2000

Justice or differential treatment? : Adult offenders with an intellectual disability in the criminal justice system

Judith Cockram
Edith Cowan University

Edith Cowan University

Copyright Warning

JUSTICE OR DIFFERENTIAL TREATMENT?

ADULT OFFENDERS WITH AN INTELLECTUAL DISABILITY IN THE CRIMINAL JUSTICE SYSTEM

by

Judith Cockram

A thesis submitted in fulfilment of the requirements for the award of the degree Doctor of Philosophy (Human Services)

at the Faculty of Community Services, Education and Social Sciences
Edith Cowan University
August, 2000

USE OF THESIS

The Use of Thesis statement is not included in this version of the thesis.

ABSTRACT

The purpose of the study was to present a thorough examination of the extent of participation of adult offenders with an intellectual disability within all levels of the criminal justice system in Western Australia, that is, from arrest to charge, to court appearance and finally to conviction. Western Australia provides a unique opportunity to examine the operations of the criminal justice system, because it possesses comprehensive computerised data sources on offenders, and by utilising the State central register on people with disabilities, it was possible to include in the study a significant proportion of those people with an intellectual disability in Western Australia. The study was a longitudinal study over a ten-year period where it was possible to examine all levels of the criminal justice system, that is, from arrest to court appearance and finally to conviction and possible detention. In examining the different outcomes, it was also possible to control for the number and types of offences committed by first time offenders. In addition, the available data provided the opportunity to study the rate of recidivism of people with an intellectual disability compared with other offenders.

Eight hundred and forty three individuals with an intellectual disability were tracked through the justice system and their experiences were compared with two thousand four hundred and forty two other offenders. At the first stage of the justice process, namely arrest, the study found that people with an intellectual disability were no more likely to be arrested and charged with a criminal offence than others within the general population. However, once they entered the system, they were subsequently rearrested at nearly double the rate compared

with the non-disabled sample. In addition, it was found that there was substantial disparity in the offending profiles, at arrest, between the two groups. A notable finding was the difference in the charge pattern over time. Not only were people with an intellectual disability charged more often, they were charged at a far greater rate over the latter part of the study period, while arrests for the non-disabled sample were about the same over the two five year periods. It is suggested that the higher incidence of arrests during the period 1990-1994, may offer support for the view that the rise of arrests of people with an intellectual disability within the criminal justice system, has corresponded with the deinstitutionalisation of state facilities.

At the next stage of the justice process, formal prosecution in the court, it was found that people with an intellectual disability appear to be treated differently in the types of penalties imposed, and the different penalties imposed for similar offences. It was also found that differing uses were made of alternatives to imprisonment. An important aspect of the study of offenders with an intellectual disability is the prevalence of recidivism. A considerably higher probability of re-arrest was found for offenders with an intellectual disability compared with other offenders, and the study canvassed several explanations for this higher recidivism rate.

The conclusion of this study is that explanations of psychological and sociological disadvantage or the susceptibility hypothesis which have been put forward as possible reasons for people with an intellectual disability being over-represented in prison populations, are not sufficient to account for the findings of this study. The

fact that different outcomes were experienced by people with an intellectual disability as they proceeded through the criminal justice system is not inconsistent with the differential treatment hypothesis. In addition there is strong evidence to suggest that the quality of services is a critical factor relevant to the rate of recidivism. A service model is recommended to assist in reducing the high rate of re-arrest of people with an intellectual disability.

DECLARATION

I certify that this thesis does not, to the best of my knowledge and belief:

I. Incorporate without acknowledgement any material previously submitted for a degree or diploma in any institution of higher education.

II. Contain any material previously published or written by another person except for where due reference is made in the text

III. Contain defamatory material.

Signed: 

Date: August, 2000

ACKNOWLEDGEMENTS

A project such as this does not come to fruition because of the efforts of one person. It is a reflection of the direct and indirect efforts of many people.

Firstly, I extend my gratitude to the public agencies – Disability Services Commission, Western Australian Police Services, Ministry of Justice, and the Crime Research Centre at the University of Western Australia who permitted me to access the data required to complete this study. It is hoped that the study will provide critical information for policy planning and intervention.

My positive experiences of supervision from Professor Rod Underwood and Dr. Irene Froyland were crucial throughout the development and implementation of the study and writing of the thesis. I thank them for their generously given time and expert guidance and advice. The outcome owes much to Rod's critical comments, encouragement and good -natured debate which made the journey an enjoyable experience. His belief that I was capable of conducting this research created a learning process that was challenging and was characterised by exemplary supervision. His enthusiasm for my research topic endured to the end.

Heartfelt thanks go to Anna Ferrante at the Crime Research Centre, University of Western Australia for the considerable time and effort she afforded me in assisting to set up the very large data bases required to complete the study. Her helpful advice and unwavering patience is gratefully acknowledged. Particular thanks also goes to Elaine Pascoe, Research Consultant at Edith Cowan University who

spent many hours with me setting up the databases and giving expert advice in the analysis process.

I also acknowledge my peer support group and thank them for the friendship and companionship throughout my postgraduate years, especially Jane McFarlane, Tom Barrett and Christopher Churchhouse. Last but not least, I thank my family Col, Rebecca and Anna Cockram whose love and support kept me going through some hard times.

My grateful thanks.

J.C.

TABLE OF CONTENTS

CHAPTER THREE: THE CRIMINAL JUSTICE SYSTEM IN WESTERN AUSTRALIA: PROCESS AND ISSUES 53

LIST OF FIGURES

LIST OF TABLES

CHAPTER ONE

INTRODUCTION

INTRODUCTION

One of the most pressing problems of the mentally retarded is that by default, as it were, their legal rights are often ignored, disregarded, or simply violated (Haggerty, Kane and Udall, 1972, p.60).

The number of people with an intellectual disability who now live in the community, and the extent to which they exercise control over their lives has increased over the last 30 years. Factors contributing to this phenomenon include a better understanding by the community of what people with an intellectual disability can accomplish and the development of programs designed to assist them to integrate into society. One of the consequences of deinstitutionalisation is that persons bearing the intellectual disability label are being exposed to ordinary community situations. These may often be situations for which they are ill-prepared, especially when they have also been handicapped by the deprivations inherent in institutional confinement. It is conventional wisdom that thousands of people who were so closely supervised and controlled in the past that they would have had no opportunity to commit crimes, are now much freer and this liberty often includes the freedom to behave in ways that bring them into conflict with the law. Some formerly institutionalised persons may experience less social control in terms of direct

staff supervision. They may also have occasion to come under the control of those who can influence them to engage in antisocial acts.

In both community and institutional settings, people with an intellectual disability are disadvantaged by a limited and usually segregated education, and a greater likelihood of being unemployed and living on welfare , or just above the poverty line. In the community, people with an intellectual disability often reside in unstable accommodation such as boarding houses or hostels (Noble & Conley, 1992). Some people may be aware of the fact that they have an intellectual disability and may feel stigmatised by such a label, and attempt to hide it from the outside world. Those who have spent a large part of their lives in institutions are usually inadequately prepared for integration into mainstream society; and chronically inadequate and uncoordinated service provision leads to many people being insufficiently supported or supervised in the community. People with an intellectual disability often experience a lack of social, recreational and sexual relationship opportunities in their lives. Substance abuse is also frequently a problem. Indeed, the high rate of appearances before the courts has been linked to the lack of support services able or willing to address the "high support" needs of individuals with challenging behaviour. It has even been commented that some support workers look to the criminal justice system as a way of relieving them of 'troublesome' individuals (Intellectual Disability Rights Service, cited in New South Wales Law Reform Commission, 1996).

In relation to offenders with an intellectual disability, most research has been carried out in prisons and early analyses of the abilities of people convicted of crimes and serving sentences in prison tended to confirm the belief that there were disproportionate numbers of people with an intellectual disability. More recent studies, both in Australia and overseas, also consistently

point to the overrepresentation of people with an intellectual disability in prison populations. However, bedevilled as the studies are by methodological and other problems, professional agreement has not yet emerged regarding the precise statistical statement of this problem. Nevertheless, it is clear from the literature, that there is considerable concern that people with an intellectual disability are disadvantaged when they encounter the criminal justice system. Those individuals with an intellectual disability, who commit offences should, like any citizen, be expected to be accountable for their acts. However, because of their intellectual limitations, important and complicated issues arise that must be considered if the outcomes of the judicial processes are to reflect a humane system of justice. Australia's adoption of the British legal system leads to the assumption that justice will be administered in a fair and equitable manner to all Australians. Yet there is substantial evidence which casts doubt on many aspects of the judicial system as it affects the lives of people with an intellectual disability, and suggests that they may be treated differently by the judicial processes.

Perske (1991) makes the point that the further people with intellectual disabilities are drawn from their communities into the criminal justice system, the harder it is for them to get back into those communities. "Many such people become the loneliest, most friend-forsaken prisoners the system ever sees" (p.10). In advocating for people with intellectual disabilities who come before the criminal justice system, Perske asks the question "Did that person receive equal justice? Whether guilty or innocent, did the system treat that person as other citizens are treated when they are charged with the same crime?"(p.11). This investigation seeks to answer that question.

BACKGROUND TO THE STUDY

The Phenomenon of Intellectual Disability

Intellectual disability is the largest category of lifelong disability in our society (Wellesley, Hockey, Montgomery, & Stanley, 1992). The common life experiences and the place of people with intellectual disability within the social context, indicate that this group is relatively disadvantaged, oppressed and devalued (Wolfensberger, 1992). In fact, this group is part of a larger group of people who have similar experiences, the most common of which is rejection which leads to congregation and segregation. Such people have commonly been congregated with other people who were believed to be 'of their own kind'. This is usually followed by the segregation of such groups, both physically, by locating them at a distance from valued society for example, and socially, perhaps by denying their citizenship or rights, or placing them in social roles of low value. This occurs in the face of strong rhetoric of denial and an ideology which redefines the identity of this group so that the impact on those people in terms of their labelling and separation from the mainstream of society, and the manner in which various stereotypes about them are sustained and reinforced through that process, are powerful and impelling (Cocks, 1994).

The degree of the intellectual disability may range from very mild to very severe. Ninety per cent of people with an intellectual disability are mildly affected and only a small minority are either moderately, severely or profoundly disabled (Wellesley, Hockey, Montgomery & Stanley, 1992). Those who have a considerably reduced intellectual capacity may have difficulty learning even simple skills, such as walking, talking, caring for themselves and living independently. People with a mild or moderate intellectual disability may have difficulty in grasping abstract concepts, handling complex tasks, and absorbing and assessing information at a normal rate. However, they are

usually capable of learning to overcome the restrictions of their disability so that they can function in the broader community, especially if they are supported in this regard by specialised educational and other services. Governments have, for some time, recognised this potential by implementing policies designed to de-institutionalise the lifestyles of people who have an intellectual disability. The impact of the disability on his or her life depends not only on the degree of disability, but also on such factors as the adequacy of support services, the presence of compounding disability, and the individual's motivation (Morton, Hughes & Evans, 1986).

DEFINITIONS AND DESCRIPTIONS: IDENTIFICATION OF PERSONS WITH INTELLECTUAL DISABILITY.

Definitions

There are a variety of terms used to refer to intellectual disability. People with an intellectual disability are sometimes referred to as mentally retarded, mentally handicapped, intellectually handicapped, learning disabled or developmentally disabled. In Australia the preferred term is people with an intellectual disability and this term will be used throughout this study.

The most widely accepted definition of intellectual disability is that laid down by the American Association on Mental Retardation (1992). The AAMR Board approved definition is as follows:

> Mental retardation refers to substantial limitations in present functioning. It is characterised by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self care, home living, social skills, community use, self-direction, health and safety, functional academic, leisure and work. Mental retardation manifests before age 18.

Significantly sub-average intellectual functioning, means an IQ of less than *about* 70, obtained on a general intelligence test which is individually administered. The IQ level was not meant to be precise because IQ tests have

different levels of reliability leading to IQ scores generally being expressed in a *range* rather than a single number. Thus the upper limit of IQ could be as high as 75. The definition also includes the requirement that the individual whose intellectual functioning is significantly subaverage must also have related limitations in the range of personal skills which are seen as appropriate for people who are of the same age and in a similar social situation as the person with intellectual disabilities. The definition also stipulates that the disability must "manifest before age 18".

If we accept the definition outlined above, then we must also accept a considerable degree of imprecision in our efforts to determine who is or is not intellectually disabled, and in our attempts to discover how many individuals come within the definition in any given population, including the populations in the prison system. Even more important, we must recognise that the definition includes people of vastly differing levels of ability. One of the chief problems created by defining a subpopulation based on assessment of their reduced intellectual ability is that all members of the subpopulation come to be regarded as having the same difficulties and needs. As Haywood (1976) pointed out:

> Retarded offenders do not constitute a class, just as mentally retarded persons do not constitute a class...There is more variability within a group of mentally retarded persons than between retarded and non-retarded persons...Mentally retarded persons are not alike, because mental retardation is not an entity. It is a collection of well over 200 syndromes that have only one element in common: relative inefficiency at learning by the methods and strategies devised for other people to learn. (p.677)

As mentioned above, the range is approximate and depends upon the particular IQ test that is used. It may also be influenced by the judgement of the person doing the assessment, that is, there may be particular circumstances that occur during testing, for example, that may lead the tester to place qualifications on the actual assessed level. The following levels, based on the

World Health Organisation Classifactory system, are still widely used in Australia.

Levels	I.Q. Range
Borderline	75-80 approximately
Mild	50-55 to approximately 70-75
Moderate	35-40 to 50-55
Severe	20-25 to 35-40
Profound	below 20 or 25

PREVALENCE OF INTELLECTUAL DISABILITY IN AUSTRALIA

Theoretical Prevalence

Theoretical prevalence is based on the distribution of scores on IQ tests. Intelligence and scores on IQ tests are said to be normally distributed. An IQ of 70, that is, two standard deviations below the mean, is the critical score. This is the cut-off point stipulated by the AAMR definition of intellectual disability that was discussed previously, below which people may be considered to have an intellectual disability if the other requirements of the definition are also met. According to the particular theory of intelligence and the manner in which IQ tests are statistically constructed according to normal distribution, if IQ was the only factor to be considered in defining intellectual disability and the cut-off point was set at IQ 70, then 2.3% of the population of Australia would have an intellectual disability (over 400,000 people). In the real world, however, these theoretical rates are modified by various factors. Social factors, for example, play an important role and cannot be accounted for in considering raw IQ scores. Theoretical prevalence is thus a very imperfect method of determining the number of people in a large population who have intellectual disabilities (Xingyan, 1997).

Administrative Prevalence in Australia

There have been three major surveys of disability in Australia carried out by the Australian Bureau of Statistics, in 1981, 1988 and 1993 and one in Western Australia to identify all children in birth cohorts, 1967-1976 (Wellesley, Hockey and Stanley 1992). In the 1981 survey, intellectual disability was included under four categories: Mental retardation, mental degeneration due to brain damage; slow at learning; and specific delays in development. Within these categories, the survey estimated that 111,200 people in Australia had an intellectual disability. This is an overall prevalence rate of 0.76% (7.6 per thousand people) which is also the conclusion of the Western Australian study. In the 1993 survey, which used more methodologies 328,000 people (1.86%) reported intellectual disability as either the primary or associated condition. Of this group, 174,000 (0.99%) reported the need for assistance with daily living activities. Xingyan (1997) concluded that in assessing the prevalence of intellectual disability in Australia, the use of theoretical prevalence rates (e.g., 2.3%) is of limited value because it overlooks the importance of adaptive skills. He asserts that we could use the administrative prevalence figure found in the 1993 survey (i.e., 1.86%) by acknowledging that this is based on self-report (or at least the report of a person close to the person with a disability) and is not necessarily associated with a need for support. However he believes that the most meaningful figure to use is approximately 1% which takes into account people who have intellectual disabilities and also require support in daily living activities. This figure approximates that of other countries throughout the world (Baird & Sandovnick, 1985; Hagberg & Kylleman 1983; Rantakillio and von Wendt, 1986; Shiotuski, Matsuishi, & Yoshimura et al. 1984). It should be noted however, that this figure includes people with severe or profound level of intellectual disability who are unlikely to commit crimes due to their

of intellectual disability who are unlikely to commit crimes due to their significant deficits and generally greater supervision. When these people are not taken into account, the prevalence is approximately 0.6% (Wellesley, Hockey, Montgomery & Stanley, 1992).

Intellectual Disability Vs Mental Illness

It is important to distinguish between intellectual disability and what is usually referred to as mental illness. The two conditions are very different, contrary to views of many people in the community (McAfee & Gural, 1988). Ellis and Luckasson (1985) express the distinction in this way:

> Mentally ill people encounter disturbances in their thought processes and emotions; mentally retarded people have limited abilities to learn.... Most mentally retarded people are free of mental illness (p.424).

They stress the fact that mental illness is frequently temporary, cyclical or episodic, whereas an intellectual disability remains relatively constant through life, although the deficits in adaptive behaviour which combine with reduced intelligence to define such a disability may be ameliorated through appropriate services and positive relationships.

Dual diagnosis is a term used when an individual is found to have both an intellectual impairment and mental illness. It is not surprising that there are persons who manifest both types of problem. While the intellectual disability may be innate, it often leads to so many frustrations and deprivations that the person has difficulty maintaining emotional stability. Menolascino (1975) estimated that thirty percent of the prison population, who have intellectual impairment, also exhibit symptoms of mental illness. It is frequently difficult to identify persons, especially when they have the third label of offender attached to them, who are both intellectually disabled and emotionally disturbed. Luckasson (1988) maintains that "the mental retardation may partially mask

between long-term institutionalisation and emotional instability, especially after release. He maintained that behaviour is so totally controlled by the social situation in an institution that:

> ...disorders may become latent... Untreated, these symptoms and disorders are likely to resurface...as these individuals come into contact with new stressors such as those associated with sudden deinstitutionalization, social isolation, and exposure to the criminal justice system (p.59).

McAfee and Gural (1988) point out that the legal protections which are provided in the criminal justice system tend to be designed with the psychiatrically involved offender in mind. Sometimes there is a belief that these protections will be equally appropriate and available to a person with an intellectual disability, but such is often not the case (p.5). For example, they found that many American jurisdictions deprive such accused persons of the defence of diminished culpability by restricting it to those who have been diagnosed as mentally ill (p.6).

RESEARCH OVERVIEW

Purpose of the Study

This research owes its origins to the concern of people with an intellectual disability being over-represented in prison populations. The purpose of this study is to present a thorough examination of the degree of involvement of adults with an intellectual disability in the criminal justice system, using one state in Australia- Western Australia - as the case study. It focuses in particular on identifying any differential treatment of this group and identifying where the divergence takes place. A further purpose of the study is to provide a deeper understanding of the reasons that this group is over-represented in prison populations.

Significance of the Study

The nature of the official data available in Western Australia permits an empirical study in a breadth and detail not hitherto attempted within this field. It has several original features; it fills an information void using data which is unique in detail and comprehensiveness and provides an opportunity to assess the participation by people with an intellectual disability at all levels of the criminal justice process, i.e. from arrest to charge and court appearance and finally to conviction and possible detention, over the whole of Western Australia and over a long period of time. This has made it possible not only to test for any bias amplification as individuals move through the various stages of the criminal process, but also to inquire whether one discretionary outcome "impacts more oppressively" (Gale & Wundersitz, 1987, p.6) on the individual than another. It is of limited use, for example, to legislate for new sentencing procedures if the greatest impact and inequity occurs at the point of apprehension.

Yet despite the value of the data source, some words of warning must be issued. The study is an examination of the operation of the criminal process, rather than an analysis of patterns of actual offending behaviour. This was determined by the methodology employed, that is, the utilisation of official statistics on adult offending, which cannot reveal more than the process whereby individuals and groups are selected for formal treatment by the system. Data collection begins only after the person has entered the processing mechanisms of the justice system. However, despite the lack of official information on the apprehension decision itself, the statistics do provide considerable insight into whether people with an intellectual disability receive different outcomes from other offenders once they have entered the formal justice system.

The Investigation

To enable the investigation of the following research questions to proceed, three databases were used. The first database was that of the Disability Services Commission, the Western Australian government agency where all individuals with a suspected intellectual disability are referred for assessment. Access was granted to extract information on all persons known to the Commission over the age of 18 years as at 1 April 1984. These individuals were then matched with a second database, the Police Apprehension Records, located at the Western Australian Police Services, to identify those individuals who had been charged with an offence. This group was then compared with a group of other individuals, (that is, individuals not included in the Disability Services Commission database) who had similarly been charged with a criminal offence over the period of the study.

The next step was to track both groups through the criminal justice system to compare their experiences and identify if different treatment was taking place. This was made possible by using the third database, the Integrated Numerical Offender Identification System, (INOIS system), located at the Crime Research Centre, University of Western Australia.

The study is based on the summation of nearly 11 years of data, 1 April 1984 - 31 December 1994. By combining a number of years, an average picture emerges which gives a more accurate presentation of the situation than does a single year of data which may be subject to fluctuations.

Research Questions

1. Do adult offenders with intellectual disability who have been charged with a criminal offence in Western Australia receive different treatment as they proceed through the criminal justice system than adult offenders who do not have an intellectual disability? Specifically:

   (i) Are adults with an intellectual disability charged with a criminal offence more often than other adults ?

   (ii) Do adult offenders with an intellectual disability receive bail less often?

   (iii) Are adult offenders with an intellectual disability convicted more often?

   (iv) Are adult offenders with an intellectual disability sentenced to imprisonment at a higher rate than other adult offenders?

   (v) Do adult offenders with an intellectual disability receive parole less often than other adult offenders?

   (vi) Do adult offenders with an intellectual disability receive community based correction orders more frequently than other adult offenders?

   (vii) Do adult offenders with an intellectual disability have a higher rate of recidivism than other adult offenders?

2. Are there differences in treatment of adult offenders with an intellectual disability over time?

Plan of Thesis

The thesis consists of ten chapters. CHAPTER TWO presents a review of the literature pertaining to adults with intellectual disabilities as offenders. CHAPTER THREE describes the process of the criminal justice system in Western Australia, and discusses issues specifically relating to people with an intellectual disability as they arise at each point in the system. CHAPTER FOUR describes the method by which the data for the project was gathered. CHAPTERS FIVE, SIX, SEVEN, EIGHT AND NINE present the results of the project. CHAPTER TEN discusses the findings of the investigation and provides the conclusions of the research which are analysed from the perspectives of the research purposes.

CHAPTER TWO

LITERATURE REVIEW

Introduction

Contemporary debate on the criminal justice system and people with intellectual disabilities extends across many issues - apprehension and arrest, fitness to plead and to be tried, court procedures, sentencing and disposition. This chapter has two purposes: First, it will examine historically, the legal recognition within the criminal law and associated laws and policies for people with an intellectual disability in Western Australia. Secondly, it will review the literature on people with an intellectual disability and the criminal justice system over the past thirty years. In particular it examines the link between intellectual disability and criminal behaviour, and the prevalence of offending. Reasons that this group may be over-represented in prison populations are then discussed. The literature on the characteristics of offenders with an intellectual disability, and the types of crime which people with intellectual disabilities typically commit is then reviewed, followed by recidivism studies and the management and provision of services for prisoners with an intellectual disability. Chapter THREE will provide an overview of the criminal justice system, and how it operates in Western Australia, including apprehension and arrest, fitness to plead and to be tried, court procedures and sentencing. Issues which have a particular relevance for offenders with an intellectual disability will be discussed as they arise at each stage of the criminal justice process.

Common Law History

Upon colonisation, Western Australia inherited the common law of England. The Swan River Colony was established on 29 February 1829, but Captain Stirling had left Britain before the passage of legislation to commission a Governor and establish a legislature for the colony. When, on 18 June that same year he declared that "...the Laws of the United Kingdom as far as they are applicable to the circumstances of the case do therein immediately prevail and become security for the Rights, Privileges and Immunities of all His Majesty's subjects..." the whole of English customary law and statutes (the common law) then in force formed the first law of the colony (Russell, 1980).

Many ancient laws and a whole legal tradition of thinking thus applied in Western Australia and that legal tradition was not particularly sensitive to the needs of people with an intellectual disability. For example, though the law provided a means of appointing guardians, it did so primarily for the purpose of protecting the property of people with an intellectual disability. Its first purpose was to ensure the orderly devolution of land, on which the authority (and financial stability) of the Crown originally rested.

The first contact between the criminal law and persons who were then described as persons of unsound mind can be traced back over 700 years to a statute at the end of the Reign of Henry III recognised in the *Statute de Prerogative Regis*. That statute provided that the King would have the custody of the lands of "natural fools", "taking the profits without waste, finding them unnecessary and after their death restoring them to their right heirs" (Bottomley, 1989, p.34). That law recognised only two conditions of unsound mind, namely idiocy and lunacy. In the former case, the right of guardianship was a profitable right analogous to the right of wardship. In the latter case, it

was in the nature of a duty and no profit could be made from it. Gradually the two conditions assimilated and jurisdiction passed from the Exchequer to the Chancellor. An Act of 1744 gave justices the power to confine lunatics and this led later in the century to controls on asylums in London and Middlesex through control being vested in a committee elected by the College of Physicians. Many of these asylums were private facilities (Walker, 1969, p.78).

An Act of 1800 provided that people who were insane and indicted for crimes could be detained, although it did not say where, and some were detained in prisons at His Majesty's pleasure. In 1806 Sir George Paul, the prison reformer of Gloucestershire, addressed a memorial to the government on the terrible condition of these criminal lunatics. The result was an Act of 1808, the title of which was *An Act for the Better Care and Maintenance of Lunatics, being Paupers and Criminals,* which addressed the perceived problem of the detention of the insane in jails, poorhouses and houses of industry or correction by enabling the establishment of lunatic asylums in various counties by direction of Courts of Sessions (Walker, 1969, p. 80-81). It is most probable that the term insane included people with an intellectual disability. Various reforms, as they were regarded at the time, were introduced from 1830 onwards. The culmination of these 19th century developments was the enactment of the *Lunacy Act* 1890 (UK).

Early Western Australian Legislation

The first enactment locally was the *Lunacy Act* 1871 which in substance established many of the procedures for commitment or restraint of the person which are still in force today in the *Mental Health Act 1962.* The *Lunacy Act* was intended to provide for the safe custody or the prevention of offending by the

insane who were thought to be a risk to others, and the care and maintenance of persons of unsound mind. It provided for the apprehension of a person found in circumstances suggesting that they were mentally ill or had intended to commit suicide or another crime. He or she could be committed to a gaol or public hospital by two justices of the peace upon consideration of the opinions of medical practitioners. The Act also provided for civil commitment of non-dangerous but insane people, but there is little evidence of how those discretions were exercised.

Western Australia's *Lunacy Act* 1871 made no distinction between persons of unsound mind and idiots. Both were included in the definition of "lunatics". It provided special procedures for dealing with pauper lunatics, established some procedural requirements in certifying whether there were facts upon which to base a medical practitioner's opinion that the person was an idiot, lunatic or person of unsound mind, and provided for visitors to oversee the discharge and detention of all patients. It also provided that management of the estates of such persons be instituted by way of a court's finding that the person was incapable of managing his/her affairs and that it was "just and reasonable or for the lunatic's benefit" to place control of the property in the hands of a manager or committee, subject to the supervision of the Master of the Supreme Court.

The Lunacy Act 1903 (WA) came into operation on 1 January 1904 and has endured through to the present era. For the first time the legislation drew a distinction between a person who was insane and a person who was incapable. The former was a person found to be insane or of unsound mind and incapable of managing himself or his affairs; the latter was a person found to be incapable through mental infirmity, arising from disease or age, of managing his affairs (S4). The Parliamentary debates show that the members

some awareness of the distinction between the insane and idiots and feeble-minded people and the undesirability of trying to house or treat both together (Western Australian Parliamentary Debates, 1903, p. 533). The Act, however, concerned itself with the full range of people who were unable to care for themselves, including people with an intellectual disability and habitual drunkards (included within the insane definition). It distinguished between the insane and imbeciles and provided measures for the removal from penal discipline of those who could not comply with prison discipline (*Lunacy Act* 1903, S.84). And for the first time the Act clearly provided that the court, in determining whether a person was in need of a guardian, was required to take into account matters relating to the personal well-being of the person as well as the management of the estate (S.146). The terms insane, imbecile, idiot, lunatic or person of unsound mind were, however, used variously and inappropriately throughout the legislation, indicating that there was still quite a degree of uncertainty about the varying states and types of "mental disorder" meant to be covered by the Act. So far as the criminal was concerned, the Act made provision for the establishment of hospitals for the criminally insane. In this way, the close connection between lunacy and criminal lunacy was maintained.

At this time, the prison had only a rudimentary system of classification based on the length of a prisoner's sentence (Thomas & Stewart, 1976, p.68). The mentally weak were not segregated within the prison system and there were no special programmes or policies for their care or rehabilitation. The absence of policies and programmes for the care of the offender with an intellectual disability reflected a more general dearth of policy development in Western Australia. In 1912, Dr Montgomery, the Inspector -General for the Insane, was asked by the under-secretary, F.D. North, to outline the general methods used in handling the intellectually handicapped in the state.

Montgomery wrote back to North, stating that there were "no methods adopted here dealing with persons who are mentally deficient, although not sufficiently so to be regarded as insane" (Thomas and Stewart, 1978, p 78).

This lack of policy development was not through want of trying on Montgomery's part. In 1911, he and his assistant at the Claremont Asylum, Dr. Birmingham, attempted to persuade the State Government to recognise the special position of the "feeble-minded". That year, Montgomery requested funding by the Chief Secretary's Department to send Dr Birmingham to Britain and the United States to investigate their methods for dealing with "the intellectually handicapped". The subsequent Birmingham Report reflected eugenicist fears of "race suicide" stemming from the "unfit" out-breeding the "fit" (Bacchi, 1980; Fitzpatrick, 1988). In his report, Birmingham claimed that the "mentally deficient", by producing "abnormally large" numbers of "deficient", "insane" and "epileptic" children would inevitably bring about the "degeneration of the race" if left to go unchecked within the community.

The only effective means of preventing such degeneration, Birmingham concluded, was the "compulsory and permanent segregation of mental defectives" (The Birmingham Report, p. 8-9). He was particularly adamant that criminal mental defectives be permanently segregated (p. 49). Birmingham recommended that they be confined in special homes under the control of the Inspector- General for the Insane. Birmingham claimed that, as things stood, "defectives" lacked the control to conform to prison discipline. When they breached discipline they were punished by ordinary prison methods, few of which had any reformatory or deterrent effects upon them. Under the circumstances, he concluded, "it is about as irrational to put a defective into prison as to take out the tooth of a person who has a broken leg." (p.38).

In a system where "mental defectives" were expected to bear the full responsibility for their crimes, many were repeatedly convicted for petty offences, with their central problem of "deficiency" being overlooked. This high rate of recidivism would continue, Birmingham argued, until the "deficiency" was recognised and the offender permanently segregated, "not as a criminal but as a defective" (p.11).

Birmingham's view of the connection between crime and intellectual disability had a long pedigree, beginning with the work of the Italian criminologist, Cesare Lombroso. In the nineteenth century, Lombroso had argued the case that the tendency to criminal behaviour was organically caused and passed from parents to children by the process of heredity. Other European and North American criminologists and eugenecists believed that they had found irrefutable evidence of links between crime and inherited feeble mindedness. This point will be taken up in more detail in the next section on Intellectual Disability and Crime.

It was in the criminal law as enacted in the *Criminal Code* that the principal provisions relating to persons with mental disorder were contained. In 1902, the Western Australian Parliament had passed a new Justices Act repealing its earlier enactment and also passed Act No. 24 of 1902, "An Act to establish a *Code of Criminal Law*". This Code was repealed and re-enacted with amendments made between 1902 and 1913 by Act No. 28 of 1913.

The first matter which arose under the criminal code in relation to the trial of a mentally disordered accused person was the fitness to plead of that person. Section 631 of the Code provides:

> If, when the accused person is called upon to plead to the indictment, it appears to be uncertain, for any reason, whether he is capable of understanding the proceedings at the trial so as to be able to make a proper defence, a jury of twelve men, to be chosen from the panel of jurors, are to be empanelled forthwith, who are to be sworn to find whether he is so

capable or no. If the jury finds that he is capable of understanding the proceedings, the trial is to proceed as in other cases. If the jury find that he is not so capable, the finding is to be recorded and the Court may order the accused person to be discharged, or may order him to be kept in custody in such place and in such manner as the Court thinks fit, until he can be dealt with according to law. A person so found to be incapable of understanding the proceedings at the trial may be again indicted and tried for the offence.

The best known of the provisions of the *Criminal Code* in relation to mental disorder was that establishing the defence of insanity. Section 26 of the Code established the presumption that every person is of sound mind until the contrary is proved. Section 27 provided that:

A person is not criminally responsible if, at the relevant time, he is in such a state of mental disease or natural mental infirmity as to deprive him of the capacity to know he ought not to do what he has done. A person whose mind at the time of his doing or omitting to do an act, is affected by delusion on some specific matter or matters, but who is not otherwise entitled to the benefit of the earlier provisions of S.27, is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist".

A further amendment to the *Criminal Code* in 1918 was to have far-reaching effects upon the management and detention of people with an intellectual disability. Section 662 of the *Criminal Code* would allow indeterminate sentences in certain circumstances. It specified that:

When any person apparently of the age of eighteen years or upwards is convicted of any indictable offence, not punishable by death (whether such person has been previously convicted or not), the court before which such person is convicted may, if it thinks 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 -

(a) direct that on the expiration of the term of imprisonment then imposed upon him be detained during the Governor's pleasure in a reformatory prison; or
(b) without imposing any term of imprisonment upon him sentence him to be forthwith committed to a reformatory prison, and to be detained there during the Governor's pleasure (Western Australian Acts of Parliament, 9 Geo. V., 1918-19, Act No 32, Section 662).

Opposition to the proposed bill raised three important issues. The first was the concern that prisoners sentenced to a few months imprisonment could be detained for years, if not forever (Western Australian Parliamentary Debates, 1918, p.476). This fear of excessively long terms of imprisonment encouraged some debate within the Assembly. However anxiety was quelled when one member informed the Assembly that indeterminacy had been successfully practised in Victoria for well over a decade.

The second line of opposition was when Phillip Collier, the future Labor Premier, asked the Assembly to consider the emotional effects that indeterminate sentencing might have. He requested that a fixed sentence be imposed so that individuals might look forward to their release. Collier claimed that "the sentencing of a person to a term, the duration of which he does not know, will have a detrimental effect, in fact a heart-breaking effect" (Western Australian Parliamentary Debates, 1918, p.473). However, this argument was not addressed by other members of the Assembly, who were perhaps more preoccupied with the more expedient objective of the Bill. The mover of the Bill himself admitted that indeterminacy was designed to keep these people "out of the way" (p.383).

The third issue raised in opposition to the Bill concerned the proposed reformatory prison. Opponents to the legislation argued that the prison was unsuitable for reformatory purposes and the staff not sufficiently trained for the special treatment required. It was felt that people with intellectual disability should be permanently placed within special institutions where they could be given appropriate treatment. The proposed amendment, it was claimed, stressed the element of segregation but failed to guarantee specialised treatment (Western Australian Parliamentary Debates, 1918, pp. 382-384).

These concerns carried little weight with a government which had clearly identified the social engineering implications of indeterminacy as a means of dealing with habitual criminality, deviancy and perceived genetic threats. The Parliamentary Secretary agreed with the policy of segregating the "mentally deficient" and:

> would be glad to see the day - and have the money - when we could establish segregated farms in the country for these people,...where persons who are mentally deficient, or are morally insane, may be treated humanely for their own benefit, and certainly for the benefit of the community (Western Australian Parliamentary Debates, 1918, p. 398).

In the meantime, he argued, action must be taken. With the stress upon segregation "for the benefit of the community", the amendments were passed in 1918. A section of the Fremantle Gaol was to be set aside as a "reformatory prison" and Western Australia committed itself to the policy of indeterminacy - a policy which some social historians claim has ever since "permeated the entire administration of criminal justice in the state" (Thomas and Stewart, 1978).

Birmingham's reaction to the adoption of indeterminate sentencing is unclear. What is clear is that along with overseas contemporaries such as Fernald and Goddard, he energetically promoted the interconnectedness of notions of "mental deficiency", "criminality" and "heredity" and was influential in a society increasingly affected by the bogus science of eugenics. In Birmingham's writings can also be seen an underlying concern with the menace posed by the "moral imbecile", the "feeble-minded" person without a functioning moral faculty. The portrayal of menace and what Wolfensberger (1992) refers to as the devaluing of people with intellectual disabilities through "stereotyping", were undoubtedly influential with judges and magistrates as some case studies of the time suggest (Supreme Court Records of Western Australia, 24 March, 1908).

According to the 1918 plan, prisoners awarded indeterminate sentences in the reformatory prison were to be kept apart from the rest of the prison population. It is evident from the Annual Reports, however, that they spent their working hours at least, alongside the other prisoners (Thomas and Stewart, 1978). Indeed, there is no evidence to suggest that offenders with intellectual disabilities were institutionalised, as Birmingham had hoped, in an environment of specialised care rather than punishment as defectives rather than criminals. In the following decades, the criminal justice system remained preoccupied with the issue of indeterminacy and displayed little interest in its implications in terms of human rights.

In *Imprisonment in Western Australia: Evolution, Theory and Practice* (1978), Thomas and Stewart claim that by the end of the 1950s the Indeterminate Sentence Board was being phased out. Rather than pursuing a definite policy of indeterminacy, they claim:

> ...the position was arising when the only reason why a prisoner continued to be locked up was that there was nowhere for him to go...Such a situation easily arises where prisoners are docile, sentences are indeterminate and after care arrangements haphazard (p.117-118).

Clearly, this suggests that people with - intellectual disabilities were vulnerable to indeterminate sentencing. In 1963, to address the problem of repeat offending by alternate means, namely through the provision of after-care for prisoners, the State Government enacted the *Offenders Probation and Parole Act*. As Thomas and Stewart note, the reason for this change of direction lay with the proposition that "the offender is helped to survive in the community by a sympathetic counsellor" (1978, p. 150). The prison system in the late 1960s and early 1970s was also characterised by the growth of non-uniform staff such as psychologists, social workers and welfare officers (Stewart and Thomas, 1978, p. 163). One would expect, therefore, that by the late 1970s

with judicial disfavour of indeterminate sentencing, the availability of after-care service and the development of treatment programs, the possibility of prisoners with intellectual disability becoming lost in the prison system would become remote. Unfortunately this was not the case, as has been witnessed, even in very recent times, with a number of individuals with an intellectual disability in the Western Australian prisons being simply forgotten.

Change in the 1980s and 1990s

In 1981, a Working Party on the future delivery of services for people with an intellectual disability in Western Australia was established with Professor Arthur Beacham as Chairperson. This Working Party was one of three which were part of a Government Mental Health Legislation Review. The Review was to consider three pieces of enabling legislation: changes to the law dealing with the care and treatment (including compulsory detention) of people with psychiatric illness; guardianship legislation and the establishment of a statutory authority for people with an intellectual disability.

After canvassing a number of options, the *Beacham Report* recommended the establishment of a statutory authority under the direction of a Minister and in 1985 *The Authority for Intellectually Handicapped Persons Act* 1985 was passed by Parliament.

With this enactment, statute law in Western Australia gave positive recognition to people with an intellectual disability for the first time. The Act removed the definition of "intellectually defective" in the Mental Health Act, and "mental disorder" in that Act was defined to exclude intellectual disability. The recognition by law that intellectual disability was not "mental illness", and that people with an intellectual disability had the full range of human rights and

dignities was a major achievement in a State where the primary legal response had been to detain this group and forget them.

However, the Mental Health Legislation Review's recommendations were not fully implemented. The Guardianship legislation was eventually proclaimed in 1990 but it was not until the end of 1997 that new legislation was passed which set out to consolidate and clarify the law as it relates to the disposition and treatment of defendants who are mentally impaired. This matter will be taken up in the concluding chapter.

A further change which would have an impact on offenders with an intellectual disability was changes to the *Offenders Probation and Parole Act* 1963 made by the *Acts Amendment (Imprisonment and Parole) Act* 1987, which commenced in 1988. This amendment removed the determination of the length of a minimum term from the court's discretion. The courts retained the authority to order that a person be eligible for parole but the length of the period in prison and subsequent parole period were then to be established administratively through the operations of the Act. The significance of this amendment was the removal of the option for the courts to set a very low minimum term with a long maximum term with the view that the offender should spend some considerable time on parole under supervision. The effect of the 1987 Act, has then, precluded the option of unusual periods of detention, that is, indeterminate detention or exceptionally long periods of parole. These changes are consistent with the principles of equity and proportionality, and protection of people with intellectual disabilities against unreasonable and unrealistic sentences.

Intellectual Disability and Crime

The vexed question of the link between mental abnormality and criminal behaviour has been the subject of hypotheses, conjecture, and philosophical consideration for centuries. However, since the beginning of this century there has been a gradual decline in the belief in the importance of intellectual disability as a causal factor in crime. In 1910, Henry Goddard, who served a term as president of what is now the American Association on Mental Retardation, started administering the Binet-Simon Intelligence test to delinquents and criminals and found an incidence of 66% of feeble-minded cases in a sample of juvenile delinquents (Goddard, 1914). Surveying other groups of criminals, Goddard found an incidence of feeble-mindedness ranging from 28 to 89%. Similar views prevailed in the United Kingdom (Goring, 1913), and gave rise to the first comprehensive piece of legislation for the mentally handicapped - *The Mental Deficiency Act*, 1913, which included the concept of the "Moral Defective who from an early age displayed some permanent mental defect coupled with strong, vicious or criminal propensities on which punishment had little or no effect". These early views were based upon surveys of criminal populations using intelligence tests, which had a high verbal bias and were more a measure of educational under-achievement than innate low intelligence. Subsequent studies have demonstrated a much more limited negative correlation with, on average, only an 8 IQ point difference between delinquent and non-delinquent populations and a very low prevalence of mental handicap (Hirschi and Hindelgang, 1977; McGarvey, Gabriele, Bentler and Mednick, 1981; Sutherland, 1931; West and Farrington, 1973; Woodward, 1954). More recently, Edgerton

(1981) used a longitudinal design to investigate the theory that people with an intellectual disability are inherently criminal. The results did not support the theory, suggesting instead that the relationship between crime and intellectual disability is influenced by factors such as social isolation, parental and peer rejection, poor community adaptation and a lack of self esteem, factors which could also be attributed to many offenders in the general offending population. Nevertheless, numerous research studies in Australia and other Western nations have reported that people with an intellectual disability are over-represented in prison populations when compared with the prevalence of intellectual disability in the general population.

Prevalence of intellectual disability in the prison population

Estimating the magnitude of the problem – that is, the percentage of persons in the prison system who have intellectual disability, is very difficult to do for reasons that follow.

In two large-scale cohort studies from America (Bromberg and Thompson, 1937; Messinger and Apfelberg, 1961), employing the Weschsler Adult Intelligence Scale (WAIS) administered by a trained psychologist, it was found that the mentally handicapped comprised 2.4% and 2.5% respectively of the criminal population. However, Brown and Courtless' (1971) work identified that the number of incarcerated offenders with an intellectual disability in the U.S. prisons ranged from 2.6% to 24.3% with a national mean of 9.5% of the prison population classified as having an intellectual disability. More recent studies have tended to indicate smaller, but still significant numbers of prisoners with an intellectual disability. Rockowitz for example, identified 3.6% of the Monroe County (N.Y.) gaol population as being intellectually disabled

(Rockowitz 1985). Pugh (1986) identified 1.9% of prisoners in the Texas Department of Corrections with IQs less than 70. In a partial replication of the work of Brown and Courtless (1971), Denowski and Denowski (1985) found that the prevalence of intellectual disability differed between American states from a low of 1.5% to a high of 19.1% with an average of 6.2%.

In the UK Coid (1988) found only 34 people from approximately 10,000 admitted to Winchester prison on remand, were considered "sub-normal" and Gunn, Maden and Swinton (1991) considered seven out of 1769 sentenced prisoners could be described as having mental retardation. Murphy, Hartnett and Holland (1995) found that 33 of 157 men screened in a south London prison reported having an intellectual disability. Only 21 could be tested and none were found to be in the mentally handicapped range. However, Gudjonsson, Clare, Rutter and Pearse (1993) investigated a number of suspects detained at two police stations in London and found that 8.6% had a full scale IQ below 70 and a further 42% were in the borderline range.

Data on the prevalence of offenders with an intellectual disability in Australian gaols are gradually becoming available. There appear to be differences in prevalence rates between States reflecting the availability of community services for persons with an intellectual disability, differences in jurisdictions in sentencing and parole regulations, and possible diversions from the correction system. In 1980, a study in New South Wales of offenders serving sentences of longer than 12 months found that approximately 5% had an IQ of less than 70 (Hayes and Hayes, 1984) and in 1988 (Hayes and McIlwain, 1988) estimated the prevalence of intellectual deficit at 13% (2.4% with an intellectual disability and 10.5% borderline) in N.S.W. prisons. Victorian studies estimate a much lower prevalence rate which may reflect the lower imprisonment and remand rates in that State. One study in 1986 calculated a 3-4% rate of

intellectual disability in the inmate population, based on those offenders who were known to the Victorian Office of Intellectual Disability Services (Bodna, 1986). Another study in 1989 found the prevalence rate to be 0.47 per cent, but these figures estimated only those people with an intellectual disability in juvenile institutions (Victorian Office of Corrections, 1989). Two studies have been undertaken in Western Australian. The first study (Fitzgerald and Downs-Stoney, 1987) compared prisoner census data and Authority for Intellectually Handicapped Persons client listings and found a prevalence rate of 0.34%. A more recent study (Jones and Coombes, 1990) found that prevalence rates varied between the prisons, from a low of zero to a high of 10%, with an overall prevalence rate of 1.2% of the prisoner population having an intellectual disability and 2.4% who were functioning within the borderline range. The prevalence rate increased with the percentage of a given prison population who participated in the voluntary screening programme. This may be related to the fact that as a greater proportion of inmates in any prison is tested, it is more likely that included in that sample will be some inmates with an intellectual disability. These inmates may be threatened by the testing procedures and opt not to participate, and are thus not included in the samples in those prisons where a low participation rate occurs.

Other researchers have investigated the extent of penal court decisions made in favour of people with an intellectual disability. For example, in a survey of 22,000 mentally handicapped people known to the Danish services on a census day in 1973, Svendsen and Werner (1977) found 290 to be subject to a penal court decision - a prevalence of little over 1%. A recent study of mentally retarded criminal offenders in Denmark (Lund, 1990) identified only 92 patients serving statutory care orders under the Danish penal code on the census day in 1984 - a point prevalence of less than 0.5%. Lund concluded that this apparently

dramatic decrease since the 1973 census was less a reflection of a genuine reduction in criminal activity and more a reflection of shorter sentences and a reduction in the number of borderline retarded persons receiving such sentences - the implication being that they had been dealt with within the normal penal system. There was a decrease in crimes of property and an increase in sex offences, violence and arson amongst those convicted in 1984. Lifespan figures are naturally higher. Dyggve and Kodahl (1979) reported that 31 (3%) of 942 mentally retarded persons registered in the Danish county of West Zealand in 1973, whom they examined, had a history of conviction for a criminal offence. In Canada, a 9% incidence of intellectually disabled individuals was found among a 10-year cohort of pre-trial "psychiatric" patients (Kunjukrishnan, 1979).

A number of researchers have discussed the reasons for the observed discrepancies in prevalence rates in different jurisdictions (See Hayes and Craddock, 1992; MacEachon, 1979; Noble and Conley, 1992; Santamour, 1986). These are best summarised as follows:

(i) differences in state sentencing and parole regulations, and State prison reforms;

(ii) the level of community services available for people with an intellectual disability;

(iii) psychometric factors such as use of individual as compared with group intelligence tests, the professional expertise of the test administrator, and the adequacy of brief IQ measures in classifying prisoners with an intellectual disability;

(iv) whether adaptive behaviour measures and other cultural/clinical measures are used as part of the classification process;

(v) population base; inasmuch as prevalence rates tend to be higher when based on total offender populations than when based only on new admissions to prison, or offenders serving longer sentences;

(vi) sampling of the prison population; rates tend to be lower when a sample is tested rather than when all offenders have taken an intelligence test; and

(vii) the operational definition of intellectual disability since prevalence rates are lower when standard Z scores (of more than two standard deviation units below the mean) rather than test scores are used to identify offenders with an intellectual disability.

A number of other factors may influence the prevalence of intellectual disability in prisoner populations, including the fact that prevalence rates may not be static over time (as demonstrated above in the Victorian studies). This has been replicated elsewhere. For example, a radical drop in prevalence occurred in Iowa between 1965 and 1972 when the proportion decreased from 13 % to 1% (Rockoff, 1978). The decrease was attributed to an alteration in court attitudes and policies and an increase in alternative resources. As a consequence, persons who would otherwise have inflated the proportion of people with an intellectual disability behind bars, are now receiving some support to maintain themselves in the community or perhaps other non-penal institutions. The other implication is that individuals with intellectual disability who are left incarcerated are likely to be only mildly impaired which may make it less probable that they will be detected as having any special needs (McAfee and Guralˆ, 1988, p.9).

The decrease in Victorian prisons may have been related to the creation of a secure unit operated by the Office of Intellectual Disability Services, which

offered an alternative sentencing disposition. The proportion of the general population imprisoned also affects prevalence rates. In Australia, rates of imprisonment vary dramatically between the States, being highest in the Northern Territory (407.6 prisoners per 100,000 population) and lowest in the Australian Capital Territory (55.2 prisoners per 100,000 population) (Walker, 1991).

Any number of the above factors operating singularly or in unison may account for the differences that exist in the measured prevalence of prisoners with an intellectual disability. However, even allowing for these differences in many jurisdictions, the rate of incarceration of this group is significantly higher than would be expected from general population prevalence estimates. In light of these findings, there is obviously a need for a better understanding of both the extent of and reasons for this over-representation.

Explanations for Over-representation

Various explanations for the over-representation of people with intellectual disabilities that occurs in different jurisdictions have been put forward. These include the susceptibility hypothesis, psychological and socio-economic disadvantage, the social services explanation and the different treatment hypothesis or the social model of disability.

The susceptibility hypothesis proposes that people with an intellectual disability are more likely to become involved in the criminal justice system because of their personal characteristics. It has been suggested that characteristics such as impulsivity, suggestibility, exploitability, and a desire to please, lead to a greater probability of apprehension. Menninger (1986) emphasises the importance of impulsiveness and the need for immediate

gratification. However, Clarke, Clarke and Berg (1985) propose increased suggestibility as the reason. Hence, the victim may be more likely to be led into petty crime, to be exploited, and to be cajoled into taking the most risky role. Furthermore he/she would be less successful at concealing his/her actions or getting away. Clare and Gudjonsson (1993) also argue that suspects with intellectual disability may be unduly susceptible to acquiescence and suggestibility during questioning. In addition, they make the point that this group may not fully understand their legal rights, and may not appreciate the consequences or significance of their decisions. Wirth (1987) emphasised the importance of varying one's mode of questioning to obtain an accurate appraisal of the situation. The person with an intellectual disability might appear uncooperative upon interrogation simply because of a difficulty in retrieving words. Such behaviours could add to an officer's suspicion and result in an arrest.

Other researchers have concluded that a greater likelihood of detection is due to an inability to conceal their actions; and less likelihood of ready access to legal counsel, poor resilience, memory difficulties and difficulty with abstract reasoning are possible reasons for this group's over-representation in the prisons (see for example, Byrnes, 1995; Ellis and Luckasson, 1985; Hayes and Craddock, 1992; Herman, Singer and Roberts, 1988; Noble and Conley, 1992; Perlman, Erikson, Esses and Issacs, 1994; Tully and Cahill, 1984).

The psychological and socio-economic disadvantage explanation covers a variety of theories about psychological and socio-economic disadvantage which may lead to over-representation. For example, a recent Victorian study of all admissions into two specialist units for offenders with an intellectual disability revealed that "intellectual disability is merely a marker of an overwhelming array of psychosocial disadvantages" (Deane and Glaser, 1994, p.6). The

Victorian study found that prisoners with an intellectual disability "even more so than the 'mainstream' prison population, experience unemployment, major educational disadvantages, childhood institutionalisation, disrupted or disturbed families of origin, frequent contact with psychiatric services, alcoholism, drug addiction and poor social skills" (p.2).

Hayes (1994) also supported the "socio-economic disadvantage" explanation. She asserted that in explaining the phenomenon of over-representation of people with intellectual disabilities amongst offender populations, the deficits in cognitive functioning, as reflected by IQ scores, are not as significant as deficits in many areas of adaptive behaviour, especially communication and social skills. Hayes made the point that the results presented in her study describe an alienated and deprived sub-group of society where unemployment, isolation, drugs and alcohol abuse, sexual victimisation and dysfunctional childhood experiences are endemic, and concluded that communication and social skills deficits are both a cause and an outcome of their isolation, which could in turn lead to boredom, frustration and a lack of appropriate social role models. She argued then, that it is possible that it is not the presence of intellectual disability which leads to criminal behaviour, but rather in a scenario similar to other afflicted groups (such as epileptics, drug and alcohol abusers, and brain damaged youths), it is the constellation of negative social circumstances which results in over-representation in the criminal justice system. However, Hodgins (1992) argued that such factors may indicate that people with an intellectual disability are not necessarily or solely experiencing harsher treatment at later stages in the criminal justice process, but are actually coming into contact more often with the criminal justice system. She argues that this theory is supported by the conclusions of a Swedish birth cohort study, which followed 113 subjects up to the age of 30 who had been placed in special

classes for intellectually deficient children in high school. The research found that men with an intellectual disability were three times more likely to be charged with at least one criminal offence than non-disabled men, and five times more likely to be charged with a violent offence. Women with an intellectual disability were almost four times more likely to be charged than their non-disabled peers, and 25 times more likely to be charged with a violent offence. In over half of the subjects, the criminal behaviour appeared before the age of 18 years. Such studies indicate the complexity of factors contributing to over-representation, including aspects of the lifestyle, characteristics and environment of people with an intellectual disability, which increase the likelihood of engaging in behaviour which will bring them to the attention of the criminal justice system. Additionally, such studies reveal that the behaviour which eventually led to arrest was usually apparent during childhood and yet was never addressed by schools, the health or social services system.

Diminishing services in the community for many people with an intellectual disability is also a possible contributor to this group's over-representation in the prison system. In a recent report by the N.S.W. Law Reform Commission (1992), the issue of non-custodial alternatives for people with an intellectual disability was seen to be an area of major concern, and a possible explanation for this group's over-representation in the prison system: "..the lack of services means a judge may have no alternative other than to award a custodial sentence" (p.60). It has been suggested that the process of deinstitutionalisation has led to an increase in offending behaviour because there has not been a concomitant increase in community services (Maloney, 1983). A change in arrest patterns over a period of time could be related to a change in the provision of social services to this group of people.

Another possible explanation for over-representation in the prisons is that people with an intellectual disability may be at a distinct disadvantage when they come into contact with the criminal justice system, in that they are treated differently. The different treatment hypothesis suggests that people with an intellectual disability are not more delinquent but more likely to be found so by the courts owing to their vulnerability in criminal justice processes (Zimmerman, Rich, Keilitz and Broder, 1981). Linked to the different treatment hypothesis is Oliver's (1990) social model of disability which says that people with disabilities experience systematic deprivation and disadvantage caused by restrictive environments and disabling barriers. Institutional discrimination is evident when the policies and activities of social groups or organisations result in unequal treatment or unequal outcomes between disabled and non-disabled people.

Although there appears to be no hard data to support the different treatment hypothesis, one study has, for example, suggested that they may be disproportionately more likely to be arrested, questioned and detained for minor infringements of public order law (N.S.W. Anti-Discrimination Board, 1981, p.320). Another study suggests that people with an intellectual disability may be coerced to confess to a crime they have not committed (Gudjonsson, 1990), or they may not have their rights explained in a manner which they understand (Fulero and Everington, 1995; Gudjonsson, Clare, Rutter & Pearse 1993). People with an intellectual disability may have a greater rate of refusal of bail perhaps as a result of previous breaches of bail conditions, or lack of supports and resources enabling them to obtain bail and they may receive more custodial sentences, either because of the nature of the offence, or their presentation in court or the lack of dispositional placements in the community (Hayes, 1993). Hayes (1993) points out that the critical question for further

research is whether or not the over-representation in prisons arises as a consequence of harsher sentencing of this group, or whether the over-representation occurs at each stage of the criminal justice process.

Other commentators suggest that people with an intellectual disability tend to serve longer sentences or a greater percentage of their sentence before being released on parole and may require maximum security facilities for segregation and "protection" needs (Hayes and Craddock, 1992).

Related to the suggestion of different treatment, Wolfensberger (1992) argued that people with an intellectual disability are systematically stereotyped and attributed with characteristics that place them into roles such as being treated as an eternal child, a menace, sick, or an object of pity. These stereotyped roles are then the basis upon which society relates to people with an intellectual disability, which leads them to being treated in quite negative ways. Some support for this position is put forward by Swanson and Garwick (1990), in their study of low functioning sex offenders, viz.:

> It is our experience that low-functioning sex offenders are commonly at first ignored or given minor consequences, such as scolding by police or parents with little training or therapy. Eventually, someone's tolerance is passed as offences continue and severe punishments are suddenly applied, ranging from beatings by a victim's family, to jail or a state hospital. (p.156).

The importance of the issue of community and professional attitudes to people with disabilities in addressing the needs of people with an intellectual disability in the criminal justice system has also been emphasised by a Western Australian study which has examined the attitudes, perceptions and procedures in the criminal justice system to see if they reflect negative community stereotypes which are likely to contribute to differential treatment, and, in turn, to the over-representation of people with an intellectual disability. The research which involved police (Cockram, Jackson and Underwood, 1991),

judges/magistrates (Cockram, Jackson and Underwood, 1993); prison and community correction officers (Cockram, Jackson and Underwood, 1994b); and service workers (including lawyers) (Jackson, Cockram and Underwood, 1991) responding to a questionnaire and interview, has provided some support for the different treatment proposition, but little support for the susceptibility hypothesis. Although all groups interviewed agreed that people with an intellectual disability have particular problems and special needs (such as communication difficulties) which would disadvantage them in the criminal justice system, some of the responses of police and service workers "were not logically derived from the agreed characteristics of people with an intellectual disability, which might indicate stereotyping and perceptions being based on underlying prejudices" (Cockram, Jackson and Underwood, 1994a, p. 16).

Profile of offenders with an Intellectual Disability

Hayes and McIlwain (1988) discussed the profile of the offender with an intellectual disability in New South Wales and agreed with Jones and Coombes, (1990), in Western Australia, when they stated that:

> ...the average age tends to be in the 20s; unemployment is the norm, and those who are employed have low status jobs; very few receive schooling after the age of 16; most are single; Aborigines are over represented; alcohol is prevalent and related to the offence; severe deficits in social and adaptive skills are present, particularly in the area of communication and social interaction skills; there is a high prevalence of multiple problems, such as psychiatric history, behaviour disorder, sensory deficit, or communication problems (p.6).

Hayes and McIlwain (1988) also point out that 94% of offenders with an intellectual disability are male, although their study reports that women with intellectual disabilities appear to be over-represented in prison populations in New South Wales.

Other authors also agree that psychosocial deprivation is a factor as is low socio-economic class, a family history of criminality, cerebral abnormality, minor physical imperfections and a history of behaviour disorder as a child, all implicated in delinquency and adult crime generally, (Gunn and Fenton, 1969; McCord, 1979; West and Farrington, 1977) are found commonly in mentally handicapped offender populations (Craft, 1984; Day, 1988; Denkowski and Denkowski 1984; Hayes, 1994; Kugel, Trembath and Sager, 1968; Lund, 1990). Contamination by criminal family members or peers, gullibility, lack of self-control are common features and sometimes offending may be motivated by status seeking (Day, 1990).

In the US, a study of the characteristics of offenders with an intellectual disability (MacEachron, 1979, p. 167) shows that, typically, they are in their late 20s or early 30s, non-white, educated to early high school level, but functioning educationally up to three years behind this level, holding low-skill jobs (when employed), and living on low incomes (for example social security benefits). It has also been shown that offenders with an intellectual disability are single, are likely to have been in special education classes, come from large families, and are likely to have alcohol-related problems (MacEachron, 1979, p.171). Approximately 27 per cent of offenders with an intellectual disability have been reported as having character disorders (MacEachron, 1979, p.171), whereas a Danish study recently reported that behaviour disorder was found in 88% of such offenders serving care orders (Lund, 1990). The latter study concluded that offending behaviour was predicted by a history of early institutionalisation, having disabled or divorced parents of low socio-economic status, and behaviour disorder of the social-aggressive type, whereas biological factors such as epilepsy did not have any significant predictive value. It has been suggested that the vast majority of offenders with an intellectual disability

are mildly disabled (Brookbanks, 1995; Jones and Coombes; 1990 Svendsen and Werner, 1977).

In order to put the offender with an intellectual disability in perspective, it is necessary to compare their characteristics with those of the general penal population. As has been pointed out earlier, factors which are implicated in delinquency and adult crime generally are psychosocial deprivation, low socio-economic class, a family history of criminality, cerebral abnormality, minor physical imperfections and a history of behaviour disorder as a child. The vast majority of prisoners are male, with only 5.4% of the Australian prison population being female (Walker, 1991). The sex difference is not related to a greater innate criminality by males, but rather to the ascription to males and females of different social roles which influence behaviour extensively. As the social role of women alters, their crime rates become more similar (Sykes, 1967). With respect to age, the majority of persons arrested are under the age of 35; the peak age is between 18 and 24, not so different from the age range into which most offenders with an intellectual disability fall (Hayes, 1994).

Offence Pattern

A number of researchers have attempted to answer the question as to whether there are certain types of crimes which persons who have an intellectual disability are more likely to commit than other crimes, and whether there are differences between these patterns of criminal activity and that of those offenders who have not been labelled intellectually disabled. One of the difficulties in trying to understand the statistics on criminal activity, which various authors have published, is that there are no consistent categories of crimes used in their various analyses. In addition, it appears that there have

various authors have published, is that there are no consistent categories of crimes used in their various analyses. In addition, it appears that there have been no consistent criteria applied in determining who qualifies as an offender with an intellectual disability. Added to the difficulty in trying to reach conclusions about the meaning of such fundamentally incomparable data, some researchers took their statistics from prison populations and others from broader offender groups. It is highly likely that incarcerated persons present very different offence profiles than those who remain in the community.

Some researchers (Boslow and Kandel, 1965; Garcia and Steele, 1988; Steiner, 1984) use only two categories: crimes against persons and crimes against property. Boslow and Kandel came to the conclusion that "In both our retarded and non-retarded populations, we see the same ratio of 60% offences against persons as contrasted with 40% offences against property" (p.648). Garcia and Steele (1988) reported virtually the same findings as had been observed by Kentucky correctional officials: 63.1% of persons identified as developmentally handicapped had committed crimes against persons and 36.9% crimes against property (p.809).

Steiner's (1984) findings were almost exactly the opposite of those reported in the research noted above. Their study showed that 63% of those offenders labelled mentally handicapped had committed crimes against property and 38% against persons (p.184). A Florida study cited by Garcia and Steel, 1988 p.851) was in line with Steiner, in that 37 per cent had offended against persons, but only 43 per cent had committed a property offence alone. Twenty per cent had committed both types of offences.

However, the most widely quoted statistics about crime rates among incarcerated persons with intellectual disabilities are those of Brown and

persons with mental retardation - about 21% of the sample. Other criminal homicides accounted for about another 18%. About 18% of the sample were incarcerated for breaking and entering. These high rates of serious crimes are consistent with more recent reports from New York (Sundram, 1989), where 38% of inmates in state prisons with IQs below 70 have committed or attempted to commit murder, manslaughter, assault, robbery, kidnapping and sexual offences. In addition, Santamour (1989, p.6) reported: "Research on prison populations suggests that retarded offenders as a whole are more frequently convicted of crimes of burglary and breaking and entering (35%); 13% committed homicide and 5% committed rape and sexual crimes." Although frequently cited, these data on the frequency of serious crimes committed by persons with intellectual disability are misleading. To begin with, as noted by Brown and Courtless (1971), the prisons from which these data are derived house individuals who commit the more serious types of crimes. Offenders with mental retardation who are in local jails or are placed into community diversion programs would generally be expected to have committed much less serious crimes. In addition, one would expect the percentage of severe crime reported among all prison inmates to be greater than among new admissions, since inmates who commit the more severe crimes will usually receive longer prison sentences and over time will represent an increasing proportion of inmates who remain in prison. Consistent with this observation is a report by the Illinois Mentally Retarded and Mentally Ill Offender Task Force (1988), which concluded: "Despite common misconceptions that this population commits the majority of violent felony crimes, in reality the overwhelming majority of offences committed by persons who are mentally retarded and/or mentally ill are misdemeanours, less serious felonies, and public disturbances" (p.10). White and Wood (1986), reporting on

a special community program for offenders with mental retardation, noted that over half of the program participants had committed only misdemeanours.

Other studies, including two Australian studies, indicate that offenders with an intellectual disability most frequently commit property offences and sex offences and arson are over-represented (Craft, 1984; Day, 1990; Gibbens and Robertson, 1983; Glaser, 1991; Hayes and McIlwain, 1988; Jones and Coombes, 1990; Kugel, Trembath and Sagar, 1968; Lund, 1990; Svendsen and Werner, 1977). Some authors maintain that the incidence of sex offences is four to six times (Milner, 1949; Tutt, 1971; Walker and McCabe, 1973) than in the general population. Koller, Richardson, Katz and McLaren (1982), in their follow-up study of children with a mental handicap to age 22 years, found that 12.5% of the males had been involved in improper sexual behaviour compared to 1% of the matched controls. Higher detection and prosecution rates have been put forward as an explanation (Murphy, Coleman and Haynes, 1983; Schilling and Schinke, 1988). However, this is not supported by the findings of a study by Day (1993) in which only 60% of 191 sexual incidents committed by 47 men with a mental handicap were reported to the police and only half of these were proceeded with. These figures are comparable to those for non-detection and non-prosecution in other major studies of sex crimes (Day, 1993).

Other commentators believe legal prosecution of men with intellectual disabilities who sexually offend is rare (Swanson and Garwick, 1990; Chapman and Clare, 1992; Bowden, 1994), and there is some evidence that this is less likely than for other offender groups (Gilby et. al., 1989; Brown et. al., 1995). For those men with intellectual disability who do enter the prison population, there is conflicting evidence as to whether they have been sentenced differentially for their sexual crimes when compared with other sexual offenders (Hayes, 1991a; Gross, 1984).

Arson is another offence which appears to be particularly associated with people with an intellectual disability. In the US, nearly 50% of 1300 arsonists studied by Lewis and Yarnell (1951) were classified as mentally handicapped. Patients diagnosed subnormal made up one third of Walker and McCabe's Hospital Order patients (1973) and were responsible for nearly half of the cases of arson committed by the group as a whole. In more recent studies, Bradford (1982) found that 14.7% of arsonists referred for forensic examination in a Canadian province were mentally handicapped and in a survey of 54 fire setters in South West Ireland (O'Sullivan and Kelleher, 1987), 7% were diagnosed as mentally handicapped. Another research project concluded that in the study group of arsonists, 15% of the adolescents and 10% of the adults had an intellectual disability, and that abuse of alcohol was a related factor (Bradford and Dimock, 1986).

Recidivism

Follow-up studies of people with mental handicap who have been institutionalised following a conviction, show high rates of reconviction (Craft, 1984b; Day, 1988; Gibbens and Robertson, 1983; Lund, 1990; Tong and Mackay, 1969; Walker and McCabe, 1973; White and Wood, 1986; Wildenskov, 1962), although it is important to note reconviction for serious offences is uncommon following appropriate intervention. The often cited White and Wood study (1986) reveals that the recidivism rate for offenders with an intellectual disability is 60%, unless they receive appropriate programmes, when the rate can fall to 5%.

In a study of 135 offenders with an intellectual disability in the United States, Scorzellie and Reinke-Scorzelli (1979) found that 68% had a history of

prior arrests. This study suggested a higher level of recidivism than has been found among mainstream prison populations. A study of Victorian prison populations by Burgoyne (1979) noted a recidivist rate of 58% among offenders who had committed any offence, and 31% among those who had committed crimes of violence. Broadhurst and Maller (1990) noted a recidivist rate of 45% in Western Australian prisons. A longitudinal study conducted by Broadhurst and Maller (1992), which tracked offenders over a 12-year period, found a recidivist rate of 35% among those who committed any category of offence, and 21% among those committing crimes of violence, including sex offences. The Victorian Ministry of Police and Emergency Services (1990) studied the recidivism of 851 prisoners who exited the prison system between May 1985 and December 1986. The rate of recidivism, which was defined in this study as "return to prison", was 45%. In 1994 Klimecki, Jenkinson and Wilson found that 75 offenders who had served a sentence in the segregated unit for people with intellectual disability at the Reception Centre in Melbourne, had an overall recidivist rate of 41.3%.

Some authors argue that the risk of reconviction is highest during the year immediately following discharge (Day, 1988; Gibbens and Robertson, 1983; Tong and Mackay, 1969; Walker and McCabe, 1973). A history of convictions prior to the offence for which they were institutionalised substantially increases the chances of further convictions (Day, 1988; Payne, McCabe and Walker, 1974; Walker and McCabe, 1973), and is the best predictor of the likelihood of reconviction (Gibbens and Robertson, 1983). Property offenders have a substantially greater chance of reconviction than offenders against the person (Day, 1988; Walker and McCabe, 1973; Tong and Mackay, 1969).

Sex offenders, both with an intellectual disability and those who do not have an intellectual disability, display a low but persistent tendency to repeat sex offences (Day, 1990; Soothill and Gibbens, 1978). Commentators have noted the importance of follow-up for all offenders with an intellectual disability, particularly sex offenders. A number of studies have found that a shorter duration of institutional care is associated with a greater likelihood of reconviction and rehospitalisation and imprisonment (Lund, 1990; Walker and McCabe, 1973). Sex offenders are prone to relapse in times of high stress or in situations of obvious temptation and need to learn to identify, prevent and escape from high-risk situations. The evidence suggests a positive correlation between good outcome and stable residential placement, regular daytime occupation and regular supervision and support (Glaser, 1991). Such support may include the establishment of a support network of friends, family members and other caregivers who have some awareness of the offender's problems.

Individual offenders with an intellectual disability tend to commit a wide range of offences. Kugel, Trembath and Sagar (1968) reported that most of the 142 male and female patients committed to a state institution for the mentally retarded in Rhode Island were charged with a variety of often three or four different offences. The 83 males in the study were convicted of a total of 2206 offences ranging through sex offences, larceny, vandalism, fire setting, truancy and alcoholism. This tendency is more pronounced in offenders against the person. In a 3-5 year follow-up of 20 male offenders with a mental handicap, Day (1988) found that of the sex offenders 75% had previous and 50% subsequent convictions for offences other than sex offences compared to only 17% of the property offenders although the latter had twice the reconviction rate. Lund (1990) also found that property offenders tended to continue to

committed arson, violence or sex offences repeated such crimes, the majority subsequently committing property offences. A similar finding has been reported in non-handicapped offenders (McClintock, 1963; West and Farrington, 1977).

MANAGEMENT AND PROVISION OF SERVICES FOR PRISONERS WITH AN INTELLECTUAL DISABILITY

There are four possible custodial options for prisoners with an intellectual disability: detention with mainsteam prisoners; detention in special units, which have specialist services and which exclude other prisoners; detention in special units with other vulnerable prisoners; or transferring the person out of prison into another secure institution in the community.

Special units

In many jurisdictions, departments of corrective services have set up, and oversee, special units for some prisoners with an intellectual disability. Admission to many of these units requires the prisoner to have either an IQ of less than 70, or an IQ between 70 and 80, together with severe adaptive deficits, to avoid the units becoming a dumping ground for problem prisoners (Nelson-Hall, 1992). The purpose of these special units is to provide appropriate services which will improve the person's ability to cope in gaol and to live in the general community as self- reliant, law abiding citizens. Individual program plans are developed covering areas, including literacy and numeracy; work preparation and work skills for employment within the units; personal care and hygiene, interpersonal skills, including sexual relationships, budgeting and financial management, coping skills, especially for managing frustration and

management, coping skills, especially for managing frustration and violence and group discussions. In many instances, custodial officers volunteer to be transferred to the units, and as far as possible staffing is constant so that inexperienced officers who may not understand the inmates are not deployed (Hayes and Craddock, 1992). Each officer is appointed case manager for certain inmates, and is responsible for establishing goals, monitoring progress with program plans, averting crises, and conveying relevant information to other members of the team.

In some jurisdictions, for example Western Australia, people with an intellectual disability are housed in protection facilities. These facilities are designed to provide a safe environment for "vulnerable and disturbed" prisoners with some special education and other programs, but they do not have the full range of programs, services and accommodation options offered throughout the prison system (Jones and Coombes, 1990, p.78).

Hayes and Craddock (1992) commented on the limitations of these Special Units, namely, the small number of places available, and the fact that "the degree of overcrowding in gaols, places the existence of the units at risk, and they are also threatened with funding and staff cutbacks" (p.280).

Secure Units in the Community

Secure units in the community are operated in a number of jurisdictions, for example, the Secure Services Unit operated by the Office of Corrections and Community Services Victoria, which has jointly provided services to meet the habilitation needs of offenders with an intellectual disability. The unit is a five-bedroom house which has at least two staff on duty, 24 hours a day, and is within a high fence. The inmates are primarily those who have been found

unfit to plead and are being held at the Governor's pleasure, but may also include sentenced prisoners believed to be particularly vulnerable within the prison system, even within the special units discussed above. The inmates are transferred out of the control of the Corrections Services by order of the Minister, pursuant to S21 of the *Intellectually Disabled Persons Services Act 1986* (Vic). The person becomes a "security resident" and receives a range of protections under that Act (Community Services Victoria, 1991).

The accommodation service is designed to enable clients to move to less restrictive levels of support and programs, with the ultimate aim of living successfully within the community. The Unit is designated as "Level One" security. There are also 24 hour supervised accommodation options with lower levels of security: "Level Two" in the grounds of an institution and "Level Three" in the community (Department of Community Services and Health, 1993).

In other jurisdictions, offenders with an intellectual disability are placed in state-operated mental health forensic facilities. Secure hospital facilities, where forensic patients are treated for restoration to competency or as not guilty by reason of insanity, are operated by departments of mental health and, in some cases, departments of correction. However, for many years, it has been recognised that persons with intellectual disability are not well served in a mental health facility. Recent years have seen a tightening of the criteria for admission to the special hospitals and independent reports have recommended the establishment of regional secure units for those offenders who required a greater degree of security than could be provided within local mental health hospitals, but less security than that available in special hospitals (Day, 1990; Dickens, 1991; NSW Law Reform Commission, 1996).

Conclusion

This chapter has examined historically the legal recognition in criminal law of people with an intellectual disability and reviewed the literature on people with an intellectual disability and the criminal justice system. It is clear that a number of significant issues remain to be addressed by appropriate research, including an understanding of why people with intellectual disability may be over-represented in the criminal justice system.

The next chapter will describe the process of the criminal justice system and how it operates in Western Australia. Issues relating specifically to people with an intellectual disability, are discussed as they arise at each point in the system.

CHAPTER THREE

THE CRIMINAL JUSTICE SYSTEM IN WESTERN AUSTRALIA

PROCESS AND ISSUES

INTRODUCTION

As a major purpose of this study is to present an extensive examination of the degree of participation of adults with an intellectual disability in the criminal justice system in Western Australia, it is necessary to have an understanding of that system. Accordingly the aim of this chapter is to describe the process of the criminal justice system and how it operates in Western Australia. Issues relating specifically to people with an intellectual disability, are discussed as they arise at each point in the system.

Western Australian Criminal Law

The most important point to note at the outset of any discussion regarding criminal law in Western Australia is that the law, in the main, has a statutory basis. This contrasts fundamentally with the situation prevailing in the criminal law of England, and some other Australian States, where the common law is still an important source of the criminal law, thus necessitating a reliance on the decisions of courts as the primary source of the law rather than the legislation of Parliament (Herlihy & Kenny, 1990). In Western Australia, decided cases must be studied to understand the criminal law, but these cases do not form the basis of that law; they merely aid the interpretation of the various statutes wherein the criminal law is to be found.

Western Australia had its constitutional origin in an Imperial Act of 1829. In 1830 an Order in Council was made under the Act setting up a

Legislative Council in Western Australia. The Council was formed in Western Australia in 1832, and existed until the Western Australian Parliament came into existence in 1890 by virtue of another Imperial Statute (53 and 54 Vict c 26). The Legislative Council passed Ordinances dealing with criminal law; for example, in 1856, 37 Vict No. IV dealt with defects in the then existing criminal law. When the Western Australian Parliament came into being, it passed various Acts dealing with Criminal law, for example, 59 Vict No 11 dealing with the appointment of Justices of the Peace (Russell, 1980).

In 1902, the Western Australian Parliament passed a new Justices Act repealing its earlier enactment and also passed Act No 24 of 1902, *An Act to establish a Code of Criminal Law*. This Code was repealed and re-enacted with amendments made between 1902 and 1913 by Act No 28 of 1913 which is still in force (with later amendments) in Western Australia. The whole of the statutory criminal law passed by the Western Australian Parliament is not contained in the Criminal Code. The Parliament has passed statutes since the enactment of the Criminal Code dealing with criminal law. These are primarily the *Road Traffic Act* 1974-1982 and the statute creating minor criminal offences the *Police Act* 1892-1983. Every criminal offence in Western Australia is therefore a breach of the Criminal Code or some other legislation. The courts cannot create new criminal offences and the common law no longer applies. Interpretation of the Code and other legislation is made by judges with the result that a body of case law has grown up which must be read with the legislation.

If a person is charged with a criminal offence, his or her future usually will be determined by the subsequent and interactive effects of law enforcement agencies, - the police, the judiciary and corrective services - agencies which form the criminal justice system. What follows is an overview of the criminal justice system and how it operates in Western Australia. Issues which have a

particular relevance for a person with an intellectual disability will be discussed under each section.

WESTERN AUSTRALIAN POLICE SERVICE

The Western Australian Police Service consists of the Police Force, established under the *Police Act* 1892-1983, and the Police Department, created for the purpose of the *Public Service Act* 1978. The operations of the Department are represented by the Policing Program and the Emergency Management Program together with the sub-programs of Police General Duties, Crime, Traffic and Operational Services. The objective of the Crime sub-program, the program most relevant to this study, is to promote a professional level of investigation and evidence preparation to enable the Criminal Justice System to be in the best position to appropriately deal with criminals. The following section will describe this process.

Police Powers/Arrest

General Comments

The police play a very important role in maintaining public order and enforcing the laws of Western Australia. The law enforcement process, however, necessarily results in the curtailment of the personal freedom and civil liberty of the general public. The rules of law attempt to provide a balance between the need to permit citizens to freely carry on their lives and the need to apprehend criminals and protect the community at large. The law relating to police powers before, during and after arrest is clearly stated in a number of publications (Bishop, 1983; Bowen, 1987; Bates, 1986; Herlihy & Kenny, 1990; Lawrence & Child, 1989). Due to the volume and complexity of the law in this area, this section only contains a brief summary of the major principles.

Arrest

The police have wide powers of arrest and have discretion whether to arrest and charge a person. Once a person is arrested, and the police decide to charge that person with an offence, that person should be cautioned by the police that he or she is not obliged to say anything unless he or she wishes to do so, and that anything said will be taken down and may be used in evidence.

Police Questioning

A person may be questioned or interrogated by police before arrest and after arrest. Usually, the police will make a record of interview which is admissible evidence in a court. This record of interview is a written report of the questions asked by the police and the answers given by an accused person. The police will usually ask the accused person to sign this record of interview or verbally agree to its authenticity.

The evidence in this record may amount to an admission of guilt or a confession. Alternatively, the police may write out a statement which is a confession and ask an accused to sign the statement. Generally, these documents are admissible as evidence against an accused person. However, if these documents are not freely and voluntarily given, they may be excluded from the court on the basis that they were improperly or illegally obtained (Law Handbook, 1991).

Issues Relating to People with an Intellectual Disability and Contact with the Police:

As the initial contact with the police can so often determine the ultimate outcome of a matter, it is crucial that police procedures are fair and appropriate. This is particularly important for people with an intellectual disability because of their low levels of understanding and their recognised disadvantage in

existing police procedures (Gudjonsson, 1990). Appropriate procedures at the police level are likely to have a significant impact on obtaining fair treatment of people with an intellectual disability in the latter stages of the criminal justice process. In a recent Discussion Paper of the NSW Law Reform Commission (1993), the Commission identified the areas needing particular consideration in relation to suspects with an intellectual disability and the police:

- the adequacy of the existing police guidelines (the Police Commissioner's Instructions);
- the effectiveness of the police caution for people with an intellectual disability;
- identification of a person's disability by the police;
- police questioning of suspects, victims or witnesses with intellectual disability;
- treatment of confessions made by people with an intellectual disability;
- education and training programs for police officers in all of these areas.

Police Guidelines:

There is now a growing consensus in a number of jurisdictions that whenever a person with an intellectual disability is interviewed by police with a view to obtaining a statement from the person, that the suspect ought to be accompanied by a support person to assist with communication and to provide independent confirmation that the interview is fairly conducted. Such a requirement is specifically provided for in some Australian States and the United Kingdom, here the use of and independent third person is now routine. However, it seems that sometimes independent third persons do not intervene appropriately during the course of an interview, even where it is clear that the suspect is having difficulty in understanding police questioning. There has also been reports of cases where, the independent third person, usually lacking

qualifications as a health professional, has been asked inappropriately by the police to make judgements as to the person's fitness to be interviewed (Glaser, 1996).

In Western Australia, this is the only area where there are guidelines or any attempt at instruction as far as police policy relating to people with an intellectual disability is concerned. Police Manual 3-3.44 provides:

> Where the accused is a child or someone under a disability, more persuasive evidence is needed than ordinarily is required to prove that a confession is voluntary. It is always advisable in such cases to conduct the interview or obtain subsequent verification of the voluntariness of the confession or other statement of admission in the presence of a third person such as the accused's parents, other relative, friend, welfare officer, Justice of the Peace, etc. or a Senior Police Officer, not involved in the investigation.

And Police Manual 3-3.52 provides:

> Where, because of such language differences or physical disability, comprehension or communication are limited, a member may need to obtain an interpreter.

However, it is important to note that these guidelines do not have the force of law in Western Australia. A breach of the guidelines may be a factor in the rejection of evidence, or an argument that the evidence is not reliable, but there is no established procedure within the police force for ensuring observance of the Instructions and no penalty for breach (Nicholson, 1994a). In addition, it appears that knowledge of these Guidelines is not widespread. A recent study in Western Australia found that even though there are police procedures set down for interviewing people with an intellectual disability, the police surveyed were generally unaware of these guidelines (Cockram, Jackson & Underwood, 1991).

The problem of special guidelines for police relating to people with an intellectual disability awaits comprehensive solution in Western Australia. This issue is well recognised nationally and internationally, and has received

particular attention in the recent Reference of the New South Wales Law Reform Commission on People with an Intellectual Disability in the Criminal Justice System (1996), where it was recommended that Codes of Practice setting out police procedures for conducting criminal investigations should be developed along the lines of those used in the United Kingdom (Code of Practice C, *Police and Criminal Evidence Act*, 1984). The Discussion Paper went further and recommended the Codes should be statutory instruments, achieving that status as regulations under an enabling Act, and promulgated only after public exposure of and debate over draft Codes. They would also be subject to Parliamentary disallowance (NSW Law Reform Commission, 1993).

However, as Nicholson, (1994b) observed:

> These proposals fall short of legislation or actual regulation other than as stated. That recognises the real difficulty of the law attempting to govern the precise manner in which interviews relevant to investigation are to be conducted. Quite apart from police reluctance to accept legal regulation there is a genuine question whether the law is the appropriate mechanism to govern the conduct of such interviews. The proposals recognise that the goals may be better achieved by a more flexible use of the law than direct legislation. (p.10)

The Discussion Paper nevertheless turns to the law to provide a sanction where evidence is obtained improperly or in contravention of a law or Code. It proposes that there should be a presumption that such evidence would be inadmissible. Such evidence would only be admissible where the desirability of admitting it substantially outweighed the undesirability of admitting the evidence having regard to the manner in which it was obtained (NSW Law Reform Commission, 1996, p. 37).

There is a further subtlety to the Commission's proposals, as noted by Nicholson (1994a), when he observed that courts have not generally accorded high status to internal guidelines of the police. By having the Codes in the

form of statutory instruments, the requirements of the Codes are public requirements entitled to greater weight in the courts.

The Police Caution and the Right to Silence

The police caution refers to one of the most important safeguards for people being questioned by the police, namely the right to silence. This right may be of more than usual importance for the person with an intellectual disability, due to the added disadvantages they face in police questioning. One author has suggested that, in his opinion, the problems associated with police interrogation of suspects who have an intellectual disability are so considerable that a solicitor should not lightly advise the client to participate (Ierace, 1989, p.15).

Hayes and Craddock (1992) have also commented on the importance of the right to silence:

> [a]n intellectually disabled suspect may need more than others to be able to rely upon the right to silence. Such a person may be unable to cope with questioning which is designed to obtain a confession or incriminating material rather than to search for the answers which will exculpate the suspect. The intellectually disabled accused may be simply too inarticulate or too overwrought to ensure that the innocent explanation is made clear in order to balance or outweigh the incriminating circumstances. Having time to think, take advice and give a coherent account should not be equated necessarily with a desire to fabricate a false story (p.69).

The purpose of the caution is to remind suspects of their legal rights in this regard. The caution in Western Australia does not refer, as is commonly believed, to the right to a lawyer or to make a telephone call (as is the case in some American states). It was suggested in the New South Wales Law Reform Commission Issues Paper (1992) that the mere reading of the police caution to a person with an intellectual disability may be an empty exercise and there should be a real attempt to ensure genuine understanding.

> Any system which pays lip-service to the existence of rights yet does nothing to ensure that they are known and understood - and indeed which may depend on their not being understood - is a system that discriminates against the weak, the unintelligent and the uncomprehending in favour of the strong-willed, the smart and the linguistically competent ...(p97)

According to the Police Commissioner's Instructions in Western Australia, the caution to be used before questioning a person suspected of committing a crime is as follows:

> I am going to ask you certain questions. You are not obliged to answer unless you wish to do so, but whatever you say may be used in evidence. Do you understand that? (Police Manual 3-3.53, p.42).

The caution ends with a question inviting a "yes" "no" response, which could invite a person with an intellectual disability to answer "yes" without actually comprehending its meaning (Ierace, 1989, p.71). Some suspects may not comprehend words like "obliged", yet the law does not require an arresting police officer to explain such terms. However, the absence of such a simple safeguard may increase the likelihood of a major injustice occurring as in the *Confait case* in the UK. (Fennell, 1994). There have been many cases where confessions made by mentally disordered, and offenders with an intellectual disability have been found to be unreliable (Gudjonsson, 1990). Glaser (1996) notes the case of *Simm* (Victoria, unreported, 1994) where the alleged offender, a man with an intellectual disability and autism, was remanded in custody for several months on rape charges before it was realised that his language deficits seriously compromised the validity of his confession. It was likely that he did not understand the questions put to him, despite the presence of an independent third person at the interview (Glaser, 1996).

It is also important to recognise that a person with an intellectual disability may not only need to have the right to silence explained to him or her

but also may need to be reminded regularly during the course of the interview of that right. This may lead to some conflict between the police and the lawyer involved (Ierace, 1989). One person who has acted as an independent third person in Victoria, commented in this regard that:

> I am quite sure that five minutes later there wouldn't be five of the people that I have sat with that could fully explain it [the caution] back to me because they simply don't have the retention. At the point you explain it to them...I am one hundred per cent sure that all of them understood... But none of them had the power to recall five minutes later...(cited in NSW Law Reform Commission, 1993, p.99).

Identification

Because there is always a danger that a person with an intellectual disability may attract the attention of the police as a result of his or her disability, in circumstances in which a person without a disability might quickly be released or otherwise avoid prosecution, there is a real risk of persons with an intellectual disability being too readily criminalised. Often police interviews do not act as an effective screening procedure, most police officers being ill equipped by training to recognise the characteristics of intellectual disability. It is because police officers and police surgeons in the UK receive no specific formal training in the field of mental illness and disability, that the Royal Commission on Criminal Justice has urged that the police should have access to psychiatric assistance whenever required (Cm.2263, 1993, HMSO, cited in Laing, 1995). In reality many people with an intellectual disability may enter the criminal justice system without their disability being detected. This has the potential of producing serious injustice, particularly where unskilled persons fail to assess the presence of relevant mental disorder or disability and assume an offender is competent to undergo questioning and to participate in a trial (Laing, 1995).

Police Questioning

People with an intellectual disability are likely to be overly impressed by authority figures and to respond obligingly to suggestive questions (Clare and Gudjonsson, 1993). For example, many people with an intellectual disability tend to answer "yes" to any questions asked by an authority figure (Bright, 1989). This will place them at a particular disadvantage in police questioning. Hayes & Craddock (1992) outline further difficulties that people with an intellectual disability face during police questioning, including the difficulty that people with an intellectual disability may have poor longer term memory, particularly about such factual matters as dates and times. Prompt interviewing is therefore crucial. People with an intellectual disability also may not comprehend the level of language used or common police questions or concepts, for example those involving time sequencing or the right to remain silent. As well, such people are likely to have difficulty in maintaining concentration for the long periods often involved in police questioning. These authors also point out that people with an intellectual disability are often perceived by the police and lawyers, as unreliable witnesses. Often the problem is one of communication, rather than unreliability.

People with an intellectual disability have been known to falsely confess to committing an offence (Gudjonsson, 1990). Ierace (1989) maintains that it is important that when the police take a confession from a person with an intellectual disability, they do not rely solely on the confession, but continue the investigation so that the opportunity to test the admission against other evidence is not lost. A person with an intellectual disability however, may be very convincing in the eyes of the police when making a false confession.

A study sponsored by the UK Police Foundation titled *Police Interviewing of the Mentally Handicapped* (Tully & Cahill, 1984) involved a controlled study of

the memory recall of a play by 30 subjects who had a mild intellectual disability. The subjects were interrogated by 15 detectives, who consistently over-estimated the quality of accounts received from them, as compared with the control subjects who did not have an intellectual disability. This was despite the officers having been highly and efficiently discriminative about their judged perceptions of the subjects' general intelligence, having had a fair appreciation of the problems of interviewing people with an intellectual disability, and being aware of the reservations which would be employed. The authors concluded:

> This has important implications, for it does not support the view that if only the mentally handicapped can be identified, then they will be dealt with and judged appropriately (Tully & Cahill, 1984 p. 30).

The reason for the discrepancy in the officers' perceptions between perceived and actual reliability of accounts given by those subjects with an intellectual disability, is possibly that the officers tended to associate the subject's level of confidence with reliability. If the witness is co-operative and appears confident, and there are no glaring discrepancies in the witness's account, the officer may regard the witness as competent, although he or she is not (Tully & Cahill, 1984). Other research supports the same basic conclusion that self-confidence of the subject, inspires a reliance by the listener on the account given as being accurate (Rowan, 1992).

A suggested minimum requirement to overcome the problem of false confessions is that all interviews between the police and a suspect who may have an intellectual disability be recorded, preferably on video tape. This recommendation is made against the reality that it is now widely the case in Western Australia that police interviews of any person are conducted on video (Nicholson, 1994b). Amendments have been made but not proclaimed to the

Criminal Code providing that on the trial of an accused person for a serious offence, evidence of any admission by the accused shall not be admissible unless the evidence is a videotape on which is a recording of the admission, or the prosecution proves, on the balance of probabilities, that there is a reasonable excuse for there not being a recording on videotape of the admission or the court is satisfied that there are exceptional circumstances which, in the interests of justice, justify the admission of the evidence (*Acts Amendment (Jurisdiction and Criminal Procedure) Act* 1992 (WA) s5 (to be proclaimed).

Police stations throughout all regions of Western Australia have video facilities available for the purpose of taking evidence by such means (Nicholson, 1994b). The resulting video is tendered in court as an exhibit and is admissible as proof of what it records (*Cf R v Sitek* (1988) 2 Qd R 284). Once these amendments have been proclaimed, it would, of course, make the conduct of the interview by video mandatory in the case of a person recognised as having an intellectual disability.

Diversion

While some people with an intellectual disability are dealt with under the criminal justice system by prosecution, trial, conviction and sentence, others who come to official notice for alleged criminal activity may not be prosecuted. In the U.K. a number of recent initiatives are aimed at providing psychological and psychiatric assessment at police stations as soon as possible after the point of arrest, thereby saving both time and money and in appropriate cases, diverting mentally disordered and intellectually disabled offenders to receive health care or other appropriate interventions at the earliest possible stage (Laing, 1995). In many other jurisdictions, criminal justice officials can use their discretion to place arrested individuals into pre-trial diversion programs. Typically, these individuals have never been arrested before and their offence is

of a minor nature. Pre-trial diversion provides for treatment outside the formal criminal justice system so as to save the implicated party from the stigmatising effect of a conviction. An arrested individual might, for example, be given the opportunity to participate in job training, drug rehabilitation, or family counselling. Charges would be dismissed if the person successfully completed the designated program within a stated time frame (Snashall, 1986). Diversion programs are increasingly being considered the most appropriate option for many individuals with an intellectual disability who are incompetent to stand trial. In fact, by 1980 a survey revealed that 20 out of 36 state court systems in the US had begun to make alternative placement recommendations for such persons (Reichard, Spencer & Spooner, 1982). The New South Wales Law Reform Commission (cited in New South Wales Law Reform Commission, 1993), refers to options for diversion, namely admission centres, admission to hospital, programs for juvenile offenders, contract based diversion and community justice centres. These diversionary procedures offer an alternative to arrest for the adult offender with an intellectual disability. In 1996 a pilot diversionary program commenced in Western Australia which operates on the juvenile justice model of cautioning for minor offences, and as a consequence diverting the individual with a disability out of the criminal justice system. At the time of writing the program is undergoing an evaluation to ascertain the program's success in meeting its purpose.

After Arrest/Police Bail

Where a person is arrested and charged with an offence, the arresting officer has a duty to bring the arrested person before a justice to be dealt with according to law. In practice, this means that an arrested person will appear before a Court of Petty Sessions within 24 hours of being arrested (within 48 hours on weekends). After arrest, but prior to being brought before a justice, an

arrested person is either kept in custody (usually in the police lock-up) or released on Bail.

Issues Relating to People with an Intellectual Disability and Police Bail

Under the *Bail* Act 1982 WA, the police officer is required to give the accused person "such information in writing respecting his entitlement to or eligibility for bail as is prescribed by the regulations" (Schedule, Part C, c1). A person with an intellectual disability is unlikely to be able to read and comprehend such a written form. If the police refuse to grant bail, the issue is referred to a court. Similar considerations will apply whether the decision maker is a police officer or a court and many of these considerations will work against a person with an intellectual disability.

Schedule, Part C, c1s 1(a) and (b) states that there is a right to release on bail for most minor offences unless, for example:

> the person is, in the opinion of the authorised officer or court, incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection.

Ierace (1989) has noted that the behaviour of a person with an intellectual disability is sometimes mistaken for that of a person who is under the influence of alcohol or a drug, for example by failing to comprehend simple questions. He has also commented that the criteria to be considered by the court or by the police in considering bail applications may mean that a person with an intellectual disability is less likely to receive bail. The Legal Aid Commission of NSW (1993) agreed that people with an intellectual disability often "do not have good family and community support to enable them to meet bail conditions and, as a consequence, are often unnecessarily held in custody" (p.150). Further, given that a person with an intellectual disability's social ties and supports "may be especially fragile" (p.50) and that their disability can be a

disadvantage in their finding employment and accommodation, the negative effects of a period in remand may be substantial and long-term: "a far longer period of time may be required to replace the applicant in his pre-remand position"(p.51). These disadvantages also could act to hinder the funding and preparation of a defence.

Other determination criteria under the Act include those relating to the time which the person may be obliged to spend in custody if bail is refused, the conditions of that custody, and the needs of the person in preparing for court and/or obtaining legal advice (*Bail Act* 1982 WA), Schedule 2, Part D, c1, 2). In custody the accused with an intellectual disability is especially vulnerable to discrimination and sexual assault (Ierace, 1989). Ierace also makes the point that the special difficulties for lawyers in obtaining instructions from persons with an intellectual disability are exacerbated under custodial conditions by security measures, lack of privacy, and the impossibility of a trusted friend or relative attending any conference.

Another problem which may arise is that even where a person has been bailed, their residential facility may refuse to take them back. This may occur when police intervention and charging arises only at the end of a history of petty offending by a person with an intellectual disability, where those offences have previously gone unpunished by the police or the residential facility: that is, when the course of behaviour exceeds an "acceptable social nuisance level" (Bodna, 1986, p.19). In such a case, the accused with an intellectual disability is left without accommodation or services.

A person with an intellectual disability may also be disadvantaged by not understanding the necessity to comply with bail conditions or appear in court and may thus achieve a record of failure to appear and be less likely to receive bail on future occasions.

Summons and Infringement Notices

A summons is usually issued in situations where the offence alleged is not serious and an arrest would be inappropriate. Generally, a Justice of the Peace will not issue a warrant for arrest on a complaint of a simple offence. The Police Commissioner has issued standing orders indicating that the power of arrest should not be exercised in cases where the offence is trifling or minor, and the name of the offender can be obtained (Standing Order, No. 391)

THE MINISTRY OF JUSTICE

The Ministry of Justice is a public organisation responsible to the Attorney General, for the provision of a broad range of justice services throughout the state of Western Australia. The Ministry was established on 1 July 1993 in accordance with the *Acts Amendment (Ministry of Justice) Act* 1993. During 1995, the Ministry of Justice operated 9 programs namely, Adult Offender Management; Juvenile Justice; Victim Services; Court and Tribunal Services; Crown Solicitor; Legislation; Public Guardian; Public Trust Administration and Registrar General. This section will provide a description of two programs relevant to this study - Court Services and Adult Offender Management.

COURT SERVICES

Nature and Hierarchy of Courts Exercising Criminal Jurisdiction in Western Australia.

Three Western Australian Courts have the jurisdiction to deal with adults who are alleged to have committed a criminal offence.

- The Supreme Court
- The District Court
- The Court of Petty Sessions

The following diagram illustrates the hierarchical structure of Western Australian Criminal Courts.

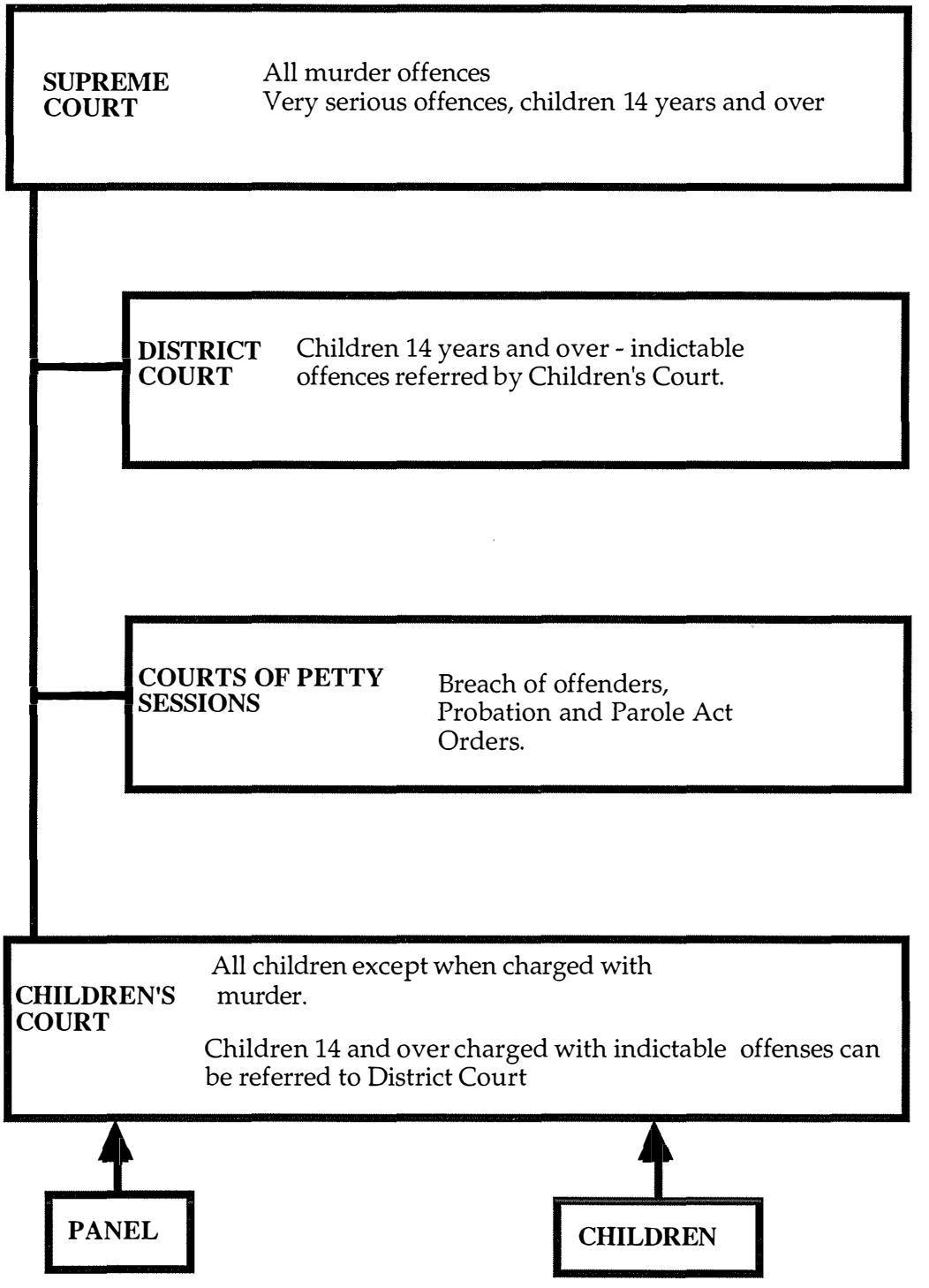


Figure 1. Hierarchy of Courts in Western Australia exercising criminal jurisdiction

Generally, adults charged with less serious offences (simple offences) are dealt with in the Court of Petty Sessions. More serious offences (indictable offences) are dealt with in the District Court or Supreme Court. However, some indictable offences may be dealt with in the Court of Petty Sessions at the election of an adult defendant. Election is the making of a choice by the defendant to have his/her case dealt with by the magistrate.

Adults who are charged with indictable offences may elect to be brought before a Court of Petty Sessions for a preliminary hearing (committal proceedings) prior to a trial in the District or Supreme Court, if they believe that the prosecution does not have a sufficiently strong case.

The primary difference between the Lower Court (the Court of Petty Sessions) and the intermediate and higher courts (District and Supreme Courts) is that cases in the lower court are dealt with summarily, (that is, before a magistrate without a jury) and cases in the higher courts are tried before a judge and jury if the defendant pleads not guilty. If he/she pleads guilty and the offence is too serious for the magistrate to sentence him/her, then the defendant will be remanded to the District or Supreme Court for sentencing by a judge only. Appeals from lower courts can be made to higher courts.

Offences

Classification of Criminal Offences

Traditionally, a distinction has been drawn between serious offences and minor offences, with serious offences being treated as indictable offences. The Western Australian Criminal Code maintains this distinction. Criminal offences are classified as being either:

- Indictable offences which are serious offences and are further classified as either crimes or misdemeanours.
- Simple offences are defined to include all offences not classified as a crime or misdemeanour.

An important outcome of the classification of offences into indictable offences and simple offences is the determination of the type of criminal proceedings which are applicable when a person is charged with an offence. Simple offences are dealt with summarily (before a magistrate, without a jury) in the Court of Petty Sessions. The more serious indictable offences are dealt with in the District Court or Supreme Court before a judge and jury. Some less serious indictable offences can be dealt with summarily at the election of the accused person. These indictable offences are known as indictable offences triable summarily.

Generally persons found guilty of indictable offences will be liable to heavier penalties than persons who are guilty of simple offences. The criminal justice system attempts to protect a citizen's civil rights by providing for trial by jury in cases involving indictable offences. On the same basis, the Government has decided that as a person who is accused of a simple offence is only exposed to light penalties, that person does not need to have a trial by jury, and can be dealt with summarily. In the case of a person charged with indictable offences triable summarily, the law gives that person an option to have the case dealt with summarily or before a judge and jury.

General Principles of Criminal Law

Two important aspects of criminal law are the presumption of innocence and the notion of criminal responsibility.

It is a well known proposition that a person is innocent until proven guilty. For all offences, the burden of proof is on the prosecution, that is, the prosecution must prove that the accused person is guilty. It is a requirement that the guilt of an accused person be proven beyond a reasonable doubt, before a magistrate or jury can convict that person.

The notion of criminal responsibility raises the question of whether an accused person is morally blameworthy. A criminal offence can generally be separated into two elements, the wrongful act (*actus reus*) and a guilty intention (*mens rea).* The essence of the common law doctrine of *mens rea is* that criminal responsibility flows directly from conscious volition (*mens rea* or a guilty mind).

In Western Australia, criminal responsibility does not depend directly upon the common law doctrine of *mens rea.* Instead, the criminal responsibility of an accused person will depend entirely upon the effect of the statutory provisions, which creates an offence together with the provisions in chapter five of the *Criminal Code.* Chapter five contains a number of provisions which set out various excuses or defences which may be raised by an accused person. The chapter five provisions are based largely upon the common law doctrine of *mens rea.*

Proceedings in the Court

General Comments

This section contains information about criminal prosecutions in the courts. Proceedings in a Court of Petty Sessions will generally be commenced following an arrest of a person or the issue of a summons. However, in special circumstances proceedings can be directly commenced in the Supreme Court or District Court (eg. committal for trial by coroner, or ex officio indictment). The information in this section will refer only to the more usual process, that is, criminal proceedings which are initiated in a Court of Petty Sessions and which are then tried in those courts or in the alternative, committed for trial in the District Court or Supreme Court.

The Court of Petty Sessions has the power to conduct two types of hearings:

- Summary Hearing - a trial which determines the guilt of a defendant.

- Preliminary Hearing (also known as committal proceedings) - A hearing to determine whether the evidence presented by the prosecution is sufficient to put a defendant, accused of an indictable offence on trial in either the District Court or Supreme Court.

The first step of any proceeding is the reading of the charge or complaint against a defendant. The procedure which then follows will depend upon the type of offence and to some extent the decisions of the defendant (generally assisted by his or her legal representatives), the magistrate and the prosecution. Three categories of offences are dealt with in the criminal courts:

- Simple offences
- Indictable offences
- Indictable offences triable summary

Diagrammatic flow charts of the different procedures for each type of offence are set out in Figure 2 below.

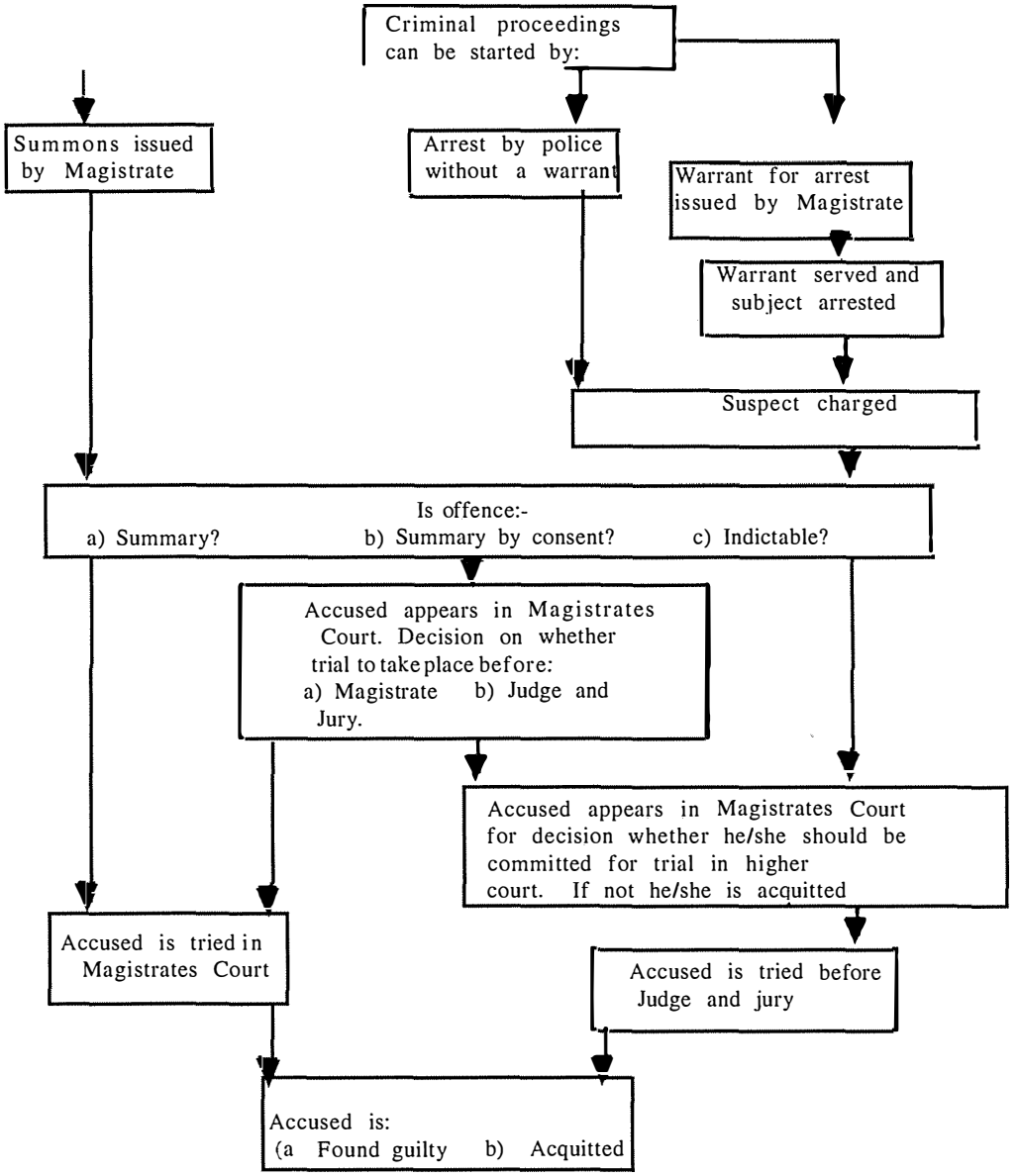


Figure 2. The Criminal Law System.

The duration of a criminal proceeding from the first appearance of a defendant to the disposition of the case will vary according to a number of factors, including: the type of offence; the plea made by a defendant, that is, not guilty, guilty, or not fit to plead etc., the complexity of the facts of the case, for example, the number of witnesses, production of documents; number of adjournments.

An important factor affecting the process of a criminal proceeding is the mental state of the defendant. The fact that a defendant has an intellectual disability may be very significant and can have considerable impact upon criminal proceedings. Details of the specific courts and sentencing issues concerning people with intellectual disability are set out below. However, at this stage, it should be noted that intellectual disability might be significant in relation to: the competency of a defendant to participate in a trial, that is, fitness to plead; the criminal responsibility of a defendant, that is, the defence of insanity. Section 27 of the *Criminal Code* is available to some people who suffer from natural mental infirmity, a term which has been defined to include intellectual disability, and the sentencing process: The court will take into account, among other things, an accused person's mental state.

Court of Petty Sessions

Other than for matters involving children, all proceedings begin in the Court of Petty Sessions. Whether the first appearance follows the issue of a summons, or arrest, it takes place in the Court of Petty Sessions.

Figure 3 below describes the processes and procedures of charges of indictable offences in diagrammatic form. Figure 4 describes the Trial procedures in the Court of Petty Sessions.

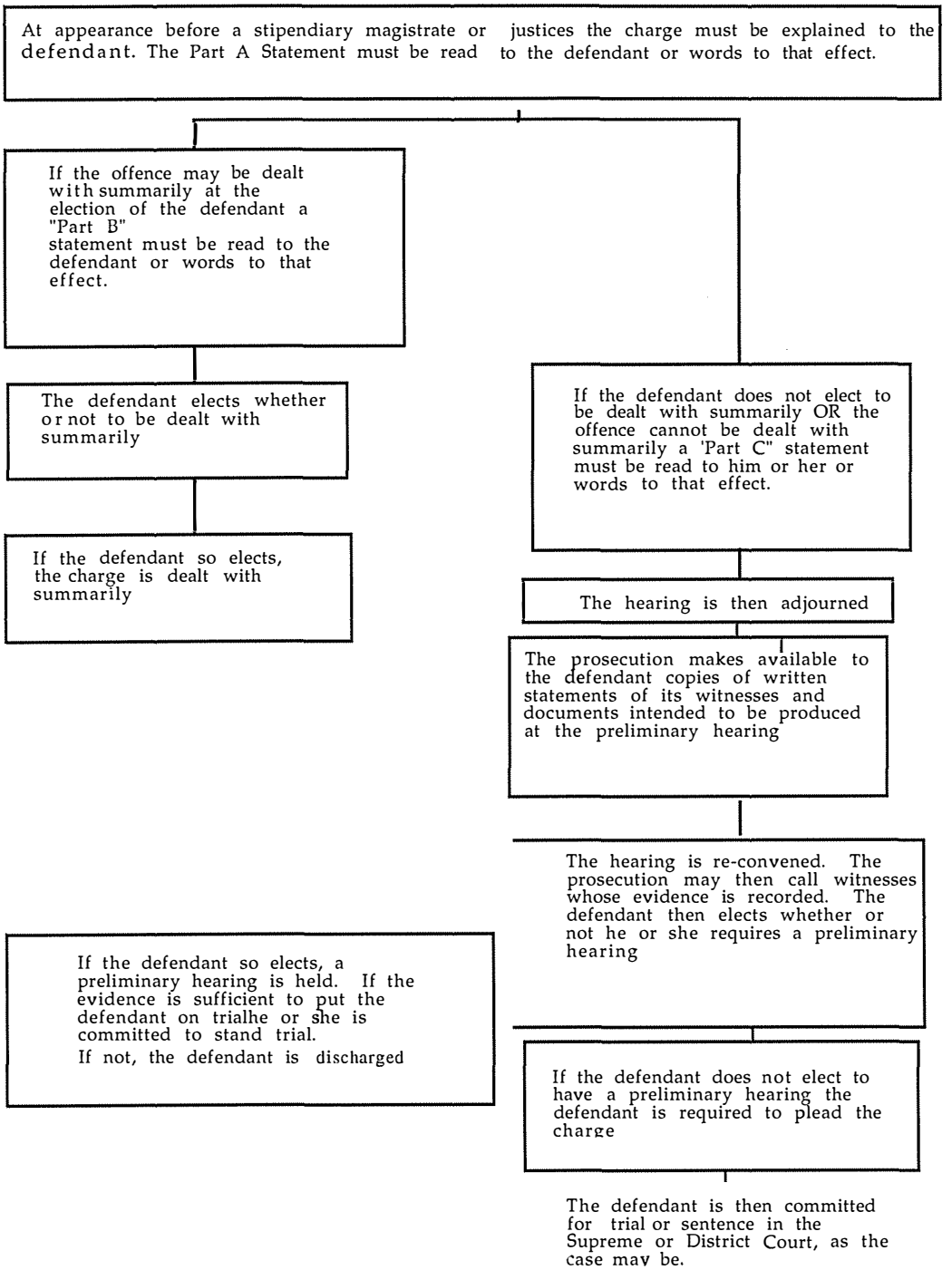


Figure 3. Charge of Indictable Offence

The District Court

Following remand from the Court of Petty Sessions, the defendant will appear in the District Court to enter his plea. If he/she pleads guilty, the matter may be heard then and there and sentence passed. This depends largely on how busy the Court is, and how long is required in the particular case for the defendant's lawyer to make submissions to the Court in mitigation. It also becomes necessary to adjourn passing sentence to a later date where pre-sentence reports are required. If the defendant enters a plea of not guilty then the matter is set down for trial, usually in 2 to 3 months' time. The District Court has jurisdiction to hear appeals against decisions in the Court of Petty Sessions.

The Supreme Court

The Supreme Court is reserved for hearing charges which are very serious in nature, such as murder, some drug matters and sexual assault. The procedures for trial are the same as for the District Court, but the Supreme Court can impose longer sentences - the District Court can't impose a sentence of life imprisonment whereas the Supreme Court can. Appeals from lower courts are to a single judge of the Supreme Court. Appeals in regard to Supreme Court decisions are to three judges of the Supreme Court - which is known as the full bench, and the bench is called The Court of Criminal Appeal. Appeals to all levels can only be made with leave (that is, the Court is convinced that there is a real reason for the appeal). Appeal may be made by either the prosecution or the defence and may be with regard to the actual finding of guilt or innocence; or may be on the sentence - the defence may argue that it was too harsh; while the Crown may argue that it wasn't harsh enough.

Bail

The Court's first concern is to ensure that the defendant comes to trial. As the lead-up to trial involves a number of adjournments (the higher the Court, the greater the number) after each appearance the accused is remanded to the next appearance. He/she may be remanded in custody or may be granted bail. Usually if the accused answers bail, bail will be continued. The granting of bail comes under the provisions of the *Bail Act* 1982. Figure 4 may assist to illustrate the relevant occasions when bail may be granted in respect of an indictable offence.

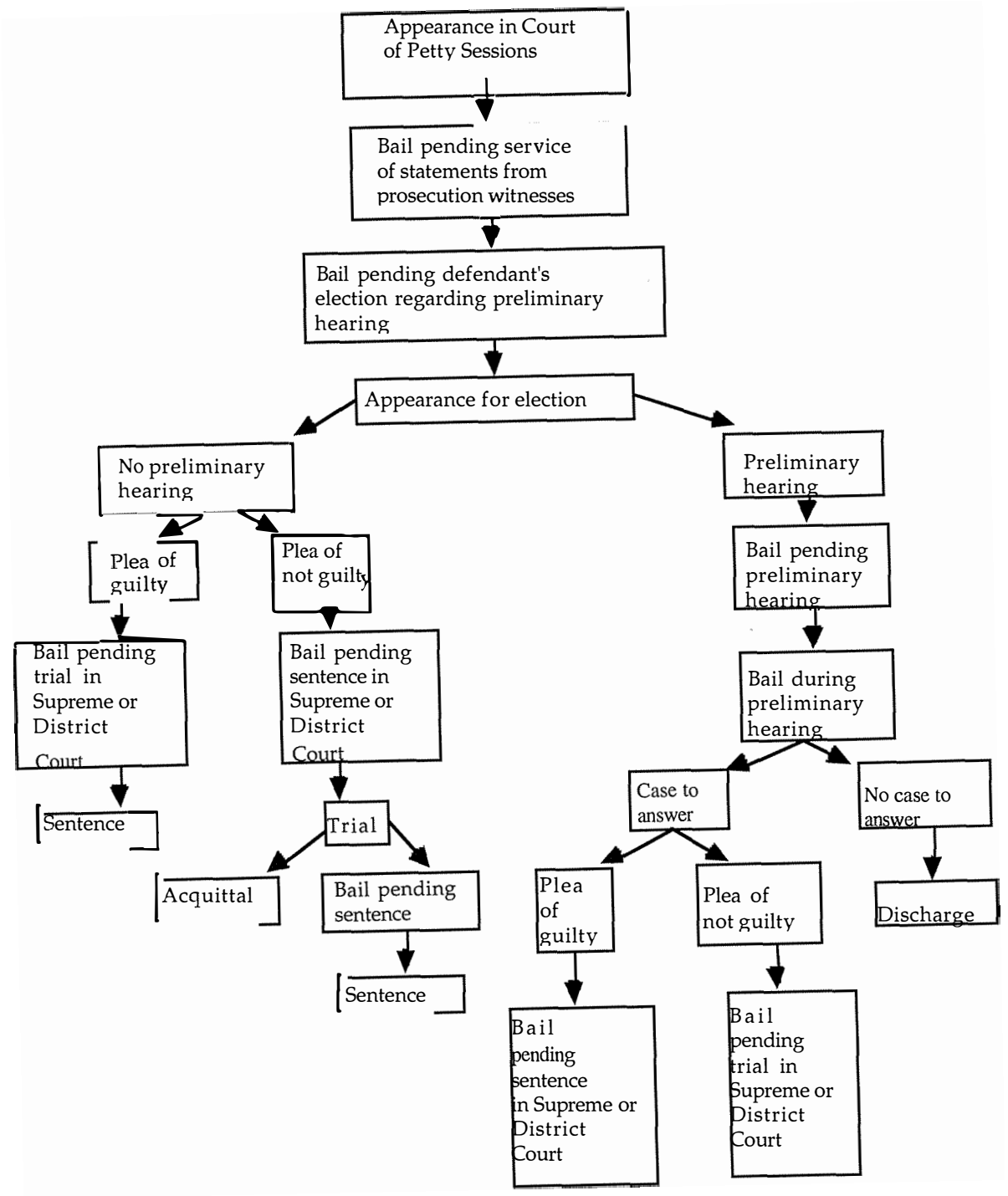


Figure 4. Bail in respect to an Indictable Offence.

SENTENCING

General Comments

The trial process is divided into two distinct stages:

i) The fact finding stage

At this stage, all the facts are presented to the magistrate or judge and/or jury (depending on the plea, and the court in which the trial is held); and a decision is made as to the guilt or innocence of the defendant. At this stage, the decision makers do not consider any mitigating factors, that is, reasons or excuses for carrying out the alleged criminal act.

(ii) Sentencing stage:

This occurs after the defendant has been found guilty (convicted). The judge or magistrate, without reference to the jury, makes this decision. The prosecution may present arguments as to what it considers the appropriate punishment. The defence lawyer then presents arguments as to why the defendant should be given as light a punishment as possible, and gives details of any mitigating factors.

Factors Taken Into Consideration When Sentencing

The Court determines the length of the sentence handed down after all the factors discussed below have been considered. The decision involves a balancing between the rights of the individual and the interests of the community. If the sentence is considered too harsh in light of the circumstances of the case, it may be appealed against. Similarly, if the Crown considers it to be too light in the same circumstances, it may also appeal. Appeals on sentencing go to a higher court. Which court depends on where the sentence was handed down, for example, appeals from the District Court may go to the Supreme Court, sitting as the Court of Criminal Appeal. In Western Australia a

custodial sentence is a sentence of last resort (James v R. unreported, Court of Criminal Appeal WA 1985).

Pleas in Mitigation

After a person has been convicted of an offence, whether he/she pleaded guilty or not guilty, their lawyer will be given an opportunity to advance any arguments or explanations which might, in part, excuse their actions or make them more understandable. At this point, arrangements can be made for a pre-sentence report to be prepared with regard to the offender's psychological nature, any psychological problems, any mental or physical incapacity, any history of criminality, literacy problems and any other relevant matters. Psychologists, psychiatrists, doctors, social workers and other welfare workers usually prepare pre-sentence reports.

Matters relevant to a plea in mitigation include: the offender's age; sex; family background; character; employment record; family commitments, for example, married, children, parents and other relatives to support; place of residence; habits, for example, drug use, alcohol, which may have influenced behaviour at the time of the offence; emotional problems; desire to resolve any drug dependence/emotional problems; effect on other parties if imprisoned; desire to make amends - remorse, restitution (that is, repay money, restore or replace property). All of these and any other matters which may lead the judge to impose a more lenient sentence may be raised. Occasionally, the prosecution may support submissions for leniency, and may be quite ready to accept the mitigating factors advanced. At other times they may make submissions emphasising aggravating factors to support their contention that the maximum penalty should be imposed.

Discharge

It is possible for the Court to order the offender to be discharged and no conviction to be entered. However, this is rarely done, as probation orders and bonds have almost the same effect without the offender believing he walked away unpunished.

Suspended Sentences

When a person is convicted, the Court will record a conviction but defer sentencing to a later date. This means that if the offender re-offends or misbehaves in some other way during the period of the sentence, the Court may decide to hand-down the postponed sentence.

Indeterminate Sentences

If an indeterminate period of detention is imposed, this often relates directly to unfitness to plead and findings of unsoundness of mind during trial, and is frequently not actually a sentence imposed on conviction, after a finding of guilt by a judge and/or jury (Hayes & Craddock, 1992).

COURTS AND SENTENCING ISSUES RELATING TO PEOPLE WITH AN INTELLECTUAL DISABILITY

Making Elections

The making of elections during the various stages of the trial process is not particular to cases involving offenders with an intellectual disability. The issue which arises which is specific, is whether such offenders have the intellectual capacity to make the required elections. Is the offender capable of understanding the choices being offered to him/her? Is he/she capable of weighing up the choices and making an informed decision? Even if he/she has legal counsel, does he/she have the capacity to instruct counsel as to his/her own wishes, or do his/her decisions only reflect the opinions of those advising him/her? Elections are choices regarding certain aspects of the trial process.

Once the defendant has been charged, the most obvious, and in many ways the most important of these, is the decision to plead guilty or not guilty; others relate to the decision to have a matter tried summarily; where the matter is to go to trial, whether to accept the police version of the facts, or to challenge these at a preliminary hearing; and whether the accused should give evidence on his/her own behalf

Fitness to Plead/Fitness to Stand Trial

Section 631 of the *Criminal Code Act* 1913 (WA) provides:

> If, when the accused person is called upon to plead to the indictment, it appears to be uncertain, for any reason, whether he is capable of understanding the proceedings of the trial, so as to be able to make a proper defence, a jury of twelve men, to be chosen from the panel of jurors are to be empanelled forthwith, who are sworn to find whether he is so capable or no.

The manner in which the jury is instructed to make their finding is that described by *Smith J in Presser v R* (1958) *VR 45* at 48 in the Supreme Court of Victoria, approved by the Court of Criminal Appeal in Western Australia in *Ngatayi v R* (1980) 30 *ALR 27* at 33, namely:

> That Section does not mean that an accused can only be tried if he is capable, unaided, of understanding the proceedings so as to be able to make a proper defence. This is self-evident when the incapacity to understand the proceedings is due to an inability to understand the language in which the proceedings are conducted. In such a case, if an interpreter is available the incapacity is removed. Similarly, in deciding whether an accused is capable of understanding the proceedings so as to be able to make a proper defence it is relevant that counsel defends him. If the accused is able to understand the evidence, and to instruct his counsel as to the facts of the case, no unfairness or injustice will generally be occasioned by the fact that the accused does not know, and cannot understand, the law. With the assistance of counsel he will usually be able to make a proper defence. That of course is the test which s631 provides: is the accused capable of understanding the proceedings at the trial, so as to be able to make a proper defence? The section does not require that an accused, before he can be tried, must be capable of understanding the law which governs his case, if that lack of capacity does not render him unable to make a proper defence.

This section applies only in relation to indictable offences and therefore not to offences before the Court of Petty Sessions. Those Courts do, however, have power to obtain either on a preliminary hearing of an indictable offence, or during a summary trial, a psychiatric report on a defendant (*Mental Health Act* 1962 WA S36). If the defendant is found to be suffering from mental disorder he or she may be committed to an approved hospital either by the court or the superintendent of an approved hospital.

Raising the Question

Generally, because the question of disposition rests in the Court's hands, most defence lawyers would avoid raising the question of fitness to plead (Hayes and Craddock, 1992). It may, however, be raised by the prosecution, the Court itself, or any other person concerned with the trial. If raised at arrest, or in Petty Sessions, because there are no special guidelines for making a finding of fitness, the police or court may dismiss the charge if it is a relatively minor offence and they do not believe the alleged offender is competent to stand trial. If the charge is more serious, the Magistrate can remand the accused for assessment, and adjourn the matter to a higher court for decision.

Technically in Western Australia, the question of fitness only arises when the accused is required to 'plead to an indictment' which means in relation to an indictable offence, but in practice it appears to be possible to raise it earlier in the trial process or in the lower court (Herlihy and Kenny 1990). However, it has been noted that because the section applies where for any reason uncertainty arises in relation to the understanding of an accused, it is capable of being activated by the presence of intellectual disability (Nicholson, 1994a).

Consequences

The issue is not often raised and there is very little record or case law on which Courts may base their decisions (Herlihy and Kenny 1990). This means that the outcome of a finding of unfitness in unpredictable. Under the *Criminal Code Act* 1913 WA the judge has a discretion to dismiss the charge or order detention for an indefinite period for medical assessment and treatment. This has been a matter of much concern in relation to mentally ill offenders, and appears to be fraught with even more danger for people with an intellectual disability. Moves have been made to effect reform in this area, but the situation was as described above during the period of the study.

Criminal Responsibility

Known as the insanity defence, the principle relates to the state of mind of an accused person at the time of committing an offence. This question is not one of guilt or innocence, but is rather one of criminal responsibility. Section 27 of the *Criminal Code* Act 1913 WA provides that a person cannot be held criminally responsible for an unlawful act if he/she lacks the mental capacity to understand what he/she had done; or to control his/her actions; or to know that what he/she has done is wrong. The section specially extends its application to a person suffering from a natural mental infirmity. Criminal responsibility involves issues, distinct from procedural questions concerning arrest and fitness to plead, and is principally concerned with an offender's mental culpability at the time of the commission of an alleged offence. The fact of intellectual disability will often be relevant in deciding whether a person had the required *mens rea* (mental state required to be proved as part of the offence alleged) although persons in the moderate to severe range of intellectual disability will seldom be subject to judicial determinations of responsibility because they will lack the mental capacity to understand or appreciate the legal

character of the conduct they are charged with (Brookbanks, 1995). Such persons will often be in sheltered or secure environments which severely limit their freedom to become involved in anti-social activity. The main group for whom issues of responsibility will be relevant are persons with borderline or mild intellectual disability.

While all criminal defences would be theoretically available to an offender with an intellectual disability, intellectual disability is more likely to be relevant to those defences which involve abnormal mental states including insanity, automatism, mistake, provocation and lack of *mens rea.* The point of critical importance for individuals with an intellectual disability, is that in many instances they may not be criminally responsible in legal terms because for various reasons they may lack the *mens rea* for a crime, but lack the ability to articulate their concerns in order to adequately present a defence to a charge. For example, with regard to the crime of arson which is an offence that is often cited as being commonly committed by some offenders with an intellectual disability, the *Criminal Code* contains a number of sophisticated *mens rea* elements which may be difficult for many offenders with an intellectual disability to meet because of their limited intellectual capacity. One alternative definition of the offence requires proof that the offender wilfully set fire to 'any property'...if he/she knows or ought to know that danger to life is likely to ensue. In such a case, the prosecution would be required to prove that the offender both *wilfully set* fire to property while at the same time knowing that danger to life was likely. In many cases, the questions of whether the accused was able to meet the threshold requirement for wilfulness or knowledge will never be tested because the accused will either have been found, or, perhaps ill-advisedly, have entered a guilty plea to the charge because the existence of intellectual disability was not identified by his/her counsel.

The S27 defence is still widely recognised in Western Australia as the insanity defence, even though accused persons who are not insane may rely on it. Because of the very nature of the concept, it has the effect of stigmatising any accused person who relies on it, and a finding of unsoundness of mind can have most unfavourable consequences, as the insane person may be ordered to remain in custody at the Governor's pleasure. The outcomes depend largely on the seriousness of the offence and the discretion of the Court. However, as Nicholson (1994a) points out, the advantage in the past, of relying on an insanity plea was to avoid the death sentence. Since the abolition of capital punishment in Western Australia, the disadvantages of pleading insanity outweigh the advantages.

ADULT OFFENDER MANAGEMENT

The Ministry of Justice Adult Offender Management Division is responsible for managing and supervising remanded and convicted adult offenders, both in secure prison custody and in the community. It also provides advice to sentencing an offender and releasing authorities such as the Courts and Parole Board regarding offender's suitability for sentencing options or release plans. Prison Operations include the management of prisons throughout the State as well as the specialist areas of Prisoner Programs Prisoner Management and the Sex Offenders' Treatment Program. Community Corrections is responsible for providing advice to sentencing and releasing authorities and the management of Community Based Supervision Orders throughout the State as well as the specialist units of Victim-Offender Mediation, Central Law Courts, Bail Hostel and the Intensive Supervision Unit.

Custodial Sentences

The principal laws governing prisoners in Western Australia are contained in the *Prisons Act* 1981 and the regulations made under it.

Prisoners in Western Australia are under the direct control of the Superintendent of the prison, who in turn is responsible to the Executive Director of Prisons for the discipline, management and safe custody of the prisoners. The Ministry of Justice employs all prison officers in Western Australia.

Place of Imprisonment

The place of imprisonment may vary depending on where the trial was held, the seriousness of the offence and other details personal to the offender (for example, age, sex). The Ministry of Justice, not the Court, generally makes the decision regarding these matters. The Court imposes a specified length of sentence for each offence for which the defendant was convicted. If there is more than one sentence, these may be ordered to be served concurrently, that is, at the same time; alternatively the Court may order each sentence to be added together, to give a head sentence or both may be ordered, for example, where more than two offences have been proved, two or more sentences may be served concurrently while others may be added on. Sentences which are added on are ordered to be served cumulatively.

Length of Sentence

The length of custodial sentences varies from case to case but the section of the *Criminal Code* which defines the offences, usually also provides for a maximum period of imprisonment. Some offences carry a mandatory sentence (that is the judge must impose that sentence), for example, a conviction for wilful murder carries a mandatory sentence of strict security life imprisonment, life imprisonment or (in particular cases) indefinite detention at the Governor's pleasure. The Court may and often does exercise its discretion in determining the maximum period of imprisonment to be served. This is most apparent when more than one offence is involved, and the Court is able

to order that the various sentences be served concurrently or cumulatively - orders of this kind can make a very big difference to the overall length of the head sentence.

Security Rating

In general, there are many aspects which are taken into account when giving a prisoner a security rating. Some of these are the length of sentence; the nature of the offence; seriousness of offence; whether the offence involved violence or sexual offence or a serious drug offence, previous escape record; previous performance in prison; and apparent adaptation to the current sentence of imprisonment (Herlihy and Kenny 1990).

A maximum security rating applies to prisoners who are considered a threat to the community or who have an effective sentence in excess of 24 months. This threat may come about because the person is considered a high escape risk, or requires a high level of protection, either in the interests of the prisoner or the community. Prisoners may initially be rated as a maximum rating until assessed; the rating may then be varied.

Medium security rating applies to prisoners who pose, or are perceived to pose, a minor threat to the community. In effect it also applies to prisoners, who, if they did escape, would only cause minor alarm in the community.

Minimum security rating applies to prisoners who require minimal supervision as they are considered to pose a minimal risk.

Open rating applies to prisoners who are on leave of absence (for example, home leave, work release).

CUSTODIAL SENTENCES AND PEOPLE WITH AN INTELLECTUAL DISABILITY

There would seem to be a growing perception in some quarters, of the need for an increased range of options in the sentencing and disposition of

offenders with an intellectual disability. One author has commented on the lack of facilities in major prisons to cope humanely with mentally disordered detainees or prisoners (Campbell, 1988). However, the problem may be more pervasive than simply the inadequacy of custodial arrangements in prisons. Intellectual disability is a relevant factor in sentencing generally, and may be conceived as either a mitigation or aggravation of penalty, depending on the nature and circumstances of the offence, the degree of disability present and the likelihood of the offender gaining insight from punishment.

Where an offender with an intellectual disability has been convicted of a crime and sentenced to a term of imprisonment, the issue then arises as to whether he or she should be placed in the mainstream of the prison or within a specialised or protection unit, if such a unit exists. There may, therefore, be a conflict between the principle of normalisation (Wolfensberger, 1972) and the need to provide special services and/or protect people with an intellectual disability (NSW Law Reform Commission, 1992). The issue becomes one of segregation or integration.

At this time, no special places of detention suited to offenders with an intellectual disability exist in Western Australia. Prisoners convicted of a crime, or those who are on remand, are usually incarcerated in the same prisons as all other prisoners. The only option available for the accommodation of some prisoners with an intellectual disability is the Protective and Vulnerable Unit at the major maximum security prison where there is level of risk. However, the difficult life of a protection prisoner is well recognised (Simpson, 1989). There is also evidence to suggest that these prisoners are subjected to abuse and victimisation because of their disability (Ierace, 1989). Suggestions have been made for provision of alternative facilities for the protection of these prisoners, but the sheer expense in terms of bricks and mortar, as well as conflicting views

on which government departments would be responsible for funding accommodation and staffing have left the matter unresolved (Fitzgerald, 1990).

Parole Eligibility

Parole may be defined as the conditional release of an offender from prison under the supervision of a Community Correction Officer after the offender has served part of his/her sentence in custody. A person on parole remains under sentence, but serves a part of the sentence in the community under supervision (Ministry of Justice, 1995).

Under the current Parole legislation, a person sentenced to a specified term, has an automatic remission of 2/3rds. This means that, for a 6-year sentence, he will spend 2 years in gaol, and 4 years on parole. This will not be the case if the judge says not eligible for parole when making his order. When on parole, the parolee has certain conditions imposed on his release (in many ways similar to Bail (Section 7), and must report to his parole officer on a regular basis, at a specific time and place. Violation of the conditions of parole and/or re-offending could result in re-imprisonment until the full sentence has been served. Many problems have recently arisen over the Parole legislation and there is strong community feeling that the sentence should more truly reflect that actual period of imprisonment.

COMMUNITY BASED ORDERS

These are sentences which may be imposed, requiring the person to be punished in some way other than by going to prison. Some non-custodial sentences may be imposed instead of imprisonment, others may be set as well as imprisonment. Non-custodial sentences are given to the majority of offenders for a variety of reasons. Some reasons include the inappropriateness of custodial sentences for relatively minor offences; the disadvantage of

exposing young offenders to the gaol environment and the likelihood of rehabilitation being more effective in the community than in gaol. Non-custodial options are also less expensive than imprisonment (Ministry of Justice, Annual Report, 1995). In Western Australia, apart from fines, there are a number of alternatives to imprisonment, which may be completely non-custodial as in the case of Community Service Orders or bonds, or which may be semi-custodial, such as periodic detention or home detention.

Probation

The authority to impose a Probation Order is set out in Section 9(1) of the *Offenders Community Corrections Act* 1963. This is not a sentence in the sense that it can't be appealed against. This type of sentence requires that the offender enter an agreement to be on good behaviour. It is a consent agreement, that is, both the Court and the offender agree to the order. Probation may be imposed for any but the most serious offences and may not be for less than 6 months or more than 5 years. Probation is supervised by probation officers appointed by the Court and the probationer reports to his probation officer at specified times. The Court may attach conditions to a probation order, for example, place of residence, with whom the probationer may be friends with, or refraining from drinking. Probation is very similar to parole and is administered by the same body, but is not preceded by imprisonment. Breaking probation (or parole) by failing to comply with all or any of the conditions may result in imprisonment (Ministry of Justice, 1995a).

Community Service Orders

Under s20B(i) of the *Offenders' Probation and Parole Act* 1963, the Court has the power to make an order for an offender to do unpaid work, instead of sentencing the offender. These orders require the offender to serve a specified number of hours doing supervised service of the community, for example,

beautifying roads or cleaning up rubbish along the freeway. Failure to comply with the terms of the order, for example, failing to attend for duty, work not done or not done properly, may lead to arrest, and the imposition of further punishment which may include a fine, additional hours of service or imprisonment.

Fines

Fines are penalties paid for with money. The amount varies depending on the nature of the offence. Fines may be imposed together with some other form of sentence such as imprisonment, probation, community service order; or instead of another form of sentence. Failure to pay (fine default) may result in imprisonment. A lot of problems have arisen because of the imposition of fines on people who have no capacity to pay. This certainly affects people with an intellectual disability who, in the main , are social security benefit recipients. Little consideration is given to the offender's circumstances when setting the amount of the penalty. This may, in turn, lead to imprisonment, which is not a punishment fitted to the offence for which a fine was considered suitable punishment in the first place. (Ierace, 1989)

Home Detention

Home Detention in Western Australia is established by the *Community Corrections Legislation Amendment Act* 1990. Home Detention must not be imposed on a grant of bail, unless the Court is satisfied that after considering a report from a community corrections officer about the defendant and his/her circumstances, that the defendant is suitable to be subject to a home detention condition, and that the proposed place of residence is a suitable place. The Court also must be satisfied that unless a home detention condition is imposed, the defendant will not be released on bail.

To be eligible for Home Detention as a condition of bail, a defendant must be 17 years of age or older. The Ministry of Justice, Community Based Corrections Division Manual (1995) sets out factors of suitablility for Home Detention Condition including: previous response to community based supervision if applicable; personal history including reference to alcohol or substance abuse, or other evidence of personality/functional problems; and the nature of the charge(s).

NON-CUSTODIAL OPTIONS AND PEOPLE WITH AN INTELLECTUAL DISABILITY

Community Service Orders

A Community Service Order (CSO) requires the offender to perform a number of hours (not exceeding 240 hours) of unpaid community work. A CSO is only to be ordered instead of imposing a penalty of imprisonment (S20B (1) *Offenders Community Corrections Act* 1963) and the offender must consent to a CSO (S20D (1) *Offenders Community Corrections Act* 1963). This latter section also requires that pre-sentence report must be given stating that the offender is a suitable candidate for a CSO and that the relevant programs are available. The Community Based Corrections Division of the Ministry of Justice supervises all CSOs. Breach of CSOs means that the offender is brought back before the court and may lead to imprisonment (S20 B (6) (a) and 6(b). Hayes and Craddock (1992, p. 208-9) have pointed to the particular advantages of CSOs for offenders with an intellectual disability, namely:

- The opportunity for maintenance or boosting of self esteem through the work undertaken;
- The preservation of normal social skills rather than institutional skills and values;

- The opportunity for "modelling upon typical members of the community rather than exposure to the anti-social, violent and criminal behaviour occurring in gaols;
- A CSO is likely to be a more meaningful punishment to the offender with an intellectual disability than, for example, a fine paid out of a bank account or trust fund: "[t] he work may take the form of restitution, if not to a specific individual or property, then at least along similar lines - a basic form of 'making the punishment fit the crime', which in this situation means also that the offender understands that the punishment is related to the crime" (p.208).

A survey of judicial officers in NSW however, suggested that some magistrates believe that physical or mental disabilities make some offenders unsuitable for CSOs (Bray & Chan, 1991) and a Western Australian based study found that community correction officers felt that community services orders as they are currently organised are quite inadequate for this group (Cockram, Jackson & Underwood, 1994b).

Home Detention

One alternative suggested by the West Australian Authority for Intellectually Handicapped Persons (Now Disability Services Commission) is home based detention, as it "does not expose the person with intellectual disability to the abuses that frequently occur in prison and it ensures that any effort at habilitation occurs in the place where the person lives and works (McCoy & Lowe, 1990, p.42).

In Western Australia, home detention is established by the *Community Corrections Legislation Amendment Act* 1990 and is administered by the Intensive Supervision Unit.

The general advantages and disadvantages of home detention have been discussed in detail elsewhere (Dovey, 1988; Lay, 1988). The procedures involved in such an option, however, for instance answering a telephone check call and the use of monitoring devices, may be beyond the abilities of some people with an intellectual disability, who would therefore require constant support. This alternative may thus impose an unfair burden on the offender's family and may present problems of supervision. Similarly, many residential services may not accept such people, which would make it difficult to find them placements in the community (NSW Law Reform Commission, 1994). There is also concern that such procedures can be used to pass the cost of detention onto families and disability services.

Probation

There are a large number of offenders being supervised in the community by Community Corrections Officers. Therefore, identification and supervision of the offender with an intellectual disability may be difficult, as it is generally recognised that supervision of a person with an intellectual disability is time consuming:

> The extraordinary burdens on the [Probation] Service in Western Australia mean that supervision will often amount to no more than a weekly or even monthly request to attend at the Service's office for an interview. Many officers have little or no training in intellectual disability and the additional time demands of dealing with such offenders sometimes leads to frustration on the part of both offender and supervisor. Involvement of another specialist service which is willing to provide oversight of the offender whilst on a bond might be a better way of meeting the needs of the intellectual disabled offender (Cockram, Jackson & Underwood, 1994a, p.4).

Many of these issues were borne out in the Western Australian based study quoted above (Cockram, Jackson & Underwood, 1994a), where it was also stressed that there was a need for training of all community correction staff. The lack of existing programs and special supervision may mean that a

Community Corrections Officer who is preparing a Pre-sentence Report informs the court that the offender is unsuitable for a non-custodial sentence. Thus the offender with an intellectual disability may be gaoled by default (NSW Law Reform Commission, 1994).

Parole

Parole poses particular problems for people with an intellectual disability. Firstly, the questionable assumptions surrounding the concept of dangerousness find their way informally into parole decisions via the criterion of public interest (Thomson, Birgden & Morrison, 1993). Secondly, the prisoner must show the potential and then exhibit the ability to adapt to normal lawful community life. Such adaptation is difficult for many prisoners, but may be more so for prisoners with an intellectual disability, particularly if they were without family or other support to consider release options for them. This support includes appropriate accommodation, and post-release services and support in understanding the parole conditions, for even if parole is granted to a prisoner with an intellectual disability, they may have difficulty in meeting the conditions imposed.

Conclusion

This chapter has described the process of the criminal justice system in Western Australia and considered issues relating to people with intellectual disability at each point in the system. The proposed investigation will attempt to provide insights into issues confronting people with an intellectual disability when they come into contact with the criminal justice system. Chapter 4 will describe the method by which the data for the study was collected.

CHAPTER FOUR

METHOD OF THE STUDY

INTRODUCTION

The purpose of this study is to provide a thorough examination of the degree of participation of adults with an intellectual disability in the Western Australian criminal justice system, focusing on whether they received different treatment from other offenders as they proceeded through the system.

Sample source

The sample for the study was drawn from the Disability Services Commission client data base. This database was then matched with the Western Australian Police Service apprehension records to identify those individuals included on the Commission's register as at 31 December 1994, who had been arrested and charged with a criminal offence over the period of the study. This group (the Index group) was then compared with a random sample of other offenders not included in the Disability Services Commission database, (the Comparison group) who had been similarly charged with a criminal offence between the period of the study, 1 April 1984 - 31 December, 1994. Both groups were then tracked through the criminal justice system to compare their experiences. This process was completed twice at each stage of the criminal justice system; first, for all offenders over the study period and secondly for those individuals who had no prior criminal history at the start date of the study, that is, where the complete criminal history was known.

Tracking was made possible by using a comprehensive individual unit record collection designed to link data from police, courts and correctional services, known as the Integrated Numerical Offender Identification (INOIS) database, located at the Crime Research Centre, University of Western Australia. This data base includes computerised conviction records maintained by the WA Police Service and computerised records of the Corrective Services Division of the Ministry of Justice.

Before proceeding, approval to access relevant records needed to be granted from a number of public agencies - Disability Services Commission, The Crime Research Centre, University of Western Australia, Western Australian Police Service and the Ministry of Justice. This process was a long one, taking over eighteen months before all agencies gave their approval to access their data. What follows is a detailed description of the method by which the data for the study was gathered and analysed.

Disability Services Commission Database

The Disability Services Commission (DSC) is the Western Australian government agency where people with a suspected intellectual disability are referred for assessment. It provides a full medical and psychological assessment of each referred client and continues management of their condition and all associated problems. Centrally based teams from the Commission visit all country areas annually, so isolated rural cases are included. Long-term and short-term residential services are also provided.

The eligibility criteria for DSC -provided services has four components:

- The person will have scored on a recent, (within three years) formal intellectual assessment more than two standard deviations below the mean for their peers matched for age, race and socio-economic status.
- The person will have demonstrated significant deficits in adaptive behaviour.
- Both conditions will have become manifest prior to the person's 18th birthday.
- The person/family is a resident of Western Australia. (Disability Services Commission, Annual Report, 1994-95)

For various reasons, not all individuals known to the Commission are receiving services. These include individuals who have less severe disabilities; individuals who have requested that they not be contacted by the Commission; individuals who have had no contact with the Commission for some time, and lack of resources to provide a service. DSC provided access to its database to extract information on all clients known to the Commission as at 31 July 1994, that is, 11,115 records. The database contained the following information: full name; date of birth; gender; race (Aboriginal or non-Aboriginal); home type; employment type; disability severity; date of registration with DSC;, and the client's service status (ie whether or not they were receiving a service). An examination of the database over the 11-year study period showed that the increase of individuals included on the register each year was fairly stable, ranging from 220 in 1989 to 284 individuals in 1992 with a mean of 256 individuals being added to the register each year for the period of the study.

The database has a long history. Individuals with an intellectual disability were registered from the early 1950s when Irrabeena (now DSC) was established to house a central register and provide direct services to people identified as having an intellectual disability.

In 1990, a study by Wellesley, Hockey, Montgomery and Stanley (1992) was carried out to update the database for forward planning of appropriate facilities and future management strategies. The study's objective was to produce comprehensive, community based data on the aetiology and frequency of intellectual disability of all severities below IQ 70 of children born in Western Australia between 1967 and 1976, inclusive (that is, aged six to 16 years at the time of the survey). The results of the study showed that the prevalence of intellectual disability in Western Australia was 8.9 per 1000 live male births and 6.3 per 1000 live female births with an overall rate of 7.6 or 0.76%. The figures for mild, moderate, severe and profound intellectual disability were 3.0, 2.4, 1.0 and 0.6 per 1000, respectively, with 0.8 per 1000 with an unknown IQ. The study involved multiple sources to trace all children with an intellectual disability born in Western Australia during the period of their study. The majority of cases were ascertained through Irrabeena (now Disability Services Commission). Wellesley and her colleagues were also given access to the records of the Support Branch of the Education Department which assesses all children who experience difficulties with their schoolwork, and provides assistance or alternative facilities as required. Close perusal of all their records was permitted to allow identification of all children with an IQ < 70.

The Child Development Centre run by the Health Department of Western Australia assesses and manages children with a variety of problems predominantly relating to delayed development, and the Centre provided a further source for cases. In addition to these major sources, all agencies, public and private schools potentially involved with children with an intellectual disability and teenagers, were contacted to request cases. Of the schools contacted, only half replied; of

those that did reply there were very few children not already known to the researchers from the other sources.

Princess Margaret Hospital for Children, the only tertiary paediatric referral centre in Western Australia, was another potential source of cases. However, their records are computerised by the admitting complaint and not the underlying disorder (for example, Down's syndrome). Therefore, this source was useful only to improve on the quality and quantity of data received from other sources.

Australian social services provide financial benefit to most parents with a child with a disability. In order to obtain this weekly allowance, a doctor's report, and in most cases an IQ test is required, so virtually all children with an intellectual disability are known to one of the above agencies. In all, 1602 children were included in this survey. Most children (79%) were registered at Irrabeena, 20% were ascertained through the Support Branch of the Education Department, and the remaining 10% from the other sources mentioned.

In Wellesley's et al. view the method of using multiple sources of ascertainment is the "best we have for such community-based studies" (p.95). They believed that ascertainment of cases has been reasonably complete in all cases of the State except possibly for some nomadic Aboriginal groups which may have eluded attention and for some children with a mild intellectual disability, managing in normal private schools (who did not respond to their requests).

The author was provided with 11,115 records which represented all individuals known to the Commission as at 31 December 1994. However, 1,193 individuals were excluded, as their records indicated "not intellectually handicapped". The population of Western Australia as at 31 December 1994 was approximately 1.7 million people (ABS, 1995). Using Wellesley's et al. (1992) study

of prevalence of intellectual disability in the Western Australian population, that is, 0.76%, the frequency of intellectual disability would be 12,920. Therefore it can be concluded that the 9922 records provided for the present study represents 77% of people with an intellectual disability in Western Australia.

Background to the development of Integrated Numerical Offender Identification Database.

In 1989, the Crime Research Centre and criminal justice agencies in Western Australia became involved in the Integrated Numerical Offender Identification System (INOIS) project. The principal aim was to introduce a common unique identifier for offenders so that a longitudinal database could be established that could track offenders through the criminal justice system. Construction of the database required the collaboration of the Western Australian Police Service, the Department for Community Services, The Crown Law Department and the Department of Corrective Services, (the latter two departments now being incorporated within the Ministry of Justice), each of which maintained its own independent and autonomous information system(s). Traditionally, as with most jurisdictions, these information systems had been developed in ways which met the operational and administrative needs of each agency rather than from the viewpoint of establishing an integrated database relevant to the overall operation of the criminal justice system. Consequently, these systems were often incompatible with each other, and numerous information gaps existed. A database that amalgamated data from all of these agencies would be the first ever

constructed in Australia and would explicitly acknowledge the inter-relatedness of the criminal justice system (Ferrante, 1993).

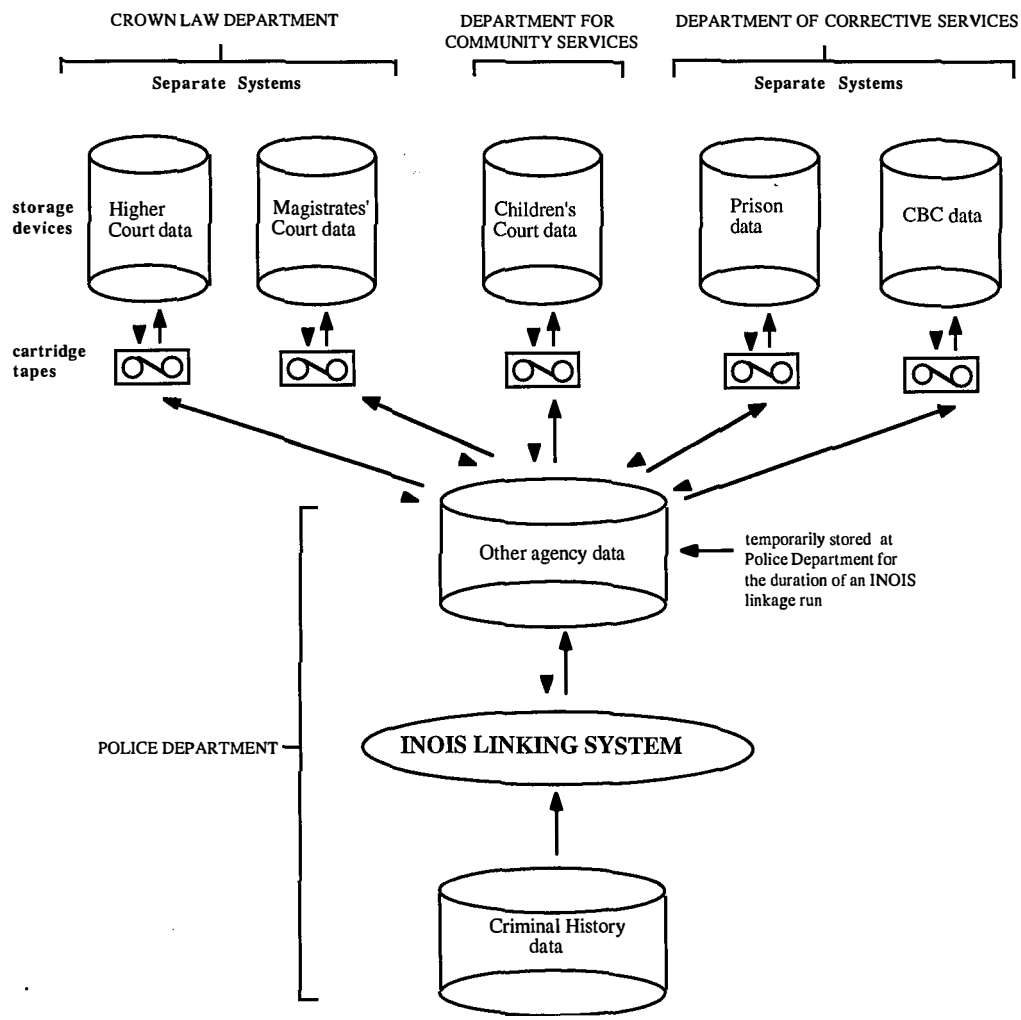
The database was designed to prospectively collect cross-sectional data (that is, offender records collected over a short period such as 3 or 6 months) from a number of criminal justice agencies and place them together into a single data system. With appropriate links between the various records, the resultant database could be used to track offenders both through the criminal justice system cross-sectionally (that is, from arrest to charge and court appearance and finally to conviction, possible detention and subsequent release) and over time (that is, longitudinally).

Because of an absence of any prior cross-agency standard for offender identification, a singular identification system was introduced. A unique identifier known as the INOIS number was adopted by all of the collaborating agencies. Based on the Western Australia Police criminal history docket number (a unique sequential number assigned to an offender after first arrest and validated by fingerprint records), this identifier would be applied to all offenders and thus to all of the criminal justice system, including both the juvenile justice and the correctional (including post-release) areas. Fingerprint identification ensured the accuracy of the INOIS identifier as unique to each offender.

The INOIS Linking System

On a regular basis (each quarter of the year) the INOIS Linking System receives offender records consisting of name identifiers and other demographic details from each criminal justice agency. These records are systematically matched to police criminal history records and then returned to the agency with an INOIS identifier attached to each individual that was matched. The agencies then

supply unit record data with INOIS number (but without name identifiers) to the Crime Research Centre which, in turn, adds these records to the longitudinal database. In this way, the research database is created, while preserving the confidentiality of records and the privacy of individuals. Figure 5 is a schematic representation of these operations.



Source Ferrante (1993).

Figure 5, Operation of the INOIS Linking System

The Linking System uses record linking software and probabilistic processes to determine if records from various sources, which do not have unique common identifiers, should be matched or linked.

The Linking System Software

Special purpose record linking software called LINKS (Wajda & Roos, 1987) is used to link data from the various sources. The software consists of a series of modules (or sub-programs) which perform data management and record linkage functions. The modules are SAS macros which can be run on any computer system which has the SAS system installed (with its accompanying macroprocessor). These macros can be executed independently or chained to run together, and can be edited and adapted to suit any particular record-matching requirement.

For the INOIS project, a number of other modules (macros) were written to supplement the core LINKS modules. These were modules which encoded surnames into phonetic groups, computed frequencies weight sets and generally reported on the state of the record linking process at different stages. Additionally, programs were written to control the overall record-linking task and were tailored to optimise the linking process between agency data and police data, making use of the characteristics unique to each data set.

PROCEDURE

Matching the Disability Services Commission Client Database with Police Apprehension Records.

In order to safeguard confidentiality, a representative from Disability Services Commission met the researcher at Police Services and provided a disk to a representative from the Crime Research Centre, containing client names and other

demographic information. The representative from the Crime Research Centre oversaw the electronic matching process and ensured that it was not possible for the researcher to view any names.

The source data comprised apprehension records of the Western Australian Police Service collected over the period April 1 1984 to December 31 1994. About 870,239 charges were found involving 597,649 arrest events and 226,704 distinct persons. These persons were then matched electronically with the 9,922 individuals provided by the Disability Services Commission in order to identify those individuals known to the Commission who had been arrested and charged with a criminal offence, at least once as an adult in Western Australia, over that period. An arrest event was defined as a charge laid on a given date; if more than one charge was laid on the same day it was counted as one arrest.

The INOIS linking system divided the record-matching task into two components - first, preparation and analysis of the data and, secondly, the record linking processes itself.

Preparation of the data consisted, in part, of cleaning up some variables (e.g., removing hyphens, apostrophes and spaces from names and surnames - as in Anne-Marie, O'Connor and Del Casale). Other variables, such as date of birth, sex and race, were standardised to common formats and codes. Dates of birth were split into three separate variables: year, month and day, and for each of these, missing values were standardised. Race was categorised as either Aboriginal or Other. Data preparation also included the phonetic encoding of surnames so as to minimise the problems caused by mis-spellings and typographical or keyboard errors. The sound-based NYSIIS (New York State Intelligence Information System)

code (Newcombe, 1988) was used for this. Alias names were also flagged and encoded using NYSIIS.

As is typical in most record linking projects, the linkage process was broken into a number of key steps. These were: finding exact matches; pocketing; creating pairs of potentially linkable records within each pocket; weighting pairs of records and setting thresholds and resolving links.

Step 1: Finding Exact Matches

This first step involved using the LINKEXC module of the LINKS software to compare pairs of records from the two data sets and determine records which agreed exactly on all comparison variables. This was a long process, taking over ten hours to complete. Two hundred and eighty nine records were classified as exact matches and were subsequently excluded from any further linking. This had the effect of reducing the number of records to be considered for (probabilistic) matching in the next steps and, therefore, saved on computing resources.

Step 2: Pocketing

The remaining records from each data source were grouped or pocketed into smaller groups so that only records falling within the same pocket (and agreeing on a minimum number of specified variables) would be compared with each other in this and the next steps. Pocketing in this way substantially reduced the number of comparisons to be performed and provided large savings in computing time. Records were pocketed by NYSIIS-CODE (NYSIIS encoded surname) in the first linkage pass (passes are discussed later), and by birth year and first initial in the second pass.

Step 3: Creating Pairs of Potentially Linkable Records Within Each Pocket

Within each pocket, pairs of records were then compared. Variables used in the comparison were: birth year, first initial, second initial, the first four characters of first name, the first six characters of surname, gender and race. The variables were compared directly to each other (for example, the value of the gender variable of one record was compared to the value of the gender variable of the paired record) and in more complex ways involving conditional - and cross-comparisons. For example, when a comparison of first initials failed and when second initials also disagreed, a cross-comparison of first initials with second initial was made. Similarly, when a direct comparison of birthdays failed and when birth months also disagreed, a cross-comparison of birthday with birth month was made. There were some instances in which comparisons did not always yield complete or full agreement of a variable but the values were similar nevertheless. For example, a comparison of the first four characters of the first name may have disagreed because, although the first two or three characters of a given name were the same, the next characters were not (as in Sue, Susan, and Susanne). Similarly, birthdays may not have agreed exactly but may have differed by only one day. In these circumstances, certain levels of similarity or partial agreement were recognised. The comparison rules for birthday, birth year surname and first name all recognised some level of partial agreement.

The comparisons described here are indicative of the sorts of comparisons which can generally be made of variables in a linkage project, (Newcombe, 1988), but these are by no means exhaustive. Decisions about how many and which sorts of comparisons to make are usually based on i) those which give the greatest return, ii) the simplest logic, and iii) the most convenient to implement. Decisions

are also influenced by other factors, in particular, the need to minimise correlation errors. These errors are caused when there is some correlation of some linkage variables which may bias the aggregated weight either upwards or downwards.

Step 4: Weighting Pairs:

In this step, weights were attached to each pair of records on the basis of the outcome of each comparison. Comprehensive discussions about the derivation of weights can be found in Howe and Lindsay (1981), Hill (1981), Wajda and Roos (1987), Newcombe (1988), and Roos and Wajda (1991). As Newcombe explains:

The basic idea is very simple. If a name or an initial or a month of birth, or any other identifier agrees or disagrees or is more or less similar or dissimilar in any way, one simply asks, "How typical is that comparison outcome among linked pairs of records as compared with unlinkable pairs brought together at random?" (Newcombe, 1988: 7).

This basic principle can be re-stated as a frequency or odds ratio. That is:

$$\frac{\text{outcome frequency in linked pairs}}{\text{outcome frequency in unlinked pairs}}$$

Weights are computed based on $\log_2$ of this odds ratio, that is,

$$\text{weight} = \log_2 \frac{\text{outcome frequency in linked pairs}}{\text{outcome frequency in unlinked pairs}}$$

The weight is therefore an estimate of the chances that the pair of records does, in fact, refer to the same individual rather than different people.

During the data preparation and analysis stage, weights were computed and stored in a lookup table for reference during this step. These were value-specific frequency weights calculated for each variable (and parts of variables) used in making comparisons. Weights were computed using the formula:

$$W(i) = 10 * \log_2 \left(\frac{N}{n(i)} \right)$$

where: W (i) is the frequency weight for field value i

n (i) is the frequency of occurrence of field value i

N is the number of records on the file having non-missing values for field i.

These weights were attached to each pair of records on the basis of the outcome of each comparison. Where there was complete agreement in a comparison, the frequency weight, W (i) was attached to the pair. When there was disagreement, a general negative weight was attached. This disagreement weight (DW) was calculated as:

$$DW = \frac{-2}{3} \; 10 * \log_2 \frac{1}{\sum_i \left(\frac{n(i)}{N} \right)^2}$$

where: n (i) and N are as before. (The inner term is just the sum of the squares of all the specific frequencies of a particular variable). This term is often referred to as the general agreement frequency weight for a variable (Newcombe, 1988, p.28). The disagreement weight is just negative proportion (set at -2/3) of the general agreement frequency weight).

When there were missing values in a field, no comparison was made and no weight was attached. For simplicity's sake, missing information was considered to mean no information. This, however, assumes a certain randomness in the distribution of missing values in the data sets which may not necessarily be the case. Ferrante (1993) found in setting up the INOIS Linking project, for example, that Aboriginals, particularly older ones, would often have missing dates of birth because this information is simply not known.

When partial agreements were the case, a reduced frequency weight was attached. For example, if birth years differed by one year (say, the first record had a value of 1945 and the paired record had 1946) then the agreement weight of the first value (1945) less an adjustment weight was attached. When birth years differed by more than one year but less than four, the weight was reduced still further before being attached to the pair. Adjustment weights differed between comparisons (that is, the adjustment for partial agreement of birth years, e.g., differed from the adjustment weight for partial agreement of birthdays).

A total weight was then aggregated for each pair of records. (Since the weights were based on logs, they were additive). Total weight thus became an indicator of the probability that the two records were matched. The higher the total weight, the more probable it was that the two records were of the same individual.

Step 5: Setting Thresholds and Resolving Links

After weighting, each pair of records was classified as either a "rejected", "possible" or "definite" link. This was done by comparing the total weight of the pair to pre-determined upper and lower acceptance thresholds. If the total weight exceeded the upper acceptance threshold, the pair was said to be a "definite" link. Those pairs with a total weight falling below a lower rejection threshold or "cut-off" were labelled as "rejected" links. The remaining pairs were classed as "possible" links.

The purpose of the lower threshold was to reduce the size of the linkage task and therefore save on computing resources. Once rejected, a linked pair was excluded from any further processing. Only definite and possible links entered the final stage of resolving links.

Both upper and lower thresholds were determined by the user on the basis of reports which plotted the distribution of the link weights (from step 4) and by experimenting within certain ranges of weight values. The distribution of link weights in these reports resembled the form, in Figure 6 below.

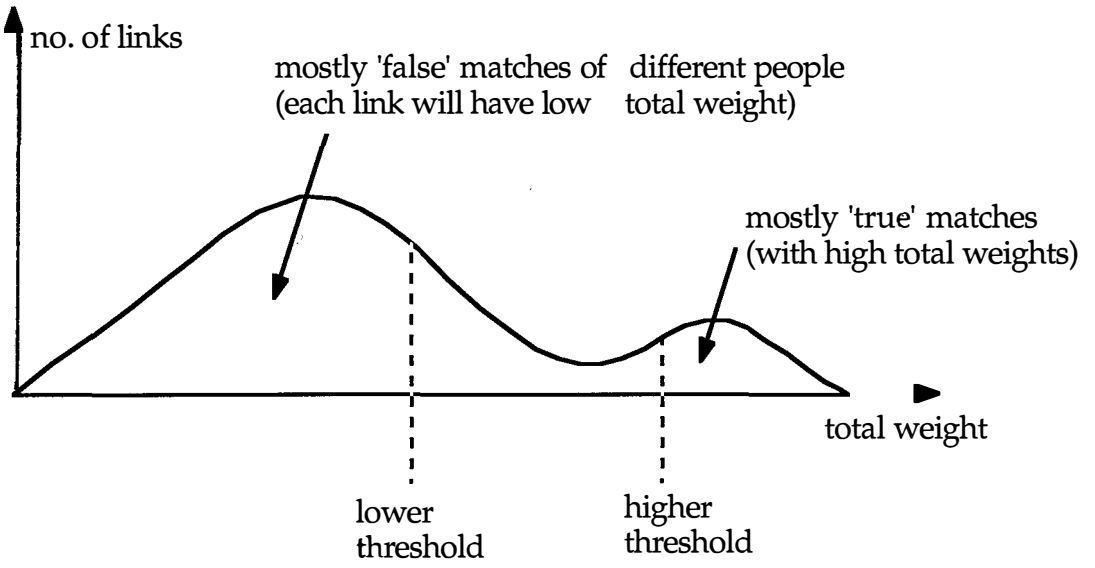


Figure 6. Simplified Distribution of Link Weights

Using the weight distribution reports, estimates of the best position for the thresholds were made. Additional reports were then produced which reported on the links around these threshold points. Determining the position of the upper threshold was, by far, the most important as it was the position of this threshold that most significantly influenced the overall number of false positives. In this case, the threshold was set at 240. Links about this threshold were inspected

(manually), and, because some records just below 240 were considered to be acceptable, the threshold was revised at 238.

The requirement for accuracy (that is, that the number of false positives be kept to a minimum) meant that the upper threshold was set at levels high enough to cause many "true" links to fall into the "possible" link category rather than in the "definite" link category.

The LINKS MODULE, LINKRES, performed the final task of resolving links. This module determined if combinations were tied on weight. Ties occurred if a record from one data set was found to match to different records from another data set with exactly the same probability (i.e., the same weight). This can happen when duplicate records for the same individual exists in one of the data sets. Only one tie was found during the matching process. This case was placed in a separate data set and resolved manually. The flowchart in Figure 7 shows the processes of the INOIS linkage run.

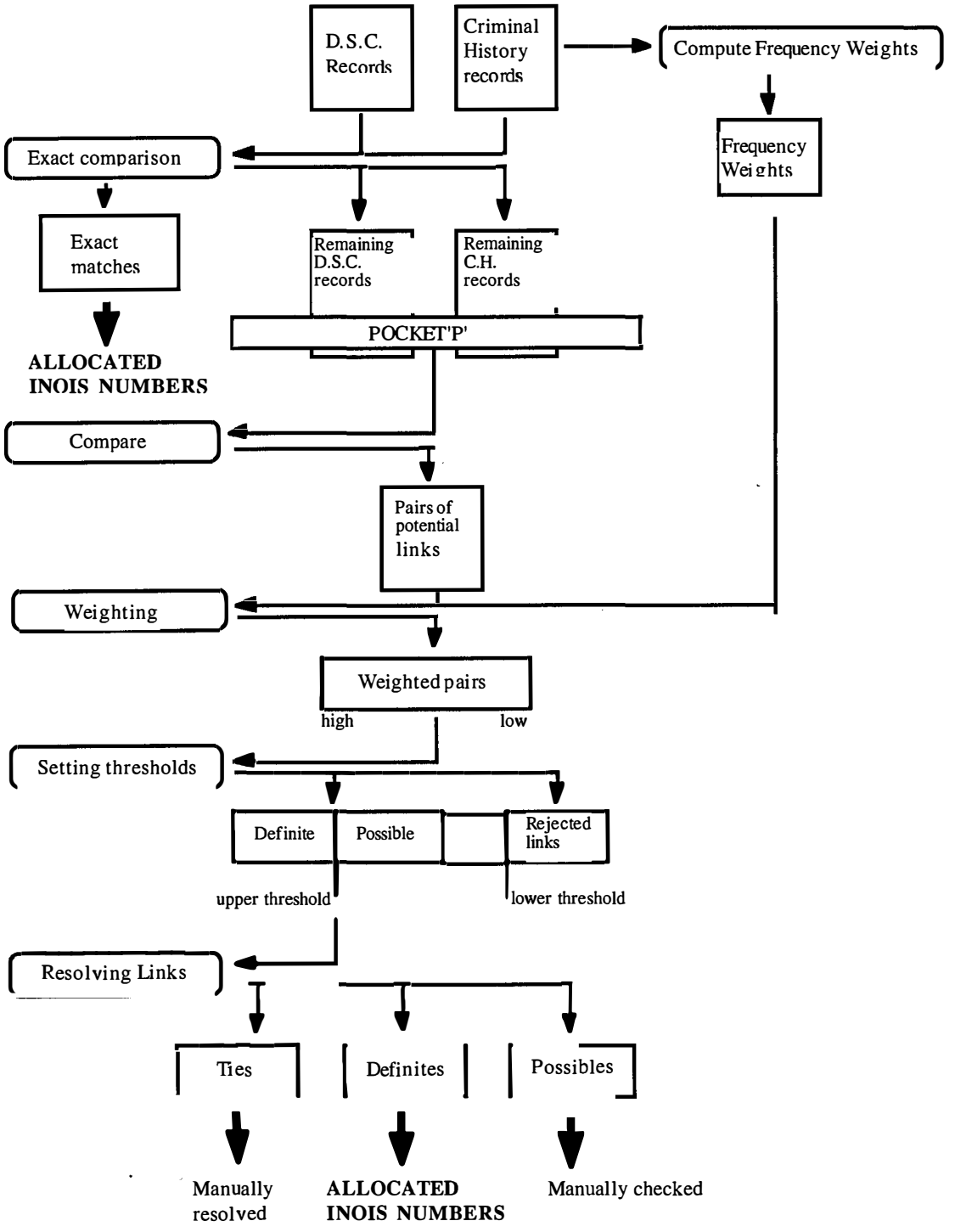


Figure 7. The INOIS Linkage Run

Linkage Passes

The record matching process for this study was conducted using exact matches and then two passes. This resulted in 289 records being identified as exact matches. First pass records were pocketed by NYSIIS code and then matched using the linking steps described above. Records that had either matched exactly or were considered definite links were placed in a separate data set. This phase involved 815,813 observations of possible matched surnames and resulted in 672 records being identified as exact matches. The remaining records were re-pocketed using different variables: birth year and first initial and re-linked using procedures similar to those described above. The second pass involved 2,571,219 observations and 43 matches were identified. Ten records were included, being individuals of Aboriginal birth, who had exactly the same name and year of birth but the birth date did not match. It was found that the Disability Services Commission Client database commonly used 1 January for Aboriginal clients when a birthdate was not known. It was also found that in six cases all fields were exactly the same except that the Disability Services Commission client database did not include second names for those individuals. These records were accepted as definite matches. Twenty-two records were rejected. These rejections were made on the grounds that: i) there were more than 2 differences in fields; and, ii) if there was a difference in one field, the case was rejected if the name was a common one. This led to the result that 983 individuals on the Disability Services Commission register were identified as having been charged with a criminal offence during the period of the study.

The next step was to track the Index group through the criminal justice system and compare their experiences with the Comparison group. This was to be done via the research database held at the Crime Research Centre, University of Western Australia.

Crime Research Centre Database

As outlined above, The Crime Research Centre developed the INOIS system in 1989 in order to establish a longitudinal database of offenders that would enable "tracking of offenders through the criminal justice system in Western Australia and over time. The database contains over 180,000 offender records (these differ in number from the police records as aliases have been cleaned up and removed), from 1 April 1984 to 31 December 1994. The database contains records of juveniles as well as adults, and includes details of arrests, court outcomes, custodial and non-custodial (community-corrections) sentences and post-release (parole). A key feature of the database is that it is relational, meaning that it has a structure capable of collecting and storing data in very flexible ways. The database does not require that records be supplied in condensed form nor that hierarchy or selection rules be devised to produce summary records of the most serious offence, outcome or sentence. (These rules may be required later, however, during analysis.) In this way, the database overcomes many problems of the "forced choice" structures of other offender tracking systems and allows the researcher more analytical freedom (Ferrante, 1993).

The data was provided to the investigator in three stages. First two files containing police apprehension records, (that is., individuals who had been arrested and charged by the Western Australian Police Service at least once as an adult) were forwarded to the Supervisor of the Criminal Records Section of the

WA Police Service by a representative of the Crime Research Centre. One file contained details of arrest events of 843 individuals in the Index group who had been identified during the matching process. Although 983 individuals had been matched, 128 individuals were excluded as these individuals had only offended as juveniles and 12 were "not intellectually handicapped". The other file contained similar information for a random sample of 2442 Comparison group offenders, all of whom had been charged at least once as an adult. The random sample was determined at approximately three times the number of the Index group, to allow comparison between the two groups on different variables.

Representativeness of the Sample

Table 1 describes information extracted from the Disability Services Commission (DSC) database, including gender, racial type, home type, disability severity and service status of the 843 adult persons identified, together with characteristics of all adults on the register as at 31 December, 1994 for comparison. Juveniles (that is, individuals who had not turned eighteen by the last day of the study) were excluded, leaving 6776 of the individuals on the DSC register for comparison. It can be seen that the Index group was found to match closely the mean age and racial type of all DSC adults. However, the Index group appeared to differ in terms of gender. Seventy six percent of individuals charged, were male, whereas males accounted for only 59% of all adults on the DSC register and females in the study sample accounted for 24%, whereas 41% of females known to DSC were females. Ten percent of the Index group lived in specialist disability accommodation whereas 18% of all DSC adults lived in similar accommodation, and 68% of the Index group were not in receipt of services compared to 43% of all DSC adults. Considerably more of those individuals who were charged were

classified with a borderline disability (33%) or mild disability (44%) whereas only 21% of all DSC adults were classified as borderline and 36% with a mild disability.

Table 1

Characteristics of adults with an intellectual disability identified as having been charged with a criminal offence and all adults on DSC register

	Index Group		All DSC	
Gender	%	n	%	n
Male	75.7	639	59.2	4011
Female	24.3	204	40.8	2765
Mean Age				
Male	25 years		29 years	
Female	26 years		31 years	
Racial Type				
Non-Aboriginal	97.6	823	98.7	6687
Aboriginal	2.4	20	1.3	89
Home type				
At home with family members	53.5	450	47.1	3195
Independent	14.6	123	9.8	664
Disability Hostel	7.2	61	8.4	569
Group home/duplex	2.0	17	5.8	393
Special care hostel	0.6	5	3.5	236
Unknown	22.2	187	10.6	719
Service Status				
In receipt of services	30.6	258	44.7	3029
Not in receipt of services	42.2	356	29.0	1966
Not to be contacted by agency	25.9	218	14.6	989
Deceased	1.3	11	11.7	792
Disability Severity*				
Borderline	33.0	279	21.3	1442
Mild	43.9	370	36.4	2470
Moderate	8.8	73	27.1	1837
Severe	1.4	11	11.0	742
Unspecified	12.9	110	4.2	285
n=	100.0	843	100.0	6776

**Based on the World Health Organisation classificatory system and adopted by Disability Services Commission.*

Table 2 describes gender, race and age of the Comparison group, compared with the Western Australian adult offending population. It can be seen that

demographic characteristics of the Comparison group were found to be consistent with the overall Western Australian adult offending population (Crime Research Centre, 1998).

Table 2

Characteristics of comparison group and whole Western Australian adult offending population 1984-1994.

	Comparison group	**WA offenders**
Gender	%	%
Male	79.8	78.8
Female	19.7	20.8
Racial type		
Aborigine	7.4	8.3
Non-Aborigine	86.7	86.9
Mean age at first arrest (years)	28.7	30.1

The officer from WA Police Services previewed the encoded data prior to release from the Crime Research Centre to the researcher. The officer then met with the researcher at her university to supervise the downloading of the data to the author's personal computer and the subsequent destruction of the diskette. The file contained no identifying information but included a record number for each individual for subsequent tracking. This number was a unique number which had been manufactured at the Crime Research Centre and was neither the police docket number nor the Disability Services Commission client identification number. A letter of assurance was provided to the police by the researcher, that no one other than herself and her three identified supervisors would have access to the data, nor would it be released in any format without the approval of the WA

Police Service. Agreement was also given that at the conclusion of the research project, supervision of the destruction of the downloaded encoded data would take place.

In the second and third stages, a similar process was followed. The Crime Research Centre provided two diskettes to the Ministry of Justice and to the W.A. Police Service which contained encoded data for the same individuals. After ensuring that confidentiality had been maintained, the discs were forwarded to the researcher for downloading. Data included court outcomes, prison records and community based correction records.

The data relating to court outcomes contained charges heard in the lower courts (Courts of Petty Sessions) and the higher courts (District Court and Supreme Court). It was not possible to obtain accurate and timely data relating to the activities of the Courts of Petty Sessions from court records. However, it was possible to extract relevant Petty Sessions data from the computerised Conviction Records maintained by the WA Police Services and Higher Court decisions from the computerised records of the Corrective Services Division of the Ministry of Justice.

It was also not possible to extract charges which incurred fines or acquittals in the Higher Courts, but given that approximately 80,000 charges are heard in the Courts of Petty Sessions each year and only 5,000 in the Higher Courts, the large majority of court decisions are reported.

The standard counting rule applied to this data is that all charges finalised either by acquittal (including *nolle prosequi* and defendant incapacity) or conviction and sentence, are included in the counting period. In this collection, data are

extracted on the basis that the final judgement date (not always the date of sentence) occurred within the period. Thus, not all cases finalised by way of sentence during the study period are included. As some of these cases would have had final hearings prior to the counting period, they would be excluded from the data file.

Data which is reported for terms of imprisonment or community based sentences was extracted from the computerised records of the Corrective Services Division of the Ministry of Justice. This Division has responsibility for the management and good order of prisoners (including offenders remanded in custody by the courts pending trial or sentence) and the supervision of offenders serving non-custodial court orders such as probation, community service orders and work and development orders. In addition, the Division supervises offenders released on parole and following indeterminate sentences, as well as those prisoners participating in work release and home detention programs (see generally *Prisons Act* 1981, *Offenders Probation and Parole Act* 1963, Community *Corrections Centres Act* 1988 and *Community Corrections Legislation Amendment Act* 1990).

Prisoners may serve their sentences in prison or police lockups. Many prisoners serving very short sentences and who live in remote localities, undergo sentences in lock-ups rather than in Ministry of Justice prisons. At the time of the study, lock-ups in Western Australia were managed by the WA Police Service, which records prisoner information on property sheets. It appears that data entry procedures used in some lock-ups differ from those used in other lock-ups, particularly in regard to offenders who are released from lock-up, appear in court

and are then re-admitted to the lockup. Therefore, only limited data about offenders serving sentences in police lockups pending committal for trial are provided.

Reception history sheets, police property sheets, warrant summaries and exit forms are the principal sources of data on adult prisoners. These data are selectively used to describe imprisonment for all receptions/receivals of persons during the period of the study. It is important to note that some demographic data (race, marital status, employment, occupational and educational status on reception) are based on prisoner self-report.

Rearrest Probabilities: A Survival Analysis

Another task of the research was to find out if people with intellectual disability have a different rate of recidivism than the general offending population. Estimates of recidivism are useful in assessing the effect of penal policies and the utility of specific interventions upon offending behaviour.

As the purpose of the analysis was to estimate probabilities of rearrest and to see if there were differences between groups, it was important to establish the order and timing of arrest events, from the time of first arrest. Thus only those individuals who had been arrested for the first time on or after 1 April 1984 were included in the analysis. Persons arrested in 1984 were able to be followed up for a maximum of 10.66 years, those arrested in 1985 for 9.66 years and so on, until the cutoff date. Subjects, on average were followed up for 5.9 years. It is important to note that an arrest record usually excludes contact with police involving minor

offences while a juvenile. Therefore a first arrest may not equate with the first record of contact with police.

Probabilities of rearrest are estimated from a parametric statistical model fitted to the observed failure or follow-up times. The data are said to be censored, since in some cases insufficient time had elapsed between arrest and the chances of rearrest. At the extreme, an individual arrested on the cut-off date of 31 December, 1994, would have no opportunity to be rearrested, and ordinarily including such cases would seriously bias estimates of rearrest. A statistical method, known as failure or survival rate analysis, is utilised to account for such bias and permits accurate estimates of the ultimate probability or rearrest to be calculated. In previous work on the probabilities of rearrest in the West Australian context, a Weibull mixture model was fitted, with good results, to the observed failure or follow-up times of persons arrested for the first time (see Broadhurst and Loh, 1995).

The Weibull mixture model can be described as follows: the failure time of an individual (*T*) is assumed to have the distribution function

$$\text{Prob}\{T \leq t\} = P\,[1-\exp(-(\lambda t)^{\alpha})], t \geq 0 \quad (1)$$

where *P* is a parameter representing the probability of ultimate or long-term failure (1 - P is the probability of ultimate or long-term success), lambda ($\lambda<0$) is related to the rate of failure, and alpha (a <0) is the "shape" parameter of the Weilbull model. The values of *P and* the associated 95% confidence intervals are reported for all estimates. The median time to fail in months is also reported as a summary measure of the time to fail.

An important caveat to the estimates (especially the time to fail) is that they are not adjusted for time spent in custody. Linked data containing prison records will enable the follow-up time to be corrected and to count only the time that an offender is exposed to the risk of rearrest. Consequently, estimates will be conservative since, for the more serious offenders, time-out from offending, caused by imprisonment, is not taken into account. In addition, arrests that occur outside the jurisdiction are not included and therefore, for some cases, a full history of police charges is not available. Although Western Australia is a relatively isolated and closed jurisdiction, compared to others, considerable interstate travel occurs and offenders may either leave the jurisdiction or arrive within it. At present no adequate national database exists for tracing offenders across jurisdictions. This missing arrest information will also tend to underestimate the probability of rearrest.

Analysis of Data

First, a cross-sectional analysis was carried out defining rates and demographic characteristics of persons arrested in both groups for the overall period of the study. There were rather more arrests than persons arrested, as each year there were a number of persons with multiple arrests. The second stage of analysis consisted of a longitudinal study of the offending patterns of both groups for the overall period of the study. Both stages of analyses were again carried out for first time offenders only.

The population of persons charged is described and summary results of criminal careers of individuals in both groups are reported in the following chapters for the overall period of the study, and then for first time offenders only.

The results of the survival analysis to determine the re-arrest probabilities of both groups are also reported.

Descriptive data for both samples were statistically analysed using the computer software package *Statistical Package for the Social Sciences* (SPSS) version 6.1 for the following variables:

- Gender
- Racial type
- Age
- Occupation
- Arrest processing
- Number and type of offence at arrest
- Most serious offence at each arrest
- Courts of Petty Sessions outcomes
- Offence categories by outcome/Courts of Petty Sessions
- Number of receivals in prison and police lockups
- Number of custodial terms in prison and police lockups
- Number of custodial terms by year
- Receival type
- Most serious offence in custody
- Employment/prisoners
- Marital status/prisoners
- Qualifications/prisoners
- Term type
- Days on remand
- Security rating/entry and exit
- Length of sentence
- Sentencing Court/Community Based Orders
- Number of offences/Community Based Orders
- Most serious offence/Community Based Orders
- Type of Community Based Order
- Special Conditions/Community Based Order.

In addition, the following variable frequencies were statistically analysed.

The mean and standard deviation of ages for both samples were analysed and an independent t-test was used to determine any differences. The mean and standard deviation of days spent on remand was analysed. The range and sum of days were also calculated.

To determine if there were relationships between groups, chi-squared tests were completed for the following variables for both stages of the research, ie for all offenders over the study period and for first time offenders only.

Gender and racial type at each stage of the justice process
Number of arrests
Prior arrest history
Bail status
Number and type of offences involved in each arrest
Most serious offence at arrest
Most serious offence for each custodial term
Security rating on entry and exit from prison
Term type for first time offenders
Most serious offence for each community service order

A 2x 20 ANOVA test was completed to determine if there were significant differences between groups of types of offence and length of sentence.

The Fortran program devised by Maller (1994) was used to complete the Survival Analysis to determine the re-arrest probabilities of both samples.

CHAPTER FIVE

RESULTS 1: ARREST

INTRODUCTION

This chapter describes the data collected from Western Australian Police Services arrest records, which include demographic data for persons charged in both groups, followed by both groups' arrest histories for the overall period of the study. The same information will then be reported for only those individuals who were arrested for the first time after the start date of the study, 1 April 1984 (hereafter referred to as first time offenders). For each arrest event, data were available for gender, racial type, age, bail status, arrest history, occupation (including a partial record of those unemployed), offence and offence count.

As with all crime statistics, the data were structured on the basis of arrests, so that each arrest that takes place constitutes a discrete file case. However, the adult-apprehension files can also be analysed on the basis of individuals. As a result, it is possible to extract information on long-term individual offending patterns, and to determine whether, over a given period, we are dealing with a large number of once only offenders or a relatively small number of individuals who are constantly being apprehended. Such information is obviously crucial in determining strategies for the treatment and rehabilitation of offenders coming before the criminal justice system.

Incidence of Arrest: A longitudinal analysis

Table 3 shows the incidence of arrest of individuals known to the Disability Services Commission over the age of 18 years compared with the Western Australian population adults for the years 1985, 1989 and 1994.

It can be observed that while adults with an intellectual disability known to the Disability Services Commission were less likely to be charged with a criminal offence in the three selected years than their non-disabled counterparts, the incidence of arrest for the general Western Australian population was higher in 1985 than 1994; (1985, 1 in 23 adults (4.3%); 1994, 1 in 37 adults or 2.6%). However, individuals with an intellectual disability had a higher incidence of arrest over time, ranging from 1 in 65 individuals (or 1.5%) being charged in 1985 to 1 in 43 (2.3%) individuals in 1994.

Table 3

Incidence of arrests in selected years of individuals in Index and Comparison groups

Year	Individuals over 18yrs		Number Charged		Incidence of Arrest	
	DSC	Gen.Pop.	DSC	Gen. Pop	DSC	Gen. Pop.
1985	5967	712,467	93	30,518	1.5%	4.3%
1989	6531	1,008,230	117	33,618	1.8%	3.3%
1994	7709	1,266,115	176	33,560	2.3%	2.6%

Pattern of Arrests between 1 April 1984 and 31 December 1994

While it appears that people with an intellectual disability are less likely to be arrested than the general population, the subsequent arrest patterns for the two groups are significantly different (χ^2 = 2108.92, df 43, p<. 01). That is, during the eleven -year period of the study, the Index group (n=843) was involved in 4,359 arrest events (i.e. where an individual was charged with a criminal offence), or a mean of 5.17 (SD=6.79), while the 2,442 individuals in the Comparison group were involved in 6,449 arrest events (mean 2.64, SD=3.52). Thirty seven percent of individuals in the Index group had only one arrest, compared with 57.9% in the Comparison group. Fifty two percent of individuals in the Index group had between 2 and 10 arrests, compared with 38.9% in the Comparison Group. Ten percent of individuals in the Index group compared with .04% in the Comparison group had over ten arrests during the period of the study.

There was also a difference in the arrest pattern over time between the two groups, which is consistent with the longitudinal data for incidence of arrests. For the Index group in the first full 5-year period of the study (1985-1989), 36% of the arrest events occurred, while in the second 5-year period (1990-1994) 64% of arrest events took place compared with the Comparison group where the arrests were about the same over the two 5-year periods (49% and 51% respectively). It should be noted that the increase in arrests for the Index group occurred even though there were less individuals added to the Commission's register over the latter 5-year period than the first five year period (1262 individuals last 5-year period compared with 1324 individuals first 5-year period). However, as Table 4 demonstrates, the annual arrests, for individuals arrested for the first time,

remained largely constant. Hence the finding that more arrests were made in the latter half of the study can be explained in terms of repeat offenders.

Table 4

Annual arrests of persons with an intellectual disability arrested for the first time 1984-1994

Year	Males	Females	Total
1984	27	7	34
1985	42	10	52
1986	35	16	51
1987	33	10	43
1988	28	13	41
1989	33	13	46
1990	26	14	40
1991	25	14	39
1992	23	14	37
1993	22	17	39
1994	25	16	41

DEMOGRAPHIC FACTORS

Gender makeup of Index and Comparison groups

Figure 8 shows the gender of persons charged over the period of the study by group. Overall, the Index group was made up of 75.7% male and 24.3% female whereas the Comparison group was 79.8% male and 19.7% female. For 0.5% of the Comparison group, gender was not recorded. A chi-square analysis shows that

there is a statistically significant difference according to gender between the two groups ($\chi^2 = 7.28$, df 1, $p < .01$).

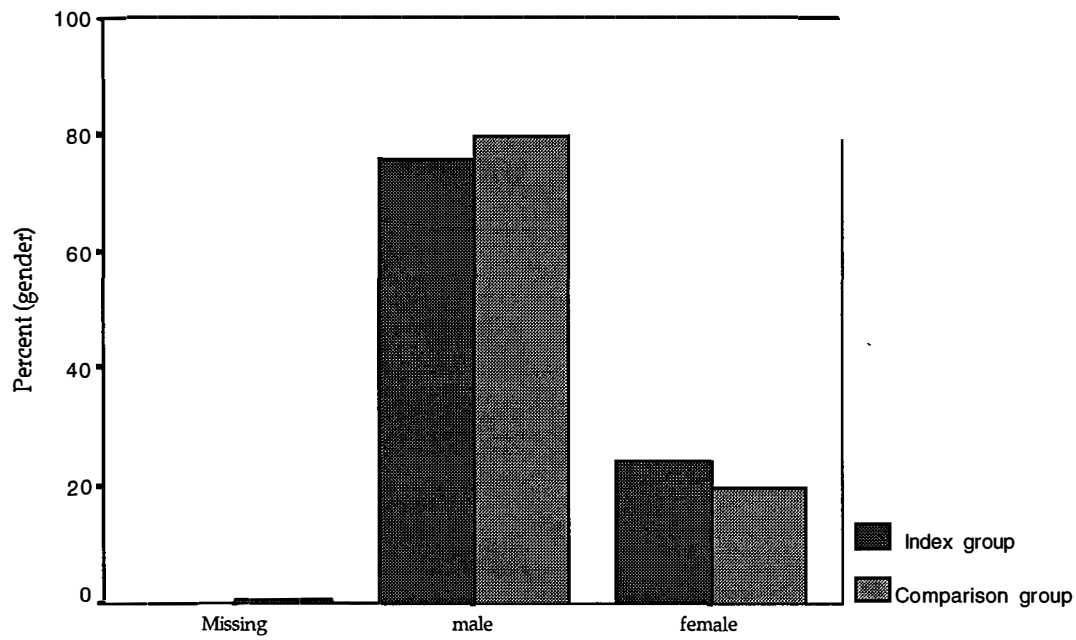


Figure 8. Gender makeup of Index and Comparison groups

Racial composition of Index and Comparison groups

Figure 9 shows race (i.e., non-Aboriginal or Aboriginal) by group. The police data for the Index group differed from Disability Services Commission data. The police records indicate that 20.0% of individuals in the Index group were recorded as Aboriginal and 76.7% nonAboriginal, compared with the Disability Services Commission client records which show that only 2.4% of persons charged were Aboriginal and 97.6% were non-Aboriginal (see Table 1). The Comparison

group comprised 7.4% Aboriginal persons and 86.7% non-Aboriginals. A chi-square analysis shows that there is a statistically significant difference in the racial composition of the two groups ($\chi^2 = 110.94$, df 2, $p < .01$).

It is interesting to note that race is recorded by police on the basis of physical inspection of the offender by the arresting officer. Fortunately, the error rate appears to be tolerable for this task. The misrecording of Aboriginality is estimated to occur in nearly 1 in 20 cases. In a record check study comparing, police records (police identified) with prison records (self-report), it was estimated that the police were likely to misclassify the race of the arrestee in about 3.2% of comparable cases. Also, most error resulted in Aborigines being misclassified as non-Aborigines (Broadhurst and Maller, 1991, p.28).

For 3.2% (n =27) of the Index group and 5.9% (n =144) of the Comparison group race was either not known or not recorded.

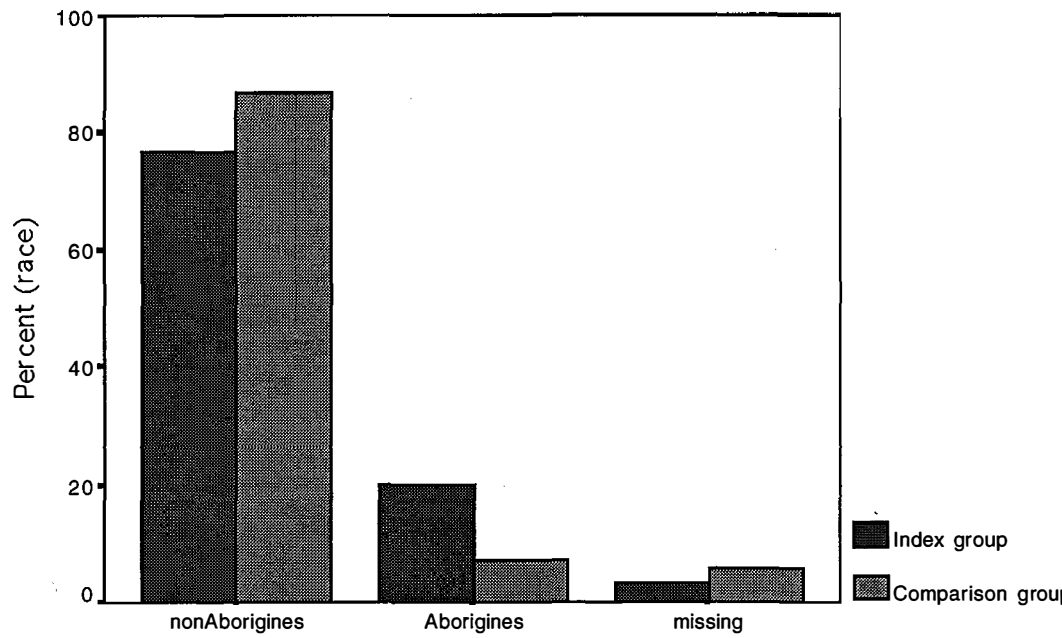


Figure 9. Racial composition of the Index and Comparison groups

Mean age at first arrest after 1 April 1984 of individuals in Index and Comparison groups

The mean age at first arrest after 1 April 1984 was 25.06 (SD = 8.21) for the Index group, compared with the mean age for the Comparison group which was 28.74 (SD = 11.87). Both males and females in the Index group tended to be

younger than in the Comparison group (Index group males, 24.6 years, SD= 8.02, Comparison group 28.3 years, SD= 11.70; females Index group 26.5 years, SD= 8.59, Comparison group 30.2 years, SD=12.26).

Occupation of individuals in Index and Comparison groups

A simple ten-group occupational code (adapted from the Australian Standard Classification of Occupations) was initially used to summarise descriptions of the occupations of persons arrested. Unfortunately, police recording practices were not standardised and the employment status of arrestees was not routinely recorded. For 14% of the Index group and 54% of the Comparison group, occupation could not be classified or was unknown. The remaining cases (66% for the Index group and 36% for the Comparison group) were described by police as unemployed.

Arrest history of individuals in Index and Comparison groups

Figure 10 reports the arrest history, that is, whether the individuals in both groups had been arrested prior to the date of the commencement of the study. It can be seen that considerably more individuals (44.7%) in the Index group had a prior arrest history. Only 29.0% in the Comparison group had an arrest prior to 1984. A chi-square analysis shows that there is a statistically significant difference in the arrest history between the two groups (χ^2 =70.48, df1, p< .01).

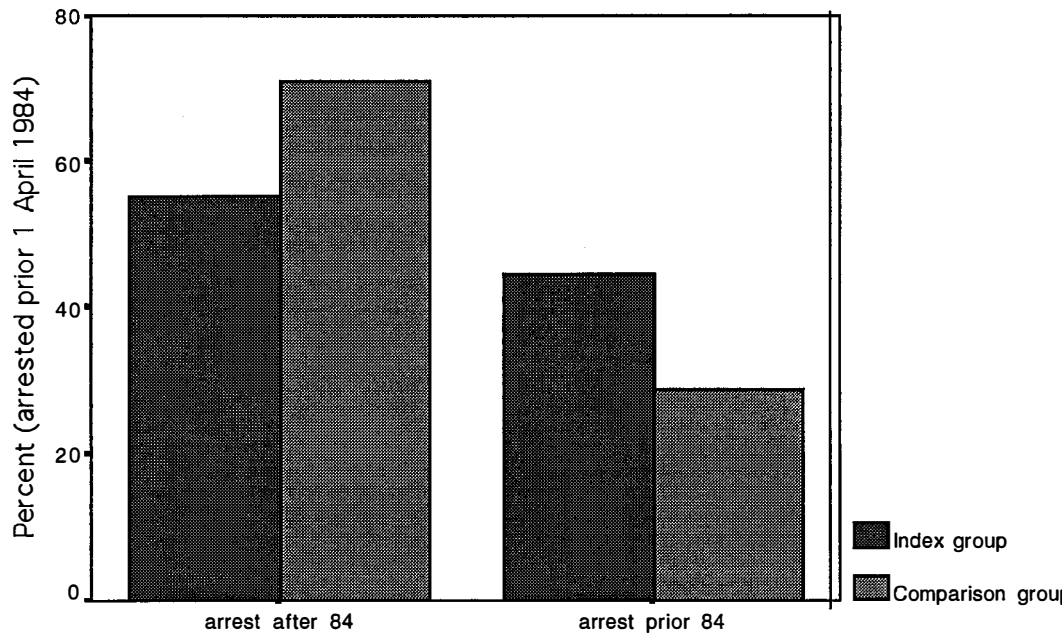


Figure 10. Arrest history of individuals in Index and Comparison groups

Arrest processing of individuals in Index and Comparison groups

The charge records also contain information about bail or custodial status of the alleged offender at arrest or whether the matter was proceeded by way of summons. The bail status of the arrest is sometimes regarded as an approximate guide to the severity of offences and the status of the offender. For example, bail is routinely applied to those offenders arrested for drunk-driving offences; other minor traffic matters are usually proceeded by way of summons. In the cases of offenders dealt with by way of summons, no arrest (in the sense of being taken into police custody) has occurred. Table 5 shows arrest processing by group. It can be seen that less Index group arrests were subject to bail (52.0%) than Comparison

group arrests (57.0%) and a larger proportion of the total set of Index group arrests resulted in the offender being placed in custody awaiting trial (31%, compared with 21.0%). A summons was also issued for less Index group charges (11.0%) than Comparison group charges (15.0%). That is, there is a statistically significant difference in arrest outcomes between the two groups ($\chi^2 = 133.53$, df 2, $p < .01$).

Unfortunately 6.0% of records for the Index group and 7.0% of records for the Comparison group did not record bail status at arrest. The absence of this information was closely related to those cases where other information such as race was also absent.

Table 5

Arrest processing of individuals in Index and Comparison groups

Group	**Bail**	**Custody**	**Summons**	**Unknown**
Index group	52%	31%	11%	6%
Comparison group	57%	21%	15%	7%

Number and type of offence involved in each arrest

There was very little difference between groups in the number of offences recorded at each arrest. The Index group ranged from 2,884 arrests or 66.3% of arrests involving 1 offence to 2 arrests which involved 54 offences, compared with 4242 arrests or 65.7% of arrests involving 1 offence and 1 arrest involving 82 offences for the Comparison group. For both groups, over 94% of cases had 3 or fewer offences recorded per arrest event. There was also little difference in the

number of offence types associated with each arrest. The Index group had an average of 1.4 types of offences associated with each arrest compared with the Comparison group average of 1.8 offence types.

Most serious offence at each arrest of individuals in Index and Comparison groups

Table 6 describes the most serious charge at each arrest for both groups. These offences were classified in accord with Australian National Classification of Offences (ANCO) according to a standard severity index (see appendix 2, Broadhurst and Maller, 1990). It can be seen that considerable differences occur in the nature of alleged offending. The Index group were more likely to be arrested for Offences Against the Person, Against Property and Offences Against Good Order while the Comparison group were more likely to be arrested for Drug and Drink Driving offences. A chi-square analysis shows that there are statistically significant differences between the two groups for the five broad categories of offences at each arrest event ($\chi^2 = 514.47$, df 4, $p < .0001$).

Table 6

Most serious offence at each arrest of individuals in Index and Comparison groups

Charge	Index Group		Comparison Group	
	n	%	n	%
Murder, manslaughter, serious assault	5	0.11	7	0.10
Sexual assault	42	0.96	25	0.38
Sex Offences	77	1.76	38	0.58
Armed robbery	9	0.20	7	0.10
Assault occasioning actual bodily harm	105	2.40	158	2.44
Other assault	307	7.04	343	5.31
Total Offences Against Persons	545	12.47	578	8.91
Arson	42	0.96	3	0.00
Break and enter	435	9.98	424	6.60
Fraud/false pretences	156	3.57	200	3.10
Receiving stolen goods	152	3.49	64	0.99
Theft	741	17.00	944	14.70
Other property damage	42	0.96	223	3.45
Total offences Against Property	1568	35.97	1858	28.84
Breach probation/CSO/parole	152	3.48	125	1.90
Escape from custody	24	0.55	26	0.40
Prostitution	13	0.29	3	0.04
Drunkenness	44	1.00	53	0.02
Trespassing/vagrancy	127	2.91	129	2.00
Other offences against good order	341	7.82	303	4.69
Total offences Against Good Order	701	16.08	639	9.95
Drug offences	166	3.80	598	9.27
Drink driving	372	8.54	1505	23.33
Other driving offences	288	6.60	420	6.51
Total Drug and Driving offences	826	18.94	2523	39.11
Other offences not elsewhere classified or unknown	719	16.49	851	13.19
Total Other offences	719	16.49	851	13.19
TOTAL OFFENCES	4359	100.00	6449	100.00

INDIVIDUALS IN INDEX AND COMPARISON GROUPS ARRESTED FOR THE FIRST TIME ON OR AFTER 1 APRIL 1984

The next section reports only individuals in both groups not previously arrested by police for any offence prior to the commencement of the study, that is, for those individuals where a complete criminal history is known. These individuals will be referred to as first time offenders.

Three hundred and seventy seven cases (44.7%) were excluded from the Index group because they had arrest records prior to April 1 1984, leaving 466 individuals, (55.3%), who were arrested for the first time. These individuals acquired a total of 1854 arrest events by the cutoff date December 31, 1994 or a mean of 3.9 arrests. Male arrest events accounted for 1352 and females 502. Seven hundred and seven arrestees, (29%), in the Comparison group were excluded, leaving 1728 individual, (71%), in the Comparison group who acquired 3975 arrest events, or a mean of 2.3 arrests per individual. Males in the Comparison group accounted for 3331 arrests and females 644 arrests.

DEMOGRAPHIC FACTORS

Gender makeup of individuals arrested for first time in Index and Comparison groups

Figure 11 shows that there was a considerable increase in the proportion of females in the Index group when considering only first time arrestees. Females

now made up 32.8%, (n=153) compared with 23% (n=398) in the Comparison group. Males accounted for 67.2% (n=313) in the Index group compared with 77% (n=1330) in the Comparison group. The difference in the percentage of males and females in the respective groups was found to be statistically significant (χ^2= 18.79, df 1, p< .001).

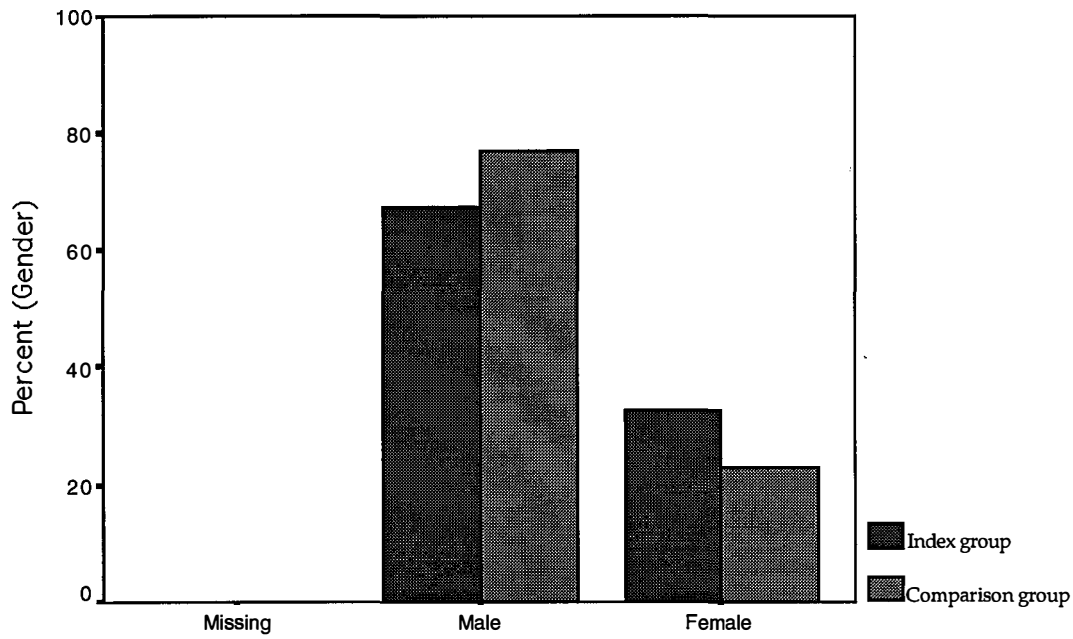


Figure 11. Gender makeup of individuals arrested for first time in Index and Comparison groups

Racial Composition of individuals arrested for the first time in Index and Comparison groups

Analysis of the racial composition of the Index group and the Comparison group was undertaken for first time arrestees to determine the percentage of

Aborigines present (see figure 12). It was found that the proportion of Aborigines was less than in the overall period of the study: sixteen percent of the Index group were now identified as Aboriginal while only 4.4% of the Comparison group fell into the same group. However, the difference in the percentage of Aborigines in the respective groups was still found to be statistically significant ($\chi^2 = 76.36$, df 1,p= < .001).

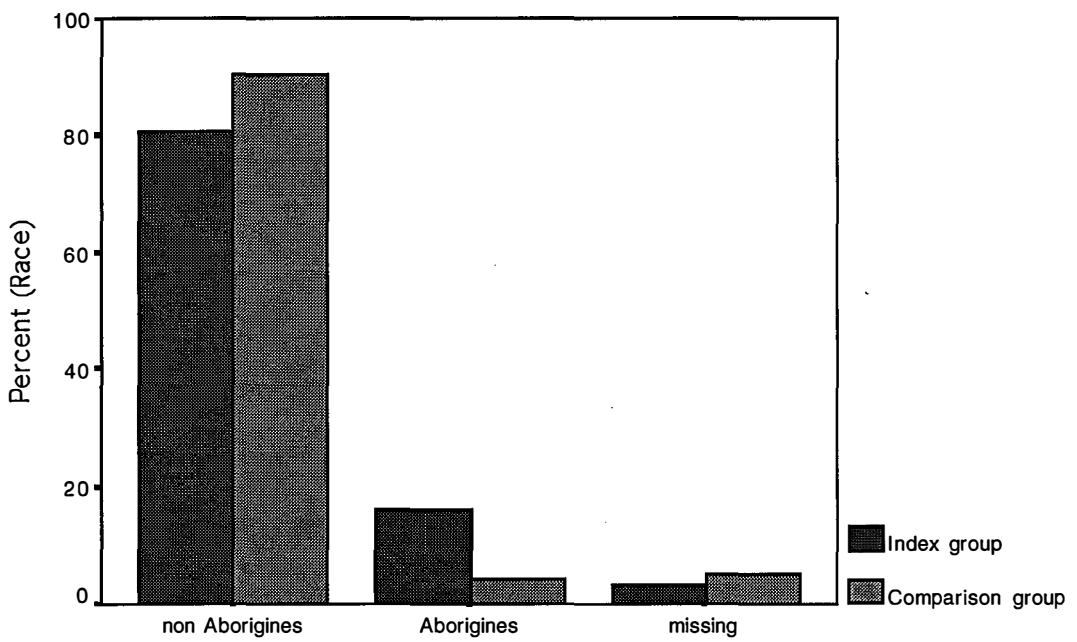


Figure 12. Racial composition of individuals arrested for the first time in the Index and Comparison groups

Age of individuals arrested for the first time in Index and Comparison groups

Overall, individuals in the Index group arrested for the first time on or after 1 April 1984 were younger than the Comparison group in that the mean age of

the Index group was 23.47 (SD = 8.00) whereas the mean age for the Comparison group was 27.56 years. An independent samples t-test performed on age, revealed that there was a significant difference between the mean ages of the two groups (t (1077.35) = 75.97, p = <. 001).

Arrest processing of individuals arrested for the first time in Index and Comparison groups

Arrest outcomes are reported below (Table 7), for bail, summons and custody for individuals arrested for the first time in both groups

More first time arrestees in the Comparison group (55.7%) than arrestees in the Index group were bailed (51.6%). A larger proportion of the total set of Index group arrests resulted in the offender being placed in custody awaiting trial (26.0%), compared with the Comparison group (17.0%) and a summons was issued for less Index group charges (21.0%) than Comparison group charges (23.0%). It was found that there is a statistically significant difference in arrest outcomes between the two groups (χ^2 = 36.19, df 2, p = <. 01). One per cent of Index group and 4.0% of Comparison group arrest processing details were not recorded.

The largest individual offence type (Theft), in the Offences Against Property category, resulted in individuals in the Index group being placed on remand at more than twice the rate of the Comparison group (25% compared with 10%).

Table 7

Arrest Processing of individuals arrested for the first time in the Index and Comparison groups

Group	Bail	Custody	Summons	Unknown
Index group	52%	26%	21%	1%
Comparison group	56%	17%	23%	4%

Number of offences and type of offences involved in each arrest of individuals in Index and Comparison groups

There was no difference between groups in the number of arrests involving one offence for first time offenders. The Index group ranged from 1223 or 67.4% of arrests involving one offence to 1 arrest which involved 26 offences. This compared with 2646 (67.4%) arrests with 1 offence and 1 arrest with 54 offences for the Comparison group. Over 94% of cases in both groups had 3 or fewer offences recorded per arrest event. The Index group had an average of 1.4 types of offences associated with each arrest, compared with the Comparison group average of 1.3 offence types.

Most serious offence at first arrest of individuals in Index and Comparison groups

Table 8 reports the most serious offence at first arrest of individuals in both groups. It can be seen that the Index group was still more likely to be arrested and charged with offences in the three of the four broad categories of offences used in the study - Offences Against Persons, Offences Against Property and Good Order offences while Drug offences and drink driving charges were again considerably

higher in the Comparison group . There was little difference between males and females, with Index group males and females being charged more often than the Comparison group in the three offence categories. Whereas theft was the most likely charge for males in the Index group, drink driving was by far the most likely charge for the Comparison group, accounting for over one third of the total charges for males in that group. Theft was by far the most likely charge for females in both groups. A chi-square analysis shows that there are statistically significant differences between the two groups for the broad categories of offences at each arrest event ($\chi^2 = 187.06$ df 4, $p = <.0001$).

Table 8:

Most serious offence at first arrest of individuals in Index and Comparison groups

Charge	Index Group		Comparison Group	
	n	%	n	%
Murder, driving causing death	-	-	4	0.23
Sexual assault	19	4.07	12	0.69
Sex Offences	14	3.00	19	1.09
Kidnapping/abduction	1	0.21	-	-
Armed robbery	2	0.42	2	0.14
Assault causing bodily harm	6	1.28	29	1.67
Other assault	36	7.72	45	2.60
Other offences against persons	2	0.42	3	0.17
Total offences against persons	80	17.12	114	6.59
Break and enter	28	6.00	53	3.06
Arson	30	6.43	-	-
Fraud/false pretences	20	4.30	71	4.19
Receiving stolen goods	7	1.50	10	0.56
Theft	102	21.88	323	18.66
Other property damage	18	3.90	44	2.54
Total offences against property	205	44.01	501	29.01
Resist/hinder police	32	6.86	27	1.50
Drunkenness	5	1.10	25	1.45
Trespassing/vagrancy	10	2.10	22	1.30
Possession of weapons	8	1.70	28	1.70
Liquor Licensing offences	5	1.10	63	3.60
Other offences against good order	34	7.30	121	7.00
Total offences against good order	94	20.16	286	16.55
Drug offences	32	6.87	274	15.85
Drink driving	20	4.30	344	19.90
Other driving offences	21	4.51	200	11.57
Total Drug and Driving offences	73	15.68	818	47.32
Other offences not elsewhere classified or unknown	14	3.01	9	0.52
Total Other offences	14	3.01	9	0.52
TOTAL OFFENCES	466	100.00	1728	100.00

RESULTS 1: ARREST- Summary

There are opposing trends in arrest incidence. Adults with an intellectual disability are less likely to be charged with a criminal offence than other adults, but the incidence of arrest for the general Western Australian population was higher in 1985 than 1994 while individuals with an intellectual disability were charged more often in 1994 than in 1985.

Differences over the period of the study

The results indicate that the Index and Comparison groups differ on the following dimensions:

- People with an intellectual disability had a different arrest pattern over time. For the first 5-year period, 36% of arrests occurred, while in the second 5-year period, 64% of arrests took place. In comparison, other offenders were arrested at the same rate over the two 5-year periods.
- People with an intellectual disability arrested during the period of the study were charged with a criminal offence, on average, 5.17 occasions compared with 2.64 occasions for other offenders.
- The Index group were less likely to receive bail or a summons but were more likely to be placed in custody awaiting trial than other offenders.
- People with an intellectual disability were more likely to be charged with offences against persons, property and good order, while other offenders were charged with drink driving and drug offences.
- People with an intellectual disability were more likely to have a prior arrest history than others charged.
- Females with an intellectual disability were more likely to be arrested than other females.

- Aborigines with an intellectual disability were more likely to be arrested than other Aborigines.

Differences -first time Arrests

These differences remained the same for those individuals who had no prior criminal record before the commencement of the study:

- First time arrestees with an intellectual disability were charged on average 3.9 times, compared with 2.3 times for other 'first time' arrestees.
- First time arrestees with an intellectual disability were less likely to receive bail or a summons but were more likely to be placed in custody awaiting trial than other offenders.
- First time arrestees with an intellectual disability charged with theft, were twice as likely to be placed on remand than other offenders.
- First time arrestees with an intellectual disability were more likely to be charged with offences against persons, property and good order offences, while others were charged with drink driving and drug offences.
- Females with an intellectual disability with no prior record were more likely to be arrested than other females.
- Aborigines with an intellectual disability with no prior record were more likely to be arrested than other Aborigines.
- Individuals with an intellectual disability were younger at first arrest than other offenders.

CHAPTER SIX

RESULTS 2: COURT OUTCOMES

Courts of Petty Sessions

Data describing contact with Western Australian lower courts which have been extracted from Western Australian Police Service apprehension records, are presented here for the study period. The apprehension records report the outcomes of charges laid only by police, and therefore do not include matters prosecuted by other agencies, such as Fisheries or Local Government, or less serious traffic offences dealt with by the automatic expiation procedures of the Justices Act which account for less than 2% of all charges. Thus, these data refer only to those cases resulting from charges laid by police in a lower court. Police records are constructed in such a way that charges (and other information) relating to individuals who are acquitted at trial are suppressed for on line interrogation purposes but are preserved for statistical purposes. Police records do not report the type of plea entered, or whether the defendant was represented by legal counsel.

Court outcomes for major offence at each appearance for individuals in Index and Comparison groups

During the period 1 April 1984 to 31 December 1994, there were 5684 charges heard in the courts of Petty Sessions resulting from the 4359 arrest events for the Index group (an average of about 1.3 charges per arrest event), compared with 8,178 charges for the 6449 arrest events (average 1.26 per arrest

event) for the Comparison group. A breakdown of court decisions for the most serious charge at each appearance is provided in Table 9.

Table 9
Court outcome for all offences for individuals in Index and Comparison groups

Offence Group	n		% Total Charges		Discharged/ Dismissed		Good Behaviour Bond		Fine		CSO		Suspended Sentence		Prison		Withdrawn / not Guilty	
	Index	Comp	Index	Comp	Index	Comp	Index	Comp	Index	Comp	Index	Comp	Index	Comp	Index	Comp	Index	Comp
Assault	332	427	5.84	5.22	0.74	0.46	8.18	2.57	61.93	77.20	11.09		0.18	10.07	17.29	9.36	0.56	0.23
Sexual Assault	34	17	0.60	0.20			25.00			71.42	55.00	16.82			20.00	11.76		
Sex Offences	66	28	1.14	0.34	22.22	3.57	2.22		35.55	28.57		39.28			33.33	28.17	6.66	
Break & Enter	491	348	8.63	4.25	0.68	0.40	2.03	0.28	43.67	51.73	20.61	19.75	0.34		30.92	27.01	1.71	0.80
Fraud/ False Pretences	110	157	2.04	1.92	1.81	1.26	10.90	0.63	29.10	67.58	55.45	19.01				10.82	2.72	0.63
Theft	896	843	15.76	10.30	0.2 0	0.28	5.13		72.18	86.28	8.13	7.35			14.25	6.08	0.10	
Receiving Stolen Goods	167	91	2.23	1.11	1.57	4.39			47.64	72.52	48.03	7.69		2.19		9.89	2.36	3.29
Arson	41	2	0.72	0.02			14.63		19.51		51.23				14.63	100.00		
Property Damage	129	188	2.26	2.29	2.18	1.61	8.52		60.83	91.57	13.10	3.22			14.84	3.58	1.31	
Offences Against Justice Procedures	979	408	17.22	4.98	0.50	0.24	3.47	2.20	95.61	96.84			0.20	0.24			0.20	0.48
Offences Against Good Order	1023	865	19.75	10.57	0.28		3.47	2.24	76.76	71.93	5.62	7.29	0.09		13.62	18.23	0.18	0.13
Drug Offences	193	578	3.39	7.06			10.36	0.17	79.79	52.57					9.84	47.25		
Drink Driving	294	1412	5.17	17.26			6.12	1.48	45.42	92.12	17.34	3.51			26.87	2.88	4.25	
Dangerous Driving	229	895	4.02	10.94			3.45	2.68	89.96	94.52					6.55	2.79		
Other Driving	112	1413	1.97	17.27					44.64	96.69	54.46	3.10					0.89	0.19
Other Offences not classified or unknown	588	516	10.34	6.31			3.00	10.07	83.45	77.72	12.56	11.62					0.98	0.58
TOTAL	5684	8178	100.00	100.00														

Discharged= found guilty but no penalty imposed; Dismissed=found guilty but conviction not recorded; withdrawn/not guilty=acquitted, not proceeded with, not proven, struck out, defendant deceased, or not guilty.

As Table 9 shows, the proportion of offenders in both groups is similar for a number of the offence categories, for example, Assault (5.84% compared with 5.22%), Fraud/False Pretences (2.04% compared with 1.92%) and Property Damage (2.26% compared with 2.29%). However, the proportion of offenders in the Index group is higher for the categories of Break and Enter (8.63% compared with 4.25%), Theft (15.76% compared with 10.30%), Offences Against Justice Procedures (17.22% compared with 4.98%) and Offences Against Good Order (19.75% compared with 10.57%). On the other hand, the proportion of offenders in the Comparison group is higher for Drug Offences (7.06% compared with 3.39%), Drink Driving (17.26% compared with 5.17%), Dangerous Driving (10.94% compared with 4.02%) and Other Driving Offences (17.27% compared with 1.97%).

The Index group were more likely to have their charges discharged or dismissed. Sex Offences resulted in most of these orders and were seven times more likely to be dismissed than for the Comparison group (22.2% compared with 3.5%). Receiving stolen goods was the most likely charge to be dismissed or discharged for the Comparison group (4.3% compared with 1.5%).

The Index group received fewer fines than the Comparison group over the period of the study. Charges relating to Offences Against Justice Procedures, (including breach of community service orders, breach of probation, parole etc., escape from custody, resist hinder police), were the most likely to attract a fine for both groups (Index group 95.6% compared with 96.8%).

The Index group received more Community Service Orders than the Comparison group, with Fraud/False Pretences resulting in a Community Service Order being issued most often for the Index group (55.4%), while Sex

offences were the most likely charges in the Comparison group to attract these orders (39.2%).

Offenders in the Comparison group who were convicted of Assault were most likely to have Suspended Sentences imposed (10.0%) compared with Break and Enter charges for the Index group (0.3%).

Index group charges were far more likely to result in a Good Behaviour Bond, Fraud and False Pretences being the most likely charge to attract these orders, whereas the Comparison group were most likely to receive a Good Behaviour Bond for dangerous driving.

Individuals in the Index group were sent to prison in the lower courts far more often over the period of the study. Sexual Offences were the most likely charges to result in a custodial sentence (33.3% compared with 28.1%), whereas the two charges for Arson in the Comparison group resulted in a custodial sentence (100.0% compared with 14.6%). Although the Index group faced far fewer charges of drink driving over the period of the study, they were far more likely to be sent to prison (26.8% compared with 2.8%).

In line with Dismissals, Sex Offences were the most likely charges to be withdrawn/not guilty for the Index group (6.6%) whereas receiving stolen goods was the most likely charge for the Comparison group to be withdrawn/not guilty over the period of the study (3.2%).

FIRST TIME'OFFENDERS

For the 466 individuals in the Index group, who had no prior record before the start date of the study, there were 1765 charges heard in the courts of Petty Sessions by the census date 31 December 1994 resulting from the 1845 arrest events, or a mean of 1.3 charges. In contrast, there were 4310 charges for the 3975 arrest events for the 1728 individuals in the Comparison group (mean 1.0 charge).

Offence Categories for First time Offenders by Outcomes

Table 10 provides a breakdown of Courts of Petty Sessions decisions for the most serious offence at first appearance. While there were 466 first time offenders in the Index group and 1728 in the Comparison group, only 349 and 1403 major charges respectively are reported here. The remaining charges were heard in the superior courts and where the outcome was a community service order or a custodial sentence these are reported in Chapters Seven and Eight.

It can be observed that excluding offences not classified or unknown, there are differences in the offences faced by both groups at first appearance in court, with the Index group facing proportionately more charges in every offence category with the exception of Offences Against Good Order, Drug Offences and Drink Driving and Other Driving Offences.

At first appearance a small number of charges were discharged or dismissed for each group (Index group n=12; Comparison group n=19).

At the first court appearance the Index group received proportionately more Good Behaviour Bonds than the Comparison group, across the total of all offences (Index Group =9.85%; Comparison group =2.71%).

Fines were more likely to be imposed in every offence category for the Comparison group, with the exception of Break and Enter, and Driving Offences.

Community Service Orders constituted 45% of the total convictions received by the Index Group and only 22% of all penalties received by the Comparison Group.

No Suspended Sentences were imposed on Index group first offenders, while first offenders in the Comparison group appearing on Break and Enter charges were most likely to attract a Suspended Sentence.

At first appearance in the Courts of Petty Sessions, a small number of offenders in both groups received a prison sentence (Index group, n=7; Comparison group n=8).

There was a differential rate of conviction for the two groups. The Index group was more likely to have their charges withdrawn or the individual found not guilty than the Comparison group, although the majority of non-convictions were for Driving Offences.

It is also apparent that there were different penalties imposed for similar offences at first appearance. Individuals in the Index group charged with drug offences and offences against good order were far more likely to receive a community service order, whereas individuals in the Comparison group were far more likely to be fined and individuals in the Index group charged with theft and drink driving were more likely to be given a good behaviour bond.

Table 10
Outcomes for most serious offence at first appearance in court for individuals in Index and Comparison groups

Offence Group	n		% Total Charges		Discharged/ Dismissed		Good Behaviour Bond		Fine		CSO		Suspended Sentence		Prison		Withdrawn / not Guilty	
	Index	Comp	Index	Comp	Index	Comp	Index	Comp	Index	Comp	Index	Comp	Index	Comp	Index	Comp	Index	Comp
Assault	21	40	6.02	2.83	14.28	5.00	9.52	2.25	28.48	47.15	33.34	37.50			4.76	7.75	9.52	
Sexual Assault	10	2	2.86	0.14							80.00	100.00			20.00			
Sex Offences	7	3	2.00	0.20	14.29	33.33					71.42	66.66			14.29			
Break & Enter	18	21	5.16	1.48		19.09	5.50		72.10	19.09	22.22	38.09	14.28					9.52
Fraud/False Pretences	20	43	5.74	3.06		2.34	30.00	4.65	50.00	48.83	20.00	34.88				9.30		
Theft	54	139	15.48	9.90			11.11		72.22	80.00	16.67	20.00						
Receiving Stolen Goods	7	9	2.00	0.63					28.57	55.55	71.42	44.45						
Arson	29	-	8.30	-			13.80		27.58	-	55.18	-			3.44			
Property Damage	18	22	5.16	1.56		9.09	16.66	3.68	27.78	55.41	55.56	31.82						
Offences Against Good Order	31	206	8.88	14.68	6.46	1.95			16.12	89.74	70.96	4.36					3.22	
Drug Offences	27	262	7.74	18.86				1.90	39.77	84.64	56.53	9.55	3.43			0.38	3.70	
Drink Driving	35	380	10.03	27.08	5.71	0.26	14.42	1.31	71.45	68.43		30.00			5.71		2.85	
Dangerous Driving	23	72	6.59	5.12	8.71	1.38	13.04	8.13	73.92	48.90		40.00	1.31				4.34	
Other Driving	19	160	5.45	11.40		1.25	10.52	10.00	78.96	53.75		35.00					10.52	
Other Offences Not Classified or unknown	30	44	8.59	3.12	6.44	2.28	10.00	4.54	26.68	93.38	53.54						3.34	
TOTAL	349	1403																

Discharged= found guilty but no penalty imposed; Dismissed=found guilty but conviction not recorded; withdrawn/not guilty=acquitted, not proceeded with, not proven, struck out, defendant deceased, or not guilty.

RESULTS 2: COURTS OF PETTY SESSIONS OUTCOMES

Summary

The Courts of Petty Sessions outcomes were not so unambiguous in terms of treatment as was the case at arrest. It appears that the two groups were treated differently by the courts on the following dimensions:

Differences over the period of the study

- People with an intellectual disability were more likely to face charges of Break and Enter, Theft, Offences Against Justice Procedures and Offences Against Good Order in Courts of Petty Sessions.
- The proportion of offenders in the Comparison group was higher for Drug Offences, Drink Driving, Dangerous Driving and Other Driving Offences.
- People with an intellectual disability were more likely to have charges dismissed or discharged than other offenders.
- People with an intellectual disability received more Good Behaviour Bonds than other offenders.
- People with an intellectual disability were less likely to receive a fine than other offenders
- People with an intellectual disability received more community service orders than other offenders.
- People with an intellectual disability received less suspended sentences over the study period than other offenders.
- People with an intellectual disability were more likely to receive a prison sentence than other offenders over the study period.
- First time offenders with an intellectual disability appeared to be treated differently at first appearance, on the following dimensions:

First time offenders with an intellectual disability appeared to be treated differently at first appearance, on the following dimensions:

- There were differences in offences faced by both groups at first appearance in court. People with an intellectual disability faced proportionately more charges in every offence category with the exception of Offences Against Good Order, Drug Offences, Drink Driving and 'Other' Driving Offences which were higher for other offenders.
- People with an intellectual disability at their first appearance in court were less likely to have their charge dismissed than other offenders.
- People with an intellectual disability at first appearance received proportionately more Good Behaviour Bonds than other offenders.
- People with an intellectual disability at first appearance in court were less likely to receive a fine in every offence category, with the exception of Break and Enter and Driving Offences.
- People with an intellectual disability at first appearance in court were more likely to receive a community service order than other offenders.
- People with an intellectual disability received no suspended sentences at first appearance in court, whereas the courts granted other offenders at their first appearance this sanction.
- People with an intellectual disability at first appearance in court were proportionately more likely to receive a prison sentence than other first time offenders.
- People with an intellectual disability received different penalties for similar offences at first appearance.

- People with an intellectual disability at first appearance in court have a differential rate of conviction in that they were more likely to have charges withdrawn or the individual found not guilty than other first time offenders, although this was more likely for Driving Offences.

CHAPTER SEVEN

RESULTS 3: CORRECTIONAL SERVICES: IMPRISONMENT

INTRODUCTION

This chapter describes offenders in both groups who were convicted by the Courts of Petty Sessions, District Court and the Supreme Court and who were given a custodial sentence. Data presented here have been extracted from the computerised records of the Corrective Services Division of the Ministry of Justice. This Division has responsibility for the management and good order of prisoners, including offenders remanded in custody by the courts pending trial or sentence. In addition, the Division supervises offenders released on parole, as well as those prisoners participating in work release and home detention programs (see generally *Prisons Act* 1981).

This chapter includes only limited data about offenders serving sentences in police lockups. These data do not include information about offenders held on remand in police lockups pending committal for trial. Information gaps and some problems with data quality have been experienced. These include: the absence of information about the alleged offences committed by remand or unsentenced prisoners; poor data collection procedures relating to sentenced prisoners serving time in police lockups; and non-recording of some relevant demographic or programme variables.

Data are reported in two parts: first, for individuals in both groups who were given a custodial sentence over the period of the study and secondly for only

those individuals who were arrested for the first time after the start date of the study. For each custodial sentence, data were available for number of receivals; number of terms; gender; racial type; most serious offence; and for prison receivals only, employment; marital status; qualifications; security rating on entry; term type; days on remand; and exit security rating. Unfortunately, the quality of prison data for racial type was poor so this variable has been excluded from the analysis.

Imprisonment

Reception history sheets, police property sheets, warrant summaries and exit forms are the principal sources of data on adult prisoners. These data are selectively used to describe imprisonment for all receptions/receivals of persons during the period of the study. It is important to note that some demographic data (race, marital status, employment, occupational and educational status on reception) are based on prisoner self-report.

Number of Receivals in prison and police lockups for offenders in Index and Comparison group

Of the 843 individuals in the Index group charged with a criminal offence, 33.8% (n=285) persons received a custodial sentence over the period of the study compared with 13.26% (n= 324) of the 2442 persons in the Comparison group. A further 4.9% of the Index group were held in custody on remand awaiting sentence compared with 1.7% of the Comparison group

Proportionately more individuals in the Index group (56%) served their sentence in prison compared with 50.6% in the Comparison group. Forty four

percent of prisoners in the Index group, compared with 49.3% in the Comparison group served their sentence in police lockups.

Table 11 below describes the characteristics of offenders in the Index group who were given a custodial sentence over the period of the study. It can be seen that 84% of individuals who went to prison were male, whereas females accounted for only 16%. Forty three percent were non-Aboriginal; nearly 35% of Aboriginal descent and for 22% this information was not recorded on entry into prison. The large majority (47%) lived at home with family members, approximately 16% lived independently, 8% lived in specialist disability accommodation, and for 28% of the sample this information was unknown. Most (59%) were not in receipt of disability services. Considerably more of those individuals who were charged were classified with a borderline or mild disability (78%) whereas only 41% of all DSC. adults had these classifications.

Table 11.

Characteristics of Index Group in custody

Gender	%	n
Male	84.0	239
Female	16.0	46
Racial Type		
Non-Aboriginal	43.0	123
Aboriginal	34.7	99
Not recorded	22.3	63
Home type (at 31.12.94)		
At home with family members	47.4	135
Independent	15.8	45
Disability Hostel	7.4	21
Group home/duplex	1.0	3
Unknown	28.4	81
Service Status (at 31.12.94)		
In receipt of services	20.7	59
Not in receipt of services	59.0	168
Deceased	1.0	3
Not to be contacted by agency	19.3	55
Disability Severity		
Borderline	39.3	112
Mild	49.1	140
Moderate	6.3	18
Severe	1.4	4
Unspecified	2.4	7
Not yet assessed	1.4	4
n=	100.0	285

Number of custodial terms in prison and police lockups for offenders in Index and Comparison groups

There was a total of 1845 custodial terms (or a mean of 6.47 custodial terms) resulting from the 782 major charges where custody was imposed by the Courts of Petty Sessions and 1063 by the Higher Courts, for the Index group over the period of the study which meant that of the 6747 major charges heard by the Courts, 27.3% resulted in a custodial term. In contrast for the Comparison group, there were 1289 custodial terms (or a mean of 3.9 custodial terms) resulting from 511 Petty Sessions major charges and 778 Higher Court major charges, meaning that of the total major charges heard in the Courts (8956), 14.3% resulted in a custodial term for the Comparison group.

There was little difference in where prisoners in both groups served their sentences; Index group's terms spent in prison accounted for 63.1%; lock-ups 36.8%, compared with 63.0% and 36.9% respectively for the Comparison group.

Gender makeup of Index and Comparison group in prison and police lockups

Figure 13 shows that the ratio of females to males who received a custodial sentence was similar for both groups (approximately 15%, 85%).

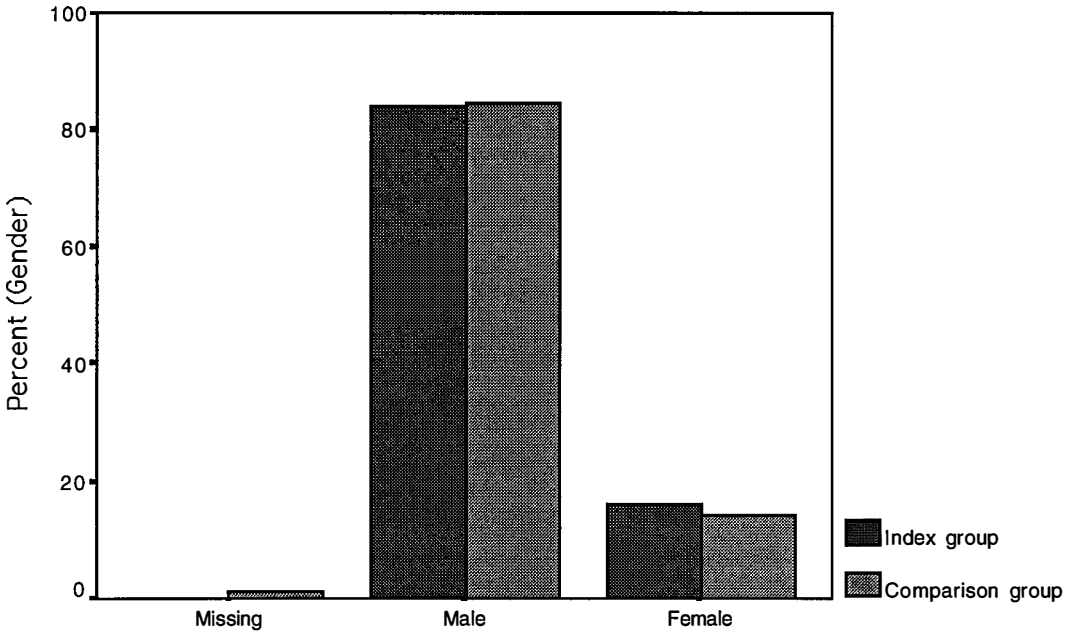


Figure 13. Gender makeup of Index and Comparison groups in prison and police lockups

Most Serious Offence for all receivals into prison for offenders in Index and Comparison groups

Table 12 reports the most serious offence for all receivals for the 285 prisoners in the Index group and the 324 prisoners in the Comparison group who were given a custodial sentence over the period of the study. It can be seen that while the Index group were charged more often with Offences Against the Person, a similar proportion in both groups went to prison over the study period. Individuals in the Index group were more likely to go to prison for Offences

Against Good Order and Offences Against Property, than offenders in the Comparison group, while the Comparison group were more likely to be imprisoned for drink driving and drug charges. A chi-square analysis of the custodial terms by broad offence categories showed that there is a statistically significant difference between the two groups ($\chi^2 = 20.15$ df 4, $p < .001$).

Table 12

Most serious offence for all receivals into prison for offenders in Index and Comparison groups

Charge	Index Group		Comparison Group	
	n	%	n	%
Murder, manslaughter	1	0.05	2	0.16
Assault	92	4.99	82	6.31
Sexual assault	8	0.43	4	0.30
Sexual offences	31	1.68	8	0.60
Armed robbery	2	0.10	3	0.23
Total offences against person	134	7.25	99	7.60
Break and enter	94	5.09	70	5.39
Theft	157	8.50	91	7.01
Arson	6	0.33	2	0.15
Other property damage	34	1.85	20	1.64
Fraud/false pretences	11	0.59	17	1.30
Receiving stolen goods	28	1.51	9	0.69
Total offences against property	330	17.88	209	16.18
Escape from custody	14	0.75	10	0.77
Resist/hinder police	31	1.68	16	1.23
Prostitution	3	0.16	0	0.00
Drunkenness	299	16.20	122	9.39
Breach probation/CSO/parole	115	6.24	85	6.54
Trespassing/vagrancy	15	0.81	55	4.23
Other offences against good order	106	5.74	97	7.47
Total offences against good Order	583	31.59	385	29.63
Drug offences	19	1.02	51	3.92
Drink driving	79	4.28	70	5.39
Total drug and driving offences	98	5.30	121	9.31
Other offences not elsewhere classified or unknown	700	37.95	484	37.28
Total Other offences	700	37.95	484	37.28
TOTAL OFFENCES	1845	100.00	1298	100.00

Prison Receivals

The following information relates to the 160 individuals in the Index group and 164 in the Comparison group who served their sentence/sentences in prison. The offenders in the Index group received 679 prison terms or a mean of 4.2 terms, compared with 476 terms, or a mean of 2.7 terms for the Comparison group.

DEMOGRAPHIC FACTORS

Employment status of offenders in Index and Comparison groups at first receival into prison after 1 April 1984

Of the 160 individuals in the Index group who went to prison, 81.2% reported at their first receival into prison (after the study commenced), that they were unemployed and 18.8% were employed, whereas of the 164 individuals in the Comparison group, 32.9% reported they were unemployed and 67.1%, reported that they had some type of employment.

Marital Status of offenders in Index and Comparison groups at first receival into prison after l April 1984

Most prisoners, (74.4%) in the Index group, on their first receival into prison after the study commenced, reported being single at the time of receival into prison, compared with 69.5% of individuals in the Comparison group. Only 2% of individuals in the Index group reported that they were married compared with 9.1% in the Comparison group and 3.1% of the Index group and 9.8% of the Comparison group reported that they were living in a de facto marriage.

More prisoners in the Comparison group were divorced (7.3%) compared with 1.9% of the Index group and one individual in the Index group reported he was widowed compared with two prisoners in the Comparison group. In the Comparison group 3.0% of individuals reported that they were separated.

Qualifications

Eighty one percent of the Index group and 67.7% of the Comparison group reported that they had no educational/training qualifications. Three per cent of the Index group compared with 8% of Comparison group had a trade. Only five individuals in the Comparison group had a technical college, tertiary, or part-apprenticeship qualification, whereas none of the Index group had these qualifications.

Security Rating on Entry into Prison

It can be observed from Figure 14 that of the 679 Index group terms and 476 Comparison group terms spent in prison, the largest single security rating on entry into prison for both groups was a minimum security rating, although the Index group terms had less minimum security ratings recorded than the Comparison group (39.8% compared with 43.4%). The Index group also had less maximum security ratings recorded, (27.1% compared with 29%) but more Index group terms (9.9%) had a medium security rating compared with 7.8% of Comparison group terms. A similar number (1.3%) of Index group terms and 1.5% Comparison group terms had a low/medium security rating. A chi-square analysis of entry security

rating found that there was no significant difference between the two groups (χ^2 = 2.16, df 4, p = >. 05).

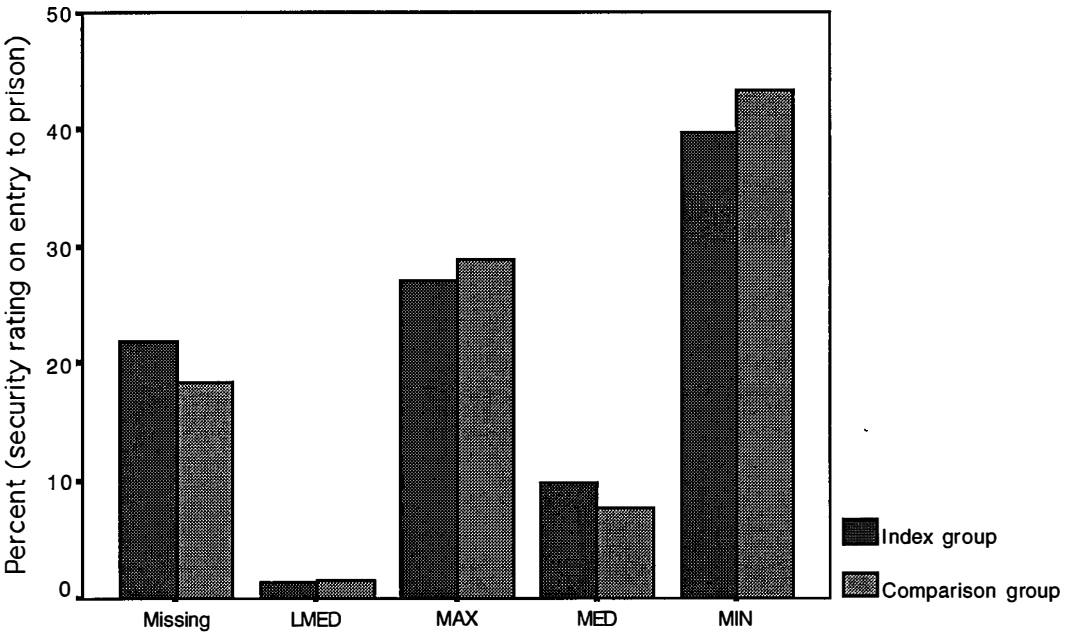


Figure 14. Security rating on entry into prison for all prison terms served by offenders in Index and Comparison groups

Term Type

More Index group terms (31%) were finite than Comparison group terms (25%). Thus the courts gave considerably more terms with parole to the Comparison group (75.0% compared with 69.0%). A chi-square analysis reveals that there is a statistically significant difference between the two groups on the type of prison term resulting from Court decisions (χ^2 = 6.5, df 1, p < .05).

Days on Remand for offenders in Index and Comparison groups

An analysis of the days spent on remand in prison reveals that prisoners in the Index group were held for slightly less days (mean 13.19 days, SD = 55.12) than prisoners in the Comparison group (mean 17.05 days, SD = 64.79). However, this difference was not statistically significant (t = 2.415, p = >. 05).

Exit Security Rating for offenders in Index and Comparison groups

Figure 15 shows that on *leaving* prison, the largest single security rating was still a minimum rating although the Index group had less in this category (52.7% compared with 58.6%). The Comparison group had also increased their minimum-security status by the time they had left prison at a greater rate than the Index group (Comparison group 15.2 % increase compared with 12.9% for the Index group). However, more Index group terms (8.4%) had a maximum exit security rating compared with 7.1% of the Comparison group.

There was no change for both groups on exit from the entry status in the medium or low/medium security rating category. More Index group terms (10% compared with 7.1%) of the Comparison group terms had a medium security rating and 2.1% of the Index group terms compared with 1.3% of the Comparison group terms had a low/medium security rating. Seven terms (1.0%) in the Index group had open exit security rating when they left prison compared with 6 terms (1.3%) Comparison group terms. A chi-square analysis of security rating found that there was no significant difference between the two groups (χ^2 = 5.36, df 4, p >. 05).

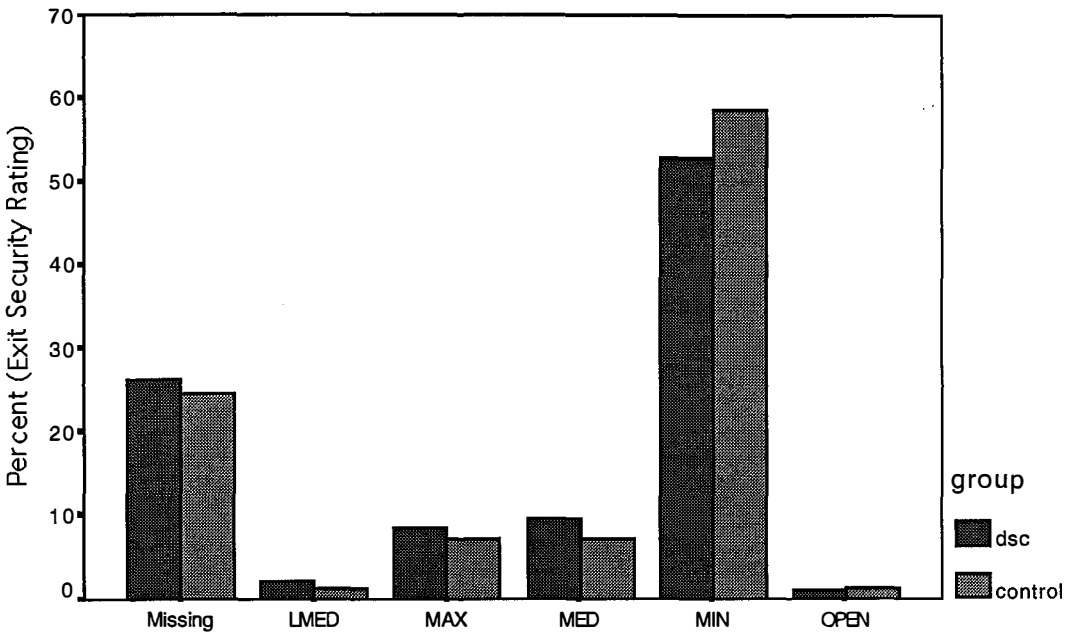


Figure 15. Exit security rating for offenders in Index and Comparison groups

FIRST TIME OFFENDERS

The following analysis relates to only those individuals who offended for the first time on or after 1 April 1984 and received a custodial sentence by the census date 31 December 1994.

Of the 466 individuals in the Index group arrested for the first time, 76 (16.3%) received a prison term. In comparison, of the 1728 individuals in the Comparison group arrested for the first time, 122 (7.0%) went to prison.

Number of custodial terms for first offenders in Index and Comparison groups

There was a total of 229 custodial sentences arising from the 142 major charges where custody was imposed by the Courts of Petty Sessions and 87 by the Higher Courts for Index group first offenders by the cut-off date 31 December

1994. Therefore of the 1765 Index group charges heard in the Courts of Petty Sessions and 87 charges heard in the Higher Courts, 12.3% of the total charges (1852) resulted in a custodial term. In comparison, there were 297 custodial sentences resulting from 99 Petty Session major charges and 198 Higher Court charges for Comparison group first offenders. Of the 4310 Comparison group charges heard in the Courts of Petty Sessions and 198 charges heard by Higher Courts, 6.8% of the total charges led to custody. There was no difference between groups where sentences were served. One hundred and sixteen or a mean of 1.3 of the Index group's terms were spent in prison and 113 terms (mean 1.4) terms were spent in police lockups compared with 142 (mean 1.1) and 155 (mean 1.0) for the Comparison group.

Gender makeup of first time offenders in prison and police lockups

An analysis of 'first time' offenders' gender makeup who were given a custodial sentence reveals a significant difference ($\chi^2 = 4.03$, df 1, $p < .05$). Figure 16 shows that males in the Index group who were given a custodial sentence, accounted for 73.7% compared with 85.2% in the Comparison group; while there were 26.3% females in the Index group compared with 14.8% females in the Comparison group.

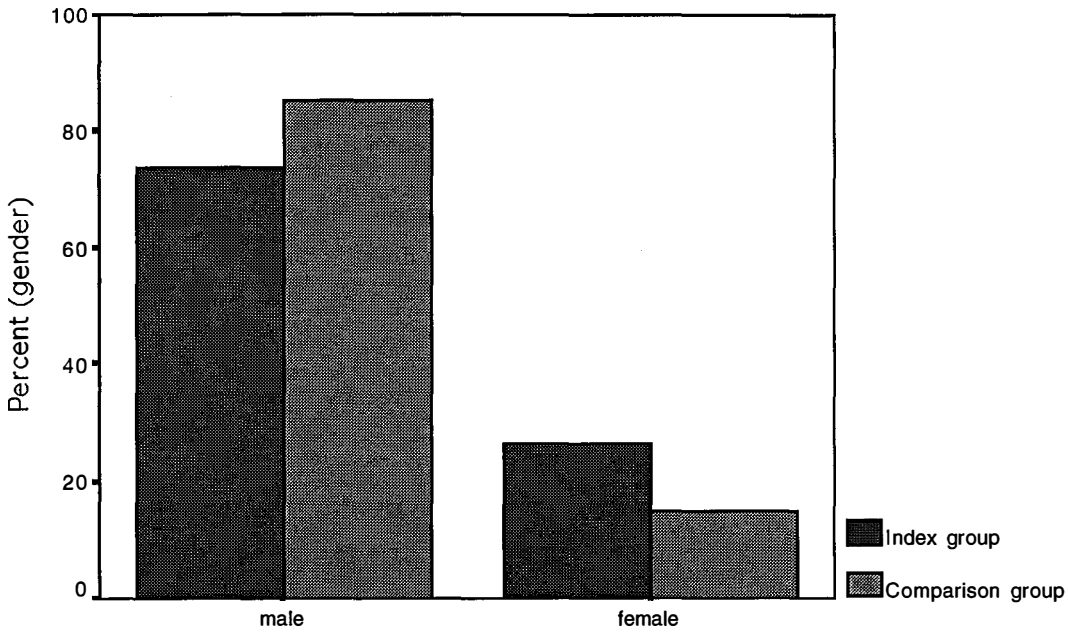


Figure 16. Gender makeup of first time offenders in Index and Comparison groups

Most Serious Offence

Table 13 reports the most serious offence at the first entry into custody for those offenders in both groups who were charged with a criminal offence on or after 1 April 1984. It can be seen that first time offenders in the Index group received more custodial terms in two of the broad offence categories -Offences Against Persons and Offences Against Property, but less in the Offences Against Good Order category and Drug and Drink driving offences. A chi-square analysis of first custodial term by broad offence categories shows that there is a significant

difference between the two groups ($\chi^2 = 11.36$, df =3, $p < .01$) in the major offence at the first prison term.

Table 13.

Most serious offence for first custodial sentence for offenders in Index and Comparison gorups

Charge	Index Group		Comparison Group	
	n	%	n	%
Assault causing bodily harm	6	7.90	0	0.00
Other assault	5	6.60	5	4.15
Sexual assault	5	6.60	3	2.50
Sex offences	1	1.30	1	0.80
Armed robbery	0	0.00	2	1.60
Other robbery	0	0.00	2	1.60
Total offences against person	17	22.40	13	10.65
Break and enter	3	3.90	8	6.56
Motor vehicle theft	3	3.90	7	5.73
Other theft	12	15.80	7	5.73
Fraud	3	3.90	5	4.09
Arson	1	1.30	0	0.00
Other property damage	5	6.60	10	8.19
Receiving stolen goods	2	2.60	1	0.81
Total offences against Property	29	38.00	38	31.10
Escape from custody	1	1.30	0	0.00
Perjury	0	0.00	1	0.80
Resist/hinder police	2	2.60	2	1.60
Trespassing/vagrancy	0	0.00	2	1.60
Breach probation/CSO/parole	1	1.30	13	10.70
Drunkenness	1	1.30	2	1.60
Other offences against good order	10	13.10	7	5.87
Total offences against good order	15	19.70	27	22.17
Drunk driving	6	7.90	15	12.30
Drug offences	2	2.60	13	10.72
Traffic offences	4	5.30	8	6.50
Driving under suspension	3	3.90	8	6.50
Total drug and driving offences	15	19.70	44	36.02
TOTAL OFFENCES	76	100.00	122	100.00

Security rating at first entry into prison for offenders in Index and Comparison groups

Figure 17 shows that at first entry into prison, the majority of offenders in both groups were given the entry status of minimum security, although the Index group had more in this category (52.6%, compared with 43.3% Comparison group). The Index group had less medium and maximum security ratings recorded (maximum 26.3%, compared with 28.3%; medium, 2.6% compared with 8.3%) and a small number of individuals in both groups, (2.6% Index group, 1.7% Comparison group) had a low/medium security rating. For 11 individuals (18.3%) in the Comparison group and 6 individuals (15.8%) in the Index group this information was not recorded. A chi-square analysis of security rating on first entry into prison found that there was no significant difference between the two groups ($\chi^2 = 2.16$, df 3, $p > .05$).

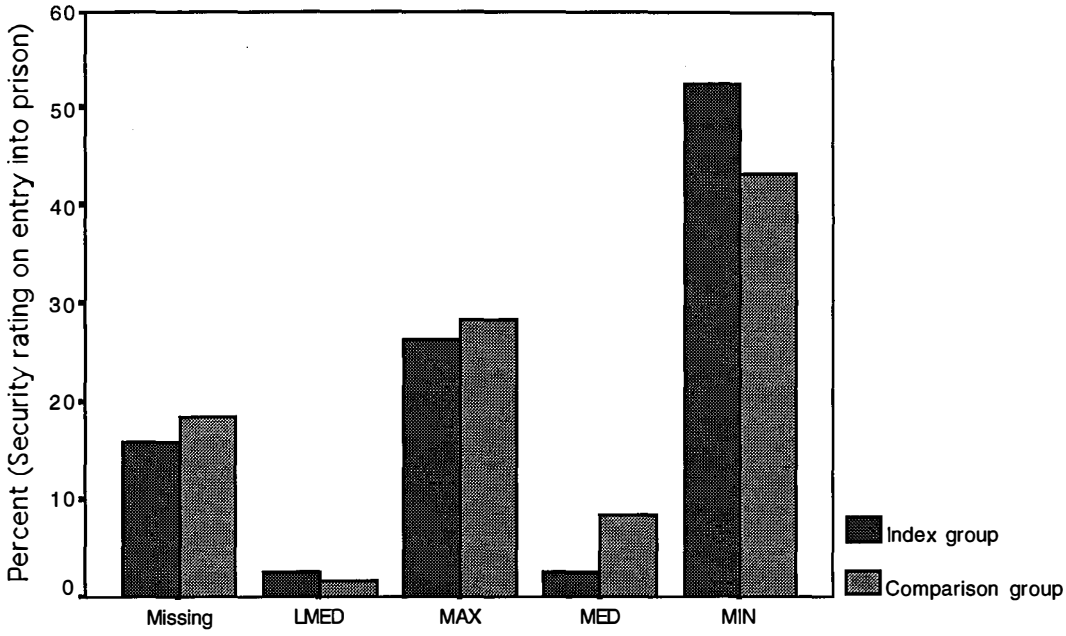


Figure 17. Security rating at first entry into prison for offenders in Index and Comparison groups

Term type for first offenders in Index and Comparison groups

Significantly more finite sentences were given by the courts to the Index group than the Comparison group (χ^2=9.65, df 1, $p < .01$). Of the terms spent in prison by the Index group, 79.3% were finite terms and only 12.1% were parole terms, compared with 63.4% finite terms and 27.5% parole terms for the Comparison group. For 8.6% Index group terms and 9.2% terms of the Comparison group this information was not recorded.

Length of Sentence for First Time Offenders'

A 2x 20 ANOVA showed no significant effects for group and type of offence on length of sentence for the first prison term (F (19,1), 63.5, >. 05). The ANOVA showed a significant interaction of the effects of group and type of offence on length of sentences (i.e., a combined effect). An analysis of this combined effect shows the contrasts (comparisons post hoc) of interest are the differences between the length of sentence for the two groups for sexual assault, drug offences and fraud and false pretences.

Contrasts show that only one of these lengths of sentence is significant - that for sexual assault, but this was severely compromised by the small, unequal cell sizes involved and the differences in the standard deviation for each cell (i.e., homogeneity of variance assumption has probably been violated).

Other points to consider are that carrying out this number of comparisons was likely to turn up a group difference by chance alone and the fact that it did not, probably underscores the lack of difference between the Index group and the Comparison group sentence lengths. This is borne out by the fact that although the interaction effect of group and offence type on length of sentence was statistically significant, the effect size only accounted for 3.2% of the variance in length of sentence overall.

Exit security rating for first prison term for offenders in Index and Comparison groups

Figure 18 shows the security rating for the first prison term for individuals in both groups on leaving prison. After adjusting for missing information, most prisoners in both groups had a minimum security rating on exit, although slightly more Index group prisoners, (64.7%, compared with 62.0%) had this rating. The Index group also had a higher proportion of maximum security ratings than the Comparison group on exit (12.1% compared with 7%), but there was less medium exit security ratings in the Index group (5.2%) than the Comparison group (9.2%). There was no difference between groups in the low/medium exit security rating (both groups 1.4%). Two terms (1.4%) in the Comparison group had an Open security rating, whereas no such rating was given to the Index group. In a significant proportion of cases, exit security rating was not recorded (23% in the Comparison group and 21% in the Index group). A chi-square analysis of exit security rating found that there was no significant difference between the two groups ($\chi^2 = 5.29$, df 4, $p > .05$).

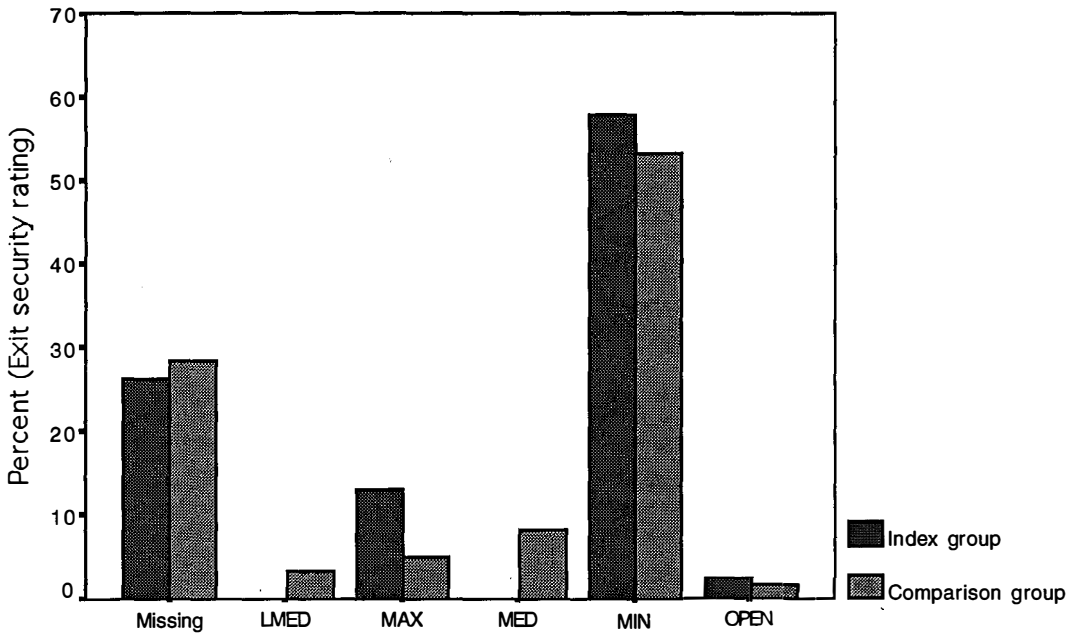


Figure 18. Exit security rating for first prison term for offenders in Index and Comparison groups

RESULTS 3: IMPRISONMENT

Summary

Differences over the period of the study

The study reveals that the Index group and the Comparison group experienced different outcomes in terms of custodial sentences:

- People with an intellectual disability were more likely to receive a custodial sentence than other offenders over the study period.
- People with an intellectual disability were more likely to be held in custody on remand than other offenders.
- People with an intellectual disability received more custodial terms over the period of the study than other offenders.
- People with a n intellectual disability received more finite custodial terms over the period of the study than other offenders.

Similarities

- No difference where prisoners in both groups served their sentences (ie., prison or police lockups).
- Offenders with an intellectual disability over the 10-year period were sentenced for the same broad types of offences as other offenders.
- Ratio of males to females who received a custodial sentence was similar for both groups.
- Security rating on entry to and exit from prison was similar for both groups of offenders.
- No difference between groups for days spent on remand in prison.

Differences – first offenders

- Offenders with an intellectual disability at first arrest, received more custodial sentences than other first time offenders by the cut off date.
- First time offenders with an intellectual disability received more custodial terms by the census date than other offenders.
- First time offenders with an intellectual disability received more custodial sentences at first entry into prison in two of the four broad offence categories used in the study, viz. Offences Against Person, and Offences Against Property other offenders received custody more often for Drug and Driving offences and Offences Against Good Order.
- First time offenders with an intellectual disability received more finite sentences than other first time offenders.
- More first time female offenders with an intellectual disability received custody than other female offenders.
- While the Comparison group received custody more often for drug offences and drink driving offences at first arrest, these offences made up 38% at first arrest, but accounted for only 23% when in custody, compared with 10% at arrest and 10% in custody for offenders with an intellectual disability.

Similarities

- No difference between groups where first sentences were served, that is, prison or police lockups.
- No difference between groups at first entry into prison of entry or exit security ratings.
- No difference between groups of length of sentence for first prison term.

CHAPTER EIGHT
RESULTS 4: COMMUNITY BASED CORRECTION ORDERS

INTRODUCTION

This chapter describes offenders in both groups who have been convicted by the courts and were subject to supervision in the community. Offenders dealt with exclusively by way of fine are included in the analysis in chapter Six (Court Outcomes) except where such offenders default on the payment of the fine or breach the conditions of unsupervised bonds or convert the fine to a work and development order.

Data presented here have been extracted from the computerised records of the Community Corrective Services Division of the Ministry of Justice. This Division has responsibility for the supervision of offenders serving non-custodial court orders such as probation, community service orders and work and development orders (see generally *Offenders Probation and Parole Act 1963, Community Corrections Act* 1988 *and Community Corrections Legislation Amendment Act* 1990*).*

Again, data are reported in two parts: first, for persons subject to supervision in the community for the overall period of the study and then for only those individuals who were arrested for the first time after the start date of the study, 1 April 1984. For each order issued, data were available for gender, racial

type, sentencing court, offence, and offence count, type of order, and any special conditions of the order.

Of the 843 individuals in the Index group charged with a criminal offence 38% (n=322) individuals at some point over the period of the study received a community based correction order compared with 20% (n= 484) of the 2442 persons in the Comparison group.

There were a total of 734 orders for the Index group issued by the Courts (546 Courts of Petty Sessions; 188 Higher Courts) over the period of the study. This meant that of the 5864 major charges heard in the Courts of Petty Sessions and the 188 major charges heard in the Higher Courts, 12.5% of all major charges led to a community based order. In comparison, 881 orders were issued to the Comparison group (451 Courts of Petty Sessions; 430 Higher Courts). Therefore of the 8178 charges heard in the Courts of Petty Sessions and the 430 charges in the Higher Courts, 10.2% led to a community based order.

DEMOGRAPHIC FACTORS

Gender makeup of offenders in Index and Comparison groups receiving community based orders

It can be observed from Figure 19 that less females in the Index group (15.8%) compared with the Comparison group (21.3%) received a community based correction order. Eighty four percent of the Index group were male compared with 78.7% in the Comparison group. A chi-square analysis shows that there is a statistically significant difference between the two groups' gender make-up ($\chi^2 = 3.7$, df =1, $p < .05$).

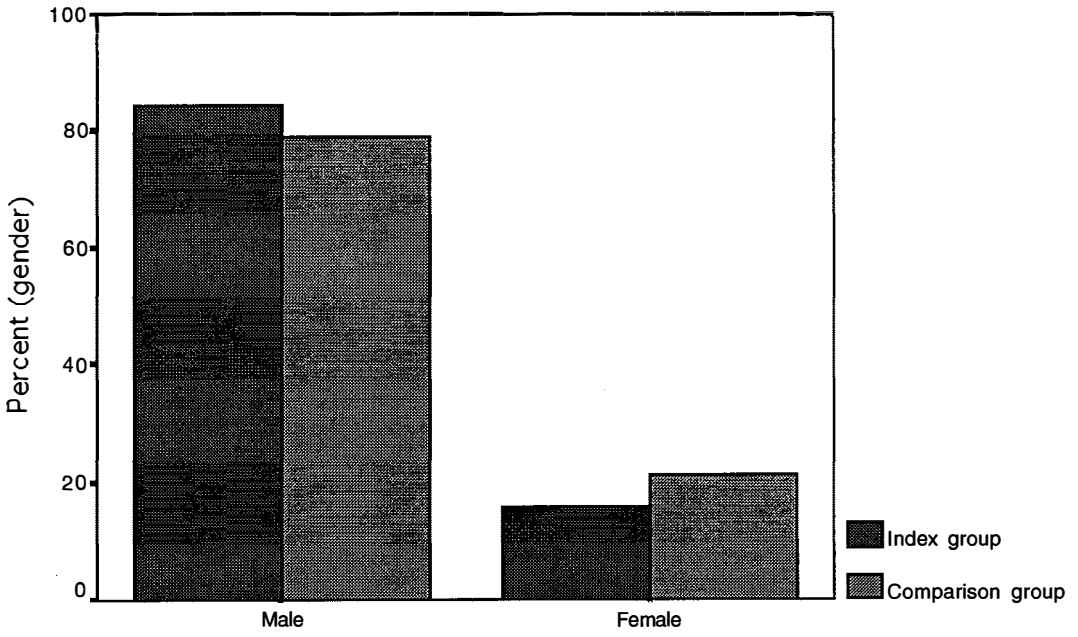


Figure 19. Gender makeup of offenders in Index and Comparison groups receiving community based orders

Racial composition of offenders in Index and Comparison groups receiving community based orders

Figure 20 shows that more people in the Index group who were of Aboriginal descent, received community based orders (24.8%) compared with 15.1% in the Comparison group. A chi-square analysis shows that there is a statistically significant difference in the percentage of Aborigines in the respective groups ($\chi^2 = 12.57$, df 1, $p < .001$).

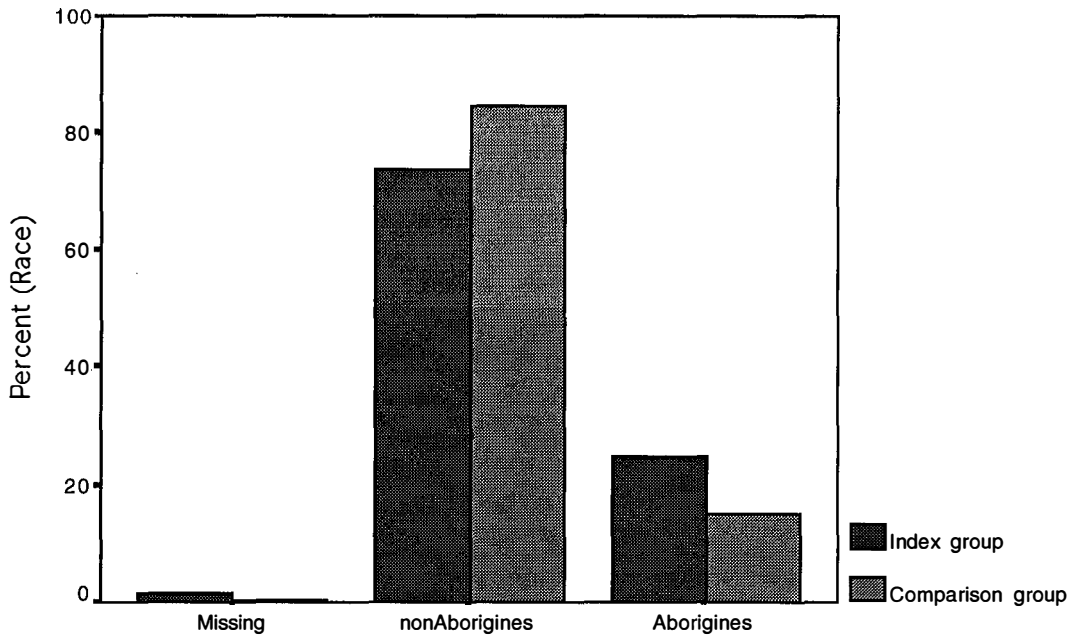


Figure 20. Racial composition of offenders in Index and Comparison groups receiving community based orders

Sentencing Court

Thirty two percent of community based orders issued to the Index group were a result of Courts of Petty Sessions sentences compared with 25.0% Comparison group orders. Nine per cent of the Index group orders were a result of District Court sentences, compared with 5.3% Comparison group orders. Two per cent *of* the Index group orders were a result of Supreme Court sentences, compared with .03% Comparison group orders.

For 57% of the Index group orders and 66.3% Comparison group orders, the sentencing court was not known. This missing information related to Work and

Development Orders for which the sentencing court is not recorded. Work and Development Orders are non-custodial penalties which serve as an alternative to imprisonment for some offenders. Usually, an individual may, in default of payment of a fine and when alternative methods of payment have been exhausted, convert the period of default imprisonment to a Work and Development Order. Under these orders, offenders are provided with a supervised program of community work and personal development activities. Dramatic increases in the issue of such orders were observed from 1990 (the first full year of operation) to 1992. Since then, the use of Work and Development Orders has diminished and in 1994 the use of these orders was effectively replaced by the operation of the Fines Enforcement system.

Number of offences involved in each community based order issued to offenders in Index and Comparison groups

There was no difference in the mean number of offences involved in community based orders issued by the courts for both groups. Each of the 734 Index group orders was related to a mean of 2.23 offences compared with a mean of 2.24 for the Comparison group.

Most serious offence recorded for each community based order issued to offenders in Index and Comparison groups

Table 14 reports the most serious offence recorded for each community based order issued to individuals in both groups. It can be seen that the Index group's major offence is higher in the categories of Offences Against Persons, Offences Against Property and Offences Against Good Order, while the Comparison group were more likely to receive a community based order for drug

offences, and driving offences, and Other offences. The most prevalent charges for the Index group were for Offences Against Property, accounting for 42% of all orders for this group whereas the Comparison group was more likely to receive a community based order for drug offences and driving offences (36% of all charges). A chi-square analysis shows that there are statistically significant differences between the two groups for the four broad offence categories by each community based order issued ($\chi^2 = 179.6$ df 4, $p < .0001$).

Table 14.

Most serious offence recorded for each community based order issued to offenders in Index and Comparison groups

Charge	Index Group		Comparison Group	
	n	%	n	%
Murder, manslaughter, serious assault	3	0.40	4	0.45
Assault causing harm	14	1.90	18	2.04
Other assault	59	8.03	43	4.88
Sexual assault	26	3.54	10	1.13
Sex offences	4	0.54	2	0.22
Other sex offences	22	2.99	9	1.02
Armed robbery	6	0.81	4	0.45
Total offences against persons	134	18.21	90	10.19
Break and enter	80	10.89	78	8.85
Theft	120	16.34	107	12.14
Arson	8	1.08	1	0.11
Fraud/False Pretences	61	8.31	51	5.78
Receiving stolen goods	12	1.63	15	1.70
Other property damage	30	4.08	18	2.04
Total offences against property	311	42.33	270	30.62
Resist/hinder police	27	3.67	26	2.95
Trespassing/vagrancy	8	1.08	8	0.90
Other offences against good order	28	3.81	24	2.72
Total offences against good order	63	8.56	58	6.57
Drug offences	23	3.13	83	9.64
Drink driving	51	6.94	128	14.52
Driving without licence/under suspension	61	8.31	107	12.14
Total drug and driving offences	135	18.38	320	36.32
Other offences not elsewhere classified	91	12.39	143	16.23
Total Other offences	91	12.39	143	16.23
TOTAL OFFENCES	734	100.00	881	100.00

Type of order received by offenders in Index and Comparison groups

There were 734 orders issued to Index group offenders and 881 orders issued to the Comparison group offenders over the period of the study. Figure 21 shows the type of order for both groups. It can be seen that considerably more individuals (24%) in the Index group received a Probation Order (PRO) compared with 11.9% in the Comparison group. There was no difference in the number of individuals in the Index group who received a Community Service Order (CSO) (8.6%), compared with 8.2% in the Comparison group. There was no difference between groups in the number who received a Combined Community Service Order and Probation Order (COMB) (13.4% Index group; 13.4% Comparison group). However. less individuals in the Index group (47%) than in the Comparison group (58.2%) received a Work and Development Order (WDO). Only a small number (.05%) in the Index group and 0.7% in the Comparison group received a Home Detention Order (HDO), although it must be noted that Home Detention Orders only became an option in Western Australia when the *Community Corrections Legislation Amendment Act* 1990 was established. For 6.7% of the Index group and 7.7% of the Comparison group type of order was not recorded.

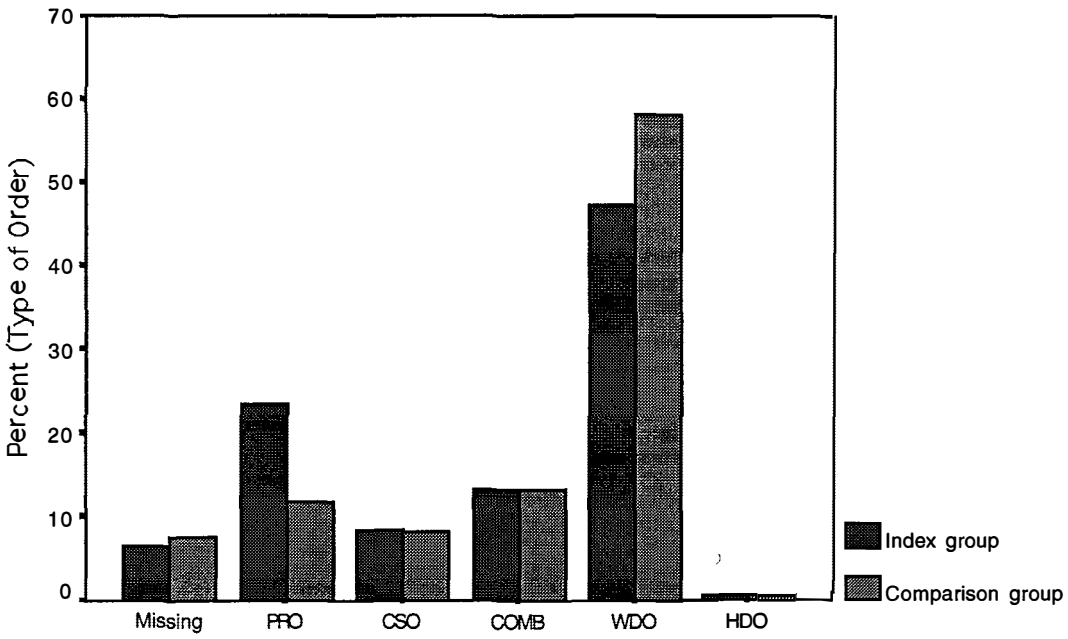


Figure 21. Type of order received by offenders in Index and Comparison groups

Special Conditions

Orders issued by the Court may have Special Conditions attached to them, for example, that the individual should undertake counselling for drug or alcohol abuse, anger management counselling or psychological counselling. Of the 734 orders issued to Index group offenders, and the 881 orders issued to the Comparison group, 19% of the Index group were subject to Special Conditions compared with 16% in the Comparison group.

The only noticeable difference was that 2.5% of the Index group orders included a condition that the offender receive psychological counselling, compared with 0.7% orders in the Comparison group.

FIRST TIME OFFENDERS AFTER 1 APRIL, 1984

The following analysis relates to only those individuals who offended for the first time on or after 1 April 1984 and received a community based order.

Of the 466 individuals arrested for the first time in the Index group, 187 (40%) received a community based order, compared with 345 (20%) of the 1728 individuals arrested for the first time in the Comparison group.

There was a total of 1858 charges heard for first time Index group offenders by the census date 31 December 1994, (1765, Courts of Petty Sessions; 93, Higher Courts) leading to 394 community based orders, which meant that 21.2% of all charges heard in the Courts led to a community based order. In contrast, there was a total of 587 orders arising from 4403 charges heard for first time' Comparison group offenders (4310, Courts of Petty Sessions, 93, Higher Court). Therefore 13.3% of all first time Comparison group charges heard in the Courts led to a community based order.

Gender makeup of first time offenders in Index and Comparison groups receiving community based orders

Figure 22 shows that the difference between first time female offenders in the Index group (19.8%) and the Comparison group, (24.1%) receiving a

community based order was not statistically significant ($\chi^2 = 1.26$, df 1, $p > .260$). Male first time offenders made up 80.2% of the Index group whereas there were 75.9% males in the Comparison group.

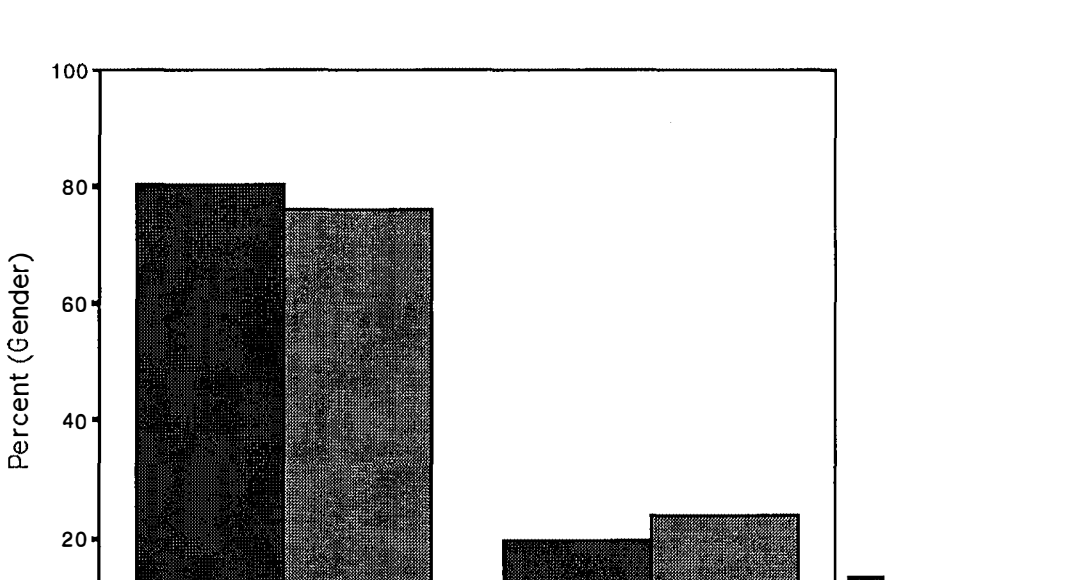


Figure 22. Gender makeup of first time offenders in Index and Comparison groups receiving community based orders

Racial composition of first time offenders in Index and Comparison groups receiving community based orders

Figure 23 shows that there were more Aboriginal first time offenders (19.8%) in the Index group who received community based orders compared with 10.2% in the Comparison group. Seventy eight per cent in the Index group were non-Aboriginal whereas 89.3% in the Comparison group were non-Aboriginal

offenders. The difference in the percentage of Aborigines in the respective groups was found to be statistically significant ($\chi^2 = 10.12$, df 1, $p < .05$).

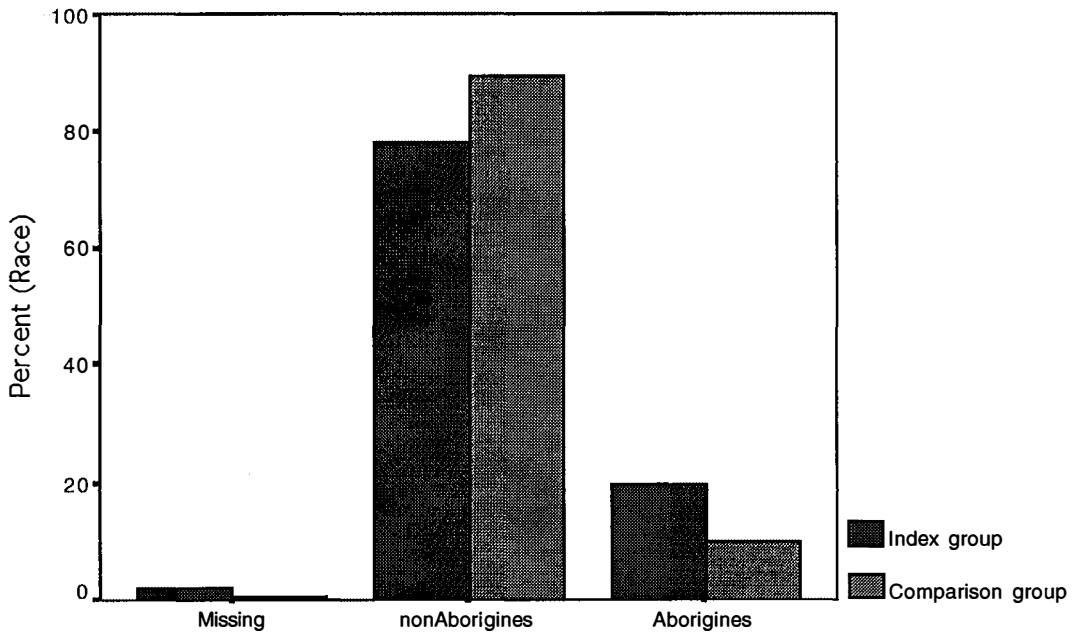


Figure 23. Racial composition of first time offenders in Index and Comparison groups

Number of offences involved in each order issued to first offenders in Index and Comparison groups

There was no difference in the number of offences per order issued between groups for first time offenders, each order relating to an average of 1.0 offence.

Most serious offence recorded for first community based order issued to offenders in Index and Comparison groups

Table 15 reports the most serious offence recorded for the first community based order issued by the Courts to first time offenders in both groups. The Index group was issued with more community based orders in two of the five broad offence categories used in the study- Offences Against the Person and Offences Against Property, with Offences Against Property being the most likely group of offences for both groups to be issued with a community based order. The most likely offence for the Index group to receive a community based order was theft, whereas again the most likely offences for the Comparison group were driving offences. Sexual offences were considerably higher for Index Group males (12.3% compared with 2.3%). A chi-square analysis shows that there are statistically significant differences between the two groups for the five broad offence categories for the first community based order issued (χ^2 =54.65, df 4, p<.0001).

Table 15.

Most serious offence recorded for first community based order issued to offenders in Index and Comparison groups

Charge	Index Group		Comparison Group	
	n	%	n	%
Murder	1	0.54	1	0.29
Assault	21	11.23	25	7.24
Sexual Assault	10	5.35	1	0.29
Sexual offences	13	6.96	7	2.03
Abduction	1	0.54	-	0.00
Armed robbery	2	1.08	2	0.58
Total offences against person	48	25.70	36	10.43
Break and enter	18	9.62	27	7.83
Theft	38	20.32	49	14.21
Fraud/False Pretences	22	11.76	24	6.96
Receiving stolen goods	2	1.06	8	2.32
Arson	2	1.06	-	0.00
Other property damage	5	2.67	7	2.03
Total offences against property	87	46.49	115	33.35
Resist/hinder police	8	4.27	17	4.92
Trespassing/vagrancy	4	2.13	5	1.45
Other offences against good order	5	2.67	10	2.89
Total offences against good order	17	9.07	32	9.26
Drug offences	7	3.75	31	8.98
Drink driving	9	4.82	72	20.86
Driving without licence/under suspension/dangerous driving	12	6.42	50	14.50
Total driving and drug offences	28	14.99	153	44.34
Other offences not elsewhere classified or unknown	7	3.74	9	2.60
Total Other offences	7	3.74	9	2.60
TOTAL OFFENCES	187	100.00	345	100.00

Type of order issued to offenders in Index and Comparison groups for their first offence

Figure 24 shows the type of order received by first time offenders in each group for their first offence. Most of the 394 orders issued to the Index group and 587 orders issued to the Comparison group, were again Work and Development Orders (WDO) (35.9% Index group, 57.5% Comparison group). Proportionately more individuals in the Index group again received a Probation Order (PRO) (Index group, 31.9%, Comparison group, 14.8%). Whereas there was little difference in the proportion of offenders in both groups who received a Community Service Order (CSO) over the period of the study, for first time offenders more of these orders were issued (12.4% compared with 9.8%). There was little difference in the proportion who received a Combined Community Service Order and Probation Order (COMB) (18%, Index group; l4.8% Comparison group), and a small number in both groups (0.3% Index group, 0.9% Comparison group) received a Home Detention Order (HDO).

Proportionately more Index group orders (15.4% compared with 12.3% Comparison group) were subject to Special Conditions. Again the only noticeable difference was that 4.1% of Orders in the Index group included a condition that the offender receive psychological counselling, compared with 0.9% in the Comparison group.

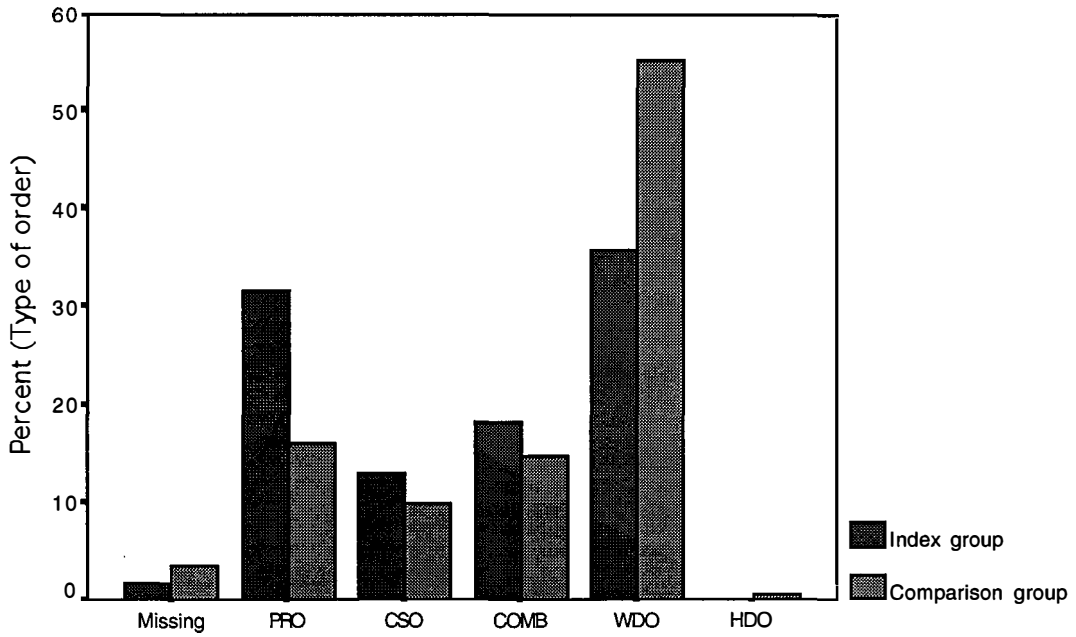


Figure 24. Type of order issued to offenders in Index and Comparison groups for their first offence

RESULTS 4: COMMUNITY BASED CORRECTION ORDERS

Summary

Differences over the period of the study

- People with an intellectual disability were more likely to receive a community based correction order than other offenders over the study period.
- People with an intellectual disability received more community based correction orders over the period of the study than other offenders.
- People with an intellectual disability are more likely to receive a community based correction order for offences Against Persons, Property and Good order, while other offenders receive these orders for Drug offences, Driving offences and 'Other' offences.
- People with an intellectual disability more likely to receive probation orders than other offenders.
- Females with an intellectual disability were less likely to receive a community based correction order than other female offenders.
- Aborigines with an intellectual disability were more likely to receive a community based correction order than other Aboriginal offenders.

Similarities

- No difference between the two groups in the number of offences associated with each community based correction order.
- No difference between the two groups in the number of individuals who received a community service order or a combined community service order and probation order over the study period.

Differences – first offenders

- People with an intellectual disability with no prior record were more likely to receive a community based correction order than other first time offenders.
- Offenders with an intellectual disability with no prior record received more community based correction orders than other offenders by the census date 31 December, 1994.
- First time offenders with an intellectual disability were more likely to receive a community based correction order for the broad offence categories of offences Against Persons and offences Against Property, whereas other offenders were more likely to receive these orders for Driving offences and Drug offences .
- First time offenders with an intellectual disability are more likely to receive a probation order and a community service order than other first time offenders.
- More first time Aboriginal offenders with an intellectual disability received community based orders than other Aboriginal offenders.
- More community based correction orders were issued to first time offenders with an intellectual disability in both the lower and higher Courts.

Similarities

- No difference between the two groups in the number of offences asociated with each order.
- No difference between groups in gender makeup at first order issued.

CHAPTER NINE

RESULTS 5: RE-ARREST PROBABILITIES: A SURVIVAL ANALYSIS

The concluding results chapter reports the results of a survival analysis performed to estimate probabilities of re-arrest for individuals in both groups who were charged for the first time between 1 April 1984 and 31 December 1994, (Index group n=446, Comparison group n=1728). For each arrest event, data were available only for a *few* items: race, gender, age, bail status, occupation (including a partial record of those "unemployed"), and offence. Thus the data do not contain many factors (e.g., educational, employment, marital status and drug or alcohol use) often found to be associated with differential probabilities of re-arrest. It was found that occupation could not be accurately described by survival analysis because of the small numbers in some categories. As the data was sparse when cross-tabulated, often only data relating to male non-Aboriginal offenders can be described.

The first three offences were recorded and classified in accord with Australian National Classification of Offences (ANCO). If there were more than three offences, the first three were selected according to a standard severity index (Broadhurst et. al., 1990). Over 94% of cases had three or fewer offences recorded per arrest event. Generally, only the most serious offence at each arrest event is used to classify the offence history of a subject. However, the additional offences (if recorded) are helpful in exploring the nature of criminal careers. This offence

information provides a more accurate basis to determine the extent and rate that criminal careers escalate (i.e., offending becomes more severe over time) or become repetitious or specialist in nature. Finally, while data quality is generally adequate, high levels of missing values occur for some variables, particularly for data collected in 1984 and 1985.

Racial composition and gender makeup of offenders in Index and Comparison groups

A distinguishing factor of the Western Australian criminal justice system (and most other Australian jurisdictions) is the high level of Aboriginal involvement. Aborigines have been found to be grossly over-represented at all levels of the WA criminal justice system. For example, Aborigines are 9.2 times more likely to be arrested, 6.2 times more likely to be imprisoned by lower courts, 22.7 times more likely to be imprisoned as an adult, and 48.3 times more likely to be imprisoned as a juvenile than non-Aborigines (Broadhurst et al., 1994, p. 13). Moreover, estimates of the probabilities of re-imprisonment showed Aborigines to have much greater risks of re-imprisonment than non-Aboriginal offenders. Consequently, differential probabilities of re-arrest were anticipated in this study and Aborigines were indeed found to have higher probabilities of re-arrest in both groups than non-Aborigines. Probabilities of a further arrest were calculated for the gender-race subgroups arrested for the first time by fitting the Weibull mixture model (1) outlined in chapter four.

The overall gender/ race results are reported in Table 16. The probabilities of re-arrest in the Index group were 0.73 for male non-Aborigines, compared with 0.52 in the Comparison group, 0.47 for female non-Aborigines, compared with 0.35, 0.97 for male Aborigines , compared with 0.90. There was no difference in the

probabilities of re-arrest of female Aborigines in both groups (0.99). Note that the tables describe the probability of ultimate re-arrest (*P*), the 95% confidence interval (CI) of *P*, the median time to fail in months (md), the total number of cases available (n), and the number of cases failing by the cut-off date 31 December 1994 (n-fail).

Table 16

Racial composition and gender makeup of offenders in Index and Comparison groups

Gender-Race	Index Group					Comparison Group				
	P	CI	md	n	n-fail	*P*	CI	md	n	n-fail
Male										
Non-Aboriginal	0.73	(0.61,0.83)	22.7	304	179	0.52	(0.48,0.56)	18.2	1282	584
Aboriginal	0.97	(0.60,0.99)	15.3	47	40	0.90	(0.72,0.97)	15.6	49	42
Female										
Non-Aboriginal	0.47	(0.35,0.95)	9.8	87	38	0.35	(0.26,0.46)	29.4	368	100
Aboriginal	0.99	(0.00,1.00)	23.5	28	20	0.99	(0.00,1.00)	63.6	29	16

P = probability of ultimate re-arrest; CI= 95% confidence interval; md=median time to fail; n =number of cases available; n-fail = number of cases failing by the cutoff date December 31, 1994.

Male probabilities of re-arrest by age at first arrest of individuals in Index and Comparison group

Table 17 shows the results of the analysis by age group for males by race by group. The probability for re-arrest is highest for those *under* 30 years of age for male Aborigines in both groups and lowest for male non-Aborigines in the Index group *over* the age of 30 years.

It can also be observed that while male non-Aborigines *over* the age of 30 years in the Index group have the lowest probability of re-arrest, their median time to fail was the shortest (16 months compared with 37 months). However, male non-Aborigines *under* 30 years in the Index group took longer to fail (21.5 months) than the Comparison group (16.9 months).

Table 17

Male probabilities of re-arrest by age at first arrest of individuals in Index and Comparison groups

Age Group	Index Group					Comparison Group				
	P	**CI**	**md**	**n**	**n-fail**	***P***	**CI**	**md**	**n**	**n fail**
Male non-Aboriginal										
under 30	0.80	(0.67,0.88)	21.5	244	163	0.60	(0.56,0.64)	16.9	882	481
30 and over	0.32	(0.28,0.50)	16.0	60	16	0.40	(0.22,0.62)	37.0	400	103
Male Aboriginal										
under 30	0.97	(0.17,0.50)	14.5	46	40	0.97	(0.25,1.00)	16.3	40	37
30 and over				0	0				9	3

P = probability of ultimate re-arrest; CI= 95% confidence interval; md=median time to fail; n =number of cases available; n-fail = number of cases failing by the cutoff date December 31, 1994.

Bail Status of offenders in Index and Comparison groups

The probability of re-arrest for male non-Aboriginal offenders with custodial status was significantly higher for the Index group than the Comparison group (0.71 compared with 0.50), and the median time to fail was also shorter for the Index group (11 months compared with 16.9 months). However, male non-Aboriginal arrestees in the Index group who were bailed or summoned took longer

to fail than the Comparison group (bail 22.1 months, compared with 19.1 months; summons 36.7 months, compared with 17.5 months).

Release on bail tends to be somewhat contingent on the past record of the alleged offender and the severity of the offence. Variations in the probabilities of re-arrest by bail status were found, depending on the offence category in question. Thus differences in the probability of re-arrest arising from bail or custodial status in *subsequent* events of arrest reflect potential interactions with prior arrest and offence type.

Type of charge for male non-Aborigines at first arrest in Index and Comparison groups

The following analysis only relates to male non-Aborigines who accounted for 65.2% of the Index group and 74% of the Comparison group. Considerable differences occur in the nature of charges for male non-Aborigines at first arrest. The Index group was more likely to be arrested for Against Property offences (35.1% compared with 24.3%), Good Order (22.4% compared with 19.2%) and Against the Person (19.7% compared with 6.4%), while the Comparison group was more likely to be arrested for Drug offences (11% compared with 4.9%) and motor vehicle and other offences (39.1% compared with 17.8%).

Re-arrest probabilities are calculated for the offence groups and shown in Table 18. It can be seen that male non-Aboriginal offenders in the Comparison group, arrested for Against the Person offences, had the lowest probability of re-arrest, while offenders in the Index group involved in offences in every category (except drugs, where the number was too small in the Index group for meaningful analysis), had higher probabilities of re-arrest. However, it can be observed that the Index group took longer to fail in all the offence categories.

Analysis of male non-Aborigines for specific offence groups shows substantial variation in the probabilities of re-arrest, depending on the nature of the principal offence which led to the first arrest. Taking the base rate probability of re-arrest for the Index group at 0.73, Against Property (0.89) and Good Order offences (0.81) exceeded the base rate, while Against the Person offences were lower (0.64). For the Comparison group, taking the base rate at 0.52, Drug offences (0.72) and Against Property Offences (0.64) were higher, while Against the Person (0.40) and Good Order Offences (0.49) were lower.

Some of the rarer offences, such as homicide, could not be accurately described by survival analysis when distinguished by race and sex because of the small numbers found. In such cases the likelihood of long prison sentences would mean that few cases would have been released long enough to estimate probabilities of re-arrest.

It should be noted that of the 60 male non-Aborigines who were charged with Against the Person offences in the Index group, 27 (45%) were sex offences, while only 18 (21.7%) of the 83 Against the Person offences in the Comparison group were sex offences. The number of these offenders who failed was 7 (25%) and 5 (28%) respectively.

Table 18

Male non-Aboriginal re-arrests in Index and Comparison groups

Offence Group	Index Group					Comparison Group				
	P	CI	md	n	n-fail	*P*	CI	md	n	nfail
Male non-Aboriginal										
Against the Person	0.64	(0.90,0.97)	41.4	60	24	0.40	(0.27,0.54)	22.9	83	28
Against Property	0.89	(0.41, 0.99)	23.8	107	73	0.64	(0.55,0.72)	15.0	311	175
Good Order	0.81	(0.56,0.93)	22.1	68	47	0.49	(0.42,0.56)	12.5	245	111
Drugs				15	10	0.72	(0.51,0.87)	23.9	141	82
Motor Vehicle + other	0.51	(0.36,0.66)	16.0	54	25	0.43	(0.38,0.49)	22.0	502	188

P = probability of ultimate re-arrest; CI= 95% confidence interval; md=median time to fail; n =number of cases available; n-fail = number of cases failing by the cutoff date December 31, 1994.

Careers - Persistent Offenders in Index and Comparison groups

The number of subsequent arrests to the cut-off date gives an indication of the proportion of the population that persisted with offending (though inaccurate because of censoring). For example, of the 304 male non-Aboriginals in the Index group arrested for the first time, 61 (20%) had been arrested at least five times compared with 155 (12%) of the 1282 offenders in the Comparison group.

It can be observed from Table 19, that a prior record of offending substantially increases the risk of subsequent offending. Indeed, for male non-Aboriginal offenders in both groups, given further arrests, the probability of re-arrest increases, to the point where re-arrest probabilities approach a certainty, although it is slightly higher for the Index group (for example 0.98 at 9th arrest,

compared with 0.95 for the Comparison group). Moreover, the time to fail falls in both groups, from nearly 2 years for the Index group and 18 months for the Comparison group at first arrest, to a few months after five episodes. However, relatively large proportions of male non-Aboriginal offenders, even those with three ofrfour arrests, desist from offending.

Table 19

Probabilities of re-arrest by number of arrests for male non Aborigines in Index and Comparison groups

Re-arrest	Index Group				Comparison Group			
Event no.	*P*	CI	md	n	*P*	CI	md	n
1	0.73	(0.61,0.83)	22.7	304	0.52	(0.48,0.56)	18.2	1282
2	0.84	(0.69,0.92)	12.7	179	0.68	(0.63,0.73)	11.8	584
3	0.73	(0.62,0.83)	8.4	124	0.82	(0.69,0. 90)	14.2	348
4	0.88	(0.72,0.96)	8.6	81	0.83	(0.73,0.90)	10.7	224
5	0.92	(0.69,0.98)	8.8	61	0.91	(0.67,0.98)	8.9	155
6	0.81	(0.63,0.92)	6.1	49	0.86	(0.71,0.94)	6.0	113
7	0.99	(0.00,1.00)	7.8	35	0.85	(0.72,0.93)	4.8	83
8	0.93	(0.61,0.99)	6.3	30	0.93	(0.56,0.99	6.4	63
9	0.98	(0.14,1.00)	6.2	25	0.93	(0.76,0.98)	2.8	51
10					0.95	(0.49,1.00)	5.3	43

P = probability of ultimate re-arrest; CI= 95% confidence interval; md=median time to fail; n =number of cases available; n-fail = number of cases failing by the cutoff date December 31, 1994.

RESULTS 5: RE-ARREST PROBABILITIES: A SURVIVAL ANALYSIS

Summary

1. Male and female non-Aborigines with an intellectual disability have a higher probability of re-arrest than other non-Aboriginal offenders.
2. Male Aborigines with an intellectual disability have a higher probability of re-arrest than other male Aboriginal offenders.
3. No difference in the probability of re-arrest between the two groups of female Aborigines.
4. Probability of re-arrest of male non-Aborigines with an intellectual disability with custodial status is higher than other male non-Aborigines and the median time to fail is shorter.
5. Male non-Aborigines with an intellectual disability who were bailed or summoned took longer to fail than other male non-Aboriginal offenders.
6. Male non-Aborigines with an intellectual disability had a higher probability of re-arrest in every offence category, except drugs, but took longer to fail in all the offence categories than other male non-Aboriginal offenders.
7. More male non-Aborigines with an intellectual disability were charged with sex offences at first arrest than other male non-Aboriginal offenders, but there was no difference between the two groups in the number of these offenders who failed.
8. The probability of rearrest of male non Aborigines with intellectual disability *over* 30 years was the lowest.
9. Probability of rearrest is highest for male Aborigines *under* 30 years in both groups.

10. Male non- Aborigines with intellectual disability *over* age 30 had the shortest fail time.

11. Male non -Aborigines with intellectual disability *under* 30 years took longer to fail than other offenders in this category.

12. The number of offenders charged with sex offences who failed was similar for both groups.

CHAPTER TEN

DISCUSSION AND CONCLUSIONS

Introduction

The purpose of this chapter is to discuss the results of the study in relation to the research questions set down in Chapter One and to discuss the findings in relation to the theoretical issues raised in the literature review of Chapter Two.

The aim of this study was to present a thorough examination of the degree of participation of adult offenders with an intellectual disability in the criminal justice system in Western Australia, focusing on any disparity in outcomes between people with an intellectual disability and other offenders at the various points in the system. Western Australia provides a unique opportunity to examine the operation of the criminal justice system and people with an intellectual disability, because it possesses comprehensive computerised data sources on offenders, and by utilising the Disability Services Commission data source on people with an intellectual disability, it was possible to include a significant proportion of people with an intellectual disability in Western Australia. Thus, in terms of its size and continuity, the study permits a far more comprehensive investigation than has been possible elsewhere. The study is significant in that it was a longitudinal study over a 10-year period where it was possible to examine the different outcomes at arrest, and the court outcomes for specific offences. In examining the different outcomes, it was also possible to control for the number of offences committed by looking at first offenders only. In addition, the available

data provided the opportunity to study the rate of recidivism of people with an intellectual disability compared with other offenders.

The research questions as described in Chapter One are as follows:

1. Do adult offenders with intellectual disability who have been charged with a criminal offence in Western Australia receive different treatment as they proceed through the criminal justice system than adult offenders who do not have an intellectual disability? Specifically:
   (i) Are adults with an intellectual disability charged with a criminal offence more often than other adults?
   (ii) Do adult offenders with an intellectual disability receive bail less often?
   (iii) Are adult offenders with an intellectual disability convicted more often?
   (iv) Are adult offenders with an intellectual disability sentenced to imprisonment at a higher rate than other adult offenders?
   (v) Do adult offenders with an intellectual disability receive parole less often than other adult offenders?
   (vi) Do adult offenders with an intellectual disability receive community based correction orders more frequently than other adult offenders?
   (vii) Do adult offenders with an intellectual disability have a higher rate of recidivism than other adult offenders?
2. Are there differences in the treatment of adult offenders with an intellectual disability over time?

Each component of the justice system was examined separately: apprehension by police; the outcome of Court appearance, including subsequent sentencing decisions; and correctional services. It is crucial to examine each of these stages, since to concentrate solely on the ultimate stage of prison creates a distorted picture. It ignores the fact that the decisions taken early in the criminal justice process may be the crucial ones, since these determine whether or not an accused person will face the full weight of a Court hearing.

i) Are People With an Intellectual Disability Charged with a Criminal Offence more often than other adults?

While it appears that there has been no previous research on arrest rates of people with an intellectual disability, a number of reports (see for example NSW Anti Discrimination Board, 1981) have put forward the proposition that people with an intellectual disability are more likely to be arrested and charged than other offenders. However, this study does not support such a proposition. The present study found that people with an intellectual disability in Western Australia were not arrested and charged with a criminal offence more often than the non-disabled population. For example, the 1994 annual arrest rate for both the general Western Australian population and the Disability Services Commission population was slightly more than 2%. The study did find, however, that there was substantial disparity in the offending profiles between the two groups, that is people with an intellectual disability at first arrest, were more likely to be charged with different types and more serious offences.

The finding that people with an intellectual disability are no more likely than other offenders to be charged, challenges the susceptibility hypothesis proposed by Byrnes (1995) and others which proposes that people with an

intellectual disability are more likely to be involved in the criminal justice system because of personal characteristics. The hypothesis predicts that the incidence of arrest for people with an intellectual disability would be higher than for the population at large. While recognising that arrest incidence is only one indicator of the level of criminal activity, the results of this study indicate that the susceptibility hypothesis is unlikely to provide an adequate explanation of the offending behaviour of people with an intellectual disability.

Again, the fact that the arrest incidence was similar for the two groups does not lend support to the notion that the target group experiences a higher level of psychological or sociological disadvantage than the Comparison group as proposed by Deane & Glaser (1994). Nor can the data support the claim that people with an intellectual disability are more criminal than the general population.

However, when individuals with an intellectual disability entered the system, they were subsequently re-arrested at nearly double the rate compared with the non-disabled sample.

Profile at Arrest

It is not only higher re-arrest rates which set people with an intellectual disability apart from other offenders in Western Australia. The present study found that there were substantial differences in the criminal profiles of the two groups. The arrest profile of an individual has three aspects: the person's past criminal record; the crimes with which he or she is charged; and how the person charged will be processed. In all three aspects, people with an intellectual disability differed from other adults arrested. They were far more likely to have a

prior arrest history (see Figure 10); they were charged with different and more serious offences (see Tables 6 and 7); and they were given bail less often (see Table 7). There were dramatic differences between the accused with an intellectual disability and the non-disabled accused in terms of prior contact with the criminal justice system. The large majority of individuals in the non-disabled sample had not previously been charged with a criminal offence; in contrast, nearly one half of individuals with an intellectual disability had a prior arrest record. This has significant implications for people with an intellectual disability as a prior arrest record has been shown to be an important factor in influencing the subsequent arrest decision. Previous research of police and black minorities in South Australia, for example, found that those individuals who had at least one prior appearance were more likely to be re-arrested. As the number of previous appearances increased, so did the likelihood of re-arrest (Gale and Wundersitz, 1987).

According to existing research (see for example, Garcia & Steele, 1988; Lund, 1990) there is conflicting evidence of the types of crimes which persons who have an intellectual disability are more likely to commit than other crimes, and whether there are differences between these patterns of criminal activity and that of other offenders. One of the difficulties in trying to understand the statistics on criminal activity which various authors have published, is that there has been no consistent categories of crime used in the various analyses. In addition to the difficulty in trying to reach conclusions about the meaning of such fundamentally incomparable data, some researchers took their statistics from prison populations and others from broader offender groups. It is highly likely that incarcerated persons present very different offence profiles than those who remain in the community. Garcia and Steele (1988) for example, reported that Kentucky

Correctional officials had observed that 63 % of individuals identified with a developmental disability had committed crimes against persons and 37% had committed crimes against property. However Lund (1990) reporting on charges against 65 mentally retarded offenders serving care orders, found that 46 % had been charged with property crimes and 24 % with crimes against persons. As far as the crimes with which people with an intellectual disability were charged in Western Australia over the study period, it was found that this group were arrested and charged with their major offence more often in the four of the five offence categories used in the study – (Against Persons, Against Property, Against Good Order and 'Other' offences -see Table 6), whereas 39% of charges for other offenders related to Driving and Drug charges.

This pattern did not change, even when controlling for prior criminal history, although there were even more disparities in the percentages of offences, at least in two of the categories (see Table 7). In line with Lund's (1990) study, 17% of offences were Against Persons and 44 % were Against Property. A further 20% of offences were Against Good Order, and 'Other ' offences accounted for 3 %. In contrast, Drug offences and Driving offences accounted for nearly one half of all charges for other offenders. The difference in charging might be explained by both the susceptibility hypothesis and the pyscho-social disadvantage hypothesis, in that people with an intellectual disability were more likely to commit offences involving impulsive or unpremeditated behaviour, such as property offences and have less resources to obtain drugs or to have access to vehicles.

On closer examination, further variations between the two groups at first arrest emerged when specific offences within the offence categories were examined. It was found that both males and females with an intellectual disability

were more likely to be charged with more serious offences than other offenders. For example, people with an intellectual disability were more likely to be charged with the more serious property offence of break and enter than other offenders. A similar pattern emerged for arson. Thirty charges of arson were laid against first time offenders whereas none were laid against the non-disabled population.

This study also found that at first arrest 33 people with an intellectual disability were charged with an offence of a sexual nature while 31 people in the Comparison group were charged with similar offences. To some extent, the higher offending rate by those with an intellectual disability may be accounted for in terms of the susceptibility and psychosocial disadvantage hypotheses. That is, people with an intellectual disability may have a lack of understanding about "crime" and its consequences, and the difference between doing an act in private and doing the same act in a public place. Inadequate sex education may also be a major problem; a person does not learn appropriate sexual behaviour if he is not taught how to act socially. What may be seen by police and witnesses to be a person with an intellectual disability committing an act of indecency, could be a poorly educated adult who has never received the proper education. People with an intellectual disability may be also more likely to explore their sexuality in inappropriate ways if they are treated like children (Deane, 1994), and their sexual experimentation is often more visible and more upsetting (Craft and Craft, 1978). In addition, the management procedures for these offenders deserve to be addressed by the police authorities. The results also highlight the necessity for appropriate social services, such as sex counselling, to be available.

The study also found that a significantly higher proportion of people with an intellectual disability were charged with resisting or hindering police than was the case for other offenders. Several explanations may be offered to account for this difference. It may be that people with an intellectual disability are more likely to resist arrest, as they are do not fully understand what is happening to them. They may also not appreciate the consequences of resisting arrest, or as Klinger (1994) argued, if the individual adopts a disrespectful attitude toward the police, this will increase the chances of arrest. The management of the behaviour of the alleged offenders by police may also account for the difference in the arrest rates.

There are undoubtedly a number of factors which influence police decision-making in selecting an appropriate response to a particular situation. A major problem is recognition of the presence of intellectual disabilities, including impairments in memory, cognition, and ability to foresee the results of one's actions. Other factors include the person's demeanour and behaviour towards the police at the time of apprehension; the fear of abnormality held by many members of the public, including police; and the process of choosing the offence, which is the subject of the charge, resulting in the person with an intellectual disability facing a more serious charge than might be the case with a less vulnerable member of the community. This outcome may be accounted for in terms of the differential treatment hypothesis, which predicts that people with an intellectual disability are more likely to be charged with more serious offences, which in fact was the case in Western Australia. The study found that people in the target group were arrested for different and more serious crimes and as a result were treated differently according to the law. However, when both groups were compared for similar offences, it was clear that different treatment occurred.

The nature of the charges may also reflect the lack of support services to assist people with an intellectual disability at arrest. This is likely to have a significant impact on obtaining fair treatment for people with an intellectual disability. For example, the fact that the police in Western Australia are not required to have an independent third person for the interview as is required in some other Australian states and the United Kingdom, puts people with an intellectual disability at a distinct disadvantage.

It is not possible to say that the actual offending behaviour of these two groups is different; merely that the recorded charge patterns are not the same. It is not clear to what extent people with an intellectual disability actually commit more serious offences, or whether other factors and, in particular, police discretion in charging, are at work. At the point of apprehension, a police officer must select from a range of possible charges, which in his or her estimation most appropriately reflects the illegal behaviour observed. For example, a person may be charged with arson, or the less serious offence of property damage. A person who opens the door and enters an unlocked garage on another person's property and steals an item of minor value, may be charged with breaking and entering. Or alternatively, he or she could be charged with being unlawfully on premises.

A recent study has also shown that police hold some significant biases about persons with an intellectual disability (McAfee, Cockram and Wolfe, in press). Officers in Western Australia and Pennsylvania were asked to respond to crime reports. Some of the reports involved persons with an intellectual disability who were identified as either victims or alleged perpetrators of the crime. Results showed that the officers found alleged offenders with an intellectual disability less

believable and their crimes more serious, in spite of the fact that all other aspects of the statements remained constant. The authors noted that the fact that police officers indicated they would take more drastic actions when a person with an intellectual disability is involved in a crime, may explain some of the over-representation of persons with an intellectual disability in the criminal justice system. Given a significant amount of discretion if police react more strongly to crime involving persons with an intellectual disability, it is more likely that some action will be taken. Thus a disproportionate number of arrests involving people with an intellectual disability will fill the records of the courts. This does not mean that the disproportionate representation does not reflect real differences, but rather the differences may be inflated.

The police discretion does no end here. At the pre-trial stage, the police prosecutor may disagree with the original charges and substitute new ones. In a case known to the investigator, for example, a man with an intellectual disability was charged by apprehending officers with the offences of stealing from the person and assault. Before the matter came to trial the offence of robbery with violence was substituted and subsequently listed in the official records. Again, it must be stressed that differences in recorded behaviour do not necessarily imply differences in real behaviour, since the type of charges imposed reflect police discretion. Nevertheless, once a person enters the formal justice system, behaviour ascribed to that person at the point of contact and officially recorded in police apprehension records is subsequently deemed to be an accurate portrayal of real behaviour. In effect, recorded data becomes reality, and these recorded facts are made available to the people involved in decision-making at subsequent stages of the criminal process. Differences between the recorded charge patterns may

therefore help to explain why the outcomes recorded at later stages in the system for the two groups are different. Discussions are under way in Western Australia to disband the police prosecuting section in favour of legal practitioners, which may assist in decreasing the possibility of police discretion pre-trial. However, police prosecutors were able to substitute charges during the period of this study.

It is all too evident then, that people with an intellectual disability differ from their non-disabled counterparts in terms of their legal profile. People with an intellectual disability were charged with different and more serious offences; they had longer criminal records and they were processed differently, all of which may support the different treatment hypothesis which suggests that people with an intellectual disability are not more delinquent but more likely to be found so by the police, owing to their vulnerability in criminal justice processes.

ii) Do People with an Intellectual Disability Receive Bail Less Often?

When apprehended, people with an intellectual disability are not only charged with somewhat more serious offences than their non-disabled counterparts, they also have a very different profile as far as arrest processing is concerned.

Once the police have determined to proceed with a matter, they must then decide on the method of apprehension - that is, whether to arrest the alleged offender and consider bail or file a report, which subsequently results in the issuing of a summons. Again, differences between the two groups were immediately apparent, with first time arrestees with an intellectual disability receiving a harsher outcome at this point. Nearly one half of people with an

intellectual disability were denied bail (compared with 44% of the general offending population sample), and just over one quarter of this group were held in custody awaiting trial, compared with just over 17% of the non-disabled sample (see Table 6). It was also found that first time offenders with an intellectual disability were placed on remand at more than twice the rate of other first offenders for the same type of offence which is strong evidence for different treatment by the police.

The bail status of the arrest is often regarded as an approximate guide to the severity of the charge and the status of the offender. Generally in Western Australia, there is a right to bail (with or without conditions) for certain minor offences defined by the Bail Act. This right is negated where, among other reasons there has been a previous failure to comply with a bail undertaking or condition imposed in respect of the offence, or the person is, in the opinion of the authorised officer or court, incapacitated by intoxication, injury or use of a drug, or is otherwise in danger of physical injury or in need of physical protection. With specified exceptions (for which bail nonetheless may be sought) there is a presumption in favour of bail for all other offences.

There may be a number of reasons why people with an intellectual disability are less likely to be granted bail. The susceptibility hypothesis may account for some of these reasons. For example, those individuals who fail to comply with a bail undertaking may do so because of poor organisational skills and understanding rather than deliberate avoidance. Also the behaviour of a person with an intellectual disability, such as a failure to understand simple questions, is sometimes mistaken for that of a person who is under the influence of alcohol or a drug (Ierace, 1989). In such a case the person with an intellectual

disability may unfairly lose the right to release on bail. Where the presumption of bail applies, bail is granted or refused according to criteria set in the Act. Many of these criteria may act to the disadvantage of an accused with an intellectual disability. Considerations relating to prior failure(s) to appear and perceived incapacitation by intoxication or drugs again become relevant. Bail conditions, for example reporting weekly to a police station or limitations on a person's movements, may be more onerous for the accused with an intellectual disability to comply with and understand. Misunderstanding of bail conditions also may increase the possibility of a breach of the bail undertaking. A failure to appear pursuant to a bail undertaking is an offence under the Act, prejudices future bail determinations, and potentially exposes the accused to additional and perhaps harsher penalties than would have applied otherwise.

Other reasons may be explained in terms of psychosocial disadvantage, such as those relating to the person's background, community ties, and employment, which may mean that a person with an intellectual disability is less likely to receive bail. It has been reported that people with an intellectual disability often "do not have good family and community support to enable them to meet bail conditions and, as a consequence, are often unnecessarily held in custody" (Legal Aid Commission of New South Wales, cited in New South Wales Law Reform Commission, 1993, p. 21). Further, given that a person with an intellectual disability's social ties and supports may be especially fragile and that their disability can be a disadvantage in their finding employment and accommodation, the negative effects of a period in remand may be substantial and long-term: "a far longer period of time may be required to place the applicant in his pre-remand position" (Ierace, 1989, p.24). These disadvantages also could act to hinder the

funding and preparation of a defence. In addition, the conditions, if applicable, under which bail may be granted are set out in the Act, and may operate to the disadvantage of the accused with an intellectual disability. Although the philosophy of the Act is to reduce reliance upon monetary conditions, the system operates primarily on a financial basis, as is the case with other Bail Acts in Australia. This is obviously of great concern for people with an intellectual disability. The finding of this study that the large proportion of people with an intellectual disability were unemployed, and may therefore rely on social security benefits, would mean that any sort of monetary condition may be difficult, if not impossible, to meet. Where monetary conditions cannot be met, an accused may need to rely on their social networks, which are recognised to be lacking for people with an intellectual disability.

Of the non-monetary conditions which may be imposed, one involves the accused entering into an agreement to observe specified requirements as to conduct when at liberty. The other condition involves an "acceptable person" who is acquainted with the accused satisfying the court that they consider him or her to be responsible and likely to comply with any imposed conditions. A lack of community ties and an unwillingness to disclose intellectual disability may restrict the number of persons that an accused with an intellectual disability would be willing to nominate as an acceptable person. Even if a welfare worker or citizen advocate is available, their role often is limited to giving support: "it may be unrealistic to expect them to make themselves available as an acceptable person, or surety" (Ierace, 1989, p.25). Indeed, it has been stated that some government departments specifically disallow their welfare worker employees from acting as surety or as an "acceptable person" for their clients (Ierace, 1989).

Another reason for denial of bail focuses on offence severity which has been acknowledged as the critical issue for legal decision making (MacEachron, 1979). Consequently, the lower rate of bail for the individuals in this study may be attributed to the more serious offences people with an intellectual disability are charged with and the fact that they had a far higher prior arrest history. However, even when controlling for prior arrest, just over one quarter of offenders with an intellectual disability were held in custody awaiting trial, compared with only 18% of non-disabled offenders (see Table 8), which may give support to the idea that the likelihood of the more serious charge at arrest, is a primary decision to hold the individual in custody.

This finding introduces the possibility that the differences in charge patterns could account for the persistent difference between the two groups at later stages in the justice process. As this study demonstrates, the force of the decision to arrest is by no means spent at the time of entry into the formal process. It has repercussions on decisions and even at later stages. The results clearly support Freeley's (1979) argument that, to concentrate solely on the final stages of Court adjudication and disposition in the criminal process, gives a distorted and incomplete picture of the real impact of that process on an accused. Whilst it is important to investigate rates of detention, it is equally if not more important to examine the operations of the pre-trial mechanisms, since these affect a far greater number of accused. Clearly, people with an intellectual disability have already experienced considerable disadvantage long before they even reach the final stages of disposition. The evidence for this lies in the differences in charge patterns, arrest processing and in their social characteristics

(iii) Are Adult Offenders with an Intellectual Disability Convicted More Often?

For the accused person in Western Australia, the next stage in the criminal justice process is formal prosecution in the court. The court system is essentially intended to operate as an adversarial system, with proceedings being initiated by police and contested by the accused with the assistance, if sought, of legal representation. Yet in reality, the primary role of the court is one of disposition rather than adjudication. The reason for this is the overwhelming number of guilty pleas. Although the type of plea was not included in the official data analysed for this study, further investigation reveals that the majority of individuals who come before the courts in Western Australia admit the allegation. In fact, in Western Australia in 1993, 90% of individuals entered the plea of guilty (Australian Bureau of Statistics, unpublished data). The overwhelming tendency to admit guilt means that, for most people, a court appearance results in a criminal record. This has serious implications for individuals appearing before the courts, but is particularly serious for people with an intellectual disability. The fact that individuals with an intellectual disability have a significantly higher probability of re-arrest, virtually guarantees a criminal record for the majority of individuals who pass through the system. Why do so many people plead guilty? The proposition that police operate with total accuracy, apprehending only those who are actually responsible for committing crimes, has been refuted. Heindensohn (1996) suggested that police actively encourage this acquiescent response, which is again particularly pertinent for people with an intellectual disability. Another important factor, especially amongst people with an intellectual disability, is the desire to have the matter disposed of quickly (Brookbanks, 1995). The general (but not always accurate)

belief is that if they plead guilty to a charge, the case will be processed more swiftly. A not guilty plea inevitably results in a trial which may take months before it is scheduled for hearing. Moreover, the trial itself may run over a number of consecutive days, with the person being required to attend court on each of those days. For many people, this in itself is a daunting prospect, which is further accentuated by the ordeal of giving evidence and facing cross-examination by the police prosecutor, but for people with an intellectual disability this is significantly more so.

In addition, in appearing in court in proportionately greater numbers, not only does it increase the likelihood that people with an intellectual disability will leave the system with a criminal record, which impacts on any future contact, but it means they must also endure the full effects of the court's pre-adjudication process. Specific court practices, such as the use of adjournments and transference of cases from one court to another and obtaining legal representation, must all be considered in the context of the thesis that the process is the punishment.

Statistical analysis of the sentencing process of the courts is problematical, since the penalty is often tailored to the individual. In addition to the welfare input at the dispositional stage, the individual may have appeared on multiple charges and so an order may reflect other offences in respect of which he or she was formally discharged. The data analysed in this study consider only the penalty imposed for what was coded as the major charge. This analysis therefore assumes a direct relationship between the major charge and the major charge penalty. Notwithstanding these provisos, when the sentencing stage of the court process is finally reached, people with an intellectual disability appear to be treated differently from others.

There was no difference between groups in the proportion that was convicted, that is, where a penalty was imposed by the Courts of Petty Sessions. However, over the period of the study, there were considerable disparities between groups of the types of penalties imposed. Yet this pattern of differential treatment is somewhat unexpected. In general terms, appearances by people with an intellectual disability were more likely to result in a detention or a community based order and discharge/dismissal or withdrawal/not guilty orders than the non-disabled sample (see Table 9). Thus they appear in disproportionately high numbers at both the top and bottom ends of the penalty scale.

More than 20% of sex offence charges, for example, were dismissed for people with an intellectual disability over the study period whereas only 3% of these charges were dismissed for the general population sample. In addition, over 6% of charges of a sexual nature were withdrawn for people with an intellectual disability, or the person found not guilty, while the non-disabled sample had none of these charges withdrawn (see Table 9). It is obviously not possible from the data to know the reasons for these decisions. However, the differing legal and service responses are bound to some extent to determine outcomes for people with intellectual disability that sexually offend. There are common echoes of alarmingly arbitrary intervention throughout the literature. It is said that people with an intellectual disability who sexually offend, receive "hypocritical, capricious, inconsistent or dangerous care" (Swanson & Garwick, 1990 p.156) and bounce between treatment services and the legal system (Department of Health, 1989). Cox-Lindenbaum, (1990) argued that professional perspectives which distort and deny the behaviour are given to contribute to this situation. He identifies a pattern whereby the men's behaviour is largely ignored over a period of time and then

gains an unexpected and dramatic response. The author suggested that services must take responsibility for the understandable desensitisation and then later confusion.

It may be also of course, that in some instances magistrates prefer to dismiss the charges with the possibility of imposing orders, rather than impose inappropriate sentences. In many cases the courts will require assurances that such people will receive adequate supervision and assistance to prevent or minimise any danger to themselves and the community. Unfortunately, in many cases these involve ordering a person to reside in a secure setting, or a highly restrictive setting within the community. Such an outcome offers little prospect for rehabilitation for the offender, with the focus generally being on the care and supervision of the resident, and an absence of specialist habilitative programs. It can also disadvantage any other residents of the service with the strain of attempting to meet the different needs of the resident group. It is critical that the development of an appropriate range of non-custodial options be in place which would enable the judiciary to make findings of guilt or innocence, and where guilty, provide an appropriate sentencing response. Of great concern, is that without the further development of models of non-custodial sentences, the sentencing needs of offenders with an intellectual disability will continue to be hidden - either by incarceration, or through the use of restrictive bail or dismissal orders. Hidden forms of incarceration include placement in institutions, coerced placements or offenders remaining in prison beyond the completion of their minimum sentence due to a lack of appropriate alternatives. The amount and quality of information on people with an intellectual disability who are accused of committing crimes must be greatly improved. Data must be collected on: when the

disability was first identified by the criminal justice system; the accused's understanding of the effects of the alleged crime; if re (habilitation) services were provided, and if so the effectiveness of these services. A topic for further research could also include the reasons behind dismissal of charges.

A sentence of detention represents the most severe penalty which can be imposed by the courts. In Western Australia, courts may not impose a custodial sentence unless all other options have been rejected as inappropriate. Imprisonment is the sentence of last resort (*Criminal Code* 1913, section 19A). Nevertheless, a higher proportion of first offenders with an intellectual disability than non-disabled first offenders had this outcome. Resulting from first appearance in all of the courts, detention accounted for just over 16% but only 7.0% of appearances by other first offenders. Moreover, offenders with an intellectual disability have not apparently benefited as much as their other offending counterparts from recent policy moves which favour alternatives to actual detention - for instance suspended sentences. In fact, no custodial sentences for first offenders with an intellectual disability were suspended, compared with nine for non-disabled offenders, and as would be expected given their economic circumstances, proportionately fewer people with an intellectual disability than other offenders' appearances resulted in a fine (see Table 10).

The Court Orders undoubtedly preferred by all persons, who appear before it, are those of discharge without penalty. In these, people with an intellectual disability hold a slight advantage (see Table 9). Yet this should not be a cause for complacency. It could be suggested that some people with an intellectual disability should not be sent to court in the first place and the court is merely recognising this fact by discharging them. This is important, since an individual

who is eventually discharged by the court, has nevertheless been subjected to the criminal justice process and, as a result of the court appearance in which the allegations have been proved, will leave the system with a criminal record.

It was also apparent that there were different penalties imposed for similar offences for people with an intellectual disability compared with other offenders at first appearance, illustrated by the outcomes for drug offences, offences against good order, drink driving and theft (see Table 10). Rigorous analysis of the sentencing process is not possible because of the complexity of the dispositional process itself. A wide range of information regarding the offending behaviour and the characteristics of the person are usually placed before the court, much of which cannot be quantified. This applies particularly to the input by social workers and the various reports presented to the courts. What it may show however, is that people with an intellectual disability are under considerable disadvantage at the sentencing stage in that they are treated differently. Non-disabled alternatives to imprisonment focus on the fine, while alternatives for offenders with an intellectual disability tend to involve community orders.

Unfortunately, it was not possible to extract cases where the individual was found unfit to plead, as this information is not recorded in the official police data. During the period of the study, the question of fitness only arose when the accused was required to plead to an indictment. If raised on arrest, or in Petty Sessions because there were no special guidelines for making a finding of fitness, the police or court could withdraw the charge if it was a relatively minor offence and they did not believe the alleged offender was competent to stand trial. If the charge was more serious, the magistrate could remand the accused for assessment and adjourn the matter to a higher court decision. It should be noted however, that although

this can be a major issue for people with an intellectual disability, the doctrine arose infrequently in Australia during the study period, as most defence lawyers would have avoided raising the question of fitness because of the consequences for this group (Hayes and Craddock, 1992).

The need for reform of the law applying to mentally impaired defendants has been argued for many years in Western Australia. Consequently, in 1997 new legislation was passed which set out to consolidate and clarify the law as it relates to the disposition and treatment of defendants who are mentally impaired. Fundamental to the Act is the recognition that the criminal justice system must be modified to accommodate factors specific to mentally impaired defendants. The main factor is that mentally impaired defendants are not criminally responsible for their actions. As pointed out by the Western Australian Law Reform Commission in its 1991 report: "It is wrong to treat as criminal those who by reason of severe mental illness or intellectual disability, are temporarily or permanently deprived of capacity to conform with the requirements of the law or distinguish right from wrong" (p.3). For this reason, the Act operates on the premise that, although it may be necessary to protect the health, safety or security of the defendant or another person, the form of that protection needs to be appropriate to the particular circumstances of the defendant. Unlike the provisions of the old legislation, s.4 states that this Act applies in respect of any defendant before any court exercising criminal jurisdiction. A new provision (s.143) is inserted in the *Justices Act* 1902 to enable a court of summary jurisdiction to make a special finding. Where a defendant is found not guilty of an offence on account of unsoundness of mind, a summary court, having regard to the factors such as the nature of the offence, the defendant's character and the public interest, may order that the defendant be

released unconditionally, placed on a non-custodial order under the *Sentencing Act* 1995, or ordered to be detained in custody. These are the same factors as those which are applied in the determination of whether a person found unfit to stand trial should be held in custody.

In the case of the superior courts, the substantive law relating to the defence of unsoundness of mind is retained in a similar form, in *The Criminal Code*. The powers of superior courts to release the defendant unconditionally or to make either a non-custodial or a custodial order are similar to those of Courts of summary jurisdiction, but a custody order must be made in respect of certain serious indictable offences listed in the schedule of the Act.

Part 5 of the Act makes provision for the management of mentally impaired defendants found unfit to plead or acquitted on account of unsoundness of mind. Matters addressed include:

- the place of custody - as determined by the Mentally Impaired Defendants Board. The Act provides that a mentally impaired defendant may be detained in an authorised hospital, a declared place which could be a facility for a person with an intellectual disability, a detention centre or a prison;
- the Board must report in writing to the Minister about a mentally impaired defendant within 8 weeks of a custody order being made, when requested by the Minister, whenever there are special circumstances for doing so and in any event, at least once each year;
- release by the Governor at any time either unconditionally or subject to conditions such as undergoing specified treatment or training, residing in a specified place or complying with the lawful direction of a supervising officer; and

- the discharge of a mentally disordered defendant from a custody order.

However, the appropriate place of detention for prisoners with an intellectual disability found unfit to plead and ordered to remain in detention, remains a contentious issue. The mental health system has demonstrated quite clearly that it would not accommodate persons other than those who have a diagnosable and treatable condition. There is no indication of any change in this policy even with the building of a forensic unit within the mental health system. The Disability Services Commission maintain they do not have the capacity, nor the statutory duty, to provide custodial care or detention for people with an intellectual disability. It would seem, therefore, that persons with an intellectual disability who are found unfit to plead or are acquitted on account of unsoundness of mind, and given a custodial order, will continue to be held in the prison system until it is appropriate for the person to be released by the Governor in Executive Council.

3. Are People with an Intellectual Disability Sentenced to Imprisonment at a Higher rate than Other Offenders?

Over the period of the study, 34% of individuals with an intellectual disability who were charged with a criminal offence by police, were given a custodial sentence, and nearly 5% were held in custody on remand, compared with only 13% and 2% respectively of the non-disabled arrestees. Moreover, not only did people with an intellectual disability receive custody at a higher rate, they also received more custodial terms over the period of the study. Arising from charges heard by all of the courts, 27% resulted in a custodial term, compared with only

14% for other offenders. Previous research has shown that the most important determinant of a detention order seemed to be a person's prior record (Blumstein, Farrington, & Moitra, 1985). Once an individual had come before the courts on a number of occasions, and the usual range of fines and community orders had been exhausted, a point was sometimes reached where detention seemed the only option. For a judge or magistrate, the constant reappearance of a person before the court is taken as a clear sign that he or she is a recidivist who failed to respond to the court's attempts at rehabilitation and henceforth detention was warranted to ensure the protection of the community. The fact that people with an intellectual disability were more likely to have prior records could thus largely explain their high rate of detention. The initial police decision to arrest, which virtually ensures a court appearance and subsequent acquisition of a criminal record, may also influence the final sentencing stage and may contribute to the disproportionately high number of detention orders imposed on this group. In addition, more custodial sentences were given to people with an intellectual disability in the higher courts, which is related to the more serious offences with which they were charged. This would also contribute to the over -representation of people with an intellectual disability in the prisons.

However, even when prior prison records were taken into account, individuals with an intellectual disability who had been arrested for the first time, received over twice as many custodial terms compared with their non-disabled counterparts (16% compared with 7.0%), resulting from the major charge heard in all courts. First time offenders with an intellectual disability were more likely to receive custody for offences against persons than other offenders, assault occasioning actual bodily harm being the most frequent offence to attract a

custodial term (see Table 13). In contrast, in this category of offences, non-disabled offenders were most likely to go to prison for 'other' assault. First time offenders with an intellectual disability were also more likely to be imprisoned for offences against property than other offenders as well as offences against good order.

Although offenders with an intellectual disability had more minimum security ratings recorded at first entry into prison (see Figure 14), by the time they left prison they had a higher proportion of maximum security ratings recorded (see Figure 15). This may be explained by the fact that most prisoners with an intellectual disability in Western Australia are transferred to the only 'protective unit' where people with an intellectual disability are normally housed, which is within the maximum-security prison. Effectively, this may mean that many of these prisoners are serving their entire sentences in maximum security, sometimes for quite minor offences.

The inequitable position of people with an intellectual disability is illustrated by their experience in the prisons. The incidence of physical and mental abuse of offenders with an intellectual disability in the prison context is well known and attested (see for example, Bilken, & Mlinarcik, 1978). They are often abused and exploited by other inmates, are more likely to have problems with discipline and are likely to regress in the harsh and unstimulating environment of a prison. The reality is that prisons are rigorous environments for the most well-adjusted inmates, but are significantly more so for those who are socially, emotionally and intellectually ill -equipped to cope with the demands of prison life. Clearly, the idea of imprisonment being officially designated a sentence of last resort in the case of offenders with an intellectual disability, on the basis that it offers little by way of rehabilitation to such persons and may often produce a

significant deterioration in the individual's mental health and adaptive skills, could be supported.

(v) Do Adult Offenders with an Intellectual Disability Receive Parole Less Often?

Another question asked by this research was "Do adult offenders with an intellectual disability receive parole less often?" Parole may be defined as the conditional release of an offender from prison under the supervision of a Community Correction officer after the offender has served part of his/her sentence in custody. A person on parole remains under sentence, but serves part of the sentence in the community under supervision. Under the current parole legislation, a person sentenced to a specified term has an automatic remission of two thirds for sentences over one year. This means that for a six-year sentence, he/she will spend two years in gaol and four years on parole. This will not be the case if the judge says "not eligible for parole" when making the order. When on parole, the person has certain conditions imposed on his/her release (in many ways similar to bail) and must report to the parole officer on a regular basis, at a specific time and place. Violation of the conditions of parole and/or re-offending could result in re-imprisonment until the full sentence has been served.

At this point in the sentencing process, 'first time' offenders with an intellectual disability were again treated differently from other offenders, that is, significantly more custodial non- parole sentences were given by the courts than those given to non-disabled offenders (31% compared with 25%). It is not possible to know from the official court data whether the sentencing judge in his/her

decision not to grant parole took this into account and gave a more lenient custodial term.

Previous research has shown that two factors have a dominant influence on the decision to deny parole at sentencing: the charge that led to the incarceration, including the issues of public safety and the public's reaction to it (Elion and Megaree, 1979), and the related concept of dangerousness (Scott, 1977). The fact that people with an intellectual disability in this study were more likely to be charged with more serious crimes, would offer further support for the first factor. The concept of dangerousness is of great significance for the accused person with an intellectual disability for two important reasons. First, it may be taken into account when imposing a sentence and secondly, it may be a factor taken into consideration when a decision to grant or deny parole is taken. There are no established procedures for assessing dangerousness and few helpful reliable predictors have been established (Gelder, Gath and Mayon, 1990). Because of the inherent difficulties of assessing and predicting dangerousness, objective, scientific evaluations tend to give way, or at least be influenced by subjective expectations held by a particular psychiatrist (Price, 1970). However, as Hayes and Craddock (1992, p. 26) argued, impressionistic case studies "lacking scientific methodological rigour" continue to be reported and to be influential in persuading professionals and the public that certain "types" of criminals are dangerous and that the issue of public safety is paramount. Consequently questionable assumptions surrounding dangerousness may be seen to be a significant criterion influencing sentencing decisions and may in fact account for the judiciary's tendency to be conservative in their decisions in this study in denying parole for more offenders with an intellectual disability.

Many problems have recently arisen over the parole legislation and there is strong community feeling in Western Australia that the sentence should more truly reflect the actual period of imprisonment. Parole has been criticised as creating uncertainty and disparity in sentencing practice, failing to reduce recidivism and incorporating predictions of dangerousness and recidivism which are beyond the capacities of the Parole Board (Potas 1982).

Even if parole is part of the sentence laid down by the court, it poses particular problems for people with an intellectual disability when parole is due. First, again the questionable assumptions surrounding the concept of dangerousness find their way informally into parole decisions via the criterion of public interest. Secondly, the prisoner must show the potential and then exhibit the ability to adapt to normal lawful community life. Such an adaptation is difficult for many prisoners, but may be more so for prisoners with an intellectual disability and thirdly, there is no guarantee that decision-makers within the parole process are sensitive to those circumstances of people with an intellectual disability which, if not taken into account, may place them at a disadvantage in obtaining parole, and set them up to fail upon release. The present investigator knows of a number of cases in Western Australia for example, where the individuals have spent longer periods in custody, as they were not being released on parole at the expiration of their minimum term because of the lack of post -release programs. Another example of how the lack of services adversely affects the parole process for people with an intellectual disability, is the lack of accommodation when parole is applied for. The NSW Law Reform Commission (1994) recently found that services for ex-prisoners/parolees are reluctant to accept people with an intellectual disability who require a great deal of support, but disability service

providers are also reluctant to accept ex -prisoners. This also appears to be the case in Western Australia. It is extremely difficult in Western Australia to secure accommodation for people with an intellectual disability, especially when the person has served a gaol term, and even more so where the offence concerned was of a sexual nature. As the Parole Board cannot make a conditional parole order until it has decided, in light of the offenders circumstances, that it will be feasible to secure compliance, the Board usually requires the nomination of place of residence to ensure supervision, hence people with an intellectual disability are disadvantaged.

Clearly, services have a major part to play in providing adequate attention in respect of accommodation and supervision to assist the offender with an intellectual disability to complete his/her parole period successfully. The fact that there is a lack of services and resources enabling offenders with an intellectual disability to obtain parole, or inadequate supervisory arrangements which do not satisfy the Parole Board's requirements, inevitably means that the individual will remain in prison long after their original term is completed. Worthwhile future research could investigate the circumstances of offenders with an intellectual disability being denied parole and the availability and effectiveness of community support programs to assist the offender with an intellectual disability to successfully complete the parole period.

(vi) Do Adult Offenders with an Intellectual Disability Receive Community Based Correction Orders More Frequently Than Other Offenders

Community based orders are given to the majority of offenders in Western Australia for a variety of reasons, including the need to provide an appropriate response to relatively minor offences, which may not require the most restrictive sanction society can order; an acknowledgment that the prison environment has a negative influence; recognition that rehabilitation occurs more effectively in community settings and provision for sentencing options which recognises the vulnerability of certain groups of offenders to the prison environment.

Non-custodial options are also less expensive than imprisonment. Ministry of Justice figures show the cost of keeping a person in prison for one year is $65,510 which meant the total cost of keeping prisoners in Western Australia in 1994 was $167 million. Hence, for every one-dollar spent on prisoners serving their time in the community, it cost $5.50 to imprison them. (Ministry of Justice, Annual Report, 1994).

Evidence of different treatment was again apparent in that more first time offenders with an intellectual disability received community based orders than other offenders. Arising from all charges heard in the courts for this group, just over 21% led to a community-based order, whereas only 13% of charges for the non-disabled group led to these orders. Offenders with an intellectual disability were issued with more community based orders in three of the four offence categories used in the study, with offences against property again being the most frequent category of offences for both groups to be issued with these orders (see Table 15). The most likely single offence for male and female offenders with an

intellectual disability to receive a community-based sentence was theft, whereas again the most likely offence for other offenders were driving offences.

The finding that people with an intellectual disability were more likely to receive a community service order than other offenders at their first appearance in court, may relate to the court's recognition that appropriate educational, psychological, social skills, sexuality and vocational training programs are more likely to be found in the community than in the prison system. The community service order also provides the opportunity for maintenance of normal social skills rather than the acquisition of a set of institutional habits and routines and modelling upon typical members of the community rather than exposure to the anti-social violent and criminal behaviour occurring in prisons.

However, what may be seen to be more lenient sentencing, becomes debatable when account is taken of the differing uses made of alternatives to imprisonment. Alternatives to imprisonment for non-disabled offenders focus on the fine, which is finite, certain, unsupervised and retributive, while alternatives for offenders with an intellectual disability tend to involve probation (see Figure 24), which is periodic, uncertain, supervised and rehabilitative in conception.

While there are a range of non-custodial options currently available to the courts in Western Australia, their usefulness for people with an intellectual disability is limited. For example, one alternative suggested is home-based detention, as it "does not expose the person with intellectual disability to the abuses that frequently occur in prison and it ensures that any effort at habilitation occurs in the place where the person lives and works" (McCoy and Lowe, 1990, p. 41). The home detention program commenced in April 1990 in Western Australia but has had limited use. Despite a 73% increase in the number of Home Detention

Orders issued in 1993 (as compared with 1992) Home Detention Orders accounted for just 1.5% of all community based orders issued during that year Ferrante and Loh, 1994). Certainly for people with an intellectual disability, this may be related to the fact that home detention most closely parallels what might be seen as being the most problematic of the non-custodial gaps, that is, accommodation which ensures a level of supervision and community protection. Home detention consists of a non-removable wrist or ankle bracelet attached to the person. That bracelet is placed into a device at the person's home when a phone call is received at that person's home. The person must acknowledge the phone call verbally, otherwise that person's supervisor is called. A serious breach involves returning to court and spending the remainder of the sentence in prison. The person may also be visited at home during the home detention and made to submit to drug and alcohol testing.

It could be argued that the procedures involved in a home detention scheme may be beyond the abilities of some people with an intellectual disability, and so could be setting them up to fail. Secondly, those procedures necessitate constant support for the person involved, which would pose a heavy burden on the person's family or carer. Where the person resides with their family, the scheme could also place significant strain on the relationship between the person and their primary carer who happens to be their supervisor or de facto jailer. For those who do not live with their families, there is likely to be a resistance from residential services to accept or support a person on the basis of home detention. There is also the concern that such procedures can be used to pass the cost of detention onto families and disability services.

Community Service and Probation Orders are potentially positive options for offenders in assisting them to remain in the community. Community service orders are non-custodial penalties which may require an offender to undertake between 40 and 240 hours of unpaid work at an approved charitable or voluntary organisation to be completed within twelve months. Community service orders are frequently combined with Probation Orders. Probation Orders are non-custodial penalties which enable the courts to place an offender under supervision after conviction of an offence. A Probation Order has a minimum of six months and a maximum of five years duration, and may be subject to special conditions such as substance abuse or psychological counselling. Community Service Orders are only to be ordered instead of imposing a penalty of imprisonment and the offender must give consent to these orders being issued. A pre-sentence report is required, stating that the offender is a suitable candidate for such an order and that the relevant programs are available. All Community Service Orders are supervised by the Probation Services at Community Corrections and breach of Community Service Orders means the offender is brought back before the court and this may lead to imprisonment. A major difficulty in Western Australia is the availability of agencies where offenders with an intellectual disability may complete their order. For example, a recent study reported that community correction officers found it was very difficult to place these offenders (Cockram, Jackson & Underwood, 1994a). In addition, a survey of judicial officers suggested that intellectual disability make some offenders unsuitable for Community Service Orders (Cockram, Jackson & Underwood, 1993).

There are no specialised options within the Western Australian Probation Service for people with intellectual disabilities, therefore general community

services are relied upon. Consultations with probation officers have referred to the difficulties faced in dealing with these clients, including: the failure to recognise a person's disability, particularly if the person's disability is masked by other factors such as alcohol; the expense and difficulty of obtaining assessments; problems with transfers of information from the courts and the gaols; and the lack of services (especially accommodation), policy and training in this area (New South Wales Law Reform Commission, 1994).

Clearly, the fact that so many people with an intellectual disability are issued with Probation and Community Service Orders is problematic and demonstrates the need for wider sentencing options and facilities to be available for the Courts. This warrants further research.

(vii) Do Adult Offenders with an Intellectual Disability Have a Higher Rate of Recidivism Than Other Offenders?

An important aspect of the study of intellectual disability among offenders is the prevalence of recidivism. In this study, recidivism was defined as the probability of re-arrest. The results describe the variations in the probabilities of rearrest arising from the limited variables available from the summary arrest data. Some of these factors such as occupation and employment status were of dubious value and therefore of limited assistance in assessing the relative probabilities of rearrest. However, race, gender, age, offence, bail status and number of arrests all significantly influence the risks and timing of rearrest (Broadhurst, and Loh 1995). These factors are fundamental in distinguishing differential probabilities of rearrest and evaluations must be sensitive to which arrest event is relevant, if valid comparisons are to be made.

As noted, the rearrest probabilities calculated here take no account of the individuals who subsequently served prison sentences and thus for some period were not exposed to the risk of rearrest. The probability of rearrest will be underestimated and the time to fail extended for this group. Moreover, many offenders serve probation and/or community service orders, which might also modify the risk of rearrest or delay the time to rearrest. To address these problems, a combined database linking the first arrest population with other criminal justice records (including adult correctional records and police lockup terms) is under development in Western Australia. This will enable exact comparisons of various definitions (rearrest, re-conviction, re-imprisonment) of recidivism and permit the necessary refinements to the calculation of exposure to risk. Nevertheless, striking differences in the probability of rearrest were observed between offenders with an intellectual disability and mainstream offenders. In fact the finding of this research that the probability of rearrest of male non-Aborigines with an intellectual disability was 73% (compared with 52% for their non-disabled counterparts – see Table 16) was considerably higher than other studies, including the often cited White and Wood (1986) study where it was revealed that the recidivism rate for offenders with an intellectual disability was 60% and an Australian study (Klimecki, Jenkinson & Wilson, 1994) where it was found that there was a recidivist rate of 41.3% for offenders with an intellectual disability returning to prison.

The finding that people with an intellectual disability have a much higher probability of re-arrest raises a crucial question. Once known to the police, are people with an intellectual disability charged more often due to personal characteristics which have been identified in the offender with an intellectual

disability, and/or their low socio-economic status and lack of support services, or is it because of management procedures by the police?

Based on the experience of Special Offenders Services, Wood and White (1992) in discussing the reasons that people with an intellectual disability become multiple lawbreakers, were of the view that three factors seem to be prevalent: low self -esteem, the influence of more experienced peers and the lack of knowledge of consequences for one's actions.

This study did not examine the notion that re-offenders have a lower level of self esteem than those who don't re-offend. However, this factor could be an area for more rigorous examination in future research.

Other authors have supported the second factor cited by Wood and White (1992) – the influence of more experienced peers- as a factor contributing to the high rate of re-offending by people with an intellectual disability. For example, in Britain a number of research reports over the years have suggested that people with an intellectual disability are more likely to be "shopped" by their brighter criminal colleagues (Craft, 1984b, p. 13) and that association with delinquent colleagues is clearly related to participation in criminal behaviour at later stages (Farrington, 1983; Polk et. al, 1981). Support for this position also comes from a recent Western Australian study which investigated how offenders with an intellectual disability were disadvantaged by the criminal justice system from the perspective of family carers. It was found that a number of carers were of the view that prison was an inappropriate place for their family member with an intellectual disability who had offended because, as one mother commented..."prison is the worst place for my daughter – she is a concrete learner and doer...she soaks up the experience and learns from hardened criminals; consequently she has been in and

out of prison over the past five years" (Cockram, Jackson & Underwood, 1998, p.4). This factor may be one explanation for the higher rate of re-offending by people with an intellectual disability.

The last factor discussed by Wood and White (1992), that is, lack of knowledge of consequences for one's actions, might have some support if there was a greater rate of arrest for people with an intellectual disability than the general population. However, as it was not found that there was no difference in the arrest rates for people with an intellectual disability and the general population, this factor can be discounted. This would also apply to the suggestion by Prins (1980) that people with an intellectual disability are less expert at avoiding detection than their non-disabled counterparts.

Perske (1991) argued that people with an intellectual disability continue to end up in the criminal justice system because they were unable to learn from experiences owing to their cognitive impairments. A greater proportion of borderlines in the non-recidivist group may support this proposition. However, an analysis of recidivists and non-recidivists in the present study found this not to be the case. In fact there was no difference between the two groups in the percentage of individuals classified as borderline; 24% of re-offenders were in this category, whereas 25% of individuals who had only offended once by the census date also had this classification.

Age may be a factor in re-offending. Overall, recidivists with an intellectual disability tended to be younger (see Table 17) than other recidivists, suggesting that commission of the first offence at an early age may be a predictor of subsequent re-offending behaviour. This finding is consistent with findings of other studies (see for example Klimecki, Jenkinson & Wilson, 1994). Further

support for the relationship between age and subsequent participation in criminal behaviour, is demonstrated by the fact that offenders with an intellectual disability who had been charged with multiple offences by the census date in this study, were younger than those who had been charged only once. The mean age of recidivists was 19 years, whereas individuals who had been charged only once had a mean age of 24 years.

Accommodation has also been identified as a major contributing factor in re-offending by people with an intellectual disability (New South Wales Law Reform Commission, 1992). However, a recent study of recidivism among offenders with an intellectual disability found that stability of accommodation did not appear to be related to recidivism. The majority of third time offenders (69%) resided in stable accommodation usually with family, prior to arrest, disputing the hypothesis that secure accommodation is a stabilising influence against re-offending (Klimecki, Jenkinson & Wilson, 1994). It was only possible to extract details of accommodation status of individuals known to the Disability Services Commission on the last day of the study period. However, the finding of this study that the large majority of those arrested lived with family members, may be seen to be consistent with these findings.

Studies have also shown that employment status on entry to prison is related to recidivism. Broadhurst & Maller, (1992) and the Victorian Ministry of Police and Emergency Services (1990), for example, found that offenders who were employed, on release tended to re-offend less than those who were unemployed. Klimecki, Jenkinson & Wilson (1994) found that there were definite trends to indicate that employment status is related to recidivism. Both the first month and six to twelve months following release appear to be high-risk times for re-

offending. For second offenders, unemployment was highest in these periods, with 45% of those who re-offended within the critical time frame being unemployed. In the present study, given that over 80% of offenders with an intellectual disability (compared with 33% of other offenders) at their first receival into prison reported they were unemployed, this must be seen to be a critical issue for this group and a possible contributor to their re-offending in Western Australia.

Another explanation for rearrest may be found in the momentum of official notice. Once a person with an intellectual disability has come into formal contact with the system, the chances of avoiding future processing may be low. In short, the process may be self-generating. Evidence tending to confirm the increased surveillance hypothesis is found in longitudinal and self report- studies carried out by a number of authors (see for example, Tracy, Wolfgang and Figlio, 1990; Wolfgang, Figlio and Sellin 1972) where it was found that those who come from a poor neighbourhood, look different, or behave unusually have a very much greater chance of being caught in the law enforcement net. The more an offender gets caught, the more difficult it is to get disentangled from the net – a process sometimes called "the deviency amplification spiral" (Harding, 1995, p.11). The interaction between these factors and people with an intellectual disability would assure higher rates of involvement with police and formal criminal justice procedures.

The lack of services and support for people with an intellectual disability who have offended is a critical issue, and is likely to have a major impact on recidivism. This is not unique to Western Australia. Many submissions made to the New South Wales Law Reform Commission in their investigation of the criminal justice system and people with an intellectual disability (1996),

commented on the lack of appropriate services providing care and support for this group. For example, one submission stated "...although it is occasionally possible to find care for persons who have not committed offences, this becomes virtually impossible for those who have offended"(p.394). Clearly the finding of this study that the majority of offences were committed during the period covered by the latter half of the study, demonstrates the urgent need for resources to be allocated to recidivists. This is crucial to prevent further re-offending and to promote rehabilitation. Overseas programs, like the Lancaster Program, (Wood & White, 1992), have achieved a recidivism rate of 5% compared with a national rate of 60%. Establishing a similar service will require extra resources from both corrective services and disability services and a special budget allocation would need to be made available to implement it. If recidivism is prevented and rehabilitation is promoted, the expenditure will be balanced by savings in money spent on prisons and on the legal process.

It seems clear that there is not one explanation to account for the higher recidivism rate of people with an intellectual disability. It is likely that the influence of more experienced peers is a factor that contributes to over-representation of people with an intellectual disability in the criminal justice system. In addition, the findings of this study do support the view that age is a factor in re-offending. The fact that recidivists with an intellectual disability were younger than other recidivists provides evidence for the relationship between age and subsequent participation in the system. Unemployment is also likely to be a strong contributing factor. People with an intellectual disability at their first receival into prison, reported that they were far more likely to be unemployed than other prisoners. Based on other studies, this must be seen to be a critical issue and

a possible contributor to re-offending. Lack of services and support for people with an intellectual disability who have been charged, sentenced and paroled must also be seen to be factor, contributing to the high rate of recidivism for people with an intellectual disability. Clearly there are not enough preventative services and programs to address the behaviour that led to the person coming into contact with the law on a number of occasions. The goal for programs, support and services for people with an intellectual disability who re-offend, should be prevention and rehabilitation (or habilitation). Different treatment by police may also assure higher rate of re-arrest. If a person with an intellectual disability becomes associated with crime and is labelled, then it is more likely that they will be sought out by the police because of their 'lawlessness' or 'dangerousness'.

2. Is There Any Difference in the Treatment of Offenders with an Intellectual Disability Over time?

A notable finding of this study was the difference in the charge pattern over time. Not only were people with an intellectual disability charged more often, they were charged at a far greater rate over the latter part of the study period. That is, people with an intellectual disability were charged far less during the first 5-year period, 1985-1989 than the second 5-year period, 1990-1994 –(see Table 3), while arrests for the non -disabled sample were about the same over the two 5-year periods. However, the annual arrest rate of individuals with an intellectual disability arrested for the first time, remained largely constant, hence the finding that more arrests were made in the latter half of the study could be explained in terms of repeat offenders.

One plausible explanation for this finding may be that in Australia, including Western Australia, there has been a gradual increase in the proportion of people with an intellectual disability living in community environments where they can become involved in, or suspected of committing crimes. Over the past three surveys conducted by the Australian Bureau of Statistics (1981, 1988, 1993), it was found that the living arrangements of people with an intellectual disability in Australia decreased from 8.8% of individuals living in institutions in 1991 to only 5.7% in 1993. The downward trend in Western Australia is consistent with national trends. The Review of Accommodation Services for People with Disabilities in Western Australia (1992) found that from 1982 –1992, accommodation services progressively moved from a largely institutional orientation to a much less institutional focus with group homes providing almost a third of all accommodation services. During 1989-1990, the Disability Services Commission acknowledged that the current policy was to discourage families from seeking a government residential service (Stella, 1996). In 1989, Irrabeena, the service arm of the Authority for Intellectually Handicapped Persons (now Disability Services Commission), provided funding for residential services for 1175 individuals, 14.7% of whom lived in specialist disability hostels, whereas on the last day of the study period 31 December 1994, only 9.1% resided in these settings. The higher incidence of arrests during the period 1990 –1994 then, may offer support for the view that the rise of arrests of people with an intellectual disability within the criminal justice system, has corresponded with the deinstitutionalisation of state facilities (Armstrong, 1997).

The lack of support services overall for people with an intellectual disability in Western Australia, particularly for those with less severe disabilities, may have

also had an impact on police contact. The trend towards the provision of more accommodation for people with disabilities in local communities has given rise to the demand for realistic levels of individualised services and supports. The Accommodation Review (1992) commented that the focus on individual and family supports needed to include ongoing supports and living skills training for people already living independently in the community and noted that without adequate supports independent living could become very lonely and isolated (p. 43). However, from about the late 1980s with government funding dwindling, it became apparent that there were less and less support services available for individuals with less severe disabilities, in the form of accommodation services or support for employment or other day activities. Indeed the majority of people with an intellectual disability known to the Disability Services Commission do not receive a service from them. On the last day of the study period, their records indicate that 44% of individuals known to them were in receipt of services and only 30% of the sample in the present study received services – (see Table 1), no doubt because the individuals were predominantly in the borderline/mild categories.

By 1990, it was considered that people with intellectual disabilities should be treated in the same way as other people, and therefore the provision of services should be mainstreamed (Stella, 1996). This would mean that housing for example, would be provided by the public housing body, Homeswest and private real estate arrangements and indeed, in the early 1990s Homeswest did begin building houses for people with intellectual disabilities. Stella (1996) argued that mainstreaming of services led, in many instances, to chronically inadequate and uncoordinated service provision. The post-bureaucratic shift to Local Area Coordinators had the

effect of significantly reducing the available resources with which Local Area Coordinators and others could operate, and in turn left many people being insufficiently supported or supervised in the community. Lack of support services for people with an intellectual disability who have been charged, sentenced and paroled may be a critical factor. Clearly, support services should be focussed on these offenders to ensure that services meet the individual's needs such as sex education, health and community services and that challenging behaviour is addressed.

There is strong argument for the adoption of an inter-departmental program along the lines of the Special Offenders Services Program operating in Lancaster, Pennsylvania to enable offenders with intellectual disability to successfully complete probation or parole (Wood and White, 1992). The overall goal of the program is to enable offenders with intellectual disability to successfully complete probation or parole. This is accomplished by providing teaching, training, services and counselling in a habilitation plan specifically designed to meet the needs of each offender. The habits, routines and mores learned in this setting by offenders with intellectual disability apply to all areas of their lives, helping them to successfully participate in society, and not just to probation and parole. Participation in individualised programs is a condition of release on parole, and so is compulsory. A failure to participate, amounts to a breach of probation/parole regulations. A prisoner in breach of the program is returned to prison before being brought before the original sentencing judge, who determines whether detention will continue. This process usually is enough to modify prisoners' behaviour, and so the co-operation of the courts is necessary in order for the program to be successful. (p.156). The philosophy of these special offender programs, is to build

individualised programs based upon services towards which the client has shown interest, such as vocational training. The Lancaster program also reinforces the link between behaviour and consequences. This applies also to positive consequences arising from success within the individual's programs so that skills are learned and self-esteem increased. Because staff are knowledgeable about available services, referrals have a high success rate (p.156). This success is said to flow from the adoption of a joint systems approach; that is, combining intellectual disability and probation/parole services in one department, so that the best of both services is provided. There is also consistency and intensity of service provision. Clients are seen on a regular basis (at the initial stage, daily), crisis situations are dealt with immediately, and individual programs are designed to ensure client success which can be built upon. A critical element of the program is the focus on making clients responsible and accountable for their behaviour, backed by, if necessary, the sanction of the courts.

However, before such a program could be established, several issues would have to be resolved. Any program would have to be sufficiently resourced, to implement the special programs and services required for individual clients, and to provide sufficient staff to maintain high levels of supervision. In addition, community-based residential accommodation would have to be in place to provide further supervision where necessary. Staff for the program would have to be drawn from disability services and community corrections , with staff trained in the areas of assessing and designing programs, and implementing behavioural modification programs. The program would also have to have communication and interaction with criminal justice agencies, other government agencies such as departments of education, housing and other welfare agencies offering services,

including support in finding employment. It is crucial that any moves to provide community based accommodation facilities for offenders with intellectual disabilities, will not simply result in community based mini-prisons. There is a need for the establishment of a set of criteria, standards or principles which will identify the distinguishing features required to ensure that accommodation options for offenders which can be used as sentencing options do not become alternative forms of incarcerations. It is also essential that programs such as these be run according to legislative guidelines, to ensure that programs are court sanctioned, and determinate

Concluding Comments: Justice of Differential Treatment?

The probability of a person with an intellectual disability being arrested in Western Australia appears to be similar to that for anyone in the general population. Yet, this study has shown that adult offenders with an intellectual disability are clearly disadvantaged in their interface with the criminal justice system in comparison with other offenders. They are substantially more likely than other offenders to receive the harsher of the outcomes available at first arrest.

Significant differences were found between the two groups in terms of the types of offences with which they were charged, although it is not clear to what extent people with an intellectual disability actually commit more serious offences or whether other factors and, in particular, police discretion in charging are at work. There was evidence, however, of people with an intellectual disability being disadvantaged, in that they were treated differently by the police, in arrest processing for similar offences.

The critical question of whether people with an intellectual disability suffer disadvantage purely because they have an intellectual disability, cannot be ascertained from official data. Instead, the apparent differential treatment given to suspects with an intellectual disability compared with other offenders at the initial point of contact, could be explained by certain facts: first, people with an intellectual disability are more likely to be unemployed; they are more likely to be charged with different more serious offences and to have prior records of apprehension. Clearly if police discretion is biased against people with an intellectual disability, this has dire consequences for this group and will ensure that they have harsher outcomes, for example denial of bail and the increased likelihood of a custodial sentence. Further research as suggested previously, concentrating on police behaviour, would give us considerable insights into this.

A disproportionate number of detentions were ordered for people with an intellectual disability than other offenders and they were less likely to have sentences suspended. In this, they fail to benefit fully from current trends away from incarceration in favour of more constructive alternatives. The nature of the charge does not offer an adequate explanation for this. A crucial finding of this research is that it appears that the initial police decision to charge, seems to have an enduring, albeit indirect effect at the final stage of disposition. More people with an intellectual disability were directed to court because they were re-arrested, and in turn, this higher court referral rate guaranteed more prior court records and consequently stiffer penalties. In addition, people with an intellectual disability are far more likely to be unemployed than other offenders thus they are likely to be penalised for their already disadvantaged social position.

Of those individuals with an intellectual disability who went to prison for the first time, they received proportionately more custodial sentences in four of the five broad offence categories used in the study, that is, offences against persons, against property and good order offences. In addition, first offenders with an intellectual disability received parole less often and subsequently received more custodial sentences by the census date. More Aborigines and women with an intellectual disability went to prison than other offenders in these groups.

Evidence of different treatment was also apparent in that first offenders with an intellectual disability were more likely to receive a community based correction order, and at subsequent court appearances this group received more of these orders than other first time offenders. Differing uses were made of alternatives to prison, with offenders with an intellectual disability receiving the more punitive options.

Looking at the whole operation of the criminal justice process, it is clear that any disadvantage experienced by people with an intellectual disability at the sentencing stage, can properly be seen as the end result of a compounding effect of numerous factors operating at earlier stages in the process. To show that the detention rate of people with an intellectual disability is over double the rate of other offenders, virtually misses the real issue. The crucial point is that throughout the whole process, right from first contact with police, people with an intellectual disability are disadvantaged so that the final court outcome is merely an inevitable result. Even though there may be many participants in the system who may do all that is possible to try to achieve justice for offenders with an intellectual disability, the die is cast against equity right from the beginning.

Clearly the police have a critical role to play in the person's entry and subsequent journey through the criminal justice system. It is crucial that police procedures ensure that people with an intellectual disability are aware of their rights and are provided with the opportunity to exercise them, while at the same time fostering mutual understanding and respect between people with an intellectual disability and police. One way that this protection may be secured for a person with an intellectual disability, is by *requiring* a lawyer to be present for police questioning. The New South Wales Law Reform Commission (1996) recently raised this suggestion when they recommended that a 24-hour duty solicitor scheme be established. While police in that State did not support the recommendation, the Commission believed that the difficulties faced by people with an intellectual disability are so extreme that steps should be taken for them, and that a lawyer be present at all police interviews after arrest of a suspect with an intellectual disability. For many years now it has been recognised that there is a need for police at all levels, but particularly front line police officers, to have access to information and training regarding people with an intellectual disability. It is of enormous concern that the Police Academy in Western Australia has recently discontinued police training on issues involving people with an intellectual disability in favour of further computer studies. Truly comprehensive training on these issues must be instituted. Police Services must be trained to recognise when a person might have an intellectual disability and how to communicate with him or her. They also need to appreciate the factors that may cause a person with an intellectual disability to be accused of a crime or confess to a crime he or she did not commit.

The needs of offenders with an intellectual disability are complex and will require a committed response spanning legislative, administrative and funding initiatives. There is an urgent need to focus on developing service models where responsibility and expertise may be shared between the relevant government (and, where appropriate, non-government) agencies. Key areas for development include the provision of accommodation as part of a sentence, and rehabilitative programs, including behaviour intervention for re-offenders. The recidivism rate clearly indicates the failure of imprisonment as a mechanism for individual and social change. Special programs are therefore required if the re-offending rate of people with an intellectual disability is to be reduced.

Questions arise about the capacity of probation and parole services to effect the reintegration of people with an intellectual disability back into the community. Difficulties with parole are magnified for those with intellectual disabilities. Depending on the period of time an individual has spent in custody, there maybe a diminution of skills to overcome in order to reintegrate into society. Parole officers usually only have time to periodically check on the progress of those assigned to them. They have no time to spend on extensive counselling, life skills, education, or assistance in obtaining employment or other meaningful day activities. In any event support may not be limited to supervision, and may be required beyond the parole period. The absence of community-based accommodation and services will contribute to recidivism and prevent successful reintegration into the community. If released, a prisoner without community support may fail to comply with the parole order, and/or is more likely to re-offend and be sent back to the correctional setting.

Although there is general agreement among criminal justice system agencies that the absence or lack of accommodation and services is a critical issue, there is less certainty over which body should be responsible for providing them. In many jurisdictions, there is a tendency to view the roles of the criminal justice and disability services systems, as distinct. However, the development of appropriate services for offenders with an intellectual disability, particularly those with intensive support or accommodation components for example, are likely to require the input of a number of government agencies. Integration of services is necessary to ensure that prisoners with an intellectual disability who are released do not fall into gaps between existing services, and re-offend or otherwise breach parole/release conditions. Establishing links between the released person and service providers in the community can ease the person's reintegration into the community, and avoid them being simply cast adrift when Corrective Services are no longer accountable for their care and custody.

The Western Australian Department of Corrective Services operates a case management scheme for all prisoners, which assists prisoners to plan the various stages of their sentence, including post release. In the case of a prisoner with an intellectual disability, the case manager would usually be the Disability Services Commission, and the sentence plan developed would include elements of a behaviour management program designed to address or curtail the offending behaviour. Where the offender is willing to comply, supervision and management in a residential facility may arise as a post release option. However, individuals who have a less severe intellectual disability, that is their support needs arising from the disability are less intensive, would not be eligible for services provided by the Commission, and would find it difficult to access them elsewhere. It

appears that priority of service provision will be given to those individuals with an intellectual disability with moderate to high support needs which places those people with borderline to mild intellectual disability, who are in contact with the criminal justice system , outside of the priority group. It is argued that this does not follow. A person who is involved in the criminal justice system may have mild or even borderline assessed intellectual disability, but almost by definition, may have high support needs in terms of their need for intensive support, supervision and behaviour intervention. If the person has spent some time in prison, the resultant loss of skills may also mean they have high support needs, in spite of their assessed level of disability. It is suggested that many such people should fit squarely within the priority category for services, with particular emphasis on those individuals that continue to re -offend.

People with an intellectual disability are disadvantaged in many of their interactions with society, not the least of which are the problems encountered when they have contact with the criminal justice system. The responses of the State to date focus on either rejection (by simply ignoring, in the case of many minor infringements), or on separation and containment, through whatever means available. These responses fail both the individual, the service systems and society. The individual is unfairly punished which heightens their exclusion from society. Disability services and correctional services are stretched by trying to accommodate the needs of people within existing structures developed for other purposes and society fails in its obligations to rehabilitate and support an individual who requires assistance.

In the final analysis, while explanations of psychological and sociological disadvantage or susceptibility may have enhanced our understanding of why

people with an intellectual disability are over-represented in many prison populations, they are not sufficient to account for the findings of this study. It is clear from the findings of this study, that people with an intellectual disability are being treated differently when they come into contact with the criminal justice system. In addition there is strong evidence to suggest that the quality of services is a critical factor. We need to develop models of services to ameliorate the disadvantage that this group face and to assist in overcoming the high rate of re-arrest.

REFERENCES

American Association on Mental Retardation, (1992). Manual, *Mental Retardation: Definition, Classification and Systems of Supports*, (9th Ed.)Washington, D.C: American Association on Mental Retardation.

Armstrong, L. (1997). The reality of rights: People with an intellectual disability and the criminal justice system. *Australian Journal of Human Rights*, 78-89.

Australian Bureau of Statistics, (1995). *Australia at a Glance*. Canberra: Australian Bureau of Statistics.

Australian Bureau of Statistics (1993). *Survey of disability, ageing and carers* Australia. Cat. No. 4430.0

Australian Bureau of Statistics (1988). *Survey of disabled and aged persons*. Cat. No. 3152.0

Australian Bureau of Statistics (1981). *Survey of handicapped persons*. Cat.No. 2443.0

Bacchi, C. (1980). The nature-nurture debate in Australia 1900-1914. *Historical Studies*, 19, October, 75.

Baird, P. & Sandovnick, A. (1985). Mental retardation in over half a million consecutive live births: An epidemiological study. *American Journal of Mental Deficiency*, 899, 323-330.

Bates, F. (1986). *The Australian social worker and the law*. Sydney: Law Book Company, 64-70.

Bilken, D.P. & Mlinarcik, S. (1978). Criminal justice. In Wortis, J., (Ed.), *Mental retardation and developmental disability*. New York:Brumer/Mazel.

Bishop, J. (1983). *Criminal Procedure*. Sydney: Butterworths.

Blumstein, A., Farrington, D.P., & Moitra, S. (1985). Delinquency careers: Innocents, amateurs, and persisters. In N. Morris & M. Tonry, (Eds.), *Crime and Justice: An annual review of research*, Volume 6. Chicago Ill:University of Chicago Press, 187-222.

Bodna, B. (1986). People with an intellectual disability and the criminal justice system. In Challinger, D. (Ed.). *Intellectually disabled offenders*, Canberrra:Australian Institute of Criminology.

Bostock, L. (1991). Access and equity for people with a double disadvantage. *Australian Disability Review*, 2, 3-8.

Boslow, H.A. & Kandel, A. (1965). Psychiatric aspects of dangerous behaviour: The retarded offender. *American Journal of Psychiatry*, 122, 646.

Bottomley, S. (1989). Law and psychiatry: Aspects of the relationship in New South Wales. *Australian Journal of Law and Society* 2(1), 34

Bowden, K. (1994). No control of penis or brain? Key questions in the assessment of sex offenders with a learning difficulty. *The Journal of Sexual Aggression.* 1 (1), 57-63.

Bowen, J. (1987). *The Macquarie easy guide to Australian law.* Chatswood: Macquarie Library, Part II, 763.

Bradford, J. & Dimock, J. (1986). A comparative study of adolescents and adults who wilfully set fires. *Psychiatric Journal*, University of Ottawa, 11(4), 228-234.

Bradford, J.M. (1982). Arson: A clinical study. *Canadian Journal of Psychiatry*, 27, 188-93.

Bray, R. & Chan, J. (1991). *Community Service Orders and periodic detention as sentencing options: A survey of judicial officers in New South Wales.* Judicial Commission of New South Wales, Monograph Series, 3, 2.

Bright, J. (1989). Intellectual disability and the criminal justice system: New developments. *Law Institute Journal*, 63, 933.

British Psychological Society (1991). *Mental Impairment and Severe Mental Impairment: A Search for Definition.* Leicester: British Psychological Society.

Broadhurst, R., Maller, M., Maller, R. & Duffey, J. (1994). Aboriginal and nonAboriginal recidivism in Western Australia: A failure rate analysis. *Journal of Research of Crime Delinquency* 25, 83-108.

Broadhurst, R. & Loh. N. (1995). Rearrest probabilities for the 1984-1993 apprehended Western Australian population: A survival analysis. *Journal of Quantitative Criminology*, 11(3), 289-313.

Broadhurst, R., & Maller, M., (1992). The recidivism of sex offenders in Western Australia. *British Journal of Criminology*. 32, 54-80.

Broadhurst, R., & Maller, R. (1991). Estimating the numbers of prison terms in criminal careers from one-step probabilities of recidivism. *Journal of Quantitative Criminology*. 7, 275-290.

Broadhurst, R. & Maller, M. (1990). The recidivism of prisoners released for the first time: Reconsidering the effectiveness question. *Australian and New Zealand Journal of Criminology*. 23, 88-104.

Bromberg, W. & Thompson, C.B. (1937). The relation of psychosis, mental defect and personality type of crime. *Journal of Criminal Law and Criminology*, 28, 70-89.

Brookbanks, W. (1995). *The development of legislation to meet the needs of individuals with intellectual disability who, because of their disability are considered to present a serious risk to others.* Auckland: Ministry of Health.

Brown, H., Stein, J. & Turk, V. (1995). The sexual abuse of adults with learning disabilities: Report of a second two year incidence survey. *Mental Handicap Research*, 8 (1), 3-24.

Brown, B.S. & Courtless, T.F. (1971). *The mentally retarded offender*. U.S. Government Printing Office, Washington DC: Department of Health Education & Welfare Publication No. (HSM) 72-9039.

Byrnes, L. (1995). People with an intellectual disability. *Interaction*, 8(5), 19-24.

Burgoyne, P.H. (1979). *Recidivism among rapists*. Unpublished report, Victoria: Australian Criminology Research Council and Department of Community Welfare Services

Campbell, I.G. (1988). *Mental Disorder and Criminal Law in Australia and New Zealand*. Sydney: Butterworths.

Carlen, P. (1988). *Criminal Women*. Cambridge: Polity Press.

Chapman, T. & Clare, I. (1992). Education about the laws and social rules relating to sexual behaviour. *Mental Handicap* , 20 (2), 74-80.

Clare, I.C.H. & Gudjonsson, G.H. (1995). The vulnerability of suspects with intellectual disability during police interviews: A review and experimental study of decision-making. *Mental Handicap Research*, 8(2), 110-128.

Clare, I.C.H. & Gudjonsson, G.H. (1993). Interrogative suggestibility, confabulation and acquiescence in people with learning difficulties (mental handicap): Implications for vulnerability during police interrogations. *British Journal of Clinical Psychology*, 32, 295-301..

Clarke, A.M, Clarke, A.D.B. & Berge, J.M. (1985). *Mental deficiency: The changing outlook*. London:Methuen.

Cockram, J., Jackson, R. & Underwood, R. (1998). People with an intellectual disability and the criminal justice system: The family perspective. *Journal of Intellectual and Developmental disability*, 23(1) 41-56.

Cockram, J., Jackson, R. & Underwood, R. (1994a). Attitudes towards people with an intellectual disability – Is there justice? *Proceedings of the First International Congress on Mental Retardation. The Mentally Retarded in the 2000s Society*. Rome, Italy, March 23-26, p.342-356.

Cockram, J., Jackson, R. & Underwood, R. (1944b). Prison Officers Perceptions of Offenders with an Intellectual Disability. *National Socio-Legal Bulletin*, No. 15, Summer.

Cockram, J., Jackson R. and Underwood R. (1993). Perceptions of the judiciary and intellectual disability. *Australian and New Zealand Journal of Developmental Disabilities*, 18(3), 189-200.

Cockram, J. , Jackson, R. & Underwood R. (1991) People with an intellectual disability in the Criminal Justice System: The police perspective. *Proceedings of the National Evaluation Conference*. Vol. 1. 128 - 134. Australasian Evaluation Society. Adelaide. October.

Cocks, E. (1994). *Encouraging a paradigm shift in services for people with disabilities*. Social Research and Development Monograph No. 9. Perth: Edith Cowan University.

Coid, J. (1988). Mentally abnormal prisoners on remand - rejected or accepted by the NHS. *British Medical Journal* . 296, 79-82.

Community Services Victoria (1991). Review of the Kingsbury Secure Services Unit (Management Review Unit). PMR KS 003). *Conference proceedings, Criminal Law and People with Intellectual Disability*. Perth, Western Australia.

Conley, R.W., Luckasson, R. & Bouthilet, G.N. (1992). *The criminal justice system and mental retardation*. Maryland:Brookes Publishing.

Cox-Lindenbaum, D. (1990). A model for staff training and clinical treatment for the mentally retarded sex offender. In A. Dosen, A. Van Gennep and G.J. Zwanikkeen (Eds). *Treatment of mental illness and behavioural disorders in the mentally retarded*, Proceedings of the international congress (pp 387-94). Leiden, The Netherlands: Logan Publications.

Craft, M. (1984a). Should one treat or gaol psychopaths. In M. & A. Craft (Eds). *Mentally abnormal offenders*. London: Balliere Tindall, 384-96.

Craft, M. (1984b). Low intelligence, mental handicap and criminality. In M. and A. Craft (Eds). *Mentally abnormal offenders*. London: Balliere Tindall, 177-185.

Craft, M., & Craft, A. (1978). *Sex and the Mentally Handicapped*. London: Routledge and Kegan Paul.

Crow, I. (1987). Black people and criminal justice in the U.K. *The Howard Journal*, 26, 4, 303-13.

Curren, D.J. (1984). The myth of the "new" female delinquent. *Crime and Delinquency*, 30(3), 86-399.

Day, K. (1993). Crime and mental retardation: A review. In K. Howells, and C.R. Hollin (Eds). *Clinical approaches to the mentally disordered offender*. New York: Wiley.

Day, K. (1990). Mental retardation: Clinical aspects and management. In R. Bluegrass and P. Bowden (Eds). *Principles and practice of forensic psychiatry*. Edinburgh: Churchill Livingstone, 399-418.

Day, K. (1988). A hospital based treatment programme for male mentally handicapped offenders. *British Journal of Psychiatry*, 153, 635-44.

Deane, K. (1994). Better represented by a poodle: The case of Dominic Simms. *Socio-Legal Bulletin*, 47, 41-52.

Deane, K. & Glaser, W. (1994). *The characteristics and prison experience of offenders with an intellectual disability: An Australian study.* Melbourne: University of Melbourne.

Denowski, G.C. & Denowski, K.M. (1985). The mentally retarded offender in the state prison system. *Criminal justice and behaviour*. 12, 1, 55-70.

Denowski, G.C. & Denowski, K.M. (1984). Community based residental treatment model for mentally retarded adolescent offenders. In J.M. Berg (Ed). *Perspectives and Progress in mental retardation*, Vol. 1. Social Psychological and Educational Aspects. Baltimore: University Park Press, 301-311.

Department of Health (1989). *Needs and Responses: Services for adults with mental handicap, Who are mentally ill, Who have behaviour problems or Who offend*. London: Department of Health.

Department of Health and Community Services, Victoria (May, 1993). *Statewide Forensic Program: IDS Policy, Procedures and Guidelines*. Author.

Dickens, D.M. (1991). A case for hospital treatment. In K. Herbst and J. Gunn (Eds). *The Mentally Disordered Offender*. Oxford: Buttworth-Heinemann in association with the Mental Health Foundation.

Disability Services Commission, *Annual Report*, 1994-95.

Dovey, T. (1988). Home detention and supervision schemes, in D. Biles (ed). *Current Trends in Corrections*, Sydney: Federation Press.

Dyggve, H. & Kodahl, T. (1979). Disease pattern among 942 mentally retarded persons in a Danish county. *Acta Pschiatrica Scandinavia*, 59, 381-94.

Edgerton, R.B. (1981). Crime, deviance and normalisation reconsidered. In R. Bruininks, C. Meyers, B. Sigford and K. Sabin (Eds). *Deinstitutionalisation and community adjustment of mentally retarded people*. Washington D.C: AAMR., 145-166.

Elion, V., & Megaree,E.I. (1979). Racial identity, length of incarceration and parole decision making. *Journal of Research in Crime and Delinquency* 16, 232-245.

Ellis, J. & Luckasson, R. (1985). Mental retarded criminal defendants. *George Washington Law Review*, 53(3-4),414-493.

Farrington, D.P. (1983). *Further analyses of a longitudinal survey of crime and delinquency*. Final report to the National Institute of Justice: Washington, D.C.

Fennell, P.W.H. (1994). Mentally disordered suspects in the criminal justice system. *Journal of Law and Society*, 21, 57.

Ferrante, A. (1993). Developing an offender-based tracking system: The Western Australian INOIS Project. *Australian and New Zealand Journal of Criminology*, 26, 232-250.

Ferrante, A. and Loh, N. (1994).Crime and justice statistics for Western Australia. Perth: Crime Research Centre.

Ferrante, A. (1996) *Personal communication.*

Ferrante, A. (1997). *Personal communication.*

Fitzgerald, R. (1990). Criminal law and people with an intellectual disability: Prisoners with intellectual deficits, a view from inside. In Conference Proceedings, *Questions of balance: Criminal law and People with intellectual disabilities*, July, Perth.

Fitzgerald, R.E. & Downs-Stoney, D. (1987). *Prisoners who are known to the Authority for Intellectually Handicapped Persons: A review*. Internal Research Report, Western Australian Department of Corrective Services.

Fitzpatrick, M. (1988). Preventing the unfit from breeding: The Mental Deficiency Bill in Western Australia, 1929. In P. Hetherington (Ed). *Childhood and society in Western Australia*. Nedlands: University of Western Australia Press with the Centre for Western Australian History.

Fox, C. (1987). Controlling Sentences. *Australian and New Zealand Journal of Criminology* 20, 218-246.

Freeley, M. (1979). *The process is the punishment*. New York: Sussel Sage Foundation.

French, L. (1983). The mentally retarded and pseudoretarded offender: A clinical/legal dilemma. *Federal Probation* (September), 55-61.

Fulero, S.M. & Everington, C. (1995). Assessing competency to waive Miranda rights in defendants with mental retardation. *Law and Human Behaviour* 19(5), 533-543.

Gale, F. & Wundersitz, J. (1987). Police and black minorities: The case of Aboriginal youth in South Australia. *Australian & New Zealand Journal of Criminology* (20) 78-94.

Garcia, S.A. & Steele, H. (1988). Mentally retarded offenders in the criminal justice system and mental retardation services systems in Florida: Philosophical, placement and treatment issues. *Arkansas Law Review*, 41, 809.

Gelder, M., Gath, D., & Mayon, R., (1990). *Oxford Textbook of Psychiatry*, (2nd ed.), Oxford: Oxford Medical Publications.

Gibbins, T.C.N., (1981). England and Wales in F. Adler (Ed). *The incidence of female criminality in the contemporary world*. New York: University Press.

Gibbins, T.C.N., and Robertson, G. (1983). A survey of the criminal careers of hospital order patients. *British Journal of Psychiatry*, 143, 362-9.

Gilby, R., Wolf, L. and Goldberg, B. (1989). Mentally retarded adolescent sex offenders. A survey and pilot study. *Canadian Journal of Psychiatry* 34 (6), 542-8.

Glaser, W.F. (1996). A comparison of intellectually disabled and non-disabled sex offenders. *Proceedings of the 12th Annual Congress of the Australian and New Zealand Association of Psychiatry, Psychology and Law: Forensic issues in mental handicap*. Melbourne, 243-248.

Goddard, H.H. (1914). *Feeble-mindedness*. New York: MacMillan.

Goring, C. (1913). *The English convict*. London: Her Majesty's Statutory Office. Reprinted 1972, Patterson-Smith.

Gross, G. (1984). *Activities of the developmental disabilities adult offender project.* Olympia, W.A: Washington State Developmental Disabilities Planning Council.

Grossman, H.J. (Ed.), (1983). *Classification in Mental Retardation.* Washington: American Association on Mental Deficiency.

Gudjonsson, G.H. (1990). One hundred alleged false confession cases: Some normative data. *British Journal of Clinical Psychology*, 29, 249-50.

Gudjonsson, G.H., Clare, I.C.H., Rutter, S. & Pearse, J. (1993). *Persons at risk during interview in police custody: The identification of vulnerability.* Research Study No. 12. The Royal Commission on criminal justice. London: HMSO.

Gunn, J. & Fenton, G. (1969). Epilepsy in prisons: A diagnostic survey. *British Medical Journal*, 4, 326-8.

Gunn, J. Maden, A. & Swinton, M. (1991). Treatment needs of persons with psychiatric disorders. *British Medical Journal*, 303, 338-4.

Hagberg, B. & Kyllerman, M. (1983). Epidemiology of mental retardation a Swedish survey. *Brain Development*. 5 ,441-449.

Haggerty, D., Kane, L. & Udall, D. (1972). An Essay on the legal rights of the mentally retarded. *Family Law Quarterly*, 6, 59-71.

Harding, R. (1995). *Aboriginal contact with the criminal justice system and the impact of the Royal Commission into Aboriginal deaths in custody.* Leichardt: Hawkins Press.

Hayes, S. (1996). *Reducing recidivism amongst offenders with an intellectual disability* (unpublished report).

Hayes, S. (1994). Intellectually disabled defendants: Characteristics and psychological assessment. In F. Fabrizino and A. Piccioni (Eds). *Proceedings of the First International Congress on Mental Retardation.* Rome, March 23-26, 361-375.

Hayes, S. (1993). *People with an intellectual disability and the criminal justice system: Appearances before local courts.* Sydney: New South Wales Law Reform Commission, Research Report No. 4.

Hayes, S. (1991a). Sex offenders. *Australian and New Zealand Journal of Developmental Disabilities* 172, 221-7.

Hayes, S. (1991b). Services for offenders: Mentally disabled prisoners, planning resources. *Interaction*, 5(2). 34-35.

Hayes, S. & Hayes, R. (1982). *Mental retardation: Law, policy and administration.* Sydney: Law Book Company.

Hayes, S. and Hayes, R. (1984). *Simply Criminal.* Annandale: Federation Press.

Hayes, S. & McIlwain, D. (1988). *The prevalence of intellectual disability in the New South Wales prison population: An empirical study.* Report to the Criminology Research Council, Canberra.

Hayes, S.C. & Craddock, G. (1992). *Simply Criminal* (2nd Ed.). Annandale: Federation Press.

Haywood, C. (1976). "Reaction Comment" on Beverly Rowan, "Corrections", in Kindred, M. (Ed.), *The Mentally Retarded Citizen and the Law.* New York: The Free Press.

Heindensohn, F. (1996). *Women and Crime.* London: Macmillan Press.

Herlihy, J.H. & Kenny, R.G. (1990). *An Introduction to Criminal Law in Queensland and Western Australia.* Sydney: Butterworths.

Herman, D.H.J, Singer, H., & Roberts, M. (1988) Sentencing of the mentally retarded criminal defendant. *Arkansas Law Review* (41), 765-808.

Hill, T. (1981). *Generalised Interactive Record Linking System: GIRLS (Strategy Guide, Concepts Guide, Weights Guide)*. Ottawa: Statistics Canada.

Hirschi, T. & Hindelgang, M.J. (1977). Intelligence and delinquency: A revisionist review. *American Sociological Review*, 42, 571-87.

Hodgins (1992). Mental disorder, intellectual deficiency and crime: Evidence from a birth cohort. *Archives of General Psychiatry*, 49(6) 476-483.

Home Office (1992). *Gender and the criminal justice system*. London: HMSO

Homel, R. (1980). *Penalties and the Drink Driver*, NSW Bureau of Crime Statistics and Research, Report No. 1.

Howe, G.R. & Lindsay, J. (1981). A generalised iterative record linkage computer system for use in medical follow-up studies. *Computers and Biomedical Research*, 14, 327-40.

Ierace, M. (1989). *Intellectual disability: A manual for criminal lawyers*. Sydney: Redfern Legal Centre Publishing.

Illinois Mentally retarded and mentally ill offender task force (1988). *Mentally retarded and mentally ill offender task force report*. Springfield: Author.

Jones, G. & Coombes, K. (1990). *The prevalence of intellectual deficit among the Western Australian prisoner population*. The Western Australian Department of Corrective Services, Unpublished Report.

Klimecki, M.R., Jenkinson, J. and Wilson, L. (1994). *A study of recidivism among offenders with an intellectual disability*. Australian and New Zealand Journal of Developmental disabilities, Vol. 19. 209-219.

Klinger, D.A (1994). Demeanour or Crime? Why "Hostile" citizens are more likely to be arrested. *Criminology*, 32, 475-493.

Koller, H., Richardson, S.A., Katz, M. & McLaren, J. (1982). Behaviour disturbance in childhood and early adult years in populations who were and were not mentally handicapped. *Journal of Preventative Psychiatry*, 1, 453-68.

Kugel, R.B., Trembath, J. & Sagar, S.S. (1968). Some characteristics of patients legally committed to a state institution for the mentally retarded. *Mental Retardation*, 6, 2-8.

Kunjukrishnan, R. (1979). 10-year survey of pre-trial examinations in Saskatchewan. *Canadian Journal of Psychiatry*, 24, 683-689.

Laing, J.M. (1995). The mentally disordered suspect at the police station. *Criminal Law Review*, 371.

Law Handbook (1991). Sydney: Redfern Legal Centre, 8-12.

Law Reform Commission of W.A. (1991). *Report on the Criminal Process and Persons Suffering from Mental Disorders*. Perth: Law Reform Commission of W.A.

Lawrence, H. & Child, F. (1989). *The Legal Resources Book (WA)*. (2nd ed.). East Victoria Park, W.A: Sussex Street Community Centre.

Lay, R. (1988). Home detention: A community programme, in D. Biles (Ed). *Current Australian Trends in Corrections*. Sydney: Federation Press.

Leonard, E.B. (1982). *Women, Crime and Society*. Longman: London.

Lewis, J. & Yarnell, H. (1951). *Pathological fire setting: Nervous and mental diseases*. Monograph No. 82, New York: Coolidge Foundation.

Luckasson, R. (1988). The dually diagnosed client in the criminal justice system. In J. Stark, J. Menolascino, M. Albarelli & V. Gray (Eds.). *Mental retardation and mental health: Classification, diagnosis, treatment services*. New York: Springer-Verlag.

Lund, J. (1990). Mentally retarded criminal offenders in Denmark. British *Journal of Psychiatry*, 156, 726-31.

Lyall, I, Holland, J., Collins, S. & Styles, P. (1995) Incidence of persons with a learning disability detained in police custody: A needs assessment for service development, *Medicine, Science and Law* (35), 61-71.

MacEachron, A. (1979). Mentally retarded offenders: Prevalence and characteristics. *American Journal of Mental Deficiency*, 84,165-176.

Maloney, J. (1983). The J.B. factor. *Saturday Review*, November/December, 10-13.

McAfee, J., Cockram, J., & Wolfe, P. (in press). Police reactions to crimes involving people with mental retardation. *Education and training in mental retardation and developmental disabilities*.

McAfee, J. & Gural, M. (1988). Individuals with mental retardation and the criminal justice system: The view from State's Attorneys General. *Mental Retardation*, 26, 5-12.

McClintock, F.H. (1963). *Crimes of violence*. London: Macmillan.

McCord, J. (1979). Some child rearing antecedents of criminal behaviour in adult men. *Journal of Personality and Social Psychology*, 37, 1477-86.

McGarvey, B., Gabriele, W.F., Bentler, P.M. & Medrick, S.A. (1981). Social class, education and criminality: A multiple indicator model. *Journal of Abnormal Psychology*, 90, 354-64.

McCoy, M. & Lowe, H. (1990). *Criminal Law and people with intellectual disabilities: Alternative options to custody*. Conference proceedings, Questions of Balance, Criminal Law and People with Intellectual Disability, Perth, Western Australia.

Maloney, M. (1983) cited in J. McGee & F. Menolascino (1992). The evaluation of defendants with mental retardation in the criminal justice system in R. Conley, R. Luckusson & G. Bouthilet, *The criminal justice system and mental retardation: Defendants and victims*. Baltimore: Brookes Publishing

Menolascino, F.J. (1975). A system of services for the mentally retarded offender. *Crime and Delinquency*, 21(1), 57-64.

Menninger, K.A. (1986). Mental retardation and criminal responsibility: Some thoughts on the idiocy defence. *International Journal of Law and Psychiatry*, 8, 343-357.

Messinger, E. & Apfelberg, B. (1961). A quarter century of court psychiatry. *Crime and Delinquency*, 7, 343-62.

Milner, R.O. (1949). Delinquent types of mentally defective persons. *Journal of Mental Science*, 95, 842-59.

Ministry of Justice (1995) *Community Corrections Division Manual.* Perth: Ministry of Justice.

Ministry of Justice (1994). *Annual Report*. Perth: Ministry of Justice

Morgan, N. (1993). Non-custodial sentences for adult offenders in Western Australia. *University of Western Australia Law Review*, 23(2), 34-38.

Morris, A. & Gelsthorpe, L. (1981) (Eds). *Women and Crime*. Cambridge: Cambridge Institute of Criminology.

Morton, J., Hughes, D. & Evans, E. (1986). Individualizing justice for offenders with developmental disabilities: A descriptive account of Nebraska's IJP model. *Prison Journal*, 52 (2), 66

Murphy W.D., Coleman, E.B. & Haynes, M.R. (1983). Treatment and evaluation issues with the mentally retarded offender. In J.D. Greer and I.R. Stuart (Eds). *The sexual agreessor: Current perspectives on treatment*. New York: Van Nostrand Reinholt.

Murphy, G.H. Hartnett, H. and Holland, A.J. (1995). A survey of intellectual disability amongst men on remand in prison. *Mental Handicap Research*, 8(2), 81-98.

Nelson-Hall, J. (1992). Correctional services for inmates with mental retardation. In R.W. Conley, R, Luckasson and G.N. Bouthilet, *The Criminal justice system and mental retardation*. Baltimore: Paul H. Brookes.

New South Wales Anti-Discrimination Board. (1981). *Discrimination and intellectual handicap*. Sydney: New South Wales Anti-Discrimination Board.

New South Wales. Law Reform Commission (1996). *People with an intellectual disability and the criminal justice system*, Report 80. Sydney: New South Wales Law Reform Commission.

New South Wales Law Reform Commission (1994). *People with an intellectual disability and the criminal justice system: Courts and sentencing issues*, Discussion paper 35. Sydney: New South Wales Law Reform Commission

New South Wales Law Reform Commission, (1993). *People with and Intellectual Disability and the Criminal Justice System: Policing Issues*, Discussion Paper 29. N.S.W. Law Reform Commission: Sydney.

New South Wales Law Reform Commission (1992). *People with an intellectual disability and the criminal justice system. Issues Paper*. Sydney: New South Wales Law Reform Commission.

Newcombe, H.B. (1988). *Handbook of Record Linkage: Methods for Health and Statistical Studies*, Administration and Business, Oxford: Oxford University Press.

Nicholson, The Hon. Mr. Justice R.D. (1994a). Recognition of Intellectual Disability in the Criminal Justice System: The role of the Law. *Psychiatry Psychology and Law* (1), 81-85.

Nicholson, The Hon. Mr. Justice R.D. (1994b). *Waving the Magic Wand - Solving Key Legal Issues Relating to Intellectual Disability*. Paper presented to the 6th Joint National Conference of the National Council on Intellectual Disability and the Australian Society for the Study of Intellectual Disability, incorporating the 17th State Conference of the Australian Association for Special Education. Fremantle, W.A. 26-30 October.

Nicholson, The Hon. Mr. Justice, R.D. (1990). Criminal Law and People with an Intellectual Disability: An Historical Perspective. *Questions of Balance: Criminal Law and People with an Intellectual Disability*. Conference Proceedings. Perth, 6-17.

Noble, J.H. and Conley, R.W. (1992). Toward an Epidemiology of relevant attributes. In R.W. Conley, R, Luckasson and G.N. Bouthilet, *The Criminal justice system and mental retardation*. Baltimore: Paul H. Brookes.

New South Wales Bureau of Crime Statistics and Research (1979). *Two Studies of Recidivism*, NSW Bureau of Crime Statistics and Research Report No. 6.

New South Wales Department of Corrective Services (1972). *The Female Recidivist*, Research and Statistics Division, Report No. 9.

Oliver, M. (1990). *The politics of disablement*. Basingstoke: Macmillan and St Martin's Press.

O'Sullivan, G.H. & Kelleher, M.J. (1987). A study of fire setters in the south west of Ireland. *British Journal of Psychiatry*, 151, 818-23.

Payne, C., McCabe, S. & Walker, N. (1974). Predicting offender-patients reconvictions. *British Journal of Psychiatry*, 125, 60-64.

Perlman, L.G., Erickson, K.I., Esses, V.M., & Isaacs, B.J. (1994). The developmentally handicapped witness: Competency as a function of question format. *Law and Human Behavior*, 18(2), 171-187.

Perske, R. (1991). Unequal Justice: *What can happen when a person with retardation or other developmental disabilities encounter the criminal justice system*. Nashville: Abingdon Press.

Polk, K., Alder, C., Basemore, G., Blake, G., Cardary, S., & Coventry, G. (1981). *Becoming adult: An analysis of maturational development from age 16 to 30*. Final report, Grand No. MH 14806, Centre for Studies of Crime and Delinquency, National Institute of Mental Health, Washington, D.C: U.S. Department of Health and Human Services.

Potas, I. (1982). *Just deserts for the mad*. Canberra: Australian Institute of Criminology.

Price, R.R. (1970). Mentally disordered and dangerous persons under the criminal law, *Canadian Journal of Corrections*, 241-246.

Prins, H.A. (1980) Mad or bad: Thoughts on the equivocal relationship between mental disorder and criminality. *International Journal of Law Psychiatry* (3), 421-433.

Pugh, M. (1986). The mentally retarded offenders program of the Texas Department of Corrections, *The Prison Journal*, 66 (1), Spring/summer, 39-51.

Rantakillio, P. & von Wendt, L. (1986). Mental retardation and subnormality in birth cohort of 12,000 children in Northern Finland. *American Journal of Mental Deficiency*, 90, 380-387.

Reichard, C.L., Spencer, J. & Spooner, F. (1982). The Mentally Retarded Defendant Offender. In M. Santamour and P. Watson (Eds). *The Retarded Offender*. New York: Praeger, 121-39.

Review of accommodation services for people with disabilities in Western Australia (1992). Perth: Disability Services Commission.

Rockoff, E. (1978). The retarded offender: Missing in action. *Corrective and Social Psychiatry and Behaviour Technology Methods and Therapy*, 24(3), 130-132.

Rockowitz, R. (1985) quoted in Santamour, M. (1986). The offender with mental retardation, *The Prison Journal*, 66, 1 Spring/Summer, 3-18.

Roos, L.L. & Wajda, A. (1991). Record linking strategies: Part 1, estimating information and evaluating approaches. *Methods of Information in Medicine*, 30, 117-23.

Rowan, J. (1992). Electronic recording of police interviews in New Zealand. *New Zealand Law Journal*, 11, 400-402.

Royal Commission into Aboriginal deaths in custody (1991). National Report. Canberra: Australian Government Printing Office.

Russell, E. (1980). *A History of the Law in Western Australia*. Nedlands: University of Western Australia Press.

Santamour, M. (1986). The offender with mental retardation. *The Prison Journal*, 66, 1. Spring/Summer, 3-18.

Santamour, M. (1989). *The mentally retarded offender and corrections*. Washington D.C: American Correctional Association.

Schilling, R.F. and Schinke, P. (1988). Mentally retarded sex offenders: Fact, fiction and treatment. *Journal of Social Work and Human Sexuality*, 7, 33-48.

Scorzelli, J.F., & Reinke-Scorzelli, M. (1979). Mentally retarded offender: A follow-up study. *Rehabilitation Counselling Bulletin, September, 70-73.*

Scott, P.D. (1977). Assessing Dangerousness in criminals. *British Journal of Psychiatry*, 131, 127-142,

Shiotuski, Y., Matsuishi, T., Yoshimura, K, et al. (1984). The prevalence of mental retardation (MR) in Kurume City. *Brain Development*. 487, 490.

Simpson, J. (1989). A visit to four gaols. *Interaction*. 3, (3), 10.

Smith, C., Algozzine, B. Schmid, R. & Hennly, T. (1990). Prison adjustment of youthful inmates with mental retardation. *Mental Retardation*. 28, 177-81.

Snashall, R. (1986). *Pre-trial Diversion for Adult Offenders*. Australian Institute of Criminology Seminar Proceedings, 10, Canberra, 2.

Social Development Committee, Parliament of Victoria (August, 1992). *Inquiry into mental disturbance and community safety*. Fourth and Final Report.

Soothill, K.L. & Gibbens, T.C. (1978). Recidivism of sexual offenders: A reappraisal. *British Journal of Criminology*, 18, 267-76.

South Australia (1989). *The Impact of Parole Legislation Change in South Australia.* Department of Correctional Services and Office of Crime Statistics, Social Issues No. 2.

Steiner, J. (1984). Group counselling with retarded offenders. *Social Work*, 29, 181-185.

Stella, L. (1996) Normalisation and Beyond: Public Sector Residential Care 1965-1990 in E. Cocks, C. Fox, M. Brogan & M. Lee (Eds) *Under Blue Skies: The social construction of intellectual disability in Western Australia.* Perth: Centre for Disability Research & Development, Edith Cowan University.

Sundram, C. (1989). *Developmentally disabled offenders in New York State prisons.* An interim report, Correctional Facilities. Albany: New York State Commission on quality of Care for the mentally disabled.

Sutherland, E.H. (1931). Mental efficiency and crime. In K. Young (Ed). *Social attitudes*. New York: Holt.

Svendsen, B.B. & Werner, J. (1977). Offenders with ordinary services for the mentally retarded in Denmark. In P. Mittler (Ed). *Research to practice in mental retardation*. Baltimore: University Park Press, 419-24.

Swanson, C.K. & Garwick, G.B. (1990). Treatment for low functioning sex offenders: Group therapy and interagency co-ordination. *Mental Retardation*, 28 (3), 155-61.

Sykes, G.M. (1967). *Crime and society*. New York: Random House.

The Birmingham Report. CSO Files, AN24, Acc752, File No. 1108/1911

Thomas, J.E. & Stewart, A. (1978). *Imprisonment in Western Australia: Evolution, theory and practice*. Nedlands: University of W.A. Press.

Thompson, B. (1989). *The recidivism of early release, parole and mandatory release prisoners in NSW 1982-1989*. Paper presented to the 5th annual conference of the ANZ Society of Criminology, Sydney University.

Thomson, D. Bergden, A. & Morrison, M. (1993). The release of serious violent offenders and community safety in G. Gervill and W. Lucas (Eds). *Serious violent offenders: Sentencing, psychiatry and law reform.* Australian Institute of Criminology Conference Proceedings, Canberra.

Tong, J.E. & Mackay G.W. (1969). A statistical follow-up of mental defectives of dangerous or violent propensities. *British Journal of Delinquency*, 9, 276-84.

Tracy,P.E., Wolfgang, M.E. & Figlio, R.M. (1990*). Delinquency careers in two birth cohorts*, New York: Plenum Press.

Tully, B. & Cahill, D. (1984*). Police interviewing of the mentally handicapped: An experimental study*. London: The Police Foundation.

Tutt, N.S. (1971). The subnormal offender. *British Journal of Subnormality*, 17, 42-7.

United States Department of Justice Bureau of Justice Statistics (1986). *Tracking offenders: White collar crime*. Washington: Bureau of Justice Statistics, Special Report.

United States Department of Justice, Bureau of Justice Statistics (1984). *Tracking offenders: The child victim*. Washington: Bureau of Justice Statistics, Special Report.

Victorian Ministry of Police and Emergency Services (1990). *Recidivism Research Project*. Melbourne: Unpublished report.

Victorian Office of Corrections, (1989). *Services for intellectually disabled offenders/prisoners*. A report to the Correctional Services Administrators Conference, Mimeo, Melbourne.

Wajda, A. & Roos, L.L. (1987). Simplifying record linkage: Software and strategy. *Computers in Biology and Medicine*, 17(4), 239-48.

Walker, J. (1991). *Australian prison trends*. Monograph No. 176. Canberra: Australian Institute of Criminology.

Walker, N. & McCabe, S. (1973). *Crime and insanity in England*. Edinburgh: Edinburgh University Press.

Wellesley, D., Hockey, A, Montgomery, P., & Stanley, F. (1992). Prevalence of Intellectual Handicap in Western Australia: A community study. *The Medical Journal of Australia*, 156, 94-102.

West, D.J. and Farrington, & (1977). *The delinquent way of life*. London: Heinemann.

West, D.J. & Farrington, D.P. (1973). *Who becomes delinquent?* London: Heinemann.

Western Australian Law Reform Commission, (1991). *Report on the criminal process and persons suffering from mental disorder*. Perth: Western Australian Law Reform Commission.

Western Australian Parliamentary Debates (1918). *Opposition speech by W.C. Angwin, Member for North East Fremantle*, Vol. 58, 476.

Western Australian Parliamentary Debates, Vol. 23, 1903.

Western Australian Acts of Parliament, 9 Geo V., 1918-19, Act No. 32, Section 622.

White, D. & Wood, H. (1986). The Lancaster County Pennsylvania mentally retarded offender program. *Prison Journal*, 65(1), 77-84.

Wildenskov, H.O.T. (1962). A long term follow up of subnormals originally exhibiting severe behaviour disorders or criminality. In *Proceedings of the London Conference on the Scientific Study of Mental Deficiency*. London: May and Baker, 217-22

Wirth, C. (1987). When dyslexia becomes a police problem. *Law and Order*, 35(1) 46-48.

Wolfensberger, W. (1972). *The principle of normalization in human services*. Toronto: National Institute on Mental Retardation.

Wolfensberger, W. (1992). *A brief introduction to Social Role Valorisation as a high order concept for structuring human services*. Syracuse NY: Training Institute for Human Service Planning, Leadership and Change Agentry (Syracuse University).

Wolfgang, M., Figlio, R.F. and Sellin, T. (1972). *Delinquency in a birth cohort*. Chicago: University of Chicago Press.

Wood, H.R. & White, D.L. (1992). A model for habilitation and prevention for offenders with mental retardation: The Lancaster County (PA) office of special offenders services. In R.W. Conley, R. Luckasson, & G.N. Bouthilet (Eds.), *The criminal justice system and mental retardation*. Baltimore: Brookes Publishing, 153-165,

Woodward, M. (1954). The role of low intelligence in delinquency. British *Journal of Delinquency*, 5, 281-303.

World Health Organisation (1991). *The ICD-10 Classification of Mental Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines*. Geneva: World Health Organisation.

Wundersitz, J., Bailey-Harris, R. and Gale, F. (1990). Aboriginal youth and juvenile justice in South Australia. *Aboriginal Law Bulletin*, 2(44), 12-14.

Yesevage, J.A., Benezech, M., Ceccaldi, S., Bourgeois, M. and Addad, M. (1983). Arson in mentally ill and criminal populations. *Journal of Clinical Psychiatry*, 44, 128-30.

Xingyan, W. (1997). *The definition and prevalence of intellectual disability in Australia*. Canberra: Australian Institute of Health and Welfare.

Zimmerman, J., Rich, W., Keilitz, I. & Broker, P.I. (1981). Some observations on the link between learning disabilities and juvenile delinquency. *Journal of Criminal Justice*, 9, 1-17.