SUBMISSION TO THE MINISTER FOR THE
NORTHERN TERRITORY

SOME SPECIFIC PROPOSALS:
THIRD REPORT ON THE CRIMINAL JUSTICE SYSTEM
IN THE NORTHERN TERRITORY

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ROBERT L. MISNER

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It would be naive to assume that tribal justice programs can be put into effect overnight. In fact any hastily constructed program may be harmful. But this should not be used as an excuse to delay the search for answers. A highly qualified interdisciplinary team should be immediately formed to seek solutions to the problem of justice on Aboriginal settlements. This inquiry should be carried out on a full-time basis and have at its disposal the full resources of the Department of the Northern Territory. It should not be assumed that a system of tribal courts is necessarily practical, beneficial or desirable. The real challenge is to begin seriously considering the possibility.

ADMINISTRATION OF PRISONS

Introduction
It is difficult to discuss in abstract what a prisons' statute should contain. We feel that a more useful approach is to reproduce a model code and add our comments on the provisions of that code. Accordingly in this section we have set out the Model Act of the National Council on Crime and Delinquency to Provide for Minimum Standards for the Protection of Rights of Prisoners. The Model Act does not deal with all aspects of prison administration that need to be codified. It is, however, a useful guide.
RESTRICTURING THE CRIMINAL JUSTICE SYSTEM
IN THE NORTHERN TERRITORY

This report deals with, and makes specific recommendations relating to, Detoxification Centres, Justice in the Aboriginal Settlements and finally the Administration of Prisons in the Northern Territory. These suggestions are made with a large stroke of the pen. We have not attempted to deal with details which can only be settled in the course of implementation. We acknowledge gratefully the good faith and interest shown by all those who provided us with assistance, information and ideas on our visits to the Territory. We hope that our efforts and those of the Legislative Council in this field will ultimately lead to the development of a rational and efficient system of criminal justice.

GORDON J. HAWKINS
ROBERT L. MISNER
(1) **Introduction**

Our first report, *Restructuring the Criminal Justice System in the Northern Territory*, recommended that public drunkenness should be decriminalized and that a system of detoxification centres should be set up to deal with this problem. When we returned to the Northern Territory in November 1973 in order, amongst other things, to discuss with the administration, interested organizations and the general public the feasibility of our recommendations we found that our proposals regarding drunkenness were amongst those best received and subject to most general agreement. In our second report, *Framework for Change: Second Report on the Criminal Justice System in the Northern Territory*, which dealt in more detail with such matters as probation and parole and the construction of new gaol facilities in Darwin, we foreshadowed the provision of more specific recommendations regarding detoxification centres in a further report.

In the intervening period we have surveyed the growing world literature on the "public drunkenness problem" and considered the variety of detoxification programmes operating in other parts of the world, including the United States, Sweden, Japan, and Soviet Russia. In particular we have carefully considered three particular examples of alternatives to
the criminal process, operating in America. This concentration on American models was dictated by the fact that only in the case of those models there is available adequate material dealing with the evaluation of effectiveness. The models in question are the St. Louis Detoxification and Diagnostic Evaluation Center, the Washington, D.C. Detoxification Program and the New York City Vera Institute program (known as The Manhattan Bowery Project). We should also mention here the valuable report of the Detoxification Center Sub-Committee of the N.S.W. Council of Social Service A Proposal for a Detoxification Unit in Sydney (1970) and the N.S.W. Bureau of Crime Statistics & Research Report No. 7: City Drunks - A Possible New Direction (1973).

(2) Some Australian Reports

We note also that since our first report appeared in July 1973 three other official reports have made recommendations regarding the handling of public drunkenness in this country which reflect a similar approach to the problem. In the first place there is the First Report of the Criminal Law and Penal Methods Reform Committee of South Australia: Sentencing and Corrections (1973). This report specifically recommends both the abolition of the offence of public drunkenness and the establishment of detoxification centres in South Australia. It is notable that in recommending that drunkenness in a public place
should cease to be an offence the report states that the committee received a number of submissions recommending this from a variety of organizations and individuals including the Commissioner of Police, several of his senior officers, many prison officers and aboriginal welfare organizations.

The second report is the Report of the Inquiry into the Northern Territory Police Force (1973) by Brigadier J.G. McKinna, formerly South Australian Police Commissioner. Under the heading "Legislation relating to the establishment, operations and conditions of service" there is a passage dealing with Drunkenness which runs as follows:

"The large number of arrests for drunkenness gives cause for concern and again raises the question whether drunkenness, on its own, should be considered an offence. In many cases further charges (resist, arrest, assault police, offensive language, etc.) arise out of what originally was the arrest of a simple drunk. Had there been no arrest for drunkenness, there would not have been any other charges. A drunken person is sometimes taken into custody for his own protection and safety, but if, instead of being placed under arrest, drunks could be taken to a central point from which their friends could collect them and take them home before they become..."
troublesome, there would be greater harmony between the public and the police; also I feel it would be a more reasonable manner in which to treat a social problem.

By far the largest proportion of those arrested for drunkenness are Aboriginals and the Department catering for their welfare might give consideration to ways and means of having drunks taken care of before they reach the stage where police action is requested. At this stage I cannot recommend any alteration to the Police and Police Offences Ordinance section 27(1)(a), as this matter is under consideration in several areas and I believe that legislation should be uniform throughout Australia, but I suggest that a more tolerant outlook could be adopted where drunkenness only is concerned.

Although we disagree with Brigadier McKinna about the question of alteration to the legislation the general tenor of his statement accords with our own view. In about the role of the Department of Aboriginal Affairs in this area and also his suggestion regarding a central collection point which we see as one of the functions of a detoxification centre.
The Third report is the Report of the Board of Inquiry appointed to inquire concerning the liquor laws of the Northern Territory (1973). Paragraph 211 of that report states:

"We see a need to curb and treat the problem drinker and the alcoholic. We are of the opinion that gaol is no deterrent and offers no cure for drunkenness. In our view drunkenness per se should no longer be a crime".

Paragraph 212 of the report states:

"We cannot claim to have any special knowledge on the subject but the evidence suggests to us that there is need for the establishment of Detoxification Units similar to those which we were told by one witness, operate with considerable success in some parts of North America".

Finally under the general heading of "Summary of Conclusions" Paragraph 366 states:

"We recommend that the law be changed so that drunkenness per se is no longer a crime. Investigations should be carried out with a view to the establishment of Detoxification Units and Rehabilitation Centres for the treatment of persons arrested for drunkenness".

.../6
The Decriminalization of Drunkenness

We think it appropriate here, first of all, to reaffirm our recommendation regarding the decriminalization of drunkenness. This is because it would be possible for detoxification units to function under existing legislation, if the police were merely instructed at their discretion to convey drunken persons direct to a detoxification centre. But the overwhelming conclusion of existing research is that the extensive application of the criminal sanction in this area accomplishes little either for those arrested or for society. Arrest neither deters future offences nor results in rehabilitation. Indeed several writers have noted that the application of the criminal label to drunkenness may reinforce the offender's deviancy. Moreover there is no doubt that in the Northern Territory as elsewhere drunkenness arrests and the handling of these offenders under the criminal process imposes a heavy cost on the criminal justice resources from more important tasks. For a useful summary of the arguments in support of decriminalization and citation of the available evidence on this topic reference may be made to R.T. Nimmer's Two Million Unnecessary Arrests (1971) published by the American Bar Foundation. Our view, briefly, is not merely that this offence serves no useful purpose (as the South Australian Criminal Law and Penal Methods Reform Committee put it) but also that its continuance is socially harmful.
The abolition of the offence of public drunkenness would remove the authority of the police to arrest people on that ground. Nevertheless there remains a need for some means of dealing with persons found drunk in public. The reasons for this are aptly summarized in the South Australian report as follows:

"On humanitarian grounds the drunk should not be left to be run over by passing traffic or assaulted and robbed. The passing motorist should not be required to negotiate a street in which a drunk is lying or weaving his way. The drunk should not be left to die from malnutrition or excess of alcohol. Public order and decorum require that persons who through drunkenness have become an offensive spectacle should be removed from public sight".

(4) A Pilot Project
Accordingly as a first step in the desired direction we recommend the setting up, as a pilot project in Darwin, of a detoxification centre, or, as the N.S.W. Council of Social Service Sub-committee report referred to earlier describes it, "a medically oriented sobering up facility". Indeed it seems to us that the proposals for such a pilot project in the Sydney Metropolitan Area, in that report and in the N.S.W. Bureau of Crime Statistics and Research Report cited in Paragraph 2, represent...
an excellent adaptation of the American model to Australian conditions. Therefore our own proposal outlined below follows fairly closely the schemes outlined in those two reports.

(5) Detoxification Centre: Pilot project proposal

(a) **Object** To avoid the present cycle of arrest, charge, incarceration in police cells and court appearance. In other words a socio-medical service or facility for the police-court-prison system.

(b) **Auspices** Statutory health and welfare services, the Department of Aboriginal Affairs and relevant voluntary organizations.

(c) **Location** Attached to the existing Darwin hospital on an adjacent or neighbouring site and enjoying some shared facilities and staff.

(d) **Facilities**

(1) Sobering up area with toilet facilities and beds

(2) Collection centre from which friends and/or relatives could collect drunk individuals and take them home

.../9
(3) Accommodation for those requiring treatment (for up to five days) and temporary accommodation for those awaiting referral to the parent hospital for more intensive treatment

(e) Staff

(1) Director responsible for administration and evolving policies and methods of care and treatment

(2) Medical Officer from the Hospital whose primary duty is to the detoxification centre

(3) 2 Welfare Officers responsible for keeping case records, making social assessments of individual clients, helping to organize assistance where necessary and administering welfare service within the centre

(4) 3 nurses qualified in psychiatric and general nursing

(5) 4 orderlies to work as rescue aids in the collection of drunks from the streets and care service as needed by the drunk individuals. The orderlies should preferably include both recovered alcoholics and aboriginals.../10
(6) 2 plain clothes police liaison officers seconded from the Police Department to assist in the collection of drunks and provide a measure of restraint when needed.

(f) **Clientele** In general clients should be those at present arrested for drunkenness.

(g) **Removal from the Streets** It is suggested that the centre be provided with its own unmarked radio-controlled vehicle for the collection of drunk persons and that two man teams composed of one plain clothes policeman and one centre orderly man the vehicle and collect them from the streets.

(h) **Voluntarism** We favour the voluntary principle with all admissions on an informal basis and no compulsory treatment. The available evidence suggests that the centre could perfectly well operate on a voluntary basis in regard to admission. Overseas experience indicates that aggressive cases requiring compulsion are in a minority. (These should be left to be dealt with by the police under the present system.) The kind of system we have in mind is similar to that operating under the Manhattan Bowery Project. In that case, seven days
a week, a two man rescue team patrols the Bowery in the unmarked vehicles.

One member of the team is a rescue aid who is a recovered alcoholic; the other is a plain clothes policeman. Noticing a derelict in need of assistance, the aid approaches and offers to take him to the project centre to dry out. The Bowery man is never coerced; he may reject the team's offer if he wishes, and he remains free to leave the project at any point in his treatment. It has been found that this voluntary approach by the street patrol is accepted 67 per cent of the time. No further action is taken by the rescue team on the 33 per cent refusals.

On the other hand the centre could operate on a compulsory basis. If this approach is preferred we would recommend the adoption of the sort of procedures outlined in the South Australian Criminal Law and Penal Methods Reform Committee report as follows:

"Since the apprehension of drunks will not be based on the commission of a criminal offence, and there will be therefore no obligation to produce them before a court to be charged, questions of civil rights arise. We recommend that every person removed to a detoxification
centre be produced before a court, specially convened for the purpose and separate from the centre, on the first weekday morning after apprehension. The court should consist of a magistrate or where no magistrate is available, two justices of the peace. An ordinary courtroom should be used for the purpose. The responsibility for producing persons detained should rest on the officer in charge of the centre. The court should either discharge the person brought before it or order that he be detained for a further 24 hours, provided that a person may be discharged from a centre at any time on the written authority of the officer in charge. Any such authority should be produced to the court at its next sitting in order that the judicial record of the disposal of detainees should accord exactly with the record of persons admitted. The point of these procedures is fourfold: to afford protection for the police and detoxification staff in the exercise of their powers; to ensure that no-one is detained for more than a minimum period without judicial authority; to ensure that no-one is
discharged until he is in a fit condition to leave; and to afford detainees an opportunity to express to a court any protest they may wish to make about the fact of detention. If further inquiry seems to be merited, the court should have authority to order it. There should be a maximum limit of 72 hours on the length of time that a person may be detained in a detoxification centre on any one occasion. If at the end of that time the person concerned does not appear to be fit to leave, he should be conveyed to a hospital. Police and detoxification staff would need reasonable protection in the exercise of their powers before the stage at which the detainee is produced to the court. We recommend that if the official who apprehended the detainee suspected that he was drunk and had reasonable grounds for doing so, no action for false imprisonment or assault should lie in respect either of his conveyance to the detoxification centre or his detention there until produced to the court, provided that he is so produced on the first available occasion".
All the evidence points to the need for a detoxification centre to be established in Darwin, at least on a pilot basis. We have not gone into the question of cost. Nevertheless we believe that the cost of present procedures for handling drunkenness offenders exceeds the costs involved in operating our proposed scheme. For more detailed analysis and discussion of the question of costs in this area reference may be made to:


(2) The N.S.W. Bureau of Crime Statistics and Research's City Drunks - A Possible New Direction (1973) pp. 22-24

The second of these references is reproduced below as Appendix A.

Appendix A


The Cost

In 1970 the New South Wales Council of Social Services estimated that the cost of handling drunkenness offenders throughout the whole of New South Wales was approximately...
$147,000. This cost was based on information derived from statistics and consultation with senior officers of the various departments concerned.

The Bureau of Crime Statistics and Research has had the added advantage of being able to observe directly each phase of the established procedures from the street patrol to the transfer of a convicted drunk to prison. The operation of the Drunks Court at Central Court of Petty Sessions has also been observed. In the light of this additional information and taking into account general increases in salaries the Bureau has arrived at an estimate of the cost of handling drunkenness offenders which exceeds considerably the earlier estimate of the Council of Social Service. Even so, for reasons set out in Appendix A, we believe our figure is a very conservative one. Its main value is that it helps to place in better perspective the cost involved in establishing the proposed intake centre.

The estimated annual cost of involving the police, courts and prisons in the legal processing of drunks apprehended within the inner-Sydney area is $122,000 (see accompanying map of the area involved). The subsidy required to cover the salaries of the director, welfare co-ordinators, nurses, medical orderlies and secretary of the intake centre is estimated to be $75,000 per year. In addition, it would be necessary to purchase and maintain the two radio-controlled vehicles which are necessary for the successful operation of the centre.
Basic of Costing Present Procedures (Appendix A)

On average, 68 persons are arrested for drunkenness and processed at Central Police Station, 6 days a week. Of those arrested, 51 (75 per cent) are normally released having been held for some four hours. These people usually forfeit their recognizance and do not appear in court. About 17 (25 per cent) appear at the Drunks Court.

The Bureau's earlier reports have indicated that of all those arrested, 12 per cent are fined or in default, sentenced to 24 hours imprisonment and 2 per cent fined or sentenced to 48 hours. This means that an average of 9 people receive one or another of these two penalties each day. Very few of the defendants have the necessary funds to meet the fine imposed.

In arriving at an estimate of the cost of police involvement in the various stages of arrest and detention of drunks, it has been convenient to base certain of the calculations on the handling of individual cases:

<table>
<thead>
<tr>
<th>Police Involved</th>
<th>Constable</th>
<th>Senior Constable</th>
<th>Sergeant</th>
<th>Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Patrol, arrest, conveyance to police station</td>
<td>1</td>
<td>1</td>
<td></td>
<td>10</td>
</tr>
<tr>
<td>At police station - charge, search, note property, escort to cell</td>
<td>5</td>
<td>2</td>
<td></td>
<td>8</td>
</tr>
<tr>
<td>Discharge - release from cell, check and return of property, payment of bail, paperwork</td>
<td>3</td>
<td>2</td>
<td></td>
<td>5</td>
</tr>
</tbody>
</table>
The procedures involving those who are not released on bail, are better described in terms of daily averages for the whole group:

<table>
<thead>
<tr>
<th>Police Involved</th>
<th>Constable</th>
<th>Senior Constable</th>
<th>Sergeant</th>
<th>Minutes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preparation of charge sheets and list for court</td>
<td>2</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Court appearance</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) Transfer from cell to court</td>
<td>3</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(b) Court hearing, discharge where appropriate</td>
<td>3</td>
<td>1*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Transfer to prison</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* Prosecutor

**Estimated Annual Costs**

On the basis of these figures the following annual cost schedule has been prepared:

1. Arrests
   Average 68 per day, 6 days per week, charge, hold etc. $68,000

2. Discharge without court appearance.
   An average 51 persons are released on bail each day $16,600

3. Preparation of charge sheets and antecedent list for court $5,000

4. Preparation of, and transfer of prisoners to court and the court appearance $2,800

5. The minimal annual cost of meals involved in the care of people appearing at court $3,700

6. Transfer of committed persons from Central police cell to prison $1,300

    **TOTAL POLICE MANPOWER COSTS** $97,000

7. (i) Magistrate/Clerk of Petty Sessions $352

(ii) Clerical services $468

    **TOTAL COURT COSTS** $820

    **DEPARTMENT OF CORRECTIVE SERVICES** $24,000
* Considering the costs are based on a flat rate and that a great deal of time is involved for prison staff in the process of reception and discharge, this figure must be regarded as an understatement.

Thus, the estimated cost of handling drunkenness offenders in the inner city area is the total cost to the Police, the Courts and Corrective Services:

- Police $97,000
- Courts $ 820
- Corrective Services $24,000

$121,820

Police from neighbouring stations (for example, Regent Street, Darlinghurst and Phillip Street) also deliver drunks to Central Police Station. While the drunks arrested and brought to Central from other stations have been included in the drunkenness statistics, no estimate has been made of any additional cost incurred by the use of these police. The estimates made are therefore, extremely conservative. Furthermore, no account has been made of the running costs of the Police vehicles.

Costs have been assessed on a 6 day a week basis when the 'routine' patrol and collection takes place and when hotels are open. On Sundays the character of the Police work changes and more concentration on public parks is required. We have not been able to observe the Sunday arrests and procedures and have not attempted to cost them. This is another factor indicating the overall estimates are understated.
A. Introduction

Evidence that we received from every quarter of the population reinforces what we stated in our initial report: the present policy or the present conglomeration of policies of justice on Aboriginal settlements needs immediate review by an inter-disciplinary body which would conduct an extensive full-time inquiry into this extremely complex issue.

The necessity for such a full-scale review cannot be over-emphasized. We do not know if it is merely coincidental that an increasing problem of juvenile delinquency, the problem of drunkenness and lack of local autonomy and authority exist side by side in the Aboriginal communities. We do know that the present system does not appear to operate effectively either as a deterrent or rehabilitative mechanism. The diversity of the various Aboriginal tribes suggests that no one solution will be found for the problem. Time and money must be allocated now to avoid implementing any facile solution based on unfounded assumptions. This is not intended as an excuse for inaction but rather as a call to deliberation. What is needed is a carefully drafted blueprint for involving Aboriginals in
their own destiny.¹

Without in any way intending to limit or direct the interdisciplinary inquiry, we note below some of the potential problems with which such an inquiry would be faced.

1. A similar point was made by President Nixon in the President's message to the Congress concerning Indian Affairs, July 8, 1970.

"To the Congress of the United States:

The first Americans - the Indians - are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement - employment, income, education, health - the condition of the Indian people ranks at the bottom. This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny. Even the Federal programs which are intended to meet their needs have frequently proven to be ineffective and demeaning.

But the story of the Indian in America is something more than the record of the white man's frequent aggression, broken agreements, intermittent remorse and prolonged failure. It is a record also of endurance, of survival, of adaptation and creativity in the face of overwhelming obstacles. It is a record of enormous contributions to this country - to its art and culture, to its strength and spirit, to its sense of history and its sense of purpose.

It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."
B. Some Inherent Problems

Talk about "justice on an Aboriginal settlement" or about "tribal courts" conjures up a notion of returning to a system which is a part of tribal culture and which has developed over a long period of time. Such a concept is probably an "anglicization" of Aboriginal history. Any inquiry into justice on Aboriginal settlements must concern itself with authority structures in the tribes but the old methods of resolving disputes will not necessarily be able to cope with all of today's problems. Firstly, there are many types of behaviour which are not traditionally proscribed yet are disruptive of tribal life. The problems associated with drunkenness come to mind most quickly. Secondly, many Aboriginal settlements are a mixture of tribes. There would be no one authority structure. Thirdly, a percentage of Aboriginals either have lived in white communities or live a part of the year in or around white communities and may have come to

2. The Indian Justice Planning Project 1971 in its Report (herein cited "Report") stated:

"The very title "Tribal Court" brings to mind a system of traditional justice embodying the law - ways of a distinct - culture - a dispute - resolution system which is an outgrowth of the cultural needs of a people evolved through time immemorial. Nothing could be further from the truth. Tribal courts are in only a superficial sense "tribal"..... It is sufficient to say that the tribes were not characterized by a system of central government, and there was no single leader whose decisions were regularly utilized as a means of resolving intro-tribal disputes. Thus, there was no room for the traditional great courts whose enforcement powers were natural modifications of a chief's power as King's Bench and Chancery were outgrowth of a royal power in England". at p. 141-142
expect justice to be meted out in certain ways by certain people. Fourthly, tribal punishment is often "unorthodox" by white standards, e.g. spear through the thigh. Also some actions proscribed by white law are not only not unlawful in Aboriginal communities but are in fact actually required by the tribe, e.g. some actions of revenge. Again some actions which are not only unlawful in white society but also repugnant to whites are a part of Aboriginal culture, e.g. marriage of very young girls to old men. The difficulty is the ethical question whether there are limits to what "justice" can order. Do such concepts as "natural justice" "due process of law" and "human rights" apply in the situations when Aboriginals judge Aboriginals or are these paternalistic notions which have no place in the present stage of Aboriginal development? Are there certain procedural guarantees that any legal system must have? For example, the United Nations International Covenant on Civil and Political Rights\(^3\), Section 14(3) provides the following:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

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(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself, or to confess guilt.

Also Section 14(3) provides:

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

The Covenant on Civil and Political Rights was ratified by Australia on 19th December, 1972.

The effect of ratification of the Covenant by
the Australian Government is to make Australia "internationally liable" if these rights are withheld.\(^4\) It would appear that any system of justice established on Aboriginal settlements must include at least the procedural rudiments listed in the covenant. There would appear to be a conflict of basic concepts: On the one hand in the belief voiced by a world body of States and specifically ratified by Australia which states that the dignity of every individual requires that he be entitled to certain guarantees. On the other hand is the notion that each autonomous group should be able to determine how it will govern itself. This would appear to be an irreconcilable difference.\(^5\)

Finally there may well be situations where jurisdiction over an individual will be claimed by more than one tribe or perhaps even by more than one faction within a tribe. Increased contact

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4. Article 49 states that the Covenant will be effective after 35 nations have ratified it. At the present time 26 countries have ratified the Covenant. Australia has also ratified the Optional Protocol to the International Covenant on Civil and Political Rights which allows the Human Rights Committee to investigate allegations of violations of the Covenant. Article 9 of the Protocol states that the Protocol will come into effect after 10 nations have ratified it. On 13th December, 1973 Mauritius became the tenth nation to ratify the Protocol. Even though the Covenant is not yet in effect, the Covenant must be taken to be at least a statement of policy of the Australian Government.

5. The same difficulties are present in proposed Human Rights Bill 1973 Sections 20 to 29 and in the proposed Discrimination Bill 1973 Sections 7 to 9.
between tribes and more complex ways of life may, in fact, require new ways in which to resolve inter-tribal disputes.

If one assumes that traditional tribal justice will be altered to some degree to cope with new and different situations or that local jurisdiction will be restricted in some respects, then one is faced with an additional series of problems.

C. Some Practical Problems
Within every system of justice there are many separate components, e.g. law-maker, law-enforcer, judge and the punisher. These functions may reside in one person or may be exercised by different persons or agencies with varying degrees of autonomy and accountability. Whatever system is adopted, a number of fundamental problems arise.

In a number of Aboriginal settlements we were told, that at least for relatively minor infractions the Aboriginal community itself wants to have the authority to deal with misconduct perpetrated on the settlement. Invariably the discussion would center on the issue of who would exercise the police function within the community. In some communities it was felt that family loyalty often got in the way of properly performing
police functions. Other communities strongly suggested that this could be overcome. In some communities it was noted that those who were presently serving as community police lacked both the respect and support of many in the community - they had no "authority". In order to combat this problem and also to gain needed skills, many of those to whom we spoke were convinced that any tribal member who was to serve in the function of a community police officer should attend a training course. The training course would lend them authority, give them qualifications for decent


"A considerable amount of time was spent in endeavouring to ascertain whether the Aborigines themselves wished to have police stationed at settlements and the consensus of opinion was that this was necessary. Some of the younger men were opposed to it, but the majority of Aborigines whom I contacted were in favour of having a police station on the site. In reply to my suggestion that selected Aboriginal men could be trained to keep order at the settlement, a Village Council pointed out that where there were members of several different tribes at the one place, it was better to have a "neutral" policeman than a member of their own community who would be inclined to favour his own tribe".

Although we encountered this opinion, we also received statements from elders as well as young men asking for tribal police.

7. This in no way suggests that the tribal "police" need not also be linked to the traditional authority structure.
wages and also teach them something about operating as police in their own communities. There was a general consensus that the training course should be conducted off the settlement. Although the cynical might suggest that this is merely an attempt to obtain a new "perk", we disagree. We suggest that consideration be given to founding an Aboriginal training school if it is determined that tribal Aboriginals should play a major role in keeping the peace on their settlements. The curriculum would have to be tailored to the needs of the Aboriginal communities, and in this connection the Indian Police Academy in Rosell, New Mexico might be studied to obtain some guidance. The Indian Police Academy presently trains American Indians of more than 200 tribes. The curriculum itself covers over 380 hours of subjects ranging from first aid, gaol administration, professional ethics, organization of government to physical training and defensive tactics.  

8. Similar to the Roswell school is the Navajo Police Academy in Window Rock, Arizona. The Navajo Academy runs an eight week course very similar in content to the Roswell Academy. 9 In our opinion, any scheme involving Aboriginals in peace-keeping functions must provide for the proper training and equipment. In the selection of those eligible to become tribal police, past convictions such as isolated instances of drunkenness or disorderly conduct should not be regarded as a disqualification.

8. Report, p. 188

9. Report, p. 192
If autonomy is returned to the Aboriginal community to deal with its own offenders, questions of jurisdictions arise. *Jurisdiction* becomes an issue in three separate ways: jurisdiction over people, jurisdiction over events and jurisdiction over territory.

Over whom would a tribal court have jurisdiction? There would appear to be many possibilities. Firstly, the tribal court could have jurisdiction over all persons *living on the settlement* - black or white. Secondly, the court could have jurisdiction over all Aboriginals *living on the settlement*. Thirdly, the court would have jurisdiction over members of certain tribes who *live on the settlement*. Fourthly, the court could have jurisdiction over all persons who have committed certain types of tribal offences.¹⁰

The question of jurisdiction over the person appears to be a potential source of grave conflict. It has been said that the function of the criminal law is:

".... to preserve public order and decency, to protect the citizen from what is offensive and injurious, and to provide sufficient safeguards against exploitation and corruption of others ....."¹¹

¹⁰ In the United States, tribal court jurisdiction does not extend to acts of non-Indian committed on the reservation. 25 C.F.R. Part 11.

¹¹ Report of the Committee on Homosexual Offences and Prostitution (Wolfenden Committee).
It can be argued that the society which is to be protected or the public order to be preserved here is that of the Aboriginal community and consequently the Aboriginal community should have the power to try the person involved. However, it seems that this is neither acceptable to the white community nor desired by the Aboriginal community. In fact this issue could get in the way of a fair and realistic consideration of the underlying problem - the return of certain decision-making functions back to the tribe. Possibly the best solution to this problem would be firm understandings between the various tribes and the police and Crown Law Office that non-Aboriginals who commit criminal acts upon Aboriginal settlements, or against Aboriginals, will be fully prosecuted; whether the offence is assault, trespass on sacred grounds or the illegal sale or transport of alcohol. It would be necessary, to be consistent, that any Aboriginal not a member of the tribe nor a resident of the settlement should be treated in the same manner in which a white would be treated. In fact there may be as wide a cultural discrepancy between Aboriginals than as between non-Aboriginals and Aboriginal. This presents problems to those settlements which have significant numbers of transients in them. Again it seems that different settlements will need to deal differently with this question of
personal jurisdiction. 12

Over what crimes should the court have jurisdiction? On the one hand it can be argued that if autonomy is complete, the tribal court should be free to deal with all actions committed by persons over whom it has jurisdiction. To support this argument is the fact that some actions which may be deemed disruptive when committed within the Aboriginal community may not be considered so within the white community and vice versa. This argument is very similar to the argument enunciated earlier in regard to in personam jurisdiction. On the other hand there is the argument that a tribal justice system is merely meant to supplement the existing criminal system and this can best be done by limiting the jurisdiction of the court to minor offences. This argument takes cognizance of the fact that the great distances, sparse population and the resulting time delay often cause the criminal law to lose much of the effectiveness that it might otherwise have. At the present time within the Northern Territory there is a Chief

12. Again reference should be made to the problem of minimal guarantees in criminal trials held in tribal courts. On the one hand it smacks of racism to say that a non-Aboriginal taken before a tribal court must be given his full common law rights whereas an Aboriginal before the same tribal court would not be given those rights. Perhaps one can make an argument based on culture that this is correct.
Magistrate and two Stipendiary Magistrates stationed at Darwin and one Stipendiary Magistrate stationed at Alice Springs. The Darwin Magistrates, as well as sitting in Darwin, also travel to Katherine, Gove, Groote Eylandt and Maningrida. Katherine is visited weekly whereas the Magistrate sits for two days per fortnight in Gove, two days per month on Groote Eylandt and one day per month at Maningrida. The case loads are approximately 40 per sitting at Katherine, 30 per sitting at Gove, 20 per sitting at Groote Eylandt and 10 per sitting at Maningrida. The Alice Springs Magistrate travels to Tennant Creek, Warrabi and Hermannsburg. He visits Tennant Creek two days per month, and Warrabi one day per month. Justices of the Peace sit at Katherine, Groote Eylandt, Maningrida, Tennant Creek and Warrabi to deal with cases between visits by Magistrates. Justices also sit at Alice Springs when the Magistrate is forced to travel outside Alice Springs. There are many areas where there are no available Justices of the Peace and where Stipendiary Magistrates do not sit. Charges involving criminal offences often arise at centres where Stipendiary Magistrates do not sit. In some instances defendants are

13. Some such locations and their distance from nearest regular court:

<table>
<thead>
<tr>
<th>Location</th>
<th>Distance from</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bathurst Island</td>
<td>45 miles from Darwin</td>
</tr>
<tr>
<td>Oenpelli</td>
<td>231 miles from Darwin</td>
</tr>
<tr>
<td>Elk Island</td>
<td>90 miles from Gove</td>
</tr>
<tr>
<td>Pine Island</td>
<td>64 miles from Katherine</td>
</tr>
<tr>
<td>Roper River</td>
<td>211 miles from Katherine</td>
</tr>
<tr>
<td>Booralooloa</td>
<td>414 miles from Katherine</td>
</tr>
<tr>
<td>Hooker Creek</td>
<td>369 miles from Katherine</td>
</tr>
</tbody>
</table>
arrested by police and brought considerable distances to court. Witnesses also have to be brought to court. If the matter is adjourned then it is possible that the defendant may have to find his own way back to his home, although usually if the arresting officer comes from the same area and is in attendance at court, the defendant is able to return with that officer. If the defendant is summoned to court, then he may have to travel great distances at his own expense to attend court. Defendants and witnesses are put to great inconvenience and expense.\footnote{The situation could worsen, if, as is suggested by many competent and knowledgeable persons in The Territory, Justices of the Peace should be limited to adjourning matters for Magistrates and to signing court processes.}

Despite any questions of self-determination, it seems like good common sense to have some matters dealt with at the local level. The issue then becomes whether or not the white communities might also not want the authority to deal with the relatively minor matters. Again the same conflict that arose in regard to minimal guarantees raises its head.

Putting aside for the time-being the question of local non-tribal courts, research must be undertaken to consider what jurisdiction the tribes desire, and what jurisdiction they might be able to deal with effectively. Perhaps the subject matter jurisdictional question can

\footnote{The situation could worsen, if, as is suggested by many competent and knowledgeable persons in The Territory, Justices of the Peace should be limited to adjourning matters for Magistrates and to signing court processes.}
best be approached by defining those actions over which the tribal courts do not have jurisdiction. This approach has the benefit of recognizing that what is forbidden by white law may not be an Aboriginal offence and vice versa. The drawbacks of this approach are that it assumes that jurisdiction is best determined by the action itself and not the punishment that might be meted out and also that it assumes that there are actions, such as infanticide and maiming that must be punished even if they do not offend the group in which they were committed.

In the United States, initially the tribal jurisdiction was complete. In 1881, Crow Dog, an Ogalalla Sioux Chief, shot and killed Spotted Tail, a Brule-Teton Sioux Chief. The feud originated because Spotted Tail had seduced the wife of Medicine Bear, a crippled friend of Crow Dog. Settlements were made in Indian law but Crow Dog was also tried in the Federal court and sentenced to be hanged. The United States Supreme Court ordered Crow Dog discharged from custody holding that the tribe had exclusive jurisdiction over crimes between Indians and no federal law had limited the tribal authority.16

15. In fact, the penalty one is willing to mete out, may, in some respect be dependent upon the procedural guarantees he has been afforded.

The "Major Crimes Act" of 1885 first limited the criminal jurisdiction of the tribal court by taking from the tribes jurisdiction over murder, manslaughter, rape, assault to kill, arson, burglary and larceny.\textsuperscript{17} Then in 1968 the Civil Rights Act put greater limits on the tribal court's jurisdiction.

The Act says in part that:

"No Indian tribe in exercising powers of self-government shall:

(7) require excessive bail, impose excessive fines and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both.\textsuperscript{18}"

The issue of subject matter jurisdiction could again be determined by the interdisciplinary team.\textsuperscript{10}

Over what area will the tribal court have jurisdiction? The simplest answer to this problem is to assume that the court has jurisdiction over set boundaries as set out in the authorizing statute. But an argument can be made that it may be more beneficial in many cases to allow a tribe to deal with one...

\textsuperscript{17} 23. Statute 385 (March 3, 1883)

\textsuperscript{18} 25 U.S.C.A. 1302 (1973 Supp.)

\textsuperscript{19} It should be noted that here we are only concerned with the issue of criminal jurisdiction for the tribal courts. The issue of civil jurisdiction is outside our terms of reference. American tribal courts have virtually unlimited civil jurisdiction over Indian defendants.
of its members even though the crime took
place off the settlement, perhaps in town. 20

The final issue concerning jurisdiction is
the problem of the possible limits of
jurisdiction of the Aboriginal police. A
good case can be made for authorising the
tribal police to arrest and detain non-
Aboriginals suspected of committing crimes
while upon the settlement. A suspect could
be detained until the Northern Territory Police
arrived. Statutory immunity for civil liability,
however, would have to be granted to protect
tribal police from false imprisonment and
other actions filed by both Aboriginals and
non-Aboriginals.

A second practical problem, which was alluded
to earlier, concerns the interrelationship of
tribal courts to the civil and criminal courts
of the Northern Territory. Even if tribal
courts were to exercise full subject matter
jurisdiction, this would not eliminate the
problem. The issue is whether the decision of
the tribal court is subject to review. Does
western jurisprudence with its inclination toward
"certainty" as opposed to "finality" have
any place in a totally Aboriginal environment?

20. In cases where an American Indian tribe has
not established its own court and its own
criminal code, the equivalent jurisdiction
is exercised by a court of Indian Offences
established by The Secretary of the
Interior under the authority of 25 C.F.R.
Part II.
If, in fact, a tribal court has jurisdiction over many of the same offences that the Territory Court has, can a claim of racial discrimination be made out if, for the white defendant, counsel is appointed, a transcript of the proceedings is made, rules of evidence are rigidly followed and an appeal is lodged in the High Court while the Aboriginal defendant is tried in a situation where the "traditional" safeguards are absent? Does the fact that the court is being conducted by Aboriginals negate the issue of racial discrimination or should the policy of anti-discrimination in an abstract sense be made subservient to the notions of self-autonomy and self-determination? It could be argued that if the value of an appeal is that it allows for detached consideration of a situation by a disinterested party or parties, then a separate body outside the settlement could be established to hear Appeals from the tribal courts. This solution presents a number of difficulties. One of these is whether, even if the appellate tribunal were composed wholly of blacks, this would not be surrendering some tribal autonomy to an "alien" group. Also, if the appellate tribunal were made up of representatives from many Aboriginal tribes throughout the Northern Territory this assumes that an Aboriginal from the Centre is in a good position to sit in judgment on matters concerning decision of tribal courts from the Top End.
Finally, the notion of an appeal may introduce administrative duties which might greatly hinder the traditional decision-making process. Possibly the inter-disciplinary study might determine that an Aboriginal settlement may only wish to have jurisdiction over lesser offences such as drunkenness and disorderly conduct and not be able to cope with any more authority. If this is so, then the possibility of appeals to a Magistrate becomes a possibility. This would necessitate frequent visits to the settlement. It would also require a Magistrate making frequent visits to the settlement.

The review could either be one instigated by the defendant or a review of all cases as a matter of course. There are problems with introducing a Magistrate into the tribal court process but perhaps the Magistrate would also give the decisions of the tribal court more respect.

Finally it might be determined that a settlement, although able to function as tribal police, would rather retain the Magistrate as trier of fact.
fact and law. If this alternative were opted for, then more frequent visits than are presently made by Magistrates would have to be undertaken. As we noted in our first report:

"Punishment, to be effective, must be prompt, fair and in response to acts which the community deems to be offensive, considering the vast distances between outlying districts and the courts and also considering the different cultural patterns between a settlement and an urban centre, the distribution of justice in the Northern Territory must be decentralised". 22

The requirement of frequent visits to settlements to review cases or to hear cases would put great pressure on the Magistrates of the Northern Territory. Considering the present workload of the magistracy in the Territory, 23 undoubtedly the number of Magistrates would have to be increased to cope with the increased workload. Magistrates should also be briefed on Aboriginal culture with a

22. Report on Restructuring the Criminal Justice System in the Northern Territory (1973) p. 3.

23. During October, 1973, for example, the Magistrates in Darwin considered 1026 charges during 91 hours of sitting or approximately 5:3 minutes per charge. Also during October, 1973, the Magistrates heard 117 charges in Children's Court in 64 hours or approximately 3:2 minutes per charge. During October there were 173 defended cases heard in 49 hours. Despite the fact that there were many multiple charges, grave doubt is cast upon the ability of the courts to do justice while under such intolerable pressure.
view to fostering a working relationship with
the people and their cultures. A final
relationship between the courts of the Northern
Territory and the Aboriginal community that
will need be considered, whether or not any
system of tribal justice is established, is the
issue of the parole and probation of tribal
members on settlements. There are many
unanswered questions concerning whether parole
or probation would serve any function in regard
to tribal Aboriginals but there are almost
equally difficult questions concerning the
effectiveness of imprisoning tribal Aboriginals
especially when incarceration includes for
example a flight from Groote Eylandt to Darwin.
We have considered incarceration; we should
also consider the alternatives to imprisonment.

We have mentioned earlier the necessity, if a
system of tribal police is developed, that
there should be a training centre for the
police. Perhaps a brief reference to the
possibility of also establishing a tribal
judges' training centre should be made. Without
trying to speculate on the role of judges in
tribal courts, any attempt to state what role
such a judicial training centre would play would
be pointless.24 The possibility, however, that

24. "Perhaps one of the most significant
developments in the area of Indian Tribal
Legal Systems in the past few years has
been the creation of the National American
Indian Court Judges Association composed of
all the Indian Tribal Judges in the United
States. This Association has moved forward
positively to provide an unusually competent
continuing education program for the Tribal
Judges". Johnson, Ralph W. The Jurisdictional
Impact of Public Law 280 (School of Law,
University of Washington).
tribal judges would benefit from the opportunity to talk to others fulfilling the same function as themselves and also benefit from some type of training should not be ignored.

In the criminal law there are many problems which refuse either to be solved or to go away. Three of these problems are drunkenness, gaols and police misbehaviour. In the last decade many have come to think that alcohol problems should not be dealt with by the criminal law. The ineffectiveness of dealing with alcohol problems through the criminal law was explicitly referred to in our earlier report\textsuperscript{25} and is also dealt with in this report. It would not be surprising, therefore, if tribal courts also failed to effectively control alcohol problems through punishment. If effective programs are developed to deal with alcohol problems, those programs or modifications of those programs perhaps can be adapted to the settlements. This comment, however, should not be taken to mean that punishment for those who bring alcohol onto the settlements might not be effective. Secondly, much has been written recently on the problems of incarcerating individuals and the necessity for alternatives to incarceration. If some settlements sought to build local gaols it would appear that they must be places where human dignity is upheld and where physical

\textsuperscript{25} Restructuring the Criminal Justice System in the Northern Territory (1973) p. 2.
and mental health is not ignored. Finally if tribal police are given authority, care must be taken to impress on the settlement and on the tribal police themselves that their new role does not give them the authority to stand-over, bully or in any way use their influence in unethical ways.

C. Conclusion

What this section of our report has attempted to do is to define the problems inherent in dealing with the issue of justice on Aboriginal settlements. These questions must be asked and answered if any affirmative policy is to be established and carried through. Some of these become important only as time passes.

26. The following comments have been made concerning gaols on Indian reservations:

"Old, unsanitary buildings, poorly qualified and constantly changing personnel, intermingling of all types of prisoners - sick and well, old and young, hard-core criminals and misdemeanants with petty offenders in overcrowded cells and tanks and the complete absence of even the most rudimentary rehabilitative programs; and the failure of most jails to provide adequate supervision and services of a jailer at night are but a few of the more glaring deficiencies noted among the correctional facilities on Indian reservation ...." Report, p. 173

27. We have tried not to be too theoretical in our approach but there are theoretical issues that must be debated and resolved. We hope that we have stayed within the limits implied by Mr. Les Johnson, Minister for Housing and Minister for Works, when he stated in Parliament on 10th October, 1973:

"I recall talking to an Aboriginal in a hotel in the Northern Territory and asking him what he thought about assimilation versus integration and he said: "Are they starters in the Melbourne Cup, boss?" I think that very often we can become highfaluting and get well away from the attitude, concepts and aspirations of the Aboriginal people".

.../42
Section 1. Declaration of Purpose and Intent

The provisions of this Act shall be liberally construed to promote the intent of the Legislature as follows:

(a) The central principle underlying all rules, regulations, procedures, and practices relating to persons imprisoned in accordance with law shall be that such persons shall retain all rights of an ordinary citizen, except those expressly or by necessary implication taken by law.

(b) Such rights include but are not necessarily limited to nutritious food in adequate quantities; medical care; provision for an acceptable level of sanitation, ventilation, light, and a generally healthful environment; housing, providing for not less than fifty square feet of floor space in any confined sleeping area; reasonable opportunities for physical exercise and recreational activities; and protection against any physical or psychological abuse or unnecessary indignity.

(c) Persons in control of custodial facilities for prisoners shall be held responsible for maintaining minimum standards and shall make use of every resource available to them to prevent inhumane treatment of prisoners by employees, other prisoners, or any other persons.

(d) Measures shall be instituted and maintained within such facilities to protect against suicide or other self-destructive acts.

(e) All reasonable methods shall be used to protect against the theft or destruction of such personal property of prisoners as may be permitted in the institution.

A. Comments on Section 1. Declaration of Purpose and Intent

This section is broad in its wording and leaves open to subsequent rules and regulations the definition of some basic questions such as what constitutes "nutritious food" "healthful environment", and so on. It is probably desirable
to leave such questions to subsequent rule-making but in doing so certain safeguards should attach. Firstly, all rules and regulations promulgated under the Prisons' Act should be available for public inspection. Secondly, opinions of both prisoners and the public should be considered when the rules are adopted or subsequently amended. Finally, provisions should be made in The Prison Rules for controls over administrative discretion. Such provisions would guarantee adequate administrative appeals on all decisions which more than minimally alter a man's life. Instances where appeals would lie would be in cases of prison transfer, in cases of termination of a prisoner's participation, in certain programs such as education, work release and the like, and in cases of administrative cancellation of privileges.

**Paragraph (c) raises some interesting questions.**

In the United States prisoners' rights to litigation have resulted in damage claims being filed by prisoners against prison officials. **Paragraph (c) assumes that these suits will continue.** Also American litigation has determined that in certain instances injunctions will be issued requiring prison administrators to alter existing conditions. We believe that for effective enforcement of prisoners' rights such procedures must also be available to Territorian prisoners. It is true that some
frivolous litigation might develop but courts already have the mechanism with which to deal with frivolous claims.

We would suggest that within a Prison ACTs definitions of such important terms as "security" and "solitary confinement" be clearly stated so that abuses are avoided. We would also add to Section 1 a provision for personal privacy for the prisoner to as great an extent as possible, to include such things as personal grooming, clothes and unjustified searches.

We also reaffirm our recommendations concerning mail, visits and publications in Restructuring the Criminal Justice System in the Northern Territory. Guarantees in these areas go a long way toward providing "protection against any physical or psychological abuse or unnecessary indignity", and specific reference to these rights should be included within the Act.

Again we believe that Section 1 could also give specific statutory approval to such programs as periodic leave, work-release and other programs which allow the prisoner to operate in the outside world.

Finally, we believe that this Act should apply to all places of incarceration, not just to the larger institutions.
Section 2. **Inhumane Treatment Prohibited**

Inhumane treatment includes but is not limited to the following acts or activities and is hereby prohibited:

(a) Striking, whipping, or otherwise imposing physical pain upon a prisoner as a measure of punishment.

(b) Any use of physical force by an employee except that which may be necessary for self-defense, to prevent or stop assault by one prisoner upon another person, and for prevention of riot or escape.

(c) Sexual or other assaults, by personnel or inmates.

(d) Any punitive or restrictive measure taken by the management or personnel in retaliatory for assertion of rights.

(e) Any measure intended to degrade the prisoner, including insults and verbal abuse.

(f) Any discriminatory treatment based upon the prisoner’s race, religion, nationality, or political beliefs.

B. **Comments on Section 2. Inhumane Treatment Prohibited**

This section is very straightforward and needs little comment except for subsection (f).

(1). **Race**

Discrimination as to race is easy to allege but difficult to prove. There always appear to be plausible explanations for differential treatment. What is important in relation to all types of discrimination is that there should be open channels for complaint and investigation. In our initial report we recommended the creation of a civilian ombudsman. The ombudsman together with methods of correspondence, visits to prisons under Sec. 7 of the Model Act and the other
recommendations of our initial report would provide means by which grievances as to race could be aired. In addition to these methods the maintenance of statistics relating to disciplinary activities, admissions to programs and the like would aid in deterring discrimination.

(2). Religion
The practice of religion in prisons can give rise to difficult conflicts as to appearance, clergy, diet, work, reading material, and freedom of assembly. Although this is open to prisoner abuse, restrictions upon an inmate's ability to practice his religion must be justified by substantial reasons. It is not enough merely to state that a religious practice might threaten internal security.

(3). Political Freedom
Prisoners should be given the right to vote and the recommendations in our initial report concerning the rights of prisoners to information through correspondence, visits and publications, were designed to ensure that prisoners will have adequate information to form their beliefs. Again, only very serious reasons should be regarded as justifying censorship of incoming publications. A more difficult problem arises when one considers the question of communication among prisoners and with staff. There is no doubt that some limits should be placed on speech and interaction. Yet this can lead to arbitrary
use of discretion by prison staff. In exercising discretion as to interaction, prison staff can create a hierarchy of inmate status. Inmate councils have been authorized in Sweden which permit inmate participation in the operations and decision-making processes of the institution. We would encourage more open communication among prisoners and among prisoners and staff not only in regard to the political sphere but in regard to social life in general.

Section 3. Isolation in Solitary Confinement

A prisoner may be placed in solitary confinement - segregation in a special cell or room - only under the following conditions:

(a) During such confinement, the prisoner shall receive daily at least 2,500 calories of food in the normal diet of prisoners not in isolation.

(b) The cell in which the prisoner is confined in solitary shall be at least as large as other cells in the institution and shall be adequately lighted during daylight hours. All of the necessities of civilized existence, such as a toilet, bedding, and water for drinking and washing, shall be provided. Normal room temperatures for comfortable living shall be maintained. If any of these necessities are removed temporarily, such removal shall be only to prevent suicide or self-destructive acts, or damage to the cell and its equipment.

(c) Under no circumstances shall a prisoner confined in solitary be deprived of normal prison clothing except for his own protection. If any such deprivation is temporarily necessary, he shall be provided with body clothing and bedding adequate to protect his health.

(d) A prisoner may not be confined in a solitary cell for punishment, and may be so confined only under conditions of emergency for his own
protection or that of personnel or other prisoners. Confinement under such circumstances shall not be continued for longer than is necessary for the emergency. A prisoner's right to communicate with his attorney or the person or agency provided for in Section 5 to receive complaints shall not be interfered with.

(e) No prison shall be kept in a solitary cell for longer than one hour without the approval of the highest ranking officer on duty in the institution at the time.

(f) No prisoner may be kept in a solitary cell for any reason for longer than forty-eight hours without being examined by a medical doctor or other medical personnel under the doctor's direction.

(g) A log in a bound book shall be maintained at or near any solitary cell or cells, and employees in charge of such cell or cells shall be responsible for recording all admissions, releases, visits to the cell, and other events except those of the most routine nature.

C. Comments on Section 3. Isolation in Solitary Confinement

Provisions should be included within the Act to guarantee that prisoners within disciplinary cells receive adequate physical exercise, adequate diet, adequate medical attention and adequate mental stimulation whether it be in the form of reading matter or other ways.

Perhaps this would be best accomplished by a general statement within the Prisons Act as to the use of disciplinary cells leaving the details to prison rules although the provisions of this Section should also be applicable to segregation cells.

Section 4. Disciplinary Procedure

It is the responsibility of any person or persons in charge of the management of an
institution for the confinement of prisoners to develop and describe in writing a fair and orderly procedure for processing disciplinary complaints against prisoners and to establish rules, regulations, and procedures to insure the maintenance of a high standard of fairness and equity. The rules shall prescribe offences and the punishments for them that may be imposed. Any punishment that may affect the sentence or parole eligibility (such as the loss of good-time allowance) shall have a right to be present and a right to be represented by counsel or some other person of his choice. A permanent record shall be maintained of all disciplinary complaints, the hearings, and the dispositions thereof.

D. Comments on Section 4. Disciplinary Procedure

In our initial report we noted that certain procedural requirements are needed to ensure fairness whenever the State substantially affects a person's life. We would not limit the need for the minimum guarantees only to a situation where a sentence or parole eligibility is affected but would include other situations such as exclusion from work release programs and denial of participation in home leave programs. Wherever there is a substantial effect, the requirement of minimum standards such as the necessity for written rules, notice to inmates, representation by another, confrontation, cross-examination, production of evidence, record of the proceedings and appeal should be expressly stated in the Act.
Section 5. Grievance Procedure

The director of the State Department of Correction (or the equivalent official) shall establish a grievance procedure to which all prisoners confined within the system shall have access. Prisoners shall be entitled to report any grievance, whether or not it charges a violation of this Act, and to mail such communication to the head of the department. The grievance procedure established shall provide for an investigation (aside from any investigation made by the institution or department) of all alleged grievances by a person or agency outside of the department, and for a written report of findings to be submitted to the department and the prisoner.

E. Comments on Section 5. Grievance Procedure

Our initial report goes beyond Section 5 in establishing ways in which grievances can be heard: the creation of a prison ombudsman with clear statutory rights of access to prisoners and information; the prohibition of censorship of mail directed to lawyer, judge, prison officials or elected members of Federal Parliament or of the Legislative Council; increased access to the prison for officials, the press and for the public in general; the appointment of official visitors; and the restructuring of the prison administrative system. We agree with Section 5 that a method for investigating all alleged grievances must be established.
to general policy should not be made in regard to prisoners.

Two issues should be noted: firstly, courts have available procedures with which to deal with frivolous claims and; secondly, this relief should be available for local gaols. It must also be made explicit in any act just what standing a person must have before he can seek relief; must a person be incarcerated to seek relief or is it enough that at one time he was incarcerated? This is of importance in cases where a local gaol may be in gross violation of the Act but incarcerates persons for very short periods of time. Thus a prisoner would be extremely limited. Money damages in a civil suit should also be included within Section 6.

Section 7. Visits to Prisoners and Institutions

The director of a department responsible for the operation of an institution or a system of institutions for the confinement of prisoners shall establish rules and regulations permitting attorneys of record, relatives, and friends to visit and talk in private with any prisoner in an institution at reasonable times and under reasonable limitations. The institution may be visited at any time by members of the state legislature, judges of the criminal or appellate courts, the attorney general, and the governor.
Any other citizen may make application to visit an institution and talk in private with prisoners if the applicant establishes a legitimate reason for such visit and if the visit is not inconsistent with the public welfare and the safety and security of the institution. The director may reject any such application if the visit or any aspect thereof would be disruptive to the program of the institution.

If application for a visit is denied, the person may apply (court of general jurisdiction) for an order directing the head of the institution to permit the visit. Such order shall be granted after notice and hearing it is found that (a) the person is a representative of a public concern regarding the conditions of the prison, (b) he is not a mere curiosity seeker, and (c) it is not established by the head of the institution that the visit, or any aspect of it, would disrupt the program of the institution.

G. Comments on Section 7. Visits to Prisoners and Institutions

We believe that the comments made in our earlier report concerning the necessity for "open" prisons are consistent with the approach taken in this Section. We reaffirm our recommendation regarding the necessity of allowing the greatest possible visiting opportunities for a prisoner consistent with the practical operation of the prison.
Conclusion

As we noted earlier, the Model Act does not cover all the aspects of prison administration which should be included within a new prisons act and the regulations promulgated thereunder. The recommendations contained in our first report concerning the structure of the prison system, prisoner wages and so on should be incorporated in any bill which is drafted. What the Model Act does provide is a starting point and a framework for a new prisons act. Prisons Acts are uniquely resistant to amendment and up-dating. What must be drafted at this time, is a document which can serve as a blueprint for prison management for many years to come.