under Supervision and Number of Probationers reported for Breaches requiring Court Action, 1965–66 to 1973–74

Year	Probationers under supervision during year	Probationers reported for breaches requiring court action[a]	Breach rate %
1965–66	467	23	4.92
1966–67[b]	820	52	6.34
1967–68[b]	1,026	66	6.43
1968–69	1,323	59	4.46
1969–70	1,632	92	5.64
1970–71	1,825	125	6.85
1971–72	1,921	155	8.07
1972–73	1,937	168	8.67
1973–74	2,017	153	7.59
Total	12,968	893	6.89

a Includes probationers summarily dealt with by the courts for further offences and those probationers reported to the Crown Prosecutor for breaches of probation order.

b Corrected figures.

SOURCE: Chief Probation Officer's Annual Report under Section 8 (b) (i) and (ii) *Offenders Probation and Parole Act* 1963–71.

Just as it is by no means clear that the use of parole has contributed towards the decline in the daily average number of prisoners in Western Australia, it cannot be claimed that the use of probation has contributed towards the phenomenon. Certainly, the use of probation has increased in recent years, and in terms of Section 9 of the Offenders Probation and Parole Act, an order may only be made in relation to an "offence punishable by a term of imprisonment other than in default of payment of a fine". However, it is not necessarily the case that courts only make probation orders in respect of offenders who would otherwise be sentenced to prison. It may well be the case that another non-custodial measure would be used, such as a bind-over.

3. PROBATION UNDER THE *OFFENDERS PROBATION AND PAROLE ACT* 1963-1971

(a) The making of a probation order

The circumstances under which a court may make a probation order are set out in Section 9. The power exists in any court before which a defendant is convicted of an offence punishable with imprisonment, otherwise than in default of payment of a fine, provided the court considers, having regard to the circumstances, including the nature of the offence, the character and personal history of the defendant, his home surroundings and other environment, that it is desirable to place him under the supervision of a probation officer for between one and five years. The power does not exist instead of proceeding to conviction, but it is expressly instead of sentencing the offender. The significance of this provision has been considered in *Satchell* v. *Cross*, which is discussed below.[2] Section 9 does not apply to or with respect to a child, as defined by the *Child Welfare Act* 1947-1972, who has been convicted by a Children's Court, unless the sentence has been passed by the Supreme Court or the District Court.[3] Section 9 (3) provides that the court that makes the order shall specify as the supervising court a Court of Petty Sessions that is nearest to the place where the probationer resides or that the court making the order deems most convenient.

Originally, it was obligatory that the probation order contained a provision that the probationer should report where directed within twenty-four hours of his release.[4] It was observed by the Chief Probation and Parole Officer in the first Annual Report[5] on the operation of the Act, that at least at the time of the Report, this requirement discriminated against offenders placed on probation in more remote country areas. The problem had already been partially overcome by the appointment of honorary probation officers in country towns, but the Chief Probation and Parole Officer was still of the view that the statutory provision should be sufficiently flexible to give the court discretion to order that a longer period be given, if necessary, for the offender to report to the appropriate place. The terms of Section 9(5) were altered in 1965 to provide such flexibility and the provision now requires that the probationer shall report within twenty-four hours "or as otherwise directed".

The Regulations under the Offenders Probation and Parole Act stipulate that the probation order shall be in the form set out in the Schedule to the Regulations.[6] Form B in the Schedule contains conditions other than the one referred to in Section 9(5) of the Act and it

is apparently obligatory that the following are included:
(a) that the offender abstains from violation of the law;
(b) that he carries out the lawful instructions of the probation officer;
(c) that he reports and receives visits as directed by the probation officer; and
(d) that he notifies the probation officer within forty-eight hours of any change of address or change of employment during the probation period.

Certain other conditions may be included in the order at the discretion of the court. Such requirements must be "as the court making the order considers necessary for securing the good conduct of the probationer or for preventing a repetition by him of the same offence in respect of which he was placed on probation or the commission by him of other offences".[7] A few requirements that may be included in a probation order are expressly mentioned. An order may include a requirement that the probationer submit himself to medical, psychiatric or psychological treatment and for the purposes of receiving such treatment, if the court is satisfied that arrangements have been or can be made for his reception, there may be a requirement that the offender reside for such period, not exceeding twelve months, in an institution or place specified by the court.[8] A court making a probation order also has express power to include a general requirement relating to residence, either in Western Australia or in another state or territory. However, before a court may make an order concerning residence, the court must consider the probationer's home surroundings and if it is proposed that he be admitted to an institution, that arrangements have been or can be made for his reception there for the necessary period.[9] If the probation order does not contain a requirement as to residence or permission for the offender to live in another state or territory, it shall be a requirement of the order that he does not leave the state, except with the consent of the supervising court or the Chief Probation Officer.[10] Another requirement that may be attached to a probation order, and which is expressly mentioned in the Offenders Probation and Parole Act, is that the probationer pays such damages as the court thinks fit for injury or compensation for loss arising out of the offence.[11]

Subsection (8) provides that when a court proposes making a probation order, it must, before making it, explain the effect of the order in language that is readily understood by the offender. In particular, the court must explain to him the consequences of his failing

to comply with the order or committing another offence. The probation order may not be made unless the offender expresses his willingness to comply with the requirements of the order.[12] Courts are not given any guidance by the legislature as to the appropriate circumstances in which special conditions should be attached to probation orders. However, in an extra-judicial statement at a Magistrates' Conference in Perth on 28 May 1975, Mr Justice Lavan warned Magistrates against attaching to orders conditions that are incapable of implementation.

(b) Supervision of probationers

Neither the Offenders Probation and Parole Act nor the Regulations contain much indication of the nature of supervision. There is no requirement, for instance, that the probation officer's duty shall be to "advise, assist and befriend" his client;[13] the Regulations simply provide that a probation officer shall "carry out directions of the Court in relation to the probation order", shall "maintain case records and statistics as required by the Chief Probation Officer", shall "keep a register" as directed by the Regulations and shall "perform such other duties as directed by the Chief Probation Officer". The form of the register is set out in the Schedule[14] and it provides for the recording of purely factual information about the probationer, such as his name, age, religion, occupation, the name of the court that made the order, the offence and dates of visits. The Regulations contain no reference to the sort of evaluative judgments that the probation officer may be expected to make during the course of his work, such as the response of the probationer to various situations and types of supervision. A wide discretion, then, is conferred generally upon probation officers, and particularly upon the Chief Probation Officer, as to the style of supervision that is required in individual cases.

(c) Variation of a probation order

Section 14 of the Offenders Probation and Parole Act confers wide powers on the supervising court to amend the terms of a probation order and such amendment may be on the application either of the probation officer under whose supervision the offender has been placed, or on the application of the probationer himself.[15] The court may amend the order by cancelling any of the requirements or by inserting, either by addition or substitution, any requirement that could have been inserted in the order in the first place. However, the

supervising court may not amend the order by reducing the probation period or by extending it beyond five years from the date of the original order. Furthermore, there is a specific requirement that the supervising court may not alter the order so that the probationer, without his consent, is required to reside in an institution. In addition to this specific requirement, there is a general provision in Section 15(1) that requires that if the application for amendment is not by the probationer himself, the supervising court shall summon him to appear before it and shall not alter the order unless he agrees to comply with the amended terms. Such general provisions do not apply, however, if the order is amended in the probationer's favour by the cancellation or the reduction of the period of any requirement, or by the substitution of one supervising court for another. Section 13 empowers, in wide circumstances, a supervising court to appoint another Court of Petty Sessions to assume its responsibilities.

Although Section 14 prohibits the amendment of a probation order by the reduction of the probation period, there is power in the court by which the order was made, on the application of the probationer or his probation officer, to discharge the order altogether.[16] This power exists quite independently of the discharge that may arise from compliance with the terms of the order,[17] or from discharge that may follow the probationer being sentenced for the offence in respect of which he was placed on probation.[18]

(d) Breach of a probation order

(i) Failure to comply with the requirements of a probation order otherwise than by conviction

Section 16(1) makes it an offence in itself to fail to comply with the express or implied terms of the probation order, whether the failure occurs in Western Australia or elsewhere. However, the mere fact that such a breach has occurred does not necessarily lead to the cancellation of the order, or indeed, to any proceedings being taken against the offender. Under Regulation 17(7), the Chief Probation Officer is responsible for determining when action shall be taken under Sections 16 or 17 of the Act and the 1967 Annual Report indicates expressly that the Chief Probation Officer exercises his discretion not to initiate proceedings in a substantial minority of cases in which breach reports are made by probation officers.[19] In the same annual Report, the Chief Probation Officer states that many breach reports are occasioned by failure of probationers to report as required by their orders.[20]

If the Chief Probation Officer decides to initiate proceedings, there remains in a Justice of the Peace discretion as to whether or not the probationer shall be required to appear before the appropriate court.[21] A Court of Petty Sessions before which a probationer appears, following a breach of a requirement of the probation order, may either fine him a sum of up to $100 without affecting the continuation of the order or, if the original order was made by a Court of Petty Sessions, deal with him as if he had just been convicted of the offence in respect of which the probation order was made. If the probation order was originally made by a higher court, a Court of Petty Sessions can commit him to custody or release him on bail to appear before that higher court.[22] Once the offender comes before the higher court, on being satisfied there has been breach of a requirement of the probation order, the higher court may deal with him for the original offence.[23] It will be noted that it is not mandatory that the higher court so deals with the offender for the original offence and the statutory provision leaves open the precise nature of the orders that may be made against him. In the absence of an express provision, presumably the higher court may not merely order that the probation order be continued, but it seems it could make a fresh probation order if it found that the offender still fell within terms of Section 9 of the Act.

(ii) Breach of a probation order by conviction for an offence committed during the probation period

There are several ways in which proceedings may be initiated against an offender who has been convicted of another offence, other than the offence of merely failing to comply with the requirements of the order. Under Section 17, the offender may be brought before a Justice of the Peace on a complaint, and the Justice may order, by summons or by warrant, that he be brought before the court that made the order, or, if that court was a Court of Petty Sessions, the supervising court.[24] Discretion to commence proceedings in this manner resides in the Chief Probation Officer under Regulation 17(7) and, in theory, he is under no more compulsion to initiate proceedings than he is if the offender is merely in breach of one of the lesser conditions of the probation order. However, under Section 17(3), a court by which an offender is convicted of an offence may commit him to appear before the court by which the original order was made or, if that court was a Court of Petty Sessions, the supervising court.

Whether proceedings are initiated under Section 17(1) or Section 17(3), the court before which the offender eventually appears may deal with him as if he had just been convicted of the original offence.[25] If the original probation order was made by a Court of Petty Sessions, and the offender is convicted of an offence committed during the probation period by a higher court, there is no need for the offender to be brought separately before a Court of Summary Jurisdiction. By virtue of Section 17(7), the higher court may deal with the offender for the original offence in any way in which the lower court could have dealt with him following conviction. For most purposes, the sentence so passed on the offender will be deemed to be one of a Court of Petty Sessions, but for the purposes of any appeal, it shall be regarded as a sentence imposed on a conviction on indictment.

There is a specific provision in Section 18 of the Act that any question concerning the failure of a probationer to comply with the conditions of his probation order, or his conviction of an offence committed during the probation period, shall be determined by a Judge or Chairman of the Bench rather than by the verdict of a jury.

4. DECISIONS RELATING TO PROBATION

A number of the decisions considered for the purposes of this Report concerned cases in which the making of a probation order followed the preparation of a pre-sentence report. In such circumstances, it is hardly surprising that courts tend to consider two issues at the same time: firstly, courts look at the circumstances in which a pre-sentence report is desirable and secondly, they refer to the circumstances in which a probation order is appropriate. Rather than emasculate the judicial statements, it seemed to the writer desirable to treat the two topics together. This is done in Chapter 5. Accordingly, the cases that are considered in the present chapter are those that deal with relevant topics other than the appropriate circumstances to make a probation order. However, it is fitting at this stage, perhaps, to refer to an extra-judicial comment that was made by Mr Justice Lavan at a Magistrates' Conference on 28 May 1975. He advised Magistrates that probation was not designed for the chronic recidivist who is without domestic ties and has a poor work record. Clearly, His Honour implied that such a man had little incentive to do other than abscond.

(a) The nature of a probation order

In *Satchell* v. *Cross*, the appellant had been convicted of an offence under Section 137(1) of the Child Welfare Act of contributing to the victim becoming a neglected child under Section 4 of the same Act. In fact, the victim was a 17-year-old youth, the appellant was a 24-year-old married woman, and her contributions to the victim's status as a neglected child had been brought about by acts of sexual intercourse over a period of more than three months. The appellant had been brought before a lower court and had been placed on probation. Unfortunately, the record of the case does not reveal the nature of the conditions that were attached to the order, but the appellant claimed on appeal that they were "unreasonable" and "excessive". The appellant's contention failed on the grounds that a probation order is not a "sentence" in Western Australia. Mr Justice Burt expressed the view that the whole idea of the Offenders Probation and Parole Act is to enable courts to deal with offenders without penalizing them by sentencing them to imprisonment, or perhaps even to a monetary penalty. Nor, in his Honour's opinion, could a probation order be viewed as a penalty within the meaning of the Justices Act, because it is required in the Offenders Probation and Parole Act that the offender must express his willingness to comply with the terms of the order before it can be made. Further, Burt J. took the view that it followed there could be no appeal from a probation order. He said:

> a penalty one understands as being something penal in nature which is imposed upon somebody whether they like it or not, in the sense that there is no option given to the person as to whether he is going to suffer it. That ... is inconsistent with the idea of a probation order, which should never be made and can never be made unless the person to be placed on probation agrees to it being made. In that sense, it is a consensual sort of thing and leads one, I think, to say as a matter of policy (altogether apart from the specific words of the statute) that there should not be an appeal from an order placing somebody on probation. It would seem to me to be odd that a judge, instead of sentencing somebody, should say, "I will place you on probation on these conditions, provided you agree to abide by them," and the accused person having so agreed and been placed on probation could then come to a court and say that the terms were unreasonable. I would have thought that if they were unreasonable then he should not agree to abide by them, but if subsequent facts or circumstances change so as to make the conditions of the order unworkable or inappropriate (and that may well happen) then the solution is to be found within the Offenders Probation and Parole Act itself, and specifically within S.14 of it which permits the probationer or the probation officer to go to the Supervising Court to have the terms of the

> probation order reformulated to meet changed circumstances. So for that reason I would say that the appeal in so far as it seeks to vary the conditions of the probation order is simply incompetent ... [26]

It is clear that Burt J. placed considerable emphasis on his view of a probation order as "a consensual sort of thing" and it was on that basis that he considered, as a matter of policy, there could be no appeal from a probation order. However, it is open to argument that a probation order can hardly be regarded as consensual when the offender probably has an understandable suspicion that if he expresses dissatisfaction about the terms of it, the court will find a less congenial manner of disposing of his case. If this argument be accepted, it may well be that *Satchell* v. *Cross* should be confined to appeals other than those that are taken to the Court of Criminal Appeal, because of the wording of Section 703 of the Code that relates to appeals to that court and specifically states that "sentence" includes "any order of the Court made on conviction with reference to the person convicted". However, it would be highly undesirable to have one rule that relates to the Court of Criminal Appeal and a different one that relates to other courts. It is submitted that it would be far better if there were a legislative provision that explicitly stated that appeals should be available in respect of probation orders regardless of the court to which the appeal is taken.

(b) Probation with hospital treatment

It will be recalled that under Section 9(6)(a), there is express authority for a court to make it a condition of a probation order that an offender receives medical, psychological or psychiatric treatment and that the court may, if appropriate arrangements have been made for his reception, order that the offender be a resident in an institution for up to twelve months for the purposes of receiving such treatment. There appears to be some reluctance on the part of the courts to invoke this provision. In *Puzas* v. *R.*, the applicant argued on an application for leave to appeal that he should have been dealt with under Section 9(6)(a) and that he was prepared to receive hospital treatment for his drug problem. The Court of Criminal Appeal called for a psychiatric report, which confirmed the applicant's contention that he wished to be cured of his addiction. Nevertheless, the Court of Criminal Appeal declined to make the order the applicant sought and said:

> it is important the decisions relating to the acceptance of patients for treatment, the forms of treatment and the duration of hospital residence

should be the responsibility and at the discretion of the medical staff of the hospital, who should not be subject to externally imposed restrictions on the exercise of therapeutic practice. Moreover, in the applicant's case, there would have been a substantial risk ... of his walking out of hospital and committing further offences.[27]

Instead, the Court of Criminal Appeal found it preferable to reduce the applicant's minimum terms to an effective total of twelve months, in response to his improved attitude towards his addiction and to give him the opportunity of an early release on parole.

(c) Breach of probation

Two cases amongst those considered for the purposes of the present Report relate to the courts' powers on breach of a probation order. In *Rich* v. *R.*,[28] the applicant had been originally convicted of breaking and entering an hotel and stealing a quantity of beer valued at $250. He had been placed on probation for this offence for a period of twelve months. During the probation period, he was convicted of driving a motor vehicle with an excess concentration of alcohol in his blood and of two allied driving offences. The record of the case does not reveal what penalties were imposed in respect of the three driving offences, but the applicant was sentenced to eighteen months' imprisonment in respect of the original offence that led to the making of the probation order. He applied to the Court of Criminal Appeal for leave to appeal against the sentence of eighteen months' imprisonment, evidently on the ground that it was manifestly excessive. The application was granted and the Court of Criminal Appeal quashed that sentence and, in lieu, imposed a term of three months' imprisonment. In doing so, the Court of Criminal Appeal expressed the view, per the Chief Justice, that the original offence was not serious. The Chief Justice intimated that if the applicant had originally been convicted before him and he had not seen fit to place the applicant on probation, he would have fined him. In view of the explicit statement of the Court of Criminal Appeal that imprisonment was not appropriate in the first instance, it is hard to understand why, on the breach proceedings, a short term of imprisonment was substituted for the sentence imposed by the court below. It may have been, of course, that the applicant had already served the term of three months pending the application for leave to appeal, and the Court of Criminal Appeal was exercising its discretion under Section 20 of the Criminal Code.[29] However, if that were the case, one would expect the court to refer to the exercise of its discretion.

The other case that related to breach proceedings was *Jack* v. *R.*[30]

That case is authority for the proposition that if breach proceedings are taken, they must be taken promptly. The applicant had, in 1965, been convicted of shop-breaking and stealing goods to the total value of $30. He was placed on probation for a period of three years. During 1966, he was convicted of further offences, the nature of which was not reported, but which led to the imposition of sundry terms of imprisonment. Following a complaint in July 1967 by the Chief Probation Officer, a Court of Session at Kalgoorlie sentenced the applicant to a term of three years' imprisonment, with a minimum of two years, in respect of the original offence. Such term was to be cumulative upon the terms then being served by the applicant, which were not due to expire until February 1968. The applicant made application for leave to appeal against the sentence imposed for the original offence. His argument was that it was excessive, in view of a substantial delay in the initiation of proceedings under Section 17 of the Act. The delay had been caused by an oversight on the part of the Chief Probation Officer. The Court of Criminal Appeal was persuaded by this argument and reduced the term of imprisonment for the original offence to eighteen months, with a minimum term of six months, to be cumulative on the other terms then being served by the applicant. The Court of Criminal Appeal stated that although the powers created by Section 17(3) and 17(8) of the Act were discretionary, these powers should ordinarily be exercised promptly, to avoid prejudice.

NOTES

1. The writer is indebted to the Western Australian Commissioner of Police for this information.
2. See pp. 107 and 108 of this Report.
3. *Offenders Probation and Parole Act* 1963-71, Section 5 as amended.
4. Section 9(5).
5. Western Australia. Probation and Parole Service, *Probation Report for the Year ended 30 June 1965* (Perth: Government Printer, 1965), p. 4.
6. Regulation 8.
7. Section 9(6)(a).
8. Ibid.
9. Section 9(7).
10. Section 9(7a) and (7b).
11. Section 9(6)(b).
12. Section 9(8).
13. cf. English *Criminal Justice Act* 1948, Schedule V, para. 3 (5).
14. Form E.

15. Both the Probation and Parole Service and the Crown Prosecutor have suggested that the Offenders Probation and Parole Act should be amended to permit the court that made the probation order authority to amend or vary its terms. Letter to the present writer from Mr J. George dated 4 December 1975.
16. Section 12(1).
17. Section 12(2).
18. Section 12(4); see also pp. 105 and 106 of this Report.
19. See Western Australia. Probation and Parole Service, *Probation Report for the Year ended 30 June 1967* (Perth: Government Printer, 1967), p. 5, where it is indicated that in sixteen of ninety-five cases in which the Chief Probation Officer received breach reports from probation officers, he took no action.
20. Ibid., loc. cit.
21. Section 16(3)(e).
22. Section 16(3)(e).
23. Section 16(6).
24. Section 17(1) and (2).
25. Section 17(6) and (7).
26. Unreported decision of Burt J., No. 121 of 1972, at 5-6.
27. Unreported decision of Jackson C.J., Lavan and Wickham JJ., Nos. 27 and 29 of 1972, at 4.
28. Unreported decision of Jackson C.J., Hale and Burt JJ., 16/8/71.
29. See p. 47 of this Report.
30. [1968] W.A.R. 137.

5

Pre-sentence Reports and Conferences

1. INTRODUCTION

Section 8(a) of the *Offenders Probation and Parole Act* 1963-1971 provides that the Chief Probation Officer shall, "[w]hen and as often as he is required by any court to do so, cause to be prepared and submitted to that court such reports and information with respect to any convicted person as the court requires". The fact that Section 8(a) may only be invoked in respect of a convicted person may be unduly restrictive, because a case may arise in which a court suspects it would be desirable to deal with the offender without convicting him, as, for example, under Section 669(1)(a) of the Criminal Code. Yet it would appear that in view of the present wording of Section 8(a) no pre-sentence report could be called for in such a case. The Act gives the courts no guidelines as to the sorts of cases in which a pre-sentence report may be useful and there is no statutory direction to the probation service concerning the actual contents of a report, beyond a provision that such a report shall include reference to the fact if a convicted person has, as a juvenile, been committed to the care of the state or to an institution. Form A in the Schedule to the Regulations under the Act contains the wording of the request that must be made by a court desiring a pre-sentence report and the court must indicate whether a medical, psychiatric or psychological report is required, in addition to the social report, which is to be prepared by the probation service itself. Regulation 4 provides that a pre-sentence report shall be furnished to the court that has requested it within twenty-one days from the receipt of the request. If a medical, psychological or psychiatric report is also required, it is the responsibility of the Chief Probation Officer to notify the appropriate person, and once the report is obtained, to forward it to the court with the pre-sentence report prepared by the probation service.

The type of information included in a pre-sentence report in

Western Australia is referred to in the 1965 Annual Report of the Probation and Parole Service. In that report, the Chief Probation Officer stated that:

> The preparation of a pre-sentence report involves painstaking inquiry into the offender's background and his parental and marital family; his education; employment record; medical history, including psychological and psychiatric reports where necessary; previous criminal record, including Children's Court record; leisure-time interests and activities and all other relevant information considered necessary for the court's information.[1]

Several of the Service's Annual Reports contain reference to the fact that the preparation of a pre-sentence report takes, on the average, or a minimum of, fifteen hours[2] and it is clear that not only the probation service but also those who provide supporting reports have found it extremely hard to meet the demands made for reports by the courts.

There is no indication that the probation service has resented the pressure placed upon it by the courts: indeed, the contrary has been the case. In the 1967 Annual Report, the Chief Probation Officer said:

> I am well aware that some Courts, knowing of the pressure on the Probation staff and out of consideration for them, ... do not ask for Pre-sentence Reports as often as they would like, thus depriving the Courts of a valuable aid in the disposition of convicted offenders. The Pre-Sentence Report is a procedure specially made available to the Courts by Parliament since 1st January, 1965 under the Act. Restriction of its use by staff shortage is surely a malfunction.[3]

Earlier in the same Report, the Chief Probation Officer suggested that the courts, on occasions, made inappropriate orders for probation, whereas if pre-sentence reports had been called for and all the circumstances were known to the courts, the subjects would not have been granted probation. The staff shortage in the probation service is the subject of comment in many of the Annual Reports, but there appears to have been some improvement in recent years. The last reference to the shortage was contained in the 1973 Annual Report, when the Chief Probation Officer stated:

> On the basis of case-loads set by the Public Service Board, namely 70 cases per male officer and 50 cases per female officer, the Probation Service at 30 June, 1973 was understaffed to the extent of 4 probation officers. Despite several attempts by the Public Service Board to recruit professional staff during the year, a net gain of only two professional

> staff resulted. Officers therefore are functioning under considerable pressure caused by excessive case-loads. In the area of human relations in which the Probation Service is involved, the pressures caused by staff shortage can and must reduce effectiveness.[4]

The case-loads[5] actually carried by probation officers has been as high as 115 by male officers[6] and 81 by female officers.[7] The more recent Annual Reports have not contained precise information as to actual case-loads, although the 1971 Report stated that: "some officers carried between 40-50 cases over the case-load of 70".[8] The situation has presumably been relieved to some extent by an amendment in 1969 to the Regulations that no longer restricts male and female probation officers to the supervision of offenders of their own respective sexes. The introduction of honorary probation officers also may ameliorate the situation. In 1975, a scheme was established for the appointment and training of twelve honorary Aboriginal officers.

Attention will now be paid to the actual use that courts make of pre-sentence reports. The consideration of the statistics will be followed by a discussion of cases that are relevant to the topic.

2. STATISTICS ON THE USE MADE BY COURTS OF PRE-SENTENCE REPORTS

Figure 1 shows the steady and steep increase in the number of pre-sentence reports that have been called for in Western Australia since the first full year that the Offenders Probation and Parole Act came into operation. The courts sometimes avail themselves of their power to call for "combined" reports, that is, for a social report from the probation service, together with a psychiatric, psychological or medical report in relation to the same offender. The pattern of calling for combined reports over the years has been erratic, as shown in Table 1. During 1966-7, 61 per cent of the requests for reports were for combined reports. However, by 1971-2, only 9.2 per cent of the requests were for combined reports. In 1972-3, there was a slight increase in the percentage of requests for combined reports, but it seems to be the case that courts are now calling less frequently for supporting reports from psychiatric, psychological or medical services. There may be a number of reasons for this situation. It may be that the reports from the probation service are incorporating material of a psychiatric, psychological or medical nature and the courts feel no need to request expert reports from the appropriate services.[9] It may be that courts have not found that reports

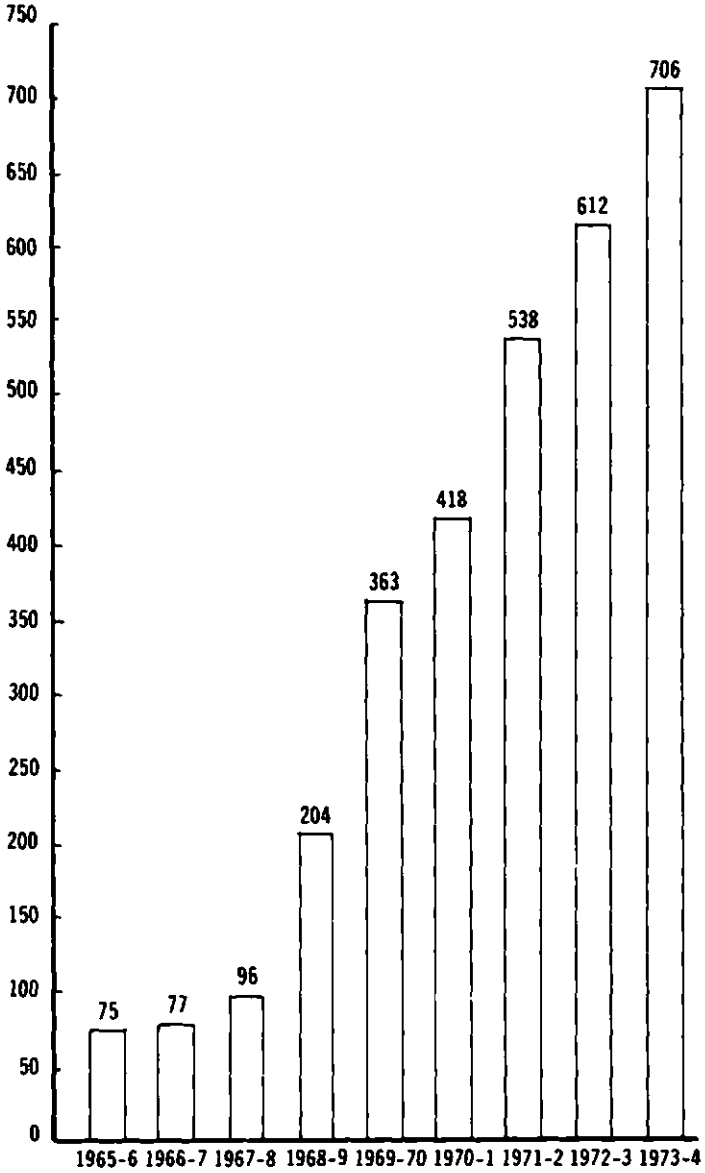


Fig. 1. Western Australia: Number of Pre-sentence Reports requested by the Courts, 1965–66 to 1973–74

Table 1. Western Australia: Pre-sentence and Supporting Reports requested by the Courts, 1965–66 to 1972–73

Year	1965–66	1966–67	1967–68	1968–69	1969–70	1970–71	1971–72	1972–73	Total
Psychiatric	34	46	28	36	51	31	41	60	327
(%)									(55.8)
Psychological	16	20	9	18	24	15	12	34	148
(%)									(25.3)
Medical	11	19	7	15	23	9	10	17	111
(%)									(18.9)
Total	61	85	44	69	98	55	63	111	586
(%)									(100)
Pre-sentence	75	77	96	204	363	418	538	612	2,383
Combined supporting reports with pre-sentence	39	47	31	40	60	39	49	76	381
(%)	(52.0)	(61.0)	(32.3)	(19.6)	(16.5)	(9.3)	(9.1)	(12.4)	(16.0)

Note: Break up of totals not available for 1974. However, 706 pre-sentence reports were requested and, in addition, 108 psychiatric reports were called for in support of them.

from sources other than the probation service have been promptly supplied or have been particularly useful or relevant for sentencing purposes. It may be that persons in respect of whom psychological or psychiatric reports would have been called for in the past are now less likely to be channelled through the criminal justice system at all. The issue is one that deserves attention. It would be interesting to know what sorts of offenders are the subjects of the different kinds of reports and why the patterns of requests from courts have changed over the years. It would be alarming, for instance, to find that experts in one field are purporting to furnish courts with information that is not within their area of expertise.

In view of the request in the 1967 Annual Report by the Chief Probation Officer that courts should avail themselves of the services of the Probation Department in compiling pre-sentence reports and the implication that reports may be especially useful if the court is considering making a probation order, a study was made of the ratio between the number of probation orders made by various courts to the number of pre-sentence reports that have been called for. The results of the study are shown in Table 2. It is appreciated that the conclusions that can be drawn from Table 2 are limited. Firstly, there can be, of course, no claim that the pre-sentence reports actually led to the making of probation orders. Secondly, the figures shown in Table 2 combine practices over a period of years and may conceal a tendency of a particular court over a shorter period to call for pre-sentence reports. Thirdly, the periods referred to in Table 3 are not equal because the District Court was established after the Offenders Probation and Parole Act came into operation.

However, the reason that Table 2 is presented is that it tends to suggest that country courts, particularly the District Court and Courts of Petty Sessions, are at a disadvantage in comparison with

Table 2. Ratio of Probation Orders made to Pre-sentence Reports called for, 1965–74

Supreme Court Perth	Supreme Court Country Sessions	District Court Perth	District Court Country Sessions	Petty Sessions Metro-politan	Petty Sessions Country
1965–74	1965–74	1969–74	1969–74	1965–74	1965–74
1.2:1	1.3:1	1.28:1	2.67:1	1.69:1	2.67:1

metropolitan courts. It seems that the services of probation officers are not always readily available in all country areas and therefore courts are bound to resort to the practice of making orders without first having the benefit of a pre-sentence report. It appears, then, that there needs to be more decentralization of the probation service.[10]

3. DECISIONS RELATING TO THE USE OF PRE-SENTENCE REPORTS AND PROBATION

(a) When it is desirable for a court to call for a pre-sentence report; when it is appropriate to place a defendant on probation

In *Holmes* v. *R.*,[11] the Court of Criminal Appeal expressed the view that a pre-sentence report is desirable in cases where a first offender has been convicted of a serious crime in respect of which the court is considering a sentence of imprisonment. The applicant in *Holmes* v. *R.* was only nineteen years old, which perhaps lent force to the court's opinion that a pre-sentence report should have been requested by the court below. However, there is no reason to suppose that the Court of Criminal Appeal believed that its remarks should be restricted to youthful offenders.

In the event, the Court of Criminal Appeal itself called for a pre-sentence report. Having noted from it that the applicant had apparently suffered considerable deprivation by lack of family assistance in his upbringing, and the probation officer's view that he would be unlikely to recidivate and would probably be assisted by probation, the court quashed the sentence of imprisonment that had been imposed by the court below and substituted an order for probation for three years.

Somewhat different factors in *Nuttall* v. *Stone* led Wallace J. to note with disfavour that no inquiries had been made about the appellant's circumstances before he was sentenced. The appellant had been convicted on three charges of passing valueless cheques and on one charge of false pretences. He was a first offender and had pleaded guilty to all charges. A prison sentence was imposed, which was recorded as being "for effectively six months". He appealed to the Supreme Court by way of order *nisi* to review sentence. At that stage, it apparently emerged for the first time that the appellant had a sick wife and four children and there was some possibility that he may have failed to obtain legal representation because of an assurance from a police officer that "it would be alright". Wallace J. took the view that a period of imprisonment should not have been

imposed at all. He said:

> I think this is a case where the accused should have been placed on probation for a period of one year, where he could have sought and been given advice along the lines of what he is apparently now receiving. If need be, it could have been made a term of that order that full restitution of any moneys then outstanding should be made. The purpose of the statute is to rehabilitate people and in circumstances where this appellant had no previous convictions and had the difficulties of rearing four children and looking after a sick wife, the provisions of the statute are most appropriate.[12]

It is not clear whether his Honour felt that the appellant's lack of legal representation alone would have justified pre-sentence inquiries or whether the doubt concerning the police assurance that "it would be alright" made it particularly important that such inquiries were made before sentence. Indeed, his Honour may have taken the view that there was no need for a pre-sentence report as distinct from information that could have been supplied by the defence lawyer. It is apparent, however, that Wallace J. felt the appellant had been seriously prejudiced by the lack of legal representation. At the conclusion of the case, Counsel for the Crown evidently asked his Honour to elaborate his views concerning the possible impropriety of the police in discouraging the appellant from obtaining legal advice. In response, Wallace J. said:

> We all witness a situation where an accused person is faced with a charge and it is true and he is in a mess; he is in a nervous condition and there is an endeavour on the part of the arresting officer to ease his pain and to say "Look, probably it will be alright." He [the arresting officer in the appellant's case] may never have said that, and I am conscious of this, but on the other hand I have seen it on not infrequent occasions and it occasions me concern that, after all, the prosecuting officer is in that role an advocate for the Crown. His task, really, is to put everything before the court to secure a conviction properly and shouldn't step outside that role. That is all I am saying.

In the event, Wallace J. did not put the appellant on probation. Apparently taking into account that he had already served two months' imprisonment, Wallace J. merely quashed the sentence imposed by the court below.

(b) The influence on the court of the contents of the pre-sentence report

From time to time, appeal courts are faced with a particularly difficult problem where the lower court has called for a pre-sentence

report and then has apparently disregarded it in determining the appropriate sentence. One such case was *Summers* v. *Bartlett*. The appellant was a 26-year-old man who had been convicted on one charge of receiving $80 and on another, of unlawful possession of a drug, pethedine. At the time of his conviction, he was on parole, having been sentenced some sixteen months previously to two years' imprisonment, with a minimum term of eight months, for unlawfully possessing drugs. The appellant had pleaded guilty to both the present charges and the Magistrate in the lower court had called for a pre-sentence report. The report apparently indicated that the appellant was the only child of his parents and had been over-protected and over-indulged. It was thought that such upbringing had hampered his emotional maturation and had inhibited the development of self-reliance. The pre-sentence report had evidently suggested that the appellant was not basically anti-social and he had already been horrified and embittered by imprisonment. It was considered that any further imprisonment would seriously jeopardize the appellant's chances of eventual adjustment. It was pointed out that further imprisonment for the present offence would lead to the automatic cancellation of parole. The contents of the pre-sentence report were apparently confirmed by a psychiatrist. In spite of the pre-sentence report and its confirmation, the Magistrate had imposed a three months' sentence of imprisonment on the receiving charge and a six months' sentence on the unlawful possession charge, such sentences to be served cumulatively.

On the appeal to the Supreme Court, the appellant's sentence of imprisonment were quashed and in lieu of the term imposed for receiving, the appellant was fined $200. In lieu of the term imposed for unlawful possession, the appellant was placed on probation for two years on sundry conditions, including that he returned to his parents in South Australia and that he did not leave or remain out of that state without the consent of the appropriate court or the South Australian Chief Probation Officer. Wallace J. disapproved of the failure of the Magistrate to make any reference, in sentencing the appellant, to the fact that he had taken the pre-sentence report into account. Wallace J. said:

> In this instance, a pre-sentence report, including a psychiatric report ... was obtained. Its provision is in accord with modern principles relating to sentencing and its sole purpose is to assist a court in arriving at a conclusion. Although any recommendation contained within such a report cannot be binding on the court, which at all times will remain free to differ therefrom, there seems no point in bespeaking a report where little or no notice is taken thereof.[13]

Wallace J. admitted that the Magistrate in the particular case may have taken the report into account, but his criticism was based on the fact that the Magistrate did not actually say that he had done so. However, his Honour was not prepared to go so far as to quash the sentence owing to the Magistrate's failure to give reasons. He could not find that either the Magistrate's failure to accord with the recommendations of the probation service or his failure to express reasons for departing from such recommendations amounted to an error of principle, which would entitle the Supreme Court to intervene. Nevertheless, he found that such intervention was justified on the grounds that the Magistrate failed to refer to the fact that a sentence of imprisonment on the present charges would lead to automatic cancellation of parole.

Although he did not find that failure to give reasons for declining to follow the recommendations justified quashing the sentence, Wallace J. clearly disapproved of the Magistrate's failure and said, "where a report contains such strong recommendations as to the effect of imprisonment on the appellant, the Court imposing the sentence of imprisonment notwithstanding bears a substantial responsibility."[14]

On the other hand, in *Hayes* v. *R.*, the Court of Criminal Appeal seemed more complacent about the failure of the court below to refer to the pre-sentence report and said, "the fact that in his remarks passed when sentencing [the trial Judge] made no express reference to the [pre-sentence] report does not justify any conclusion that he disregarded it."[15]

It is sometimes argued on appeal that the court below should have heeded a recommendation or statement made by a probation officer. This contention was advanced in *Hales* v. *R.*, where the pre-sentence report had evidently been "very favourable" to the applicant and the officer had said that a period of probation might be a suitable alternative to imprisonment. However, the Court of Criminal Appeal held that:

> in no sense could it be said that for the probation officer merely to add [a] rather qualified comment in any way bound the trial Judge or compelled him to pay any more regard to it than one would to any other helpful report as to the background of the offender.[16]

It would be interesting to know what view the court would have taken towards a recommendation that was less equivocal.

In *Williams* v. *Mott*,[17] the argument was not that the lower court had failed to take into account a recommendation in a pre-sentence

report, or had failed to give its reasons for diverging from such recommendation, but rather that the court had been too strongly influenced by the report in sentencing the appellant to one month's imprisonment. Hale J. found that the Magistrate in the court below had called for a pre-sentence report, to see whether there were any mitigating circumstances. In response, the Chief Probation Officer had apparently stated that the appellant, in his view, would not benefit from probation. Hale J. said:

> To obtain a pre-sentence report would be useless, unless it was intended and expected to influence the court who asked for the report. It appears to me that the Magistrate was entitled to be influenced by the report, and what is more important is that although there are some comments in the report which I think myself would have been better omitted,[18] the substance of it is a recommendation against probation because in the opinion of the Chief Probation Officer the appellant would not benefit by probation. I am unable to conclude that the Magistrate made any use of the pre-sentence report which he was not entitled to make.

To summarize these four decisions, it appears that Western Australian appellate courts adopt the view that a court is entitled to be influenced by a pre-sentence report, but is not bound by a recommendation contained in it. On the other hand, if a court departs from a strong recommendation in a pre-sentence report, it would be as well, if not essential, for the court to give its reasons.

(c) The reliability of the pre-sentence report

It is a disturbing fact that although the probation service is working under considerable pressure[19] and, on occasion, this must inevitably affect the reliability of its findings, there is very little challenge to the contents of reports.[20] The cases considered for the purposes of the present Report included few in which any doubt was thrown, either by counsel or by the Bench, on the conclusion reached by those preparing pre-sentence reports. It seems reasonable to assume that in most cases in which such reports are called for, considerable weight is attached to them.

Occasionally, instead of calling for an up-to-date report a court will use an old one. The dangers of this practice came to light in *Patterson* v. *R.*[21] In that case, the Court of Criminal Appeal found that the learned trial Judge had been "somewhat misled" by certain aspects of a pre-sentence report that had been made available to him and that contained material derived from the Psychiatrist Superintendent of Child Guidance, which had been prepared some

five years previously. Apart from *Patterson* v. *R.*, the only other case amongst those considered in which doubt was cast on the reliability of a pre-sentence report was *Smith* v. *R.*[22] In that case, a sentence of eighteen months' imprisonment was quashed by the Court of Criminal Appeal and instead, the applicant was placed on two years' probation. Evidently, the pre-sentence report, which had been called for by the lower court, had indicated that the applicant had an "erratic employment record". The reliability of this statement was questioned on appeal by the applicant's counsel and the Court of Criminal Appeal seemed inclined to accept the view that there had been a misunderstanding between the investigating officer who actually made the pre-sentence inquiries and his senior officers. It was alleged that the applicant's employment record was not as erratic as it seemed on the face of it, and that the investigating officer's doubt about the applicant's suitability for probation had been translated into a positive finding of unsuitability by senior officers in the probation service. The Court of Criminal Appeal evidently felt that the grounds for challenge to the reliability of the pre-sentence report were strong enough to justify it quashing the term of imprisonment imposed by the court below.

Of course, it is one thing to say that there should be more challenge to the reliability of pre-sentence reports and it is another to design a means whereby such challenge can usefully be made. In order to provide opportunity for challenge, it is necessary that the defendant,[23] or his lawyer, and possibly the prosecution, has sight of the pre-sentence report and that there is adequate time between such sight and the actual hearing for the challenging party to substantiate his case. To permit the parties to have sight of the report assumes that there is no part of it that should remain confidential from the defendant, in his own interests. It further assumes that if the defendant is unrepresented, he possesses attributes that will enable him to do justice to his case. The present writer is mindful of these complex issues surrounding the reliability of pre-sentence reports, but from experience derived while working as a probation officer in England, she can only assert her belief that the potential evils of failing to give parties the effective opportunity to challenge pre-sentence reports outweigh the difficulties of making such opportunities available.[24]

(d) Pre-sentence conferences between the Bench and the police

The cases considered included one, *Lurssen* v. *Ibbotson*, in which the issue arose of the propriety of a pre-sentence conference between

Justices of the Peace and a police sergeant. The appellant, aged nineteen, had been convicted, with three co-defendants, of breaking, entering and stealing. He had been sentenced to two months' imprisonment, but the co-defendants had been dealt with much more leniently. On the return of an order *nisi* to review sentence, Virtue S.P.J. found that the conference that took place between the Justices and the police sergeant constituted sufficient ground of itself for interfering with the sentence. He said:

> This should never have occurred. Justice must not only be done but it must appear to be done and such a conference would inevitably give rise to a suspicion that matters concerning the sentence of the accused may have been discussed, a suspicion which would not be lessened by the fact that though no reasons were given by the Justices, there was undoubtedly a very serious disparity between the penalty imposed on the appellant and three other youths convicted with him for acts the quality of which it is not disputed was substantially the same.[25]

It would be interesting to know whether his Honour would adopt a similar view with regard to conferences between the Bench and probation officers. However, the Chief Justice has advised the present writer that such conferences do not occur in Western Australia.

NOTES

1. Western Australia. Probation and Parole Service, *Probation Report for the Year ended 30 June 1965* (Perth: Government Printer, 1965), p. 5.
2. Western Australia. Probation and Parole Service, *Probation Report for the Year ended 30 June 1968* (Perth: Government Printer, 1968), p. 3; and Western Australia. Probation and Parole Service, *Probation Report for the Year ended 30 June 1967* (Perth: Government Printer, 1967), p. 3.
3. *Probation Report for the Year ended 30 June 1967*, p. 3.
4. Western Australia. Probation and Parole Service, *Probation Report for the Year ended 30 June 1973* (Perth: Government Printer, 1973), p. 5.
5. It seems that in computing case loads, some formula has been devised to take into acccount hours spent in preparing pre-sentence reports.
6. *Probation Report for the Year ended 30 June 1967*, p. 6.
7. Western Australia. Probation and Parole Service, *Probation Report for the Year ended 30 June 1966* (Perth: Government Printer, 1966), p. 5.
8. Western Australia. Probation and Parole Service, *Probation Report for the Year ended 30 June 1971* (Perth: Government Printer, 1971), p. 5.
9. According to Mr J. George, the Deputy Chief Probation Officer, courts are now more inclined than previously to leave it to the discretion of the probation service to call for supporting reports. (Letter to the present writer dated 25 November 1975).
10. However, Mr George advises that during 1974 and 1975 there has been an in-

creasing demand for pre-sentence reports from those presiding over country courts. He attributes this to a trend towards more decentralization, in that probation officers are now visiting country areas regularly.

11. Unreported decision of Jackson C.J., Virtue S.P.J. and Hale J., 24/9/71.
12. Unreported decision of Wallace J., No. 122 of 1973, at 3.
13. Unreported decision of Wallace J., No. 90 of 1973, at 5.
14. Ibid., at 6.
15. Unreported decision of Jackson C.J. and other unnamed Judges, No. 14 of 1972, at 2-3.
16. Unreported decision of Jackson C.J., Lavan and Jones JJ., No. 6 of 1975, at 2.
17. Unreported decision of Hale J., No. 10 of 1971.
18. There is no record of what these comments were.
19. See pp. 113 and 114 of this Report.
20. See M.W. Daunton-Fear, "Social Inquiry Reports: Comprehensive and Reliable?" *British Journal of Criminology* [1975]: 128. But in a commentary on "Fact-finding for Sentencers", paper read by Richard Fox and Bernard O'Brien at a seminar organized by the Australian Institute of Criminology, Canberra, 9-11 May 1975, Fiori Rinaldi argued that it is in fact a usual practice for courts to give the defendant an opportunity to be heard before sentence is passed. He referred also to the unreported decision of *Garlett* v. *R.* (*West Australian*, 18 September 1973) in which Wickham J. considered an appeal in which a Magistrate had imposed sentence after reading a pre-sentence report, but without inviting counsel to speak for the defendant before sentence. The learned Judge commented, "I think it was a serious error."
21. Unreported decision of Jackson C.J., Burt and Lavan JJ., 21/6/71.
22. Unreported decision of Jackson C.J., Hale and Lavan JJ., No. 20 of 1971.
23. Sir Lawrence Jackson advised the present writer that it is not the practice in Western Australia for an unrepresented defendant to be handed a copy of a pre-sentence report. This practice developed because the former Chief Probation Officer expressed the view that potential contributors of information would be less likely to co-operate if they knew their comments might be scrutinized by the defendant himself. With respect, experience in other jurisdictions has not suggested that the Chief Probation Officer's fears were well-founded. And even if they were, it is submitted that the danger of restricting the defendant's right of challenge outweighs the possible reduction of co-operation by potential contributors of information.
24. See Daunton-Fear, "Social Inquiry Reports: Comprehensive and Reliable?".
25. Unreported decision of Virtue S.P.J., No. 108 of 1972, at 3.

6

Other Non-custodial Measures

1. INTRODUCTION

Western Australian courts, compared with other Australian jurisdictions, do not have a wide range of non-custodial or semi-custodial measures from which they can choose in imposing sentence. They have no power to order, for instance, that the offender be sentenced to periodic or weekend detention. There are at present no statutory provisions for courts to make work or community service orders. There is no power to suspend the execution of a sentence, although there are powers to suspend imposition.[1] Furthermore, in a recent decision of the Full Court, *Walsh* v. *Giumelli and Others* and *White* v. *Gifford and Others*,[2] it has been held that Magistrates and Justices sitting in Petty Sessions have only the powers strictly given to them by statute, that is, they have no inherent jurisdiction such as that possessed by superior courts of unlimited jurisdiction. A Magistrate's attempt, therefore, to "caution" respondents who had been convicted of selling obscene papers was held invalid.

Understandable concern has recently been expressed by the Law Reform Commission of Western Australia following the decision in *Walsh* v. *Giumelli and Others* and *White* v. *Gifford and Others*, for lower courts had frequently assumed the power to caution and discharge offenders, particularly for the offence of being found drunk in a public place under Section 53 of the Police Act.[3] Although the Commission was not able to obtain comprehensive statistics, it appears that in the East Perth Court of Petty Sessions during twelve consecutive court days in September 1974 and one day a week during six consecutive weeks in January and February 1975, the total number of convictions was 653. Sixty-six cautions were given in respect of these convictions, which amounts to 10.1 per cent.

After examining sundry other powers of the lower courts, including a device sometimes used whereby offenders are committed

to custody for a few hours "until the rising of the court", the Commission concluded that the administration of criminal justice is likely to be facilitated if courts have available to them "as wide a range of powers of disposition as is reasonably practicable", a view that is heartily endorsed by the present writer. Lower courts had previously assumed the power to caution offenders either where the offence was regarded as trivial or where any penalty, custodial or otherwise, seemed futile. Tentatively, the Commission suggested that legislative intervention is required to ensure that the power of all courts be extended to dismiss charges and to discharge offenders conditionally and unconditionally.

This chapter will deal with the limited range of non-custodial measures that may be taken and that have not already been considered elsewhere in this Report.

2. THE BIND-OVER POWER

D.G.T. Williams[4] defined the English common law bind-over power in these terms:

> [It is] a power, wherever the punishment is not fixed by law, to postpone or suspend the imposition of sentence upon a person who has pleaded guilty, or has been found guilty, or has been committed by a magistrates' court to quarter sessions for sentence.

He stated that the normal procedure is to require such a person in open court to enter into a recognizance, with or without sureties, to come up for judgment when called upon, subject to a condition that he shall in the meantime keep the peace and be of good behaviour. Special conditions, in addition to the requirement of keeping the peace and being of good behaviour, may in appropriate circumstances be inserted into the recognizance. Williams distinguished the common law bind-over power from that that he described as the statutory bind-over power. The latter, which enables courts to bind the offender over to keep the peace and be of good behaviour, probably also has its origins in common law as well as in statute, but is different from the common law bind-over power in that the offender is not directed to come up for judgment when called upon. Williams also distinguished the common law bind-over power from the power of courts to admit offenders to bail pending an appeal, from the power to place offenders on probation, from the power to discharge offenders conditionally, from the power of postponing sentence and from the power of suspending the execution of a sentence.

South Australia is the only Australian jurisdiction in which a superior court has questioned its inherent jurisdiction to grant common law bonds.[5] Discussion of the issue in Western Australia is to a large extent academic because of the statutory provisions of the Criminal Code that reinforce the power of courts to require that offenders come up for judgment when called upon. All of the bind-over powers that are discussed in the present section of the Report authorize conditional discharge.

Sections 19(8), 656 and 669(1)(b) of the Criminal Code all permit courts to discharge offenders on recognizance to appear and receive judgment at some later date, which, in the case of Sections 19(8) and 656, may be specified by the court or may be entirely open. Under Section 669(1)(b), the court may not specify any particular date or sittings of the court: the date for judgment can only be open. Sections 19(8) and 656 are potentially of wide application. Section 19(8) provides:

> 19. In the construction of this Code, it is to be taken that, except when it is otherwise expressly provided,
> (8) When a person is convicted of any offence not punishable with death, the Court or justices may, instead of passing sentence, discharge the offender upon his entering into his own recognizance, with or without sureties, in such sum as the Court or justices may think fit, conditioned that he shall appear and receive judgment at some future sittings of the Court, or when called upon.

The only apparent exception to the type of offence that may attract Section 19(8) is one that is punishable by death and since the death penalty has now been abolished in Western Australia for all offences but wilful murder, treason, piracy and attempted piracy with violence, the provision is almost of universal application. Section 656 is mainly procedural in nature and authorizes a court to pass sentence forthwith or to discharge the offender on recognizance "[i]f a motion to arrest the judgment is not made or is dismissed". Section 669(1)(b) is of more limited application and may be invoked only in relation to first offenders[6] who have been convicted of an offence not punishable with more than three years' imprisonment. Furthermore, the court must deem it inexpedient to inflict any punishment, regard being had to the "youth, character or antecedents of the offender, or the trivial nature of the offence or to any extenuating circumstances under which the offence was committed".

The only general curb on courts from invoking the powers contained in Sections 19(8), 656 and 669(1)(b) is contained in Section 10 of the Offenders Probation and Parole Act, which states that courts

must first be of the opinion that the offender could not properly and conveniently be released on probation. It is hard to see the necessity for this curb on the courts' powers to invoke Sections 19(8), 656 and 669(1)(b). While it is reasonable to require courts to consider the use of a non-custodial sanction before imposing a sentence of imprisonment, there is no obvious reason to make them consider probation before exercising a bind-over power. Indeed, it might perhaps be more understandable if courts were obliged to consider the exercise of a bind-over power before making a probation order

Once a common law bind-over or its statutory equivalent has been breached, two courses of action, according to Rinaldi,[7] are available. Firstly, the recognizance may be estreated and secondly, the defendant may be called upon to appear for judgment. The court's jurisdiction to impose sentence does not arise if the defendant has merely been summoned to show cause why the recognizance should not be estreated: he must be summoned specifically to appear for judgment.

Unfortunately, there are no published statistics that indicate the use of Sections 19(8), 656 and 669(1)(b) and indeed, it would be interesting to know the circumstances under which courts are having recourse to their somewhat draconic powers.[8] Rinaldi claims that:

> Although little, if anything, can be said in favour of Superior Courts using common law bind-overs, given the limited nature of crimes that may be triable summarily and the sentencing alternatives [already available] to courts of summary jurisdiction, it is extremely difficult to appreciate why these courts should be invested with power to grant common law bind-overs—a power which they use quite frequently, nearly always to the prejudice of the offender in cases when less severe sentences such as conditional discharge, fine or probation order would be appropriate.[9]

Rinaldi, of course, was speaking generally of the position in Australia and the published information regarding sentence is by no means equivalent in each jurisdiction. Nevertheless, it is perhaps of some interest that in only one of the cases examined for the purposes of the present Report was the common law bind-over power or any of its statutory equivalents considered. In *Dodd* v. *Smith*,[10] the applicant had been dealt with under Section 19(8) of the Criminal Code and the terms of his recognizance were that he should appear and receive judgment when called upon. The applicant had in fact been called upon and the Magistrate had purported to discharge him again on a similar bond. It was held by the Full Court that it was not within the jurisdiction of the Magistrate to require the applicant to

enter into a similar bond. Once the offender has been called upon to receive judgment, the court must sentence the offender for the offence. Rinaldi describes this decision as "regrettable" and observes that no arguments in support of the decision were offered by the court.[11] Of course, the fact that the common law bind-over and its statutory progeny are rarely the subject of appeals[12] does not necessarily indicate that courts are failing to use these powers: it must be recalled that almost all of the decisions considered for the purposes of this Report were appeals and it may well be the case that common law bind-overs or their statutory equivalents are not often appealed against. If so, this in turn may indicate a tendency on the part of the courts or the responsible authorities to desist from calling upon defendants at a later date to receive judgment. Be that as it may, it is beyond dispute that the powers available to higher and lower courts are extremely wide, and without any guidelines being given as to the circumstances in which they should be invoked, the possibility undoubtedly exists of their inappropriate application. Now that the Crown has a right of appeal to the Court of Criminal Appeal, it is likely that principles will be gradually accumulated that relate to circumstances in which bind-overs are appropriate.

At a Conference of Stipendiary Magistrates held in Perth in May 1975, the present writer enquired of Magistrates the extent to which they used their power to require defendants to come up for judgment when called upon. She gained the impression that some Magistrates make quite frequent use of the power, while others do not use it at all. At the same conference, Mr Justice Lavan expressed the view that the power was sometimes useful in dealing with Aborigines. Unfortunately, more precise information concerning the powers was not available.

In addition to the bind-over powers that are exclusively of common law origin and that authorize courts to order that offenders come up for judgment when called upon, there are other statutory provisions that authorize courts to bind an offender over on condition that he observes the terms of a recognizance or bond. These are the powers that Williams described as statutory, but he conceded that even these had a mixed ancestry and could probably be traced back to the common law as well as to statute. Often the powers that Williams described as statutory bind the offender to keep the peace and be of good behaviour for a fixed term, such as one year. There are several such powers that are conferred on courts by the Western Australian Criminal Code. The principal powers are contained in Subsections (6) and (7) of Section 19 of the Criminal Code. Subsec-

tion (7) authorizes courts, except where otherwise expressly provided, when dealing with any offence upon summary conviction, instead of imposing any other punishment, to discharge the offender on his entering into a recognizance, with or without sureties, to keep the peace and be of good behaviour for a term not exceeding one year. Subsection (6) may be invoked, except where otherwise expressly provided, in relation to any offence not punishable by death and may be used in addition to or instead of imposing any other penalty. Again, the recognizance, which may be with or without sureties, is to keep the peace and be of good behaviour. However, in this case, the court has absolute discretion as to the period of recognizance. Subsection (6) also empowers the court to order the offender to a period of imprisonment of up to one year for failing to enter into the recognizance.[13]

As with bind-overs that have their exclusive origin in common law, there are no published statistics that indicate the incidence of the use of statutory bind-overs or the incidence of breach. In two of the cases considered for the purposes of this Report, the Supreme Court, sitting in its appellate jurisdiction, quashed sentences of imprisonment imposed by lower courts and substituted statutory bind-overs. In *Di Camillo* v. *Wilcox*,[14] the appellant, a first-year medical student who had won a scholarship entitling him to six years' free education at the university, was convicted of loitering. He had no previous convictions. Hale J., in substituting a statutory bind-over for one month's imprisonment with hard labour, made it clear that he regarded the offence as very minor. Unfortunately, Hale J. did not indicate whether he thought the appellant's status as a student with a scholarship was relevant to sentence.

In *Lurssen* v. *Ibbotson*,[15] Virtue S.P.J. substituted a statutory bind-over for a sentence of two months' imprisonment, which had been imposed on a youth for what was regarded by the Judge as an escapade of dishonesty of a minor type. In substituting the bind-over, Virtue S.P.J. noted that the appellant had no prior record of dishonesty and only one previous conviction for a minor offence, which had been committed nearly two years previously. Evidently, the Judge thought it relevant that the appellant's chances of entering a "very respected and rewarding avocation" (engine-driving) were ruined.

The cases examined contained no information concerning the circumstances under which estreatment proceedings are generally instituted in Western Australia.

3. DISCHARGE

In the present context, the courts' powers to discharge offenders without a recognizance will be examined. In contrast with the provisions discussed in the previous section of the Report, the provisions now to be considered authorize the absolute discharge of the offender.

There are several provisions in the Criminal Code that authorize courts when dealing with certain types of cases to convict and discharge the defendant without imposing any punishment. The first provision is contained in Section 321 and deals with cases of assault where the defendant is summarily convicted. The second is contained in Section 467, which relates to certain indictable offences[16] that may be dealt with summarily. In each case, the court must consider the offence of so slight a nature that punishment is not justified. A wide power, once the prerequisites are satisfied, is conferred on courts by Section 669(1)(a) of the Criminal Code. That subsection provides that:

> When upon the trial of any person on a charge of any offence not punishable with more than three years' imprisonment, with or without any alternative punishment, such person shall plead guilty, or the Court shall think the offence proved, if it appears to the Court that regard being had to the youth, character, or antecedents of the offender, or the trivial nature of the offence, or to any extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment, and provided that no previous conviction, other than his conviction, as a child, by a children's court, is proved against the offender,—
>
> (a) The Court may, without proceeding to conviction, dismiss the indictment or complaint and make an order to that effect, and if the Court thinks fit may, upon such dismissal, order the offender to make restitution of any property in respect of which the offence was committed, or to pay compensation for any injury done to such property, or compensation for any injury done to any person injured, as the case may be, and may assess the amount to be paid by the offender in any such case with such costs of the prosecution as the Court may think reasonable, and may direct when and to whom and in what instalments the amount ordered to be paid is to be paid, and such order may be enforced in the same manner as orders made on summary conviction;

An interesting point arose in *Aitken* v. *Wilson*[17] as to the appropriate circumstances in which Section 669(1)(a) could properly be invoked. The respondent, a man of forty-four, with no previous convictions, had pleaded guilty to a charge under Section 32 of the

Traffic Act, that he had driven a vehicle whilst under the influence of alcohol to such an extent as to be incapable of having proper control of the vehicle. The police gave evidence that his breathalyser reading was 0.152 per cent alcohol in the blood at the time of arrest, and the police calculated that it was probably as high as 0.173 per cent at the time of the accident that brought the respondent under attention. The Magistrate gave no reasons, but dismissed the charge under Section 669(1)(a). The prosecution appealed by way of order to review. Mr Justice Burt, with whom Wickham J. concurred, noted that the prosecution had accepted that the Magistrate had not been precluded from invoking Section 669(1)(a) merely because Section 32(3)(a)(i) of the Traffic Act provided that a person convicted of an offence against the section was liable to certain stated minimum penalties. Burt J. expressed the view that the prosecution had been correct in making this concession and indeed felt that in the light of the High Court decision of *Cobiac* v. *Liddy*,[18] any contrary contention was foreclosed. However, all the members of the Full Court in *Aitken* v. *Wilson* considered that the respondent did not fulfil the prerequisites referred to in Section 669(1). He was not young and nothing was known of his character and antecedents, except that he had been driving since 1950 with no traffic or other convictions. The court did not regard the offence as trivial, nor could the court find any extenuating circumstances under which the offence was committed. According to Burt J., there was nothing capable of maintaining the discretionary judgment that it was inexpedient to inflict punishment upon the respondent. Accordingly, the case was remitted with a direction to convict and deal with the question of penalty. It was implicit in Mr Justice Burt's decision, and explicit in that of Wallace J., that the onus was on the respondent to put before the Magistrate sufficient information to enable him to exercise his discretion. One could argue, however, that in the absence of further information, the respondent was just the sort of person who should have the advantage of Section 669(1). At least it was clear that he had been driving for a long time and that he had no traffic convictions.

Another power to discharge is contained in Section 671 of the Code. Although this section applies only to persons convicted of summary offences relating to property, the court does not have to form the view that the offence is trivial before invoking it. Rather, the section may be invoked by the court if the offender makes "satisfaction to the person aggrieved for damages", with or without costs, as may be approved by the court.

A further power to discharge is contained in Section 137 of the

Police Act 1892-1974. Under Section 137, Justices are not bound to convict an offender if the view is taken that the offence is of so trivial a nature that it does not merit punishment. In *Durham* v. *Ramson*,[19] McMillan J., with whom Burnside J. concurred, held that Section 137 could not be invoked in respect of a defendant who had committed an offence against Section 7 of the *Sale of Liquors Amendment Act* 1897 and indeed, McMillan J. considered that the provisions of Section 137 apply only to offences under the Police Act.

Although, on the face of it, Section 137 appears capable of broad application, its usefulness is restricted. Not only is its scope narrowed by the principle stated in *Durham* v. *Ramson*, it can only be invoked if the court is prepared to refrain from entering a conviction because of the trivial nature of the offence. As observed by the Law Reform Commission,[20] there may be circumstances in which the court feels constrained to enter a conviction, not because it wishes to impose punishment, but merely because, in the event of recidivism, a heavier penalty becomes available. For instance, under Section 66 (1) of the Police Act, a person who has committed an offence under Section 65, and has been previously convicted as an idle and disorderly person, may be liable to imprisonment for twelve months. If no conviction is entered, the maximum penalty available in the event of recidivism may well be considerably lower. Further, the mere fact that Section 137 requires that the court shall be satisfied of the trivial nature of the present offence may itself have a restrictive influence. Although in some situations the personal circumstances of the offender may cause the court to view the offence as less heinous that it would otherwise, there will inevitably be cases in which a court would like to invoke Section 137 because of the offender's circumstances, but feels inhibited from doing so because the offence he committed can hardly be described as trivial.

4. CORPORAL PUNISHMENT

There is still provision for the infliction of corporal punishment in Western Australia for a variety of sexual offences committed by recidivist males. The sentence is always discretionary and may be imposed in addition to any other punishment provided by the law. Under Section 206 of the Criminal Code, the following offences may attract whipping if committed against a girl under the age of thirteen, or one whom the offender knows to be an idiot or an imbecile, and the offender has previously been convicted of one of these offences:

(a) defilement of a girl under sixteen years;
(b) defilement of an idiot;
(c) indecent "dealing" with a girl of under sixteen years or sundry others;
(d) rape;
(e) attempted rape; or
(f) indecent assault.

If the offender is sixteen years or over himself, the defilement of a girl of under the age of thirteen years may attract a whipping, even though the offender has not previously committed a sexual offence. In the case of male juveniles, a whipping may be imposed for any offence, summary or indictable, either in addition to or in substitution for any other penalty.[21]

Whipping may not be inflicted on any female offender.[22] Section 659 of the Code provides that it shall be inflicted with a cane or leather strap and the number of strokes may not exceed twenty-five, or, if the offender is under the age of eighteen, twelve.

Although no researcher has been able to indicate that the existence of corporal punishment as a sanction for criminal offences in any way acts as a deterrent weapon in the hands of the courts, public opinion may well prevent or delay its abolition. There is a widespread belief that whatever else fails, the threat of physical injury is a powerful influence on human behaviour. The difficulty with this view is that it does not discriminate between the various circumstances under which punishment is inflicted.

In 1960, the English Advisory Council on the Treatment of Offenders reported on corporal punishment and drew a distinction between its use in homes and schools and its use as a criminal sanction. It observed:

> Parents (except, of course, those who use violence excessively or indiscriminately) and school-teachers know their boys and how they are likely to react to corporal punishment. The punishment is inflicted soon after the offence in respect of which it is given, and usually by the person who has made the decision to inflict it. The boy will usually have affection, or at least respect, for the person who beats him, and because of their continuing relationship there is abundant opportunity for reconciliation. These conditions are not, and cannot be, fulfilled when the penalty is imposed by the courts, and our conclusion as to judicial corporal punishment has no bearing on the wholly different question of corporal punishment in the home and in schools, which is outside our terms of reference.[23]

There are a number of factors that militate strongly against

the usefulness of corporal punishment as a deterrent penalty in the hands of the courts. Firstly, it is generally inflicted, if indeed it is inflicted at all, on offenders who have committed sexual offences. But sexual offences undoubtedly have an excessively high "dark" figure, which is aggravated by the social pressures on the victim not to report the incident. If any penalty carries a deterrent value, it is surely the certainty of conviction that influences the defendant rather than the mere existence of the penalty on the statute book. The chances of being convicted, then, of a sexual offence are extremely low and it is hardly likely that a would-be offender will desist because he suddenly recalls that whipping is a remote possibility. Still less likely is it that the penalty will have any deterrent effect, in view of the highly emotionally charged atmosphere in which most sexual offences and, indeed, offences of violence, take place.

For the individual offender who is whipped, there is a possibility, of course, that he will resolve never to commit the particular offence again. On the other hand, the infliction of corporal punishment may engender in him a sense of victimization and bitterness, particularly if he compares his lot with that of his unconvicted peers, including those whose offences have not been detected. Indeed, his resolution may well be not to desist in the future, but rather to evade detection or intimidate more strongly the victim and any potential witnesses.

Another difficulty is one that corporal punishment shares with other penalties, namely, that it is hard to standardize its effect between offenders. The actual pain inflicted on the offender depends not so much on the number of strokes he receives as the strength with which they are applied and the physique of the offender receiving them. The pain suffered by a muscular, hard-skinned offender bears no relation to that suffered by the obese and soft-skinned.

Yet another problem with corporal punishment arises from the delay that so often occurs between the commission of the offence and its infliction. There is indeed provision in the Criminal Code that whipping may not be inflicted more than six months after sentence is pronounced,[24] but the sentence itself may, of course, be long after the offence that gave rise to it. Whatever the reason for the delay, the offender is not likely to be in the same frame of mind after it as he was immediately following the commission of the offence. Human beings have a tendency to rationalize circumstances and the defendant is much more likely, after the effluxion of time, to have convinced himself that the victim's injury was slight or that he was strongly provoked or that he was led by others. All these factors are likely to reduce any deterrent value that corporal punishment would

otherwise have had. It may indeed be an awareness of these problems that accounts for the fact that although the cases considered for the purposes of the present Report include a considerable number that could have attracted corporal punishment, it was imposed in only one of them.

In *Cameron* v. *R.*,[25] the applicant, whose age was not recorded, and who had a prior record of "minor offences", was convicted of attempting to have carnal knowledge of a girl under the age of thirteen years. The court of first instance had imposed a fourteen-year term of imprisonment, with a whipping. No mention was made, according to the record, of a minimum term. The applicant sought leave to appeal against sentence, but the application was dismissed. It seems that no reference was made by the Court of Criminal Appeal as to the principles of sentencing that it thought applicable.

5. FINES

Rinaldi has argued "that fines, if properly imposed, must remain as one of the most desirable features of any system of criminal administration".[26] Certainly, most legislatures make common provision for their imposition. In Western Australia, the Criminal Code states that in construing the Code, except when it is otherwise expressly provided, "a person liable to imprisonment, either with or without hard labour, may be sentenced to pay a fine not exceeding One thousand dollars in addition to, or instead of, such imprisonment."[27] Furthermore, Section 19(4) of the Code provides that in construing the Code, unless it is otherwise expressly stated, a person liable to a fine of any amount may be sentenced to pay a fine of any lesser amount.

These provisions, of course, confer wide powers on courts to impose fines of discretionary amounts. Legislative provisions that relate to the jurisdiction of lower courts commonly provide that a fine may or must be imposed as the whole penalty or part of it. Sometimes the legislature merely sets the maximum fine, sometimes a fixed amount is referred to. However, the lower courts have discretion to reduce a fixed fine under Section 166 of the Justices Act if it is imposed in respect of a first offence. Justices also have discretion under Section 166 to substitute a fine not exceeding $500 for imprisonment, which can be imposed for an offence under an Act other than the Justices Act. The amount of the fine, however, must not be so high that, in default of payment, it will render the offender liable to serve a longer term of imprisonment than that to which he would

have been liable had he been sentenced directly to imprisonment.

Section 166A provides for the apportionment of a fine between those who are severally convicted of the same offence, according to the discretion of the Justices, in cases where the offence might not have been committed but for the collaboration of the offenders. However, in the case of *Waterman and Others* v. *Oliver and Others*,[28] it was held that Justices have no power to impose a consolidated fine on convicting a defendant of more than one offence. In the case in issue, Justices had purported to impose fines of £5 on each of six defendants, all of whom had been convicted on three counts of assault. It was held that a separate penalty should have been imposed in respect of each conviction.

The courts' powers to order that an offender be imprisoned in default of payment of a fine have already been considered in Chapter 3.[29]

Unfortunately, statistics are not available that indicate the frequency with which fines are used in Western Australia or the incidence of non-payment. In twelve of the cases considered for the purposes of this Report, either the imposition of a fine by the court below was approved by the appellate court or the appellate court substituted a fine for the whole or part of the penalty imposed by the lower court. Little general information can be gleaned from the cases concerning the principles on which fines are imposed, although a few of them contain some helpful comments on specific points. Six of the cases arose out of breaches of traffic regulations and it is quite common in such cases for the fine to be imposed in conjunction with another penalty, which is usually a period of disqualification from holding a driving licence. Perhaps it hardly needs observation that where more than one penalty is imposed for one offence, or for several offences arising from the same incident, the courts, in determining the appropriate amount of the fine, are taking into account the nature of the other penalty. In *Taylor* v. *Christie*,[30] for instance, Wallace J. noted that the Magistrate in the court below had imposed the maximum fine for the particular offence of which the appellant was convicted and indicated that, in the circumstances, he thought it appropriate to reduce the period of disqualification. And in *Pye* v. *Foster*,[31] in substituting a $75 fine for the part-penalty of three months' imprisonment, which had been imposed by the court below, Wickham J. took into account the fact that the appellant had already served a period of thirteen days in custody awaiting the appeal, and presumably that the Magistrate had also disqualified the appellant from driving for six months. It appears that courts may be

not only taking into account other penalties in determining the appropriate amount of the fine but are also prepared to accept that costs are relevant as well. In *McGibbon* v. *Tuckey, Huysing and Tuckey*,[32] the Magistrate had assessed the fines in the light of the fact the respondents would have to bear the costs of the victim in bringing counsel from Perth to Carnarvon. Although Wolff C.J., on dismissing the appeal against sentence by the prosecutor (on the ground that the fines were inadequate) did not specifically refer to the relevance of costs, it seems that he accepted the basis of the Magistrate's assessment.

Another factor that courts understandably consider relevant to quantum is the financial profit that the defendant gained, or could have gained, from the offence. In *Commissioner of Taxation for the Commonwealth of Australia* v. *Herrick*,[33] the appellant was convicted of wilfully and knowingly understating his income for two years and Hale J., in imposing substantial fines, noted that the appellant would have had the use of the sum of which he had defrauded the revenue for some six years.

In the recent decision of *Murphy* v. *Watson*, *Davidson* v. *Watson* and *Ward* v. *Watson*, the Full Court indicated that for some types of offence at least, the imposition of a low fine may be the best of a poor choice of alternative measures that are open to a court. The Full Court was considering appeals by three Aboriginal women, each of whom had been convicted of disorderly conduct and had been sentenced to six months' imprisonment. The maximum penalty set by the legislature for the offence is a fine of $100 or six months' imprisonment, or both. The three cases are considered in greater detail in Chapter 8, but it is relevant at this stage to observe that the Full Court, after considering the limited alternatives available, and having quashed their sentences of imprisonment, reluctantly decided to fine the appellants. The court said: "To fine such a person [as each of the appellants] 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 ... "[34]

The appellate decisions are of interest, not only because they reveal the dilemma that courts face in sentencing certain offenders but also because they show that there is a concern on the part of some Judges to adjust fines to amounts that are within the defendant's means. In the event, the three appellants were fined $10 each.

The present writer has argued elsewhere[35] that in imposing fines, three factors are of crucial relevance, namely, the means of the defendant, the likelihood that he will bear the major impact of the

fine himself and reparation in favour of the victim. The writer believes that fines that are totally unrelated to the defendant's present or shortly anticipated ability to pay, are both unsound and unnecessary. They are unsound in that they discriminate unfairly against the poor and, often, indigenous people. If imprisonment be used as a default penalty, fines that are unrelated to the defendants' means tend to inflate the prison population by the incarceration of the poor and the unemployed. A vicious circle is then too easily established. Employment is harder to obtain after incarceration, families may be less cohesive and new and undesirable associations are set up within the prison. Further imprisonment no longer seems to the defendant unthinkable. It is recognized that to suggest that courts should investigate the defendant's means may well aggravate an already heavy burden, particularly that borne by the lower courts. However, on humanitarian grounds and in the interests of the community as a whole, the case for such investigation is compelling. Furthermore, it is a corollary of this contention that the defendant should always be given time to pay a fine, assuming he needs it. Indeed, a fine that is payable by instalments may in some cases serve to remind the defendant, over a protracted period, of his debt to society and yet avoid the debilitating and even counter-productive effect of an order for an immediate, lump-sum payment.

The second relevant factor to be borne in mind when imposing a fine is the likelihood that the defendant himself will bear the major impact of it. Of course, it is never possible to ensure that the defendant himself will pay a fine, or even if he does, that he will not cause it indirectly to be borne by some third party. However, it is possible that certain steps may encourage the defendant to pay it himself, as, for instance, if the amount and instalments are calculated in relation to his daily or weekly wages, after allowing for commitments. Where the fine is substantial, it may be that a short period of supervision by a probation officer or by a budget adviser could be helpful.

Thirdly, it is suggested that before a fine is imposed, the courts should always consider whether any reparation should be made to the victim. If the defendant has financial resources, the victim's interest in receiving reparation should surely rank above the state's claim to recoup expenses by the imposition of a fine. Indeed, it has been suggested that the legislature might consider the diversion of fines into a fund for the compensation of victims of crime.[36]

It has already been argued that failure to investigate the defendant's means may lead indirectly to the discriminatory imprisonment of the poor. This assumes, of course, that imprisonment is used

more or less automatically if default occurs, and it should be emphasized that there is no clear indication that this happens in Western Australia. However, a strong case can be made for restricting the use of imprisonment to those defaulters who have had the means to pay and yet their default is wilful. It is always possible that between the time the fine is imposed and the last date of payment, the defendant's financial circumstances have deteriorated through no fault of his own. In such cases, it would be totally unjust for the defendant to suffer imprisonment without the opportunity of explaining his circumstances or of applying for an extension of time to pay.

6. REPARATION

There is little purpose to be served by dealing separately with those provisions that relate to compensation and those that relate to restitution: both are considered in the present section. Western Australia, like many other jurisdictions, has a complex and partly overlapping network of statutory provisions that empower courts to make orders for compensation and restitution by the offender. Some may be activated only on the application of the aggrieved person,[37] others exist independently of any such application.[38] Most of the compensation provisions relate to property, though exceptionally, Section 674 of the Criminal Code enables courts to make an order in respect of any loss of time that the aggrieved person may have suffered by reason of an offence dealt with on indictment. Few of the provisions allow for compensation for personal injury, although Section 669(1)(a) of the Criminal Code and Section 145 of the Justices Act are exceptions. Section 669(1)(a) is fairly limited in its scope, because it relates only to a first offender who is convicted of an offence not punishable with more than three years' imprisonment and the circumstances are such that the sentencing court, having regard to the youth, character or antecedents of the offender, the trivial nature of the offence or any extenuating circumstances, deems it inexpedient to inflict any punishment. In such a case, even though the court may dismiss the indictment or complaint, if it thinks fit, it may order the offender to make restitution or pay compensation for any injury done to property or sustained by the victim. Some provisions enable courts to make orders relating to the prosecution's costs.[39]

Perhaps the most general section relating to compensation is Section 719, which relates to any offence, indictable or summary, and by which the aggrieved person may be compensated for any loss of

property or for expenses incurred because of the offence. Unlike victims whose award is under some of the other statutory provisions,[40] the aggrieved person who is awarded compensation under Section 719 may still exercise any civil remedy that he may have against the offender, but the amount that he obtains as a result of the criminal proceedings must be taken into account in the assessment of damages by the civil court.

Section 672 is potentially wide-ranging and it would be interesting to know how many victims are compensated as a result of its operation. It provides that:

> On a summary conviction by which any penalty is imposed upon the basis of the value of any property taken, killed, or destroyed, or of the amount of any injury done to any property, such value or amount is to be assessed by the convicting justices, and the amount, when recovered, is to be paid to the person aggrieved, unless he is unknown, or unless the property taken or injured is of a public nature; in either of which cases it is to be applied in the same manner as other fines imposed by justices:
>
> Provided that when several persons join in the commission of the same offence, and on conviction a penalty is imposed upon each of them upon the basis of the value of the property or of the amount of the injury, no further sum than such value or amount is to be paid to the person aggrieved, and the remainder is to be applied in the same manner as other fines imposed by justices.

It seems likely that in almost every case in which a fine is imposed in relation to an offence against property, the sentencing court pays some regard to the extent of the damages. If that be the case, perhaps many victims of such offences should receive compensation under Section 672.

The right to restitution is not necessarily confined to the situation in which the offender still has in his possession the actual goods that were dishonestly acquired. Under Section 717, the right attaches to "any personal property which is found in [the offender's] possession, and which appears to the Court to have been derived, directly or indirectly, from such unlawful acquisition". However, the right to restitution may not be exercised under the section if the property dishonestly acquired is a valuable security or a negotiable instrument to which a *bona fide* third party has acquired an interest for valuable consideration.

Under Section 682A, enforcement of orders of the Supreme Court that relate to any pecuniary penalty, compensation or costs may be made in the same manner as similar orders by courts of summary jurisdiction. The Justices Act contains provisions relating to the enforcement of such orders.[41]

Statutory provisions that permit courts to order compensation by offenders discriminate unfairly against the victim who has sustained physical injuries as a result of the offence. However, the injustice has now to some extent been rectified by the *Criminal Injuries (Compensation) Act* 1970.

Until the *Criminal Injuries (Compensation) Act* 1970 came into operation, victims of crime who sustained loss or damage to property were generally in a more favourable position in their chances of obtaining compensation than were victims who sustained injury.[42] To some extent, the imbalance has been redressed by the Act, although the legislation is restricted in its operation and gives rise to uncertainties and a number of anomalies. The Law Reform Commission of Western Australia has recently published a Working Paper on the Act and has sought the views of the public on a number of aspects of the legislation.[43]

The injuries that may be the subject of compensation under the Act are defined in Section 3 as bodily harm, including pregnancy, mental and nervous shock. It is not clear whether pecuniary loss, such as loss of earnings and medical expenses, is included, although a strict interpretation of Section 3 would imply that it is not. According to the Law Reform Commission, Mr Justice Lavan took the view that pecuniary loss was not a factor to be taken into consideration in *Maher* v. *Thomson*,[44] and Mr Justice Wallace expressed similar views in *Edwards* v. *Taylor and Hall*.[45] On the other hand, the Chief Justice, in *Hill* v. *Shaw*,[46] said that in assessing compensation, it would have been relevant to take into account "the question of medical, hospital and similar expenses", if there had been evidence of them. The Commission has urged that the problem of pecuniary loss be clarified by the legislature, but has observed that if the nature of the award be regarded primarily as a civil remedy rather than as a further form of punishment for the offender, it could be argued that the same heads of loss should be adopted as may be used in tort actions, and these include both pecuniary and non-pecuniary loss. However, a further problem arises in relation to indignity, grief or outrage suffered by the victim, as opposed to nervous shock. It appears there has already been some judicial controversy as to whether compensation may be awarded in respect of such factors.[47]

The maximum amounts that may be awarded under the Act are $300 for a simple offence and $2000 for an indictable offence.[48] As the Law Reform Commission points out, an immediate problem arises as to the classification of indictable offences that may be dealt

with summarily. Although this difficulty has not yet been resolved by the Supreme Court, Magistrates have apparently taken the view that $300 is the upper limit for such offences.[49] However, there are more fundamental problems associated with the somewhat arbitrary maxima: the injuries actually sustained by the victim do not necessarily turn at all on the nature of the charge laid against the offender. It may well be the case that factors such as plea bargaining by the police have determined whether the offender is charged with a summary or indictable offence. Another problem associated with the maxima is that the legislature has not indicated whether they are intended to be reserved for the worst sort of cases or whether they are merely cut-off points beyond which awards may not be made. It appears from Table 1[50] that courts are regarding the maxima as cut-off points rather than limits to be reserved for the worst sort of cases. In any event, it can hardly be denied that the maxima are exceedingly low and the problem has been aggravated by the steep rise in inflation since the Act was passed.

It may be, however, that the problem of the low maximum can be overcome in cases of pack rape by awarding sums of up to $2000 against each defendant. It was certainly the view of Mr Justice Wickham in *R.* v. *Larkin and Others*,[51] that it was open to the Supreme Court to grant an award of $5000 to the victim of rape, where three defendants had assaulted her.

Rather curiously, but not without precedent, the Act fails to provide for a victim whose assailant has been undetected or has not been charged. Further, there is doubt concerning the victim's eligibility for compensation if his assailant has been acquitted on the ground of insanity. It is appreciated that in cases where the assailant is undetected, there is a need to safeguard against fraudulent claims, but this problem is hardly insuperable and it may well be the case that some guidance is to be gained from measures taken in other circumstances to guard against fraud, as, for example, by insurance companies, which need to ensure that property losses are not feigned.

Section 4(2) contains an interesting provision, namely, that in determining whether or not to make an order under Subsection (1), the court or Judge shall have regard to:

> any behaviour of the [victim] that contributed, directly or indirectly, to the injury suffered by him, and to such other circumstances as it or he considers relevant (including whether [the victim] is or was a relative of the person against whom the order is sought, or was, at the time of the commission of the offence, living with such person as his wife or her husband, or as a member of the household of such person) ...

Perhaps surprisingly, it has been held in *Re: Hondros* that Section 4(2) does not authorize reduction of compensation for contributing conduct, but it constitutes an absolute bar to recovery. While it is understandable that contributing conduct, which presumably includes provocation, should affect quantum, it seems unreasonable that it should prevent the victim from receiving any compensation. Furthermore, it is not clear why the legislature should specifically refer to the relationship between the victim and his assailant or to their household arrangements. It is appreciated that if the parties are related or share a house, there may be a likelihood that the victim has contributed to the conduct of the assailant. But contributing conduct is specifically mentioned in Section 4(2). The problem created by the wording of the subsection is that courts will construe the mere existence of a family or domestic relationship between the victim and his assailant as constituting a total or partial bar to the recovery of compensation, whereas it is submitted that such a relationship should only be relevant insofar as it establishes a *prima facie* case of contributing conduct.

A further problem arises from the fact that the Act is not explicit in stating the persons who are eligible for compensation under the Act. Section 4(1) simply refers to "a person who has suffered injury in consequence of the commission of the offence" and on the face of it, this would appear wide enough to cover personal representatives or relatives. Certainly, it is difficult to justify any distinction being made between the case of the victim who lives just long enough to recover compensation and one who dies shortly before the order would have been obtained. Whether relatives should have an independent right to claim compensation would, in many cases, depend upon resolution of the issue concerning entitlement for pecuniary loss. Many relatives of victims must suffer loss when the victim's earning capacity is affected. However, there must also be circumstances in which the nervous shock suffered by a relative of a victim is considerable and it may even exceed that suffered by the victim himself. As a matter of justice, it is submitted that personal representatives and relatives of victims should be able to recover compensation under the Act.

The procedure whereby compensation may be granted is complex. Where there has been a conviction, the aggrieved person may apply under Section 4 to the Court before which conviction took place for an order that a sum be paid by way of compensation. It is not stated specifically that the order should be made forthwith on conviction, although in *Re: Hondros*, the Chief Justice commented: "The Act

does appear to contemplate that the amount of compensation will be fixed by the court before whom the offender was tried upon a consideration of the evidence given at the trial ... " However, the Chief Justice did concede that "there will be cases where it is desirable to defer the application until the extent of any permanent harm arising from the injury becomes known."[52]

With respect, it is suggested that, in fact, it will be rather more the exception than the rule that the court that dealt with the offence will have sufficient information before it to assess the appropriate amount of compensation to be paid to the victim, and that if the offender has pleaded guilty, the attention paid to the extent of the victim's injuries may well have been minimal. The Law Reform Commission observes that the possibility of further evidence showing that the award was not justified is probably the reason why the Treasurer is given discretion to refuse to make payment. In a sense, then, the Treasurer acts in a reviewing capacity. However, it may well be the case that injuries become apparent after the criminal proceedings against the offender are completed and there is no means by which the victim can obtain a review by the Treasurer of a refusal by a court to make an order.

Bearing all these considerations in mind, there is much to be said for the removal from the trial court of the responsibility to make orders for compensation. If compensation issues were determined by a separate tribunal, not only would the case be heard at a stage at which the extent of the victim's injuries was clearer, but the issue would be determined in an atmosphere quite different from that of a criminal court. Of course, the tribunal would not have the advantage of having heard and assessed the veracity of the evidence concerning the offence, but a full transcript of the criminal proceedings could be made available to the tribunal and possibly the trial Judge or Magistrate could append special notes for the assistance of the tribunal. Having a separate tribunal to deal with compensation would have the added advantage, as mentioned by the Law Reform Commission, of facilitating the introduction of a similar procedure for victims whose assailants are unknown or have not been charged. At present, the Act provides a separate procedure for claims by such victims. The tribunal that deals with the compensation issue might also be given jurisdiction, in cases where it makes an award in favour of the victim, to order that the Crown, where possible, should recoup the award from the offender. Consideration might further be given to granting the victim and the Crown a right of appeal from the tribunal to, say, the Full Court.

It follows from the views stated above that the present writer endorses the opinion of the Law Reform Commission that the Act should be recast so as to make the Consolidated Revenue rather than the offender primarily liable to pay compensation for criminal injuries. It is simply unrealistic to adopt any other approach. The Commission observes that a total of $11,620 has so far been paid to victims, yet only $43 has been recovered from offenders.

Table 1 sets out details in respect of the payments that have been made since the Act came into force.

Table 1. Payments made under the *Criminal Injuries Compensation Act* 1970, between June 1972 and March 1975

Offence in respect of which made	Amount $
1. Assault	120
2. Assault	150
3. Assault	250
4. Assault and robbery	600
5. Rape	750
6. Assault	1,000
7. Rape	1,250
8. Armed robbery resulting in gun-shot wounds	1,500
9. Rape	2,000
10. Assault occasioning bodily harm	2,000
11. Assault occasioning bodily harm	2,000
Total	11,620

All the payments were made following conviction or acquittal and the total sum that was originally ordered by the courts in respect of such claims amounted to $12,570. It seems clear from Table 1 that only a small percentage of those who are eligible for compensation under the Act are in fact granted it. The Law Reform Commission observes that although the Annual Reports of the Western Australian Commissioner of Police indicate that for 1971, 1972, 1973 and 1974, there were about 800 serious cases of assault that were reported to the police, only in twenty-one cases have there been claims under the Act. As the Law Reform Commission has observed, there should be better publicity concerning the scheme.

It is perhaps of some interest that the South Australian Criminal Law and Penal Methods Reform Committee, when reviewing the Criminal Injuries Compensation legislation of that state, felt there would be some merit in extending the scope of the victim's rights against the state to such an extent that other statutory provisions for

compensation would become superfluous and should be repealed. The Committee recommended that consideration be given to making full compensation for property loss or damage, as well as for criminal injury, out of general revenue and subrogating to the Treasurer all the victim's recovery rights.[53]

7. DISQUALIFICATION FROM DRIVING

Western Australia has recently taken the innovative step of establishing, by its *Road Traffic Act* 1974, a Road Traffic Authority. The new Authority has taken over the functions formerly fulfilled by the Police Traffic Branch. Western Australian courts now have wide discretionary powers of disqualifying drivers from holding or obtaining driving licences. Section 74(1) of the Road Traffic Act is much wider in scope than its statutory predecessor[54] and provides that the court may disqualify the offender where he is convicted:

(a) of an offence of which the driving or using of a motor vehicle is an element;
(b) on indictment, or otherwise, of an offence which is triable on indictment where—
  (i) a motor vehicle was used in the commission of the offence;
  (ii) the commission of the offence was aided or facilitated by the use of a motor vehicle; or
  (iii) a motor vehicle was used after the commission of the offence for the purpose of providing, or in an attempt to provide, the means by which that person or any other party to the offence could leave the place at which the offence was committed, or was otherwise used by that person to avoid apprehension.

Section 103 of the new Act provides for the automatic disqualification of persons from driving if they have accumulated a certain number of points. The details of the points system are specified by regulation, and disqualification depends in part on the particular offences that have been committed previously. Subsection (3) provides that an offence shall not be taken into account unless the driving or use of a motor vehicle was an element of the offence, and in assessing the aggregate number of points, only those recorded during the previous three years shall be taken into account.

When dealing with offenders under several provisions of the Road Traffic Act, courts are under an obligation to order disqualification, but the precise period of disqualification is usually discretionary above a specified minimum. For instance, if the defendant is convicted of his first offence of driving under the influence of alcohol,

drugs, or alcohol and drugs under Section 63, the court must, as one of his penalties, disqualify him for a period of not less than six months. For a second offence, the minimum period is two years, but for a third offence, permanent disqualification is mandatory.

There is a specific provision in Section 106 of the Road Traffic Act that penalties, including periods of disqualification that are provided for in relation to offences (whether by use of the expression "minimum penalty" or "not less than" or by any similar expression), are not reducible, even though there are provisions for mitigation of penalty in the Justices Act and the Criminal Code. Until recently, one might have merely speculated as to what attitude the courts would take towards attempts to invoke such provisions as Section 669(1)(a) of the Criminal Code. It seemed fairly clear that the view sould be the same as it was in *Aitken* v. *Wilson*,[55] namely, that *Cobiac* v. *Liddy*[56] is binding and that a mandatory suspension provision only operates if a conviction is actually recorded. Further speculation might have been made in regard to an attempt to place an offender on probation following his conviction of an offence for which there is a minimum penalty specified in the Road Traffic Act. One could argue since *Satchell* v. *Cross*,[57] that Section 106 refers to a "penalty" and a period on probation is not a penalty because an order is made "instead of sentencing" the offender.[58] Further, a probation order is a "consensual sort of thing".[59]

Now it seems, however, that speculation is unnecessary because the issue arose in *Drage* v. *Connor*, *Hubert* v. *Connor* and *Oxenham* v. *Connor*[60] concerning the "apparent conflict" between Section 34 of the Child Welfare Act and Section 60(1) of the *Traffic Act* 1919-1974, a statutory predecessor of Section 106 of the *Road Traffic Act* 1974. The only substantial difference between Section 60(1) and Section 106 is that the former created penalties that were "irreducible notwithstanding the provisions of any Act", whereas the latter refers to penalties being irreducible "notwithstanding any provisions of the Justices Act, 1902 or The Criminal Code, 1913". Without reference to any other decisions or principles, therefore, the argument could be advanced that the draftsman of Section 106 intended to leave open to the courts the power to invoke relevant provisions of the Child Welfare Act and the Offenders Probation and Parole Act simply by reference to the maxim *expressio unius exclusio alterius*. However, since the three recent decisions, it is clear that even before the repeal of Section 60(1) of the *Traffic Act* 1919-1974, Section 34 of the Child Welfare Act could be invoked, and presumably a persuasive argument could have been advanced for the extension of the princi-

ple to the Offenders Probation and Parole Act. The crucial point of the three recent decisions can be demonstrated most clearly by a reference to the judgment of Mr Justice Burt:

> To use a power which is conferred upon the Children's Court by S. 34 of the Child Welfare Act is not to reduce a prescribed penalty by way of mitigation but rather to do something other than to impose the penalty prescribed by the statute creating the offence, it being something which it is in the circumstances of the case authorised by the Act to do ... I find no conflict of legislative intent revealed by S. 60 of the Traffic Act when read with S. 34 of the Child Welfare Act. I am accordingly of the opinion that notwithstanding the prescription by S. 60(1) of the Traffic Act of a minimum penalty, a Children's Court upon a child being convicted of an offence against that section could in lieu of imprisonment make one or other of the orders mentioned in S. 34.

The Road Traffic Act contains provision for certain offenders who have been disqualified from driving to apply for removal of the restrictions. By Section 78 of the Road Traffic Act, offenders who have been dealt with under that or any other Act and have been disqualified for more than three years, may apply to a court for an order removing the disqualification.

There are certain minimum periods during which the offender must have been subject to the disqualification before he can apply for removal of the restriction. If he has been disqualified for not more than six years, the minimum period is three years. If the disqualification is between six and twenty years, the minimum is one-half of the period of disqualification. If the disqualification is for more than twenty years, the minimum period is ten years. Permanent disqualification ranks for these purposes as disqualification for more than twenty years.

Subsection (5) provides that the court may order removal of the restriction if it thinks fit, having regard to:

(a) the safety of the public generally;
(b) the character of the applicant;
(c) the circumstances of the case;
(d) the nature of the offence or offences giving rise to the disqualification; and
(e) the conduct of the applicant subsequent to the disqualification.

If an application is refused, no further application may be made within one year from the date of the refusal. The cases considered for the purposes of the present Report included seven in which appellate courts either approved of the period of suspension and disqualification imposed by the court below, or varied the period referred to in

the order. In two other cases, applications were made for the removal of restrictions that had been imposed earlier. All of the cases involved offences created by the legislation that was repealed by the *Road Traffic Act* 1974 or its companion statute, *Acts Amendment (Road Traffic) Act* 1974. However, the cases have not ceased to be of relevance, for they concern provisions in the old legislation that have counterparts in the new.

In *Cherry* v. *Whyte*,[61] Wickham J. made some general comments about the use of the courts' powers to suspend licences and disqualify drivers. He was dealing with a case of reckless driving and although the offender had had other driving convictions, it was his first conviction under Section 31 of the *Traffic Act* 1919-1973 (as it then was).[62] In the circumstances, the sentencing court was obliged to suspend the offender's licence and disqualify him for a period of not less than six months. In fact, the court had sentenced the appellant to three months' imprisonment and had imposed a suspension and disqualification period of two years. Wickham J. allowed the appeal and imposed, in lieu of the prison sentence, a fine of $200, being the maximum fine under Section 31(3). However, he increased the period of suspension and disqualification to three years. Of the suspension and disqualification power, Wickham J. said it was designed "not only for the protection of the public but also as a punishment to the offender ... and as an example to others". Interestingly, Wickham J. referred to the possibility that the applicant might seek removal of the restrictions under Section 33A, the legislative progenitor of Section 78 in the new Act, and said, "[t]his licence should not be lightly reinstated even in a temporary way or with special conditions". Having said that, however, his Honour recognized that he had no authority to bind a court hearing a complaint under Section 33A and he said that he did not wish to inhibit the decision of such a tribunal, Under the new legislation, of course, a driver whose licence has been suspended for three years or less would not be eligible to apply for reinstatement.

In *Benz* v. *Cavanough*, Burt J. made some interesting comments about the respective roles of the courts and the legislature in dealing with traffic offenders. He was concerned with an appeal by an offender who had been convicted under Section 32B(9) of the *Traffic Act* 1919-1972 (as it then was), of failing to co-operate in a preliminary test to determine his blood alcohol level.[63] The court below had imposed a fine of $200 on the appellant and had suspended his licence and disqualified him from driving for six months. Burt J. dismissed the appeal and noted that the penalties

had been prescribed in a modern statute, that the prescribed range for the fine was between $100 and $300 and that the minimum suspension and disqualification period was three months. He went on:

> in the face of it, it is not for Magistrates or Judges or anybody else to form independent views of how serious this particular offence is, either in the absolute sense or by comparing it with other offences to be found within the Traffic Act. The Parliament has indicated its view of the offence by prescribing the penalty which it has prescribed ... and one can see of course very good reasons for doing so—that is, very good reasons for making the penalty apparently quite severe, because if it were otherwise the whole of the statutory scheme directed to the measuring of the amount of alcohol in a driver's blood at the material time could be aborted merely by drivers failing to co-operate in the taking of tests and suffering the comparatively minor penalty which might be prescribed.[64]

On the specific point of disqualification, Burt J. said:

> It is time, I think, that drivers of motor vehicles came to appreciate that a licence is in a sense a privilege—it is given to people to enable them to drive motor cars—in a general sense they are required to drive them having regard to the life and limb of other people, and more specifically, they are required to drive them on the particular conditions to be found in the Traffic Act and if the driver of a [motor vehicle] deliberately fails to co-operate and do what the statute in terms requires him to do, then my own view is that he should not have a licence. And I certainly would not think that disqualification in the circumstances of this case for a period of six months is excessive.

In *McShane* v. *Commissioner of Police*,[65] an important issue was discussed, namely the circumstances in which various charges could appropriately be laid against drunken drivers. The appellant had been convicted of an offence under Section 32AA of the Traffic Act, of driving with more than 0.08 per cent of alcohol in his blood.[66] He was fined $100 by the sentencing court and his driving licence was suspended for twelve months, the minimum period of mandatory suspension under the Act being three months. The fine was not the subject of appeal.

On appeal, the case came before Virtue S.P.J. His Honour observed that whereas incapacity to control a motor vehicle as well as indulgence in alcohol had to be proved for a conviction under Section 32,[67] proof of the requisite concentration of alcohol in the blood was sufficient under Section 32AA. Inability to control a motor vehicle was immaterial under that section, although under Section 32C(4),[68] if the blood alcohol level was 0.15 per cent or above, there

was a conclusive presumption that the defendant was unable to control a motor vehicle. Virtue S.P.J. concluded that if the level were in fact 0.15 per cent or above, one would expect a defendant to be charged under Section 32 rather than Section 32AA. In the case before His Honour, the appellant's blood alcohol level was 0.126 per cent.

The Judge considered that one would not normally expect the penalties imposed on offenders convicted under Section 32 to exceed those imposed on offenders convicted under Section 32AA. The fixed period of suspension for a first offender convicted under Section 32 was six months. On the facts of the case before him, Virtue S.P.J. reduced the period of suspension to three months. However, while one would not normally expect the penalty imposed on a first offender under Section 32AA to exceed six months, Virtue S.P.J. anticipated that there might be exceptional cases. One such exceptional case might be where the offender had been convicted for the first time under Section 32AA, but had a previous conviction under Section 32.

In view of the fact that inability to control a motor vehicle was not a component part of an offence under Section 32AA, Virtue S.P.J., in *McShane* v. *Commissioner of Police*, felt that "too much weight in assessing penalties should not be given to evidence concerning manner of driving". He continued:

> If the manner of driving of a person found to have committed an offence under S. 32AA should indicate that he [is] guilty of another offence under the statute or the regulations, he should be charged with that offence and punished for it separately if the offence is proved against him. The bare suggestion of another offence in giving an outline of the facts (particularly where, as in the present case, it is admitted that the facts alleged could not be proved against him) may perhaps be proper to be admitted, to the extent that it may afford a justification for the police requiring the accused to submit to the test, but should not be used as a circumstance of aggravation in determining a penalty. The circumstances particularly to be taken into account in fixing a penalty in cases of an offence of this type are firstly of course the actual concentration of alcohol in the accused's blood shown on the analysis ... The next important factor is the record. If there are any previous convictions for drunken driving these would normally be taken heavily into account. The same would apply to a bad record of serious traffic offences of other descriptions.[69]

The notion is novel that too much weight should not be attached to a particular factor because its presence gave the prosecution the option of preferring a more serious charge against the defendant. If

such a policy is widely accepted, it could have some interesting implications in other areas of the criminal law. For instance, it could mean that the fact that the victim of an assault has suffered bodily harm could not be taken into account in relation to a charge under Section 313 of the Code, because the defendant could have been charged under Section 317. It is submitted, with respect, that the policy introduced by Mr Justice Virtue is unfortunate in that it reduces the scope of the sentencing court's discretion in imposing penalty and indirectly may encourage the prosecution to take a harder line against defendants than necessary. Particularly in the context of driving offences, this could well lead the prosecution to prefer a serious charge against an offender, which, if successful, will leave the court no option to substitute an alternative for imprisonment.

There may be conflicting views about a court's power to suspend a licence and disqualify an offender who has merely been guilty of a breach of a traffic regulation as opposed to an offence under the Road Traffic Act or the Criminal Code. On the one hand, in *Letica* v. *Mann*, the appellant had been convicted of overtaking a bus that was stationary at a pedestrian crossing (a breach of Traffic Regulation 232) and the part penalty of suspension and disqualification for six months was upheld by D'Arcy J. on appeal.[70] On the other hand, in *Taylor* v. *Christie*, Wallace J. disapproved of an order of a lower court for suspension and disqualification for six months where the appellant had been convicted of a breach of Traffic Regulation 4(3), which related to vehicle weights. Wallace J. said:

> It seems to me that Parliament intended to give the court power to take away a driver's licence only if the driver concerned was guilty of an offence involving the driving of a vehicle *per se* or was unsuitable to drive a motor vehicle by virtue of the criteria set out in subs. (1) of s. 24. If Parliament intended to empower a court to suspend a licence on the circumstances under review, it should have clearly said so and this was not the case.[71]

It is possible, of course, that *Letica* v. *Mann* and *Taylor* v. *Christie* could be reconciled on the ground that *Letica* v. *Mann* involved the actual driving of a vehicle whereas *Taylor* v. *Christie* did not.

In *Gilgallon* v. *R.*,[72] proceedings to remove the disqualification for ten years were evidently taken under Section 668A(5) of the Criminal Code, which was the statutory predecessor of Section 78 of the *Road Traffic Act* 1974. Unfortunately, the record of the case contains few facts, except that the applicant had been convicted of dangerous driving causing death and the penalties imposed upon him

were an unspecified term of imprisonment and the period of disqualification, which would probably have commenced running at the date of his release from prison. The record of the case does not state how long it was since the applicant was released, but the Commissioner of Police was directed to issue him with an extraordinary licence for twelve months, subject to certain limitations relating to the hours during which he could drive. In making the order, Jackson C.J. was evidently satisfied that public safety would not be jeopardized thereby and the applicant's character was described as "first-class". The Chief Justice found that there would be a substantial degree of hardship and inconvenience caused to the applicant if the sought order were refused. *McKenzie* v. *R.*[73] was a similar case. The applicant had been convicted of negligent driving causing death and the sentencing court had imposed a term of nine months' imprisonment and had disqualified him from driving for ten years. He was released on parole after serving six months. Six years and nine months had expired since his release from prison. In the meantime, he had completed an apprenticeship as a mechanical fitter, which he had started before the offence, and eventually entered a partnership in a business that derived a substantial part of its income from the north-western area of the state. The applicant's job was to instal air-conditioning and refrigeration equipment and because of his ineligibility to drive, he had to travel by air and send the equipment by air freight, at considerable cost. Judge Heenan found the ineligibility "not of a crippling or disabling character" but "a considerable hardship and ... likely to cause the applicant and his partners not only embarrassment and inconvenience but probably also substantial financial loss". The Judge described the applicant as "an honest and responsible young man". He continued:

> The imprisonment and suspension of his driver's licence were designed to punish the applicant for the serious offence of which he had been convicted and also, no doubt, to act as a deterrent to others. However, in my view, the conduct of the applicant during the period ... which has elapsed since those penalties were imposed and the prospect of the hardship that would be occasioned to him in the future outweigh any argument in favour of depriving him of a licence for the remaining [time] ...

In view of the nature of the applicant's business, Judge Heenan found that the granting of an extraordinary licence would be unreal and the licence would be "difficult to police", especially in the north-west of the state. In the circumstances, he restored the licence in full. In doing so, one of the factors that had evidently been taken into account by the Judge was that the applicant, shortly after his release

from gaol, had gone to New South Wales and had applied there for a driver's licence, having informed the appropriate authorities of his disqualification in Western Australia. The licence had been granted.

Although Section 668A(5) of the Criminal Code has now been replaced by Section 78 of the *Road Traffic Act* 1974 there is no reason to suppose that courts will consider the factors mentioned in *Gilgallon* v. *R.* and *McKenzie* v. *R.* as other than relevant in determining whether restoration should be granted.

Undoubtedly, the power to suspend the licences and disqualify offenders from driving is widely exercised, not only in Western Australia but in many parts of the world. However, Robinson, in a recent paper,[74] observed that there are a number of factors that will motivate a disqualified driver to ignore, or at least have little regard for the disqualification sanction. In particular, he referred to the low probability of the apprehension of disqualified offenders, the uncertainty and inconsistency of punishment of driving offenders, the positive attraction of driving offences for a substantial proportion of drivers (particularly the young) and the inadequacy of alternative means of transport. Robinson noted that there is some evidence that, in fact, the majority of disqualified offenders continue to drive.

At a theoretical level, Robinson was prepared to argue that a period of disqualification is not likely to make an offender a better driver. Indeed, at the end of his period of disqualification, he may have lost what little driving skill he had, making him an even greater hazard on the roads. Of course, if Robinson is right in his observation that most disqualified drivers continue to drive, the risk of lost "skill" is presumably reduced. However, it would appear reasonable to suggest that those whom the courts disqualify from driving should be required to undergo a driving test before their licences are restored.

Robinson also noted that short terms of disqualification are likely to be better observed than long ones, but even so, the percentage of violators is still high. Dr J.H.W. Birrell, Police Surgeon with the Victorian Police, has recently claimed that for drunken drivers, a far more effective measure than disqualification is the referral of the offenders to a hospital where they can receive therapeutic treatment.[75] Be this as it may, it is likely that courts will still feel they have a responsibility to endeavour to deter potential offenders, even if therapeutic hospital treatment is perceived as a useful adjunct to the withdrawal of licences.

NOTES

1. Note, however, that Rinaldi describes the power that courts have under the Criminal Code, Section 669(1)(b) as "[the] most rudimentary form of suspended sentence". See F. Rinaldi, "Suspended Sentences in Australia", Penology Monograph no. 3, roneoed (Canberra: Faculty of Law, Australian National University, 1973), p. 21.
2. [1975] A.C.L.D. 79.
3. Working Papers of the Law Reform Commission of Western Australia on *Alternatives to Cautions*, Project no. 60 (Perth, 22 August 1975).
4. D.G.T. Williams, "Suspended Sentences at Common Law", *Public Law* [1963]: 441.
5. *R.* v. *Wright, Ex parte Klar* (1971) 1. S.A.S.R. 103; see also Rinaldi, *Suspended Sentences in Australia*, p. 9.
6. A conviction by a Children's Court does not count for the purposes of Section 669(1)(b).
7. Rinaldi, *Suspended Sentences in Australia*, p. 20.
8. The Chief Justice advised the present writer that the bind-over powers in Western Australia have been largely replaced by probation, except in country districts where probation officers are not readily available. In a Working Paper on *Alternatives to Cautions*, the Western Australian Law Reform Commission states that in 1970, 767 out of 79,899 convictions were dealt with by bond. In 1971, 782 out of 93,548 convictions were so dealt with. In 1972 and 1973, the comparative figures were 816 out of 95,673 and 1296 out of 101,972 convictions. However, it is not clear whether the Law Reform Commission was referring to all bonds or merely those that can be imposed under Section 19 (7) and (8) of the Criminal Code. It may be that Subsections (7) and (8) are invoked less frequently in the future than in the past, following a doubt that was mentioned by the Full Court in *White* v. *Giumelli and Others* and *White* v. *Gifford and Others* that they applied to offences not under the Code.
9. Rinaldi, *Suspended Sentences in Australia*, p. 12.
10. (1955) 57 W.A.L.R. 89.
11. Rinaldi, *Suspended Sentences in Australia*, p. 19.
12. Indeed, it may well be the case that common law bind-overs cannot be the subject of an appeal in Western Australia. As far as the present writer is aware, this matter has not yet been raised in Western Australian courts.
13. See Chapter 3 of this Report.
14. [1964] W.A.R. 44.
15. Unreported decision, No. 108 of 1972.
16. See Section 465 for a statement of the offences to which Section 467 relates.
17. Unreported decision of Burt, Wickham and Wallace JJ., No. 18 of 1974.
18. (1969) 119 C.L.R. 257. *Cobiac* v. *Liddy* is authority for the proposition that the mandatory suspension of a driving licence does not arise until a conviction is actually recorded.
19. (1907) 9 W.A.R. 76.
20. Law Reform Commission of Western Australia, *Alternatives to Cautions*, pp. 6-7.
21. Section 670.
22. Section 18.
23. *Corporal Punishment*, Report of the Advisory Council on the Treatment of Offenders, Cmnd. 1213 (London: H.M.S.O., 1960), p. 4.
24. Section 680.

25. Unreported decision of Wolff C.J., Virtue and D'Arcy JJ., 16/8/66. This case was apparently overlooked by the *Daily News* when on 12 December 1973 it reported that corporal punishment had been inflicted in about three cases in Western Australia, following orders of criminal courts, during the last thirty-six years. The cases cited did not include *Cameron* v. *R.*.
26. F. Rinaldi, "Imprisonment for Non-payment of Fines", Penology Monograph no. 2, roneoed (Canberra: Faculty of Law, Australian National University, 1973), p. 11.
27. Section 19(3).
28. (1911) 13 W.A.R. 109.
29. See pp. 45 and 46 of this Report.
30. Unreported decision of Wallace J., No. 141 of 1973.
31. Unreported decision of Wickham J., No. 61 of 1973.
32. Unreported decisions of Wolff C.J., Nos. 84, 85 and 86 of 1967.
33. Unreported decision of Hale J., No. 4316 of 1970.
34. Unreported decisions of Jackson C.J., Burt and Wickham JJ., Nos. 26, 28 and 29 of 1974, at 5.
35. M.W. Daunton-Fear, "The Fine as a Criminal Sanction", *Adelaide Law Review*" 4, no. 2 (1972): 307-29.
36. See Working Papers that led to the Study Draft of the Federal Criminal Code, vol. II, at 1327.
37. For example, see Criminal Code, Sections 674 and 719.
38. For example, see Criminal Code, Section 669(1)(a).
39. For example, see Criminal Code, Section 674.
40. For example, see Criminal Code, Sections 669 and 671.
41. Justices Act, Sections 158 and 169; see also Chapter 3 of this Report.
42. Although some statutory provisions allowed limited categories of victims to recover compensation from the Crown even before the *Criminal Injuries (Compensation) Act* 1970 was passed, such provisions could offer a remedy only to a small percentage of those injured through crime. See, for example, the *Police Assistance Compensation Act* 1964 and the *Workers Compensation Act* of 1912.
43. Working Paper of the Law Reform Commission of Western Australia on *Criminal Injuries Compensation*, Project no. 46 (Perth: 3 June 1975), p. 5.
44. Unreported decision of Lavan J., 13/6/74.
45. Unreported decision of Wallace J., 5/5/75.
46. Unreported decision of Jackson C.J., 8/12/72.
47. The Law Reform Commission contrasts the views of Jackson C.J. in *Hill* v. *Shaw* (ibid.) and Burt J. in *R.J.E.* v. *Bandy and Another* (Unreported decision, No. 5489 of 1974).
48. Section 4 (1).
49. However, in a letter dated 24 November 1975 to the present writer, the Crown Prosecutor has expressed the view that indictable offences should not be categorized as simple offences merely because they are triable summarily.
50. See p. 148 of this Report.
51. *Age* (Melbourne), 9 October 1975.
52. [1973] W.A.R. 1, at 3-4.
53. Criminal Law and Penal Methods Reform Committee of South Australia, First Report, *Sentencing and Corrections* (Adelaide: Government Printer, 1973), p. 163.
54. *Traffic Act* 1919-1974, Section 33.
55. Unreported decision of Burt, Wickham and Wallace JJ., No. 18 of 1974.
56. (1969) 119 C.L.R. 257.

57. Unreported decision of Burt J., No. 121 of 1972.
58. *Offenders Probation and Parole Act* 1963-1971, Section 9 (1).
59. See Chapter 4 of this Report, p. 107.
60. Unreported decisions of Jackson C.J., Burt and Jones JJ., Nos. 46, 47 and 48 of 1975.
61. Unreported decision of Wickham J., No. 7 of 1973.
62. See *Road Traffic Act* 1974, Section 60 for similar offence under the present legislation.
63. The new provisions creating a corresponding offence and specifying the penalty are contained in Sections 66 and 67 of the *Road Traffic Act* 1974.
64. Unreported decision of Burt J., No. 82 of 1972, at 2.
65. Unreported decision of Virtue S.P.J., No. 31 of 1971, at 4.
66. The new provision is contained in Section 64 of the *Road Traffic Act* 1974.
67. The corresponding provision is contained in Section 63 of the *Road Traffic Act* 1974. While the wording of the new provision differs in some respects from that of the old, both include the requirement that for the commission of an offence, the defendant must be "incapable of having proper control of the vehicle".
68. The new provision is contained in Section 63 (5) of the *Road Traffic Act* 1974. The expression "conclusive evidence", which appeared in Section 32C(4) of the old legislation, has been replaced by a statement that the defendant "shall be deemed to have been under the influence of alcohol". Further, Section 63(7) in the new Act specifies certain defences that the defendant may raise when charged with an offence under Section 63(5). The question arises, of course, as to whether the defendant may raise any defences other than those that are expressly referred to. It could be argued that the maxim *expressio unius exclusio alterius* applies. On the other hand, the provision is a penal one and the courts might interpret it in the way most favourable to the defendant.
69. At 6-7.
70. Unreported decision of D'Arcy J., No. 38 of 1964.
71. Unreported decision of Wallace J., No. 141 of 1973, at 3.
72. Unreported decision of Jackson C.J., No. 4 of 1973.
73. Unreported decision of Heenan D.C.J., No. 0/A 37/70.
74. C. Robinson, "Social Implications of Driver Disqualification: Reality and Road Traffic Laws" (Paper read at the 46th Annual Congress of the Australia and New Zealand Association for the Advancement of Science, Canberra, January 1975).
75. J.H.W. Birrell, "Drunken Drivers" (Paper read at Seminar for Magistrates organized by the Australian Institute of Criminology, Canberra, May 1975.

7

Juveniles

1. JUVENILE PANELS

It would be misleading to refer to the process of the Western Australian Children's Courts without first adverting to a scheme that is designed to provide an alternative approach.

On 1 August 1964, the Juvenile Suspended Action Panel came into operation in Perth.[1] The scheme was extended to country areas on 1 April 1971.[2] It had been first mooted in 1960, when the then Director of the Child Welfare Department had expressed the view that there was need for the introduction of alternative machinery to the Children's Courts to deal with first and minor offenders whose transgressions did not merit court proceedings. Although there have been several proposals since the introduction of the scheme that it be supported by appropriate legislation,[3] the proposals have not yet been implemented and the status of the scheme remains administrative only.

According to Mildern, the Juvenile Panel scheme has altered little since its introduction.[4] Its main purpose is to act as a semi-formal warning scheme for first and minor offenders. In the metropolitan area, the panel consists of an officer of the Department for Community Welfare (formerly the Child Welfare Department) and a retired Superintendent of Police. In country areas, the panels consist of a Community Welfare field officer and a commissioned police officer. Since 1971, the panels have been dealing with offenders under the age of sixteen years.[5] Mildern claims that the Western Australian scheme has certain resemblances to that that exists in South Australia, although the latter is established by statute.[6] In neither state are allegations against children proved before panels. No panel members are legally qualified and under neither scheme have panels wide powers. Mildern observes that the only practical measure that Western Australian panels may take is to organize

supervision of the child for a period of up to six months by an officer of the Department for Community Welfare.

From the inception of the scheme, reports have been submitted to a panel by the police and the Department for Community Welfare. The responsibility of the panel is to determine whether or not to refer the matter to the court, and certain matters are obviously related to its decision. Firstly, the child must give an unqualified admission of the offence. Secondly, the panel needs to be satisfied that the parents or persons *in loco parentis* have the apparent ability to discipline and control the child without the court's intervention.[7] Thirdly, both the child and his parents must be willing to co-operate by accepting supervision by an officer of the Department for Community Welfare for a period of six months. In the event of the child or his parents wishing to contest the charge, there has always been free access to the Children's Court.

The procedure is that the child and his parents are brought before a panel and their co-operation is sought. If this is forthcoming, it now appears to be the practice that no further steps are taken against the child.[8] However, in the early days of the scheme, action was merely suspended for six months and failure to co-operate on the part of the child or the parents resulted in the allegations being referred to the court.[9]

Although the original proposals for the introduction of the scheme were to the contrary, panels now assume discretion to deal with a child who is alleged to have committed an offence in the company of another person who is not eligible to appear before a panel.[10] Panels also assist to organize restitution in some cases, provided the parents have the means and the willingness to pay.[11]

2. CHILDREN'S COURTS

The *Child Welfare Act* 1947-1972 defines a child as "any boy or girl under the age of eighteen years; and, in the absence of positive evidence as to age ... any boy or girl under the apparent age of eighteen years".[12] Under Section 20 of the Act, the Children's Court has exclusive jurisdiction to hear and determine a complaint of an offence alleged to have been committed by a child. However, if the offence with which the child is charged is wilful murder, murder, manslaughter or treason, or attempting any of those crimes, the jurisdiction and powers of the Children's Court are limited to those that are exercisable, in respect of adults, by summary courts.[13] Furthermore, the Children's Court has discretion in respect of a

child over the age of fourteen years who is charged with an indictable offence, to commit him for trial or sentence to the appropriate higher court.[14] In passing sentence on a child who has been committed for trial or sentence to a higher court, that higher court has jurisdiction to impose any penalty or disqualification or make any order that could be imposed or made in respect of an adult convicted of the same offence, or that could be imposed or made by a Children's Court.[15] Section 19(6a)(a) of the Criminal Code contains a special provision in relation to a child convicted on indictment of an offence punishable with imprisonment. Instead of sending a child to gaol, a court may order that the child be detained in strict custody during the Governor's pleasure. According to a newspaper article, Mr Justice Burt has recently had occasion to enquire about the fate of children who are dealt with under this provision. If they are detained in gaol, according to the report, they are probably subject to assessment and possible release by the Parole Board. But if they are detained in an institution for juveniles, it is unclear whether the Parole Board has any jurisdiction in relation to them.[16] However, it is submitted that it is by no means certain that offenders detained under Section 19(6a)(a) are subject to assessment by the Board or are eligible for release by it if they be sent to gaol. The categories of prisoners who are subject to assessment by the Board are clearly set out in Section 34(2) of the Offenders Probation and Parole Act and those eligible for release by it are referred to in Section 41(1). In neither case is there any mention of offenders who are committed to gaol under Section 19(6a)(a) of the Code. Section 34AA of the Offenders Probation and Parole Act, however, provides that the Governor may order the release of an offender detained under Section 19(6a)(a) of the Code, subject to such conditions as he thinks fit, including a provision that he be under the supervision of a parole officer.

Under Section 19(6a)(b), where a child or young person under the age of eighteen has been convicted on indictment of an offence punishable with imprisonment, the court may commit the offender to the Department for Community Welfare until he is eighteen or until the expiration of two years from the date of conviction, whichever is the longer. It is also stated in the subsection that the provisions of the Child Welfare Act shall apply to the offender. In *R. v. Fraser*,[17] Mr Justice Wickham had occasion to consider the effect of sentences under Subsections (6a)(a) and (6a)(b) and expressed the view that whereas a sentence under the former is entirely indeterminate and the provisions of the Offenders Probation and Parole

Act do not apply, a sentence under the latter is not theoretically indeterminate.

The jurisdiction of the Children's Court is not confined to cases in which the defendant is a child. Under Sections 20B and 20C, there are circumstances in which the Children's Court may have jurisdiction to deal with defendants who are over the age of eighteen. Section 20B has been amended several times since it was introduced. In its present form, it gives a Stipendiary Magistrate sitting in the Children's Court jurisdiction to hear and determine a complaint of committing or attempting to commit any of a number of indictable offences involving carnal knowledge or indecent dealing (as set out in the Third Schedule to the Act) that is brought against a person who was, at the time of the alleged offence, of or over the age of eighteen, if that person so elects.[18] The jurisdiction only arises if the offence was committed "against, or in respect of, a child under the age of sixteen years",[19] and a defendant convicted under the section is liable to imprisonment with hard labour for eighteen months.[20] The section contemplates that the Children's Court may find its sentencing powers too limited and Subsection (4)(d) provides that it may commit the defendant for sentence to the Supreme Court or the District Court, as appropriate. The higher court may then deal with the offender as if he had been convicted on indictment.

An interesting and technical issue arose in *Eatwell* v *R.*,[21] concerning the extent of the Supreme Court's powers following a committal for sentence by a Children's Court. The case demonstrated a flaw in the Child Welfare Act, as it was in 1963, inasmuch as there was not precise correspondence between the list of offences referred to in the Third Schedule of the Child Welfare Act and the sexual offences created by the Criminal Code. One category in the Third Schedule was too broad in that in covered, in the view of the majority,[22] two separate offences under the Criminal Code. The consequence of the flaw was that the power to deal with a defendant, committed by a Children's Court for sentence, was limited to the maximum that the Supreme Court could impose for the lesser offence under the Code, whereas, on indictment, the defendant would have been guilty of the greater offence. The particular flaw in the Third Schedule has since been rectified, but the case serves as a reminder of the type of hazard faced by the draftsman of similar provisions.

Section 20C is even more far-reaching than Section 20B and resembles an earlier form of Section 20B. Section 20C confers exclusive jurisdiction on a Children's Court consisting of a Stipendiary Magistrate, to deal with a defendant aged eighteen or over who is charged with assaulting a child under the age of sixteen.

The purpose of Section 20B in its earlier form, and Section 20C in its present form, was probably correctly defined by Mr A.R.G. Hawke, then Minister for Child Welfare, in a debate on the second reading of a Bill to amend the Child Welfare Act in 1957. He said, "the aim was to safeguard children as much as possible from the atmosphere of legal courts as apart from a children's court, and to protect children to the greatest extent possible in that regard."[23]

It was evidently considered by the legislature that to submit very young victims to the traumatic experience of a trial in a higher criminal court was unjustified in any circumstances and that to do so would be to remove cases from the jurisdiction of the very person who was most competent to deal with them, namely the Children's Court Magistrate. However, for some years there was apparently growing unease about the prejudicial effect summary trial could have upon the defendant's interests.[24] By 1957, the unease had gathered sufficient momentum to lead to the amendment of Section 20B so that the defendant should have the right to elect whether his case would be dealt with summarily in the Children's Court or by the appropriate higher court. So it is that the present legislative provisions reflect an unsatisfactory attempt to balance the interests of the young victim with those of the defendant. The compromise is unsatisfactory in that the exposure of the victim to the ordeal of examination and cross-examination in a higher criminal court now depends upon the choice of the defendant rather than on any factors that relate to the effect of the proceedings on the victim. Yet it can hardly be argued that the defendant's traditional right to trial by jury is one that should be jettisoned lightly.

The problem of the traumatic nature of criminal procedure is not one that is confined to young children, although they are perhaps peculiarly susceptible to psychological harm. Many adult female victims of sexual assaults suffer extreme distress as a result of the nature of the adversary system and rules of evidence that leave them open to cross-examination on a number of apparently irrelevant but highly personal matters. In some cases, the distress caused by the administration of criminal justice may even exceed the shock and shame of the sexual assault itself.[25] With persons whose consent can negate the existence of an assault, there is the additional potential trauma that the acquittal of the defendant will carry stigma for the victim. Indeed, the criminal justice system may appear so intimidating to victims of sexual crime, whether they be children or adults, that that, in itself, constitutes a strong deterrent to the disclosure of the offence to the police. Clearly, law reform is required

and the present nature of the proceedings needs to be modified so that the defendant's right to a fair trial is preserved, but more consideration is given to the interests of the victim. It is beyond the scope of the present Report to make precise recommendations on this point. However, the writer suggests that the problem demands not that the jurisdiction of the higher courts be diminished, but rather that attention be paid to extent of the evidence that is regarded as admissible against the victim and the way in which interrogation takes place, both in court and outside.

Section 20B raises another interesting question, namely the meaning of the phrase "is liable to". Although this phrase is implicitly defined in Section 19 of the Criminal Code[26] by the inclusion of provisions that authorize courts to treat such phrase as setting a maximum term of imprisonment and a maximum fine, there is no indication in the Child Welfare Act that a similar interpretation is justified.[27] The fact that nearly all of the offences that may be dealt with summarily under Section 20B carry substantial longer maximum penalties than eighteen months' imprisonment, if dealt with on indictment, may incline one to the view that the expression "is liable to" in Subsection (3) should be construed as setting a mandatory rather than a discretionary penalty. However, there seems little doubt that Parliament intended that the expression be interpreted as setting a maximum term only. In his speech on the second reading of the Bill to amend the Child Welfare Act in 1957, Mr Hawke said: "Where an accused person chooses to be tried by the Special Magistrate, he can, if found guilty, be sentenced to a maximum term of imprisonment with hard labour of 18 months."[28]

It is suggested that this interpretation is consistent with the commonly understood meaning of the phrase and it should be interpreted merely as setting a maximum.

There are a number of general principles in the Child Welfare Act concerning the imposition of sentences on children. The most general is contained in Section 25, which states that: "The court, in dealing with a child, shall have regard to the future welfare of the child."

Indeed, this principle is stated so broadly, it is probably of limited help to those who carry the heavy responsibility of determining the appropriate order. There are many who would argue, for instance, that the future welfare of the child is by no means threatened and may even be enhanced by the imposition of a retributive penalty. Nevertheless, it is unlikely this view is universally held. The terms of Section 25 are stated too widely and are ambiguous.

However, the other sections that deal with the imposition of penalties are more specific. Section 26 authorizes a Children's Court to refrain from imposing any punishment or to dismiss the complaint without proceeding to conviction, having regard to "the antecedents, character, age, health or mental condition of the child" and taking into account "the nature of the offence or any special circumstances of the case" and "notwithstanding the nature of the evidence adduced". The same section authorizes the court, even though it has decided to impose no punishment, to order that the child be subject to the supervision of the Department for Community Welfare until he attains the age of eighteen years, or for a shorter period. Whether or not the child perceives such supervision as a penalty, an order in respect of a young child who has committed a trivial offence could of course lead to a substantial restriction of his freedom. However, the Act in its present form gives no specific power of enforcement to the Department in respect of a child who refuses to co-operate while subject to supervision.

Section 34 relates to any child who has been found guilty of an offence[29] that is punishable by imprisonment and authorizes the Children's Court to:

(a) commit such child to the care of the Department for treatment, discipline and training until he attains the age of eighteen years, or during such shorter period as the court may think sufficient; or
(b) order the parent to give security for the good behaviour of such child until the child attains the age of eighteen years, or during such shorter period as the court may think sufficient, and upon being satisfied that such security has been given, may dismiss the charge; or
(c) adjourn the case on a near relative undertaking to punish the child in such reasonable or moderate manner as the court may approve, and on being satisfied that such punishment has been duly inflicted may dismiss the charge; or
(d) release the child on probation on such conditions, if any, as the court may order, and in such case the child shall be subject to the supervision of the Department until he attains the age of eighteen years, or during such shorter period as the court may think sufficient; or
(e) discharge the child upon his entering into his own recognisance, with or without sureties, in such amount as the court thinks fit, that he will keep the peace and be of good behaviour for a term not exceeding one year; or
(f) impose on the child a fine not exceeding five hundred dollars:

Provided that no order for security shall be made against a parent under this section, unless such parent has been summoned to attend

before the court and has had an opportunity of being heard.

Provided also that, in the case of a child committed to the care of the Department for treatment, discipline and training, the Department, with the approval of the Minister, may release the child on parole under the supervision of a probation officer, or other officer of the Department.

Once the child has been committed to the care of the Department for Community Welfare, he becomes a ward.[30] It is not necessarily the case that wards are detained in institutions. It will be observed that the last proviso to Section 34 authorizes their release on parole, but the Director also has authority to place any ward in outside residence, either with a relative of the ward, or with any other person deemed suitable by the Director.[31] In addition to the power to commit a child to the care of the Department under Section 34, there is another power in Section 39 that authorizes a court to commit a child of sixteen years or more to the Department for a period not exceeding two years, to run apparently from the date of the order.[32] There is no reason to suppose that this power could not be exercised on the eve of a child's eighteenth birthday, and the order could then continue for a full two years.

Section 34A restricts the circumstances under which a Children's Court may impose a sentence of imprisonment on a child. No such sentence may be imposed on a child under the age of fourteen years. No sentences, individually or cumulatively, of more than three months may be imposed on a child between the ages of fourteen and sixteen years and no sentences of more than six months, individually or cumulatively, may be imposed on a child between the ages of sixteen and eighteen years.

Subsection (2) provides that the court may direct that a child be imprisoned at a special penal institution for children, but in practice, no such penal institution exists.

Section 34B of the Child Welfare Act sets out alternative measures that a court may take instead of imposing a fine on a child, following a determination of guilt of an offence that is not punishable by imprisonment. These alternatives are substantially the same as those referred to in paragraphs (b) to (e) inclusive of Section 34.

Probation orders that terminate earlier than the child's eighteenth birthday may be extended by the Minister on the recommendation of the Director.[33] However, such extension may not continue after the child is eighteen. There is equal flexibility with regard to the early discharge of a probation order: the Minister, on the recommendation of the Director, may in his absolute discretion abridge or dis-

charge an order. The probation officer who has control of a child has wide-reaching powers to cause the child's apprehension while he is on probation.[34] They may be exercised not only on the failure of the child to observe the conditions of the probation order but also if the person responsible for the child fails to observe such conditions. Furthermore, the probation officer need not even find there has been a breach of the conditions: he may cause the child to be apprehended merely upon his dissatisfaction with the conduct of the child or the person responsible for him. Once the child has been apprehended, and brought before a court, he may be dealt with "according to law".[35] Presumably, this means that the court may make any of the orders originally available to it in respect of the offence.

There are complex provisions designed to prevent the detention of a child in prison for failure to pay any penalty, compensation or other sum adjudged by a court to be paid.[36] Such detention may take place, however, in an institution for juveniles.

3. DECISIONS ON THE CHILD WELFARE ACT

Only seven of the cases considered for the purposes of this Report, apart from those already referred to, concerned issues arising under the Child Welfare Act and five of these related to imprisonment as a penalty. The leading cases were two that were dealt with together, *Milling* v. *Kucera and Braby* and *Puzio* v. *Kucera and Braby*. The appellants, both aged sixteen, had been sentenced by a Children's Court to effective terms of imprisonment of six months and had been disqualified from holding driving licences for periods that were not specified in the record of the cases. Milling had pleaded guilty to offences of breaking, entering and stealing and to unlawfully using a motor vehicle, while Puzio had pleaded guilty to the same offences, and in addition, to dangerous driving and driving without a licence.

In quashing the sentences of imprisonment and substituting orders committing the appellants to the care of the Department until they were eighteen, the Chief Justice said:

> I agree with the submission to me by Counsel for the appellants that it is now well settled that juveniles such as these and at their ages should not be sent to prison except as a last resort. Indeed [s. 34A] of the Child Welfare Act ... permits a court to direct when sentencing a child to imprisonment that that imprisonment be served in a penal institution established by the Department for Community Welfare for the imprisonment of children. Unfortunately, there is no such penal institution as yet established, so that it necessarily means when a child (and I use this

> phrase as defined in the Child Welfare Act) is sentenced to imprisonment he must go to one of the penal institutions which are established for imprisonment of adults.[37]

The maximum term of imprisonment under Section 34A had been imposed on the appellants and the Chief Justice continued his decision by referring to the very limited circumstances in which such a sentence might be appropriate:

> it does not appear to me that the appellants had reached that stage where there was nothing else that could be done except to imprison them, and in my view, a sentence of imprisonment at all and certainly the maximum sentence permitted under s. 34A of the Child Welfare Act should not be resorted to, except for very serious offences committed by children who already have a bad record and for whom there is no real alternative. The intention of Parliament, as appears from the legislation, seems to be that youths of this age should not in general be imprisoned, but should be dealt with in one of the methods prescribed by s. 34 of the Child Welfare Act ... It is clearly the purpose of the legislation that the Department now called the Department for Community Welfare should have the responsibility for the treatment and training of youthful offenders. It is not for the courts, in my view, to question what the Department does once the children have been committed to them. That is a matter for the Department and its qualified officers to decide ... [38]

In these decisions, the Chief Justice makes it quite clear that he is reluctant to impinge upon the responsibility of the Department for Community Welfare, and in a later passage of his decision, he declined to act upon the suggestion (presumably from the prosecution) that he might recommend to the Director for Community Welfare that the appellants should be detained in a maximum security institution for juveniles.

In *Abraham* v. *Slater*[39] in 1967, Virtue J. (as he then was) indicated his belief that prison is an unsuitable place for 17-year-olds. The appellant, an Aborigine, had been sentenced by a Children's Court to six months' imprisonment for the offences of disorderly conduct against Section 54 of the Police Act. The term was the maximum for the particular offence. Virtue J. quashed the sentence and substituted an order that the appellant be committed to the Department for treatment, discipline and training until he attained the age of eighteen. His Honour observed that gaol is not an appropriate place for juvenile offenders and they should not be compelled to rub shoulders with hardened criminals and be "exposed to the pernicious and debasing influences with which they are likely to come into contact during a substantial stay in an adult penal establishment".

In *Attorney-General for Western Australia and Another* v. *Williams, King and Ramsey*[40] the question arose as to the circumstances in which a Children's Court should exercise its discretion to commit a child for sentence to the appropriate higher court. The three respondents, the first aged sixteen and the others seventeen, had been convicted by a Children's Court of attempted rape. The Magistrate had discharged each respondent on his own recognizance in the sum of $500, with two sureties, to keep the peace and be of good behaviour for one year. The Attorney-General had appealed by way of order to review. The appeal was allowed and the order *nisi* against Williams and Ramsey was made absolute. The order *nisi* against King was declared a nullity, owing to a technical defect in the Child Welfare Act, which has since been remedied.[41]

The Full Court decided a number of important issues in relation to Williams and Ramsey. Firstly, although the section was not as clear in 1971 as it is now, it held that the Attorney-General was entitled to be a complainant under Section 197 of the Justices Act.[42] Secondly, it held that the Children's Court had exclusive jurisdiction to try the particular cases and thirdly, it held that the powers of the Children's Court to impose appropriate sentences were so plainly inadequate that the Magistrate should have committed the respondents to a higher court for sentence. In reaching this conclusion, the Full Court stated that it was taking a number of factors into consideration. The offence of which the respondents were convicted carried, under the Criminal Code, the maximum penalty of fourteen years' imprisonment, with or without a whipping; the victim was under sixteen years; she had been assaulted in succession by six young men in the bush, and was struck once or twice about the face by one of them, and although she had previously had intercourse with Williams and was voluntarily with the young men on the night of the offence, she was unwilling to allow intercourse on that particular night and was in a distressed condition as a result of the assaults. Furthermore, the other young men involved were awaiting trial on indictment and were likely to be convicted and receive substantial sentences.

The Full Court conceded that the Children's Court may have failed to exercise its discretion to commit the respondents to a higher court for sentence because of a fear that such action would be interpreted as an indication that heavy prison sentences were appropriate. However, the Full Court observed that the only correct inference from such committal would have been that the appropriate order or penalty was within the ambit of the power possessed by the

superior court. The Full Court noted that the Solicitor-General had placed little emphasis on the argument that the actual order made by the Children's Court was grossly inadequate. The Full Court found the Solicitor-General justified in his approach, because in its view, no order that the Children's Court had power to make would have been adequate.

In *R. v. Fraser*,[43] Mr Justice Wickham sentenced the defendant who had been committed for trial by a Special Magistrate presiding over a Children's Court. The defendant was seventeen and had been charged with breaking and entering a dwelling-house with intent to commit an offence. He was also charged with rape. In the Supreme Court, the defendant pleaded guilty to each charge. After reviewing the limited powers available to the Children's Court, Mr Justice Wickham endorsed the obvious view of the Magistrate that the powers of the Children's Court were inadequate for the case. However, in the particular circumstances, as observed earlier,[44] it is clear that he also found the powers of the Supreme Court defective.

4. STATISTICS CONCERNING JUVENILES

The 1974 Annual Report of the Department for Community Welfare contains some statistics relating to children appearing before panels and courts. It also contains a statement of the institutional services that are available to children in Western Australia. This statement has been reproduced as Appendix B in this Report. Figure 1 shows the number and sex of children appearing before metropolitan panels in 1971-2, 1972-3 and 1973-4. It will be seen from the figure that there has been a steady increase in the number of children appearing before panels and the increase has been particularly marked amongst girls.

Table 1 shows that in metropolitan areas, the proportion of girls in 1973-4 was highest in Perth and Fremantle.

The ages of the children appearing before metropolitan panels is shown in Table 2.

Table 2 indicates that of the 13-, 14- and 15-year-olds, the majority were girls and that there was a marked difference between the number of 12-year-old girls appearing before panels and the number of thirteen year old girls. Indeed, thirteen and fourteen for both sexes seem to be "critical ages" in terms of the likelihood of appearance before a panel.

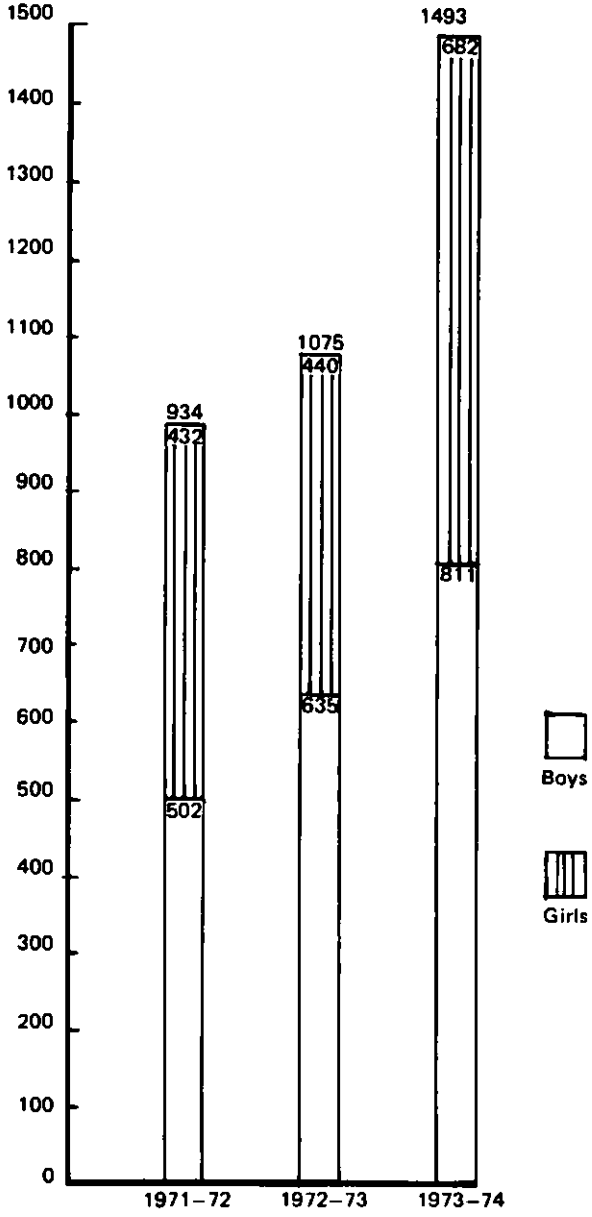


Fig. 1. Western Australia: Numbers and Sex of children appearing before the Juvenile Panel in the Metropolitan area for the years 1971–72 to 1973–74

Table 1. Western Australia: Number and Sex of Children appearing before Panels

	Perth	Fremantle	Midland	Total
Boys	539	205	67	811
Girls	472	175	35	682
Total	1,011	380	102	1,493

Table 2. Western Australia: Age of Children appearing before Panels in Metropolitan Areas, 1973–74

Age	7	8	9	10	11	12	13	14	15	Total
Boys	3	16	30	72	76	126	186	173	129	811
Girls	–	4	9	14	46	85	192	197	135	682

The ages of children appearing before country panels were not recorded in the 1974 Annual Report of the Department. However, the numbers were recorded and so was the sex. From Table 3, it is apparent that in most areas the proportion of girls is fairly high. In Collie, the number of girls exceeded the number of boys.

Table 3. Western Australia: Number and Sex of Children appearing before Panels in Country Areas, 1973–74

	Boys	Girls	Total
Albany	12	8	20
Bunbury	21	13	34
Collie	3	5	8
Geraldton	3	3	6
Kalgoorlie	7	3	10
Katanning	–	–	–
Narrogin	7	1	8
Northam	9	2	11
Total	62	35	97

Unfortunately, the Annual Report does not indicate the breakdown between Aborigines and non-Aborigines who appeared before the panels, but Mildern has observed that with regard to the five-year period between 1968 and 1972, apart from minor fluctuations, Aborigines were under-represented before the panels.[45] He included the information shown in Table 4 in his thesis.[46]

Table 4. Western Australia: Number of Offenders appearing Annually before Panels, according to Ethnic Status, 1968–72

Year[a]	Ethnic status		
	Aboriginal	Non-Aboriginal	Total
1968	4	273	277
1969	7	483	490
1970	7	570	577
1971	16	732	748
1972	17	900	917
Total	51	2,958	3,009

a Each year refers to a calendar year, i.e. 1 January to 31 December.

SOURCE: Original data.

It is fruitful to compare the statistics relating to the panels with those relating to the Children's Courts. There has been a general increase in the number of boys and girls who have appeared before Children's Courts between 1963 and 1974, as shown on Figure 2.

However, according to Mildern, between 1968 and 1972, it was unlikely that the number of court appearances increased at the same rate as the population growth of children in the same period. By contrast, the increase in the number of appearances before panels has exceeded his "guestimate" of the population growth rate in the Perth Statistical Division, as indicated by Figure 3.[47]

For the years 1972-3 and 1973-4, the peak age for appearances before Children's Courts was sixteen for girls and almost seventeen for boys, as shown in Figure 4.[48]

One of the most interesting findings that emerges from the Department's 1974 Annual Report is that whereas the percentage of non-Aboriginal boys and girls who have appeared before Children's Courts has gradually declined between 1971 and 1974, the percentage of appearances by Aboriginal boys has increased quite strongly and the percentage of appearances by Aboriginal girls has remained fairly constant, as shown in Figure 5.[49]

A number of general trends may be observed from a consideration of the available statistics. Firstly, and assuming Mildern is right in his "guestimate" of the population growth of children, it may be said that between 1968 and 1972 at least, there has been growing use of panels and declining use of the courts in relation to the total number

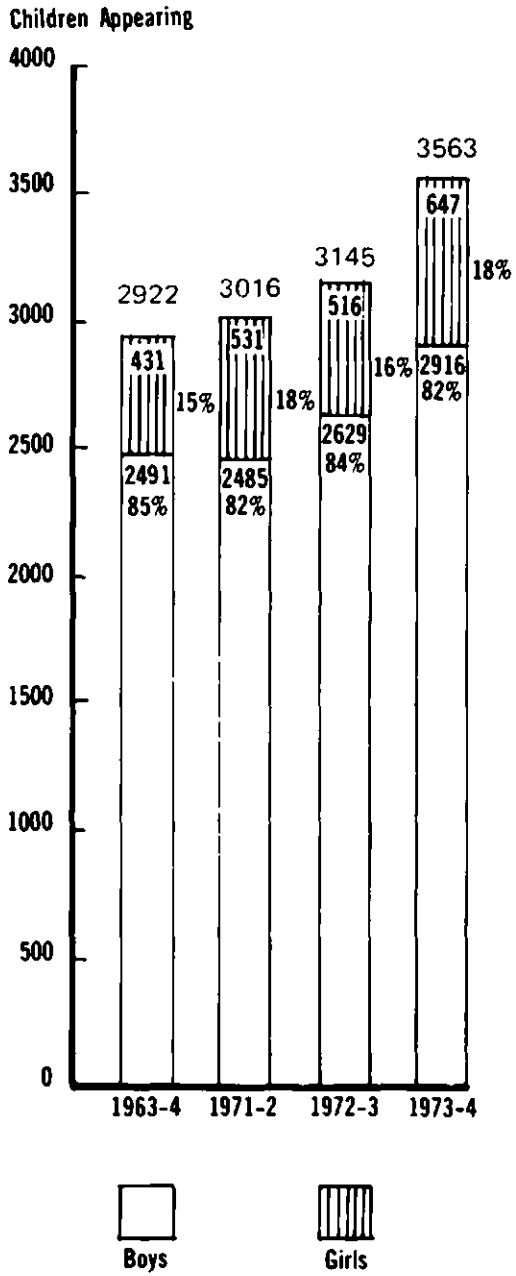


Fig. 2. Western Australia: Juvenile offences: Number of children appearing in Children's Courts during the years 1963–64 to 1973–74

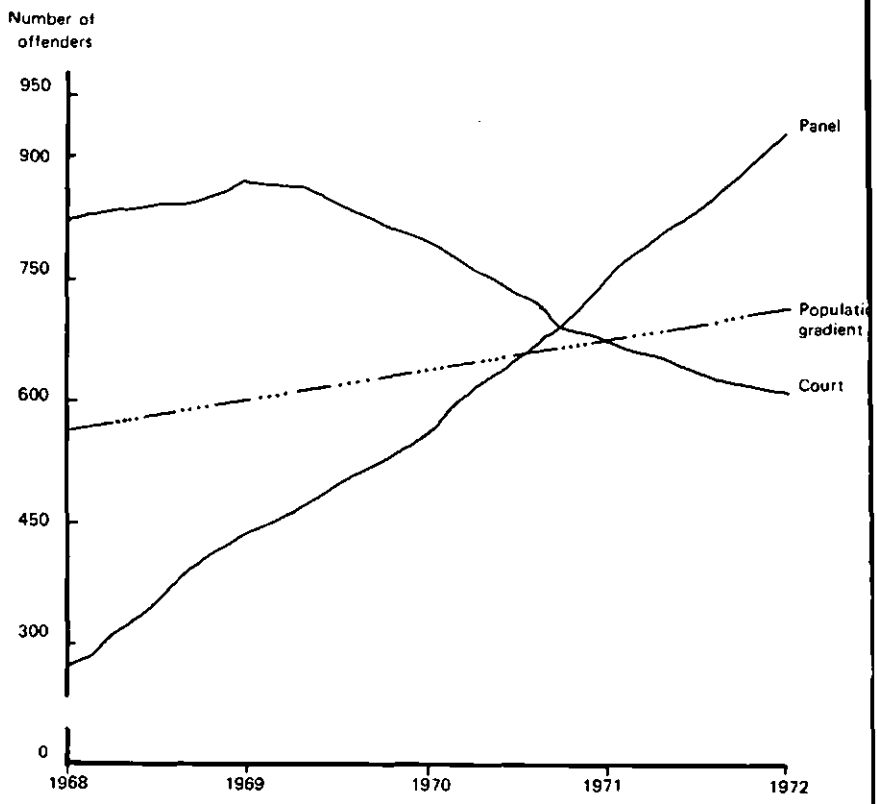


Fig. 3. Western Australia: Perth statistical division (child) population gradient with total Panel and Court offenders

of children in the population. Secondly, there is a marked and increasing incidence in the percentage of girls appearing before panels. Thirdly, according to Mildern, there is an under-representation of Aborigines who appeared before panels between 1968 and 1972 and an over-representation of Aborigines who appeared before the Children's Courts. The trend of over-representation before the courts has not only continued since 1972, but has increased. Fourthly, the "critical ages" at which children are likely to appear before panels are thirteen and fourteen, and the "critical ages" at which children are likely to appear before courts are sixteen for girls and almost seventeen for boys.

Age (Years)	7	8	9	10	11	12	13	14	15	16	17	Total
Boys	10	29	97	149	256	445	1095	1380	1618	1876	2686	9591
Girls	1	1	1	4	11	56	105	200	269	389	314	1351
Total	11	30	98	153	267	501	1200	1680	1887	2215	3000	10942

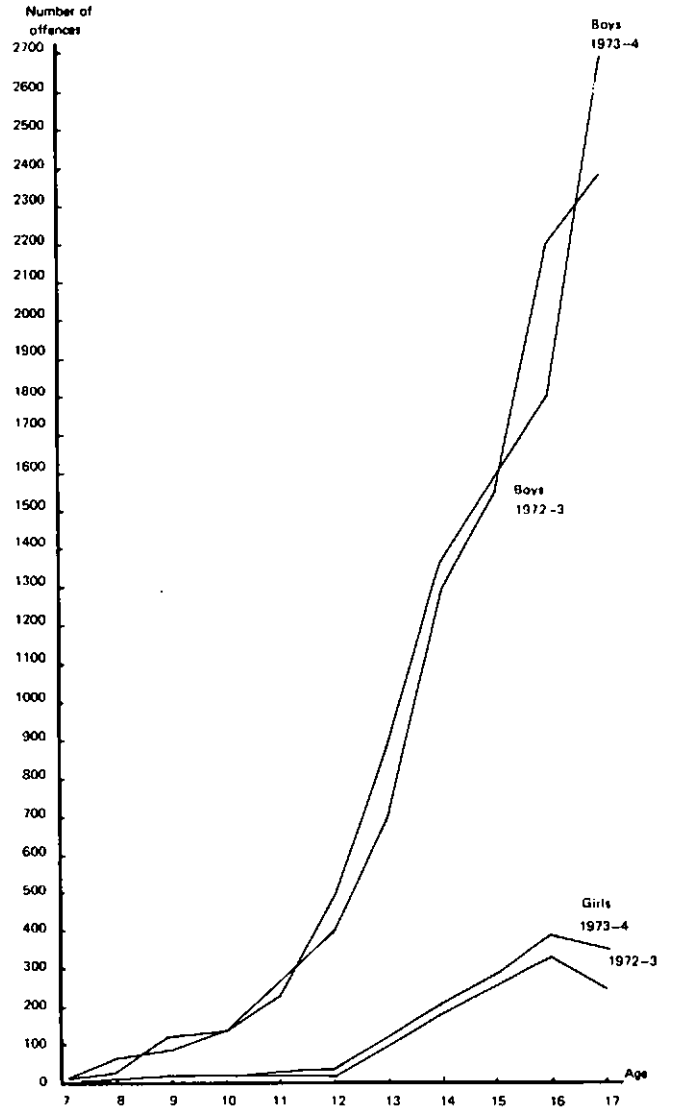


Fig. 4. Western Australia: Juvenile Offences: Number of offences with which children were charged in terms of the children's ages (Children's Courts)

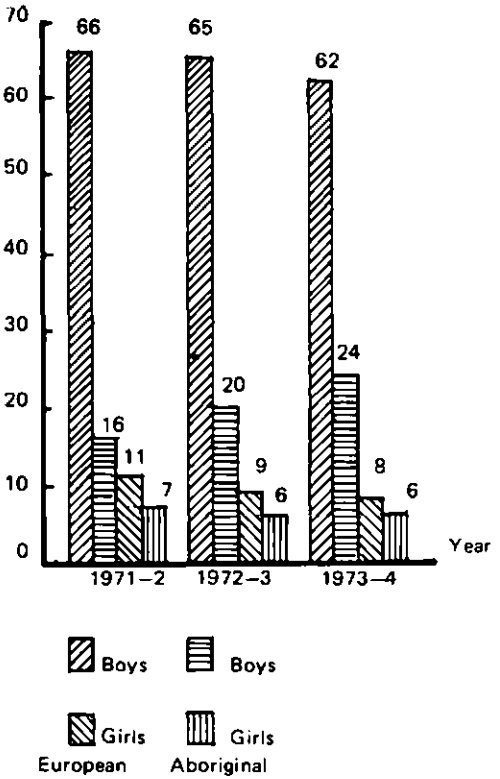


Fig. 5. Western Australia: Juvenile Offences: Aboriginal and European Children appearing in Children's Courts during 1971–72 to 1973–74

In considering the implications of the trends, it is important to take into account the criteria that are apparently used in determining whether the child shall have the opportunity of appearing before the panel or shall be charged formally. According to Mildern,[50] the major criterion is the nature of the offence of which the child is suspected. Offences are rated as low, medium or high in seriousness. First offenders who are believed to have committed offences of low seriousness and meet other criteria, such as having parents who are deemed "suitable", may be referred to a panel. Offences of high seriousness are referred to a Children's Court. A determination of the seriousness of the offence is made by members of the panel and is based on the number of charges and the type of offence.

In considering the increasing use of panels, Mildern conceded that this may be due to an increase in the number of minor offences. However, he found it more likely that since panels have come into existence, children are being referred to them, whereas previously, they would not have been charged.[51] In other words, he believed that there is some "recruiting" of children to appear before the panel. Presumably, before the introduction of the scheme such children, if they had been reported and detected, would have had police discretion exercised in their favour. Mildern also felt that "recruiting" may be a possible explanation for the high proportion of girls who appear before panels.[52]

Mildern considered the implications of the findings in relation to under-representation of Aborigines before the panels and their over-representation before the courts. It is possible that this finding arises because a higher proportion of Aborigines than non-Aborigines are committing serious offences. Indeed, Mildern found that an analysis of the seriousness of offences of Aboriginal offenders before the panel suggested that Aborigines may commit slightly more serious offences.[53] However, he did not believe that this fully accounted for the difference between the panel and court proportions of Aboriginal offenders. Rather, he suggested that Aborigines tended to fall foul of the "parental suitability" criterion and that this "deficiency" might also affect adversely the nature of the charge that is laid against the child.

The failure to meet the "parental suitability" criterion, in Mildern's view, is not likely to be common only amongst Aborigines. Probably, it applies also to other low socio-economic and culturally disadvantaged groups. However, he felt more research on this point is required.

Very little information is available concerning the precise disposal of cases that come before the Children's Courts. Figure 6 is taken from the 1974 Annual Report of the Department for Community Welfare.

It is perhaps surprising that relatively few children were committed to the care of the Department, whereas fines were seen as appropriate dispositions in so many cases. Again, in view of the strong disapproval of the higher courts of imprisonment for young offenders, it is remarkable that as many as ninety-eight were gaoled during 1973-4. According to the Chairman of the Juvenile Panel, Mr D. Fogarty, the high incidence of children in gaols is influenced by the tendency of the courts, particularly in the northern-most part of the state, where there are no juvenile institutions, to gaol children

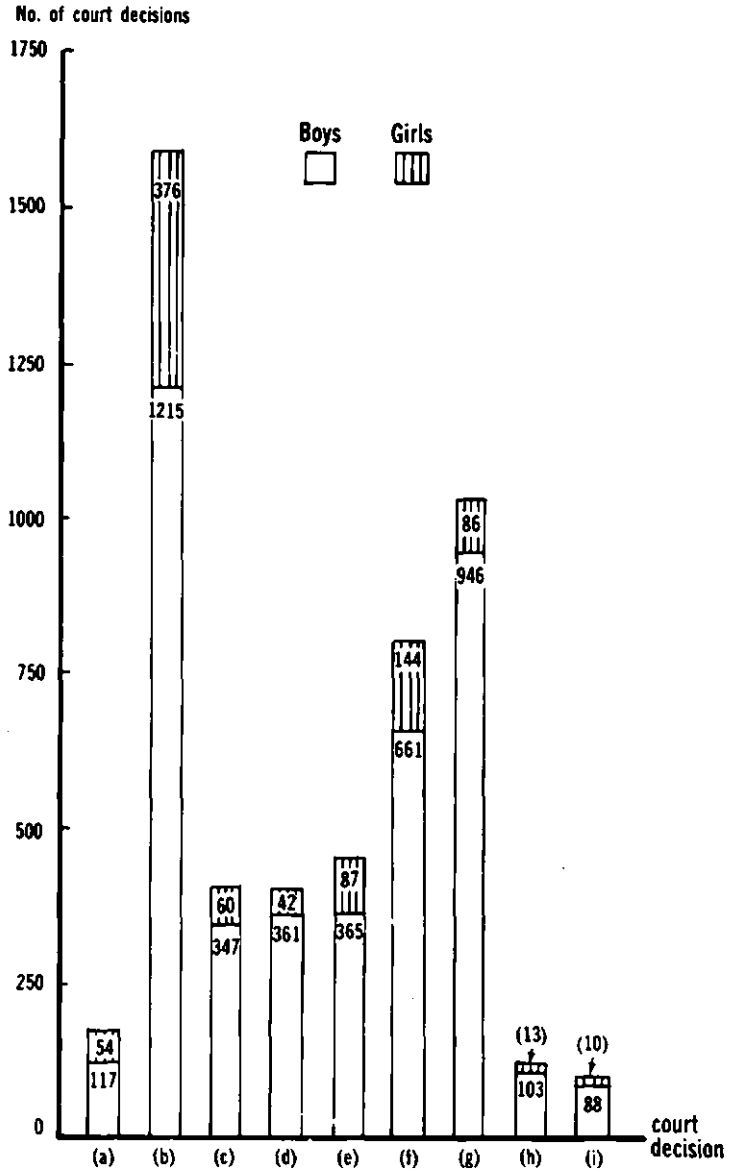


Fig. 6. Western Australia: Juvenile Offences: Court decisions on cases appearing in Children's Courts (at which Departmental Officers were present during 1973–74)

Key. (a) Cautioned; (b) Dismissed; (c) Dismissed with supervision; (d) Placed on probation; (e) Committed to care of department; (f) Re-committed to care of department; (g) Fined; (h) Placed on bail; (i) Goaled.

between the ages of sixteen and eighteen years for short periods for offences such as disorderly conduct, wilful damage and offences concerning the consumption of alcohol. The alternative institutional care would only be available in Perth and would, in Mr Fogarty's view, be unsuitable for most of the children, particularly those of Aboriginal extraction.[54]

There is clearly need for the expenditure of more funds to provide alternatives to imprisonment for children in the north of Western Australia.

NOTES

1. E.J. Mildern, "The Western Australian Juvenile Suspended Action Panel: A Baseline Study" (thesis submitted to the University of Western Australia in partial fulfilment of the requirements for the degree of Master of Social Work, 1973), p. 27.
2. Ibid., p. 33.
3. Ibid., pp. 32-3.
4. Ibid., p. 34.
5. Western Australia. Department for Community Welfare, *Annual Report for the Year ended 30 June* 1974 (Perth: Government Printer, 1974), p. 35.
6. *Juvenile Courts Act* 1971-1972 (S.A.).
7. However, the Chairman of the Juvenile Panel, Mr D. Fogarty, advises that although in the early stages of the scheme the suitability of the parents to control the child was considered very important, the attitude has now changed somewhat and the factor is not given so much weight. Almost every child is being given one chance of being dealt with by the panel, regardless of the parents' ability to control him. (Letter to the present writer dated 5 August 1975).
8. Mildern, "The Western Australian Juvenile Suspended Action Panel", p. 28.
9. Ibid., p. 25.
10. Ibid., p. 28.
11. Ibid., loc. cit.
12. Section 4. Furthermore, under Section 20(1a), the jurisdiction extends to a person who has attained the age of eighteen between the time of the alleged offence and appearance before the court.
13. Section 20(2).
14. Section 20(3).
15. Section 20(3b).
16. *West Australian*, 24 June 1975. However, in practice, if offenders are sent to Riverbank, after being dealt with under Section 19(6a)(a), the Governor in Council assumes authority to release them on advice from the Parole Board. Following release, they are supervised by an officer from the Department of Probation and Parole. (Letter to the present writer from the Director for Community Welfare dated 17 October 1975).
17. Unreported decision of Wickham J., 25/9/75.
18. Section 20B(1).
19. Section 20B(2).

20. Section 20B(3).
21. [1963] W.A.R. 121.
22. Jackson S.P.J. (as he then was) and Hale J.
23. *W.A. Parliamentary Debates* 148 (1957): 3805.
24. Concern about depriving a defendant of his right to a trial by jury was amply demonstrated by the decision of the High Court in *Behsman* v. *Ansell* and *Behsman* v. *Baker* (1957) 98 C.L.R. 284. Behsman had been convicted by a Children's Court for committing incest with his 16-year-old daughter and had been sentenced to five years' imprisonment with hard labour. He appealed to the Supreme Court of Western Australia against conviction and sentence and his appeal, which was heard by Virtue J., was dismissed. He applied, *inter alia*, for special leave to appeal against the decision of Virtue J. to the High Court. On the particular facts before the High Court, which are irrelevant to the present discussion, it was held that a defect in the constitution of the Children's Court invalidated the conviction. However, the High Court also found there was another ground that justified allowing the appeal. At that time, Section 20(a) of the Child Welfare Act conferred on a Children's Court "exclusive jurisdiction in respect of all offences alleged to have been committed *by or against* children" (the italics are those of the present writer). The High Court held that there are a number of possible interpretations that could flow from the use of the word "against". Firstly, it could relate to offences that involved someone below a specified age, but not more than eighteen. Secondly, it could relate to offences against laws that are designed, by criminal sanctions, to give protection to the individual against wrongful acts tending to his physical harm or moral injury if, in any given case, the person was not more than eighteen. Thirdly, it could relate to acts involving a person not over eighteen, if those acts are criminal and if in the particular circumstances they tend to the prejudice of that person. The High Court conceded there were other possible interpretations, but found that if the second were correct, the Children's Court did not have jurisdiction over the applicant, whereas if the third interpretation were accepted, it did.

    The High Court held that as Section 20(a) deprived accused persons of the right to trial by jury, it should not receive a wider interpretation than its terms or the evident policy of the legislature demanded. Accordingly, the High Court accepted the second of the interpretations stated above. It was not prepared to define incest as an offence against a law for the protection of the individual against wrongful acts tending to his physical harm or moral injury. Rather, the High Court saw it as a crime based on "the abhorrent evil of sexual relations between persons closely akin". The High Court noted that if the victim in the case before it had been eighteen and had consented to sexual intercourse, she, too, would have been guilty of an offence.

    It seems that the decision was not universally regarded with favour. Indeed, Mr Hawke indicated during the course of a parliamentary debate that it did not accord with the layman's interpretation of the word "against".

    Legislative policy has now been clarified by the terms of Section 20B(2) which confers jurisdiction on a Children's Court in respect of offences committed "against, or in respect of, a child under the age of sixteen years".
25. Paper by Justice Evatt, Chairman of the Royal Commission on Human Relationships, on "Women as Victims of Crime", read at a seminar organized by the Australian Institute of Criminology on "Women as Participants in the Criminal Justice System" (Canberra: 18-21 June 1975).
26. See p. 45 of this Report.
27. See A. Freiberg and D. Biles, "The Meaning of 'Life': A Study of Life Sentences in Australia" (Canberra: Australian Institute of Criminology, in press).

28. *W.A. Parliamentary Debates* 148 (1957): 3805.
29. Section 137A of the Child Welfare Act authorizes the court, in certain circumstances, to order that the parent pays, in whole or in part, costs, damages or restitution following the commission of an offence by the child to which the parent has contributed, by neglect, to exercise care and control of him.
30. Section 4.
31. Section 51.
32. In *R.* v. *Fraser* (Unreported decision, 25/9/75), Wickham J. considered the relationship between Section 39 of the Child Welfare Act and Section 19(6a)(b) of the Criminal Code. He expressed the view that whereas an order under the former runs for two years from the date of the *order*, a sentence under the latter runs for two years from the date of *conviction*. In all other respects, the effect of the two provisions appears the same.
33. Section 34C(1).
34. Section 38(1).
35. Section 29(3).
36. Section 35.
37. Unreported decision of Jackson C.J., Nos. 119 and 120 of 1972, at 3.
38. At 4.
39. Unreported decisions of Virtue J., No. 35 of 1967.
40. Unreported decisions of Jackson C.J., Hale and Burt JJ., Nos. 51, 52 and 53 of 1971.
41. Although King was seventeen at the date of the offence, he was eighteen by the time the case came before the Children's Court. Section 20 (1a) has now been enacted, which gives a Children's Court jurisdiction in such circumstances.
42. Section 197 has since been amended specifically to include the Attorney-General.
43. Unreported decision of Wickham J., 25/9/75.
44. See Chapter 3 of this Report, p. 89.
45. Mildern, "The Western Australian Suspended Juvenile Action Panel", pp. 51-2 and 113-14.
46. Department for Community Welfare, 1974 Annual Report, p. 79.
47. Mildern, "The Western Australian Suspended Juvenile Action Panel", p. 105.
48. Department for Community Welfare, *Annual Report for the Year ended 30 June* 1974, p. 78.
49. Ibid., p. 80.
50. Mildern, "The Western Australian Suspended Juvenile Action Panel", p. 38.
51. Ibid., p. 108.
52. Ibid., p. 112. However, the Chairman of the Juvenile Panel prefers an alternative explanation to the increasing use of panels. He claims:

    The big increases in recent years of the number of children seen by the Panel is not due to "recruiting" of children, but to other factors such as:

    1. The strengthening of security staff at most big stores.
    2. The rapid increase in the number of large shopping complexes in the suburban areas.
    3. The gradual increase in the upper age ... limit for children appearing before the Panel.

    It has been estimated that somewhere about 90 per cent of the offences for which children appear before the Panel are for stealing from shops. The other 10 per cent is made up of other stealing offences such as stealing bicycles, wilful damage, disorderly conduct and minor breaking and entering. When the Panel first began, most children offending by stealing from shops did so either on Saturday mornings when they came to Perth to shop or for some other activity

or when they truanted from school and came to the city to fill in the time. With the advent of the large suburban shopping complexes, it is a much simpler matter for the children to get to these either going to or from school or at lunchtimes, etc., and the number of offences resulting from these is still growing.
(Letter to the present writer dated 5 August 1975.)

53. Mildern, "The Western Australian Suspended Juvenile Action Panel", p. 114. However, the Chairman of the Juvenile Panel observes:
Concerning the under-representation of children of Aboriginal extraction dealt with by the Panel, it is not so much the result of parent unsuitability which influences this figure, but the fact that it is rather rare for these type of children to be detected at stealing from shops, and as already mentioned, these offences comprise 90 per cent of the total. The offences for which Aboriginal children are brought before the Panel are generally stealing bicycles, other stealing offences or minor breaking and entering.
(Letter to the present writer dated 5 August 1975.).
54. Letter to the present writer dated 5 August 1975.

8

Aborigines

1. INTRODUCTION

Western Australia is by no means the only jurisdiction in which Aborigines and the white population are differentially affected by the criminal justice system.[1] In 1973, the Criminal Law and Penal Methods Reform Committee of South Australia drew attention to the over-representation of Aborigines in prisons in that State.[2] Similar evidence has also come recently from the Northern Territory.[3] It is unlikely that anyone who has been involved in the administration of criminal justice in Australia will be surprised that Aborigines are over-represented amongst those charged with and convicted of criminal offences. However, the extent of the over-representation is probably greater than generally imagined. Attention has already been drawn to the situation in Western Australian Children's Courts.[4] Martin has observed that whereas, in 1971, Aborigines constituted 2½ per cent of the total population in Western Australia, they accounted for 19 per cent of all convictions in Magistrates' Courts and 33 per cent of the daily average prison population. Furthermore, she noted that in 1970, Aboriginal convictions accounted for 49 per cent of all offences against good order, 32 per cent of offences against the person and 16 per cent of offences against property.[5]

Although the percentage of Aborigines in prisons throughout Australia is alarming, the Western Australian statistics suggest that it is not a reflection of longer sentences being imposed on Aborigines. Indeed, according to Martin, Aborigines' sentences tend to be shorter than those imposed on whites.[6] Rather, it appears that the daily average percentage of Aborigines is a function of the number of commitments to gaol and that this in turn is inflated by the number of remands in custody of Aborigines and the high incidence amongst them of non-payment of fines. However, Martin reports that a somewhat different picture emerges from a considera-

tion of the number of distinct persons committed to Western Australian prisons. From a consideration of the number of commitments alone in 1971, it would appear that 19 per cent of the total Aboriginal population had been committed to prison. However, many Aborigines were committed more than once, and on the basis of the number of distinct persons who were committed to gaol, a relatively small percentage, namely 9 per cent, of the total population was imprisoned.

Nevertheless, 9 per cent still represents a high incidence of Aborigines amongst prisoners and this has attracted a considerable amount of attention in recent years. In 1974, Judge Furnell, as Royal Commissioner into Aboriginal Affairs in Western Australia, reported that he was not prepared to conclude from the over-representation in prisons alone, that there was necessarily discrimination against Aborigines. He pointed to the high incidence of drunkenness amongst Aborigines as being one factor that in part accounts for their over-representation in prisons. He said:

> An Aborigine affected by liquor and likely to merit charges of that nature is entirely lacking in discretion. Boisterous bravado becomes his guiding force and in the public street he is disappointed if his irregular behaviour does not attract attention. Many white drinkers of course behave in the same way, but it is doubtful if they are so numerous. Indeed a warning to a European drinker is far more effective than a similar warning to an Aborigine in the same condition.[7]

Judge Furnell also noted that the police tend to attribute the disproportion to other factors, such as the unsatisfactory conditions under which Aborigines live and the readiness in a great number of them to pose provocatively before authority in attitudes that necessarily attract arrest. At a later stage in his Report,[8] Judge Furnell suggests that the following factors should be borne in mind in interpreting the prison statistics:

(a) the same offender very often repeatedly returns to prison;
(b) one in a state of drunkenness more readily commits further offences;
(c) among the Aborigines, there is a far greater proportion of young people than among non-Aborigines, and this difference increases yearly. It is this young age group more than any other that seems to combine drunkenness and other misbehaviour.
(d) The occupational status of Aborigines is relatively lower in Western Australia and this, coupled with a high rate of unemployment, leaves greater opportunity for idleness and mischief.

Assuming that it is correct to assert that there is a high incidence of drunkenness among Aborigines and that persons prone to that condition tend to recidivate more readily than others, it is still important that other factors be taken into account. Firstly, the white population has a collective responsibility towards Aborigines, to whom it introduced many alcoholic beverages. Secondly, as Judge Furnell observes, many Aborigines do in fact belong to lower socio-economic groups of society. As underprivileged people, their offences are much more visible to the eyes of law enforcement officers than the offences committed by those of higher social status. As Chapman has observed generally in relation to the underprivileged members of society:

> The institutions of privacy have been little studied by sociologists, yet the degree to which a person's life is spent in public rather than private places will have a quantitative effect on his liability to break the law and to be detected in breaking the law ... It would be possible to measure social status in terms of the ratio of time spent in public places (places to which the police have continuous unfettered access) to time spent in private places (places to which the police have access only in special circumstances and after due safeguards).[9]

Chapman continues his study by a development of the argument that certain circumstances affect the visibility of the individual to law enforcement officers. For instance, the ownership of house property at once gives privilege, since many forms of proscribed behaviour are only proscribed if seen, or if they take place in public. Some institutions affect visibility. For instance, in the industrial situation, much behaviour that would rank as theft if committed outside is concealed from law enforcement officers. Similarly, there is a generalized pattern of relative immunity that attaches to those who occupy middle- and upper-social positions. Within the education system, the preparatory school, the private boarding-school and the residential college render the student almost immune from criminal prosecution. In leisure, the middle-class member of society is more frequently in a private social area, whereas the member of the working class is in a public area. Again, there appears to be a differential distribution of immunity according to social class at the level of the exercise of police discretion. Those with higher social status are more likely to have discretion exercised in their favour. All these and other factors lead Chapman to suggest that the members of the middle class are rarely sent to prison, while the members of the working class are frequently imprisoned for offences of the same gravity. It seems likely that Chapman's thesis is no less true of Australia than of England,

although in this country, it tends to be the indigenous people who occupy the lowest socio-economic positions.

Indeed, Elizabeth Eggleston, in her detailed analysis of the administration of criminal justice in Western Australia and South Australia, found that there is clear evidence of discrimination between Aborigines and whites.[10] Her study was not based solely upon orthodox legal research. She undertook also extensive field work over a period of one year in the capital cities of the two states, in country towns, at missions and on reserves. Eggleston had set out to determine whether any factors apart from discrimination could have accounted for the over-representation of Aborigines amongst prisoners. Could it be, for instance, that Aborigines were convicted of more serious offences than whites and therefore they were more likely to be imprisoned? However, she found that for most subcategories of offences, more Aborigines than whites were sentenced to imprisonment. In particular, this was true of drunkenness, traffic offences, disorderly conduct, assault, offences against the police and the unlawful use of motor vehicles. Could it be argued that the over-representation of Aborigines flows from a higher incidence of prior convictions? Indeed, she found that Aborigines were slightly less likely than whites to be first offenders and she conceded that the existence of prior records partly explained the differences in sentences. However, the fact that more Aborigines than whites had prior convictions may simply indicate that discrimination is operating against them at an earlier stage, as, for instance, in the initiation of criminal prosecutions.

2. DECISIONS INVOLVING ABORIGINES

The cases considered for the purposes of this Report included some where it was clear that the defendant or the victim or both were of Aboriginal descent. In a few of these cases, the fact of racial origin was apparently recorded coincidentally and nothing in the decision turned on the fact. The following passage relates only to the cases where the appellate court referred to the race of defendant or victim and obviously attached some importance to it.

The most significant of the cases were the recent decisions of *Murphy* v. *Watson*, *Davidson* v. *Watson* and *Ward* v. *Watson*. The appellants were three Aboriginal women aged, according to police records, thirty-three years, thirty years and twenty years respectively. It is interesting that each woman claimed to be substantially younger,[11] but none claimed to be so much younger that her age, if

she were correct, would bring her within the jurisdiction of the Children's Court. All three women were charged with disorderly conduct under Section 54 of the Police Act, an offence that carried the maximum penalty of a $100 fine or six months' imprisonment, or both. Each woman had a substantial number of prior convictions in respect of offences involving alcohol,[12] and each woman, for the offence giving rise to the appeal, was sentenced by Justices of the Peace to the maximum term of imprisonment prescribed for the offence, six months. The three appellants had all been intoxicated at the time of the present offences and had screamed obscenities outside an hotel in Leonora, an inland centre some 240 kilometres north of Kalgoorlie.

The Full Court drew the conclusion that each appellant had become addicted to alcohol and, when in drink, she habitually manifested her intoxication by screaming obscenities at her friends or at large. On some occasions, this behaviour had led to drunken brawling. The Full Court obviously regarded itself on the horns of a dilemma. The Judges took the view that there was no basis for the application of generally accepted principles of sentencing. They believed that none of the sentences within the limits of Section 54 would lead to the cure of the appellants of alcoholism. Justices were not entitled to make orders under the *Convicted Inebriates' Rehabilitation Act* 1963-1974 and in any event, there was no institution under that Act for women. The Full Court took the view that no sentence under Section 54 would deter the appellants or others from drinking and that no question of retribution could arise. The Full Court said:

> The choice ... is very limited indeed. Probation is a possibility, but in the absence of any back-up treatment facilities—as to which see s. 9(6) of the *Offenders' Probation and Parole Act*—it would seem pointless to place such a person on probation ... because ... the terms of such an order could not be complied with[13]... One is therefore thrown back to the alternatives to be found within s. 54 of Police Act itself—imprisonment or a fine. 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 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 ... [each appellant], upon release from custody, 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 for an offence under s. 54 of the Police Act, and in a case 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. The appeals will be allowed and in each case the custodial sentence will be set aside and a fine of $10 substituted.[14]

The three cases represent a frank expression of the problems that confront courts when faced with offences involving alcohol, which are particularly prevalent among Aborigines. The three cases were not the only ones amongst those considered where the appellate court had taken a more lenient approach than the court of first instance. In *Green* v. *Josey*, the appellant, a semi-tribal full-blood Aborigine, had been convicted on two charges of being drunk and disorderly under Section 53 of the Police Act, and because he had been similarly convicted three times during the preceding twelve months, he was deemed idle and disorderly under Section 65(6) of the Police Act. Section 65 provides that an offender who is so deemed, shall be liable to imprisonment for six months. The Justices of the Peace before whom the appellant had appeared at first instance had imposed twenty-one days' imprisonment on the first charge and six months on the second, to be served concurrently. On appeal by way of order to review, Wickham J. quashed the sentence on the second charge and substituted the term of six weeks, to be served concurrently with the sentence on the first charge. As the appellant had already served more than six weeks, he was released following the appeal.

Of the sentence imposed by the Justices, Wickham J. said:

Normally a maximum term of imprisonment is not imposed unless there are some circumstances of aggravation or other special considerations and it is necessary that the punishment in the particular case should be proportionate to the offence and to the circumstances surrounding it. ... The sentencing of a man convicted three times of drunkenness within the previous 12 months to a maximum period of six months with hard

> labour, as a cure is wrong in principle however well intentioned such a sentence might be. I have every sympathy for the police, the justices and the people of Meekatharra in the apparently insoluble predicament in which they are placed by behaviour such as this, but in the administration of the law and in the sentencing of offenders principle cannot be allowed to give way to expediency.[15]

On the facts of the particular case, Wickham J. found that the appellant was comparatively harmless and amiable and that there were no elements of violent or vicious behaviour. The appellant was merely a nuisance to himself and to others.

Immediately following *Murphy* v. *Watson*, *Davidson* v. *Watson* and *Ward* v. *Watson*, observers in Western Australia may have speculated as to whether the Full Court had demonstrated reluctance to approve imprisonment for any offences in respect of which drunkenness is the primary constituent element. However, in *Wicker* v. *Taylor*[16] and *Tumbler* v. *Doyle and Higgins*,[17] the appellants, like Green, were deemed idle and disorderly persons under Section 65 (6) of the Police Act. Both were Aborigines. Wicker was sentenced to six months' imprisonment and Tumbler to three. In each case, the appellant's counsel clearly placed weight on Murphy's case in arguing that the lower court had been wrong in principle in imposing a sentence of imprisonment. However, in each case, the Full Court held the lower court had not been wrong and a distinction was drawn between provisions like Section 53 of the Police Act, which gives the sentencing court a choice between imprisonment and a fine, and Section 65 (6), which simply states that on conviction, the offender shall be liable to imprisonment not exceeding six months. Although the Full Court accepted that even where the offender is deemed idle and disorderly, a fine could be imposed in lieu of imprisonment under Section 166 of the Justices Act, it rejected the view that a fine was appropriate for Wicker or for Tumbler. Under Section 166, it is necessary that "the justice of the case will be better met by a fine than by imprisonment" and in the Full Court's view, in neither case was that requirement satisfied. Indeed, Burt J. went so far as to say in *Tumbler* v. *Doyle and Higgins*, that so long as Section 65 remains in its present terms, "it can never be said, as the ground of appeal would have it, that to impose a term of imprisonment is wrong in principle".

Clearly, *Wicker* v. *Taylor* and *Tumbler* v. *Doyle and Higgins* have reduced the potential scope of the authority of Murphy's case and may even have confined it to closely similar facts to its own. Undoubtedly, there will be further appeals to test the scope of the deci-

sion. While the Full Court in *Wicker* v. *Taylor* and *Tumbler* v. *Doyle and Higgins* evidently felt under an obligation to discharge the orders *nisi*, it is apparent that its constraint emanated from the wording of Section 65. In the circumstances, it seems clear that legislative intervention is required if imprisonment for drunkenness and closely related offences is to cease.

The present writer suggests that serious consideration should be given to the possibility of decriminalizing offences that amount to public drunkenness and that the problem would be better regarded as one for social welfare authorities rather than for the criminal law. However, it is not suggested that drunks should be left on public view and it is urged that a necessary corollary to the recommendation for the decriminalization of public drunkenness be the establishment, wherever possible, of detoxification centres. A recommendation to this effect was made by the Criminal Law and Penal Methods Reform Committee of South Australia[18] and it is to be implemented shortly in that state.

The problems in South Australia occasioned by public drunkenness among Aborigines are not dissimilar from those experienced in Western Australia and it seems likely that each state could benefit from the other if research findings were shared. The Criminal Law and Penal Methods Reform Committee suggested that state-owned overnight houses should be established in metropolitan areas and in the larger country towns for the accommodation of insensible and exhausted drunks. The Committee recognized that in smaller country places such centres are impracticable. For them, the Committee found that there is no alternative to the continuation of the use of police cells, which should be designated detoxification centres for the purpose. It was appreciated that transport facilities would be required and that medical staff (if any) from the centres and police should be authorized to detain in public places persons whom they reasonably suspect to be drunk and to convey them to a detoxification centre. If the drunk has a nearby home, which he can identify, the Committee suggested that he should be driven there: the purpose of the centres should be to provide temporary accommodation only for those who are without alternative shelter. The Committee accepted the fact that its recommendation gave rise to an important civil liberties issue and suggested that there should be an obligation on the appropriate authorities to bring every person removed to a detoxification centre before a court, specially convened for the purpose, on the first week day after apprehension. The court should either discharge the person brought before it or should order that he

be detained for a further twenty-four hours, provided that a person might be discharged from a centre at any time on the written authority of the officer in charge. Any such authority should be produced to the court at its next sitting, so that the judicial record of the disposal of detainees should accord with the record of persons admitted to detoxification centres. The Committee explained that the point of the recommended procedures was fourfold: to afford protection to the police and detoxification staff in the exercise of their powers; to ensure that no one is detained for more than a minimum period without judicial authority; to ensure that no one is discharged until he is in a fit condition to leave; and to afford detainees the opportunity to express to a court any protest they may wish to make about the fact of detention. The Committee recommended that there should be an upper limit of seventy-two hours on the length of time that a person may be detained on any one occasion, and that if at the expiration of that time he is apparently not in a fit condition to leave, he should be transferred to a hospital, where the appropriate review procedures should operate concerning him.

The frustration that the Full Court has recently expressed in endeavouring to find a suitable penalty for the three drunken women highlights the need for an alternative to the criminal justice system to be found. Indeed, it is not unreasonable to expect that the decisions reached by the Full Court will give rise to an increasing number of appeals, particularly in view of the increased availability of legal aid for Aborigines.[19]

The suggested method in the present Report of resolving or at least ameliorating the problem only applies, of course, to offences that amount to public drunkenness, without such aggravating circumstances as assault. Where there are aggravating circumstances, it is recognized that the criminal law must be involved and if, for any reason, there is a high incidence of such circumstances among Aboriginal drunks, the decriminalization of lesser offences will still leave crime rates of indigenous persons at a high level. It is beyond the scope of the present Report to speculate further as to the reasons that may lie behind excessive aggression on the part of Aboriginal drunks:[20] the writer can only suggest that more research should be conducted to investigate fully the areas and the extent of discrimination. One of the cases considered for the purposes of the present Report may have represented an unusual form of discrimination against an Aborigine. In *McGibbon* v. *Tuckey, Huysing and Tuckey*, the respondents were white and the victim was an Aborigine.[21] The principal respondent was the mayor of Carnarvon

and the licensee of the hotel where the offence took place. The victim had evidently given the respondents some provocation, but the three respondents were all convicted of assault and the penalties imposed on them by a Magistrate were fines of $40 in the case of the principal respondent and $20 in respect of the other two. The prosecution appealed against sentence on the basis that the fines were too lenient, but Wolff C.J. dismissed the appeal, apparently approving the Magistrate's acceptance of the view that the principal respondent occupied a prominent position in society and had consequently suffered particular humiliation following the conviction. As mentioned earlier,[22] the Chief Justice evidently also approved the fact that the Magistrate had taken into account the respondents' responsibility for bearing the costs of the victim's counsel. Although the recorded facts of the case do not permit strong conclusions to be drawn concerning the operation of discrimination, and it is at least arguable that the principal respondent's prominence in Carnarvon was not improperly taken into account, the obvious doubt arises as to whether a heavier penalty would have been imposed if the victim also had occupied a privileged position in society.

In several of the cases considered for the purposes of this Report, Judges acknowledged that the conduct constituting the offence was repugnant to the defendant's tribe. In *Jameson* v. *R.*,[23] the appellant was a full-blood Aborigine who had been convicted of manslaughter. No facts were recorded concerning the circumstances of the offence, but it is clear that the Divisional Superintendent of Native Welfare was called to give evidence. The trial Judge imposed a sentence of twelve years' imprisonment on the appellant, with a minimum term of six years. On appeal against sentence, it was argued that the trial Judge had imposed the long term partly to protect the appellant from, or at least to delay, tribal vengeance. Of this desire on the part of the trial Judge, the Chief Justice said, "These are kindly motives but seem inappropriate in considering sentence." While one might agree with the Chief Justice concerning the impropriety of the use of the criminal justice system for paternalistic purposes, the adjective "kindly" seems strangely incongruous in the particular context. Another case in which the attitude of the defendant's tribe to the offence was mentioned was *Warrie* v. *R.* In that case, the applicant, an 18-year-old full-blood Aborigine from Yandeyarra, was convicted of sodomy of a 3-year-old Aboriginal girl. The child had been taken from her parents' protection and had been subjected to a brutal assault, so that she suffered heavy and permanent injuries. There had been some risk at one stage that the child might die. The trial Judge

had imposed a term of ten years' imprisonment on the applicant, with a minimum term of four years. The applicant had a number of prior convictions, including three of aggravated assault that were said to have involved "some form of sexual aggression". The applicant appealed unsuccessfully against sentence. The Court of Criminal Appeal recognized that the sentence was a heavy one, particularly for an 18-year-old. However, the Court was clearly of the view that the attack was especially brutal and added: "It was not suggested that the offence was any less repugnant to people of the applicant's race than to those of European descent."[24] Unfortunately, the court did not indicate how the sentence might have been affected if people of the applicant's race took a more serious view of the offence or, indeed, a less serious view. Nor did the court advert to the possibility that the applicant might suffer tribal vengeance on his release from prison. If vengeance were inevitable, should the sentencing court take this into account?

This perplexing problem has recently been tackled by Burt J. in *R.* v. *Ferguson*[25] and Wallace J. in *R.* v. *Fazeldean*.[26] In each case, the Judge set a low minimum term,[27] apparently because of an awareness that the defendant, on return to his community, would suffer tribal payback. In fact, subsequent enquiries revealed that Ferguson did suffer payback, in the form of a spear wound in his thigh. While these two decisions are to be welcomed in the sense that they indicate an awareness of the problems associated with subjecting individuals to two legal systems, their tribal system and the Australian system, undoubtedly, the decisions are vulnerable to criticism from members of two schools of thought holding views that are diametrically opposed one to another. On the one hand, it could be argued that the decisions do not go far enough to recognize tribal law. The Parole Board in neither case was obliged to release the defendant at or near the expiration of the minimum term. Ferguson could have been imprisoned for the maximum term of two years and Fazeldean for five years. It is possible, of course, that the maximum term, like the minimum term, reflected a degree of leniency on the part of the sentencing Judges, in recognition of the problem of twice punishing the defendants, both of whom had been convicted of manslaughter. It is true also that in the case of Ferguson, Burt J. indirectly made a recommendation that in the event of the Parole Board not releasing the defendant quickly, he should be detained in one of the country prisons where other Aborigines constituted the majority of the population. Burt J. said:

> it is to me unthinkable that you should serve this sentence incarcerated in

> what I might describe as a conventional gaol, including within that description the so-called open institutions established in and around the metropolitan area of Perth.
>
> Apart altogether from the fact that your language difficulty would mean that such imprisonment from a communication point of view [amounted to] solitary confinement, the other environmental factors which are necessarily associated with such imprisonment would, I think, in your case and if continued for any significant length of time be extremely harmful to you both physically and psychologically; indeed I am advised that such punishment might well have fatal consequences.[28]

In spite of his Honour's views, which, with respect, were enlightened, Ferguson could have been detained in a metropolitan prison for two years and then have suffered payback at the hands of his own community. In this sense, then, it could be argued that justice was not done: the defendant was subjected at least to the possibility of suffering double punishment.

On the other hand, there are undoubtedly those who would argue that any recognition of tribal law is tantamount to a licence to the defendant's community to inflict any forms of vengeance, including death.

3. THE DILEMMA CONFRONTING CRIMINAL JUSTICE

There can be no doubt that their Honours were justified in *Murphy* v. *Watson*, *Davidson* v. *Watson* and *Ward* v. *Watson*, when they observed that the appellants' cases constituted merely the tip of a deep and serious social problem and the solution to it must lie beyond the criminal law. The white man bears immense responsibility for the disintegration of Aboriginal culture, particularly as it is hard to see that it has been, or will be replaced, by a life-style that is qualitatively superior. Schapper, who was writing with reference to Aborigines in Western Australia, has described the changes in these terms:

> Until the white man came to Western Australia, Aborigines enjoyed relative freedom from want, disease, ignorance, squalor, and idleness, in terms of their needs then. They were self-determining; they reared their children to become self-sustaining and independent persons within family and tribal groups; they had well-defined and esteemed roles in their family and tribe; they had an appropriate identity, self-respect, and dignity; and they were motivated to participate as full members of their society.
>
> One hundred and fifty years later the Aborigines are but one-half of their earlier number, they have been transformed from semi-nomadic hunters to sedentary unskilled labourers, and from freely self-

determining persons to degraded dependants. About half have become genetically different, and in terms of ways of life now acceptable to both them and us, the needs of most of them are utterly unfulfilled. The transformation of Aboriginal attributes, from what they were then to what they are now, has resulted in ways of life in most Aborigines very different from the traditional, and yet unacceptable within the mainstream of Australian society. These impoverished ways of life are self-perpetuating and are associated with the geographic, social, and economic isolation and segregation of life on mission settlements, pastoral stations, and camping reserves. They constitute distinct subcultures which are characterized by extreme poverty, lack of identity, family failure, and dependency.[29]

The changes that have taken place are such that it would be difficult, even if it were accepted as desirable, to restore the original *status quo* to Aborigines. Quite apart from the mixed blood of a high proportion of those who identify with full-bloods, many Aborigines have now become urbanized or semi-urbanized. Both intermarriage with whites and the urbanization of many Aborigines have caused a blurring of the boundaries between the cultures. While the restoration of land to individual tribes must be applauded, such grants can constitute little more than slight recompense to Aborigines for the invasion of the white man and the consequent disintegration of tribal culture. Whether the assimilationist tide at this stage can be turned is debatable. However, it is not beyond the bounds of possibility that a new brand of conventional wisdom can be refined from the flames of the current culture conflict. There may be at least some scope for the reassertion of certain traditional norms and values of Aboriginal culture.[30]

Clearly, it is beyond the scope of the present Report to consider the entire social problem. Nevertheless, it is possible to refer to some of the specific issues that ultimately will have to be solved by policy-makers in the sphere of criminal justice. It is proposed to deal, on the one hand, with those Aborigines whether of full or part blood, who retain some tribal affiliations, and on the other hand, with those who do not. It should be emphasized that the present writer's effort is directed more towards a delineation of the problems than to their solution.

(a) Aborigines still retaining tribal affiliations

In her thesis, Eggleston pointed to the problems that can arise from conflict between tribal law and Australian criminal law.[31] Just a few examples will suffice to demonstrate the nature of the problems.

Some tribes do not permit intermarriage between certain people and in the event of a "wrong" marriage taking place, the slaughter of the child of that marriage may be tolerated. However, under Australian criminal law, the death could lead to a conviction of murder, manslaughter or infanticide. Again, polygamous marriages are sometimes accepted by traditional societies and yet technically they constitute bigamy under Australian criminal law. Further, initiation ceremonies may well involve conduct that could, in theory at least, give rise to a conviction of assault. Further still, certain forms of behaviour are regarded quite commonly amongst Aborigines as most heinous and are punishable by death. Such forms of conduct include the revelation of tribal secrets to women and the crossing into a secret area or the viewing of secret objects by women. The present writer is not aware of any comparative research by anthropologists that indicates the disparities between tribal laws, but Meggitt reports that for the Walbiri tribe, at least, the following types of conduct are proscribed:

A. Offences of commission
1. Unauthorized homicide (that is, not decreed as a punishment for another offence).
2. Sacrilege (that is, the unauthorized possession of sacred knowledge and objects and the unauthorized observation of sacred rituals).
3. Unauthorized sorcery (1. and 3. are not easily distinguished).
4. Incest (copulation with actual kin of certain categories).
5. Cohabitation with certain kin (usual classificatory relatives in the categories associated with 4.)
6. Abduction or enticement of women.
7. Adultery with certain kin (usually classificatory relatives in the categories associated with 5.).
8. Adultery with potential spouses (7. and 8. in effect cover all cases of fornication).
9. Unauthorized physical assault, not intended to be fatal.
10. Usurpation of ritual privileges or duties.
11. Theft and intentional destruction of another's property (exclusive of 2.).
12. Insult (including swearing, exposure of the genitals).

B. Offences of omission
1. Physical neglect of certain relatives.
2. Refusal to make gifts to certain relatives.
3. Refusal to educate certain relatives.[32]

And the penalties that such forms of conduct may attract are:

1. Death — a. caused by a non-human agency (A2).
b. caused by human sorcery (A1, possibly A3).

c. caused by physical attack (A1, A2, possibly A3).

2. Insanity — caused by a non-human agency (A2).
3. Illness — caused by human sorcery (A1, A2, A3, A5, A6, A7, A8; B1, B2).
4. Wounding — attack with a spear or knife, intending to draw blood (A5, A6, A7, A8, A9, A10, A11).
5. Battery — attack with a club or boomerang (A6, A7, A8, A9, A10, A11, A12, B1, B2, B3).
6. Oral abuse — this accompanies all human punishments.
7. Ridicule — this is directed mainly at offences of omission.[33]

However, Meggitt points out that the stated penalties are in effect the maxima: people sympathetic to the offender may plead for a lesser punishment. They do not deny his offence, because this is usually patent, but they sometimes put forward what whites would describe as mitigating circumstances. However, it may also happen that aggravating circumstances are referred to, so that an offender's reputation, rather than his present behaviour, may require that a more severe penalty be inflicted upon him.

Eggleston distinguished between three different attitudes that a tribe may adopt towards the retaliation by a victim or his relatives towards someone who has wronged him. Firstly, the retaliation may be justified, in which case the tribe would take no action against the actor, whatever view is taken by Australian criminal law. Secondly, the retaliation may be obligatory, in which case the "actor" himself would be guilty of an offence if he failed to regard his obligation. Thirdly, the retaliation may be unjustified,[34] in which case the tribe will probably punish the offender, even though he suffers some penalty for his infringement of Australian criminal law. Eggleston explained that it may well be the case that the tribe considers that Australian law affords little satisfaction to the aggrieved party. However, the present writer must observe that in the Northern Territory at least, a Judge of the Supreme Court has been known to appeal to the defendant's tribe not to exact retribution because he has already been the subject of penalty in a white man's court.[35]

After an interesting discussion of the informal ways in which tribal law may be taken into account in criminal proceedings,[36] Eggleston weighed the arguments for and against Australian courts recognizing tribal law. In favour of such recognition, she made the following points. Firstly, it is unjust for the Aboriginal defendant who is ignorant of the white man's law and who acts in accordance with tribal law to be subjected to ordinary punishment in criminal courts.[37] Secondly, it is equally unjust for the Aboriginal defendant who has acted under tribal obligation to be convicted and dealt with

by a criminal court. Thirdly, justice is not even afforded to the Aboriginal defendant whose conduct constitutes a breach of tribal and Australian law, because he is liable to be punished twice. To these arguments, a rather negative one one could be added, namely, that to punish an offender unjustly, or even twice, may create in him and his kinship group such a strong sense of resentment that a general attitude of hostility and aggression may be fostered. rather than a determination in future to comply with the law or laws that have been transgressed. Against recognizing tribal law, Eggleston considered the following arguments could be raised. Firstly, the criminal law has an educative function and can deter conduct that is condemned by most societies. As an example of the combined effect of the criminal law and the influence of missionaries and others at Ernabella, Eggleston cited the fact that infanticide has almost totally died out among the Pitjantjatjara. Secondly, it is sometimes argued that it can be divisive to recognize more than one legal system in Australian society. Thirdly, it is contended that there is a need not only to protect Aborigines from Aborigines but also whites from Aborigines. Fourthly, it is sometimes suggested that the function of the criminal law is to keep the peace by removing the temptation of private revenge. To this argument, Eggleston understandably replied that revenge can hardly be described as private, especially when it is socially sanctioned by the tribe. And in any event, the intention to retaliate in no sense disperses merely because of the action of a criminal court. Fifthly, it is argued that if people (i.e. Aborigines) are protected by the criminal law, they must also be subjected to it. This argument, Eggleston observed, is only valid if Aborigines really look to the criminal law for protection.

After considering all these arguments, Eggleston reached the conclusion that the injustice of failing to recognize tribal laws outweighs all other considerations. However, she accepted that there are, of course, problems in implementing a policy of recognition. Firstly, it may not be easy to determine whether the tribal law in any way impinges on the Australian law, and if so, the exact terms of the tribal law. Also, courts will have to respect the desire of many Aborigines to maintain tribal secrets[38] and this may involve taking some evidence *in camera*. Eggleston pointed to the need for more qualified interpreters to be used in court and for anthropologists to be called as expert witnesses.

Assuming that more radical reform in the nature of the establishment of tribal courts is impracticable, is deferred or is introduced with limited jurisdiction only, the present writer supports the view

that Australian courts should, where possible, recognize tribal laws, particularly in cases where the defendant has been under some obligation to behave in the manner that gave rise to the criminal charge. However, she believes that the Australian courts should not be seen to condone retaliation against the defendant, which will itself constitute a further breach of Australian criminal law. Rather, she believes that anthropological evidence should be heard first, as to the attitude of the defendant's tribe towards his conduct, and secondly, as to the nature of possible retaliation against him and the likelihood that it will be taken. If the evidence indicates that the tribe tolerates, or even encourages, the behaviour that gave rise to the charge, the Australian court should treat the matter as mitigating. In some circumstances, this should lead the court to dismiss the defendant without penalty or with a nominal penalty only. If the evidence indicates that the defendant's tribe also proscribes the conduct that gave rise to the charge, and the victim or his family will be obliged to retaliate whatever attitude the Australian court takes, the court should regard the matter as mitigating, but should expressly dissociate itself from condonation of any retaliation that would itself constitute a breach of Australian criminal law. However, if possible, the Australian court should strive to enlist the co-operation of the defendant's own community and persuade its members not to exact extreme retaliation.

In fact, Western Australia has in the past had a formal means by which tribal law could be taken into account in determining penalty. Between 1936 and 1954, legislation was in force that established courts of native affairs.[39] Such a court had jurisdiction in respect of any offence committed by a native against another native and was constituted by a special Magistrate and a protector nominated by the Commissioner of Native Affairs. Section 59D(3) provided that the court "may ... take into account in mitigation of punishment any tribal custom which may be set up and proved as the reason for the commission of the offence". Section 59D(2)(c) provided that the "Court shall if practicable call to its assistance a headman of the tribe to which the accused person belongs".

Eggleston had the opportunity, in the course of her research, of examining the Native Court Evidence Book covering the period 1947 to 1952 in respect of the Native Court at Broome, Derby and Hall's Creek. During that period, six cases were heard by the court and on each occasion, the court was constituted by the Resident Magistrate and another member, who in some cases was a Justice of the Peace. From Eggleston's study, it appears that in three cases,

tribal law was treated as mitigating and in three, it was not. In three of the cases, evidence was taken from an elder or headman, but in one of them, his evidence was only taken after there had been a finding of guilt.

Eggleston made some significant criticisms of the legislation. She observed that it did not make clear the capacity in which the headman was supposed to act, whether as an assessor, a witness for the defence, or in some other way. In one of the cases recorded in the Evidence Book that she examined, the headman had been called as a witness for the defence and the prosecution called different evidence concerning the tribal law. Further, Eggleston notes that at least one anthropologist[40] would argue that the view of a man describing himself as a "headman" may in fact be partisan. He, himself, has kinship affiliations. In her other criticisms of the legislation, Eggleston to some extent followed Elkin.[41] He had already pointed to the fact that the court had extremely wide jurisdiction in view of its constitution and could even pass a death sentence. Also, the poor wording of the Act created doubts concerning rights of appeal.

The legislation establishing Native Courts was repealed in 1954. Eggleston concludes her consideration of the legislation with a plea that if a similar statute is contemplated in the future, her criticisms should be met. However, there is probably little pressure these days for the establishment of such courts. A more extreme measure may well be mooted, namely that Aborigines be given exclusive jurisdiction to deal at least with certain offences committed by their own people. Misner, in his recent article, considered this possibility in relation to Aborigines in the Northern Territory and he compared native justice in America with the movement for it in this country. Whereas the Indian nations in the United States have been described by the Court of Appeals as "quasi-sovereign",[42] a contrary ruling was made in relation to Aborigines in *R. v. Murrell*.[43] Gradually, however, the United States Congress has whittled away the sovereignty of the Indians and now tribal courts only have jurisdiction to impose a fine of up to $500 or imprisonment for six months, or both, in respect of any one offence. According to Misner, there were a number of historical, jurisprudential, anthropological and social reasons for the corrosion of the sovereignty of the American Indians, but one major problem was the co-existence of different standards of justice within the one country. If exclusive jurisdiction is ever granted to Aborigines in respect of offences committed by their own people, a similar problem will be encountered. Indeed, it may seem incongruous, in a decade that is particularly and in-

creasingly sensitive to the need for open courts, legal representation, fair trials and humane punishments, to consider granting jurisdiction to Aboriginal tribunals, to whom notions of "due process" are entirely foreign. On the other hand, the white community in Australia may well ask itself what moral right it has to impose its own rules on a race that in the past, has been well able to regulate the conduct of its members in accordance with its own laws and customs.

(b) Aborigines who have lost their tribal affiliations

It cannot be assumed, of course, that the loss of tribal affiliation is necessarily voluntary, in the sense that the individual has a free choice between two or more realistic courses of action. Many of the Aborigines who have drifted towards the cities and country towns have done so for family, economic or social reasons. It is by no means unknown for an Aborigine to be removed from his usual home to undergo imprisonment, and at the expiration of his sentence, to be unable or unwilling to return. An increasing number of part-blood Aborigines have experienced nothing except an urban existence. While it would be easy to suggest that Aborigines who have chosen a European life-style should be treated as though they had renounced tribal life, such an argument would be based on the fallacy that the adoption of such a life-style, albeit in a deprived and impoverished form, is a matter of choice.

In the circumstances, it is suggested that no conclusion about the strength or weakness of tribal affiliations should be drawn solely from the fact that a defendant, who has been charged with a criminal offence, apparently comes from an urban area or a country town. Rather, the court should treat each case on the individual circumstances and should form its own view of whether the defendant has been influenced by, or will be subject to, penalty at the hands of his own tribal community. If the court forms the opinion that there has been no such influence and there will be no such retaliation, there seems no justification to treat the Aboriginal defendant differently from the white.

NOTES

1. See Margaret Martin, "Aborigines and the Criminal Justice System: A Review of the Literature", Report to the Department of Corrections, roneoed (Perth, 1973), p. 2.
2. Criminal Law and Penal Methods Reform Committee of South Australia, First

Report, *Sentencing and Corrections* (Adelaide: Government Printer, 1973), p. 203.

3. See Gordon J. Hawkins and Robert L. Misner, *Restructuring the Criminal Justice System in the Northern Territory*, Submission to the Minister for the Northern Territory, 1973-74 (Canberra: Department for Aboriginal Affairs, 1974); and Robert L. Misner, "Administration of Criminal Justice on Aboriginal Settlements", *Sydney Law Review* 7, no.2 (1974), pp. 257-83.
4. See Chapter 7 of this Report.
5. Martin, *Aborigines and the Criminal Justice System*, p. 6.
6. It seems likely that this observation is related to the offences that Aborigines commit: sentences for offences against good order are often short-term. See also Catherine E. Dengate, "Prison System of Western Australia", Penology Monograph no.6, roneoed (Canberra: Faculty of Law, Australian National University, 1975), p. 9.
7. Western Australia. Royal Commissions. Aboriginal Affairs, *Report of the Royal Commission into Aboriginal Affairs, Western Australia, July 1974* (Perth: Government Printer, 1974), p. 364.
8. Ibid., p. 376.
9. Dennis Chapman, *Sociology and the Stereotype of the Criminal* (London: Tavistock Publications, 1968), pp. 56-7.
10. Elizabeth Eggleston, "Aborigines and the Administration of Justice", (Ph.D. thesis, Monash University, 1971), p. 421. However, she was swift to observe that in some respects Aborigines find themselves in a favoured position. See, for example, p. 254 *et seq*.
11. The first defendant claimed to be seven years younger, the second, five years younger and the third, two years younger.
12. 26, 58 and 29 respectively.
13. The Full Court evidently had it in mind that probation would be useless without a residential order being made and there was no suitable institution for the appellants.
14. Unreported decisions of appeals, dealt with together, of Jackson C.J., Burt and Wickham JJ., Nos. 26, 28 and 29 of 1974, at 4-5.
15. [1970] W.A.R. 70; and see also *Abraham* v. *Slater* (Unreported decision of Virtue J.), No. 35 of 1967, at 71-2.
16. Unreported decision of Jackson C.J., Burt and Wallace JJ., No. 210 of 1974.
17. Unreported decision of Jackson C.J., Burt and Wallace JJ., No. 195 of 1974.
18. Criminal Law and Penal Methods Reform Committee of South Australia, *Sentencing and Corrections*, pp. 208-11. It appears that the proposals suggested by the South Australian Committee have some support from the Chief Justice, Sir Lawrence Jackson. See *West Australian*, 7 June 1975, concerning comments made by his Honour when considering an appeal against conviction and sentence for being an habitual drunkard by Reginald Malcolm Wicker.
19. See also *Aboriginal Affairs Planning Authority Act* 1972, Section 48.
20. Paul Albrecht has made some interesting observations about drunkenness among Aborigines at the Fink River Mission. He expresses the view that it is not a physical condition that makes it impossible for an Aboriginal to stop drinking once he has started; rather, those who drink do so for the very purpose of getting drunk. The reason for their motivation is that the state of drunkenness allows one, according to cultural norms, to act irresponsibly and to flout accepted behaviour patterns with impunity. It is rare for disciplinary action to be taken against a drinker who is indulging in unacceptable behaviour, unless he begins to divulge sacred knowledge or makes disparaging remarks about "men's business". Paul

Albrecht, "Aborigines and Alcohol", *Newsletter on Aboriginal Affairs*, no. 4 (1975), pp. 12-16, at 14.

21. Unreported decisions of Wolff C.J., Nos. 84, 85 and 86 of 1967. The victim's ethnic origin does not appear in the record of the case, but the writer was advised of it by a Magistrate who sat at Carnarvon.
22. See p. 140 of this Report.
23. Unreported decision of the Court of Criminal Appeal over which Wolff C.J. presided (names of other Judges not recorded), 7/4/65.
24. Unreported decision of Jackson C.J., Virtue S.P.J. and Jones J., No. 8 of 1974, at 3.
25. Unreported decision, 8/4/70.
26. Unreported decision, 21/12/73.
27. In the case of *R.* v. *Fazeldean*, this was explicitly stated on sentence. In the case of *R.* v. *Ferguson*, the information was conveyed in a letter dated 26/9/75 to the present writer from Judge Heenan.
28. *R.* v. *Ferguson*, (Unreported decision), 8/4/70, at 2-3.
29. Henry P. Schapper, *Aboriginal Advancement to Integration: Conditions and Plans for Western Australia* (Canberra: A.N.U. Press, 1970), p. 141.
30. For a more detailed discussion of the problems that arise from the need to reconcile a centralist legal system with a pluralist society, see M.W. Daunton-Fear and A. Freiberg, "'Gum Tree' Justice: Aborigines and the Courts", in D. Chappell and P. Wilson (eds.), "Australian Criminal Justice System", 2nd edn (Sydney: Butterworths, in press).
31. Eggleston, "Aborigines and the Administration of Justice", p. 380 *et seq.*
32. M.J. Meggitt, *Desert People* (Sydney: Angus & Robertson, 1974), p. 256.
33. Ibid., p. 258.
34. As, for example, where the wrong weapon is used, such as a club instead of a spear.
35. *R.* v. *Puruntatameri* (Unreported decision of Forster J.,) S.C.C., No. 104 of 1974.
36. For example, in constraining police to exercise discretion in favour of an Aborigine, or the Crown to enter a *nolle prosequi*, or the jury to return a verdict of not guilty.
37. The fact that the maxim *ignorantia juris haud excusat* often operates against white people in no way diminishes the strength of Eggleston's argument.
38. *R.* v. *Gibson* (Unreported decisions of Bright J. (S.A.)), Nos. 1809 and 1810, 2/11/73.
39. *Aborigines Amendment Act* 1936.
40. L.R. Hiatt, *Kinship and Conflict* (Canberra: A.N.U. Press, 1965).
41. A.P. Elkin, "Aboriginal Evidence and Justice in North Australia", *Oceania*, 17, no. 3 (1947); 173-210 at p. 205 *et seq.*
42. *Groundhog* v. *Keeler* 442 F.2d 674 (1971), cited by Misner, "Administration of Criminal Justice on Aboriginal Settlements".
43. (1836) 1 Legge (N.S.W.) 72.

9

Special Issues

I. MENTALLY DISORDERED OFFENDERS

If an offender has been convicted in Western Australia of an offence and the court considers that some form of custodial care would be appropriate, it has a very limited range of choice. Either the court must send the offender to prison or to an institution established under the *Convicted Inebriates' Rehabilitation Act* 1963-1974.[1] The court has no power to make a hospital order[2] in respect of the offender and in the circumstances, it is not surprising that courts have perceived Section 662 of the Criminal Code as affording an opportunity for the most suitable disposition.[3] If it is appropriate to place an offender on probation, of course, a court may always make an order under Section 9 (6) (a) of the Offenders Probation and Parole Act, but the court may feel that such an order would be a waste of the probation service's time. Once a prison sentence has been imposed, the Director of the Department of Corrections has authority to order that the offender be removed to a mental hospital under Section 54 of the *Prisons Act* 1903-1971, but such a decision is an administrative one and as such is beyond the jurisdiction of the courts. However, it should be observed that neither the Prisons Act nor the *Mental Health Act* 1962-1973 makes clear the position of a patient who has been transferred from prison on the expiration of his sentence. Section 54 of the Prisons Act states that during treatment, the patient is deemed to be under the legal custody of the gaoler of the prison from which he was removed. This implies that his sentence is not suspended and it would appear he should be released upon its expiration. However, the matter requires legislative clarification. As a matter of practice, it appears that prison authorities "discharge" the offender from gaol at the expiration of his sentence. Whether or not the offender continues to be detained in the hospital will depend upon the terms of his admission.

2. ALCOHOL AND DRUG ADDICTS

There are special statutory provisions that relate to convicted alcoholics. These are contained in the Convicted Inebriates' Rehabilitation Act. In Section 3 of that Act, an inebriate is defined as "a person who habitually uses intoxicating liquor to excess".

The power to make an order under the Act exists in summary[4] and higher courts, and arises where the court finds that drunkenness was an element or a contributory cause of the offence. In such a case, the court may order that the offender resides in an institution for convicted inebriates for a period not exceeding twelve months. The number of admissions and the number of individuals to whom the admissions applied, between 1963 to 1974, are shown in Table 1. If the offence of which the convicted inebriate has been found guilty was dealt with on indictment, the court may impose any other penalty that it is entitled to order, in addition to the one under the Act. If the other penalty so ordered be imprisonment, Section 4(2)

Table 1. Western Australia: Commitments to Inebriates' Institutions, 1963–64 to 1973–74

Year	Daily Average	Inebriates' institution	Persons received	Distinct persons
1963–64	32.09	Karnet	65	63
1964–65	35.24	Karnet	66	65
1965–66	40.33	Karnet	76	74
1966–67	44.90	Karnet	109	108
1967–68	54.10	Karnet	81	81
1968–69	43.30	Karnet	84	83
1969–70	50.90	Karnet	108	107
1970–71	47.77	Karnet	110	108
1971–72	27.00	Karnet[a]	48	47
	4.53	Byford[a]	54	54
1972–73	22.26	Byford	95	89
	17.00	Karnet	–	–
1973–74	23.73	Byford	78	74
	2.00	Karnet	–	–
	12.26	Barton's Mill	–	–

a Until 20 April 1972, Inebriates were committed direct to Karnet. From 21 April 1972, all committals passed through Byford, whereupon Karnet Inebriates' Section became a sub-centre of Byford until 5 August 1973. From 6 August 1973, Barton's Mill Inebriates' Section replaced Karnet as a sub-centre.

requires that the gaol term be served before the period in the inebriates' institution. Unless the court sees fit to dispense with the requirement, the court shall require the production of the certificate of a medical practitioner to confirm that the offender be an inebriate. The court also has power to appoint some other person to "inspect and report on" the offender, in order to satisfy itself about his condition.

Under Section 9 of the Act, the court that ordered the offender to be placed in an inebriates' institution may vary the order by reducing the period of detention or by permitting the trial release of the offender, subject to any conditions it sees fit. The variation order may be rescinded if the court finds the offender is in breach of any of the conditions under which he was released.[5]

The court that made the original order also has power, on the application of the Director of the Department of Corrections, to rescind the order committing the offender to the institution, if it is satisfied that he is resisting his clinical treatment.[6] In such case, the court has power to impose such punishment, or further punishment, as it could have imposed if the order had not been made. The Act does not make it clear whether the offender has a right of audience and legal representation before a court to whom the Director has applied for an extension. Clearly, the offender should have such rights, for his freedom is in jeopardy. Further, the Act does not limit the number of extensions that could be made and it is suggested that this factor renders it all the more urgent that the rights of the offender to audience and legal representation be scrupulously safeguarded.

The original period of twelve months may be extended by a further twelve months if the Supreme Court or a Judge, on the application of the Director of the Department of Corrections, deems that such extension is in the interests of the rehabilitation of the offender.[7] In extending the period, the court or Judge may direct that the offender be released on trial, as under Section 9.

Section 6 originally provided for the establishment of an Inebriates' Advisory Board, comprised of two psychiatrists and a welfare officer, the function of which was to oversee, advise and assist in the clinical treatment and the rehabilitation of convicted inebriates. However, since 1974, the Board has been abolished and its functions have now been taken over by the Alcohol and Drug Authority, which was established by the *Alcohol and Drug Authority Act* 1974. The Authority consists of four members appointed by the Governor, at least one of whom must be a medical practitioner.

In only one of the cases considered for the purposes of the present Report was an order made under the Convicted Inebriates' Rehabilitation Act. In *Cameron* v. *R.*, the applicant was convicted of unlawful wounding and had a long record of petty offences, most of which were associated with alcohol. The court below had imposed a term of two and a half years' imprisonment on him, but the Court of Criminal Appeal reduced this term to twelve months and, in addition, ordered that the applicant be placed in an institution under the Convicted Inebriates' Rehabilitation Act for a period of six months. The Court of Criminal Appeal remarked that the case was one that called for an order under the Act, "following a sentence appropriate to the crime and to the circumstances of the offender". The court continued:

> It is important that the provisions of this Act should not be overlooked by courts when sentencing persons who have the misfortune to be habitual inebriates. Not only does it provide for the treatment of the inebriate in a special institution, but it brings him within the purview of an advisory board ... [8]

The court was not confident that the period of six months would necessarily be adequate for full rehabilitation, but was content to leave it to the appropriate authority to apply for an extension of the order if necessary.

Although the Convicted Inebriates' Rehabilitation Act appears to provide courts with a welcome alternative to the restricted types of orders they may make in respect of offenders, the Act may only be used in a limited way. Firstly, a summary court may only use the Act if the court comprises a Stipendiary Magistrate: Justices of the Peace have no power to make orders. Secondly, there is no institution under the Act that accommodates women and thirdly, and perhaps most importantly, it does not apply to drug addicts, with the inevitable consequence that these offenders are often imprisoned. Clearly, treatment within a prison environment has less chance of success than treatment in a specially established institution, and it appears that drug addicts in Western Australia suffer a considerable disadvantage in terms of facilities available for them.

It is to be hoped that some of the inadequacies of the Convicted Inebriates' Rehabilitation Act will soon be remedied. One of the functions of the new Alcohol and Drug Authority, which was established by the legislation in 1974, is:

> to inquire into the respective provisions of the laws of this State with respect to offences in which the use of alcohol or drugs, or both, is an ele-

ment, and with respect to the penalties for those offences, to consider the desirability or otherwise, in the community interest, of repealing or modifying any of those provisions, and to make such recommendations thereon to the Minister and the Attorney-General as the Authority thinks fit.[9]

Notes

1. See p. 208 of this Report.
2. In *R.* v. *Fraser* (Unreported decision of Wickham J.), 25/9/75, the Judge had occasion to draw attention to the paucity of the Supreme Court's powers in relation to offenders requiring mental treatment.
3. See, for example, *Schmidt* v. *R.* (Unreported decision of Nevile, Hale and Burt JJ.,) 2/5/69 and *Bello* v. *R.* (Unreported decision of Wolff C.J., Virtue and Nevile JJ.), 5/12/67.
4. Provided the summary court consists of a Stipendiary Magistrate. See p. 210 of this Report.
5. Section 9.
6. Section 10.
7. Section 11.
8. Unreported decision of Jackson C.J., Virtue S.P.J. and Lavan J., 19/11/71, at 1.
9. *Alcohol and Drug Authority Act* 1974, Section 18(g).

Appendix A

Prison Establishments and Facilities: Western Australian Department of Corrections

1. ESTABLISHMENTS BRANCH

The Establishments Branch of the Department of Corrections is responsible to the Director for running the institutions that are staffed by the Department, and for maintaining Police Gaols at East Perth, Marble Bar and Onslow. Details of Department institutions in terms of location and facilities are listed in Table 1 on pages - .

Notes on facilities

Denoting an institution as "maximum" security indicates the provision of armed perimeter guards on a twenty-four hours per day basis. "Medium" security indicates the provision of certain limited security arrangements, so that the prison is secure at night but "semi-secure" during the day. "Minimum" security denotes an "open" institution at which inmates are not locked in at night and there are no physical barriers to absconding. Minimum and medium security institutions may have a secure block for occasional use.

In comparison with other states of Australia, Western Australia has a high proportion of inmates in minimum security. The figures for the years 1969-70 are as follows:

State	*Daily average in minimum security*	*% of total daily average*
Qld	92	7.98
N.S.W.	851	21.52
Vic.	658	28.82
Tas.	72	20.57
S.A.	133	14.92
W.A.	592	51.11

The high proportion of regional institutions reflects in part the demographic characteristics of Western Australia, but there are many advantages in localized, less security-oriented institutions. A less-restrictive environment, together with opportunities for productive employment, lessen the demoralizing aspects of institutionalized prison life. Localized institutions mean that offenders can maintain community and family ties and that this decrease in social estrangement aids more successful reintegration on release.

The material in this Appendix has been compiled by the Department of Corrections of Western Australia for use in this Report.

Many institutions are involved in community work through work parties for pensioners, public buildings, local hospitals and other community projects. The work release programme, begun in 1970, has also widened community involvement in corrections and is aimed at increasing the likelihood of successful social and employment adjustment on release.

Facilities, security arrangements, vocational and educational training and other facets of the programme vary at different institutions, both from planned policy and in adaptation to the local conditions.

Both maximum and minimum security institutions emphasize the positive functions of employment within prison. As well as the therapeutic aspects of productive employment and the provision of vocational training, the institutional industries also reduce the cost of correctional services and encourage increased self-sufficiency of prisons.

The majority of institutions possess workshops, with qualified instructors in attendance. In all country institutions, some types of gardening, husbandry and farming are undertaken. Manufactured articles from workshops and primary produce are used mainly for the internal needs of an institution, but many goods are also supplied to other institutions within the Department.

A large proportion of prison populations is engaged in maintenance, construction, cooking and cleaning duties. In this way, all prisons are self-sufficient in labour for up-keep and maintenance.

2. CORRECTIONAL PSYCHIATRY BRANCH

The first psychiatric service available within the prison system was provided by the Forensic Division of the Mental Health Services. As the workload grew, this Division was transferred to the Prisons Department and formed the nucleus from which the Correctional Psychiatry Branch and the Psychology and Research Section of the Treatment and Training Branch developed. At present (1975), the Correctional Psychiatry Branch comprises a psychiatrist-superintendent and one other full-time psychiatrist.

As a referral service to the courts, the branch psychiatrists examine remanded inmates and submit psychiatric reports. Reports on other referred inmates are also submitted to the Classification Committee, the superintendents of institutions and the Probation and Parole Department. These functions place a heavy work load on the Branch.

It has been estimated that a significant proportion, perhaps 10 to 15 per cent, of the prison population in Western Australia suffers from emotional or mental disorders requiring psychiatric care. Many of these would require hospitalization and facilities that are not available in a prison setting. Security and other management problems make the selective treatment of disturbed inmates difficult. When security demands permit, the more severely disturbed inmates are transferred to Graylands Hospital, operated by the Mental Health Services.

Considering an average daily inmate population of up to 1,500, only limited psychiatric services can be provided within institutions. Inmates from regional institutions requiring psychiatric attention are often transferred to Fremantle, or in some cases sent to Graylands Hospital.

3. TREATMENT AND TRAINING BRANCH

This Branch is responsible for a diversity of functions relating to the welfare and treatment of inmates and the selection and training of prison officers. It has four sections:

(i) Social Work and Welfare Section

The Department currently employs one senior social worker, eight social workers, one senior welfare officer and seventeen welfare officers under the guidance of a social work supervisor. Activities of the Social Work and Welfare Section can be broadly defined within three areas, combining traditional casework and welfare work, and a more community-oriented approach to social problems associated with corrections.

The first function of social workers and welfare officers is concerned with obtaining information about the social backgrounds of inmates. Recommendations are then made on inmates' applications for aid, work release, counselling, compassionate leave or "special considerations" to the Classification Committee.

The second important function of the Section is that of a referral service, where requests for aid come from the individual inmate, his family, psychologists or psychiatrists. In this function, the roles of social worker and welfare officer are complementary in serving the psycho-social needs of inmates, before and after release, and their families.

Welfare officers, some of whom are stationed permanently at several metropolitan and country institutions, attempt to interview all inmates soon after their admission and prior to their release, as well as on request during their sentence. They are concerned with the immediate, short-term, often material needs of inmates and their families (e.g. accommodation, housing, clothing and employment).

The functions of social workers tend towards longer involvement with inmates and families. Research into the family social background and family counselling is undertaken to enhance the ability of the persons involved to cope with the stresses and crises of living and problems centred around the prison experience.

Thirdly, the increasing orientation of the social workers has been towards involvement with the community aspects of prison welfare or the "broader social ramifications of the penal system". The community work programme involves initial identifications of existing problems such as juveniles in prison, geriatric prisoners, accommodation shortages, post-release facilities for Aboriginal prisoners, problems of released homosexual prisoners. Surveys are also made of existing voluntary groups and agencies dealing with these and similar problems. Attempts may be made to interest such bodies in working towards some solution of the problem, at the same time offering approved official support to such moves. By liaison with community organizations, it is hoped to increase their effectiveness, organization and support in the community, and at the same time broadening the sphere of social correctional welfare.

One of the most important projects undertaken by the Section is development and operation of a work release programme. This is a pre-release scheme in which offenders work in the community for a period of up to three months prior to their release. It is designed to achieve some pattern of work stability and to re-establish contact with the community, and especially the family. Other projects that the Section has helped to initiate and develop have been the creation of a Gambler's Anonymous Group and the development and supervision of the voluntary tutoring programme also previously outlined.

(ii) Social Work Student Unit

The Social Work Student Unit was established in November 1974, to provide a learning experience for social work students on placement within the Department of Corrections. The students are engaged in a social work course at either the University of Western Australia or the Western Australian Institute of Technology (W.A.I.T.).

Both of these educational institutions place students within the unit on an equal-time basis.

To date, fourteen students have worked within the Unit. It is expected that approximately twenty students will be placed within the Unit on an annual basis.

The Student Unit provides both a small group placement experience and individual placements within the Department. The learning experiences provided concentrate on the development of the student's social work practice skills and in gaining an understanding of the Department and the related welfare network.

(iii) Staff Training Section

In March 1970, the Staff Training School was transferred to Wooroloo Training Centre, at which stage residential promotional courses were introduced. These courses were administered by two uniformed staff members and were of three types: probationary officers', senior officers' and principal officers' courses. The beginning of 1972 saw the introduction of a co-ordinated training scheme, under the guidance and direction of a Board of Studies.

Since then, a position has been created for a senior education officer and two education officers with tertiary qualifications and teaching experience. 1975 saw the introduction of in-service information courses for senior members of the uniformed staff.

Training for probationary officers

Selection procedures consist of spelling, maths and psychological tests, followed by an interview. Probationary officers then undergo a twelve weeks' residential training course. The number of courses vary each year, depending on the required staff intake. The course combines intensive study with practical application, and during the twelve weeks, probationary officers spend a total of four weeks' placement at a major metropolitan prison and one of the country institutions.

Training subjects include Duties, English, Self-defence, Human Behaviour and First Aid. The courses are conducted by appropriately trained full-time staff. Other subjects of the course are designed to give officers knowledge and experience in all aspects of the correctional system, legal procedures, sentencing, administration, security and other duties and are undertaken by a lecturer with background as a prison officer. Further specialist topics such as Probation and Parole, Welfare and Work Release and Accounting Procedures are treated by visiting lecturers.

The course is designed to give the trainee a thorough knowledge of the working of the Department, and both theoretical and practical training in the work of a correctional officer.

Promotional training

After a period of nine months' service, inclusive of training and subject to the satisfactory reports by superior officers, a probationary officer joins the permanent staff. He is then eligible to work towards promotion through the promotional courses. The structure within the ranks of the uniformed disciplinary staff is:

Permanent officer
Senior officer
Principal officer (chief officer)
Superintendent (a Public Service position, not a uniformed rank)

Selection tests and interviews are held for those permanent officers wishing to embark on training courses for promotion. All promotional courses are residential,

lasting for five weeks each year. Courses taught are as follows:

Senior officer	
First year	Administration: Acts and Regulations
	Criminology
Second year	Principles of Supervision
	Social Control
Permanent officer	
First year	Law
	Government
Second year	Sociology
	Community Resources
Third year	Organizational Theory
	Government Finance

Wherever necessary, lecturers from the W.A.I.T. or the University of Western Australia are hired to teach these specialized courses.

The in-service information courses are designed to acquaint senior uniformed staff with the content of the probationary officers' training.

(iv) Psychology and Research Section

This Section has three broad functions:

(a) to provide psychological services within the Department;
(b) to provide research services both within the Department and to other people working in the field of crime and delinquency;
(c) to provide practical training for students in clinical psychology.

There are established positions for sixteen psychologists and clinical psychologists in the Section.

Psychological services

An out-patient style clinical service is provided to offenders within prison, offenders being supervised in the community (e.g. on probation or parole), and the families of offenders.

Referral: The referral of inmates in institutions or other offenders may be made as follows:

(a) *Self-referral*: Any offender may refer himself to a psychologist. At the time of referral, the offender need give no reason for seeing the psychologist other than the fact that he wishes to have a consultation.
(b) *Referral from reception history sheets*: All offenders received in any institution staffed by the Department go through a standard reception procedure, which includes the following questions:

Any illness or condition requiring psychological/psychiatric consultation?
Suffered any head injury causing unconsciousness *and* hospitalization?
Seen a psychologist/psychiatrist in last twelve months?
Ever been a patient in a mental hospital or psychiatric ward?

A positive answer to any of these questions generated an immediate referral for psychological evaluation.

(c) *Court referrals*: The court may, prior to sentence, request a psychological report as part of a pre-sentence report. If the offender is remanded in custody, a referral is made to the Section; if remanded on bail, referral may be to the Section or other appropriate agency. Upon sentencing an offender to imprisonment, if the court recommends psychological attention, then referral would be made to the

Section: if a non-custodial penalty is prescribed, referral may be to the Section or other appropriate agency.

(d) *Professional staff referrals*: Any professional staff of the Department or related agencies may refer an offender to the psychological service.

(e) *Administrative and custodial staff referrals*: any uniformed institutional staff or administrative staff may refer inmates for psychological attention.

Assessment: Assessment is a relevant part of referral in two areas: firstly, the institutional area, and secondly, the psychological treatment area.

(a) *Assessment for decision-making*: The psychologist may be asked to supply information to decision-makers within the Department for use in determining placement, educational and vocational opportunities for the offender. The information would be normally supplied in the form of a report, for example, a report to the Classification Committee, the Parole Board, the court, the Director of the Department or the superintendent. It is at the discretion of the individual psychologist whether any report written by him should be shown to the offender before it is sent to the addressee. Such discretion applies only to the psychologist's own report. The psychologist should not show the offender other reports on file and the inmate should not be given a copy of any report for his own use.

(b) *Assessment for treatment*: Many referrals received by the psychologist ask that an inmate be assessed, with a view to treatment. In these cases, the assessment is for the use of the psychologist and although recorded on the psychological file, is seldom written as a formal report, except in cases where referral is being made by the psychologist to a colleague.

(c) *Techniques of assessment*: The psychologist should use whatever assessment techniques he feels may be relevant to the case. This may include requesting behavioural reports on the inmate from appropriate uniformed staff.

(d) *Confidentiality of files*: When a psychological file is created on any offender, it is assumed that information on that file will be treated as confidential. In general, information would be released by the senior clinical psychologist only with the consent of the inmate. It should be noted that the limits of confidentiality are dictated by ethical standards only, there being no statute giving the psychologist privilege at law.

Treatment: Psychologists use a wide variety of individual treatment techniques, including psychotherapy, vocational and educational counselling, behavioural techniques, hypnotherapy, etc. Some group techniques are also used (e.g. group psychotherapy, family therapy). At present, institutional treatments (i.e. programmes involving the whole institution) are not used.

Wherever possible, psychological treatment is voluntary, i.e. the informed consent of the offender is obtained before commencing any treatment programme and the offender may withdraw from treatment at any time without any administrative penalty.

(a) *Research*:

The psychologists in the Research Section carry out research in several areas related to corrections and the criminal justice system. Some examples of current research projects include a literature review on problems relating to Aboriginal people and the criminal justice system, development of a rating schedule by which senior staff can report on probationary officers' job performance, a literature review on methods of evaluating correctional programmes, developing a questionnaire with which to evaluate community attitudes to ex-prisoners and research comparing employment patterns of prison inmates and people in the population at large.

In addition to these types of projects, the Research Section provides a research con-

sultant service to anyone working in the field of crime and delinquency and has established a correctional research library.

(b) *Training*:

The Section is involved in the post-graduate training of clinical psychologists studying at the University of Western Australia. Facilities are made available for students to undertake clinical work under the supervision of clinical staff in the department.

4. SPECIAL FACILITIES

(i) Education Facilities

As well as vocational training given in the specialized workshops, inmates are encouraged to undertake further education while serving sentences. All inmates are encouraged to undertake Technical Extension Service (T.E.S.) courses. Where possible, those taking correspondence courses are placed in single-room accommodation and/or given the use of study rooms and access to teaching staff where these are available. Study is to be done in the inmate's free time, usually in the evening, but assistance with courses may be obtained where full- or part-time teachers visit the institution.

Since 1973, a voluntary tutoring programme has been operating in the metropolitan area. This programme provides for inmates being tutored in a wide range of subjects from remedial reading and writing to diesel mechanics, on a one-to-one basis. The tutors are all selected volunteers from the community, the university, the W.A.I.T. and Teachers' Training Colleges. Inmates have responded well to the programme.

Voluntary tutors can be requested by a referral made by any departmental staff members who think that a particular inmate could benefit from the one-to-one contact. This could be because of the inmate's failure within the classroom situation in the past; because of the inmate's lack of schooling opportunities in the past, and the thought that he may be embarrassed by his standard of school work and thus avoid attending school; or because he is finding it difficult to cope with a subject he is doing by correspondence and which requires a specialist in that area to teach.

Library facilities are generally inadequate, books are in short supply and are mainly fiction. Exceptions are Fremantle and Bunbury, which use the services provided by the Western Australian Library Board. The Board supplies a collection of fiction and non-fiction, which are changed regularly. Books not available in the collection may be requested on inter-loan. Inmates attending an outside school or college have access to source material from associated libraries. In some cases, library material may also be made available from a local school or town library.

Day-school facilities are varied.

Fremantle

There are two full-time Education Department schoolteachers. A counsellor from the Education Department attends the prison school once a week, as does an art teacher from the T.E.S., but demand far exceeds the day-school facilities. The counsellor sees inmates referred on by the schoolteachers for enrolment in correspondence courses.

Attendance at school is not compulsory. However, all new inmates are interviewed by a schoolteacher. At this interview, inmates may request to be enrolled in a course. If the course chosen is to be done by correspondence, a further interview takes place with the counsellor from the Education Department. Books and other course requirements are obtained through the school and must be returned to the school at the completion of the course, or at the completion of the sentence, whichever comes first. The

headmaster of the prison school can give approval for an inmate to attend the school for up to two and a half days a week. If an inmate wants full-time school, he must approach the headmaster, who will assess whether the inmate's study-load warrants full-time school. If so, the headmaster applies to the superintendent of the prison for full-time school for the particular inmate.

Any inmate wanting to do some work in maths or English, but not wishing to enrol in a correspondence course, can do so.

Courses are available by correspondence through the T.E.S., the W.A. Correspondence School (W.A.C.S.), the W.A.I.T., the University, and migrant education. Inmates can work for the Achievement Certificate at either first- second- or third-year level.

Geraldton

A local schoolteacher visits three evenings a week, to teach illiterates and semi-illiterates and to assist those doing correspondence courses. Adult education courses are also available at the technical school and suitable applicants may attend classes there or at the local high school.

Attendance at the school is compulsory to juveniles (those under eighteen years) and to inmates who are illiterate. School is optional to the remainder. If an inmate wishes to enrol in a correspondence course, he must obtain the approval of the superintendent of the prison.

Bunbury

Bunbury has good educational facilities: study-room, including a classroom, a schoolteacher on the staff and access to good library material. Several trainees also attend evening classes at technical college.

Attendance at the school is not compulsory, but most trainees do attend. Trainees are interviewed by the schoolteacher, who discusses with them the school and courses that may be undertaken there.

Trainees may do work in maths and English at any standard. Trainees who do, go to school in groups of four to five, two to three times a week. Each trainee works at his own level within the group.

Courses may be studied through the T.E.S., the W.A.C.S. or the W.A.I.T. Achievement Certificate courses are available through the correspondence school.

In order to do some subjects through the T.E.S., it is necessary to have already achieved a certain standard in other subjects (e.g. to study Psychology I, the student must be able to prove he has passed fourth-year high school English). The T.E.S. issue a booklet listing available subjects. Subjects available include hobby subjects such as motor maintenance and ticket-writing, and work subjects such as welding and cartography. Leaving and Matriculation subjects can also be studied as well as tertiary level subjects, through the W.A.I.T. for example. These are only undertaken, however, when the necessary prerequisite subjects have already been achieved.

Any trainees who complete a correspondence course, either through the T.E.S. or the W.A.C.S., obtain a certificate from them.

As well as the full-time schoolteacher, trade instructors are available to help with trade courses. Assistance can also be obtained by sending queries to the T.E.S. or the W.A.C.S. if the course originates from one of these. Tutors at these centres will respond to the queries by post.

Bandyup

Facilities at Bandyup cover a wide range of activities. There is a library and a large school-room and a full-time teacher appointed. Apart from general interest classes at Bandyup, suitable inmates may attend classes at different technical colleges or schools. Voluntary tutors are also available to inmates at Bandyup.

Albany

Albany possesses a limited library and a schoolteacher visits one evening weekly. All inmates taking T.E.S. courses are placed in single rooms, where possible. Voluntary tutoring is now being established.

Broome

Facilities at Broome are very limited, with no provision for study-rooms or library. Native education literacy classes are held when there is sufficient demand.

Brunwsick Junction

Brunswick Junction Prison is visited by a schoolmaster one night a week. Attendance at school or the technical college in Bunbury can be arranged if there is sufficient demand.

Other institutions

T.E.S. courses are available at Wooroloo, Pardelup, Kalgoorlie and Karnet. The voluntary tutoring service is available for inmates at Wooroloo and Karnet. In this case, the inmates are transported to West Perth Work Release Hostel once per week to meet with the tutors.

Vocational guidance

The Psychology and Research Section offers a vocational guidance service based in Fremantle. Inmates are advised of this service and may refer themselves for evaluation. A close liaison is maintained with the Guidance Branch of the Department of Education.

The vocational counselling looks at two factors:

(a) the interests and abilities of the inmate, with respect to employment and training opportunities within the prison,
(b) interests and abilities, with respect to opportunities for employment or training upon release from prison.

In all cases, the inmate is advised of the results of any testing and the decisions regarding employment and training courses are left to the individual inmate.

(ii) Leave of absence from imprisonment

The provisions for special leave are contained in the Leave of Absence section of the Prison Regulations.

Work release programme

The reasoning behind the introduction of the work release programme in March 1970 was that by allowing inmates to participate in a pre-release work programme in the community, the rate of recidivism *may* be reduced. As such, the programme was seen as having a twofold purpose:

(a) to allow for the gradual return to, and establishment in, the community of those individuals who had served reasonably long periods of imprisonment;
(b) to attempt to cut across the offending—reoffending patterns of behaviour of a large segment of the prison population who have or who are developing extensive criminal histories.

The means by which the programme was designed to achieve these ends were:
(a) work stability (at least for a three-month period);
(b) the gradual re-establishment of social contact, particularly with the family;
(c) to ensure that upon release the offender was in employment and had sufficient capital to offset his or her immediate needs;
(d) to allow for a greater use of initiative and self-discipline in their day-to-day lives than is possible within a protective institutional existence.

To date, the programme has been regarded as successful in that over the past five years the absconding rate has remained at a static 3.5 per cent of the total participants in the programme, the drunkenness rate whereby work releasees have been removed from the programme for being under the influence or introducing liquor into an institution has remained at a static 4 per cent, and the total breakdown rate during the work release period has remained 10 per cent of the total number undertaking work release. From March 1970 to 30 June 1975, 1050 prisoners had undertaken work release in Western Australia.

From an economic point of view, the programme has been a success. Participants on work release are required to pay board ($14.00 per week), support their families and pay taxes. As such, the commitment of various government departments to offenders and their families (Corrections, Community Welfare, Social Security) is significantly if not wholly reduced.

Criteria for work release

In view of the limited facilities available for the operation of the programme, a set of criteria governing eligibility for inclusion in the programme was established. These criteria are:
(a) Inmates should serve six months in prison before being included in the programme. This does not preclude a prospective applicant from applying for work release before he has served six months' imprisonment.
(b) Unless special circumstances are evident, the maximum period on work release shall be three months.
(c) Some preference will be given to inmates who have family responsibilities.

It should be noted that the Classification Committee will consider any prisoner who applies for work release, regardless of the above criteria. In fact, if an inmate or his family are faced with exceptional circumstances, any or all the above criteria may be set aside.

Two other informal criteria operate in determining suitability for the programme. The first is that work release is granted to applicants as a "reward" for good behaviour while in prison. The second is that work release is granted as a pre-parole (or pre-release) trial period to prisoners who, by their pattern of offending or pattern of behaviour, indicate they are unable to cope in the outside community. This latter informal criterion is sometimes formalized by a specific request from the Parole Board to include a prisoner in the programme.

It is felt that both of these factors serve a useful purpose. However, a balance must be preserved. It is necessary that prisoners who exhibit good behaviour in prison must not be disadvantaged by too heavy an emphasis upon the use of the programme as a pre-parole (or pre-release) trial period.

Similarly, there is a tendency to exclude this latter category in favour of "good" prisoners. Hence the necessity to ensure some degree of balance between the broadly defined categories of prisoners on work release.

Selection procedure

In order that suitable applicants are selected for inclusion in the programme, the following procedure is adopted:

(a) The applicant makes written application to the Classification Committee through the superintendent of the institution in which the sentence is being served.
(b) The superintendent, the principal officer and the officer in charge of the applicant's work area submit reports as to the applicant's suitability.
(c) The application and reports are forwarded to the welfare officer/social worker at the institution. The welfare officer/social worker prepares a detailed report on the applicant's circumstances and suitability for the programme. This report is prepared on the basis of interviews with the applicant, the applicant's family, prison officers to whom the applicant is known and on other relevant information on file.
(d) If the applicant is serving a minimum term of imprisonment, his parole officer is required to submit a report on the applicant's suitability for the programme.
(e) The file with all reports attached is submitted to the Classification Committee, where a decision is made as to whether the applicant should be recommended to the Director for inclusion in the programme.
(f) The Director recommends to the Chief Secretary that he approve the application; with this approval, the applicant is allowed to undertake work release.
(g) Officers of the Social Work and Welfare Section responsible for the Work Release Programme ensure that the successful applicants are included in it. These welfare officers and social workers also ensure the day-to-day operation of the programme, with the security at work release centres being the responsibility of uniformed staff.

Conditions of work release

The conditions governing a work releasee are laid down in accordance with broad departmental policy. The overall consideration given is whether any activity the work releasee requests that he engage in is likely to have some positive effect upon his future. Visiting families or approved friends is the area that has most application to a majority of work releasees. Other requests such as playing sport, attending the movies, attending the beach or other places with their families, and requests to be permitted to consume alcohol or drive a motor vehicle are all considered on their merits. All work releasees are advised that they are not permitted to visit any place or undertake any activity not covered by the conditions of their leave of absence.

If they wish to visit any place or undertake any activity, providing it is reasonable, they are required to request in writing in advance. To date, all such requests have been considered by the Work Release Committee, comprising all welfare officers and social workers involved in the programme. This system is likely to be replaced by the proposed case conference system in the future.

The Work Release Committee (as with the proposed case conference) is a recommending body to the Director. A major function of the Work Release Committee is to ensure all requests are carefully considered in the light of the work releasee's progress, as well as existing departmental policy.

(iii) Summary

The work release programme expanded in October 1974 with the opening of the West Perth Work Release Hostel. There is no reason why the programme cannot operate from every institution in the state, apart from the necessity to ensure that work releasees are accommodated separately from other prisoners.

Over the past few months, the daily average number of work releasees throughout the state has been fifty-five. The objective of the Department is to have approximately 10 per cent of the prison on work release at any given time.

Special leave

The Director may, with the approval of the Minister, grant special leave to a prisoner under the following circumstances:

(a) for his welfare or the welfare of his family;
(b) to attend hospital for treatment;
(c) to attend an educational institution.

Inmates may apply, through the superintendent of the institution at which they are serving sentence, to the Classification Committee.

(iv) Assessment and orientation

In 1974, a decision was made to reorganize assessment of offenders and to expand the concept to include orientation of inmates. The re-designing of the programme came about as a result of a desire to decentralize assessment, increase the degree of participation by uniformed officers in the assessment process and also as a result of dissatisfaction with the previous programme.

Decentralization was considered necessary as correctional institutions in Western Australia are scattered throughout the state and the cost of bringing inmates hundreds of kilometres to a central assessment programme in the metropolitan area was considered prohibitive and very often served no useful purpose, as the inmate subsequently had to be returned to the institution from which he had originated.

With the previous centralized programme, the assessment process had been limited to a few assessment officers, with the result that the majority of prison officers had no opportunity to participate in a meaningful way. The intention of the present programme is to enable all interested officers to participate fully in assessment.

In designing the present programme a number of factors had to be taken into consideration:

1. There was to be a change in emphasis from the collecting of information *from* inmates to the provision of information *to* inmates, with a view to encouraging inmates to take upon themselves the onus of selecting the way in which they might most profitably serve out their prison sentence.
2. Despite this switch to orientation rather than assessment, the amount of information made available to the Department during assessment was to be increased—not necessarily through more intensive interviewing procedures but rather through supplying a format for assessment officers that would facilitate the recording of relevant information.
3. A system had to be developed that would permit the prompt and efficient disposal of new inmates, particularly short-term prisoners received at maximum security Fremantle Prison.
4. The information collected during assessment had to be in a format that permitted decision-making to take place on the basis of factors that were readily apparent.
5. Information collected during assessment had to be of value to the Department for forward-planning, policy-making, research and evaluative purposes.

6. The documentation to be used had to be suitable for use at all institutions throughout the state regardless of the correctional resources available.
7. The new assessment programme had to be compatible with the microfilm records system.
8. Assessment was to be an ongoing process, with reviews of inmates to be organized in such a way that they were (on a reduced scale) conducted along the same lines as the initial assessment.
9. Formal reviews had to be built into the programme and the programme and documentation was to be designed in such a way that amendments and improvements were possible with a minimum of disruption.

It should be noted that the procedures to be followed are entitled "assessment and orientation". This is not merely a name change for its own sake, but is intended to highlight the fact that the information gathered serves two primary purposes. The first is security and management, the second, the utilization of correctional facilities that the Department provides. It is envisaged that these correctional facilities should be made available to the inmate insofar as this is compatible with security requirements.

(v) Classification Committee

This Committee advises the Director on most matters relating to inmate's transfers, placement and leave applications. The Committee comprises senior staff of the Establishments and Treatment and Training Branches of the Department, together with a representative of the Probation and Parole Service. The Committee can therefore consider each matter from a wide variety of viewpoints, including those of uniformed staff, senior administrative staff, specialist staff such as psychologists and social workers, and the parole service.

The Committee meets weekly and, in most cases, the inmates involved are brought before the Committee in person, to present their point of view and to hear the Committee's decision. An inmate will routinely come before the Committee early in his sentence after his initial assessment and orientation programme has been completed. At this time, the Committee decides on his placement and sets a review period (not more than twelve months), after which they will see him again. In addition, the inmate can come before the Committee at either his own request (through the superintendent of his institution) or that of a staff member.

Table 1. Western Australia: Location and Facilities of Institutions staffed by the Western Australian Department of Correction, October 1975

Albany Regional Prison	
Situated	Approx. 8 km from Albany
Type	Medium security
Accommodation	Houses up to 62 inmates in single cells
Employment	Sheet-metal work, carpentry, leather work, cooking, mechanical, welding, fitting and turning, domestic work, gardening
Education	Technical Extension Service
Professional Services	Psychologist visits each month; psychiatrist, social worker, welfare office available on request
Recreation	Badminton, gymnasium, table-tennis, TV
Work release	Available

Visiting arrangements	Weekly, Saturdays, Sundays, public holidays, approx. half-hour between 9 a.m. and 12 noon; 1 p.m. to 4 p.m.
Public transport	Not available

Bandyup Training Centre

Situated	Approx. 29 km from Perth
Type	Medium security
Accommodation	Houses up to 78 inmates in single rooms
Employment	Cooking, clerical, domestic duties, gardening
Education	Technical Extension Service; Assistance given by a full-time teacher; part-time tuition available in music, painting, arts and crafts and remedial work
Professional services	Psychiatrist available on request; full-time resident psychologist and welfare officer; social worker visits on request
Recreation	Tennis, basketball, softball, table-tennis, yoga, reading, TV, films, quiz nights, cards
Work release	Available
Visiting arrangements	Saturday and Sunday, 2 p.m. to 4 p.m.; visits can also be arranged during the week, 9 a.m. to 4 p.m., by arrangement with superintendent; unsentenced prisoners can have visits on any day between 9 a.m. and 4 p.m.
Public Transport	Not available

Broome Regional Prison

Situated	In Broome town-site
Type	Medium security
Accommodation	Houses up to 76 inmates in 4-man cells
Employment	Domestic duties, cooking
Education	Technical Extension Service
Professional Services	Psychologists and welfare officers visit when requested
Recreation	Table-tennis, swimming, football
Work release	Available
Visiting arrangements	Weekly, Saturdays, Sundays and public holidays, 9 a.m. to 11 a.m.; 2 p.m. to 4 p.m.
Public transport	Not applicable

Brunswick Junction Prison

Situated	In the Brunswick Junction town-site
Type	Minimum security
Accommodation	Houses up to 25 inmates in single rooms
Employment	Market gardening, domestic duties, cooking
Education	Technical Extension Service
Professional services	Psychiatrist, Psychologist, welfare officer contacted on request; social worker visits on regular basis
Recreation	Swimming, cricket, darts, volley-ball
Work release	Available

Visiting arrangements	Weekly, Saturdays, Sundays and public holidays, 1 p.m. to 4 p.m.
Public transport	Not applicable

Bunbury Rehabilitation Centre

Situated	Approx. 11 km from Bunbury
Type	Minimum security
Accommodation	Houses up to 86 inmates in single cells
Employment	Continuity of apprenticeship; training in mechanics, panel-beating, spray-painting, cooking, carpentry, sheet-metal work, welding, gardening, domestic duties
Education	All phases up to assisting in W.A.I.T. and university studies; Technical Extension Service; full-time school-teacher co-ordinates studies
Professional services	Psychiatrist, psychologist, welfare officer, social worker visit at regular intervals
Recreation	Soccer, hockey, cricket, water-polo, tennis, basket-ball, athletics and gymnasium work supervised by physical training instructor
Work release	Available
Visiting arrangements	Weekly, Saturday, Sunday and public holidays, 2 p.m. to 4 p.m.; visits are also arranged each alternate Sunday at Fremantle Prison, between 2 p.m. and 4 p.m., for any inmate whose visitors cannot attend Bunbury
Public transport	Not available

Fremantle Prison

Situated	The Terrace, Fremantle
Type	Maximum security
Accommodation	Ideally, the prison houses 388 inmates in single cells and 20 patients in the prison hospital dormitory; from time to time, it has been necessary to accommodate more than one inmate in some cells
Employment	Printing, tailoring, boot-making, metal trades, carpentry, cement work, bread-baking, cooking, art work, maintenance work, domestic duties, gardening
Education	Technical Extension Service; Assistance given by full-time teaching staff; part-time tuition in occupational therapy and art
Professional services	Psychiatrists, psychologists, social worker, welfare officers on full-time basis
Recreation	Debating, gymnasium, tennis, volley-ball, quoits, darts, cards, chess, films, concert
Work release	Available
Visiting arrangements	Unsentenced inmates: daily visit; sentenced inmates: once weekly; weekdays, between 9.30 a.m. and 3.30 p.m.; approx. 30 minute visits
Public transport	Within easy walking distance from the shopping area

Geraldton Regional Prison	
Situated	Close to the centre of town of Geraldton
Type	Minimum security
Accommodation	Houses up to 140 inmates in dormitories
Employment	Welding, carpentry, mechanical, cooking, fishing, gardening, domestic duties
Education	Technical Extension Service; schoolmaster attends 3 evenings weekly
Professional services	Psychologist visits each month; psychiatrist, social worker welfare officer available on request
Recreation	Basket-ball, tennis, swimming, cricket, football, soccer
Work release	Available
Visiting arrangements	Saturday or Sunday, 2 p.m. to 4 p.m. weekly
Public transport	Not applicable

Kalgoorlie Regional Prison	
Situated	Near centre of Kalgoorlie town-site
Type	Medium security
Accommodation	Houses up to 48 inmates in dormitories, 6-man cells and 2-man cells
Employment	Gardening, domestic duties, orchard work
Education	Technical Extension Service
Professional Services	Psychologist visits each month; psychiatrist, social worker welfare officer available on request
Recreation	Darts, basketball, table-tennis
Work release	Available
Visiting arrangements	Weekly, Saturday, Sunday and public holidays, 2 p.m. to 3.30 p.m.
Public transport	Not applicable

Karnet Rehabilitation Centre	
Situated	Approx. 69 km from Perth
Type	Minimum security
Accommodation	Houses up to 86 inmates in dormitories, with limited single room accommodation
Employment	Mechanical, carpentry, cooking, butchery, bread-baking, shearing, dairy work, piggery work, general farm work, poultry work, market gardening, domestic duties
Education	Technical Extension Service; W. A. I. T. studies
Professional services	Psychologist full-time; welfare officer 3 days weekly; social worker 1 evening weekly
Recreation	Tennis, cricket, football, basketball, indoor bowls, chess, table-tennis, darts, swimming, pool, library, TV
Work release	Available
Visiting arrangements	Each Sunday and public holidays, 2 p.m. to 4 p.m.
Public transport	Not available

Pardelup Correction Centre	
Situated	Approx. 29 km from Mt. Barker
Type	Minimum security
Accommodation	Houses up to 60 inmates in single rooms
Employment	Carpentry, butchery, mechanical, cooking, bread-baking, shearing, dairy work, piggery work, general farm work; domestic duties
Education	Technical Extension Service
Professional Services	Psychiatrists, psychologists on request
Recreation	TV, indoor bowls, library, swimming-pool, darts, football, cricket tennis
Work release	Inmates approved for work release are transferred to a work release centre
Visiting arrangements	Saturday, Sunday and public holidays, 1 p.m. to 3.45 p.m.
Public transport	Not available

West Perth Work Release Hostel	
Situated	John Street, West Perth
Type	Minimum security
Accommodation	Houses up to 30 inmates in single rooms; pre-work release and work release and limited working inmate staff
Employment	Work release, domestic duties, gardening, cooking
Education	Technical Extension Service; other courses available to approved inmates (e.g. W.A.I.T., university, etc.)
Professional services	Psychiatrists and psychologists readily available; 2 full-time welfare officers and 1 full-time social worker
Recreation	Tennis, table-tennis, darts, swimming-pool, chess, reading, TV
Work release	Work release is normal function of this Hostel
Visiting arrangements	Weekly, Sunday visits, 2 p.m. to 4 p.m.
Public transport	Within easy walking distance from bus and train

Wooroloo Training Centre	
Situated	Approx. 60 km from Perth
Type	Minimum security
Accommodation	Houses up to 120 inmates; 30 single rooms for those doing long sentences or other special cases, the remainder live in 2-, 3- or 4-bed "wards"
Employment	Carpentry, painting, mechanical, engineering, butchery, cooking, gardening, clerical, domestic duties
Education	Technical Extension Service
Professional services	Resident psychologist and welfare officer; social worker makes regular visits; psychiatrist is available on request
Recreation	Football, cricket, basketball, table-tennis, use of gymnasium

Work release	Available
Visiting arrangements	Weekly, each Sunday and public holidays, 2 p.m. to 4 p.m.
Public transport	Visitors without private transport are collected from bus (M.T.T.) stop at Mundaring each visiting day and are returned there after visits in time to connect with return service

Wyndham Regional Prison

Situated	In Wyndham Port area town-site
Type	Minimum security
Accommodation	Houses up to 40 males in dormitories
Employment	Market-type gardening, domestic duties, cooking
Education	Headmaster of local school assists whenever needed
Professional services	All requests, if necessary, are channelled through head office
Recreation	Tennis, table-tennis
Work release	Inmates approved for work release can be transferred to a work release centre
Visiting arrangements	Weekly, Saturdays, Sundays and public holidays, 2 p.m. to 4 p.m.
Public transport	Not applicable

Roebourne Regional Prison

This institution will be opening shortly and information will be available at a later date.

Appendix B

Institutional Services of the Department for Community Welfare

The material within this Appendix has been taken from the 1974 Annual Report of the Department for Community Welfare of Western Australia. Photographs that appear in the Annual Report have been excluded.

INSTITUTIONS

The institutional services are an important aspect of the overall programme for the welfare of families and children. Their effectiveness is determined, to considerable extent, by the relevance they have to community needs and community resources and thus close contact with the community through preventive and after-care workers is considered essential.

Emphasis in child care is placed upon keeping the family together. Placement in an institution is not considered until other avenues have been fully explored. Even then, the aim is always to return the child to a family situation as soon as possible. For these reasons, the trend has continued during the past twelve months to make institutional programmes more flexible and to strengthen after-care services.

The institutional services may be grouped under five headings. Firstly, there are temporary care and assessment centres for the initial reception of children in need of care. Secondly, there are specialized treatment centres for those children whose problems cannot be entirely managed in the community. There are hostels and group homes for the care of older children who cannot live at home, and finally a range of ancillary services to support the institutional facilities.

Temporary care and assessment

Where circumstances necessitate the placement of children away from their present home, every effort is made to provide care without institutional placement. When this is not possible, or where a comprehensive assessment of the child and the situation is required, temporary placement in an institution is necessary.

The assessment procedures involve an appraisal of the child's adjustment in such settings as the family, the school, the community and in employment where relevant. Within the institutions, medical, psychological, educational and behavioural assessments are carried out, so as to provide a comprehensive picture of the child and his potential strengths and weaknesses.

The information gathered from the various sources is then used to plan the child's future placement, with due regard for the needs of the child, the family and the availability of community resources. Where necessary, treatment plans are formulated to deal with areas of difficulty indicated during assessment and, if possible, they are put into practice while the child is still in the institution.

Those who require a more specialized treatment programme may be transferred to a treatment centre. However, the majority of children return to placements in the community, where they are supervised by the Department's social workers and welfare officers.

The continued shortage of accommodation in foster homes, group homes, private board and other longer term placements creates a number of problems. Many children stay in temporary care longer than is desirable or otherwise necessary and it is difficult to use the assessment facilities to the best advantage.

During the year, there appears to have been little overall change in the characteristics of the children admitted with regard to age, sex and ethnic ratios. However, there are indications of a trend towards the admission of children with more specialized problems, especially in the younger age groups. Accommodation pressures continue to be exacerbated by children who must be held whilst serving default for unpaid fines.

BRIDGEWATER CHILD CARE AND ASSESSMENT CENTRE

Location and description

Duncraig Road, Applecross
Bridgewater is an "open" child care centre comprised of nine cottages on an 11-acre [4½-hectare] landscaped site, designed to harmonize with the suburb of Applecross, where the centre is located. The centre can accommodate up to 107 boys and girls.

Function

Short-term emergency care and assessment of children from three to eighteen years in a setting that as far as possible replicates family life. Children who have committed offences are not admitted.

Population characteristics

1. Admissions during year:

	Aboriginal	*Caucasian*	*Total*
Boys	64	134	198
Girls	92	209	301
Total	156	343	499

2. School/employment distribution:

Pre-school	17%
Primary school	43%
High school	27%
Working	13%

3. Length of stay:

Less than three months	431
More than three months	68

4. Reason for admission:

Temporary care		
Wards		108
Non-wards		165
	Sub-Total	273
Assessment		226
	Total	499

5. Placement on discharge following assessment:—
269 case conferences

	%
Parents or relatives	43
Foster placement	32
Treatment institution	6
Other institution	10
Other placement	8

During 1973-4, more primary school children were admitted than would be expected statistically; the distribution of other age groups did not change greatly. Consistent with all previous years, more girls than boys were admitted.

There has been a rise in the proportion of Aboriginal children admitted. This reflects an increased use of Bridgewater for the temporary care of children with handicaps rather than any social change. A significant proportion of Aboriginal children require specialist treatment for ear, nose and throat conditions and they are held in care until treatment is effected.

There has been an increase in the proportion of children returning home following assessment. This probably reflects the gradual impact of professional social work in the field and the introduction of the homemaker service. Fewer large families have been admitted, the trend being towards the assessment of individual children, followed by work with the family. This trend has also led to an increased number of non-wards being assessed, often in co-operation with the Princess Margaret Hospital for Children.

Contrary to prediction, there has been a general reduction in admissions since March 1974, a trend that reflects preventive work by field staff.

Assessment and treatment programmes

Assessment for planning is covered by the observations of group workers, formal testing and play observations by the psychologist and an investigation of family life by the social worker in the field. Medical and psychiatric consultants are available when necessary.

Treatment programmes at this Centre have the goal of adaptation to a normal family. The orientation is behavioural developmental, and most programmes are carried out by group worker staff under the supervision of psychologists. Programmes are continued into the family or foster family setting.

Liaison with specialist services in the community has been established. In the areas of assessment and treatment, parents and foster parents have been invited to several case conferences and family counselling within the institution has begun. These two developments are germinal, but results have been encouraging.

Developments: Current and proposed

Tennis and basketball courts and an oval have been developed and are being used daily. Indoor activities will be catered for by a proposed recreation centre for older teenagers, which is greatly needed, particularly during wet weather.

Camps and weekend activities have been arranged for most children, with the co-operation of the youth organiser. The support of Applecross and South Perth Lions Clubs has been particularly useful, with holiday camps at Dryandra Forest.

"Open Day" was not greatly publicized, but well attended. With the help of students and film societies, we were able to present a video of the workings of the institu-

tion and the Child Placement Service. A film of minor treatment research is planned for the Australian Psychological Society Conference in August.

The research on absconding has been analysed and is available for comment. Testing of other hypotheses relating to characteristics of children and placement has not yet begun, although this was planned for 1973- 4.

Schooling remains a problem to the institution. The inefficient solution of transporting children to their own schools in order to avoid unnecessary readjustments has continued. Schooling facilities on-site for children on remand and requiring assessment are urgently required.

MT LAWLEY RECEPTION HOME

Location and description

Walcott Street, Mount Lawley

The Reception Home is an "open" institution. It is based on a large older-style suburban home, which has been modified and extended to accommodate forty-four children. In addition to lawn and garden areas within the grounds, a large public park adjoins one boundary and is used for recreation and sporting activities.

Function

Facilities are available for the short-term care and assessment of up to twenty-two boys and twenty-two girls from seven to eighteen years of age who require institutional placement, but for whom a security institution is not considered appropriate.

Population characteristics

1. Admissions during year:

	Aboriginal	*Caucasian*	*Total*
Boys	119	203	322
Girls	88	118	206
Total	207	321	528

2. School/employment distribution:

Primary School	15%
Secondary School	58%
Employment	27%

3. Length of stay:

Less than one week	183
One week to one month	227
One month to three months	102
More than three months	16

4. Reason for admission:

Temporary care only	36
For replacement	226
Court action (charge, action or remand)	85
Assessment	167
Other	6

5. Placement on discharge:

Parents or relatives	38
Private board or foster parents	22
Institution or hostel	38
Other	2

The average age of children admitted was slightly over sixteen years and this represents a rise from the previous year. The trend towards an increasing proportion of boys admitted continued this year and it was also noted that they tended to stay for longer periods, in comparison with the girls.

More children were admitted for replacement than for any other reason. However, about half of these were transfers from other institutions, and if this is taken into consideration, the number admitted because of placement "breakdown" has decreased over the past twelve months.

Programme

The number of children receiving full assessment remained at the same level as the previous year. Although assessment has become an important part of the programme, the major commitment is still the provision of suitable care and interaction with the community while the children await placement. In addition to help given with employment and schooling, social activities, picnics, outings and visits are arranged. Considering the deprived background of many of the children, these activities often represent their first contact with some aspects of community life.

Current and proposed developments

In view of the increasing average age and the number of boys and girls needing employment, liaison with employers and potential employers has become very important. In the last year, employment was found for eighty-four children and one staff member is now involved full time maintaining contact with field staff and employers, for the purpose of arranging employment and accommodation.

LONGMORE REMAND AND ASSESSMENT CENTRE

Location and description

Adie Road, Bentley

Longmore is designed for maximum security and comprises one large building complex, with areas for administration, single-room accommodation and day-to-day activities. The activity areas are related to a large open courtyard and cater for a range of assessment situations, including recreation, craft activities, schooling and workrooms for woodwork, metalwork, cooking and sewing. At present, the Centre has accommodation for thirty-six boys and twenty-four girls. Major extensions were commenced during the year and when completed these will relieve chronic overcrowding by the provision of a further twenty-two beds, together with offices and activity areas.

Function

As the Department's assessment and diagnostic centre for teenage offenders, Longmore provides accommodation and facilities for boys and girls between thirteen and eighteen years of age for whom a security setting is considered temporarily necessary. It also acts as a detention centre for children held pending court appearance, those remanded for pre-sentence and others serving default for non-payment of fines.

Population characteristics

1. Admissions during year:

	Aboriginal	*Caucasian*	*Total*
Boys	301	986	1287
Girls	148	287	435
Total	449	1273	1722

2. School/employment distribution:

	%
Primary school	—%
Secondary school	27%
Employment	73%

3. Length of stay:

Less than one week	990
One week to one month	464
One month to three months	263
More than three months	5

4. Reason for admission:
Almost all children admitted were subject to court action.
Major offences are grouped as follows:

Property offences	747
Motor vehicle offences	418
Offences against good order	368
Default warrants, other court action	222
Other reasons	139
	1894

("Other reasons" include applications to the court.)

Assessments carried out	456

5. Placement on discharge:

Parents or relatives	33%
Foster placement or private board	9%
Treatment institution	33%
Hostel	18%
Live-in employment	2%
Other placement	5%

The increase in admissions is similar to the previous year and is insignificant compared to the general increase in the Western Australian population.

There has been a continued decline in the number and proportion of Aboriginal children admitted, but the trend is less marked than in the previous year. However, there has been an increase in the proportion of non-Aboriginal girls admitted. This reflects the trend towards more court appearances for girls generally.

The proportion of children fully assessed has dropped to 456 out of the total of 1722. These figures indicate that Longmore acts more as a "holding" centre than as an "assessment" centre. Although the assessment programme takes only two to three

weeks, difficulties in finding suitable placements result in prolonged periods at the Centre for some children.

Current and future developments

It is expected that the problems involved in holding children for reasons other than assessment will be ameliorated to some extent on the completion of the new remand section. This is under construction and will provide facilities for the short-term detention of a further twenty-two girls and boys, including interview rooms and visiting areas for parents.

Research programmes already under way and planned for the future include:

(a) an investigation of the background and characteristics of a sample of children passing through Longmore and a follow-up of how they fared on leaving;
(b) a study to gain some insight into the needs of adolescents and the implications these have for future planning, by the use of an "ideal plan" approach at case conferences;
(c) a study to assess the suitability of the Jessness inventory in the assessment of juveniles in Western Australia generally, and in the Longmore population in particular.

Treatment institutions

Where the assessment carried out in a departmental institution indicates that institution-based behavioural treatment is necessary, the child is transferred to the recommended institution. From this point, the child's experiences are planned by that institution's staff. Such experiences while in the institution are planned to bear similarity and relevance to the experiences that he or she will meet later on, so maximizing chances of learning appropriate behaviour. Treatment methods are well removed from the "traditional" institutional training methods, with modern programmes being based upon research reported in professional literature and carried out in departmental institutions.

The view taken of treatment is that, before a child can live a responsible life (i.e. attend school or work regularly, remain reasonably stable in employment and residence, not offend, and so on), a number of periods may be spent in the institution's building—security or open sections. These periods may include daily school attendance or work away from the institution. The different periods spent at the institution are regarded as part of a continuing process of treatment, interspersed with further treatment while living in the community. This further treatment is carried out by, or under the supervision of, institution staff. Increasingly, the child participates in planning his or her own programme and is given more responsibility for carrying it out.

The emphasis in institutional treatment in the past has been on the training of juvenile offenders. In July 1973, the McCall Centre, a facility for the treatment of behaviourally disturbed children of primary school age, was established in its permanent premises, and in February 1974 a new centre, "Koorana", was opened at Bentley for the treatment of children with severe schooling problems. Both these centres represent movement beyond the treatment of juvenile offenders into preventive work, providing specialist help in areas where a need has been apparent for a number of years.

The institutions that are established for juvenile offenders do not emphasize the "offending" aspect of the child's behaviour as much as in the past. They are being seen as treatment centres where problem behaviour that does not necessarily include offences can be changed. Nevertheless, because of the Department's mandate to reduce the likelihood of offending in juveniles, offenders must form the majority of the admis-

sions to treatment centres for adolescents. An increasing demand for such admissions is reflected in the statistics that follow.

HILLSTON

Location and description

Stoneville Road, Stoneville
Hillston is an open treatment institution situated in a semi-rural area, twenty five miles [forty kilometres] from Perth. Facilities on the 367-acre [148½-hectare] property include a school, a mixed farm and trade workshops. These provide for general education and training in a wide range of rural and urban occupations, as well as a variety of leisure and sporting activities.

There is accommodation for 79 boys: 60 in the main section of the institution, which has provisions for security, 12 in transportable accommodation, which provides for a greater degree of individual responsibility, and 7 in a separate cottage on the property in an open "group home" atmosphere.

Function

Treatment and training of boys between the ages of eleven and eighteen years who have been committed to the care of the Department and who, as the result of a case conference, are placed at the institution. A smaller section of the population are serving default for the non-payment of fines.

Population characteristics

During the year 1 July 1973-30 June 1974, a total of 251 boys were admitted to the institution, this being a slight increase over the 1972-3 figures. The breakdown of admission is as follows:

Total admissions	251		
New admissions	144	Caucasian	98
		Aboriginal	46
Re-admissions	107	Caucasian	72
		Aboriginal	35
Defaulters	33	Caucasian	20
		Aboriginal	13
Average age	14 years 11 months		
Average length of stay	83 days (range 4-206 days)		

Many boys who come to Hillston are educationally retarded and have emotional social and behavioural problems associated with poor adjustment at home, in school or in employment. The institution's programme of training and activities takes into account the varying ages, needs and abilities of the boys and is designed to stimulate interests and develop potential skills that will help them meet the challenge of returning to school or employment in the community with an attitude of responsibility and self-confidence.

Treatment programmes

The Hillston programme endeavours to provide an individual approach to the needs of

each boy, and being an open institution, maximum involvement with the community is possible. Within the framework of the programme, there is provision for:

(a) general education, including both academic and practical subjects;
(b) general work training and specific trade instruction;
(c) organized and "free" sporting and other physical activities;
(d) participation and guidance in a variety of creative leisure activities and hobbies;
(e) social training;
(f) involvement with the family through visiting, home leave, etc.;
(g) an after-care system that provides supervision and support during the period of adjustment in the community after a boy leaves the institution.

Weekdays between the hours of 6 a.m. and 6 p.m. are divided into five periods and during each of these periods it is possible for boys to earn points. This system is easily comprehended by the wide range of boys who combine to form the total population at any one time, and provides for boys to assess their progress in specific areas of their programme. Points earned are converted to privileges and, in effect, the greater effort a boy makes in all aspects of his programme the greater number of privileges he earns.

Extension of programmes into realistic community-based situations has continued, particularly in the area of school and work. The opportunity to progress to a normal school situation whilst living in a supportive environment has shown itself to assist in both educational and social adjustment and facilitates a boy's return to his old school on discharge from Hillston.

A programme of "work release" has been developed during the year that provides for an extension of the institution work training programme into a realistic working situation and it is usual for approximately eight boys to be engaged in this type of programme at any one time. Boys engaged in such a programme earn wages, develop a responsibility in budgeting by paying board into the Department, paying off any outstanding fines and restitution, purchasing personal items, providing weekly spending money and banking with the local savings bank. This programme to date has proven to be an unqualified success and appreciation is expressed to local employers, particularly the Tip Top Abattoirs, Wooroloo, the Mundaring Shire Council and the Commercial Bank for their co-operation in making it possible.

Badgingarra

Hillston is closely involved with the development and operation of the Department's farming property associated with the "Warramia" group home at Badgingarra and opportunities occur for boys to be placed in this property during the year for periods of varying duration. Such placements are keenly sought and provide an opportunity to assess reliability, industry and attitudes generally in a relaxed, informal working situation. Produce from the Hillston Farm and this property, in the form of milk, eggs, butter, cream, mutton, beef, pork and poultry to the market value of $17975 was used in Hillston and other metropolitan institutions during the year.

After-care

There is no specific length of time a boy spends in Hillston and how long he stays depends largely on his personal progress. When released, he remains on "trial leave" under the supervision of one of Hillston's after-care officers. While on trial leave, he may be returned to the institution if he fails to comply with the conditions of release that are imposed. The after-care officers' efforts, however, are concentrated on keeping their boys out of the institution and on solving any problems that arise before they become serious enough to necessitate even a brief return to Hillston.

Developments

The development of the programme that allows for boys to transfer to normal school after a settling period, whilst continuing to live at Hillston, has indicated the advantage of the type of planning that allows for at least fringe contact with the community. This programme will be expanded to allow for greater community involvement.

During the latter part of the current year, the Children's Court has accepted recommendations made to it for boys who have re-offended whilst on trial leave to be given weekend detention. This has been achieved by the court imposing fines and ordering default to be served on a number of consecutive weekends. This method of dealing has allowed boys to continue in their normal school or work programme during weekdays, but has curtailed their weekend programme. Although the sample, to date, has been too small to form any valid opinions, the system does seem to be worthy of continued application in some individual cases.

With the continuing large number of admissions and the ever-present demand for accommodation in the institution, some possibly premature releases to trial leave are inevitable and the need for increased support on after-care is most apparent. To enable more effective after-care supervision, which is so necessary when a boy leaves the institution, one additional senior group worker item has been created by transfer from the institution staff establishment and this will allow an increase in after-care staff.

Koorana

Location and description

Allen Court, Bentley

Koorana is a non-residential "open" day attendance centre, the children being transported daily from where they live. Physical facilities exist for the enrolment of forty children; treatment procedures restrict the number to something less than that. To date maximum capacity has not been reached.

The buildings were completed in 1973 and opened in February 1974. They include seven main teaching or treatment areas, and grounds that are used for specific or general play activities. Staff include teachers, group workers, an occupational therapist, a social worker and a clinical psychologist.

Function

The population is limited to children of primary school age and grade placement.

The major referring problem is that the child's behaviour is such that he is unable to progress as well as his ability would allow in a normal school setting. Other relevant issues may be that his behaviour is excessively interfering with the progress of other children in his class, and that his formal learning is much below what could be expected. Koorana does not accept children unless the local school, working with the staff of the Guidance and Special Education Branch of the Education Department, has been unable to improve the child's level of functioning.

Wardship is not necessary for referral to Koorana. Admissions are determined on the need of the individual case seen in the light of alternatives available, with some slight weighting given to wardship.

Population characteristics

Referrals were slow for the first term of 1974, with steep increases in the rate of referral with the start of the second term.

Referrals February 1974-June 1974	37
Admission for full-time treatment	10
Some treatment responsibility accepted, but carried out in local school	4
Referrals in process	7
Age range at admission	8-11 years

All referrals, except two, have been boys. Four have been Aborigines.

All children enrolled at Koorana were referred primarily for problem behaviour within the school setting. In all cases, the children were also significantly retarded educationally and their behaviour outside the school setting caused concern. Twelve of the children referred have been wards, four of whom have been enrolled. Some other children have been from families that have had some earlier contact with this Department.

In almost every case, considerable family work is necessary. No characteristic patterns of family operation are discernable yet, but there is no established tendency for referrals to come from schools serving disadvantaged areas.

Assessment and treatment programmes

Being a new institution and different in its functions from others operating in this Department or elsewhere, both assessment and treatment programmes must be exploratory and innovative.

Assessment includes educational, physical and psychological testing to supplement that available from the referring and other agencies. The most important type of assessment, though, is that done through general and specific behavioural observations of the child in his own school setting. This assists in making the decision to accept for full-time, part-time or sessional treatment at Koorana, or for treatment within his own school setting working with his own teacher and other Education Department staff. A social work assessment contributes to this decision.

Treatment programmes are devised according to the needs of the individual case, and the contribution of the different professional personnel varies with each case. Various theoretical and practical approaches are being investigated, but it is unlikely that Koorana will make a full commitment to any one therapeutic approach.

Because Koorana's obligation is seen as initiating change in a child's level of functioning to a stage where full-time attendance at the local school is possible, the means of maintaining the change will need to be ones that can be transferred to the setting of the local school. Though the children have been referred primarily for reasons of behaviour, in every case there has been a serious retardation in formal learning, particularly in literacy and numeracy. Remedial teaching is essential.

Developments: Current and proposed

Koorana is at such an early stage of development that all approaches require further refinement and modification.

The biggest problems are anticipated as being in maintaining the child's improved level of functioning at that new level when he returns to his own school. The additional skills required for that will be developed over the next few months, when the children now attending Koorana begin to return to their own schools. More involvement of parents in the scholastic progress of their children is necessary and is projected for the near future.

McCALL CENTRE

Location and description

2 Curtin Avenue, Mosman Park
McCall Centre is an "open" institution, set in three acres [1¼ hectares] of land, on the site of the old cable station. The alterations and additions were completed in July 1973 and the Centre was then transferred from its temporary premises in Highgate.

The buildings are highly functional and include accommodation for twenty children, treatment rooms, classrooms, activity rooms, offices and a playing-field.

The Centre was officially opened by the Minister for Community Welfare on 14 September 1973.

Function

McCall Centre is a long-term residential treatment unit for children who because of their behavioural and emotional problems need specialized assistance. It is part of the Department's efforts at preventive work, the aim being to help the children overcome their problems while they are still young and thus not become a burden to the community later on.

Population characteristics

New admissions	9
Age range	5-12 years
Average length of stay	10 months

The most commonly found characteristics of the population on admission are:
(a) acting out, impulsive, uncontrollable behaviour;
(b) educational backwardness, though children of average intelligence;
(c) retardation in physical abilities, though physically healthy.

Children are admitted after close individual assessment of their history, behaviour and need for help. About 70 per cent of the children are boys and 30 per cent girls.

Treatment/training programmes

Programmes are devised according to the needs of the individual child and the potentialities seen in that child and family. They encompass the applications of behaviour modification techniques, play therapy, group therapy, occupational therapy, remedial education, speech therapy and a wide range of other activities. Various theoretical and practical approaches are attempted, without commitment to any one therapeutic framework.

Parents or substitute parents are involved in the programmes as much as possible. Considerable effort is put in to teach them management skills that are lacking, and if necessary, especially for parents living in the country, they can come to the Centre for intensive work, and be accommodated in the specially designed parent unit. Every endeavour is made to return the child as quickly as possible to the community.

On discharge, a child is followed up, for a minimum period of two years, in order to continue the evaluation of the efficacy of the treatment programme.

Developments

Over the last two years, difficulties have been experienced in finding suitable foster homes for the children. To overcome the problem, a training course of six weeks' duration for prospective foster parents was instituted. It is proposed to have three such courses per year.

NYANDI

Location and discription

3 Allen Court, Bentley
A treatment and research centre for adolescent girls, most of whom have been deemed as delinquent by the courts and society.

Function

Nyandi has a twenty-bed maximum security section, with an adjoining ten-bed minimum security cottage. It provides a system to cater for several day-attendance programmes, plus after-care personnel who cater for over one hundred girls in the community.

All facilities and systems emphasize a learning and demonstration of skills that are designed to help the girls towards a more successful adjustment to society's standards.

Social, academic and vocational skills are the three broad, interwoven areas that receive therapeutic effort. Specific social skills may include such things as compliance, greetings, table manners, accepting criticism, and so on. In fact, a list of no less than fifty-five social and survival skills have been developed. Each girl learns a relevant group of skills from this list. Eighteen of these skills are learnt by all girls prior to discharge.

Academic skills are learnt within a well-equipped classroom that caters for all grades and for many behavioural problems found in the normal schoolroom.

Vocational training is provided at various levels. Office work, factory work, domestic chores and cooking are all provided in the vocational system.

The introduction of the above skills into the girls' repertoire of behaviour reaches effectiveness through the specialization of staff in teaching methods and the application of a points system that encourages the girls to exhibit appropriate behaviour.

Maintenance of the skills learnt in Nyandi is provided by an after-care system that elicits the help of employers, families, schools and peer groups, etc. in the community.

Research at Nyandi is an ongoing and integral part of the Centre. It provides new and stimulating ideas that ensure that the latest and best methods available are applied to the task.

Population characteristics

New admissions	64	Caucasian	32
		Aboriginal	32
Age range	13 to 18 (average 16.4 years)		
Average length of stay	30.6 days for the first admission in security section		
Re-admission	16.8 days		

The majority of the girls have had several contacts with the courts and have spent an average of three and a half months in other institutions.

Therapeutic programmes

All therapeutic programmes are tailored in an effort to meet the special needs of individual girls. These programmes comprise teaching in those skills that are considered relevant and necessary for each girl's effective re-adjustment within the community.

Performance skills are currently assessed on fifty-five dimensions, using a comprehensive testing battery developed by the occupational therapist. Assessment takes place within the first two days of admission and on the basis of the test, individual teaching targets are prescribed.

These targets are expressed in grade levels (A, B, C, etc.) and are utilized as criteria for discharge. That is, when a girl has demonstrated proficiency at the prescribed level on retesting those skills listed as her targets, she is considered to have fulfilled, in large measure, the criteria for discharge.

The advantages of clearly listing all the elements of each skill are that teaching becomes more effective and subsequent monitoring is highly reliable. Inconsistencies due to interpretation are largely eliminated. The skills are taught by the teaching parent in the course of normal social interaction between girls and/or staff and girls. Teaching parents receive individual training in techniques for teaching. Their training sessions involve video recorders and extensive use is made of feed-back from trained staff.

All therapeutic procedures employed by Nyandi staff are clearly described in a comprehensive manual that functions as a training and reference text. The manual has evolved out of the obvious need to ensure that there is consistency in the application of the complex skills and teaching methods used within Nyandi. It is believed that the manual could be effectively used by other therapeutic centres of both security and open types.

The common goal of all the therapeutic programmes within Nyandi is to teach the greatest number of skills within the shortest possible time. Teaching, therefore, is intensive, often on a one-to-one basis, and takes place at every possible opportunity. Average length of stay has been reduced from two months in 1970 to forty-six days in 1973 and thirty-two days in 1974.

Success can be gauged from the observation that the girls are spending increased amounts of time in the community.

The increased efficiency with which training within Nyandi has been achieved has resulted in a reallocation of resources to provide an effective after-care service, witout any increase in staff numbers since Nyandi's inception in 1970. Consistency in treatment is facilitated by the use of a uniform system of monitoring for both Nyandi and after-care services. A manual for after-care, similar in function to the treatment manual, is currently being developed.

Developments: Current and proposed

1. The most recent developments include specialized teaching methods and the training manual, which have come directly from research into effective treatment techniques and staff training methods. This research was made possible by a generous grant from the Australian Criminology Council.

2. Some tentative observations have suggested that working directly in the community with the clientele is at least as effective as admitting them to institutional care. This drive towards community-based treatment has led to the growth of a 'homemaker' group, which is attached to the Nyandi after-care service. The homemakers are establishing their treatment goals and in their family contacts are using the same therapeutic principles as employed by other staff in the institution. Current homemaker projects include the development of a consumer questionnaire. The consumer questionnaire is being designed to provide a reliable channel for feedback about Nyandi's effectiveness from those who utilize Nyandi's services (e.g. employers, families). As soon as these treatment goals have been identified, it is proposed that both homemakers and other staff will further increase the amount of therapeutic contact established with families directly in the community.

3. A good deal of effort is being applied to the designing of a behaviour monitoring sheet. This project will do several things. It will allow all staff to readily ascertain where the girl is currently placed in reaching her target behaviours. It allows the girl to monitor her own efforts and it also structures accountability on staff effectiveness. It is envisaged that the behaviour monitoring sheet will produce a situation where the girl will become a part of the therapeutic force.

4. Research undertakings at Nyandi are fully reported and, where applicable, are submitted for publication to reputable journals. Eight such reports have been compiled this year.

RIVERBANK

Location and description

Hamersley Road, Caversham

Riverbank accommodates forty-three boys in a maximum security setting. A hostel at "Fourteen" Francis Street, Perth and Half-way House in Hamersley Road, Caversham provide additional accommodation for boys who lack family support or who need gradual reintroduction into the community.

Function

Treatment of adolescent male offenders who are aged between thirteen and eighteen years, in an environment that provides maximum security and supervision commensurate with a lad's growth towards maturity. It achieves this aim by replicating within its walls an outside community equipped with its own factory workshops, school and token economy system, fines for specific offences and "spending" areas such as films, games, music and television area. In this way, a boy is allowed to present his real self, including a limited degree of poor behaviour, to allow a base-line to be established from which more acceptable behaviour can be shaped over time.

There are definite limits to such a programme within a walled environment and specialized use of the hostel and Half-way House is needed in some cases to encourage fuller growth before a boy's complete discharge to the community under the supervision of an after-care officer.

Population characteristics: General

Although Riverbank does accommodate the serious offender, many of the boys are less-serious offenders who will not remain in more open environments long enough to accept counselling towards change. A significant proportion of the population come from an incomplete family in which, often through no fault of parent or child, their socialization process has been defective. Most boys are from lower socio-economic backgrounds and have left school prematurely.

Total admissions	318		
New Admissions	82	Caucasian	43
		Aboriginal	39
Re-admissions	236 (including 97 boys)		
Average length of stay	54.1 days		

These figures reveal slightly higher overall rates compared with 1972-3, except for re-admissions. The average length of stay remains virtually unchanged.

Compared with the previous year, there was a higher proportion of Aboriginal boys amongst the new admissions.

Training programme

In the last Annual Report the rapid change in training programme was discussed and in the past year there has been much effort involved in consolidating the change in attitude in both boys and staff. Pathetically, a few of the more damaged boys resisted the new emphasis on living in a more relaxed treatment environment and demanded a return to the former obedience training programme. These boys have required much patience and skill from staff to assure them they can eventually cope with a more natural life-style within the institution. It is to the immense credit of all, both staff and boys, that the transition has been as smooth as it was. The faith of treatment staff that the present treatment mode is to be preferred, received considerable bolster recently from tightly controlled research, comparing the present with the past outcomes. Present results measured by the rate of non-offending after discharge are significantly increased, and almost doubled.

The trend to involve the local community with the boys in such things as barbecues, dances and films has continued and helps to normalize Riverbank. Likewise, the safety driving instruction course continues to produce safer motor-car drivers from a decidedly "at risk" population. Many of the staff have also completed a driver instruction course in mini-bikes, in the belief that safe driving on the more exposed, but controlled, bikes teaches a sense of caution as a pre-requisite for safe motor-car use.

Two Aboriginal trainee group workers have recently settled into Riverbank's staff and are providing a valuable contribution in interpreting cultural differences. Whilst they are equally concerned with the care and treatment of non-Aboriginal children, their acceptance of and by Aboriginal children is specially beneficial.

Riverbank's programme is directed towards treatment of the individual child, Aboriginal or Caucasian.

Developments: Current and proposed

Two developments have currently been commenced. Both are significant in Riverbank's overall programme.

(a) *Revised basic social training course*

For some time, the school classroom, in addition to traditional high school subjects, has specialized in increasing the social knowledge and skills of boys. It has provided a course involving generalized instruction on health education, sex education, hygiene, etc. From this pilot study, it has become obvious that the course has to be more individualized, to allow each boy to progress at his own pace. Steps are now in progress to individualize, by separate booklets and teacher attention, this basic and essential knowledge necessary for a boy's post-release, social survival.

(b) *Alcohol treatment programme*

There are some boys admitted to Riverbank who appear to offend primarily when drunk. Such boys frequently express concern about the relationship between drinking and offending and appear motivated to accept some form of treatment. Riverbank is therefore taking steps to implement techniques that will help these boys to establish control over their social drinking, an approach that is more realistic than expecting total abstinence.

Hostel facilities

The Department is fully or partly responsible for the operation of several hostels in both metropolitan and country areas. Broadly, they can be divided into two categories. Firstly, those providing specialized care for older adolescents as an extension of the Department's treatment and training programmes, and secondly, those catering for students and young working people who need accommodation. In the latter case, most of the residents are Aboriginal boys and girls from areas where opportunities for education and employment are limited.

TREATMENT AND TRAINING HOSTELS

A number of young people who come under the notice of the Department do not need institutional treatment, but do require a certain degree of guidance and supervision. Where this cannot be provided in the home situation or elsewhere in the community, these hostels offer an alternative setting. They are designed to allow young people to live and work in the community while at the same time preparing them for independence.

Each admission is preceded by close consideration of individual needs and circumstances by the institutional staff and field officers concerned with the placement decision. Ongoing supervision is provided by field officers, who work in co-operation with the hostel staff. Where necessary, they also maintain contact with the family, employer and other people involved with the young people assigned to them.

The location of the hostels in the inner metropolitan area allows convenient access to employment and most community facilities.

STUART HOUSE

Location

Lawley Crescent, Mount Lawley

Population

Eight working girls aged fifteen to eighteen years

General

For girls who are unwilling or unable to live at home, Stuart House provides a stepping-stone to independence. Most of the girls are placed here from the assessment centres and their previous behaviour has shown general lack of maturity in social and personal adjustment. None have presented serious behavioural problems.

They are encouraged to maintain stable employment, and are helped to develop social skills in areas where these may be lacking. Leisure time is supervised to some degree and guidance is given on how to use it to the best advantage.

When the girls are considered ready to move out, placement is arranged in consultation with the girl, hostel staff and the field officers. Generally, the girls are encouraged to move into private board rather than flats, in order to make the transition to complete independence more gradual.

During the 1973-4 year, twenty-one girls passed through Stuart House. Average length of stay was six months and the range was between three and twelve months.

WATSON LODGE

Location

Aberdeen Street, Perth

Population

Ten working girls aged fifteen to eighteen years

General

Watson Lodge is designed to provide a more structured environment for girls who have experienced previous difficulties in personal and social adjustment. Before undertaking outside employment, the girls participate in a four-week programme that provides training in a range of social and domestic skills. This time also allows the girls and the staff to develop a mutual understanding for each other and the requirements of the hostel situation.

The girls are then helped to find suitable employment and maintain it by developing the necessary work habits such as punctuality and appropriate standards of appearance and behaviour. At the same time, advice and guidance is given on leisure-time activities.

In order to determine when the girls are ready to leave, progress is monitored by hostel staff, field officers and a psychologist. At the same time, contact is maintained with other significant figures in the girls' life, such as the family, employer and boyfriend.

On leaving, most girls move to a flat or private board where contact is maintained, and the girls are encouraged to return for periodic visits and advice where necessary.

In the 1973-4 year, thirty-five girls have been accommodated. Four were for a short stay, and the others for periods ranging from four to twelve months. Average length of stay was eighty-three days and the average number of girls in residence at any time was 7.5.

TUDOR LODGE

Location

Chelmsford Road, Mount Lawley

Population

Fourteen working boys aged fifteen to eighteen years

General

While most of the boys admitted to Tudor Lodge come from the assessment centres after case conference, about one-third come from treatment centres. In all cases, the aim is to provide a supervised environment in which the boy can be helped to settle into employment, and to make any other adjustment that may be necessary while arrangements are made for return home or placement in private board.

The programme is designed to enable the boys to develop necessary social skills such as managing their own money, choosing suitable companions and arranging their own social activities. Supervision is progressively relaxed as the boys learn more responsibility and move towards independence.

During the past twelve months, thirty-four boys have stayed at Tudor Lodge and the average length of stay has been from four to six months.

EDUCATION AND EMPLOYMENT HOSTELS

In areas outside the major population centres, facilities for education and employment are often limited and young people in these areas may not have the opportunity of developing to their full potential. The provision of education and employment hostels is one way in which this situation may be overcome.

Although the policy is to provide accommodation as close to the children's homes as possible, the location of the hostels is largely determined by the availability of schools, technical centres and employment opportunities. In the past year, a new hostel was opened at Kalgoorlie and other hostels are under construction or planned for areas where industrial and residential development has resulted in the necessary facilities becoming available.

Most of the children involved are Aborigines and the hostels are especially geared to meet their needs. The trend is towards smaller hostels and apart from the older established ones in the country, they are run along "cottage" lines, with between six and fourteen young people in each. Smaller numbers allow for greater personal contact with hostel "parents" and for individual help to be given for both education and social development.

Apart from the Applecross hostel, which is privately owned, the hostels are owned and maintained by the Department. The metropolitan hostels and the Geraldton hostel are operated by church groups or private individuals under an agreement with the Minister for Community Welfare. The other country hostels are operated and staffed by the Department.

The list below shows the location and function of the hostels and includes the ones at Kewdale and Katanning that are expected to be completed for the 1975 school year. Another hostel at South Hedland is in the planning stages.

Metropolitan

Applecross		Primary school
Ardross		Secondary school
Bedford Park		Secondary school, business college (girls)
Bentley		Secondary school
Como	"Kyewong"	Employment (girls)
East Perth	"Bennett House"	Transit hostel
Greenmount		Secondary school (boys)
Hamilton Hill		Secondary school (girls)
Kewdale		Secondary school
Medina		Secondary school (boys)
Melville	"Karingal"	Primary and secondary school (girls)
Mosman Park	"Ocean View"	Primary and secondary school
Mt Lawley	"Cooinda"	Secondary school, employment (girls)
Mt Lawley	"Katakutu"	Employment (boys)
Mt Lawley	"McDonald House"	Employment (boys)
Mt Yokine		Primary and secondary school (boys)
Mt Yokine		Secondary school (girls)
Subiaco	"Myera"	Secondary school, employment (girls)

Country

Boulder	"Nindeebai"	Secondary school
Boulder		Employment (boys)
Cue	"Kyarra"	Primary school

Geraldton		Employment (boys)
Halls Creek	"Charles Perkins"	Primary school
Kalgoorlie		Employment (girls)
Katanning		Employment (boys)
Leonora	"Nabberu"	Primary school
Marble Bar	"Oolanyah"	Primary school
Onslow	"Gilliamia"	Primary school
Port Hedland	"Moorgunya"	Secondary school
Roebourne	"Weerianna"	Primary school
Yalgoo	"Warramboo"	Primary school

A programme for the upgrading of the older country hostels has been prepared and is expected to commence during the 1974-5 financial year.

GROUP HOMES

The Department now owns three buildings that are used as group homes for children who need a more specialized type of family care than can be provided in a normal foster home or boarding placement. The children placed in these facilities are not necessarily problem children, but because of their circumstances they would find it difficult to settle into a private family. The departmental group home can provide a skilled and stabilizing environment as a stepping-stone to future return home or foster placement.

CANOWINDRA

A group home at Gelarup, which is at present being renovated and extended to provide accommodation for eight children.

DARLINGTON COTTAGE

A large group home at Darlington was purchased during the year, to provide skilled care for school-age boys who would be unable to settle in foster homes.

WARRAMIA

A group home situated on the Department's farming property at Badgingarra. Accommodation is available for up to eight primary school children who need a relaxed, stabilizing experience prior to longer-term placement.

Ancillary services

The Department's institutional facilities are supported by a catering service and a laundry.

CATERING

The Department's catering service, which was first established in 1972, has continued to expand during the year. Meals of maximum nutritional content and child acceptance, designed to meet the different needs of each establishment, are provided more economically than before. In all, it is estimated that efficient ordering of foods by the service has brought about total savings in excess of $100,000 over the last two years.

Recently, a cooking instructress was appointed to the dining-room operated by the Department in the Warburton Ranges, to train local women in the basics of cooking. "Nyalkubal" (Wongi dialect for eating-place) caters for three meals per day for an average 130 children. The trainees, inhabitants of the surrounding desert country, arrive prior to meals, wash and don clean uniforms supplied by the Department and assist with the preparation of meals. The women are proving their ability and have on occasions, without supervision for short periods, run the dining-room efficiently.

In conjunction with the Aboriginal Affairs Planning Authority, a trainee cook scheme is currently in operation in the goldfields. It is hoped that girls currently employed under the scheme will attain a sufficiently acceptable level of ability on the basics of cooking, to enable them to be employed in departmental hostels and, after further experience, the outside employment market.

The catering officer is constantly endeavouring, through negotiation with manufacturers, to have special foods developed. The purpose is to develop foods with added vitamins that are better suited to the dietary needs of Aborigines in outback areas. In these areas, fresh food is not always readily available, due to local conditions, and research is necessary to overcome the problem.

Continuing liaison is maintained by the catering officer with dieticians and food technologists throughout Australia, keeping abreast with modern trends associated with diets and the food industry and new methods of supervising and administering food programmes.

Besides catering for departmental needs, the catering service offers advice and expertise to other private agencies working in related fields.

To ensure a continually improving service, additional staff would need to be appointed to assist with research and planning. This would ensure that all concerned receive optimum nutritional value from meals provided.

LAUNDRY

A laundry, located at Mount Lawley, is operated by the Department and provides an efficient service to its institutions, hostels and group homes.

More than 3.5 dry tons [3.5 tonnes] of clothing and linen are laundered each week by a staff of five at a cost of approximately 8 cents per dry pound [3.6 cents per dry kilogram]. This represents a considerable saving when compared with commercial rates.

It is expected that the efficiency of the laundry will be further improved by a new boiler and ironer, which are currently being installed.

In addition to maintaining linen supplies and a laundry service, the facility also provides the resources for some wards to obtain work training.

Young people who would otherwise find it difficult to cope with employment are paid award rates whilst they learn work skills in a tolerant environment. On average, about ten wards are involved in this programme each year, and to date have encountered a good degree of success when subsequently employed in the community.

Subject Index