
**FINAL REPORT**

April 1998
FOREWORD

Reflected locally, nationally and internationally, there has been a sea change in correctional policy and practice since the Prisons Act 1981 was proclaimed in 1982. Research has generated a sound basis for optimism that programmes aimed at reducing re-offending do work. Positive interaction between prison officers and prisoners is now regarded as a better approach to prisoner management than simple reliance on gates and bars. Complementing its more traditional functions, prisoner labour has received recognition as an important means whereby prisoners may make reparation to the community. Increasingly, prisons are being monitored and held accountable against national and international standards and benchmarks. The introduction of competition in the provision of prison services in other jurisdictions has catalysed significant reductions in operating costs.

The Act has served the State well but can no longer provide an adequate basis for contemporary prisoner and prison management. A leader in its day, its time is rapidly passing. New legislation is necessary to reflect the changes that have occurred in prisons’ operating environment and to provide a framework which is sufficiently flexible to accommodate other changes which may be yet to come. As stated in the project brief, the primary objective of this review is the development of a legislative framework for an Act, consistent with contemporary best practice, to repeal and replace the current Act. The report of the review is comprehensive although in some areas (such as the contracting of prison services and prison revenue raising) it is acknowledged that there are issues which need further development. The Steering Committee and Project Group believe that implementation of the recommendations of the report will place the Western Australian prison system on a sure footing for the future.

Robert E Fitzgerald
EXECUTIVE DIRECTOR
POLICY AND LEGISLATION
SUMMARY LIST OF RECOMMENDATIONS

Recommendation 1

The review recommends that a new Prisons Bill be developed in accordance with the recommendations in this report.

Recommendation 2

It is recommended that the draft Bill prescribe the outcomes that imprisonment is directed to achieve and that these be as follows:

- Custody

Prisoners are to be kept in custody for the period prescribed by the court at a level of custody (security) commensurate with the risk they pose to the safety and security of the community and others;
(This outcome is consistent with the present Act.)

- Duty of Care

Prisoners' care and well-being are to be maintained;
(While a common law duty of care is well established, this has never been made explicit in the Act except by inference from Section 7)

- Reparation

Prisoners are to continue to contribute to the community through work and make good the harm done by their offending behaviour;
(This is an outcome which has not previously been made explicit although some prisoners have in practice worked on projects which make some form of reparation to the general community to make good the harm done by their offending. For example the Bibbulman Track Project and work within prison which reduces the services costs of imprisonment.)

- Reduce Re-offending

Prisoners are to engage in programmes and activities that reduce re-offending.
(This new outcome has also not been made explicit although some important programmes have operated to reduce offending among drug abusing, violent, and other prisoners.)

Recommendation 3

It is recommended that the draft Bill provide a set of principles to guide the interpretation of the Bill and the achievement of the outcomes. The recommended principles include:

1. People are sent to prison as punishment, not for punishment: the punishment associated with imprisonment is the loss of liberty arising from being in custody.

2. Prisoners retain the rights of a member of society, except those that are necessarily removed or restricted by the fact of imprisonment.
3. Every prisoner shall be treated with humanity and with respect for the inherent dignity of the human person.

4. All prisoners shall have ready access to fair grievance procedures.

5. Prisoners will be held at the lowest security consistent with the protection of the community subject to the availability of a suitable placement.

6. Discretionary management decisions affecting the administration of a sentence should be made openly and subject to appropriate controls and these guiding principles.

7. The Ministry of Justice has a responsibility to preserve the health, safety and well being of prisoners, employees and visitors and to minimise the detrimental effects of imprisonment.

8. Prisoners, employees and visitors to prisons shall take reasonable care to ensure their own health and safety and to avoid adversely affecting the health and safety of others.


10. Prisoners' family ties and obligations shall be treated with respect at all times and in all circumstances subject only to the demands of discipline, prison security or safety. The term family and the obligations that may attach to such relationships are to be interpreted as defined by the cultural or other group to which the prisoner belongs.

Recommendation 4

The review supports and recommends the adoption of the recommendation of the Report of the Review of Remission and Parole that residual remission provisions be abolished

Recommendation 5

The review recommends a provision be included in the draft Bill to formalise access to legal advice prior to a hearing for aggravated prison offences providing such advice is arranged by and at the expense of the prisoner and will not unduly delay the prison adjudication (a 7 day limitation is proposed).

Recommendation 6

The review recommends the introduction of a provision into the Bill explicitly precluding the use of prerogative writs and enabling in its place a review process.

Recommendation 7

It is proposed that where the exercise of a disciplinary power involves the removal of personal items or denial of access to canteen buy ups and other similar matters where basic rights are not threatened, prison management should be charged with establishing management reviews of the use of such powers. However, where the notion of privileges is extended to interfering with visiting rights, regulation in subsidiary legislation of the exercise of such powers is necessary.
Recommendation 8

The concept of a “contact” and a “non-contact” visit should be defined in the Regulations under the draft Bill.

Recommendation 9

It is recommended that the Bill provide for specially trained “disciplinary officers” at assistant superintendent level (similar to disciplinary officers as provided pursuant to Section 48 of the Victorian Corrections Act 1986) to hear minor prison charges and if satisfied that the charge is proven he may impose one or more of the following penalties:

- a caution
- a reprimand
- confiscation of property reasonably believed to be stolen (currently only available under Section 78[1] to Visiting Justices)
- confine to quarters
- cancel gratuities
- pay restitution
- withdraw privileges

It is proposed that a decision of the disciplinary officer may be appealed to the superintendent. This provides an appeal mechanism that does not currently exist. However, it is proposed that a decision of the disciplinary officer not be able to be appealed against, reviewed, challenged or questioned in any court.

Recommendation 10

The review recommends that the draft Bill provide the powers for superintendents to hear and adjudicate on aggravated prison offences where there is a plea of guilty. Superintendents should be able to impose (in addition to the existing punishments that may impose pursuant to Section 77) separate confinement in a punishment cell for up to 21 days (subject to the existing restrictions which provide for prisoners to spend no more than 5 consecutive days in separate confinement).

Recommendation 11

It is recommended that the draft Bill provide for a decision of the superintendent to be appealed to a Visiting Justice or alternatively a visiting panel (this might comprise a superintendent from another prison and/or an officer involved with monitoring standards).

Recommendation 12

It is recommended that the draft Bill provide for a Visiting Justice to hear pleas of not guilty to aggravated prison offences.

Recommendation 13

In order to allow the discretion for penalties to be fitted to the offence and the offender while ensuring consistency and fairness in such sentencing it is proposed to introduce into the draft Bill a provision empowering a system of “penalty units”. It is recommended that a tariff of penalty units be developed in Regulations.
Recommendation 14

In line with the trend toward making prisoners' rights explicit it is proposed to include a
provision in the Bill which requires that a prisoner be informed of his entitlements and
obligations pursuant to the Act or the Director General's Rules. The provision would also
require that the superintendent of a prison make available to prisoners (at their request) a copy
of the Act and Regulations. It is proposed to clarify in a schedule (in prisoners' handbooks) the
obligations and the entitlements which prisoners may expect and thereby to remove a point of
considerable contention which has provoked numerous complaints to staff, prison visitors, the
Minister and the Ombudsman.

Recommendation 15

It is recommended that a provision be included in the draft Bill to enable the preparation of a
written statement setting out minimum standards in relation to the exercise of any prison
functions to be carried out by either directly managed prisons (i.e. public sector prisons) or
contracted prisons.

Recommendation 16

It is proposed that the draft Bill provide for the regular monitoring of, and reporting to the

Recommendation 17

It is recommended that section 110(1) of the Act be amended by the insertion of a subparagraph
empowering regulations for the seizure and retention of drugs and other prohibited substances
and the drafting of a suitable regulation empowering the seizure and retention of drugs.

Recommendation 18

It is proposed to include a provision in Section 66 to empower the imposition of bans of up to 3
months on persons found in possession of illegal drugs.

Recommendation 19

An amendment is proposed to Section 110(s) specifically to empower the making of regulations
with regard to strip searching of persons entering or admitted to a prison.

Recommendation 20

It is proposed to include a new section in the Bill requiring the Chief Executive Officer to
develop a classification and placement system for prisoners which ensures prisoners are held at
the lowest level of security consistent with the security of the community and in which there is a
presumption that prisoners will serve their sentence within reasonable visiting distance from
their family.

Recommendation 21

The review proposes to narrow the definition of "escape lawful custody" under the Act to those
prisoners who breach a physical barrier(s) such as: from a closed security prison; a court
complex; a hospital while under guard; an escort such as for transfer or while on temporary
leave of absence on compassionate grounds. A new definition of "abscond lawful custody" is
proposed for prisoners who abscond without breaching a physical barrier(s) such as: walking
away from an open security prison; leave an area outside a closed security prison; did not return from an approved leave, or outside work, education or recreation programme; or, leave a hospital when unguarded.

Recommendation 22

It is proposed to amend Section 87 so that it gives effect to the intention that “a grant of leave of absence may not be given to a prisoner who has been classified under a system approved by the Minister unless the prisoner has been rated minimum security”.

Recommendation 23

It is proposed that the formal declaration of a prison could be made by the Minister responsible for the Act.

Recommendation 24

It is proposed that the draft Bill provides for appointment of Prison Visitors by the Minister.

Recommendation 25

It is proposed that the approval could be made by the Minister responsible for the Act and therefore that Section 86 be repealed.

Recommendation 26

It is proposed that the appointment could be made by the Minister responsible for the Act on the recommendation of the Chief Stipendiary Magistrate.

Recommendation 27

It is proposed to include a provision in the Prisons Bill enabling the Minister to delegate any power except the power of delegation and the power to appoint prison visitors.

Recommendation 28

In line with principle 7 which states: “The Ministry of Justice has a responsibility to preserve the health, safety and well-being of prisoners, employees and visitors and to minimise the detrimental effects of imprisonment”, it is recommended that the draft Bill make explicit a duty of care to prisoners.

Recommendation 29

It is recommended that the expression of a duty of care make explicit the duty to take account of gender, Aboriginal and other cultural beliefs and religious needs, where to do so would not jeopardise the security and good order of the prison.

Recommendation 30

While an oath of engagement may be replaced by a code of conduct or other such instrument, it is recommended that the draft Bill contain a provision requiring prisoners to be treated fairly and without discrimination by prison staff.
Recommendation 31

It is recommended that the draft Bill make provision for the special safe placement of young persons under 18 years of age who are lawfully held in an adult prison.

Recommendation 32

An amendment to section 67 is recommended to provide for letters of grievance concerning medical matters to be able to be sent unopened to the Director pursuant to Sections 19 and 25 of the Health Services Conciliation and Review Act.

Recommendation 33

An amendment to Section 27(1) is recommended to provide for the superintendent, where practicable, to seek the advice of the prison medical officer/medical officer or the senior nursing officer in the event that no medical officer is available, before ordering the removal of a prisoner from a prison for the purpose of receiving medical treatment.

Recommendation 34

It is proposed to amend Section 38(2) in line with the intent of the NSW provisions that allow for medical services to be provided by a medical officer employed on a short-term contract or as a locum service provider.

Recommendation 35

It is proposed to delete the requirement for the prior approval of the Chief Executive Officer before obtaining a second medical opinion.

Recommendation 36

It is recommended that Section 40 be amended to provide for the chief executive officer, Health Department to arrange for the regular health inspection of prisons.

Recommendation 37

It is proposed to amend Section 45 to include the involvement of a psychiatrist who may not be a nominated medical officer.

Recommendation 38

Section 53 to be amended to include reference to Aboriginal and Torres Strait Islander prisoners being granted access to Elders or other persons recognised as being spiritually relevant to their beliefs.

Recommendation 39

A general provision is recommended for the Act to ensure that if they are intellectually disabled or mentally ill, they have reasonable access within the prison or, with the Chief Executive Officer's approval, outside the prison, to such special care and treatment as the prison medical officer, medical officer, or medical practitioner considers necessary or desirable in the circumstances.
Recommendation 40

It is proposed that a provision be included in Regulations which requires the Chief Executive Officer to provide prisoners with food that is adequate to maintain health and well-being. In addition, it is proposed that every prisoner shall be provided with special dietary food where the superintendent is satisfied that such food is necessary for medical reasons or on account of the prisoner’s religious beliefs.

Recommendation 41

It is proposed to provide general limitations on the use of observation or administrative segregation cells in the draft Bill to highlight the procedural safeguards which must be in place for admission, review and discharge.

Recommendation 42

It is proposed that a substantially expanded provision should be made for prisoners to be actively engaged in programmes and activities that are directed reducing recidivism and assisting their reintegration with the community.

Recommendation 43

The review recommends that Section 94 be expanded to include educational study and or training to enable approved prisoners to attend tertiary education courses or training courses that are not available within prison.

Recommendation 44

Provision should to be made in legislation for prisoners to enroll formally in traineeships and apprenticeships or an approved course.

Recommendation 45

There should be a presumption that, where practicable, prisoners will serve their sentence within reasonable visiting distance from their family. In the case of Aboriginal prisoners, traditional and cultural values should also be considered in placing prisoners.

Recommendation 46

It is proposed to make a provision in the Bill to enable a Regulation to be drafted creating an offence and suitable penalties for temporary leave sponsors to be prosecuted if they willfully or negligently fail to comply with their responsibilities or knowingly provide a false report to the Ministry of Justice.

Recommendation 47

The review recommends that a new leave provision be made for intellectually disabled or other such prisoners to participate in a regime of daily escorted leaves of absence for the purposes of undertaking approved programmes, subject to suitable supervisory arrangements and the approval of the Minister.
Recommendation 48

It is recommended that there be separate, new, expanded provisions in the draft Bill for prisoners to undertake prison work which should be directed to achieving 1 or more of the following 4 major outcomes:

- To offset the costs of imprisonment through the development of self-sufficiency in such areas as primary production, vegetable growing, the manufacture of prison clothes and general cleaning and basic maintenance;

- To enable prisoners to make reparation through work which benefits the community. For example, the development and improvement of community resources such as the Bibbulman Track, the manufacture of specialist equipment for needy groups such as the disabled, and the propagation of seedlings for the regeneration of bushland;

- To develop prisoners’ skills and knowledge in areas which will result in opportunities for employment upon release thereby assisting them to become self-supporting and contributing members of society (in line with Chapter 5 above);

- To provide a variety of labours appropriate to individual capacity and ability for the disciplined occupation of prisoners during their imprisonment. In addition to productively occupying their time, such work also allows prisoners to earn a small gratuity for the purchase of approved personal items, to make a small contribution to their family, or to save money for use upon their release.

Recommendation 49

It is recommended that the draft Bill include provisions to enable and regulate the operation of directly managed (i.e. public sector prisons) and contracted prisons (in conjunction with the conditions specified in the contract).

It is recommended that provision also be made for the following:

- a redefinition of the terms “prison officer” and “superintendent” whereby under Section 36(1), a superintendent must be an officer as defined by Section 3 appointed under Section 6 or Section 13, and this will need to be expanded to include contract personnel;

- the same degree of public scrutiny apply to privately managed prisons that applies to directly managed prisons, but with the additional scrutiny of a statutory based monitor;

- the vetting of all custody officers (and their training) at contractually managed prisons and/or escort services;

- arrangements for mutual support between contractually managed and directly managed prisons;

- arrangements to enable the take over of a privately managed prison should the contractor lose effective control of the prison.
Recommendation 50

It is recommended that the powers of adjudication for prison offences be retained by the Ministry of Justice or, in the case of aggravated prison offences where the accused pleads not guilty, assigned to Visiting Justices.

Recommendation 51

Prison officers’ powers and duties should emphasise a balance between all of the purposes of imprisonment, with particular regard to ensuring that at all times the principles derived from these elements are complied with and achieved.

Recommendation 52

It is recommended that Section 13 be amended by deleting the words “the Minister” and inserting “officer nominated or party approved by the Minister”.

Recommendation 53

It is proposed to retain the employment provisions for directly employed prison officers as they currently exist in the Prisons Act.

Recommendation 54

In view of the advantages of completely independent inquiries, the ineffectiveness of past inquiries, the resulting organisational divisiveness and the enactment of other more powerful legislation for examining administrative matters, it is recommended that the powers provided under Section 9 be removed.

Recommendation 55

An exemption under the Dog Act is recommended for prison sniffer dogs.

Recommendation 56

The review committee recommends that provision be made in the draft Bill for the establishment of a formal classification committee to review the classification of all prisoners.
EXECUTIVE SUMMARY

The report of the Review of the Prisons Act 1981 (the Act) recommends that a Prisons Bill be drafted to repeal and replace the present Act which no longer provides an adequate legislative basis for contemporary best prison practice.

The report notes that since the Act was proclaimed in 1981, a significant change has taken place in research findings into rehabilitation, the criminal justice policy environment, and in the management of Western Australia's prisons. The relationship between prisoners and prison officers has been modernised with the introduction of interactive "unit" and (to a lesser extent) "case" management systems that have reduced the reliance on internal gates and barriers to segregate prisoners from prison officers and each other. While there is still further development required in these areas, prisons have been moved from being focused on inputs (providing sufficient beds, work and activities for the prisoners coming through the front gates) to an outputs focused system (concerned with how prisoners are managed and releasing them at the earliest release point in their sentence). However, the report argues that in line with best practice and in order to fully protect the interests of the community, it is necessary to move the focus of imprisonment on to the outcomes required of imprisonment (protecting the community and addressing violent or other illegal behaviours so that prisoners are released less likely to re-offend). In order to achieve these ends the report recommends that the draft Prisons Bill specify the outcomes expected of imprisonment.

The outcomes proposed are:

- custody of prisoners

  Prisoners are to be kept in custody for the period prescribed by the court at a level of custody (security) commensurate with the risk they pose to the safety and security of the community and others;

- duty of care

  Prisoners' care and well-being are to be maintained;

- reparation

  Prisoners are to continue to contribute to the community through work and make good the harm done by their offending behaviour;

- reduce re-offending

  Prisoners are to engage in programmes and activities which reduce re-offending.

The inclusion of principles is also recommended to clarify the intent of the legislation and assist those charged with interpreting the Act to understand the way in which these outcomes are to be achieved. The report examines the history and often confused purposes ascribed to prison work and proposes a significant change to way that prisoner work is provided for in the legislation. New provisions are proposed in order to disentangle work from its present alignment with prisoner welfare and realign it with the newly defined outcomes required of imprisonment.

Recognising the central role that prison officers play in the achievement, not only of safe and secure custody, but of all prison outcomes, the report recommends that the powers,
responsibilities and duties of prison officers should emphasise a balance between each of the purposes of imprisonment and proposes a number of changes to the legislative provisions under which prison officers are employed.

Significant changes are proposed to the prison adjudication system which will provide for minor offences against the “good order” of the prison to be dealt with more expeditiously while providing new appeal mechanisms for matters heard by the superintendent or his staff. Aggravated prison offences, to which a plea of not guilty has been made, are proposed to be heard by Magistrates appointed as Visiting Justices (thereby reducing the need for Justices of the Peace). These changes will significantly enhance the quality of the prison adjudication system and pave the way for legislatively precluding the costly and inappropriate use of prerogative writs by prisoners appealing on the grounds of natural justice.

The report recognises the vital importance of family visits to the successful reintegration of prisoners with the community and recommends clarifying the concepts of contact and non-contact visits. It argues there should be a clear presumption that prisoners will be held at prisons as close as possible to their families but also strengthens a number of provisions associated with preventing the entry of contraband such as drugs from entering prisons via family visits and strengthens powers for the seizure of contraband goods.

The report recommends a dual reporting approach to prisoner escapes which recognises the difference between a breakout from secure custody and a late return from home leave or a walkout from minimum security. New provisions are proposed to ensure the safe placement of under age prisoners and to ensure that prisoners with an intellectual disability are granted access to the same range of programmes as mainstream prisoners. Provisions are also recommended to ensure that gender, Aboriginal and cultural factors are taken into account in all management decisions and that Aboriginal prisoners have access to Elders and others relevant to Aboriginal spirituality.

In line with modern trends toward clarifying prisoners’ rights, it is proposed to include a provision in the Act for prisoners to be informed of their rights and obligations which will be detailed in plain English (and other languages) in prisoner handbooks.

The report also recommends that the Bill include provisions to enable the establishment of minimum standards and provisions to enable discrete prison services or whole prisons to be either directly managed (by the Government) or privately managed by the private sector. Based upon an examination of the experience inter-state and overseas with privately managed prisons, the report proposes strong legislative provisions be made to ensure rigorous monitoring is maintained of all privately (and publicly) managed prisons and that the authority for adjudicating prison offences be retained by the public prison system.

With over fifty recommendations for changes to legislation, the proposed Bill would provide the legislative base for prisons to achieve contemporary best practice prison management.
CHAPTER ONE - INTRODUCTION

The need for a review of the Prisons Act was identified by the Minister Assisting the Minister for Justice, the Hon. Kevin Minson MLA. Subsequently, the project brief and terms of reference for the review were approved by the Hon. Peter Foss MLC Attorney General on 16 May 1997.

1.1 Project Brief

The Prisons Act 1981 has been in effect for 15 years and reflects penological thinking of the late 1970's. Since its proclamation the Act has undergone many amendments on an ad hoc basis. Current Government policy in relation to prisoner management demands a focus on minimising the future recidivism of prisoners whilst ensuring their health and safety within a secure, just and humane environment. A new legislative framework is required which reflects these ends. The primary objective of the project is to develop an Act to repeal and replace the Prisons Act 1981. The new Act will reflect Government policy and be informed by the Offender Management Division’s Future Directions strategy and contemporary best practice principles.

The Terms of Reference noted that:

“The review will:

- clarify the objectives of the Act;
- examine and recommend policy in respect of:
  - guiding principles
  - appointment and discipline of Prison Officers
  - information (access by prisoners, disclosure to victims, etc.)
  - prisoner discipline (purpose, charges, hearings, sanctions)
  - search and seizure
  - vocational training and employment of prisoners
  - educational programs for prisoners
  - rehabilitation programs for prisoners
  - placement, removal and transfer of prisoners
  - temporary absences from prison for medical, programs participation, compassionate reasons
  - outsourcing prison facilities and services
  - prisoner welfare
  - monitoring of standards and conduct of inspections
  - health care of prisoners
  - visits to prisoners
  - other relevant matters;

while ensuring that any outputs take account of National Competition Policy principles.”

1.2 Overview of the Review Process

Steering Committee

Dr R. Fitzgerald, Executive Director, Policy & Legislation Division, Ministry of Justice (Chairman)
Mr G. Gibson, Director, Policy, Programs & Projects, Offender Management Division, Ministry of Justice
Mr J. Kirton, Director, Prisons, Offender Management Division, Ministry of Justice
Mr I. Vaughan, Manager Projects, Offender Management Division, Ministry of Justice
Ms M. Wilkie, Senior Lecturer, Law School, Murdoch University

The Steering Committee met to oversee and endorse progress on the review and was guided by the fact that the existing *Prisons Act 1981* is overly prescriptive and the draft Bill is intended to focus more on higher order outcomes and leave the prescription of how these are to be achieved to subsidiary legislation.

**Project Group**

Mr R. Stacey, Special Projects Officer, Offender Management Division, Ministry of Justice, (Project Group Chairman)
Mr Bill Cullen, Policy Branch, Offender Management Division, Ministry of Justice (Responsible for research and drafting the review report)
Mr G. Chapman, A/ Manager, Alternatives to Violence Unit, Offender Management Division, Ministry of Justice
Mr J. Dunstan, Superintendent Wooroloo Prison, Offender Management Division, Ministry of Justice
Ms J. Hubble, Researcher, Edith Cowan University
Mr W. Milroy, Manager Policy & Planning, Ministry of Justice
Mr P. Moore, Director Operational Standards, Offender Management Division, Ministry of Justice
Mr G. Stanley, Manager Organisational Performance, Offender Management Division, Ministry of Justice
Ms L. Stubbs, Community Corrections Officer, Community Corrections, Offender Management Division, Ministry of Justice
Mr P. Upton-Davies, Manager, Sex Offender Treatment Unit, Offender Management Division, Ministry of Justice
Ms S. Evans, Policy Officer, Policy Branch Offender Management Division, Ministry of Justice

The Project Group met weekly to discuss and recommend policy. Consultation took place with superintendents; the Director, Human Resources; the Director, Health Services and with the Ombudsman and his senior staff and is ongoing.

### 1.3 Submissions Received

Grateful thanks for written submissions are extended to the following organisations and persons:

- The Criminal Lawyers Association
- The Legal Aid Commission
- The Aboriginal Legal Service
- The Prisoners Advisory Support Services
- The Western Australian Prison Officers Union of Workers
- Hon. Justice Wallwork
- The Aboriginal Affairs Department and the Aboriginal Justice Council (Joint submission)
- The Law Society
- Director, (Prisoner) Health Services
- Senior Assistant Crown Solicitor (regarding the appointment of medical officers)
- Professor Richard Harding

(see appendices for a summary list of submitted issues)
1.4 Trends In The Prison Population

Rate of Imprisonment, Muster Growth Projections, and Prison Accommodation

Western Australia has the second highest rate of imprisonment in Australia after the Northern Territory. Ministry of Justice prisoner muster projections envisage a progressive increase in the prisoner population from a daily average of 2,300 in 1997 to 3,000 by 2005. Prison accommodation has been increasingly unable to meet demand for beds. For example, during 1997/98 there was an average shortfall of 104 prison beds based upon the daily average muster for the year.

However, on the 25 March 1998 the Government announced a major prison bed expansion programme which includes: a new 750 bed medium-security prison to be built at Wooroloo; the consolidation of Canning Vale Prison and the CW Campbell Remand Centre into a specialised remand facility to receive and assess prisoners; an additional 50 minimum-security beds at Wooroloo and Karnet Prisons; the re-opening of Riverbank (juvenile) Detention Centre as a low medium-security prison for up to 50 adult male prisoners; temporary accommodation for 150 male prisoners at Casuarina Prison; and consideration is currently being given to a site for a 50 bed minimum-security prison for female prisoners.

Demographic Profile of Prisoners

The defining characteristics of the prison population are that prisoners are overwhelmingly young and male. The peak age for property offenders across Australia is about 15 years while the peak age for violent offences is about 18 years. (Although prisons do not normally hold persons under 18 years of age.) There is therefore, what may be described as an "age of offending". This age specific offending pattern is not unique and is found in roughly comparable form in many other jurisdictions including England and Wales. The age profile of the population of Western Australia is therefore an important indicator of future changes to the prison population.

Migration into Western Australia, has kept the overall population age profile artificially young, but is expected to have a much reduced effect in the future (see profile below). Ageing of the general population may tend to decrease the overall rate of imprisonment as more senior members of the community are less likely to be received into prison.

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2 Prison Accommodation Analysis, unpublished Ministry of Justice statistical report
3 Much of the information and analysis in this subsection is taken from an unpublished Ministry of Justice 1997 briefing paper entitled "Aboriginal and Prison Populations" written by Mr Ian D'Mello
The profile of offenders being received into prison is that of young adult males, typically aged between 18 and 34 years old.

Aboriginals make up about 35% of the adult prisoner population and are over represented to the extent that an Aboriginal is 22 times more likely to be incarcerated than a non-Aboriginal. Consequently, changes in the size and age distribution of the Aboriginal population will impact on prison musters.

The Aboriginal community has distinctly different population mechanisms, with higher fertility and mortality but much lower mobility. Accordingly, the 0-4 year age group is the largest and accounts for 16% of Aboriginal people (see age and sex profile of Aboriginal population). Aboriginal population numbers then decrease progressively across age categories. This contrasts with the total population which has low fertility and is an ageing population. To some extent this explains the higher rate of imprisonment for Aboriginals - as young persons rather than older are more likely to be in prison.
The Aboriginal population profile above is pyramidal and shows a large cohort of Aboriginals aged between 0 and 19 years old. Peak imprisonment ages among Aboriginal adults is between 18 and 24 years. This would suggest that the number of Aboriginals in prison will increase over the next ten years.

Sentencing Practices

Changes in sentencing practice over the past decade have resulted in a substantial increase in the mean maximum sentences handed down for serious offences. For example, between 1985 and 1995 the length of sentences handed down for homicide increased by 75%, for assault by 126%, and for motor vehicle theft by 160%.

Between 1987 and 1997, the number and proportion of both male and female remand prisoners has risen significantly. For example, on 30 June 1985 there were 118 remand male prisoners which was 9% of the male prison population. On 30 June 1997 there were 267 remand male prisoners which was 12.7% of the male prison population. On 30 June 1985 there were 9 female remand prisoners which was 14.5% of the female prison population which had risen by 30 June 1997 to 21 which was 16.2% of the female prison population.

Offence Profiles

A significantly greater proportion of the prisoner population is serving a sentence for a crime of violence. While similar trends can be observed in both male and female prisoner populations, because of the disproportionately large numbers of male prisoners compared to female prisoners, they are treated as separate populations. For example, between 1985 and 1997 the percentage of male sentenced prisoners whose major offence was an offence against the person increased from 35.5% to 57.6%. A similar trend has been evident among female prisoners whose major offence was an offence against the person which rose from 17.7% in 1985 to 30.2% in 1997.


\(^6\) Ibid.

\(^7\) Ministry of Justice statistical reports, prisoner census data as at 30 June each year, 1984/85 to 1996/97.

\(^8\) Ibid.
Deaths in custody continue to be a matter of extreme concern with 48 deaths during the 8 calendar years 1990 to 1997. Of even greater concern is that the trend is upward with currently 7 deaths in the first quarter to 13 March 1998. In addition, in line with the findings of the Government’s Taskforce on Drug Abuse there is a possibility of further rises in the number of prisoners with drug or HIV problems.

1.5 The Changing Criminal Justice Environment

The criminal justice policy context in Western Australia has changed considerably since the Prisons Act 1981 was enacted. For example, the Young Offenders Act 1994 and the Victims of Crime Act 1994 have introduced restorative and reparative principles of justice. This, as Raynor notes, reflects a move away from the primacy of the “just deserts” emphasis solely on the principle of sentence proportionality to the offence toward a restoration of a moral balance between offenders and victims through concrete or symbolic acts of reparation.

The Sentencing Act 1995 consolidated sentencing laws to simplify and reflect modern sentencing principles as well as introducing new community orders which confirm imprisonment as the punishment of last resort. Further legislative change providing mandatory imprisonment for offenders convicted of their third breaking and enter offence requires such sentence to reflect not just the seriousness of the offence under consideration but also the pattern of offending.

In line with community expectations that community safety not be threatened by the early release of violent prisoners, release to parole under the Sentencing Act 1995 has increasingly become dependent upon a prisoner demonstrating that he/she have undertaken a programme directed to effecting a reduction in their offending. For example, the Parole Board has refused to recommend release to parole for sex offenders (assessed as being a moderate to high risk of re-offending) who have not completed a sex offender treatment programme. This has contributed to the reintroduction of effective rehabilitation programmes after a long hiatus in which rehabilitation was de-emphasised. This “rehabilitation of rehabilitation” is consistent with an increasingly substantial body of international research which indicates that programmes which target the causes of offending can be effective in reducing re-offending. Although, a distinction is drawn between the old, discredited “treatment model” of rehabilitation and the new approach.

The “prison experience” for prisoners is largely shaped by the structure of their routine prison day and a major component of prison routine is centred around work. Historically, prison work has had a sorry past, often with “hard labour” used as a means of increasing the severity of the punishment imposed. However, in recent times prison work has been valued for a variety of reasons. Modern prison work has 4 major objectives:

- to enable prisoners to make reparation through work which benefits the community. For example, the development and improvement of community resources such as the Bibbulman Track, the manufacture of specialist equipment for needy groups such as the disabled, and the propagation of seedlings for the regenerations of bushland;

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13 The “treatment model” and its replacement in Western Australia by the “justice model” is examined in a discussion paper entitled: “Review of the Prisons Act 1981, Discussion Paper 1, Background and Philosophy” which is appended to this report.
to develop prisoners' skills and knowledge in areas which will result in opportunities for employment upon release thereby assisting them to become self-supporting and contributing members of society;

- to provide a variety of labours appropriate to individual capacity and ability for the disciplined occupation of prisoners during their imprisonment. In addition to productively occupying their time, such work also allows them to earn a small gratuity for the purchase of approved personal items, to make a small contribution to their family, or to save money for use upon their release;

- to offset the costs of imprisonment through the development of self-sufficiency in such areas as primary production, vegetable growing, the manufacture of prison clothes and general cleaning and basic maintenance.

In the wider national and international context, there has long been a growing focus upon the conditions of imprisonment. Australia is a signatory to the International Covenant on Civil and Political Rights 1976 which stipulates that while prisoners may need to be detained securely in the interests of community protection, the conditions of detention must be safe and humane. The Royal Commission Into Aboriginal Deaths in Custody has highlighted the duty of care owed to prisoners as well as the need for prisons to provide culturally appropriate programmes, services, conditions and management regimes.

This focus on conditions has been extended to considerations of prisoners' rights. In an important judgement, Lord Wilberforce remarked in Raymond v Honey (1983) that under English law, a convicted prisoner, in spite of his imprisonment, retains civil rights which are not taken away expressly or by necessary implication.

Around the Western world in recent years there has been a shift from governments being the exclusive provider of services to a position whereby governments facilitate, contract, and monitor the standard of services for which they have responsibility. Prisons have been part of this process and a number of jurisdictions in Australia and around the world have privately run prisons alongside government run prisons. Such developments have had a significant impact on the final cost and quality of services provided, the structure of government agencies responsible for prisons as well as on the legislative instruments which enable, empower and control prisons.

1.6 The Current Prisons Act 1981

The Prisons Act 1981 (the Act) is the oldest mainland Australian penal legislation and is one of the largest with more than 117 sections (only the Queensland Corrective Services Act 1988 has more sections and that is due to making provisions for community corrections, community corrections boards, home detention, and parole in addition to prisons).

The Act repealed and replaced the Prisons Act 1903. On 27 October 1981 the then Chief Secretary, Mr Hassell, MLA noted in the second reading speech that:

The Bill therefore [sic] seeks to establish the department's aims, objectives, and accountability to the community through the Government and Parliament; to define the rights, duties and responsibilities of departmental officers; to ensure the operation of a humane environment for prisoners; and to protect both the prisoners and the public from abuse of those powers which are necessarily required by officers if they are to operate a secure prison system consistent with the realities of the 1980s.”

14 Article 10:1: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” And Article 7: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

15 Hansard, 27 October 1981
Despite the then Chief Secretary's comments, neither the Act nor any of its subsequent amendments explicitly define the purposes or objectives of imprisonment and subsequent amendments have been made on an ad hoc basis without the benefit of a stated philosophy or guiding principles.

The Act's long title notes that it is:

"an Act to make provision for the establishment, management, control, and security of prisons, the custody and welfare of prisoners and for related matters and to repeal the Prisons Act 1903."

The Act provides for the appointment of a Chief Executive Officer and other officers as well as the engagement, powers and duties of prison officers. It also provides for the custody, removal and temporary release of prisoners, the management, control and security of prisons, prison visits and communications involving prisoners, authorised absences from prison, and welfare programmes for prisoners.

The Act fixes accountability for powers and responsibilities, for example:

"[the] chief executive officer is responsible for the management, control, and security of all prisons and the welfare of all prisoners".

The Act was drafted in response to the excesses and perceived failure of the "treatment model" of imprisonment which was in vogue in Western Australia and across most of the Western World up to the 1970s. Under the lofty goals of that earlier model, prisons were envisaged as essentially instrumental to effecting social and individual change. However, the focus on change often obscured injustices and abuses to human rights. By the late 1970s, as imprisonment failed to realise the large scale rehabilitation that had been promised the model fell into disrepute amid a widespread belief that "nothing works" in terms of prison treatment programs.

The Act implicitly set out to implement a (then) new minimalist philosophy of sentencing and punishment which came to be known as the "justice" model or the "just desserts" model.

This view of punishment envisaged imprisonment as largely serving the ends of deterrence, incapacitation and retribution through depriving offenders of their liberty. The philosophy underpinning this model of imprisonment required only that prisoners serve their time "constructively" and not challenge the good order of the prison. Prison management focused upon improving the conditions of imprisonment and the humane treatment of prisoners and largely de-emphasised other goals such as rehabilitation.

Recommendation 1

The review recommends that a new Prisons Bill be developed in accordance with the recommendations of this report.
CHAPTER 2 - THE STRUCTURE OF THE PROPOSED PRISONS BILL

2.1 Broad Purpose of the Proposed Bill

The broad purpose of the proposed Prisons Bill is to contribute to the protection and maintenance of a just and law abiding society by providing for the administration of the penalty of imprisonment.

2.2 Specific Outcomes to be Achieved

It is proposed that the Bill be focused upon the outcomes to be achieved by prisons and that these be clarified and clearly articulated. However, imprisonment may be used to achieve many diverse outcomes (for example, to provide the community with protection from the predations of convicted violent offenders, to provide a model of just and fair prisoner management, and to ensure prisoners return to society with functional levels of literacy and numeracy). The review is of the opinion that the Bill should focus attention upon the most critical outcomes that may be characterised as being the very “cornerstones” of imprisonment.

Recommendation 2

It is recommended that the draft Bill prescribe the outcomes that imprisonment is directed to achieve and that these be as follows:

- Custody

Prisoners are to be kept in custody for the period prescribed by the court at a level of custody (security) commensurate with the risk they pose to the safety and security of the community and others;
(This outcome is consistent with the present Act.)

- Duty of Care

Prisoners’ care and well-being are to be maintained;
(While a common law duty of care is well established, this has never been made explicit in the Act except by inference from Section 7)

- Reparation

Prisoners are to continue to contribute to the community through work and make good the harm done by their offending behaviour;
(This is an outcome which has not previously been made explicit although some prisoners have in practice worked on projects which make some form of reparation to the general community to make good the harm done by their offending. For example the Bibbulman Track Project and work within prison which reduces the services costs of imprisonment.)

- Reduce Re-offending

Prisoners are to engage in programmes and activities which reduce re-offending.
(This new outcome has also not been made explicit although some important programmes have operated to reduce offending among drug abusing, violent, and other prisoners.)
2.3 Principles

Consistent with the approach adopted in the Young Offenders Act 1994 and the Mental Health Act 1996 and other national and international correctional legislation, it is proposed that the Bill articulate a number of principles to guide the interpretation and achievement of each of the proposed outcomes.

Recommendation 3

It is recommended that the draft Bill provide a set of principles to guide the interpretation of the Bill and the achievement of the outcomes. The recommended principles include:

1. Sentenced prisoners are sent to prison as punishment, not for punishment: the punishment associated with imprisonment is the loss of liberty arising from being in custody.

2. Prisoners retain the rights of a member of society, except those that are necessarily removed or restricted by the fact of imprisonment.

3. Every prisoner shall be treated with humanity and with respect for the inherent dignity of the human person.

4. All prisoners shall have ready access to fair grievance procedures.

5. Prisoners will be held at the lowest security consistent with the protection of the community subject to the availability of a suitable placement.

6. Discretionary management decisions affecting the administration of a sentence should be made openly and subject to appropriate controls and these guiding principles.

7. The Ministry of Justice has a responsibility to preserve the health, safety and well being of prisoners, employees and visitors and to minimise the detrimental effects of imprisonment.

8. Prisoners, employees and visitors to prisons shall take reasonable care to ensure their own health and safety and to avoid adversely affecting the health and safety of others.


10. Prisoners’ family ties and obligations shall be treated with respect at all times and in all circumstances subject only to the demands of discipline, prison security or safety. The term family and the obligations which may attach to such relationships are to be interpreted as defined by the cultural or other group to which the prisoner belongs.
CHAPTER 3 - THE CUSTODY OF PRISONERS

3.1 General

The proposed Bill will incorporate many of the provisions contained in the existing Act. However, it is intended that the Bill will be less prescriptive than the existing Act and that it will focus upon providing the enabling provisions and powers necessary to achieve the stated outcomes in ways consistent with the stated principles. It is proposed to relegate to subordinate regulations and rules specific detail on how and when provisions are to be effected.

The Woolf\textsuperscript{17} Report into the prison riots in the United Kingdom is instructive concerning the need for prisons to provide fair and just conditions for prisoners. According to Woolf, once British prison management lost its “legitimacy” through maintaining what prisoners perceived to be widespread unjust management regimes even non-violent prisoners rioted. The Bill will aim to provide the necessary imperatives for prison management regimes which are characterised by a firm but fair and just application of rules.

The Bill will seek to reinforce and consolidate the gains made in modern prison management which have seen a move away from a primary reliance on coercion to more interactive and co-operative relations between officers and prisoners. However, the Bill will retain the current range of coercive powers (and the checks on the abuse of such powers) necessary to ensure the safety and protection of the community and enforce the good order and management of prisons.

Nonetheless, legislation cannot and should not be expected to address all the issues which face Western Australia’s prisons. Overcrowding, deaths in custody, prison officer training to mention but a few issues currently facing prisons will require a great commitment of will and resources. But the Bill will afford a legislative base from which prisons can strategically achieve the outcomes identified in the draft Bill.

3.2 Prisoner Discipline

The application of a fair and speedy prisoner disciplinary system is crucial to the effective administration of prisons and the review received many submissions on the issue of prisoner discipline (see section 9.3 for summary). There are two competing issues which are central to prisoner discipline; firstly, the need to allow prison management to get on and manage their problems as efficiently, fairly and speedily as possible and secondly, the need for openness, accountability and transparency in the conduct of such disciplinary systems.

Part VI of the Act provides for a disciplinary system of:

- minor prison offences (for example, S69[a] “disobey a rule or order”, S69[c] “behave disorderly manner”, S69[i] “insubordination/misconduct”) and

- aggravated prison offences (for example, S70[b] “assault a person”, S70[d] “use/possess drug”) in addition, certain aggravated prison offences are also provided pursuant to Sections 10, 27, 85, 92 and 94.

This system is essentially administrative rather than judicial and aims to provide a relatively fast adjudication on offences which are largely offences against the good order of prisons but also include certain offences under the Criminal Code (for example, drug and assault offences).

\textsuperscript{17} Woolf, Hon. Justice. 1990 “Prison Disturbances in the UK” Home Office, London.
All prison officers may lay charges (although in practice most officers recommend charges which are then laid by prosecutors) which are brought before the superintendent who may formally hear minor offences (unless the prisoner elects to have the charge heard by a visiting justice) and who refers aggravated prison offences to a visiting justice or 2 visiting justices (although in practice 2 visiting justices are almost never used). Under Section 54(4) visiting justices may be appointed from persons who are Magistrates or Justices of the Peace (although in practice Magistrates have not been appointed). As the hearings are essentially administrative, the proceedings are not bound by the rules of evidence and prisoners are not legally represented. However, pursuant to Section 74(2) a Magistrate or 2 Visiting Justices may direct that a hearing shall take place in open court.

In practice, when faced with a more serious offence, superintendents ask the police to investigate and charge prisoners. However, the power for superintendents to refer matters to the police is not provided in the Act.

During 1996/97 there were 18,3680 distinct persons received into prisons (many of whom were received, exited and were again received making a total of 4,630 receivals). During this same year 19,1158 distinct persons (31%) were charged with single or multiple minor and/or aggravated prison offences which resulted in 20,2980 penalties.

While the percentage of prisoners charged with prison offences remains high and suggests that much yet remains to be achieved by interactive and co-operative prisoner management systems, the number of charges for minor prison offences (Section 69) has declined over 10 years in real terms due in part to a more professional approach to the management of prisoners and a decrease in the number of prisoners received (following a reduction in the number of short-term prisoners particularly fine defaulters). For example, during 1986/87 there were 2078 Section 69 charges and 1927 during 1996/97.

During the same 10 year period, the number of charges for aggravated prison offences (Section 70) has increased significantly. For example, during 1986/87 there were 231 Section 70 charges and during 1996/97 there were 807. The increase in charges has been almost entirely due to increases in charges laid under Section 70(d) “uses, or is in possession of, drugs not lawfully issued to him,” and Section 70(f) “does not submit himself for the purpose of having a body sample taken where he is required to do so under this Act”.

Inter-state comparisons are difficult to make due to significant differences regarding what constitutes an offence (for example, spitting is considered an assault in Western Australia but not in a number of other jurisdictions). Prisoner discipline systems are also differently provided in each of the mainland Australian jurisdictions as is indicated by the following table.

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18 Ministry of Justice Offender Management Statistical Report 1996/97, Distinct Persons Received Table
20 Ibid
22 Ibid
### Prisoner Discipline Issue 1 - Review of Remission and Parole

The Report of the Review of Remission and Parole concludes that "since the abolition of the 10% reduction in the non-parole period in November 1994, the Western Australian prison system has been able to resort successfully to other sanctions when punishing prisoners for unacceptable behaviour. There has not been a demonstrable increase in prisoner misconduct. In the view of the Committee, this demonstrates that the remission sanction is not necessary as a motivator of positive prison conduct."

As noted earlier during 1996/97, 2980 penalties were imposed for prison offences. The penalty of loss of remission was imposed in 239 instances (92 by superintendents and 147 by visiting justices).

Other penalties included:
- 279 caution/reprimands
- 174 suspended punishments
- 589 cancelled gratuities
- 8 property confiscated
- 434 pay restitution
- 1066 separate confinement
- 2 sentence imposed

The review notes that by imposing the penalty of loss of remission, the prison sentence is effectively extended. As prison is a sentence of last resort which is not normally imposed for non-criminal, minor offences, the review does not support the cancellation of remission for non-prisonable offences. The review supports the recommendation of the Report of the Review of Remission and Parole that residual remission provisions be abolished.

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Recommendation 4

The review supports and recommends the adoption of the recommendation of the Report of the Review of Remission and Parole that residual remission provisions be abolished.

3.2.2 Prisoner Discipline Issue 2 - Legal Representation

The Criminal Lawyers Association and the Aboriginal Legal Service submitted that prisoners should have the right to legal representation at hearings of minor and aggravate prison offences while the Legal Aid Commission and the Law Society recommended against such legal representation preferring instead the lesser option of access to legal advice prior to hearings.

The proposal to introduce legal representation is not supported as this would turn essentially administrative hearings into judicial hearings. The review is mindful of the potential for the prisoner discipline system to be delayed and become costly and thereby to subvert the expeditious hearing of prison offences. However, the Act does not prevent prisoners from accessing legal advice and where prisoners request such access it is usually granted providing the request is not used merely to delay proceedings.

Recommendation 5

The review recommends a provision be included in the draft Bill to formalise access to legal advice prior to a hearing for aggravated prison offences providing such advice is arranged by and at the expense of the prisoner and will not unduly delay the prison adjudication (a 7 day limitation is proposed).

3.2.3 Prisoner Discipline Issue 3 - Prerogative Writs

A further problem occurs when prisoners who are aggrieved and believe that natural justice has been denied by the process used by superintendents and Visiting Justices seek remedy by application to the full bench of the Supreme Court for a prerogative writ. In this way, the highest State judicial authority is required to adjudicate on issues of natural justice with regard to relatively trivial matters in prison which are not bound by court rules of evidence. The Legal Aid Commission and His Honour Judge Wallwork proposed to explicitly prohibit prisoners making application to the Supreme Court for a prerogative writ for prison disciplinary offences. His Honour has suggested using the appeals process under the Justices Act.

Recommendation 6

The review recommends the introduction of a provision into the Bill explicitly precluding the use of prerogative writs and enabling in its place a review process.

This proposal is placed in the context of new appeal provisions in section 3.2.6 later in the report. The Office of the Ombudsman may have a monitoring role in such a system.

3.2.4 Prisoner Discipline Issue 4 - Replacing Visiting Justices with Magistrates

A number of submissions have advocated that aggravated prison offences should be heard by a Magistrate instead of a visiting Justice of the Peace in line with "...the general down-grading of the role of justices in the administration of criminal justice as evidenced by the terms of the Sentencing Act."
Section 54(4) provides that visiting justices shall be appointed from persons who are Magistrates or Justices of the Peace. Under the provisions of the Prisons Act 1903 Magistrates were appointed as visiting justices but since the enactment of the current Act the practice has been to appoint Justices of the Peace. The review is of the opinion that Magistrates would bring a greater understanding of the law and natural justice, would be more likely to be consistent in the imposition of penalties and be perceived to be less easily influenced by prison staff.

During 1996/97 there were 1158 persons charged with single or multiple minor and/or aggravated prison offences which resulted in 3162 penalties. 21803 of these penalties were imposed by Visiting Justices. This would suggest that if Magistrates were to be appointed in the place of Justices of the Peace under the present arrangements there would be an average requirement to hear around 35 aggravated prison offences each week. The Chief Stipendiary Magistrate, Mr Con Zemplis has indicated that such a requirement would have resourcing implications. This issue is discussed more fully in section 3.2.6.

3.2.5 Prisoner Discipline Issue 5 - The “Informal” Disciplinary System

The introduction of more interactive “Unit Management” systems of managing prisoners has undoubtedly “humanised” the management of prisons. At the heart of the prison officer’s role under Unit Management is daily interaction with prisoners with a view to maintaining order through the implementation of fair and reasonable rules. However, as prison is increasingly seen by the courts as an option of last resort, prisoners may be regarded by definition as people who have demonstrated a disregard for the application of rules of behaviour. Daily interaction involves dealing with the minutiae of prison life such as; when a prisoner continues to play his stereo too loud after being warned, or when a prisoner is insulting, or a hundred other possible disruptions to the orderly running of a prison.

While inevitably, some prison officers possess better skills than others, in order to deal effectively with prisoners, prison officers rely upon concrete rewards and punishments both in terms of the application of the formal discipline system and in particular with the application of the informal discipline system which is based upon the removal of a range of privileges.

Generally speaking, prisons have been allowed a degree of latitude in the exercise of these powers with 26 courts taking the view that the exercise of such powers should not be subject to judicial review. Such latitude is regarded as broadly essential to allowing prison staff to effectively manage prisons. However, the potential exists for an abuse of such powers and the review proposes that safeguards be developed in the draft Bill.

Recommendation 7

It is proposed that where the exercise of a disciplinary power involves the removal of personal items or denial of access to canteen “buy ups” and other similar matters where basic rights are not threatened, prison management should be charged with establishing management reviews of the use of such powers. However, where the notion of privileges is extended to interfering with visiting rights, regulation in subsidiary legislation of the exercise of such powers is necessary.

26 See for example, Murray J in the matter of an application for a writ Certiorari against Richard Hughes Lamenthe Stowell, Justice of the Peace visiting Bandyup Women’s Prison, Supreme Court of Western Australia 2 September 1991, Nos 2394 & 2398 of 1991
Such regulation currently exists in Director General’s Rules for certain prescribed offences. Rules 2B and 3L provide such regulation for example with a first time cannabis offence a prisoner automatically loses contact visits for 2 months, for a second offence 3 months and for a third offence 6 months. However, there is nothing in the Act to prevent or regulate similar impositions being made for other rule infractions.

Even where these “administrative decisions” are regulated they are automatically imposed regardless and in addition to any formal punishment that may be imposed. Importantly, visiting justices are not required to take such automatic administrative decisions into account in the sentencing process and in many cases may not be aware of such management decisions.

Family visits are a further example of where administrative discretion may be applied to reduce the amenity of such visits. Section 59(1) provides prisoners with the right to receive visits subject to Part VI and in accordance with Regulations 52 and 53 which provide for weekly visits to occur under the supervision of a prison officer. However, the notion of a “contact” or a “non-contact” visit, while being extensively used in practice, is not defined and the review proposes this be included and clarified in the Regulations.

Recommendation 8

The concept of a “contact” and a “non-contact” visit should be defined in the Regulations under the draft Bill.

3.2.6 Proposed Amendments to the Prisoner Discipline System

The number of persons charged with minor prison offences is high at 31% of all prisoners received in a given year. Yet the number of prison offences for violence has not increased significantly and supports the proposition that the profile of the prison population has become more diverse and difficult to manage (for example, more prone to be alcohol or drug dependent) but not necessarily more violent (at least while they are in prison).

As noted in section 3.1 the Woolf Report has clearly demonstrated that prisoners will accept and accord “legitimacy” to prison regimes that they perceive to be generally fair and just. It follows that recourse to the prisoner discipline system may be reduced by improvements in day to day interactions between prisoners and prison officers and the management regimes (which are structured by the Director General’s Rules) that guide such interactions. The clarification of entitlements and responsibilities in prisoner handbooks along with written minimum standards and an effective inspectorate and other practical steps toward clear and transparent decision making are also likely to reduce recourse to the formal prisoner discipline system.

Regardless of improvements in other areas, the application of a fair and speedy prisoner disciplinary system remains crucial to the effective administration of prisons.

Minor Prison Offences

The review proposes to increase the speed and the effectiveness with which the disciplinary system deals with all minor offences and with guilty pleas on aggravated prison offences.

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Recommendation 9

It is recommended that the Bill provide for specially trained "disciplinary officers" at assistant superintendent level (similar to disciplinary officers as provided pursuant to Section 48 of the Victorian Corrections Act 1986) to hear minor prison charges and, if satisfied that the charge is proven, to impose one or more of the following penalties:

- a caution
- a reprimand
- confiscation of property reasonably believed to be stolen (currently only available under Section 78[f] to Visiting Justices)
- confine to quarters
- cancel gratuities
- pay restitution, or
- withdraw privileges.

It is proposed that a decision of the disciplinary officer may be appealed to the superintendent. This provides an appeal mechanism which does not currently exist. However, it is proposed that a decision of the disciplinary officer not be able to be appealed against, reviewed, challenged or questioned in any court.

Aggravated Prison Offences

If the prisoner is charged with an aggravated prison offence and pleads guilty the superintendent would hear the charge and be able to impose the same penalties as are currently available to visiting justices. (Importantly this would provide superintendents with the additional punishment of separate confinement in a punishment cell. This would act to reduce the number of matters currently heard by Visiting Justices.) It is proposed that the severity of the penalty imposed by a superintendent may be appealed to a visiting justice or alternatively a visiting panel (this might comprise a superintendent from another prison and/or an officer involved with monitoring standards).

If the prisoner pleads not guilty to an aggravated prison offence, the matter should be referred to a Visiting Justice. (Currently Justices of the Peace are appointed as Visiting Justices however, it is intended that in future magistrates will be appointed to these positions.)

Recommendation 10

The review recommends that the draft Bill provide the powers for superintendents to hear and adjudicate on aggravated prison offences where there is a plea of guilty. Superintendents should be able to impose (in addition to the existing punishments that may impose pursuant to Section 77) separate confinement in a punishment cell for up to 21 days (subject to the existing restrictions which provide for prisoners to spend no more than 5 consecutive days in separate confinement).

Recommendation 11

It is recommended that the draft Bill provide for a decision of the superintendent to be appealed to a visiting justice or alternatively a visiting panel (this might comprise a superintendent from another prison and/or an officer involved with monitoring standards).

Recommendation 12

It is recommended that the draft Bill provide for a Visiting Justice to hear pleas of not guilty to aggravated prison offences.
Recommendation 13

In order to allow the discretion for penalties to be fitted to the offence and the offender while ensuring consistency and fairness in such sentencing it is proposed to introduce into the draft Bill a provision empowering a system of “penalty units”. It is recommended that a tariff of penalty units be developed in Regulations.

Summary

The proposed new system would provide for the speedy adjudication of minor and aggravated prison offences, would provide prisoners with the capacity to appeal decisions made by disciplinary officers and superintendents (which they currently do not have) and would reduce the number of offences to be heard by visiting justices thereby opening the opportunity to appoint Magistrates to that position. The introduction of magistrates and the appeal mechanisms built into this system provide ample opportunities for ensuring natural justice and would consequently allow the Act to preclude prisoners from accessing prerogative writs.

3.3 Grievance Resolution

An equally important aspect of modern prisoner management regimes is the establishment of effective grievance resolution systems. A number of grievance mechanisms are currently provided to prisoners. Section 54 provides for the Governor to appoint prison visitors. Section 55 provides for the duties of prison visitors including the hearing of prisoner’s complaints and Section 58 provides for prison officers to co-operate with prison visitors. Regulations 76 and 77 provide the conditions for such visits and for interviewing prisoners. Director General’s Rule 4B provides for the recording of each visit. Director General’s Rule 2G provides for a complaints system which allows complaints to be made to officers, the superintendant and the Executive Director. In addition a prisoner may take a grievance to the Minister, the Ombudsman, and the Commonwealth Ombudsman.

The review is mindful that the operation of these formal grievance mechanisms will be greatly enhanced by other developments proposed by the review. For example, the development of written minimum standards (discussed in section 3.5) and the establishment of a monitoring capacity (discussed in section 3.6) which would be established outside the purchaser/provider structure. Also, the clarification of prisoner rights, entitlements and obligations (discussed in section 3.4) and their written expression in a prisoner handbook is expected to reduce the need for grievance resolution processes while at the same time enhancing their operation. The policy and procedures to assess and reconcile grievances will be strengthened to reflect the intention of the provisions contained in the existing legislation. In particular, administrative arrangements for the assessment and reconciliation of grievances will be transparently independent of the purchaser and any provider.

The existing provisions are considered appropriate and are recommended for incorporation in and under the Bill. However, the review has recommended (see under Executive Council Approvals) that Section 54 be changed to allow the Minister (rather than the Governor) appoint prison visitors.

In addition to these above mentioned grievance mechanisms it is proposed that provision be made for prisoners to lay a complaint concerning medical services by unopened letter to the Director (Department of Health) pursuant to sections 19 and 25 of the Health Services Conciliation and Review Act. This matter is discussed more fully in Chapter 4.

3.4 Provisions for Prisoners’ Rights

In an important judgement in Raymond v Honey (1983) Lord Wilberforce remarked that “under English law, a convicted prisoner, in spite of his imprisonment, retains civil rights which are not taken
away expressly or by necessary implication.” A detailed enumeration of twenty prisoner rights has been identified for prisoners of the Australian Capital Territory in the Law Reform Commission Discussion Paper No. 31.

Formal lists of prisoners’ rights are not yet common place but are being introduced in other Australian prisons legislation. For example a list of prisoners’ rights has been legislated for in Section 47 of the Victorian Corrections Act 1986 and Section 20 of the Australian Capital Territory Remand Centres Act 1976. The South Australian Correctional Services Act 1982 has detailed a number of specific rights (for example, Section 34 and Section 35 respectively provide for visiting rights and access to legal aid) and still other Acts such as Northern Territory Prisons (Correctional Services) Act 1997 (Section 91) and the Queensland Corrective Services Act 1988 (Section 36) have provided for prisoners to be informed of their rights which are then detailed in subsidiary legislation or in handbooks given to prisoners upon entry to a prison. The New South Wales Correctional Centres Act 1952 makes no mention of rights but Regulation 26 provides for “prisoners to be notified of rights and obligations”. (See Appendix 1 for a comparative table of prisoner rights in mainland Australian jurisdictions.)

3.4.1 General Protections Against Abuses of Human Rights

In order to minimise the vulnerability of prisoners to abuses of their human rights a number of initiatives have been introduced which have operated to make prisons more accountable. These initiatives include:

- the appointment of Prison Visitors and Visiting Justices under Section 54
- the establishment of a grievance mechanism under Section 67 which allows prisoners to raise complaints with the Minister, the Chief Executive Officer, the Parliamentary Commissioner for Administrative Investigations and the Commonwealth Ombudsman
- visits to a prisoner by legal counsel, police or other public officers under Sections 62-64
- the introduction in recent years of Unit Management and to a lesser extent Case Management techniques which have acted to normalise and humanise relations between prisoners and prison officers.

3.4.2 The Status of Rights, Entitlements and Obligations in the Current Act

While the major focus of the Act is on the establishment, management, control and security of prisons some entitlements are made explicit. For example, Section 59 provides prisoners with the right to visits and Section 67 provides for an entitlement to send and receive letters uncensored by prison staff. Other rights and entitlements are contained in Regulations for example, Regulation 51 provides for a prisoner to be informed, on request, of the contents of the warrant by which he/she is held in custody.

Many of the entitlements available to prisoners are in this way distributed throughout the Act, Regulations and rules and all are qualified by or subject to the good order and security of the prison. Consequently they may be withdrawn at the Superintendent’s discretion. This arrangement is appropriate for some entitlements, for example, the general entitlement to send and receive letters uncensored by prison staff clearly needs to be withdrawn in an individual case if the Superintendent has reasonable grounds to believe that letters are being used to threaten victims or contain some code which may be related to an escape or other illegal activity. Yet there are many entitlements or rights which should never to be withdrawn, for example, the right never to be subjected to torture or cruel, inhuman or degrading treatment.

27 Article 7 International Covenant on Civil and Political Rights
Most of the matters which are promulgated as prisoners' rights in the International Covenant on Civil and Political Rights, the United Nations Standard Minimum Rules for the Treatment of Prisoners, and the Standard Guidelines for Corrections in Australia (1996), are honoured in Western Australia prisons. Prisoners can apply to receive these rights and will be considered on a case by case basis. It may be argued that this situation is not dissimilar to the way rights are accessed in the community in the absence of an Australian Bill of Rights. However, distributing rights and entitlements throughout the Act, Regulations and rules, restricts prisoners' knowledge and understanding of their rights.

3.4.3 Proposed Provision for Rights and Entitlements

The reinstatement of recidivism reduction as a major corner stone outcome of imprisonment poses its own potential threat to human rights. As Fox has noted "when legal and medical models of responding to deviance become entwined, and legal/moral problems are turned into medical ones, there is a danger that restraints designed to curb unjustified punishment will be relegated to secondary position."

However, the risk in making rights explicit is that it may result in some vexatious litigation based on a perceived denial of rights (although no such litigation is reported to have occurred as a result of providing explicit prisoner rights in Section 47 of the Victorian Corrections Act 1986).

Many "rights" generally thought to be absolute and unfettered in the community may be available only as far as they do not infringe the rights of others and in a prison context become further subject to the over-riding imperatives concerning the security and good order of the prison.

Recommendation 14

In line with the trend toward making prisoners' rights explicit it is proposed to include a provision in the Bill which requires that a prisoner be informed of his entitlements and obligations pursuant to the Act or the Director General's Rules. The provision would also require that the superintendent of a prison make available to prisoners (at their request) a copy of the Act and Regulations. It is proposed to clarify in a non-statutory schedule (in prisoners' handbooks) the obligations and the entitlements which prisoners may expect and thereby to remove a point of considerable contention which has provoked numerous complaints to staff, prison visitors, the Minister and the Ombudsman.

3.5 Minimum Standards

Currently there is no provision for the application of standards in the Act and it is proposed to make such a provision in the Bill. The provision will enable the preparation of a written statement setting out minimum standards in relation to the exercise of any prison functions to be carried out by either directly managed prisons (i.e. public sector prisons) or contracted prisons. Such a provision is made in the following Acts: Victorian Corrections Act 1986 Section 9E; New South Wales Correctional Centres Act 1952 (Section 31J). However, Northern Territory and South Australia have no such provisions in their respective prisons Acts.

Recommendation 15

It is recommended that a provision be included in the draft Bill to enable the preparation of a written statement to be approved by the responsible Minister setting out minimum standards in

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relation to the exercise of any prison functions to be carried out by either directly managed prisons (i.e. public sector prisons) or contracted prisons.

3.6 Performance Monitoring for Prisons

Minimum standards are of limited value if they are not properly monitored. Therefore, it is proposed to establish a performance monitoring capacity to monitor standards, compliance with legislation and any contract conditions.

Recommendation 16

It is proposed that the draft Bill provide for the regular monitoring of and reporting to the CEO on standards, and inclusion of a report on the extent of compliance in the Annual Report.

3.7 Powers of Seizure and Conveyance of Illicit Drugs within Prisons

Under section 70(d) and (e) of the Act, it is an aggravated prison offence for a prisoner to use or be in possession of drugs not lawfully issued to him and to use drugs otherwise than as prescribed.

Section 110 of the Act provides powers to make regulations regarding a range of specific matters. However, there is an apparent oversight in the regulations in that there is no provision, in the part of the legislative scheme which deals with section 70 offences, which authorises the seizure or retention of drugs and provides for the admissibility of evidence in prosecutions related to such offences. Consequently, prison officers could be at risk of being found in unauthorised possession of prohibited substances contrary to section 6(2) of the Misuse of Drugs Act 1981.

Recommendation 17

It is recommended that section 110(1) of the Act be amended by the insertion of a subparagraph empowering regulations for the seizure and retention of drugs and other prohibited substances and the drafting of a suitable regulation empowering the seizure and retention of drugs.

The review considered the provisions of the New Zealand Penal Institutions Amendment Bill which was drafted to amend the Penal Institutions Act 1954. The Bill seeks to reduce the use of drugs and alcohol by inmates in New Zealand prisons by strengthening existing provisions and introducing new provisions. Measures contained in the Bill are designed to: reduce the demand for drugs and alcohol; facilitate treatment of inmates with drug problems; and to reduce the supply of drugs into prisons. Specifically, the Bill contains operational standards specifying random testing which are not considered superior to the existing Western Australian provisions. Other provisions which relate to strip searching have been considered and appropriate amendments have been recommended to the Regulation making provisions of the Act (see 3.9 hereafter). Otherwise the provisions of the Bill do not appear to provide any new powers to those already exercised under the current provisions.

3.8 Visiting Bans

The Ombudsman has expressed concern regarding the legality of the use of bans imposed by superintendents for periods of 12 months or longer on prison visits for visitors who refuse to be strip searched or bans on visitors where illegal drugs had been found on prisoners they had visited after the visit.

Section 49(1) of the Act provides powers for the searching of persons wishing to enter a prison. Section 49(2) extends this power to the searching of accompanying children and articles and Section
49(3) provides overriding powers (notwithstanding any other provision of the Act) for the superintendent to require a search even where a person refuses. At issue here is doubt as to whether the provisions confer the power to ban visitors, for a prescribed period. Consistent with Recommendation 2 of the Ministry of Justice Drug Management Strategy Project Report and in order to deter visitors from bringing illicit drugs into prisons, it is proposed to provide powers to restrict access to prison visits for those found in possession of illegal drugs.

**Recommendation 18**

It is proposed to include a provision in Section 66 to empower the imposition of bans of up to 3 months on visitors to prisoners found in possession of illegal drugs.

### 3.9 Strip Searching

On a practical level, the strip searching of visitors and their children is generally a most humiliating experience for visitors despite any regard for decency, sensitivity and self respect that might be shown by the searching officer. It is also highly distasteful for many officers as it can require an intimate inspection of such matters as the soiled nappies and undergarments of babies or the undergarments of women who may be menstruating. Consequently, strip searching is not to be undertaken lightly or without careful enabling provisions and controls on the manner and circumstances under which such searching may be undertaken. Nonetheless, it is imperative to prevent the entry of illicit drugs into prisons and consequently superintendents must be provided with the powers to ensure that the entry of such substances is minimised.

One option for superintendents who have evidence or suspect on reasonable grounds that illicit drugs may be introduced into the prison by a visitor is to allow only a "non-contact" visit under Rule 3L which classifies 'contact visits' as a privilege.

A second option is to enforce strip searching of visitors where there are reasonable grounds to suspect that illicit drugs or other contraband may be introduced into the prison. As noted above, section 49(1) provides powers for the searching of persons wishing to enter a prison. Section 110(1) of the Act provides for the making of regulations and paragraph (r) allows for regulations to be made "regulating visits to prisoners". Regulation 80 deals with searching persons under section 49 of the Act and Regulation 81 is concerned with "strip searches" under section 49. Subsection (6) provides that Regulation 80 applies "in the case of a search where a person is required to undress and be searched visually and by hand and in the case of an examination of body orifices". In this way the Regulations clearly recognise the ability to carry out strip searches and body cavity searches. However, while Section 110 makes specific the type of things about which Regulations may be made, it does not explicitly empower the making of regulations empowering strip searches.

**Recommendation 19**

An amendment is proposed to Section 110(s) specifically to empower the making of regulations with regard to strip searching of persons entering or admitted to a prison.

### 3.10 Prisoner Classification and Placement System

Prisons must manage the custody of persons who have been charged with or found guilty of the full spectrum of criminal offences from the most minor (as with traffic fine defaulters) to the most heinous (for example, "serial killers"). Prisons have a duty of care to maintain the safety of those in prison custody as well as a broad duty of care to protect the community from those in its custody. In order to fulfill these obligations prisons must utilise effective risk management strategies. The assessment, classification and assignment of prisoners to custody security levels commensurate with the level of
risk they pose to themselves and others is the primary mechanism for the effective and efficient management of prisoners.

Procedures for the assessment and placement of prisoners are currently provided pursuant to Director General’s Rule 2B which also provides for prisoners to be placed in prisons close to the place of residence of their families or significant others as far as practicable. These provisions are considered appropriate and are recommended for inclusion in regulations and rules under the Bill. However, in view of the centrality of prisoner classification to the management of prisoners it is proposed to provide a statutory basis for the classification of prisoners to ensure that community safety is given the highest priority.

**Recommendation 20**

It is proposed to include a provision in the Bill requiring the Chief Executive Officer to develop a classification and placement system for prisoners which ensures prisoners are held at the lowest level of security consistent with the security of the community and in which there is a presumption that prisoners will serve their sentence within reasonable visiting distance from their family.

In addition, there is administrative scope to introduce (subject to budgetary considerations) video equipment to prisons to enable “video visits” for prisoners unable to be placed at prisons close to their families. However, it is important that video links be regarded only as a supplement to face to face visits and not as a replacement.

A proposal to establish a formal classification board is developed later in this report in chapter 8 (section 8.3) as part of the considerations concerning the usefulness of inter-state boards.

### 3.11 Prison Escapes and Abscondings

#### Legislative Provisions in Western Australia

Under normal circumstances, a prison escapee in Western Australia who has been recaptured by the Police after being at large would be charged under Section 67 Police Act 1892. However, he may be charged under Section 146 of the Criminal Code (which provides higher penalty maxima) if he escaped lawful custody under sentence after conviction for an indictable offence. In this way the law views the escape of a prisoner serving a prison sentence for an indictable offence more seriously than it does a prisoner serving a sentence for a simple offence.

If a prison escapee were to be chased and or recaptured by prison officers he may be charged under Section 70(c) of the Prisons Act unless, as noted earlier, he was serving a prison term for an indictable offence. Importantly, if he is charged under the provisions of Prisons Act, all remission is forfeited. In addition, a prisoner who breaches a condition of a permit or grant of leave of absence from a prison may be charged with a minor prison offence under Section 69(j) of the Prisons Act.

#### Administrative Provisions in Western Australia

Once returned to prison custody all escapees, in addition to any penalty imposed for the escape, incur similar additional administrative consequences pursuant to Director General’s Rules 2B and 3L which provide for restrictions on the placement of escapees and the privileges they may be allowed.

#### Reporting Practices

Public confidence in the prison system is clearly threatened by reports of escapes. During 1996/97 there were 89 escapes from prison custody in Western Australia. However, this statistic provides an
incomplete picture which distorts the seriousness of the situation. Consider the circumstances in the following 2 examples:

1. Prisoner “A” is facing an extended prison sentence after conviction for a number of serious indictable offences and is being held in a maximum security prison. He recruits outside assistance and uses a weapon to escape from the waiting room of a public hospital to which he has been escorted by prison officers after feigning acute pain. The escape is effected without causing injury but nonetheless, puts the community at risk and directly traumatises many innocent people.

2. Prisoner “B” is assessed and rated a minimum security prisoner and placed at a minimum security prison where he is further approved for working under minimal supervision beyond the prison under Section 94 of the Prisons Act. While at the prison he receives a letter from his girlfriend advising him she will not see him any more. The next time he is taken to work outside the prison he runs away.

Clearly there is a substantial difference between these 2 events. However, both prisoners would be charged with escaping lawful custody and the 2 events would be reported without distinction.

The 32 Learmont Inquiry into Prison Service Security in England and Wales remarked that there was not sufficient differentiation between the types of escape and proposed categories of escape as follows:

- **Escapes from establishments** - prisoners who have had to overcome a physical barrier to escape;
- **Escapes from escorts** - prisoners who have escaped while being escorted outside a secure perimeter;
- **Absconds** - prisoners who escape without having to overcome a physical barrier, including those who escape from external work parties but also from open Category C and D prisons;
- **Temporary release failures** - prisoners who have been given leave of absence and failed to return at the due time.

**Reporting Escapes in Australian Jurisdictions**

In all states including Western Australia, escaping lawful custody is an indictable offence. However, the practice in states other than Western Australia with regard to reporting varies considerably.

For example, the New South Wales Department of Corrective Services Operations Procedure Manual includes a clear distinction between escaping and absconding based upon whether a physical barrier has been breached.

In Queensland, persons in work camps are not considered to be in custody and therefore any persons who leave are not considered to have escaped. For “other” Queensland prisoners an administrative matrix provides for defining unauthorised prisoner exits from prison as either an escape or an absconding as follows: all persons who exit from open and unescorted custody are considered to have absconded. All persons who exit from open, low and otherwise supervised custody are considered to have escaped open security. All persons who exit from medium or high security or from open, low security (when in the custody of a secure escort) are considered to have escaped secure custody.

In South Australia, all unauthorised exits are considered “escapes”. However, the individual circumstances of each escape is reported to highlight the differences between an escape from a maximum security prison and a walkout from an open security facility.

In Victoria, all escapes are considered as being the same. However, the Police have discretion where the circumstances of an escape would make prosecution difficult.

In Western Australia, all unauthorised exits from prison custody (except for certain breaches of conditions attached to permits of leave) are considered as being the same. That is, they are all reported as an escape and they are all charged as being an escape from lawful custody (albeit they may be charged under the provisions of the Criminal Code, the Police Act or the Prisons Act) and they all attract the same administrative consequences regardless of the circumstances of the escape.

**Recommendation 21**

The review proposes to narrow the definition of “escape lawful custody” under the Act to those prisoners who breach a physical barrier(s) such as: from a closed security prison; a court complex; a hospital while under guard; an escort as for transfer or while on temporary leave of absence on compassionate grounds. A new definition of “abscond lawful custody” is proposed for prisoners who abscond without breaching a physical barrier(s) such as: walking away from open security prison; leave an area outside a closed security prison; did not return from an approved leave, or outside work, education or recreation programme; or, leave a hospital when unguarded.

### 3.12 Restrictions on Grant of Leave of Absence

Section 87 provides for grants of leave of absence during the months prior to release or eligibility for parole. The leave is specifically to allow prisoners to seek or engage in gainful employment or work in a charitable or voluntary organisation. Section 89 provides for restrictions on certain types of prisoners being recommended by the Chief Executive Officer to the Parole Board pursuant to section 48 of the Sentence Administration Act 1995.

The grant of leave serves the purposes of better preparing prisoners, through strict supervision conditions, for their release to the community and providing for prisoners to make reparation to the community. In recent times the use of this form of leave for sex and violent offenders has declined sharply. The Report of the Review of Remission and Parole has recommended that this leave be abolished for parole eligible prisoners.

The issue has arisen due to the historic scaling of these prisoners’ risk of reoffending as “low”, “medium” or “high”. The Parole Board Chairman accurately regards these ratings as not meeting the requirements of either section 48(2) of the Sentence Administration Act 1995 or section 89(b) of the Prisons Act 1981 which require that a prisoner be of “minimum risk” to the community. The Shorter Oxford Dictionary defines minimum as “the smallest portion into which matter is divisible” or more relevantly “the least amount obtainable, allowable, usual…”

The Ministry has reassessed its rating system but cannot reasonably apply the term minimum to these offenders even where the commitment to a treatment programme has been high and the prognosis is optimistic due to the traditionally ingrained nature and persistence of this type of offending.

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It is noteworthy that in other Australian jurisdictions such as New South Wales, this problem does not arise as that legislation requires that prisoners be rated as C1, C2, and C3 before they be eligible for (respectively) low security, open security, and work release/home leave.

It is not the intention of the Ministry to be less vigilant than has previously been the case in only recommending those prisoners who it believes are at a low risk of offending. If the terminology in the Prisons Act and the Sentencing Act were to be changed from “minimum risk” to “low risk” the community would be entitled to believe that the conditions for release under this provision were being relaxed.

Recommendation 22

It is proposed to amend Section 87 so that it gives effect to the intention that “a grant of leave of absence may not be given to a prisoner who has been classified under a system approved by the Minister unless the prisoner has been rated minimum security”.

3.13 Executive Council Approvals

Cabinet has recently approved a number of amendments to the Prisons Act 1981 which relate to the Governor’s responsibilities. These include:

1. Section 5 currently provides for the Governor to declare that a place be proclaimed a prison or that it cease to be a prison. Presumably, the requirement that the Governor be involved in declaring a prison derives from the fact that (a) there are relatively few such proclamations, and (b) prisons are charged with carrying out the State’s severest punishment (including the death penalty when such a penalty was enforced). However, the declaration of a prison is essentially an administrative matter. In this regard, Section 13 of the Young Offenders Act 1994 provides for the Minister to declare a detention centre and Section 10 of the Northern Territory Prisons (Correctional Services) Act 1997 provides for the Minister to declare, by notice in the Gazette, a prison. All other (earlier) Australian prisons Acts provide for the Governor to declare a prison.

Recommendation 23

It is proposed that the formal declaration of a prison could be made by the Minister responsible for the Act.

2. Section 54 provides for the Governor to appoint Prison Visitors to listen to any complaint from prisoners or staff and to provide a report to the Minister. Prison Visitors are selected from members of the community and are appointed on an honorary basis to visit a particular prison every three months and to furnish a report to the Minister after each visit. Clearly, a function of Prison Visitors is to be an independent observer of prisons and thereby to ensure that any matter that the Prison Visitor believes to be significant may be directly reported to the responsible Minister. The appointment of Prison Visitors by the Minister would not diminish the independence from the Ministry of Justice nor the importance of such visitors.

Recommendation 24

It is proposed that the draft Bill provide for appointment of Prison Visitors by the Minister.

\(^{34}\)Cabinet Decision Sheet, Amendments to the Prisons Act 1981 Relating to Governor’s Responsibilities. Date of Minute 29/12/97, Date of Decision 19/1/98
The effectiveness of Prison Visitors is likely to be enhanced by the conduct of training programmes designed to improve their understanding of the relevant legislation and subsidiary regulations and rules.

3. Section 86 currently provides for the approval of permits authorising leave of absence from a prison (but remaining in custody) to visit a dangerously ill relative or to attend the funeral of a near relative for prisoners serving a life sentence or those serving an aggregate of more than 15 years. The time frames in which approval is sought are, in most cases are very short and each application is assessed to ensure that the prisoner meets the relevant criteria and appropriate security arrangements are in place.

**Recommendation 25**

It is proposed that the approval of permits authorising leave of absence from a prison be made by the Minister responsible for the Act and therefore that Section 86 be repealed.

4. Section 107 provides for the Governor to appoint a magistrate as chairman of the Prison Officers Appeal Tribunal. In practice the Magistrate is nominated by the Chief Stipendiary Magistrate.

**Recommendation 26**

It is proposed that the appointment could be made by the Minister responsible for the Act on the recommendation of the Chief Stipendiary Magistrate.

**3.13 Ministerial Delegation**

There is presently no provision under the Act for the Minister to delegate the performance of any of his functions, duties or responsibilities to any other person. Such a power of delegation to the Director General or other nominated senior officer will at times facilitate the more efficient performance of aspects of prison operations. Consequently, it is proposed to include a provision enabling the Minister to delegate any power except the power of delegation and the power to appoint prison visitors.

**Recommendation 27**

It is proposed to include a provision in the Prisons Bill enabling the Minister to delegate any power except the power of delegation and the power to appoint prison visitors.
CHAPTER 4 - THE CARE AND WELL-BEING OF PRISONERS

Every prisoner is owed a wide ranging duty of care to provide for his/her physical, psychological and spiritual well being. This duty of care is well established in Common Law and the review proposes to make this duty explicit in the draft Bill. For example, section 2.2 of this report recommends that the second outcome of imprisonment should be that: “prisoners’ care and well-being are to be maintained”.

Recommendation 28

In line with principle 7 which states: “The Ministry of Justice has a responsibility to preserve the health, safety and well-being of prisoners, employees and visitors and to minimise the detrimental effects of imprisonment”, it is recommended that the draft Bill make explicit a duty of care to prisoners.

Except where amendments or new provisions are proposed later in this chapter, it is proposed to incorporate the existing provisions in the Act, Regulations and Rules which specifically provide for health services, procedures for identifying prisoners at risk of suicide or assault and general mental health care, and rights to religious practice.

4.1 Duty of Care and Aboriginality

The current Act makes reference to duty of care in the powers and duties of the Chief Executive Officer contained in Section 7(1) where it states: “Subject to this Act and to the control of the Minister, the Chief Executive Officer is responsible for the management, control, and security of all prisons and the welfare of all prisoners”. Similarly, Section 12(b) provides for the duties of officers and states “every officer shall report to the superintendent every matter coming to his notice which may jeopardise the security of the prison or the welfare of prisoners”. The generality, economy and comprehensiveness of these statements is admirable but with Aboriginals comprising between 30 and 35% of the prisoner population it is no longer possible to rely upon generalities. Such statements might be said to maintain the fiction (by omission) that prisoners are largely a homogenous group with similar needs. The Western Australian prison system is perhaps most distinguishable from prison systems in Eastern Australian States by the very fact of the high proportion of indigenous prisoners. This has a highly significant impact upon the provision of a range of prison services. For example, the standard sought to be achieved by most Australian prison systems for accommodating prisoners is that of “one prisoner to a cell”. Many Aboriginal prisoners would consider such accommodation cruel and prefer multiple occupancy cells. Similarly, extended Aboriginal family and kin relationships must be taken into account in the development and implementation of policies which govern such matters as compassionate leave and the management of rivalry between groups.

4.2 Duty of Care, Gender and Cultural and Religious Issues

Numerous reviews have identified the disadvantages that women prisoners endure in Western Australian prisons yet despite these reviews most of the disadvantages remain unchanged. In part this is due to the small number of female prisoners and the consequential low cost effectiveness of providing them with the same range of education, employment, training, health and recreational opportunities as enjoyed by male prisoners. If the conditions of female prisoners are to improve in Western Australia greater energy and resources need to be applied to the women’s prison sub-system. As noted earlier, the Government’s prison expansion programme has identified the need for new low

security female prison accommodation and this will address many of the conditions of disadvantage. However, there is a need to bring this into focus through legislation.

Prisons also contain people who embrace a range of cultural and religious beliefs. The fact that they are not represented in the prison population in large numbers often obscures the extent to which they may be being prevented from carrying out rites and practices of deep personal significance. For example, Muslim prisoners can find it difficult to observe the strictures of their faith simply because most prison staff are not familiar with them.

Recommendation 29

It is recommended that the expression of a duty of care make explicit the duty to take account of Gender, Aboriginality and other cultural beliefs and religious needs, where to do so would not jeopardise the security and good order of the prison.

4.3 Prohibiting Racial, Sexual and other Harassment of Prisoners

Currently, pursuant to Section 13, prison officers subscribe to an oath of engagement wherein at part 2(d) they affirm to deal with prisoners “fairly and impartially”. In addition, prisoners who believe they have been subjected to harassment or other forms of discrimination may lay a complaint pursuant to Section 83 of the Equal Employment Opportunity Act 1984 or to the Commonwealth Human Rights and Equal Opportunity Act 1986.

Recommendation 30

While an oath of engagement may be replaced by a code of conduct or other such instrument, it is recommended that the draft Bill contain a provision requiring prisoners to be treated fairly and without discrimination by prison staff.

4.4 Special Arrangements for the Accommodation of Juvenile Prisoners

In Western Australia there is a separate detention system for young people under 18 years of age. However, under Section 118 of the Young Offenders Act 1994 a court may direct that a young person under the age of 18 serve their custodial sentence in an adult prison. While in practice special management regimes are put into place for such young persons there is no legislative provision or rule which provides for their safety and management in prison.

Recommendation 31

It is recommended that the draft Bill make provision for the special safe placement of young persons under 18 years of age who are lawfully held in an adult prison.

4.5 Provisions Relating to Health Care

For every prison, the services of at least one qualified medical officer must be available twenty-four hours a day. This service may be on an on-call or standby basis. Medical services are to be organised in close relationship with the general health administration in the community and must include access to a psychiatric service for the diagnosis and treatment of mental disorder.
4.5.1 Grievances (Health)

Recommendation 32

An amendment to section 67 is recommended to provide for letters of grievance concerning medical matters to be able to be sent unopened to the Director pursuant to Sections 19 and 25 of the Health Services Conciliation and Review Act.

This arises because of changes to the Health Services Conciliation and Review Act.

4.5.2 Removal of a Prisoner for Medical Treatment

In practice all Superintendents routinely consult with their medical staff on any issue which may seriously threaten the health of a prisoner including where a prisoner must be removed from a prison. However, under the present provisions a Superintendent may order the removal of a prisoner for medical treatment without consulting a prison medical officer. The key policy issue is that a Superintendent remains accountable for everything that occurs in a prison including the responsibility to seek appropriate advice concerning the health of a prisoner.

Recommendation 33

An amendment to Section 27(1) is recommended to provide for the superintendent, where practicable, to seek the advice of a prison medical officer/medical officer or the senior nursing officer in the event that no medical officer is available, before ordering the removal of a prisoner from a prison for the purpose of receiving medical treatment.

4.5.3 Nomination of Prison Medical Officer or Medical Officer

The intent of Section 38(2) is clearly to fix accountability. However, the requirements under these provisions are now out of step with the realities of current medical service provision where such services are provided by private contractors or locums. Consequently a legislative amendment is proposed that will assure accountability while accommodating the realities of contracted service provision.

This problem appears to have been averted in the NSW Correctional Centres Act 1952 wherein Section 9 it states:

(1) "The Governor may, upon recommendation of the Minister for Health and with the concurrence of the Minister, appoint one or more medical officers for each correctional centre.

(2) The provisions of the Public Sector Management Act 1988 shall not apply to or in respect of the appointment of medical officers to whom the right of private practice is reserved and any such medical officer shall not in his capacity as a medical officer be subject to the provisions of that Act during his tenure of office.

(3) Where a medical officer is for any reason unable to act as such any person who is a legally qualified medical practitioner and is a partner with such medical officer in the practice of medicine or who is carrying on the medical practice of such medical officer as locum tenens may exercise and discharge the powers, authorities, duties and functions of the medical officer who is unable to act as such. Such person shall whilst exercising and discharging such powers, authorities, duties and functions be deemed to be the medical officer."
Where no medical officer has been appointed to a correctional centre pursuant to subsection (1) the medical officer of health appointed under the Public Health Act 1991 for the medical district under that Act in which the correctional centre is situated, shall be the medical officer for that correctional centre.

Where the medical officer appointed under subsection (1) is for any reason unable to act as such and there is no person in partnership with such medical officer or acting as locum tenens as referred to in subsection (3), or where the person who may exercise and discharge the powers, authorities, duties and functions of the medical officer under subsection (3) fails or is unable to act as the medical officer, the medical officer of health appointed under the Public Health Act 1991 for the medical district under that Act in which the correctional centre in respect of which the medical officer has been appointed is situated, shall exercise and discharge the powers, authorities, duties and functions of such medical officer and shall whilst so exercising and discharging such powers, authorities, duties and functions be deemed to be the medical officer for that correctional centre.

A medical officer is, in the exercise of his or her functions, subject to the control and direction of the Chief Executive Officer, Corrections Health Service. However, if the Chief Executive Officer is not a medical practitioner, the medical officer is subject to the control and direction of the most senior medical administrator in the Corrections Health Service.”

The above legislative provisions, particularly those provisions contained in Sections (4), (5) and (6) reflect the NSW situation in which responsibility for prisoner health services rests with the NSW Health Department. However, the provisions are instructive in terms of providing for medical services, the delegation of powers to a qualified medical officer in lieu of an appointed medical officer as provided in Sections (3) and (4).

Recommendation 34

It is proposed to amend Section 38(2) in line with the intent of the NSW provisions which allow for medical services to be provided by a medical officer employed by the CEO on a contractual basis or as a locum service provider.

4.5.4 Second Medical Opinions

Section 38(2) provides for a second medical opinion, on approval by:

- the superintendent; or
- the prison medical officer; or
- the medical officer

But with the prior approval of the Chief Executive Officer.

It is unclear why the Chief Executive Officer would need to be involved and whether this section has application when prisoners are sent to a hospital under the Hospitals Act or an authorised hospital under the Mental Health Act.

Recommendation 35

It is proposed to delete the requirement for the prior approval of the Chief Executive Officer before obtaining a second medical opinion.
4.5.5 Health Inspection of Prisons

Section 40 of the Prisons Act 1981 requires the "Executive Director, Public Health and Scientific Support" to be involved, from time to time, in the health inspection of prisons. While the Health Department remains actively involved in a cycle of health inspections of prisons this position has now been abolished.

Recommendation 36

It is recommended that Section 40 be amended to provide for the chief executive officer, Health Department to arrange for the regular health inspection of prisons.

4.5.6 Power of Medical Examination and Treatment

Section 45 provides for medical examination and treatment for refusing prisoners. While the powers conferred by this section are rarely used they are not narrowly prescribed and could, for example, be used to force-feed a hunger-striking prisoner. It is therefore proposed to prescribe those circumstances in which this power might be used.

Recommendation 37

It is proposed to amend Section 45 to include the involvement of a psychiatrist who may not be a nominated medical officer.

4.6 Provisions concerning Religious Practice

Section 53 currently provides for the practice of religious rites and for prisoners to receive religious guidance

Recommendation 38

Section 53 to be amended to enable access by Aboriginal and Torres Strait Islander prisoners to Elders or other persons recognised as being spiritually relevant to their beliefs.

4.7 Programmes for Prisoners with Special Needs

Recommendation 39

A general provision is recommended for the Act to ensure that if they are intellectually disabled or mentally ill, they have reasonable access within the prison or, with the Chief Executive Officer's approval, outside the prison, to such special care and treatment as the prison medical officer, medical officer, or medical practitioner considers necessary or desirable in the circumstances.

4.8 Quality of Food

There are insufficient provisions concerning the adequacy of food or special dietary or cultural requirements for food (for example, Halal).
Recommendation 40

It is proposed that a provision be included in Regulations which requires the Chief Executive Officer to provide prisoners with food that is adequate to maintain health and well-being. In addition, it is proposed that every prisoner shall be provided with special dietary food where the superintendent is satisfied that such food is necessary for medical reasons or on account of the prisoner's religious beliefs.

4.9 The Use of Observation Cells for Medical or Administrative Segregation

In circumstances where prisoners threaten or actually inflict self-harm it is necessary to develop a management plan to ensure their safety. Part of such a management plan may involve placing them in an observation cell. The use of such cells is currently regulated by Director General's Rules 3B and 3J. Such cells are usually minimally furnished (to remove any hanging points) and it is sometimes difficult for prisoners to understand that they are not being punished. It is imperative that this type of segregation not be used as a de facto punishment.

Recommendation 41

It is proposed to provide general limitations on the use of observation or administrative segregation cells in the draft Bill to highlight the procedural safeguards which must be in place for admission, review and discharge.
CHAPTER 5 - REDUCING RECIDIVISM AND REOFFENDING

The *Prisons Act 1981* was drafted to implement a “Justice Model” which is sometimes referred to as the “just desserts model”, whereby the prison is seen as an *agent of justice* with its essential purpose being the management of the punishment (being the deprivation of freedom) in a fair and just manner.

The Justice Model was in part a reaction to the excesses of the preceding model of imprisonment for treatment and rehabilitation. That rehabilitation philosophy had arisen from insights afforded by the behavioural sciences which suggested that criminal behaviour was the consequence of faulty learning that could be changed by re-training programs. While the seeds of the rehabilitative ideal were apparent as early as 1895 in the Gladstone Report in Great Britain, in the two decades following the Second World War it was promoted enthusiastically by prison systems across Europe, North America and Australia. This resulted in prisons taking on a treatment orientation and becoming less punitive and more correctional in their day to day management of prisoners. During this period many prisons in Western Australia were given names which reflected these purposes, for example the Bandyup Training Centre, and the Bunbury and Karnet Rehabilitation Centres.

It is worth noting that psychology as practised in prisons initially conceptualised criminal behaviour as the consequence of personal or clinical problems to be treated in similar ways to the treatment for depression or anxiety. Consequently rehabilitation focused upon helping the offender to understand his or her own childhood problems. The promise of rehabilitation was therefore initially seen as: “transforming individuals into less undesirable, more complete and adequate, better functioning social beings.” The optimistic promise of imprisonment to treat and rehabilitate offenders was fraught with contradictions and at best only partially achieved. Indeed, under the guise of rehabilitation, human rights abuses were revealed as widespread, including in Australia as evidenced by the Nagle Royal Commission in New South Wales.

The publication of an article titled “What Works - Questions and Answers about Prison Reform” written by Robert Martinson and published in 1974 contained a summary of a review of 231 evaluation studies of offender treatment programs and concluded that with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism. The article proved influential and a large number of academics, policy makers and politicians took up the implication that “nothing works” from the paper’s questioning title despite Martinson’s (1979) own retraction of this view. In this way, the paper was seminal to the eventual collapse of the rehabilitative ideal.

The rehabilitative potential of programmes and activities is not essentially incompatible with the Justice Model rather it is simply not the focus. As Friedrich Losel has noted, by the late 1980s discussion on offender treatment revived (e.g. Gendreau & Andrews, 1990; Gendreau & Ross, 1987; Palmer, 1992; Lipsey, 1988; Losel, 1992; Thornton, 1987).

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In the mid 1980s in Western Australia, small but significant pilot programs on sex offender treatment and drug abuse were established and the then Department of Corrective Services moved away from an organisational structure based on the functions of its staff for: custody (prison officers) and the professional disciplines of psychology; education; recreation; and welfare, to one focused on the specific needs of prisoners. The re-organised Offender Development Branch allowed services to be more strategically directed to identified prisoner needs for: sex offender treatment; drug abuse treatment; those prisoners that were vulnerable and disturbed; and those prisoners requiring education and recreation.

The continuing development of rehabilitation theory has subsequently moved the focus of attention to the criminogenic rather than the psychological or sociological factors associated with criminal behaviour. Thus a distinction began to be made between an offender's social or psychological problems and those factors which cause, trigger or support offending. While considerable work remains to be done on the identification of criminogenic factors and the research does not support any one single approach as being a panacea, the evidence from meta-analyses of correctional rehabilitation programs confirm overall positive effects.

Thus the 1970s and 1980s saw a return to hard sentencing, the predominance of punishment, and the handing out “just desserts” to those who transgressed the law of the land. Throughout this period of rehabilitative nihilism a small group of academics and practitioners kept faith with the rehabilitative ideal, led perhaps by Paul Gendreau and Robert Ross, and slowly began to look for new ways to argue the case for rehabilitation. The turnabout when it came, was dramatic. Through the development of a methodology for statistically reviewing large bodies of research, called ‘meta-analysis’, unequivocal evidence was produced that rehabilitative programmes did work. The view that ‘nothing works’ is simply wrong; rehabilitation programmes do have a positive effect in reducing recidivism. The effect is not always large, although sometimes it is. However, it is there and that cannot be ignored.”

5.1 Remedial Education, Employment Training and Rehabilitation Programmes

The proposed Principle 9 is relevant to this section and reads as follows:

“Prisons shall seek to engage prisoners in recidivism reduction programmes however, each prisoner has the ultimate right to refuse to participate in such programmes.”

65% of Western Australian prisoners are assessed as having literacy deficiencies. Prisoners are also disproportionately affected by high rates of poverty, homelessness, substance abuse, family separation, sexual and emotional abuse, unemployment and social isolation.

The typical male offender has been characterised as follows:

• early school leaver with poor basic skills and a deep mistrust for the education system;
• little or no employment history and an unskilled work background;
• predominantly between the ages of 18 and 24;

ibid.

ibid, p.11
• one in three chance of being Aboriginal;
• dependency problems in the form of drugs or alcohol.

The typical female offender has been \(^{45}\) characterised as follows:

• they have a primary care role on admission;
• high incidences of sexual and physical abuse;
• previous bad experiences with formal education;
• victims of gender stereotyping and so lack career goals;

Despite these difficulties, the number of prisoners who enrol for educational courses is surprisingly high among prisoners. For example, \(^{46}\) 60% off those assessed as having literacy deficits took the opportunity to increase their education in prison.

Functional levels of literacy and numeracy are important skills for employment and living in modern western societies.

Currently, each of the State’s prisons has an Education Centre staffed by qualified education personnel who teach, assess and counsel prisoners, manage the Education Centres and employ tutors on contract for additional teaching. Many prisons also have vocational training facilities which are able to provide limited training. However, many prisoners wish to pursue subjects which are beyond the capacity of such centres.

**Recommendation 42**

It is proposed that a substantially expanded provision should be made for prisoners to be actively engaged in programmes and activities that are directed towards reducing recidivism and assisting their reintegration with the community.

Section 94 provides that the Minister may approve a programme of activity outside a prison, providing participating prisoners are assessed as not posing a risk to the safety and security of the community. Section 94 specifies that such programmes may comprise either of the following:

• community work;
• charitable or voluntary work;
• work associated with the operation of the prison;
• sport;
• religious observance; or
• any other activity.

While the last dot point provides for any other activity, the Crown Solicitor’s Office has advised that education and training may not be interpreted as being within the scope of the type of activities envisaged in this section and will need a specific provision.

**Recommendation 43**

The review recommends that Section 94 be expanded to include educational study and or training to enable approved prisoners to attend tertiary education courses, vocational training or other relevant courses that are not available within prison.

\(^{45}\) ibid, p.12

Section 95 currently mixes together a number of different matters which in the draft Bill are recommended to have separate sections. For example, Section 95 ostensibly (according to the Part Heading and to subsection 94(a)) provides for welfare programmes for prisoners such as counselling and other assistance to prisoners and their families. However, this part also provides under subsection (b) for “opportunities for prisoners to utilise their time in prison in a constructive and beneficial manner by means of educational and occupational training programmes and other means of self-improvement”. In addition, subsection (c) provides for “opportunities for work, leisure activities, and recreation.”

The way these matters have been grouped together and the language used in the subsections strongly reflects the Justice Model approach to imprisonment. As noted above, the rehabilitative potential of programmes and activities is simply not the focus of these provisions. Consequently, there is no imperative given to either prison staff to actively seek to engage prisoners in suitable programmes nor to prisoners themselves to actively engage in programmes which will address their offending behaviour. Similarly, there is no imperative given to prison administrators to provide full time work for prisoners which is meaningful, reparative, and offsets the costs of their imprisonment.

Consultation is currently underway with the Department of Training regarding the potential for prisoners to be formally enrolled in a number of traineeships and apprenticeships. Because of the special master/apprentice relationship and agreement an amendment may be required in either training legislation or the Prisons Act to enable an exclusion.

Recommendation 44

Provision should be made in legislation for prisoners to enrol formally in traineeships and apprenticeships or an approved course.

5.2 Family Contact

One of the most potent forces for reducing re-offending among prisoners is the influence exerted by family and friends. The maintenance of these ties is often difficult for prisoners and families both emotionally and because of the practical difficulties that often accrue to families visiting prisoners who are held in prisons distant from their home. Consequently, it is imperative that prisoners be encouraged and where possible assisted to maintain and develop their family ties and relationships.

The proposed Principle 10 reflects this imperative as follows:

“Prisoners’ family ties and obligations shall be treated with respect at all times and in all circumstances subject only to the demands of discipline, prison security or safety. The term family and the obligations which may attach to such relationships are to be interpreted as defined by the cultural or other group to which the prisoner belongs.”

Family ties may be maintained and developed through visits, letters and telephone calls. Visits are provided for pursuant to Sections 65 and 66 and Regulations 53 and 54 and Director General’s Rules 4A - F. Letters are provided for pursuant to Section 67 and 68 and Director General’s Rule 5F while telephone calls are provided for pursuant to Director General’s Rule 5D. These are considered appropriate to incorporate in or under the draft Bill.

Recommendation 45

There should be a presumption that, where practicable, prisoners will serve their sentence within reasonable visiting distance from their family. In the case of Aboriginal prisoners, traditional and cultural values should also be considered in placing prisoners.
Director General’s Rule 2B provides procedures for the assessment and placement of prisoners and includes: “1.1.4 that prisoners are placed in prisons close to the place of residence of their families or significant others as far as practicable.” This is recommended for incorporation in Rules under the draft Bill.

In addition, women prisoners may maintain family relationships where they are the primary care giver to an infant by keeping the infant with them in prison. Director General’s Rule 3A provides for the management of mothers and their children in prison and is recommended for incorporation in Rules under the Draft Bill.

5.3 Temporary Leave

5.3.1 Temporary Leave - Sponsor Responsibility

Family relationships and responsibilities may also be maintained in certain circumstances where a prisoner’s relative is sick or has died and a funeral service is being held. Pursuant to Sections 83 and 86 prisoners may apply for a grant of permit to attend the funeral or bedside of a sick relative.

Temporary leave may also be granted pursuant to Section 87 for the purposes of seeking or engaging in gainful employment or working gratuitously for a voluntary or charitable organisation. Also for visiting a friend or relation (S. 87 (4)) However, there is no power to provide for the prosecution of a home leave sponsor in the event that such a sponsor fails to comply with their responsibilities or provides a false report to the Ministry of Justice.

Recommendation 46

It is proposed to make a provision in the Bill to enable a Regulation to be drafted creating an offence and suitable penalties for temporary leave sponsors to be prosecuted if they wilfully or negligently fail to comply with their responsibilities or knowingly provide a false report to the Ministry of Justice.

5.3.2 Temporary Leave - Disabled Prisoners

The Access to Justice Working Party, which comprises members from the Ministry of Justice, the Police and the Disability Services Commission has identified that there is no provision for granting leave of absence to prisoners (including prisoners serving a sentence at the Governor's Pleasure) who, for reason of an intellectual disability and/or because of the seriousness of their offence, cannot be assessed as posing a minimum risk to the security and safety of the community. It is estimated that there are around 5 or 6 such prisoners a year who are unable to be progressed through the prison system and into a community placement which offers the opportunity of a secure environment within which to address offending behaviours for people with such disabilities. The Disability Discrimination Act 1992 requires that people with disabilities be given equal opportunity to participate in and contribute to the full range of life activities and facilities provided by government departments and agencies.

Recommendation 47

The review recommends that a new leave provision be made for intellectually disabled or other such prisoners to participate in a regime of daily escorted leaves of absence for the purposes of undertaking approved programmes, subject to suitable supervisory arrangements and the approval of the Minister.

47“Least Restrictive Viable Alternatives For Difficult Offenders” Draft Report, p.3
CHAPTER 6 – REPARATION

6.1 Provisions relating to Work

6.1.1 Historical Perspective

In order to understand the complex issues which pertain to prison work it is necessary to have some understanding of its development. Traditionally, prison work was regarded as integral to both the punishment and reformatory goals of imprisonment and this found expression in sentences of imprisonment with “hard labour”.

Although the genesis of prisons might be said to lay in the dungeons of medieval castles, in 15th century England it was the urgent need to find a solution to chronic unemployment and its consequences that first led to the establishment of modern prisons. Until the 15th century the principle instruments of official punishment were whipping, banishment and capital punishment. However, the widespread enclosure of rural lands saw such a huge influx of dispossessed peasants into the cities that vagabondage, begging and crime became a major problem. In order to reduce the level of begging in London the King consented to Bridewell Palace being set aside as a place where vagrants, idlers, thieves and petty criminals would be housed. The institution was to be run with an iron hand and its aims were:

1. to reform inmates by means of compulsory labour and discipline;
2. to discourage vagrancy and idleness in London; and
3. to ensure its own self-sufficiency by means of labour.

Bridewell was the prototype for the further spread of houses of correction throughout England in the years that followed. The Act of 1601 formally recognised this model experiment by providing judges with the powers to send to gaol: “idle blockheads”; petty offenders; vagabonds; petty thieves; prostitutes and the poor who refused to work.

From that time until the mid 1800s, sentences of imprisonment were usually no longer than two years because prison was regarded as such a severe penalty due to the commonplace use of the treadmill and other similar painful accompaniments to imprisonment. When Parliament was forced to replace the death penalty and transportation with longer prison sentences for other than capital offences it established the concept of “penal servitude” as a distinct form of imprisonment. Penal servitude was served in convict prisons administered by the national Government while more traditional forms of “imprisonment” continued in the harsher conditions of prisons run by local justices of the peace. Following the nationalisation of British prisons in 1877, penal servitude in the convict prisons and imprisonment with hard labour in the local prisons began to merge into a single, national regime (although sentences were still relatively short because, for serious offences, courts could impose “corporal punishment” to add to the deterrent and retributive effects of the sentence). The distinction between the two forms of imprisonment being finally abolished in the Criminal Justice Act 1948 which also abolished corporal punishment.

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6.1.2 Legislative Provisions For Prison Work In Western Australia

The distinction between penal servitude and imprisonment with hard labour was also legislatively defined in Western Australia. Until it was repealed in 1992, Part 5 of the Western Australian Criminal Code provided for the kinds of punishment which could be imposed and included: imprisonment, imprisonment with hard labour (and whipping other than on a female).

In the second reading speech of the Bill to amend The Criminal Code and repeal these provisions, Mr D. L. Smith 52 remarked that whipping and hard labour were “archaic punishments...[and that there has] been no hard labour in prisons for many years...”

The Prisons Act 1981 does not envisage or make provision for hard labour as an additional punishment to penal servitude. Indeed, the only reference to prisoner work in the Act is made in subsection 95(2) in which the provision is made in such circumscribed language that it might be argued that there is no clear power given to compel prisoners to work at all:

“Participation in and use of services provided under this section shall be voluntary, except that, unless a prisoner is medically unfit, he may be required to work.”

The fact that this subsection is included under “Part IX - Welfare Programmes for Prisoners” would seem to indicate that, under the Act, prison work had moved full circle from its connection to punishment and has been provided largely for the benefit of prisoners. The complete absence of the concept of rehabilitation from the current Act similarly indicates a disconnection from any rehabilitative goals.

6.1.3 The Types of Prison Work In Western Australia

A diverse range of prison work has been established in Western Australian prisons as can be seen from the following types of prison work which are available:

Aquaculture, Automotive, Bakery, Canteen, Carpentry, Cleaning, Concrete, Footwear, Garment, Kitchen, Laundry, Maintenance, Market Garden, Mechanical, Metal Shop, Nursery, Paint Shop, Print Shop, Tele-Communications, Textiles, Upholstery, and Vegetables.

However, (and perhaps not surprisingly) there has been considerable debate over the purposes of prison work. The operation of Prison Industries within Western Australian prisons has been subject to a significant amount of review. For example, in addition to a number of internal Department of Corrective Services’ reviews there were 2 significant external reviews during the 1980s:

- 53 Report of the Consultative Committee on Prison Industries, January 1984. A review conducted by an independent committee of leaders from industry; and


Among the recommendations made by these 2 reports were recommendations for the establishment of a Prison Industries Board with statutory authority to oversee the corporatisation of prison industries.

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and a range of recommendations directed to performance management. According to the most recent internal prison industries review, few of establishing the review recommendations have been implemented.

6.1.4 New Purposes/Outcomes for Prison Work

As idleness among prisoners is a major cause of prisoner unrest, prison management is concerned to ensure an ample supply of work is available. Prison work will consequently continue to play an important role in the routine of the prison week. However, with the steady growth in the prison muster, finding work suitable to the often limited skills of many prisoners has become an ongoing problem. In employing the large and captive labour force, prisons must always be careful not to move into a position where prison industry is competing with local producers and service providers and the opportunities for exporting prison produce are limited.

It is essential that there continue to be as wide a variety of prison work available as possible. In addition to the types of prison work identified above as being available, a number of prisoners are employed in full-time education. A limited number of prison work opportunities exist which, with the involvement of external training bodies, are being used to facilitate traineeships (for example, boilermaking). Negotiations are currently underway to increase the opportunities for in-prison traineeships and even apprenticeships. Traineeships are expected to be offered to prisoners through the Technical And Further Education sector (TAFE) with Commonwealth funding in conjunction with private enterprise. The traineeships are also Commonwealth funded and involve significant contributions to infrastructure, equipment and tutoring.

6.1.5 Reparation

Most importantly, the draft Bill must clarify the purposes (outcomes required) of prison in order to focus prison work and the consequent development of prison industries. Many of the decisions relevant to establishing prison work appropriate to contemporary penal practice will be administrative decisions which need not be the focus of this report. However, such decisions can only be made in the context of the clarification of the purposes of prison work. The Government has indicated that prison work be envisaged as essentially reparative in nature with significant rehabilitative opportunities as well as essential to the constructive occupation of prisoners. This is a significant policy clarification which has implications for the draft Bill and for the future development of prison work.

Reparation may be defined (in terms of prison work) as work which makes good the harm done to the community by prisoners. This can occur through an increase to the self sufficiency of a prison leading to a reduction in the cost of imprisonment having to be met by the community or by work initiatives which benefit the community in other, more direct ways. While some prison work in the past has been directed to assisting the general community and considerable prison work is directed to offsetting the cost of imprisonment, this is an outcome which has not been made explicit nor been emphasized or maximized in the past. Consequently, it is anticipated that the level of reparation made by prisoners may be significantly increased in the future.

Currently, Western Australian prisons produce more food for prison consumption than any other Australian jurisdiction. In addition, Western Australian prisoners undertake significant work which provides products and services to the community that otherwise could not be provided or would impose prohibitive costs upon the community. For example, prisoners at Casuarina Prison produce specialist equipment for physically impaired members of the community. Minimum security prisoners have been carrying out extensive work on the Bibbulman Track which has involved the upgrading of

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56 Policy developed through consultation between the Ministry of Justice and the hon. Peter Foss ML C. Attorney General
the walking track and facilities such as huts. This work has considerably benefited the community by making available a unique recreational resource and is likely to generate significant tourist interest and thereby further benefit the community.

Recommendation 48

It is recommended that there be separate, new, expanded provisions in the draft Bill for prisoners to undertake prison work which should be directed to achieving 1 or more of the following 4 major outcomes:

- To offset the costs of imprisonment through the development of self-sufficiency in such areas as primary production, vegetable growing, the manufacture of prison clothes and general cleaning and basic maintenance;

- To enable prisoners to make reparation through work which benefits the community. For example, the development and improvement of community resources such as the Bibbulman Track, the manufacture of specialist equipment for needy groups such as the disabled, and the propagation of seedlings for the regeneration of bushland;

- To develop prisoners’ skills and knowledge in areas which will result in opportunities for employment upon release thereby assisting them to become self-supporting and contributing members of society (in line with Chapter 5 above);

- To provide a variety of labours appropriate to individual capacity and ability for the disciplined occupation of prisoners during their imprisonment. In addition to productively occupying their time, such work also allows prisoners to earn a small gratuity for the purchase of approved personal items, to make a small contribution to their family, or to save money for use upon their release.
CHAPTER 7 - OTHER PROVISIONS

7.1 Contracting of Prison Services

Australia has a unique historical connection with the private management of prison services dating from its colonial foundation. Almost every transport fleet that sailed from England after 1788 with a cargo of convicts bound for Australia operated under contract to the British Government. On board every transport were Government naval agents and surgeons foreshadowing the role of latter-day prison contract monitors.

However, the contemporary debate concerning contracting out prison management has been heated and protracted. Proponents of private sector involvement have pointed to a need to introduce competition into what has been a state monopoly in order to establish objective benchmarks regarding service provision and cost efficiency. Opponents have argued that any 'punishment for profit' is morally offensive and that private sector prisons have largely failed to realise the level of savings they were supposed to achieve. The fact remains that around the world contracted prison management has continued to grow a pace of and because of substantial increases in prison populations since the 1970s.

While the resurgence in private prisons occurred first in the United States of America in response to large scale overcrowding in prisons, Australia has quickly become "the second major country to 'rediscover' privately managed prisons, with (28% per cent) of its prisoners accommodated in privately managed prison."

In general terms, contracting may be applied to the financing of a new prison, its design and construction, as well as the management of a prison or the provision of certain prison services such as health or educational services. There are significant issues arising from each of these options, for example whether the Government should own the land and buildings so that it may terminate a contract and award it to another contractor. However, important as these issues are, it is not intended to examine them further in this report. Rather, the report will examine only those issues directly related to legislation.

Clearly, governments are responsible for the overall management of the corrective services system, whether the actual delivery of prison services is achieved through private contractors or government managed facilities.

Of the 7 State and Territory jurisdictions in Australia, Tasmania is currently examining the issue of prison privatisation through a Parliamentary Select Committee and Queensland, New South Wales, South Australia and Victoria currently operate privately managed prisons. Importantly, each of these states have taken a different approach to managing and monitoring these contracts and different approaches to the legislative provisions empowering them and these are examined in some detail in the following paragraphs.

Queensland

Consequent upon the Kennedy review of the Queensland Department of Corrective Services, the Corrective Services Act 1988 was proclaimed and provided for the establishment and operation of prisons, Community Correction Centres, Community Corrections Boards and the regulation of parole.

60 Information obtained from the internet email : inra.meggtris@parliament.tas.gov.au
and other court orders. In addition, the Queensland Corrective Services Commission was established to monitor the delivery of corrective services.

As a result of recommendations in the Kennedy review, in 1990 Queensland became the first Australian jurisdiction to contract out the management of a prison with the opening of the 244 cell Borallon Correctional Centre for medium security prisoners. Borallon is operated by Corrections Corporation of Australia (a subsidiary of the Corrections Corporation of America) as a joint venture with Chubb Australia (a subsidiary of Chubb UK) and has had a relatively smooth passage into Queensland corrections.

A second private prison contractor entered the Queensland corrective services system in 1992 when the 380 cell Arthur Gorrie Correctional Centre opened with the contract awarded to Australasian Correctional Management.

According to Mr Stan Macions, Deputy Director-General, Queensland Corrective Services Commission, the reasons for introducing privatisation into Queensland were: 1. The benefits of competition, 2. Perceived cost savings, 3. The need for cultural and attitudinal change in the management and operation of prisons, and 4. The need for comparative information for future decisions.

Queensland adopted a minimal legislative basis for contracting which is contained in Section 19(2)f of the Corrective Services (Administration) Act 1988. Where it states that the Commission may:

"engage a person (other than a commissioner, or an officer or employee of the Commission) or a body of persons to conduct on the Commission’s behalf any part of its operations whether under this Act or the Corrective Services Act 1988;"

Consequently, the ability for private prisons to operate in Queensland is dependent upon the exercise of delegated authority from the Corrective Services Commission. Section 16 empowers the Commission to delegate any of the “powers, authorities, functions or duties...upon a general manager of a prison” and the legislation does not require a general manager to be an employee of the Queensland Corrective Services Commission. According to Section 18(2)(a) and (b) of the Corrective Services Act 1988, the person authorising the general manager to have powers under the Act may rescind or vary or make a new order that the general manager could have made. In other words, the Commission may effectively circumvent the authority of the general manager by introducing its own rules for the management of the prison thereby rendering the general manager’s powers ineffective.

Perhaps what is most significant about these legislative provisions is what is not included, in particular the lack of any statutory regulation provisions in addition to those that apply to directly managed prisons. These matters were left to the specific contract conditions. Harding notes that:

"the first contract, that relating to Borallon, provides that the Corrective Services Commission may (not must) appoint a person ‘to monitor the performance of the Contractor and/or undertake any audit of any aspect of the Centre or its operations’ and that this person ‘will be the official liaison between the [Commission] and the Contractor on all matters pertaining to the contract’.

Perhaps lulled by the early success of the Borallon initiative, the officer appointed to liaise between the private prison and the Commission was allowed to be diverted to activities which reduced her capacity to rigorously monitor the privately managed prisons. The theme of poor accountability is one that Harding develops as a major concern for a number of prison systems around the world (with the

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61 Ibid. p. 13.
62 Vodanovich, I 1997 “Privatisation of Prisons” an unpublished memorandum to the Review of the Prisons Act
notable exception of the United Kingdom which is examined later in this section). Importantly, he points to the common loss of accountability that occurs through what he terms the “capture” of monitors which Harding argues is a major issue, if not the major issue facing governments with regard to privately managed prisons:

“This notion [of capture] is used to describe situations where regulators come to be more concerned to serve the interests of the industry with which they are in regular contact than with the more remote and abstract public interest.”

New South Wales

In New South Wales the impetus for a privately managed prison was contained in the recommendations of a consultant’s report (the Kleinwort Benson Report). Unlike the Kennedy report in Queensland, this report was not a major review of corrective services and it did not concern itself with legislation neither did it recommend a statutory authority to monitor corrections. Based upon an assumption that the private sector is inherently more efficient than the public sector, the report recommended significant advantages would result with private sector involvement in the New South Wales prison system.

The legislative basis for contracting prison services and management is contained in the Prisons (Contract Management) Act 1990 which amended Part 6A of the Correctional Centres Act 1952. Although only two years after the Queensland legislation, “the discussion of privatisation had widened considerably and...the developing ethos was one where it was considered that monitoring arrangements should be accorded greater status, as well as some autonomy within the correctional hierarchy”.

The amendment provided for the following matters:

31A Purpose for which contractors may be engaged
31B Management of correctional centre under agreement
31C Authorisation of correctional centre staff
31D Status of staff at correctional centre managed under an agreement
31E Monitoring
31F Corrections Health Service
31G Investigation of corruption
31H Administrative complaints
31I Freedom of information
31J Minimum standards

New South Wales currently has one privately managed prison - the 600 cell correctional centre at Junee, which is operated by Australasian Correctional Management and has no current plans for any further privately managed prisons. The prison has been the subject of considerable criticism for the remoteness of its site in the South West of New South Wales and the consequent difficulty that visitors have in accessing the prison and that fact that visits do occur they often require an overnight stay. But there have been other concerns voiced about the contractual relationship between the Commission and Australasian Correctional Management. According to 67 Harding:

“despite the statutory status of the monitor at Junee prison, the Corrective Services Commission assigned a low value to the position from the outset. The monitor’s subsequent performance review noted that 96 per cent of the operational standards specified in the contract were being met. But, as with Borallon, one gets no ‘feel’ for

64 Ibid, p.33.
67 Ibid p.44-45
the working of the institution; the review is predominantly processual [sic] in tone rather than interpretative or agenda setting. A major riot subsequent to this review did not really come as a great surprise."

**Victoria**

In Victoria, the publication of "New Prisons Project" in 1994 by the (then) Department of Justice, Victoria announced that it intended to establish 3 new privately financed, built and managed prisons. The reasons for this initiative are noted therein as:

"The Government considers that improved services and significant savings can be achieved by contracting out the provision of prison facilities and services to the private sector rather than spending limited Government funds to build more prisons."

Australasian Correctional Management won the contract for the first privately managed prison in Victoria when the Metropolitan Women's Correctional Centre opened at Deer Park in 1996. The second Victorian privately managed prison opened in 1997 when the 600 cell medium security Fulham Prison opened near Sale. The third privately managed prison is the 600 cell Port Phillip Prison which is managed by the British owned Group Four Company Ltd., which has won a number of prison management contracts in Britain. The Port Phillip prison has had a particularly difficult start with a number of critical incidents prompting an inquiry which is, at the time of writing, still underway.

The legislative basis for privatisation is contained in the *Contract Management Act 1993* and in amendments made to Sections 8 and 9 of the *Corrections Act 1986* by the *Corrections (Management) Act 1993*. These amendments provide for the Minister to enter into agreements, the matters to be included in agreements, rights of access, emergency powers, and building work. Further amendments provide for the status of staff, the use of force, minimum standards, the application of freedom of information, investigation of administrative actions, and the appointment of monitors.

However, the inclusion of statutory accountability mechanisms as Harding perceptively notes:

"do not *per se* guarantee that there will be no capture; but they do give the agency and the individuals stronger ammunition with which to *resist"."

The extent to which the problems at Port Phillip may have been preventable by better legislation, monitoring, or management practices will become clearer once the inquiry has reported.

**United Kingdom**

The publication of a government green paper entitled "Private Sector Involvement in the Remand System" published in 1988 revealed the primary focus for involving the private sector as being "to improve the cost effectiveness of the remand system by making additional accommodation available more quickly and flexibly than would otherwise be possible...thus accelerating the elimination of over crowding and improving conditions for remand prisoners". The Home Office then commissioned management consultants to develop a report on the practicalities of private sector involvement in the remand system in England and Wales. That report concluded that there was no major procedural difficulties in the interaction of private contractors with other parts of the criminal justice system. Subsequently, the *Criminal Justice Act 1991* (UK) Sections 84-92 and Schedule 10 made detailed changes.

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68 "New Prisons For Victoria", publication of the Department of Justice, Victoria.
provisions for the contracting of prison management and made a number of consequential amendments to the Prisons Act 1952 (UK) to amend some restrictive definitions including those of “prison officers” and “governors”. In addition, provisions were made for the intervention of the Secretary of State in the event of a private prison director losing control of the prison and the appointment of a temporary (Crown Servant) governor as well as for mutual support between contractually managed and directly managed prisons. These provisions also provided for the vetting and certification of prison officers and for a range of penalties for anyone who resists or wilfully obstructs a prison officer performing their lawful duties.

It is also worth noting that while public and Parliamentary debate only focused upon privately managed prisons for remand prisoners, the government extended privatisation almost immediately to include prisons holding convicted prisoners.

Importantly, the introduction of a privately managed prison in England took place in the context of a pre-existing, strong and independent Chief Inspector of Prisons who has retained oversight of all prisons. In addition, the power to undertake adjudicatory functions for secondary punishment have not been ascribed to Britain’s private prison directors but are exercised by government “controllers”. These functions afford considerable insight into the way management is carried out. Even so, the Chief Inspector of Prisons has expressed concern that controllers can become too close to the operation of a privately managed prison and noted that:

“...There may be a fine line between ‘monitoring’ and ‘assisting’, but in our view the amount of assistance which can appropriately be given to the contractor by the controller should be defined clearly.”

The first privately managed 320 cell prison in England (The Wolds) subsequently opened in April 1992 and since then a succession of other privately managed prisons have followed including: the 650 cell Blakenhurst Prison, the 770 cell Doncaster Prison and the 350 cell Buckley Hall prison. A number of other privately managed prisons are being planned or are under consideration.

Harding notes that:

“The UK arrangements amount to the strongest statute-based accountability structure currently in existence. Neither Victoria nor New Zealand has gone as far as to confer disciplinary powers upon the monitor.”

**South Australia**

South Australia has progressed the introduction of privately managed prisons without any specific authorising legislation. The Government has taken the view that the existing provisions of the Correctional Services Act 1982 provide no restriction upon such activities and has consequently introduced private management (Group Four) to the 110 cell Mount Gambier Prison as well as contracting prisoner movement and in-court security management.

As result of there being no specific enabling legislation, the general manager of Mobilon Prison (which is directly managed) acts as the general manager of Mount Gambia Prison for the purposes of the Correctional Services Act 1982. The lack of enabling legislation has also meant that the powers for adjudicating on prison offences has had to be retained and is exercised by two Government paid “supervisors” (in a similar way to the British system). While not considered monitors in the strictest sense, these officers are mid-level correctional staff who live locally and perform their role as

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supervisor on 1-2 days each fortnight. Accountability is achieved, according to the Manager, Operations Liaison, Business Services, by the actions and reports of the supervisors, by the regular attendance of the (Mobiling based) general manager and by monthly audit surveys and performance indicators. The retention of adjudicatory powers is also considered to be a key factor in retaining a finger on the pulse of the prison. In line with the previously mentioned lack of legislative provisions there are no written standards or penalties for breaching the contract.

In general terms, the introduction of privately managed prisons in South Australia appears to be working very well. However, the lack of legislative provisions both to specifically enable contracting and to ensure accountability is a matter of concern to the review and this feature of the South Australian arrangements has been described by one commentator as “the most flawed regulatory structure of all [Australian and other jurisdictions]”.

Western Australia

Western Australia is a relative latecomer to consideration of private prison management and thereby may learn from the experiences in other jurisdictions. This latecoming is due in large part to a 1994 agreement reached between the Ministry of Justice and the Western Australian Prison Officers Union which became known as the “prisons package” which sought to achieve a reduction in prison operating costs of a magnitude capable of bringing the public system closer to the anticipated operating costs of the private sector in return (in part) for deferring any consideration of privatisation. That agreement resulted in the abolition of overtime, a reduction in holiday entitlements and sick leave as well as the abolition of a number of staff privileges.

The Western Australia Government’s policy on competition and contracting for services is expressed in Competitive Tendering and Contracting, (1996) which requires that the non-government sector be able to compete for the provision of services.

Like the South Australian Correctional Services Act 1982, the Prisons Act 1981 makes no express provision for the contracting of prison management or services but equally contains no provision expressly precluding the Government’s general executive power to contract.

However, the Government has already indicated its intention to develop specific legislation. On 9 September 1997, Cabinet approved the drafting of a Bill providing for the Director General, Ministry of Justice, under the direction of the Minister, to have the statutory responsibility and authority for police lock-up management, court security and detention, and transport of persons in custody or detention. The minute further directed that these functions be able to be carried out by either public sector employees or private sector contractors, with appropriate powers of delegation for the Director General. However, the minute also directed that the Director General’s powers be able to be sufficiently flexible to authorise the contracting out by the Director General of other justice services associated with the custody and welfare of prisoners and detainees, and the establishment of management control and security of prisons and detention centres.

Thus, without expressing any preference for a privately managed prison, the Government has clearly indicated that legislation must be drafted to provide for the possibility of private sector involvement in prisons.

As the timeframe for developing a complete new draft Prisons Bill would potentially delay commencement of the Woorooloo Prison South project, an amendment Bill providing for the private sector involvement with corrections in Western Australia is envisaged. This will provide for the alternative service delivery of certain police and justice non-core functions and will also provide enabling provisions for the Director General to authorise private sector involvement in the

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management of prisons. Those enabling provisions will eventually be incorporated into the draft Prisons Bill.

Elsewhere in this report, recommendation has been made for the provision of standards and for the monitoring and inspection of those standards. These have as significant an application to the directly managed prison system as they do to privately managed prisons.

Recommendation 49

It is recommended that the draft Bill include provisions to enable and regulate the operation of directly managed (i.e. public sector prisons) and contracted prisons (in conjunction with the conditions specified in the contract).

It is further recommended that among other things provision also be made for the following matters:

- a redefinition of the terms “prison officer” and “superintendent” whereby under Section 36(1), a superintendent must be an officer as defined by Section 3 appointed under Section 6 or Section 13, and this will need to be expanded to include contract personnel;

- the same degree of public scrutiny apply to privately managed prisons that applies to directly managed prisons, with the additional scrutiny of a statutory based monitor;

- the vetting of all custody officers (and their training) at contractually managed prisons and/or escort services;

- arrangements for mutual support between contractually managed and directly managed prisons;

- arrangements to enable the take over of a privately managed prison should the contractor lose effective control of the prison.

With regard to the exercise of disciplinary powers it is essential that the principles of natural justice be observed and that persons making disciplinary decisions should not have a pecuniary interest in the outcome of the decision. If private prison administrators were to have the power to order the loss of remissions the perception that natural justice was being denied could be overwhelming. However, this difficulty is reduced if the decision to remove remissions in line with the recommendation of the Chief Judge’s Parole Remission Review Committee is enacted as recommended in section 3.5 of this report. Nonetheless, it is recommended that in line with the positive experience in South Australia and the United Kingdom that powers for adjudicating prison offences be retained by the Ministry of Justice.

Recommendation 50

It is recommended that the powers of adjudication for prison offences be retained by the Ministry of Justice or, in the case of aggravated prison offences where the accused pleads not guilty, assigned to Visiting Justices.

7.2 Provisions for the Powers and Duties of Officers

The existing powers and duties of prison officers are provided pursuant to Section 14 but reflect only security, good order & management responsibilities consistent with the “justice” model of
imprisonment implicit in the current Act. The new, expanded purposes proposed for the new bill which includes "recidivism reduction" and "prisoners continuing to contribute to the community through work" will also need to be supported by prison officers.

Recommendation 51

Prison officers' powers and duties should emphasise a balance between all of the purposes of imprisonment, with particular regard to ensuring that at all times the principles derived from these elements are complied with and achieved.

7.3 Employing Authority for Prison Officers

Currently Section 13 of the Prisons Act 1981 provides for the Minister to be the employer of prison officers. Commissioner Fielding in his 1996 review of the Public Sector Management Act 1994, recommended "That the various Acts relating to public sector bodies which empower Ministers of the Crown (other than the Minister for Public Sector Management) to employ or appoint employees in public sector bodies be reviewed with a view to making the relevant Chief Executive Officer, Board or Committee of Management, as the case may be, the employing authority for the basic elements of the Public Sector Management Act" (PSMA). However, this would create difficulty when the Ministry moves to a purchaser/provider model and the Director General will require to be at a distance to direct service provision.

Recommendation 52

It is recommended that Section 13 be amended by deleting the words "the Minister" and inserting "officer nominated or party approved by the Minister".

7.4 Application of the Public Sector Management Act 1994

At present, prison officers are appointed under the Prisons Act 1981. When it was enacted, the Public Sector Management Act 1994 (PSMA) became the primary employing legislation for all public sector employees. Arguably, the employment of prison officers has been subject to those provisions of PSMA which are not over-ridden by the Prisons Act. (Prison officers in New South Wales, Victoria and South Australia are presently employed under respective state public sector management acts.)

The employment and engagement of prison officers has been examined with a view to removing the engagement provisions for prison officers from the Prisons Act and for them to be engaged under the provisions of the PSMA. Such a move has been considered to have the advantage of signalling a quantum change in the role and flexibility required of prison officers. However, Section 86 of the PSMA which relates to procedures when a charge is brought for a breach of discipline is particularly difficult in the context of prisons as it requires a lengthy process involving written details of a breach of discipline with 7 days for the alleged offender to respond before action may be instituted. In a prison where a breach of discipline may involve a serious allegation of corruption it may be necessary to remove the officer immediately from the prison while the investigation is undertaken.

At the heart of this issue is the question as to whether prison officers have substantially different responsibilities and powers to other public sector employees which would warrant unique provisions in the Prisons Act. Clearly prison officers are authorised to exercise powers beyond those exercised by other public sector employees (except perhaps those exercised by police officers). Consequently breaches of discipline can require a more expeditious exercise of actions and processes in the event of an alleged breach of discipline.

Recommendation 53
It is proposed to retain the employment provisions for directly employed prison officers as they currently exist in the Prisons Act.

7.5 Section 9 Inquiries

This section provides for the Chief Executive Officer to appoint a prison Superintendent or other suitably qualified person to inquire into and report on any matter, incident or occurrence concerning the security or good order of a prison or prisoner(s). Section 9 is an inappropriate means by which to conduct an inquiry into relatively trivial incidents and is equally inappropriate for inquiring into matters for which there is prima facie evidence of a criminal offence. The provisions are in addition to and go beyond provisions under S.106 for special disciplinary inquiries which may be constituted by the Chief Executive Officer when an employee denies a charge of breach of discipline. Importantly, the section provides a compulsion to respond to questions even if the answer may incriminate the person.

Four Section 9 inquiries have been held. The first took place in the early 1980s and was into the conduct of rostering practices at Fremantle Prison. The second was into allegations of discrimination made by a female prison officer and the two remaining inquiries were into the conduct of prison staff at Canning Vale and at Casuarina prisons. All four inquiries have been the subject of considerable controversy and have failed to satisfactorily resolve the issues involved. Concerns with these investigations have centred upon (a) the fact the persons required to conduct the investigations were departmental officers and were thus not independent and allegedly were not impartial (b) the methods used by investigators, including allegations that improper investigating procedures have been used, (c) the powers to compel witnesses to answer questions even if the answer may incriminate the person are perceived by many as unfair, (e) that the inquiries were established without due cause, using broad and non-specific terms of reference, and (f) that a Section 9 inquiry was inappropriate to the (trivial) nature of the matters being investigated.

In any organisation there is a tendency to keep and not give away any powers particularly the type of broad ranging powers contained in Section 9 as they provide an all embracing provision to investigate anything that might arise in the future. However, since the Prisons Act 1981 was proclaimed other more powerful legislation has been enacted to provide for the type of inquiries for which Section 9 has been used.

Section 14 of the Anti-Corruption Commission Act 1988 requires a report to the Commission of any matter which may concern (a) corrupt conduct, (b) criminal conduct, (c) criminal involvement or (d) serious improper conduct. The Anti-Corruption Commission would examine each allegation and decide if further action is warranted (having at his disposal the powers of a Royal Commission). In addition, investigative powers are provided pursuant to Section 14 of the Parliamentary Commissioner Act 1971. The Ombudsman has been provided with wide ranging powers to investigate any decision or recommendation made, or any act done or omitted, that relates to a matter of administration and affects any person or body of persons in his or its personal capacity in or by any department or authority.

Section 11 of the Public Sector Management Act 1994 also provides powers for the Minister to direct a suitably qualified person or persons to conduct special inquiries.

It is noteworthy that Section 9 inquiries have not been used to review and report on security practices and procedures subsequent to an escape. It is not clear what other matters might need to be investigated that were envisaged as appropriate for Section 9 inquiries and which are not currently able to be investigated under the powers and scope of the Anti-Corruption Commission Act 1988, the Parliamentary Commissioner Act 1971 or the Public Sector Management Act.

Recommendation 54
In view of the advantages of completely independent inquiries, the ineffectiveness of past inquiries, the resulting organisational divisiveness and the enactment of other more powerful legislation for examining administrative matters, it is recommended that the powers provided under Section 9 be removed.

7.6 Provision for Revenue Raising pursuant to Section 4, State Trading Concerns Act

The Ministry is currently seeking advice from the Crown Solicitor's Office regarding the effect of recent changes to the interpretation of the State Trading Concerns Act which affect the operation of revenue raising. It is anticipated that a provision excluding the Ministry from the ambit of the Act will be required.

7.7 Exemption Under the Dog Act for Prison Drug Sniffer Dogs

Dogs are used for drug detection and other operational purposes. However, the existing provisions do not provide for an exemption under this Act for dogs used in prisons.

Recommendation 55

An exemption under the Dog Act is recommended for prison sniffer dogs.
CHAPTER 8- INDEPENDENT BOARDS OF REVIEW

Following the submission of an interim report, the Attorney General, the Hon. Peter Foss MLC requested that the review also consider the usefulness of the use of inter-state experience with independent boards of review, with particular reference to the New South Wales Serious Offenders Review Council.

8.1 The New South Wales Independent Boards of Review

New South Wales has established two independent bodies to manage the releasing and sentence planning for prisoners. The Offenders Review Board has taken over the functions of releasing prisoners with parole type sentences which are now called minimum term sentences. The New South Wales Sentencing Act 1989 introduced so called "truth in sentencing" legislation and established the Offenders Review Board (which is the Parole Board by a different name). Its function is to decide whether or not a prisoner is suitable for release into the community once the minimum term has been served. The Serious Offenders Review Council (SORC) was established on 14 February 1994 as a result of amendments to the (then) New South Wales Prisons Act 1952 (now known as the Correctional Centres Act 1952). Its functions are provided for in Section 62 of the Correctional Centres Act 1952 and include the provision of reports and advice and the management of serious offenders and the conduct of review hearings on appeals on segregation directions exceeding 14 days as well as the assessment of the suitability of certain prisoners to participate in unescorted, pre-release leave programmes. (for a fuller explanation of the development of both of these boards see Appendix 2);

The independence of these two bodies (particularly that of SORC) has allowed the New South Wales Government to distance itself from difficult releasing decisions and to point to the independence of the Council and the primacy given to community safety in all of the Council's decisions, particularly those affecting the so called "public interest prisoners". For example, the Serious Offenders Review Council routinely makes recommendations to the Commissioner for Corrective Services regarding the suitability of prisoners, including public interest prisoners, for a range of programmes which require temporary absences from prison. The Offenders Review Board attaches considerable importance to prisoners successfully completing such programs as a pre-requisite to granting long-term supervised release from custody.

The larger number of prisoners (around 6000) held in custody in New South Wales (compared to around 2000 in Western Australia) provides an opportunity to amortise more widely the substantial travel, sitting fee and secretariat costs attributable to an independent Council which regularly reviews the prison progress of all serious and public interest prisoners.

The only (correctional) independent review board in Western Australia is the Parole Board which would appear to have already realised a similar perceptual advantage of independently assuring a strong focus on community safety which has been gained by (its counter-part) the New South Wales Offenders Review Board. For example, Section 48 of the Sentence Administration Act 1995 provides for the Board to decide whether to make a Work Release Order. Under subsection (2) "the Board must not make a Work Release Order in respect of a prisoner unless satisfied that the prisoner is a person whose release would pose a minimum risk to the personal safety of people in the community or of any individual in the community". Similarly, Section 26 provides that the Board may postpone, defer or refuse to parole a prisoner, and by subsection (3)(b) must

76 "Public Interest Prisoner" is a term used by the Department of Corrective Services in New South Wales to denote prisoners for whom the community has a special concern either because of the heinous nature of the crimes they have been convicted of or because of the extensiveness of the media coverage given to them has lent them a notoriety above and beyond that ascribed to other prisoners.
have regard to “the degree of risk that the release of the prisoner appears to present to the personal safety of people in the community or of any individual in the community”.

The question as to whether there would be further advantage to be gained from instituting a second independent review board (similar to the New South Wales Serious Offenders Review Council) to monitor and report upon the progress of serious and public interest prisoners must be weighed against the cost of such a board. Given the smaller number of prisoners in Western Australia and their spread over a geographically larger area requiring considerably more air travel, it is likely that the overall costs and the costs per prisoner for operating such a board would be considerably more than in New South Wales even when allowance is made for there being 24 correctional centres in New South Wales against 13 prisons in Western Australia. (No costs are noted in the 77th Annual Report for the Serious Offenders Review Council. However, telephone discussions with Ms Margaret Anderson, Executive Officer reveal that the Board has 16 members on rotation including 3 judicial officers. Sitting costs are at $800.00 per day for judicial members and $300.00 per day for community members. There are 18 full meetings each year and sub meetings occur twice each year at each of the 24 correctional centres.)

8.2 The Queensland Independent Boards of Review

Alternatively, Western Australia could establish a system based upon the Queensland Community Corrections Board which incorporates a large number of affiliated Regional Community Corrections Boards to consider the early release of prisoners to Work Release, Home Detention, and Parole pursuant to Section 139 of the Queensland Corrective Services Act 1988. The distinguishing feature of this scheme is that it allows local community views to be incorporated into the decision-making process affecting the early release of prisoners. (See Appendix 3 for Ministerial Guidelines issued to the Queensland Community Corrections Board.) However, the establishment and maintenance of regional boards is also costly.

8.3 A Formal Classification Board

The Offender Management Division of the Ministry of Justice has been giving consideration to enhancing the current classification decision-making process by the introduction of a formal classification committee to act as a committee of recommendation and review.

The present system for progressing prisoners from high to low security and their placement at particular prisons is provided under Sections 16, 26, 83, 87 and 94 of the Prisons Act 1981 and under Director General’s Rule 2B. Decisions are made based upon the recommendation of prison Unit Conference Committees and require the approval of the Superintendent or the Assistant Superintendent at Casuarina and Canning Vale prisons. The Assistant Director Prisoner Placement may veto such decisions and must approve all decisions for long-term prisoners.

This system maximises local knowledge of the prisoner and has the advantage of requiring the prison Unit Conference Committee to make hard decisions. However, the system is not well suited to assessing the broader community concern that may attach to public interest prisoners.

An alternative approach to the New South Wales and Queensland boards (which are not recommended as models for Western Australia) would be to establish such a classification committee which would comprise a number of senior Ministry of Justice staff and in this way could better provide comprehensive risk analysis into formal recommending advice into classification decisions.

77 Serious Offenders Review Council Annual Report for the Year Ended 31 December 1995
Recommendation 56

The review committee recommends that provision be made in the draft Bill for the establishment of a formal classification committee to review the classification of all prisoners.
APPENDICES

1 Overview of Submissions Received

Criminal Lawyers Association
Prisoner Discipline
Prisoners to have the right to Legal Representation
Prisoners to have the Right to Trial by Magistrate
No Loss of remission
Effect on Sentencing Act
Programs to be Voluntary
Legal Aid Commission
Remand/Convicted Prisoners
Status to be Explicit
Remand Status to be Brought to Judiciary's Attention in Order to Expedite Court
Information to Prisoners
More Information Required on Bail
More Information Required on Disciplinary Charges & Appeals
Supreme Court Civil Procedure
Not appropriate to Bail Applications
Not Appropriate to Review of Disciplinary Decisions (Abolish Right to Writ of Certiorari)
Prisoner Discipline
Prisoners to have No Right to Legal Representation
Prisoners to have the Right to Legal Advice Prior to Hearing
Prisoners to have the Right to Call Witnesses
Existing Punishment Regime To Remain
Where Charges are heard In Court, Punishment to be taken into Account?
Search & Seizure
Maintenance of Strict Enforcement of Drug Security Measures
That there be an Assumption of Evidentiary Correctness of Drug & Alcohol Test Results
Rehabilitation
Increase in Programs
Legal Services
Legal Aid to be Considered as a Service Provider for Prisoners' Legal Rights
Legal Visits
Present Arrangements Adequate

Aboriginal Legal Service
Principles
To Ensure the Safe Management of Prisons & the Safety, Health & Welfare of Prisoners
The Cultural Needs & Observances of Aboriginal Prisoners Must be ensured
Appointment & Discipline of Prison Officers
Aboriginal Prison Officers to be employed at Every Prison
Prison Officers to be screened for Racist Views
Prison Officers to Receive Cross Cultural Training
All Prison Officers to have a Legal Duty of Care
Standing Instructions should Detail the Legal Duty of Care
Information
Duty of Care Responsibilities to be made Public
Prisons & Police Lock-ups to Exchange Information on Health & Safety Status of Prisoners
Health & Safety Information Must be Shared with Appropriate Bodies
Prisoner Discipline
Prisoners to have Right to Legal Representation, particularly for Aggravated Offences
Prisoners to be Able to appeal to a Tribunal which includes Aboriginal Representation
All visiting Justices to be Magistrates particularly if Punishment affects the Length of Sentence
Rehabilitation programs
Aboriginal Bodies to be Consulted/Employed
DEET to be responsible for National Strategy for Prisoners
Placement of Prisoners
Aboriginal Prisoners should be placed close to their family with a right of Appeal
Prior Notification of such Placements should be made to Legal Counsel
Where Placement is Distant from Family, Financial Assistance to Families Should be made
Temporary Absences from Prison
Attendances at Funerals should be financially supported by the Ministry
Prison Welfare
Provisions be made for Visits from Aboriginal Organisations
Aboriginal Welfare Officers to be employed
Simplified Prisoner request Procedures
Health Care Of Prisoners
A Written Medical Health Screening be undertaken by the Aboriginal Medical Service or Health Department
Protocols be established in Consultation with ALS for Transferring Prisoners

Prisoners Advisory Support Services
General
The Act should be administered by the Minister through a Board or Commission
Guiding Principles
The Act should be User Friendly & Accessible
The Act should note that no Punishment other than Imprisonment is Intended
Information should not be Withheld on the Grounds of “Commercial Confidentiality”
The Act should provide Performance Indicators, Outcomes, Evaluation & Self-Regulatory devices
Principles should reflect the need to Challenge thinking & Behaviour of Prisoners & staff
Appointment & Discipline of Officers
Training for new Prison Officers not be undertaken by MOJ, instead Ex Offenders to have input
S.9 inquiries into Staff performance to be independent of MOJ
Failure to supply Information to a S. 9 inquiry to carry harsher penalties
internal investigations should be independent of MOJ
The Act should prohibit Prison Officers from (moonlighting) other work
Prison Officers to be trained to be responsible for reducing recidivism
Information
Sentence Plans to be shared with families and supporters
Medical files to be accessible to prisoners on request
Confidentiality of information to be assured
Act to be printed in a number of major languages
Information on culture & best practices of each prison be made available to visitors
Prisoner Discipline
Safeguards in Act to ensure that prisoners are not brutalised
Prison Officers to be trained not to use violence and abuse
All prison offences to be heard by a Magistrate
Prisoner punishments need to incorporate programs to reduce recidivism
Separate Confinement
Full medical examination prior to separate confinement
Practice of short stays punctuated by break of one day to cease
Management to see ‘Special Handling’ as requiring special care for their own victimisation
Superintendents’ performance indicators need to reflect use of separate confinement
Search & Seizure
Entry searches should apply equally to all persons entering a prison
Entry searches to be carried out by non-MOJ staff

Vocational Training & Employment of Prisoners
Prisoner training to be reflected in the new Act
Other agencies are required to provide assistance with employment opportunities
Prisoners to have a 'right' to life skills and advanced education

Education
S. 94 to be broadened to allow easier access to programs
Payment for education to be the same as for employment

Rehabilitation
Sentence plans to extend to end of parole period
Sentence plans to be developed by other than MOJ staff
Parole plans to involve support beyond a weekly visit to the Parole Officer

Placement, Removal & Transfer
Placement must take into account release needs
Prisoner transfers must ensure the safety of prisoners

Temporary Absences
Reasons for such leave to be extended to medical, educational & compassionate grounds
An independent review process should be established for refused applications
The approval process to be faster than current practice

Outsourcing Prison Services
Regional hostels, outstations & minimum [sic] detention centres to be staffed by locals
Minimum security women's housing to be established at regional centres
Security ratings to address community safety rather than length of sentence
Service providers to be treated equally
A commission required to establish standards

Prisoner Welfare
Prisoner welfare to be outsourced along with chaplaincy and prison visitors
New Act to encourage cultural & spiritual diversity
Safeguards to be established to prevent suicide and sexual abuse

Monitoring of Standards
Standards to be developed under an independent commission
Evaluation of standards to be outsourced

Prison Visits
Implementation of previous Taskforce recommendations

Financial issues & Budgeting
The Act should ensure financial performance can be measured
Cost of custodial care to include ongoing recidivism reduction supports
Prisons to be allocated a budget for each prisoner based on individual needs
Prisons that add to 'recommunalisation' to given a bonus

Mentors & community networks
Specific strategies for parole support should be specified on parole orders
Funding for services should be through a central, objective & accountable administration
Driving licenses not to be suspended for prisoners who fail to pay their fines

Families
Family and friends to be include in sentence & release planning

Racism
Racism & institutional violence to be included in STAC or AVU programs

Multiculturalism
Multiculturalism to be promoted in a variety of programs

Prisoner participation in Prisons Act review
Prisoners should participate in the review

Conclusion
Policy & Legislation Unit should enter into further dialogue with groups making submissions

Section 9
Remove from Act as a duty to report exists
Ensure if retained that reporting officer cannot have informal chats
Witnesses to be informed in writing that they are being interviewed and that they must respond

Section 13
Hospital Officers and Industrial Officers to be engaged as per Prison Officers

Section 14d
Use of force provisions for officers in conflict with instructions to use force

Part VII - Prison Offences
Concerns that under internal discipline, prison officers may not be eligible for criminal injuries compensation

Part X Discipline of Prison Officers
One system for minor breaches with penalties up to $250
Second system for more serious matters should involve a panel with union representative
Alternatively to allow legal representation
Existing appeal process to remain

Prisoner Discipline
Recommends using simply appeals processes under the Justices Act as an alternative to prerogative writs

Guiding Principles
Prison Officers have a legal duty of care to prisoners and may be personally liable for breaches
CEO has a legal duty of care to prisoners
Recognition of the special needs of Aboriginal prisoners
Minimisation of re-offending by equipping prisoners for successful reintegration with the community
Health care to a community standard
Access by all prisoners to education and training
In outsourcing, the safety and care of prisoners is given equal priority to custody

Appointment and discipline of prison officers
Prison officers' oath under Section 13 to deal fairly and impartially be expanded to humane and courteous
Prison officers be screened for racist attitudes
Prison officers personally liable for breaching duty of care

Information to prisoners and victims
Discrete Aboriginal communities and relatives to be notified of release of prisoners
Aboriginal victims to be notified on release of prisoner
Interpreters for Aboriginal prisoners for information on sentence, release, services, rules and rights

Prisoner Discipline
Visiting justices to be magistrates

Use of Firearms
Section 47 to be expanded to ensure firearms used as last resort, no intent to kill, risk of death to be taken into account before use

Complaints Officer
In line with RCIADIC rec. 176 to establish such a position perhaps in the office of the Ombudsman

Vocational Training and Employment
S.95 be amended so it is a requirement that prisoners can access education and training
Culturally appropriate educational methods and work for Aboriginal prisoners
Education and training for traditional Aboriginal prisoners for traditional purposes
Work and education for remand prisoners

Educational Programs for Prisoners
Culturally appropriate educational methods and work for Aboriginal prisoners
Equal remuneration for work and education
Programs for Aboriginal prisoners be purchased from Aboriginal suppliers

Rehabilitation Programs
Aboriginal communities to be involved in post release programs
Prisoners to be made aware of support services
Rehabilitation programs to take account of the special needs of Aboriginals
Prisoners to take home art or craft completed in prison

Placement, Removal and Transfer of Prisoners
Medical and psychiatric assessment of risk of self harm on reception
Interpreters to be available when assessments being made
Aboriginal prisoners to be placed close to family
Right of appeal when transferred away from family
Family to be provided with funds to visit prisoner

Temporary Absences
Attendance at funeral and other cultural events to be in line with RCIADIC rec. 171

Outsourcing to Aboriginal Communities and Organisations
Priority to be given to Aboriginal organisations for servicing Aboriginal prisoners
Special needs of Aboriginals to over-ride costs/profit considerations

Prisoner Welfare
Aboriginal Liaison Officers to be provided in all prisons
Aboriginal support groups to be provided pursuant to legislative provision

Health Care
Aboriginal prisoners to access Aboriginal healing processes
Prison medical staff to be trained by Aboriginal health organisations in Aboriginal culture, history and lifestyle
Protocols for the transfer of medical records between police and prisons (RCIADIC rec. 130)
24 hour access to health services of a standard available outside prison (RCIADIC rec. 150)
Prison medical staff to be responsible to medical officers not superintendents (RCIADIC rec. 153)

Visits
Act to provide all prisons have adequate visiting facilities in line with RCIADIC rec. 170
Act to provide for extended visits for visitors from remote areas
AVS to be provided for in the Act
Sections 61 to 65 to be expanded to provide for ALS, AMS, and Aboriginal child placement agencies

Other Matters
Section 54 on the death of a prisoner to be expanded to include self-harm,
Section 34 also to provide for resuscitation, debriefing, notification of the prisoners’ family, no charges against prisoner.
Objectives - No Comment

Principles - No Comment

Appointment & Discipline of Prison Officers - No Comment

Information (access by prisoners, disclosure to victims)
Basic law library facilities for prisoners to access their rights
Dedicated telephone system for legal advice
Victims of serious crime to be informed of release dates of prisoners

Prisoner Discipline
Prison charges to continue to be dealt with in a summary way with no access to legal representation
Prisoners to be permitted to access legal advice prior to such hearings
Abolition of writs of certiorari in favour of simple procedural appeals mechanism
Sentencing principles to apply to all punishments

Search and Seizure
Expansion of education and rehabilitation programs

Placement, Removal and Transfer of Prisoners - No Comment

Outsourcing
Support for outsourcing particularly minimum security and parole

Prison Welfare
See health care

Monitoring of Standards and Conduct of Inspectors - No Comment

Health Care of Prisoners
Support for Aboriginal Visitors Scheme
Amendment to Criminal Law (mentally Impaired Defendants) Act permitting courts to make hospital orders for detention
Continual monitoring of such incidents

Prof. Richard Harding
Prisoners rights
Duty of Care
Complaints to the Ombudsman
Prisons Inspectorate
Standards
Inclusion of juveniles
Substitute Magistrates for JsP in prisoner discipline
Log all medical observations
Protection status
Privatisation
Discipline of prison officers to be equitable
### 2. Comparative Prisoner Rights Table for Mainland Australian Jurisdictions

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<tbody>
<tr>
<td>3 hours open air</td>
<td>* Open air for <em>1/2</em> hr</td>
<td></td>
<td></td>
<td></td>
<td>Regulation 26: Prisoners to be notified of rights and obligations</td>
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<tr>
<td>Food adequate to health</td>
<td>* Food adequate to health</td>
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<tr>
<td>Special dietary food</td>
<td>* Special dietary food</td>
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<tr>
<td>Warm &amp; Safe Clothing</td>
<td>* Warm &amp; Safe Clothing</td>
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<td>Medical care</td>
<td>* Medical care</td>
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<tr>
<td>Mental health care</td>
<td>* Mental health care</td>
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<tr>
<td>Dental health care</td>
<td>* Dental health care</td>
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<tr>
<td>Religious freedom of practise</td>
<td>* Religious freedom of practise</td>
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<tr>
<td>Complaints to Minister, CEO, Governor, Ombudsman</td>
<td>* Complaints to Minister, CEO, Governor, Ombudsman</td>
<td>Right to grievance procedure (Section 91)</td>
<td></td>
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<tr>
<td>Visiting rights - 1 hour</td>
<td>* Visiting rights - <em>1/2</em> hr</td>
<td>Reasonable Entitlement to visits (Section 75)</td>
<td>$34 Visiting rights</td>
<td>Entitlement to visits (Section 59)</td>
<td>to send and receive mail</td>
<td></td>
</tr>
<tr>
<td>Right to be Classifieds &amp; Personal appear &amp; decisions in writing</td>
<td>* Right to be Classifieds</td>
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<td></td>
<td></td>
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<tr>
<td>Privacy of correspondence. (Qualified)</td>
<td>* Privacy of correspondence. (Qualified)</td>
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<tr>
<td>Right not to experience cruel &amp; inhumane punishment</td>
<td>* Cruel, inhumane punishment. (Section 69)</td>
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<tr>
<td>Right to refuse medical treatment &amp; experimentation</td>
<td>* Right to refuse medical treatment. (Section 88(1))</td>
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<td></td>
<td>* Right not to be force-fed (Section 89)</td>
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<td></td>
<td>* Right to access the Commissioner's Directives. (Section 98(2))</td>
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<td>Right to access Legal Aid (Section 35)</td>
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<td></td>
<td>Right to same sex supervision for strip searching. (Section 53(2))</td>
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3. New South Wales Mechanisms To Manage The Short And Longer-Term Release Of Prisoners

Until 1990 the releasing authority in New South Wales for prisoners with parole sentences was the Parole Board. However, a series of other mechanisms were also utilised to manage the release of prisoners serving sentences without parole. These are briefly outlined below.

Prior to 1984, the New South Wales Department of Corrective Services operated an early release scheme known as the Release on Licence Scheme. Under this scheme the Minister was invested with the power of early release by section 463 of the Crimes Act 1900 (NSW). Due to abuses of this scheme it was abolished in 1984 and replaced by a scheme managed by a board independent of the Minister and the Department known as the Release On Licence Board.

Under a series of reforms in January 1990 known as "truth in sentencing" the Release On Licence Board was itself replaced by the Serious Offenders Review Board and the Parole Board was abolished and the Offenders Review Board was established as the sole releasing authority of prisoners to parole.

In 1994 the Serious Offenders Review Board was itself abolished and in its place the Serious Offenders Review Council was established.

CURRENT FUNCTIONS OF THE NSW SERIOUS OFFENDERS REVIEW COUNCIL

The statutory functions of the Council are provided for in Section 62 of the New South Wales Prisons Act 1952 and include:

(i) the management of serious offenders

(ii) the provision of reports and/or advice to:

a) the Minister for Corrective Services;

b) the Commissioner for Corrective Services;

c) the Supreme Court of NSW, when serious offenders are applying for a re-determination of "life" sentences handed down prior to the commencement of "truth in sentencing";

d) the Offenders Review Board, when the release of serious offenders to parole is under consideration;

(iii) the conducting of review hearings of applications appealing segregation directions exceeding fourteen days lodged by an inmate (that is, serious offenders and other prisoners);

(iv) the assessment of the suitability of certain other prisoners to participate in external, unescorted, pre-release leave programs where the public interest is an important circumstance, such as in cases of violent offences, sexual offences, drug trafficking and other such classes of offenders as may be ordered to be reviewed by the Commissioner.
4. Queensland Community Corrections Boards

Ministerial Guidelines to the
Queensland Community Corrections Board

Made pursuant to S.139 (1) of the Corrective Services Act. 1968 (as amended)

1. BASIC PREMISES

1.1 When considering whether a prisoner should be released from custody to a community based program the priority for the Queensland Community Corrections Board should always be the protection of the community.

1.2 Prisoners should be phased back into the community in a staged process of decreasingly-restrictive supervision.

1.3 It is inappropriate for a prisoner who has not achieved a low or open security classification to be approved for or granted release to a community-based program.

1.4 It is inappropriate for a prisoner serving a sentence of 10 years or more to be approved for or granted release to a community-based program until the prisoner has successfully completed a minimum of six months in an open custody environment.

1.5 Consideration for release to a community-based program of a prisoner who has not made a genuine effort to address the causes of his/her offending behaviour while in prison should be undertaken with extreme caution.

1.6 Some prisoners constitute an ongoing risk to the community and these prisoners may never be suitable for supervised release.

2. COMMUNITY RELEASE OPTIONS

Leave of Absence (Release to Work)

2.1 It is inappropriate that a prisoner be considered for approval of release to Leave of Absence (Release to Work) unless:

a. in the case of a prisoner with a non-parole period of 30 months or less, the prisoner has served two-thirds of the non-parole component of his/her sentence; or

b. in the case of a prisoner with a non-parole period of more than 30 months, the prisoner has served all but 10 months of the non-parole component of his/her sentence.
(This guideline does not apply to prisoners who are serious violent offenders as provided by the Penalties and Sentences (Serious Violent Offences) Amendment Act 1997 or to prisoners serving a term of life imprisonment on conviction of a serious violent offence)

Home Detention

2.2 It is inappropriate that a prisoner be considered for approval of release to Home Detention unless:

a. in the case of a prisoner with a non-parole period of less than 12 months, the prisoner has served two-thirds of the non-parole component of his/her sentence; or

b. in the case of a prisoner with a non-parole period of more than 12 months, the prisoner has served all but four months of the non-parole component of his/her sentence.

(This guideline does not apply to prisoners who are Serious violent offenders as provided by the Penalties and Sentences (Serious Violent Offences) Amendment Act 1997 or to prisoners serving a term of life imprisonment on conviction of a serious violent offence)

2.3 Before a prisoner is approved for release to Home Detention, the Queensland Community Corrections Board should be satisfied that the householder or person in charge of the nominated address has agreed to accommodate the prisoner for the purposes of Home Detention and allow normal supervision access by a Corrective Services Supervisor.

The proposed residence must be geographically accessible by such a supervisor. It is highly desirable that a fixed telephone be available at the residence. The interpersonal environment of the residence should be acceptable to the Board in consideration of the prisoner's past offending behaviour.

Parole

2.4 Before making a decision to grant release of a prisoner on parole, the Queensland Community Corrections Board should be satisfied that the prisoner's residential plans are acceptable to it in consideration of the prisoner's past offending behaviour.

2.5 Before making a decision to grant release of a prisoner on parole under special circumstances, the Queensland Community Corrections Board should always consider the risk which the prisoner will pose to the Community.

2.6 Before making a decision to grant parole in the case of a prisoner claiming special circumstances for serious medical reasons, it is appropriate that the Queensland Community Corrections Board first obtain advice from the Queensland Corrective Services Commission (QCSC) Health and Medical Consultant on the
capacity of the Secure or Open Custody Program to satisfactorily manage the prisoner’s claimed medical condition.

3. BOARD DECISION-MAKING

3.1 It is appropriate that the Queensland Community Corrections Board reach unanimity in making a decision to approve or grant community-based release to a prisoner serving a sentence of life imprisonment.

3.2 An application by a prisoner serving more than five years imprisonment for an offence which the Queensland Community Corrections Board considers a violent major offence should be referred to the Commissioner of Police with a request for advice which the Board may consider helpful in determining the prisoner’s application.

3.3 It is inappropriate that a prisoner whose security classification is high or medium be approved for or granted release to a community-based program in the absence of special circumstances.

3.4 It is inappropriate that a prisoner serving a sentence of 10 years or more be approved for or granted release to a community-based program until the prisoner has successfully completed a minimum of six months in an open custody environment. An open custody environment could be an open security correctional centre or a secure correctional setting where the prisoner works with minimal supervision outside the secure perimeter for extended periods of time on an ongoing basis.

3.5 Before a decision is made by the Queensland Community Corrections Board to approve or grant release of a prisoner to a community-based program, it is appropriate that the Board give consideration to efforts which the prisoner has made to address the cause of his/her offending behaviour. Similar consideration should be given to the results of predictive indicators of the prisoner's risk, such as the Risk-Needs Inventory score.

3.6 It is inappropriate that a prisoner who has, during the current sentence:

a. breached a condition of community-based release by conviction and has, as a consequence, been sentenced to a term of imprisonment; or

b. been returned to secure custody for any reason which, in the opinion of the Queensland Community Corrections Board, represents a serious disregard by the prisoner for a condition of release.

be approved for or granted further community-based release within a period equal to one fifth of the prisoner's original period of imprisonment unless there are, in the opinion of the Board, special circumstances.
3.7 The priority when considering release options for prisoners should always be the protection of the community.

4. REFUSAL OF APPLICATION

4.1 If the Queensland Community Corrections Board refuses an application for release of a prisoner to a community-based program, the Board should give an indication to the prisoner and to the QCSC of improvements and/or activities considered prerequisite to serious consideration of a further application by the prisoner for community-based release.

4.2 If the Queensland Community Corrections Board considers that a prisoner described in 1.6 of these guidelines may never be suitable for supervised release or is suitable for release only in the last stages of sentence, the Board should advise the QCSC so that this may be taken into account in the overall management of the prisoner.

5. COMMUNICATION

5.1 It is appropriate that the Queensland Community Corrections Board forthwith provide guidelines to Regional Community Corrections Boards encompassing those principles contained in these guidelines which apply to their area of jurisdiction.

5.2 The Queensland Community Corrections Board should advise the Minister and the QCSC of its requirements and make recommendations for change in areas which will lead to the improvement of prisoner containment, correctional policy and practices and, especially, the protection of the community.

5.3 At least annually, the Queensland Community Corrections Board should give consideration to areas in which guidelines to Regional Community Corrections Boards are needed or require revision.

5.4 Communication between the Queensland Community Corrections Board and a service provider to the QCSC should follow normal QCSC protocols for communication with service providers.
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