NSW Ombudsman

Review of the *Crimes (Administration of Sentences) Amendment Act 2002* and the *Summary Offences Amendment (Places of Detention) Act 2002*

December 2005

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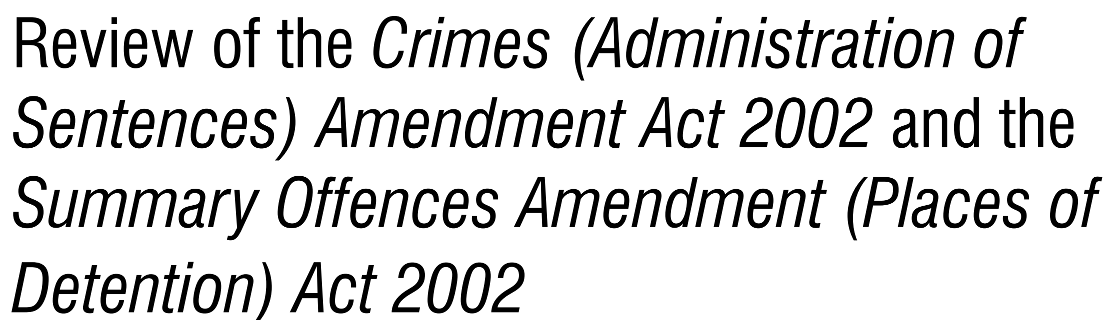

Review of the *Crimes (Administration of Sentences) Amendment Act 2002* and the *Summary Offences Amendment (Places of Detention) Act 2002*

December 2005

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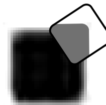

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December 2005

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Dear Messrs Kelly and Debus

Under section 4 of the *Crimes (Administration of Sentences) Amendment Act 2002*, I have been required to keep under scrutiny the operation of the provisions of that Act and the provisions of the *Summary Offences Amendment (Places of Detention) Act 2002* for the two year period commencing 21 February 2003.

The *Crimes (Administration of Sentences) Amendment Act 2002* also provides that as soon as practicable following the two year review period I am to furnish the Minister for Justice and the Attorney General with a report about the activities we have undertaken to monitor the implementation and operation of these Acts.

I am pleased to provide you with the final report of our review. In addition to reporting on our monitoring activities in relation to the relevant legislative provisions I have made a number of recommendations, some identifying potential legislative and procedural changes, for your consideration. This is consistent with section 5 of the *Crimes (Administration of Sentences) Amendment Act 2002.*

I note that key agencies involved in the implementation of the legislation under review, including the Department of Corrective Services, the Attorney General's Department, NSW Police and the Parole Board, were provided with a draft of the report. Their comments have been considered in finalising my findings and recommendations.

I draw your attention to section 6 of the *Crimes (Administration of Sentences) Amendment Act 2002* which requires the Minister for Justice to lay a copy of this report before both Houses of Parliament as soon as practicable after receipt.

Yours sincerely

Bruce Barbour
Ombudsman

Contents

Executive Summary i

Background to report i

Increased powers of correctional officers stop, detain and search people and vehicles i

The right of victims of serious offences to make oral submissions at parole hearings iii

Recapture of escaped inmates iv

Significant findings v

Summary of recommendations vii

Glossary of terms xiii

Part 1. Background 1

Chapter 1. Introduction 3

1.1. The correctional system 3

1.2. Legislative change 5

1.3. The role of the Ombudsman 5

1.4. The structure of this report 6

Chapter 2. Methodology 7

2.1. Literature review 7

2.2. Review of legislation in other jurisdictions 7

2.3. Observation 7

2.4. Interviews with stakeholders 8

2.5. Provision of information by government departments 8

2.6. Provision of information from individuals 9

2.8. Review of complaints to our office 12

2.9. Audit of contraband finds in correctional facilities 13

2.10. Discussion paper 14

2.11. Circulation of draft report to agencies 15

Part 2. Increased powers of correctional officers to stop, detain and search people and vehicles 17

Chapter 3. Items prohibited from being brought into places of detention 19

3.1. Restrictions on inmate property 19

3.2. Demand for contraband items 20

3.3. Entry of contraband items into places of detention 20

3.4. Australian laws banning certain items from places of detention 21

3.5. NSW legislation and policies 24

3.6. Clarity of NSW provisions 25

Chapter 4. Informing people about relevant laws and policies 35
4.1. Brochures 37
4.2. Signage 38
4.3. Additional ways to improve information provision 40
Chapter 5. Powers of correctional officers to stop, detain and search people and vehicles 43
5.1. Attempts by DCS to prevent prohibited items from being introduced into places of detention 43
5.2. Powers of correctional officers in Australian jurisdictions other than NSW 43
5.3. Powers of correctional officers in NSW 45
5.4. Consequences of existing NSW legislative framework 47
Chapter 6. Prerequisites for conducting a search 53
6.1. Immediate vicinity of a place of detention 53
6.2. Reasonable suspicion 56
Chapter 7. Conduct of searches 63
7.1. Sex of searching officers 64
7.2. Searching of children and vulnerable persons 70
7.3. Searches based on consent 74
7.4. Use of dogs 76
Chapter 8. Safeguards 87
8.1. Appropriateness of safeguards 87
8.2. Improving compliance with safeguards 90
Chapter 9. Detention of people and seizure of items 93
9.1. Detention of people and vehicles 93
9.2. Seizure of items 98
Chapter 10. Use of force and arrest 101
10.1. Use of force 101
10.2. Arrest 104
Chapter 11. Searches of staff and authorised visitors 109
11.1. ICAC investigations 110
11.2. DCS response to ICAC investigations 111
11.3. Searches of staff in practice 113
11.4. Issues arising out of staff searching 116
Chapter 12. Practical effect of stop, detain and search powers 119
12.1. Prohibited items detected in or near correctional facilities 120
12.2. People charged and convicted of introducing prohibited items into correctional facilities 129
12.3. DCS visitor restrictions 131
12.4. Views of stakeholders 132
12.5. Concluding remarks and recommendations 134

Part 3. The right of victims of serious offences to make oral submissions at parole hearings 137

Chapter 13. The parole process........ 139
13.1. The parole process and the role of victims 139
13.2. Recently enacted changes to the parole process........ 141

Chapter 14. Victim submissions 143
14.1. Victims who are entitled to make a victim submission........ 143
14.2. Informing victims about their right to make a victim submission 144
14.3. The role of victim submissions 148
14.4. The content of victim submissions 151
14.5. Assistance for victims who make a submission........ 153

Part 4. Recapture of escaped inmates 157

Chapter 15. Legislation concerning 'escapees'........ 159
15.1. Offences concerning escape from lawful custody........ 159
15.2. A seminal incident 160
15.3. Legislative change........ 161

Chapter 16. Processes followed after an escaped inmate has been recaptured 165
16.1. Arresting escaped inmates........ 165
16.2. Charging escaped inmates 166

Appendices........ 169

Appendix 1 – Information Requirements Agreement........ 171

Appendix 2 – Submissions received in response to discussion paper........ 175

Appendix 3 – Offences relating to places of detention........ 177

Appendix 4 – Daily synopsis audit results (miscellaneous items)........ 179

Appendix 5 – Guidelines for Police when interviewing people with impaired intellectual functioning (excerpt)........ 187

Bibliography........ 189

Acknowledgements 193

Executive Summary

Background to report

The *Crimes (Administration of Sentences) Amendment Act 2002* and the *Summary Offences Amendment (Places of Detention) Act 2002* commenced on 21 February 2003. This legislation:

- increases the powers of correctional officers to stop, detain and search people or vehicles that are 'in or in the immediate vicinity of' a place of detention
- authorises correctional officers to use dogs, and reasonable force, when stopping, detaining and searching people and their vehicles
- creates new penalties for not complying with a direction given by a correctional officer in relation to the stop, detain and search powers, and for failing to produce anything detected in a search when requested to do so by a correctional officer
- permits the seizure and destruction of property brought unlawfully into a correctional centre
- gives victims of serious offences the right to make an oral submission to the Parole Board when the Board is considering whether to release the offender on parole, and
- changes the procedures that correctional officers and police officers must follow when an escaped inmate is arrested.

When NSW Parliament passed this legislation it required the NSW Ombudsman to keep the operation of the legislative provisions under scrutiny for the two year period following commencement, and to prepare a report about the operation and effect of the legislative provisions at the expiration of the two year period.

Throughout the review period we examined a range of material provided by relevant agencies, such as reports, statistics, policies and procedures. We directly observed the operation of the legislation in practice and also sought information from stakeholders via interviews, correspondence, surveys and the distribution of a discussion paper. Contextual information was obtained by conducting a literature review, and a review of similar legislative provisions in other Australian jurisdictions. Prior to finalising our report we sought comments from the Department of Corrective Services, the Attorney General's Department, NSW Police and the Parole Board.

Increased powers of correctional officers stop, detain and search people and vehicles

The primary objective of providing correctional officers with increased powers to stop, detain and search people other than inmates was to reduce the amount of prohibited items entering correctional facilities. This was in recognition of the dangers posed by items such as weapons, drugs and mobile phones within custodial environments.

Significant findings

Legislative and policy framework

During our review no significant concerns were raised about the way correctional officers use their stop, detention and search powers. However, it became apparent that correctional officers are not always acting in compliance with the relevant legislative provisions when conducting searches of people and vehicles, and using their associated powers of detention, seizure of items, use of force and arrest. This is due in part to the fact that there are two separate pieces of legislation governing how searches of people other than inmates are to be conducted, which has led to confusion for some correctional officers about the scope of their powers and responsibilities in different circumstances.

The *Crimes (Administration of Sentences) Regulation 2001* provides correctional officers with the power to conduct certain searches of people and vehicles as a condition of entry to correctional facilities. The amendments to the *Summary Offences Act 1988* which commenced in February 2003 provide correctional officers with additional powers to conduct searches of people and vehicles where an officer reasonably suspects a person has committed or may commit certain offences. While many powers under the two pieces of legislation are substantially the same, there are differences concerning:

- where searches can lawfully be conducted
- how searches are to be conducted
- the safeguards that must be adopted during searches.

Although there are strong justifications for treating routine and targeted searches of visitors differently in some respects, we do not believe it is necessary for there to be two separate pieces of legislation governing the two searching procedures. It would be simpler if all provisions relating to the stopping, detaining and searching of people other than inmates, and their vehicles, were incorporated into a single piece of legislation. This would mean that unnecessary duplication in the provisions could be removed and the language relating to searches could be made consistent. In addition, this approach would ensure the rights and responsibilities of officers, and people being searched, were clearer and more easily accessible.

There is also scope for the Department of Corrective Services to improve the guidance it provides to correctional officers about their powers and responsibilities in stopping, detaining and searching people other than inmates, and vehicles. To this end we recommend that the department review its training material and operational policies in this area, with particular emphasis on where correctional officers have the greatest powers – such as their powers of detention, arrest, use of force and seizure of items. Providing greater guidance to correctional officers through improved training and more comprehensive policy documents will help to ensure that correctional officers act in accordance with relevant legislative provisions, and use their powers in a fair, reasonable and effective way.

Items prohibited from being introduced into places of detention

During the review we found that when correctional officers conduct searches of people and vehicles, and certain items are detected during a search, correctional officers are not always treating people in possession of such items in a consistent manner. This is particularly the case in relation to people detected in possession of items they are permitted to possess in places other than correctional facilities, such as alcohol, mobile telephones, medication, and recording devices. In some instances correctional officers permit people to carry these items into a place of detention, at other times people are warned not to carry such items in future, and on other occasions people are charged with unlawfully introducing an item into a place of detention when they are detected with such an item.

It is likely that the differential treatment of people in possession of such items is largely due to the fact that the legislative provisions and Department of Corrective Services' policies concerning items prohibited from being brought into correctional facilities, are not as clear as they might be. To overcome this problem we recommend that consideration be given to amending the relevant legislative and policy provisions to provide greater guidance about the nature of items it is not lawful to bring into correctional facilities.

We also feel that there is room for the Department of Corrective Services to improve the way it informs correctional officers, police officers and people who attend correctional facilities about the rules concerning the unlawful introduction of items into correctional facilities. Ensuring stakeholders are well informed about the relevant laws and policies is likely to reduce the number of people inadvertently bringing items into a correctional facility in contravention of the law. In addition, this will assist in ensuring people detected in possession of items being carried unlawfully are treated in a fair and consistent manner, and that prosecutions for unlawful behaviour are successful.

Recording information about utilisation of powers

During the review period it was difficult to determine the effectiveness of the new stop, detention and search powers at reducing the introduction of contraband items into places of detention. This is because these powers are only one strategy by which the Department of Corrective Services attempts to prevent the entry of contraband into correctional facilities. In addition, during the review period:

- The department did not keep comprehensive and easily accessible information about the type and amount of contraband detected within the correctional system.
- The department did not keep comprehensive records about the number of times correctional officers stopped, detained and searched people and vehicles.
- When records of searches have been kept, it was usually not clear whether searching officers were utilising their existing search powers outlined in the *Crimes (Administration of Sentences) Regulation*, or the new powers outlined in the *Summary Offences Act*.

To overcome these issues we recommend that the Department of Corrective Services improve the way it records information about searches conducted, people and vehicles detained, and prohibited items seized. For example, we feel that officers should be required to make records about the location of searches and any factors that led a correctional officer to suspect that a person was committing or had committed an offence. In addition details should be recorded about who has responsibility for seized items, and whether safeguards were complied with during a

search. Further, we suggest that it would be appropriate for more detailed reports to be made in instances where force has been used against a person, or a person has been detained or arrested.

As well as enabling the department to develop a better understanding of the effectiveness of the stop, detention and search powers, better record keeping will also enable the department to:

- provide more detailed and reliable information to police and courts if an offence is suspected of being committed
- improve the way it investigates complaints about the use of powers by correctional officers
- determine whether there are any factors that prevent officers from complying with relevant legislative and policy provisions, and
- determine whether further training of, or guidance to, correctional officers is necessary.

While we note that improving record keeping will have an impact on officers' time, we do not feel that the additional reporting requirements are likely to be overly onerous or time consuming.

The right of victims of serious offences to make oral submissions at parole hearings

Prior to February 2003, victims of serious offences could make a submission to the Parole Board about the possible release of an offender on parole, in writing. Alternatively, and only with the approval of the Parole Board, victims could make submissions orally at the parole hearing. With the commencement of the *Crimes (Administration of Sentences) Amendment Act 2002* victims of serious offences were given the right to make an oral submission about the possible release of an offender on parole, without requiring the prior approval of the Parole Board.

Significant findings

People entitled to make a submission

The *Crimes (Administration of Sentences) Act* specifies who can claim to be a victim (or a family member of a victim) for the purposes of becoming registered on the Department of Corrective Services Victims Register. Inclusion on this register is a prerequisite for being provided with certain information about an offender, and making a victim submission when the offender is eligible to be released on parole.

The definition of victim in this legislation is considered by some stakeholders to be problematic because it:

- precludes some people who believe they are legitimate victims of an offender from making a victim submission
- provides no guidance about who may claim to be a family representative of a victim
- does not enable more than one family member to register as a victim
- is different to the definition of victims, and family members of victims, in other legislation in NSW concerning victims of crime and their rights.

We were advised that in practice the Victims Register and Parole Board use discretion to determine who is eligible to be listed on the register, whether to allow more than one family member to register, and whether additional interested parties may make victim submissions.

To overcome stakeholders' concerns, and ensure the Parole Board does not act contrary to the legislative provisions in allowing particular people to make a submission, we recommend that the definition of victim should be amended. We note that any new definition should be specific enough so that victims and offenders can be reasonably clear about who would be eligible to be registered as a victim, but flexible enough to cater for victims, families or affected people in unusual circumstances.

Victims who choose to make a submission

The Department of Corrective Services does not keep records about the characteristics of people who choose to register on the Victims Register. Nor does the Parole Board keep records about who makes a victim submission. Members of the Parole Board advised us it is their perception that:

- the most common offences for which people make a victim submission are murder, and sex offences, particularly sex offences against children

- males and females make roughly the same number of submissions, with males possibly choosing to make oral submissions more often than females
- it is uncommon for people from a non English speaking background to make a victim submission and it is even rarer for Aboriginal or Torres Strait Islander people to make submissions
- people who live in rural areas are as likely, or more likely, than people who live in urban areas to make victim submissions.

It may be useful for DCS to begin recording information about the characteristics of people on the Victims Register. Collecting information about people's age, ethnicity, disabilities, and the language spoken at home, for example, may assist staff to better understand the practical needs of people on the register. This will also ensure appropriate assistance (such as an interpreter or wheel chair access) is provided should the victim wish to make an oral submission at a parole hearing. We note that some victims may not wish to provide certain information about themselves to the Victims Register, and therefore provision of information by victims should be optional.

Provision of information to victims

The fact that some victims of crime now have an automatic right to make an oral submission at a parole hearing will only be meaningful if victims are informed about this right, are given sufficient information to assist them in choosing to exercise it, and understand their rights and obligations when participating in the process.

Throughout our review we identified a number of areas where the Department of Corrective Services and the Parole Board could improve the provision of information to people who may be eligible to make a victim submission. In particular we recommend:

- the Department of Corrective Services, in consultation with the Attorney General's Department, review and update the existing information package about submissions concerning offenders in custody
- the Department of Corrective Services consult with relevant agencies about whether additional measures could appropriately be taken to inform victims from different cultural backgrounds about the parole process.

The role of victim submissions

During our review it became apparent that stakeholders have different opinions about the role of victim submissions, and in particular, how much impact they ought to have on the outcome of parole proceedings.

The Parole Board does not currently keep records about how often victim submissions are presented during parole proceedings, or the outcome of proceedings when victim submissions are presented. In addition, during the review period, the Parole Board was not required to record reasons for its decisions. These factors have meant that it has not been possible for us to comprehensively examine or evaluate how submissions are being used in practice, and the impact they have had on the outcome of parole proceedings. Anecdotally, it appears that victim submissions are most often used to assist the Parole Board in determining appropriate conditions to impose on an offender who is being released on parole.

Given that it is currently unclear what role victim submissions are having on the outcome of parole proceedings, we believe it would be beneficial for the Parole Board to start recording more detailed information about the participation of victims in the parole process. Recording such information will enable a review in the future to examine how victim submissions are being used in practice, the extent to which they are having an effect on the outcome of parole hearings, and whether additional guidelines about victim submissions would be useful.

It is important for detailed information to be kept about the participation of victims in the parole process as there are implications for victims, offenders and the community if victim submissions are being used inconsistently, unreasonably, or in a way that does not meet with stakeholders' expectations.

Recapture of escaped inmates

Until February 2003, the *Crimes (Administration of Sentences) Act* required police or correctional officers who recaptured an inmate unlawfully at large to convey the inmate to the nearest appropriate correctional centre. In other words, inmates who had escaped from custody, and those who had breached a leave order or permit, for example, by returning late to a correctional facility, were to be treated the same way.

In February 2003, largely in response to the erroneous release of an inmate, Parliament amended the *Crimes (Administration of Sentences) Act* so that following recapture, escaped inmates were no longer to be conveyed

by police officers or correctional officers to a correctional centre, but were to be taken before a police officer or authorised justice to be dealt with according to law.

The primary purpose of the legislative change was to ensure that inmates who escape from custody are charged under the criminal law before being returned to custody, while inmates who commit the lesser offence of breaching a leave order or permit are returned to the correctional centre to be disciplined. A secondary reason for amending the legislation was to remove an anomaly between the *Crimes (Administration of Sentences) Act and the Crimes Act 1900* concerning the recapture of inmates unlawfully at large.

Significant findings

The records of NSW Police and the Department of Corrective Services that we examined during the review indicate that in the majority of cases, when an escaped inmate is recaptured, or comes to police attention for unrelated matters, the person is taken to a police station and charged in relation to the escape. This is consistent with the legislative requirements in the *Crimes (Administration of Sentences) Act*.

No concerns were raised during the review period about the operation and effect of the legislative change concerning the recapture of escaped inmates. However, during the review it came to our attention that the legislative provisions in the *Crimes (Administration of Sentences) Act* and the *Crimes Act*, concerning the arrest of inmates unlawfully at large, remain anomalous. We recommend that the Department of Corrective Services consult with relevant agencies about how to best address this issue.

In addition, our research demonstrated that when a person is accused of escaping from lawful custody, NSW Police officers are sometimes charging the person with the wrong offence (there are different offence provisions relating to escaping from, for example, police custody, a juvenile justice centre, periodic detention centre or correctional centre). If a person pleads guilty to the charge, or the error is not picked up by the time the matter is heard at court, this could mean that the person could be subjected to a harsher penalty than would have been possible had they been charged with the correct offence. To overcome this issue, we recommend that NSW Police consider whether officers are receiving sufficient training and guidance about the appropriate offence people should be charged with, if they escape from lawful custody.

Summary of recommendations

1 It is recommended that the Department of Corrective Services develop a policy concerning the carrying of medication into places of detention. At a minimum this should specify that a person has lawful authority to carry drugs under Schedule Four, Appendix D, and Schedule Eight, to the Poisons List in force under the Poisons and Therapeutic Goods Act if the medication is:

   i) contained within its original packaging, and is clearly labelled as prescribed to the person carrying it, or the medication is accompanied by a prescription made out to the person carrying it, or by a letter from the prescribing doctor, and

   ii) stored securely in a vehicle or locker

2 It is recommended that NSW Parliament consider amending sections 27E(2)(b)-(e) of the *Summary Offences Act* to make it an offence for a person, without lawful authority, to bring, convey, receive or secrete into (or out of) a place of detention any item that is likely to pose a risk to the good order and security of a place of detention.

3 It is recommended that the Department of Corrective Services develop policies that specify, in as much detail as possible, the nature of items that it may be illegal to bring, convey, receive or secrete into (or out of) a place of detention, under sections 27E(2)(b)-(e) of the *Summary Offences Act.*

4 It is recommended that the Department of Corrective Services proceed with seeking a legislative amendment that places the onus of proving lawful authority on the accused, for offences contained within sections 27B and 27E of the *Summary Offences Act.*

5 It is recommended that NSW Parliament consider making legislative amendments to clarify that:

   i) a person who fails or refuses to comply with a search by correctional officers can be detained (using force if necessary), if an officer reasonably suspects that the person may be committing an offence relating to a place of detention, and

   ii) a person may be charged with failing or refusing to comply with a search request, whether or not the request is related to a routine or targeted search.

6 It is recommended that NSW Parliament consider incorporating all provisions relating to the stopping, detaining and searching of people other than inmates (and their vehicles) into a single piece of legislation, possibly the *Summary Offences Act*. It would be useful for this consolidated legislation to specify that:

   i) all people in a place of detention are subject to routine searches of their property and vehicles (including a requirement to be scanned by an electronic device, empty pockets, lockers, bags and other items for search and inspection, and to be sniffed by a dog)

   ii) a further search of a person or vehicle may be required if a correctional officer reasonably suspects that a person has or intends to commit an offence relating to a place of detention. This may entail the removal of a person's outer garments of clothing, or the search of a person or vehicle in the immediate vicinity of the correctional facility.

7 It is recommended that the Department of Corrective Services amend its policies to specify that records are to be kept about all physical searches conducted by correctional officers (those involving examination of a person, their property, or vehicle; and use of a dog). At a minimum these policies should provide that records are to:

   i) be kept regardless of whether any prohibited items are detected during the search

   ii) clearly state the location of the search, including the approximate distance of the search from the boundary of the facility (if the search was conducted outside a place of detention)

   iii) provide details about the factors which led to the officer suspecting the commission of an offence.

8 It is recommended that the Department of Corrective Services review the role of indications by drug detection dogs in the formulation, by correctional officers, of reasonable suspicion of the commission of an offence.

9 It is recommended that NSW Parliament consider amending section 27G(4) of the *Summary Offences Act* to:

i) provide that only searches involving the removal of a person's clothes are to be conducted by a correctional officer of the same sex as the person being searched, where practicable

ii) remove the provision that provides for searches to be conducted by non-correctional members of staff.

10 It is recommended that the Department of Corrective Services:

i) amend its procedures to specify that when a correctional officer wishes to require a person visiting an inmate to remove items of clothing during a search, and an officer of the same-sex as the person being searched is not available, that the officer inform the person that he or she has the right to a same-sex officer to conduct the search but that one is not available, and the alternatives open to the person are to permit the officer to conduct the search or to accept a non-contact visit with the inmate

ii) proceed with developing guidelines concerning searches of clothing and items of cultural or religious significance. These guidelines should be developed in consultation with the NSW Community Relations Commission and ethnic communities who are likely to be affected by the guidelines.

11 It is recommended that NSW Parliament consider removing the term 'mentally incapacitated person' from section 27G of the *Summary Offences Act*, and replacing it with the term 'person with impaired intellectual functioning'.

12 It is recommended that the Department of Corrective Services amend its policies to specify that when correctional officers wish to conduct a search of a child or a person with impaired intellectual functioning, (or the property of such a person):

i) an adult accompanying the person or a search observation member of staff should be requested to observe the search

ii) the search should not be conducted at the same time as a search of the accompanying adult (or the adult's property).

13 It is recommended that the Department of Corrective Services review its policies and training materials to ensure that correctional officers understand their obligation to provide quality customer service to members of the public, and have discretion to request a third party observe searches of people considered for some reason to be vulnerable.

14 It is recommended that the Department of Corrective Services:

i) include training about the role of search observation staff members as part of the department's integrated induction program

ii) produce an instruction sheet about the role of search observation staff members to be kept in the administrative or reception centre at each correctional facility, and by correctional officers involved in search operations

iii) amend its policies to provide that a correctional officer who seeks a non-correctional officer to act as a search observation staff member is responsible for ensuring the non-correctional officer has received information about, and understands what is required for the effective performance of this function.

15 It is recommended that the Department of Corrective Services amend its policies to specify that correctional officers are not to conduct searches of people (other than inmates) or vehicles in a manner that is not authorised by the legislation, regardless of whether or not a person consents to being subject to such a search.

16 It is recommended that NSW Parliament consider amending the legislation to specify that in all instances where a correctional officer uses a dog to screen people (other than inmates) or vehicles, the officer is to take all reasonable precautions to prevent the dog touching a person, and is required to keep the dog under control.

17 It is recommended that NSW Parliament consider amending the legislation to specify that if a correctional officer complies with section 27H of the *Summary Offences Act*, any slight or unintentional touching of a person by a dog does not constitute a battery.

18 It is recommended that the Department of Corrective Services begin collecting and analysing information about the performance of drug detection dogs. At a minimum this should include recording information about:

i) the number of times each dog is used to screen a person, property, vehicle or thing

ii) whether, during a screening, the dog makes a positive indication to the scent of a drug

iii) whether, following the screening, a search is conducted of the person, property, vehicle or thing

iv) whether, during the search prohibited drugs (or drug related paraphernalia) are located on the person, property, vehicle or thing

v) the type of drugs located during a search (or a description of the drugs)

vi) whether, following the search, a person makes an admission concerning past contact with prohibited drugs

vii) the success rates of individual dogs at detecting drugs during training exercises.

19 It is recommended that NSW Parliament consider amending the legislation to provide that the safeguards outlined in section 27J of the *Summary Offences Act 1988* apply only to those searches (conducted on a routine or targeted basis) that:

i) involve a person, their property or vehicle being physically examined

ii) require a person to remove outer garments of clothing

iii) involve a dog attempting to detect the scent of prohibited items

iv) are conducted outside a place of detention

20 It is recommended that the Department of Corrective Services require correctional officers to begin recording information about whether or not they have complied with legislated safeguards when stopping, detaining or searching a person (other than an inmate) or their property, and noting any reasons why the safeguards were not complied with.

21 It is recommended that the Department of Corrective Services develop guidelines about the treatment of people (other than inmates) who are detained. At a minimum, these guidelines should provide that detainees are to be:

i) provided with a chair in an area that is sheltered, and if possible out of view of other people visiting the facility

ii) provided with reasonable access to refreshments and toilet facilities

iii) informed about the reasons for the detention, the time limits of the detention, and the consequences of not complying with lawful directions.

22 It is recommended that the Department of Corrective Services amend its Operations Procedures Manual to require correctional officers to record additional information when a person (other than an inmate) is detained. In particular, officers should be required to record:

i) the reason for the detention

ii) whether refreshments and access to a toilet were provided

iii) whether prohibited items were detected in the possession of the person detained, or within a detained vehicle.

23 It is recommended that the Department of Corrective Services consider whether to begin recording information about each time correctional officers provide a person with a warning for possessing a prohibited item within a place of detention.

24 It is recommended that the Department of Corrective Services begin recording details about items seized from people (other than inmates). In particular, details should be kept about the type of item seized, the person responsible for the seized item, and information relating to the destruction of the item.

25 It is recommended that the Department of Corrective Services:

i) centrally store records and reports made by correctional officers about incidents where people (other than inmates) or vehicles have been stopped, detained and searched

ii) require senior officers to periodically audit records and reports made by correctional officers about incidents where people (other than inmates) or vehicles have been stopped, detained and searched to determine whether officers are complying with legislative and policy requirements. Priority should be given to auditing records concerning compliance with safeguards, incidents involving detention, uses of force and arrests made by correctional officers.

26 It is recommended that the Department of Corrective Services review its Operations Procedure Manual with the aim of providing additional guidance to correctional officers about their powers and responsibilities in relation to stopping, detaining and searching of people (other than inmates) and vehicles.

27 It is recommended that the Department of Corrective Services review and update its training material in relation to the stop, detain and search powers of correctional officers, and ensure correctional officers who are likely to use these powers have received adequate training about their powers and responsibilities in this area. In addition to covering standard search procedures, training should focus on the areas where correctional officers' powers are the most significant, such as those relating to detention, use of force and arrest.

28 It is recommended that the definition of victim, in section 256(5) of the *Crimes (Administration of Sentences) Act* be amended to specify:

i) who may claim to be a family representative of a victim

ii) that more than one person may claim to be a family representative of a victim

iii) that 'interested parties' may be included on the Victims Register, if considered appropriate.

29 It is recommended that the Department of Corrective Services, in consultation with the Attorney General's Department, review and update the information package, *Submissions Concerning Offenders in Custody*.

30 It is recommended that the Department of Corrective Services develop brochures in community languages about the right of victims to make submissions concerning offenders in custody.

31 It is recommended that the Department of Corrective Services consider consulting with relevant agencies, such as the Attorney General's Department, Community Relations Commission and Department of Aboriginal Affairs, about whether additional measures could appropriately be taken to inform victims from different cultural backgrounds about the parole process.

32 It is recommended that the Department of Corrective Services consider whether it would be appropriate for additional information about people who are listed on the Victims Register to be collected for the purposes of:

i) increasing the department's understanding of the type of people who are choosing to be included on the register,

ii) improving the provision of services to registered people.

33 It is recommended that the Parole Board Secretariat start recording more detailed information about the participation of victims in the parole process. In particular, details should be kept about:

- **i)** how often victims choose to make submissions
- **ii)** the offences for which victims usually choose to make submissions
- **iii)** whether victims are choosing to make written or oral submissions (or both)
- **iv)** how often parole is refused when a victim submission is presented to the Board

34 It is recommended that the Department of Corrective Services, in consultation with NSW Police and the Attorney General's Department, proceed with investigating the most appropriate way to remove the inconsistencies between the *Crimes (Administration of Sentences) Act* and the *Crimes Act* concerning inmates who are unlawfully at large.

35 It is recommended that NSW Police consider whether police officers should be provided with additional training and guidance about charging people with offences relating to escaping from lawful custody.

Glossary of terms

Term	Definition/explanation
BOCSAR	The Bureau of Crime Statistics and Research, NSW Attorney General's Department.
CCTV camera	Closed circuit television camera
C/O	Correctional officer
COPS	NSW Police Computerised Operational Policing System, a database used by police for recording events such as charges and cautions.
Correctional facility	A correctional centre, correctional complex or periodic detention centre within the meaning of the *Crimes (Administration of Sentences) Act 1999*, including police stations and court cell complexes where offenders are held in lawful custody. See also 'place of detention'.
DCS or 'the department'	The NSW Department of Corrective Services
DDDU	The Drug Detector Dog Unit, which is located within the Security and Investigations Branch of the NSW Department of Corrective Services.
Governor	The person responsible for the care, direction, control and management of a correctional centre or periodic detention centre, in accordance with section 233 of the *Crimes (Administration of Sentences) Act 1999*.
HRMU	High Risk Management Unit, Goulburn Correctional Centre
ICAC	The NSW Independent Commission Against Corruption
IDC	Inmate development committee. A committee of elected inmates, who are approved by the governor, to discuss and resolve issues and problems associated with imprisonment, with senior management of a correctional facility.
MRRC	Metropolitan Remand and Reception Centre, Silverwater Correctional Complex
OIC	Officer in charge. Refers to the correctional officer in charge of an operation.
PAD	Passive alert dog. Drug detection dogs used by the NSW Department of Corrective Services, that are trained to remain passive, and to indicate the presence of illegal drugs in a non-aggressive way.
POI	Person of interest
Place of detention	A correctional centre, correctional complex or periodic detention centre within the meaning of the *Crimes (Administration of Sentences) Act 1999*, including police stations and court cell complexes where offenders are held in lawful custody. See also 'correctional facility'.
Relevant provisions	The provisions of the *Crimes (Administration of Sentences) Act 1999* and the *Summary Offences Act 1988*, as amended by the *Crimes (Administration of Sentences) Amendment Act 2002* and the *Summary Offences Amendment (Places of Detention) Act 2002*.

Review period	21 February 2003 – 20 February 2005. The two year period following commencement of the relevant legislative provisions.
Routine search	A search of a person or vehicle that is conducted as a condition of entry to correctional facilities. Sometimes each person and/or vehicle entering a facility will be subject to a routine search, on other occasions people and vehicles will be selected on a random or ad hoc basis to be the subject of such searches.
Shiv	Item sharpened for the purpose of being used as a weapon
S&I Branch	Security and Investigations Branch, NSW Department of Corrective Services.
Targeted search	A search of a person or vehicle that is conducted because a correctional officer reasonably suspects that the person has committed an offence, or may commit an offence, or that the vehicle contains evidence of such an offence.

Part 1.

Background

Chapter 1. Introduction 3

1.1. The correctional system 3
1.2. Legislative change 5
1.3. The role of the Ombudsman 5
1.4. The structure of this report 6

Chapter 2. Methodology 7

2.1. Literature review 7
2.2. Review of legislation in other jurisdictions 7
2.3. Observation 7
2.4. Interviews with stakeholders 8
2.5. Provision of information by government departments 8
2.6. Provision of information from individuals 9
2.8. Review of complaints to our office 12
2.9. Audit of contraband finds in correctional facilities 13
2.10. Discussion paper 14
2.11. Circulation of draft report to agencies 15

Chapter 1. Introduction

1.1. The correctional system

1.1.1. Places of detention

When a person is convicted of committing a criminal offence in New South Wales (NSW), the court will impose a penalty or sentence. The purposes for which a court may impose a sentence on an offender are:

(a) to ensure that the offender is adequately punished for the offence,

(b) to prevent crime by deterring the offender and other persons from committing similar offences,

(c) to protect the community from the offender,

(d) to promote the rehabilitation of the offender,

(e) to make the offender accountable for his or her actions,

(f) to denounce the conduct of the offender,

(g) to recognise the harm done to the victim of the crime and the community.[1]

The sentence imposed will depend on the type and seriousness of the offence committed, and other relevant factors. Sanctions that can be imposed include the issuing of a fine, good behaviour bond, community service order or suspended sentence. Offenders can also be sentenced to full time detention or periodic detention in a correctional facility, or to a period of home detention. The *Crimes (Sentencing Procedure) Act 1999* specifies that:

> *A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.*[2]

The Department of Corrective Services (DCS or the department) currently manages 29 correctional centres, 11 periodic detention centres and two transitional centres for female inmates. Some of these institutions are situated separately, others are co-located on the grounds of a correctional complex. In some circumstances, the department is also responsible for offenders in court cells and police cells.

There is also one privately managed correctional centre in NSW. The GEO Group Australia Pty Ltd is responsible for the security, supervision, custody and welfare of inmates at Junee Correctional Centre. The management of Junee Correctional Centre is subject to the same legal requirements as correctional facilities managed by DCS. For the purposes of this paper the terms 'correctional facility' and 'place of detention' will be used interchangeably to describe the institutions run by the GEO Group and DCS to house inmates (whether on a full-time or periodic basis).

The *Crimes (Administration of Sentences) Act 1999* and the *Crimes (Administration of Sentences) Regulation 2001* are the primary pieces of legislation governing the management of correctional facilities in NSW. The Act states that, subject to the direction and control of the Minister, a Commissioner is responsible for the care, direction, control and management of all places of detention throughout NSW.[3] Governors are responsible for the day-to-day management of correctional facilities, and are subject to the direction and control of the Commissioner.[4]

The mission of DCS is to reduce re-offending through secure, safe and humane management of offenders.[5] The department's priorities in relation to offender management, as outlined its 2003-04 Annual Report are to:

1. Effectively manage correctional centre and escort security

2. Achieve safe custodial environments

3. Meet the care needs of those in custody

4. Promote effective participation in correctional programs.[6]

In order to achieve these goals, both correctional and non-correctional staff are employed at each correctional facility. The former are responsible for maintaining the safety and security of the facility, by undertaking custodial duties such as supervising, searching and escorting inmates, as well as controlling access to the centre, and processing, and searching visitors. In recent years correctional officers have also had a role in the case management of inmates.

Non-correctional officers who work in correctional facilities include administration staff, psychologists, teachers, welfare officers, and nurses. These staff are often involved in the rehabilitation or education of offenders, or meeting inmates' health and welfare needs, including the preparation of inmates for release back into the community.

DCS also hires contractors who enter correctional facilities to undertake work in a range of areas, such as building maintenance, and delivery of goods.

1.1.2. Inmates

There are approximately 9,000 people currently incarcerated in places of detention throughout NSW. While the actual number of inmates in custody changes on a daily basis a snapshot of the offender population for the week ending 13 February 2005 provides a hint of the variety and complexity of the population. At the end of that week there were 8,331 males in full-time custody. Of these, 5,884 were sentenced, 503 were appellants (people appealing their conviction or sentence) and 1,944 were on remand (unsentenced).[7] Of the 641 female inmates in full-time custody, 388 were sentenced, 42 were appellants and 211 were on remand. Indigenous inmates made up 19.1% of the male inmate population (1,588 males) and 29.8% of the female inmate population (191 females).[8] There were also 765 offenders attending periodic detention centres, or housed in transitional centres, police cells and court cells.[9]

There is great variety in the characteristics, problems and needs of individual inmates. Many inmates have, for example:

> *unresolved drug and alcohol issues and backgrounds of social disadvantage, low educational achievement, poor employment history, significant health problems (including mental illness), and limited family and social skills.*[10]

There are also significant differences in the offences committed by inmates, the length of the sentences they are serving, and their behaviour during incarceration. For this reason, each inmate is given a particular security classification,[11] and each centre or part of a centre is designated to house inmates of particular security classifications.

An offender's classification will change over time and will affect the security measures the inmate is subject to, as well as access to programs, work and leave. Generally, inmates of a lower classification level (minimum security inmates) will have greater freedom within a correctional facility, and greater access to non-secure areas of the facility. They may also be given permission to leave the facility in certain circumstances, such as for work or education.[12]

1.1.3. Security of correctional facilities

The primary reasons that security is so important within a custodial environment is to ensure that certain people and items are not able to enter a facility without the appropriate authority (those that are likely to threaten the good order and security of the centre), and to ensure that other people are not able to leave a facility without the appropriate authority (for example, inmates who wish to escape), or take items out of the centre when not authorised to do so.

Both static and dynamic security measures are used to help keep each correctional facility secure. Static security measures include metal detectors, x-ray machines, fences, motion detectors and closed circuit television (CCTV) cameras. Dynamic security measures include searches of people and property, use of drug detection dogs, intelligence gathering and analysis, security classification and drug testing of inmates. As would be expected, there are generally greater security measures in place at facilities that house maximum security inmates than at those which house medium or minimum security inmates.

Despite the best efforts of DCS staff, breaches of security do sometimes occur at places of detention with, for example, unauthorised items entering correctional facilities and inmates escaping. To enhance the ability of DCS to manage such situations, certain laws were amended in 2002. These amendments will be discussed below, and in particular in parts 2 and 4 of this report.

1.1.4. The parole process

When a court sentences an offender to a period of imprisonment, the court may impose a sentence with a non-parole period. The non-parole period is the minimum time the offender must serve in custody, after which the offender may be released to serve the rest of his or her sentence in the community on parole. The NSW Parole Board is the independent body that determines whether or not to release offenders sentenced to a period of imprisonment that is greater than three years, from custody on parole, and what conditions to impose on such offenders who are granted parole.[13]

When the Parole Board is considering whether or not to release an offender on parole, it must take into account a number of issues, including comments made by the sentencing judge, the offender's conduct while serving his or her sentence, the availability to the offender of family, community or government support, and the likelihood that the offender will be able to adapt to normal community life.[14] In addition, the Parole Board must consider the likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole.[15]

In 2002 the law was changed to make it easier for victims of serious offenders to provide information to the Parole Board, for it to consider when determining whether an offender should be released on parole. In particular, such victims were given a right to make an oral submission to the Parole Board during a parole hearing. Previously such submissions could only be made with the prior approval of the Board. This change will be discussed below, and particularly in part 3 of this report.

Offenders who are granted parole, are supervised by the DCS Probation and Parole Service, for the duration of the parole order, to ensure that any conditions of the parole order are met. If an offender is caught breaching the conditions of his or her parole order, this will be reported to the Parole Board which may revoke the parole order and return the offender to custody for the remainder of his or her sentence.

1.2. Legislative change

The *Crimes (Administration of Sentences) Amendment Act 2002* and the *Summary Offences Amendment (Places of Detention) Act 2002* were passed by the NSW Parliament on 25 June 2002 and commenced on 21 February 2003. This legislation:

- increases the powers of correctional officers to stop, detain and search people or vehicles that are 'in or in the immediate vicinity of' a place of detention
- authorises correctional officers to use dogs, and reasonable force, when stopping, detaining and searching people and their vehicles
- creates new penalties for not complying with a direction given by a correctional officer in relation to the stop, detain and search powers, and for failing to produce anything detected in a search when requested to do so by a correctional officer
- permits the seizure and destruction of property brought unlawfully into a correctional centre
- gives victims of serious offences the right to make an oral submission to the Parole Board when the Board is considering whether to release the offender on parole, and
- changes the procedures that correctional officers and police officers must follow when an escaped inmate is arrested.

1.3. The role of the Ombudsman

When NSW Parliament passed the *Crimes (Administration of Sentences) Amendment Act*, it included a requirement that the NSW Ombudsman '*keep under scrutiny the operation of the relevant provisions*'[16] for two years after the commencement of the legislation.

This Act further states, that for the purpose of keeping the operation of the relevant provisions under scrutiny:

> *(3) … the Ombudsman may require NSW Police, the Department of Corrective Services or the Attorney General's Department to provide information concerning its participation in the operation of the relevant provisions.*[17]
>
> *(4) The Ombudsman must, as soon as practicable after the expiration of that 2 year period, prepare a report as to the operation and effect of the relevant provisions and furnish a copy of the report to the Minister for Corrective Services and the Attorney General.*
>
> *(5) The Ombudsman may identify, and include recommendations in the report to be considered by the Minister for Corrective Services and the Attorney General about, amendments that might appropriately be made to the relevant provisions with respect to the operation of those provisions.*
>
> *(6) The Minister for Corrective Services is to lay (or cause to be laid) a copy of any report made or furnished to the Minister under this section before both Houses of Parliament as soon as practicable after the Minister receives the report.*[18]

In line with these legislative provisions, our office monitored the operation of the *Crimes Administration of Sentences (Amendment) Act* and the *Summary Offences Amendment (Places of Detention) Act* for the period 21 February 2003 to 20 February 2005. Throughout this report, this period is referred to as the 'review period'.

This report discusses issues relating to the operation of the legislative provisions that we have become aware of during the review period. It includes recommendations that we believe could be implemented to improve the operation of the legislation in the future.

1.4. The structure of this report

The first part of this report provides background information about the review we have conducted and explains the research methods we have used.

The remainder of the paper is divided into three parts. This is because the changes to the legislation that we have been monitoring, deal with three distinct aspects of criminal justice administration.

- Part two of this report examines the powers of correctional officers to stop contraband entering correctional facilities. This part focuses on the powers of correctional officers to stop, detain and search people, other than inmates, who enter or are near places of detention.
- Part three discusses the role of victims, when the Parole Board is determining whether parole will be granted to serious offenders. In particular, it examines the operation of the legislative change which provided victims of serious offenders with the right to make oral submissions to the Parole Board.
- Part four examines the procedures that are followed by correctional officers and police officers when an inmate who is absent from lawful custody, is arrested.

Additional relevant information is provided in appendices at the end of the report.

Endnotes

[1] *Crimes (Sentencing Procedure) Act 1999*, section 3A.
[2] *Crimes (Sentencing Procedure) Act 1999,* Part 2, Division 1, 5 (1).
[3] *Crimes (Administration of Sentencing) Act 1999,* section 232.
[4] *Crimes (Administration of Sentencing) Act 1999*, section 233.
[5] DCS Corporate Plan, 2004 – 2007, p. 1.
[6] Page 14.
[7] DCS Corporate Research, Evaluation and Statistics Unit, *Offender Population Report,* week ending 13 February 2005.
[8] Ibid. These figures include inmates housed in correctional centres only, and do not include inmates housed in transitional centres, police/court cells or periodic detention centres.
[9] Ibid. This figure does not include the 125 people with a periodic detention order, who were not attending periodic detention.
[10] *Productivity Commission Report on Government Services 2003*, Steering Committee Publication, 30 January 2004, 7.2.
[11] *Crimes (Administration of Sentences) Regulation 2001*, part 2, division 2 deals with the classification of inmates.
[12] *Crimes (Administration of Sentences) Act 1999*, sections 23 – 37 regulate inmate leaves of absence.
[13] For information about proposed changes to the Parole Board and parole proceedings, see section 13.2.
[14] *Crimes (Administration of Sentences) Act 1999*, section 135(2).
[15] *Crimes (Administration of Sentences) Act 1999*, section 135(2)(c).
[16] The relevant provisions are defined in section 4(1)(a) and (b) of the *Crimes (Administration of Sentences) Amendment Act 2002*. They are the provisions of the *Crimes (Administration of Sentences) Act 1999*, as amended by the *Crimes (Administration of Sentences) Amendment Act 2002*; and the provisions of the *Summary Offences Act 1988*, as amended by the *Summary Offences Amendment (Places of Detention) Act 2002*.
[17] Prior to 6 July 2004 we were not able to obtain information from NSW Police. This is discussed further in section 2.5.3 of this report.
[18] Section 4.

Chapter 2. Methodology

This chapter briefly discusses the research activities that we undertook during our review. In conducting the review we decided to use a multifaceted approach and obtain information from a range of sources, in a variety of ways. It was hoped that this approach would ensure that our review was balanced, fair and comprehensive, and also that the limitations of any one research source or method would be minimised.

2.1. Literature review

We conducted an initial review of literature we believed might be relevant to the issues under review. This involved examining media items, journal articles, websites, parliamentary debates, and other published material. Throughout the review period we continued to examine media items, newly published literature, and existing literature as we became aware of it.

While there is not a significant amount of published material concerning the powers of correctional officers to stop contraband entering correctional facilities, we did review a range of articles about the:

- problems associated with prohibited items entering places of detention
- management of drug users and drug use in correctional facilities
- importance of family and friends as support for inmates
- impact of imprisonment on the family of inmates, including the difficulties associated with visiting an inmate.

We also examined material relating to the role of victims in the criminal justice system, and the parole process; and a small number of articles about escaped inmates.

Material considered throughout the review period is listed in the Bibliography.[19]

2.2. Review of legislation in other jurisdictions

In order to obtain an understanding about how correctional officers throughout Australia attempt to prevent contraband from entering correctional facilities, we reviewed the relevant legislation in each Australian state and territory. For this purpose, in each jurisdiction, we examined:

- the items that it is against the law to bring into a place of detention
- the legislated powers of correctional officers to stop, detain and search people (other than inmates) and vehicles to detect prohibited items
- where possible, the information given to people entering places of detention in each jurisdiction about these rules and powers.

We did not conduct a separate review of Australian legislation concerning the role of victims in parole proceedings because the Australian Institute of Criminology has recently examined this issue.[20]

2.3. Observation

Staff from our office spent a number of days directly observing the operation of the legislation in practice. This involved us attending:

- 16 DCS operations aimed at detecting the entry of contraband into correctional facilities
- 5 correctional facilities where we were shown the equipment and strategies in place to prevent contraband from entering the premises
- 1 court case in which a person attempted to overturn an order by the Commissioner of Corrective Services, which banned him from entering correctional facilities
- 1 hearing by the Independent Commission Against Corruption (ICAC) into allegations that a DCS employee had trafficked contraband into a correctional facility
- 1 day of drug detection training for DCS dogs and dog handlers
- 5 Parole Board hearings at which victims (or their representatives) spoke to the Parole Board.

Observing the operation of the legislation provided us with valuable insight into the issues relating to the implementation of the new legislative provisions. It is important to note, however, that there are a number of limitations to conducting observational research.

As we conducted much of our observational research outdoors at correctional facilities, during operations often involving ten to twenty law enforcement officers, there were times when it was difficult for observers to see and hear exactly what was happening, or to understand why certain words were used or actions taken. In addition, when making notes about events witnessed, it was often difficult, if not impossible, for observers to accurately determine characteristics such as a person's age and ethnicity. Where observers have described such characteristics in their notes these should be acknowledged as subjective descriptions, and treated as a guide only.

In addition, we recognise that when we were observing DCS operations, it is unlikely that officers always acted the same as they would have, had we not been present. It is possible that their behaviour was (consciously or unconsciously) more professional, circumspect or respectful than usual as they were aware their actions were being observed. To minimise the possibility that officers would alter their behaviour significantly when we were present, we attended a number of operations so that officers would become used to, and comfortable in, our presence. In addition, prior to observing each operation we advised officers that we were present for research purposes only, and that in the course of our research individuals would not be identified.

2.4. Interviews with stakeholders

During the review we conducted over 30 face-to-face interviews with staff of DCS: including governors of correctional facilities; staff from the Security and Investigations Branch (S&I Branch); the Restorative Justice Unit; the Specialised Training Unit; and the Corporate Research, Evaluation and Statistics Unit. Most of these interviews were conducted to help us better understand DCS practices, and also to determine the roles, responsibilities and reporting practices of the different branches of the department. We also conducted many telephone interviews with DCS staff, and held one semi-structured focus group with 17 officers from the metropolitan Drug Detector Dog Unit (DDDU).

We also conducted interviews with a range of other stakeholders, including:

- seven semi-structured telephone interviews with members of the Parole Board
- interviews with representatives from three victim support groups
- four telephone interviews with senior officers from NSW Police.

Our aim was to interview a range of people so that we could develop a comprehensive understanding of relevant issues, and obtain the opinions and perceptions of a variety of people. In addition, this approach often allowed us to verify information provided by different sources. While most interviewees could be guaranteed anonymity, we recognise that their frankness may have been affected by the formal complaint taking and investigation role performed by the NSW Ombudsman.

2.5. Provision of information by government departments

Upon commencement, section 4(3) of the *Crimes (Administration of Sentences) Amendment Act* stated:

> *For [the purpose of the legislative review] the Ombudsman may require the Department of Corrective Services or the Attorney General's Department to provide information concerning the Department's participation in the operation of the relevant provisions.*

2.5.1. DCS

For several months at the beginning of the review period we spent a significant amount of time determining what information relevant to our review DCS recorded and stored, and which areas of the department were responsible for this. We then spent time considering which information we wished to receive throughout the review period, and whether or not it would be overly onerous for the department to provide. The result of this process was an 'information requirements agreement' which was signed by the Ombudsman and the Commissioner of Corrective Services in February 2004.The agreement is attached at Appendix 1 and specifies the type of information the department agreed to provide to us, and the timeframes for information provision.

While there were ongoing negotiations about, and some delays with, provision of information by DCS, overall the department provided us with almost all of the information we requested.

2.5.2. Attorney General's Department

We were of the view that the Attorney General's Department would not have a significant amount of information relevant to the review. For this reason we decided not to enter into a formal information requirements agreement with this department. Instead we sought and received information from the Attorney General's Department on an ad hoc basis throughout the review period. This included us seeking and receiving information about the outcome of court proceedings from the Bureau of Crime Statistics and Research (BOCSAR), and some transcripts of court proceedings.

2.5.3. NSW Police

During the review period it became apparent that it would be extremely useful for us to have access to information from NSW Police, such as charge information about relevant offences committed. However, we were of the view that NSW Police could legitimately refuse to provide us with such information, as it is bound by strict rules governing the release of information, and there were no legislative provisions on which we could rely to require NSW Police to provide us with relevant information.

To overcome any such difficulty, in August 2003 we wrote to the Director-General of The Cabinet Office seeking an amendment to the *Crimes (Administration of Sentences) Act*, which would enable us to require NSW Police and its officers to provide us with information for the purposes of our review.[21] In April 2004 we received a letter from The Cabinet Office advising that the Premier had approved the legislative amendment we sought.[22]

On 6 July 2004 the *Statute Law (Miscellaneous Provisions) Act 2004* received assent by the NSW Governor. This Act amended the *Crimes (Administration of Sentences) Act* to allow us to require information from NSW Police, concerning its participation in the operation of the relevant provisions.[23]

Following the legislative change, we received for the purpose of the legislative review, access to the NSW Police intranet and the NSW Police Computerised Operational Policing System database (COPS). The COPS database is a tool used by police to record details of all events such as charges and cautions. It allows police to record information about an event, such as the date, location, offence, and local area command, as well as details about suspects and offenders. COPS also contains a 'narrative' field in which officers can describe an event in their own words and record other information which may not fit easily under other category headings.

2.6. Provision of information from individuals

2.6.1. Official visitors

In July 2004 we wrote to the 41 official visitors whose role it is to visit one or more places of detention each month, with the purpose of interviewing staff and inmates, taking complaints and examining the centre(s).[24] We felt that official visitors would be likely to have a unique insight into the centres they visit and invited them to contact us if they had comments about the legislation under review.

In our letter we assured official visitors that if they chose to reply to us, any comments they made would not be attributed to them by name. We hoped this would encourage frank responses. We advised the official visitors that we would appreciate hearing their comments about any aspect of the legislation, but in particular:

> *… any views or comments you have about:*
>
> *(a) the searching powers and practices of correctional officers, including any concerns or compliments you have about the methods used to search staff, or visitors to the correctional centre*
>
> *(b) any occasions, you have been made aware of, where an inmate's family or friends are unwilling to visit the correctional centre because of apprehensions about security measures, such as personal searches or use of drug detection dogs*
>
> *(c) any occasions, you have been made aware of, where an inmate (or their family or friends) have had difficulty obtaining information about the visiting conditions of the correctional centre, such as policies about what items are not to be brought into the centre*
>
> *(d) any occasions, you have been made aware of, where a visitor to a correctional centre has had an item confiscated by correctional staff, which the visitor considered unreasonable.*
>
> *(e) any occasions, you have been made aware of, when a visitor to the correctional centre has been detained for longer than four hours, or in a manner that was considered unreasonable.*[25]

In response to our letter, we received three telephone calls from official visitors advising us that they had no comments to make on the legislation under review. We also received five written responses. One of the written responses made reference to a complaint that had been received about the *'over-enthusiastic methods'* of the DDDU,[26] and another argued that DCS should have in place a state-wide policy concerning searches of people wearing *'headgear'* for religious reasons.[27] Other responses we received commented more generally about visit procedures, and visitor bans and restrictions, rather than the conduct of searches, detention of people, or confiscation of items. The responses from official visitors therefore did not identify any systemic issues concerning the issues under review.

2.6.2. Inmates

We recognise that visitor searches can impact on inmates in a number of ways, including:

- some people may choose not to visit an inmate friend or family member because they are uncomfortable with the searching procedures
- inmates will no longer receive visits from people detected during a search, possessing contraband items
- the quality of a personal visit with family and friends may be affected if a visitor is upset about the conduct of a search.

Therefore we decided that it was appropriate to provide inmates with an opportunity to participate in the review. After careful consideration about how to best contact inmates, we decided to write a letter to one or more inmates on the inmate development committees (IDCs) at each correctional centre. The purpose of IDCs is to provide a forum for elected inmates, who are approved by the governor, to discuss and resolve issues and problems associated with imprisonment, with senior management.[28] We felt that IDC members would be likely to have a good knowledge of issues that affect inmates generally, and may also know particular inmates with concerns or opinions about the issues under review.

We chose not to give DCS advance notice that we were sending letters about the review to some inmates. This is because we wished to give inmates the opportunity to reply to us in confidence, and to safeguard against the possible perception that staff of DCS could be in a position to influence an inmate's decision about whether to reply to us, or influence the content of responses.[29]

In December 2004, we sent 62 letters to IDC members.[30] Where possible, (in 56 of the letters) we addressed the letter to an individual inmate. However, in six instances we did not know the name of any inmate members of a particular IDC. In these cases we addressed the letters to *'inmate representative, inmate development committee'.*

To ensure confidentiality we advised centre staff that we expected each letter to be provided to inmates, unopened.[31] In addition, in our letter we advised inmates that they could reply to us without using their name, and that if they did use their name, we would anonymise any comments they made that were used in our report.

While we believed that it was essential to canvas the views of inmates, we did not expect to receive a large number of responses to our letters to IDC representatives. It is our experience that inmates often do not come forward with complaints or information on the basis that it may not be kept confidential, or that it may be used against them in some way. This was confirmed by an inmate who telephoned us in response to our letter. He advised, that notwithstanding our assurances of confidentiality, some inmates at the centre were reluctant to provide us with information. They felt that doing so could jeopardise their chance of receiving parole.[32]

In total we received five letters and four telephone calls from inmates.[33]

2.6.3. Victims

Following a meeting with a representative from the Homicide Victims Support Group in March 2004, we were invited to include information about our review in the Homicide Victims Support Group newsletter, and encourage victims of crime to contact us if they had comments to make about victim submissions at parole hearings. A précis of our review was included in the April 2004 newsletter. However, only one victim contacted us in response to the article. This person provided us with some information about her experiences making a victim submission in another part of Australia.

2.7. Surveys

2.7.1. Governors of correctional facilities

In May 2004 we sent a survey to the governor of each correctional centre and transitional centre in NSW.[34] In the survey we asked a range of questions about the security procedures in place at each facility, and about the use of certain powers by correctional officers based at each centre in the review period so far (such as how often correctional officers had used force on a visitor, or arrested visitors for loitering outside the centre). The aim of the survey was to enable us to develop an understanding of the strategies and procedures in place at each centre to reduce the amount of contraband entering centres, and to obtain the views of governors about these strategies and procedures.

Prior to sending the survey to governors, we asked the Commissioner of Corrective Services to sign a memorandum, which would accompany the survey, asking governors to complete the survey and return it to our office. We felt that without such a memorandum not all governors would be likely to respond to the survey given its nature.

The Commissioner agreed to provide us with such a memorandum, on the condition that governors forward completed surveys to his office, as well as to us. While it is acknowledged that governors' responses may have been influenced by the fact that their responses were also being provided to the Commissioner, we felt that proceeding on this basis was the best way for us to obtain information from each facility in a timely manner without requiring the outlay of significant resources (such as would be required if we physically visited every centre to interview the governor and examine relevant reports). We received completed surveys from each of the 28 governors who were sent the survey (100%).

2.7.2. Security units

After receiving responses to our survey of governors of correctional centres, it became apparent that, only on rare occasions did staff based at correctional centres use their powers to search people or vehicles outside correctional property, use force on a visitor, or arrest people. This is because operations to detect contraband being brought into a place of detention by visitors, staff and authorised visitors are usually conducted by one or more of the DCS specialised security units, rather than locally based centre staff. The DCS security units include four regional units (the northern, western, southern and metropolitan security units), the DDDU, and Taskforce Con-Targ (a taskforce established in February 2004 to specifically address the issue of contraband in correctional facilities).

In September 2004 we requested information from DCS about the number of times, since February 2003 staff from the DCS security units had:

- arrested a person for loitering about or near a place of detention
- stopped, detained and searched a person in the immediate vicinity of a place of detention (ie. outside the grounds of a correctional facility)
- used force when stopping, detaining or searching a person other than an inmate
- arrested a person for an offence such as bringing unauthorised property into or out of a correctional facility; communicating or attempting to communicate with an inmate; failing or refusing to comply with a search, or produce anything detected during a search; or resisting or impeding a search.

We also asked to be provided with copies of all reports about such incidents.

In March 2005 we were provided with a number of DCS reports. There were differences in the number of incidents DCS advised us about, and the number of reports we were provided with. In addition, when examining the reports, it was not clear whether some reports related to relevant incidents. This is because relevant information (such as whether an incident occurred on DCS property, or near it) was often not included in the report.

From close examination of all reports we were provided with, it appears that 51 relate to relevant incidents. These reports were examined and analysed, and are discussed in various sections of this report.

Where reports are quoted in this report we have generally not corrected typographic, grammatical and other such errors. This approach was taken so that we did not inadvertently change the meaning of records created by correctional officers. Where we have made amendments or de-identified information contained in such reports, this is clearly indicated.

2.7.3. Visitors to correctional facilities

We felt that it was important to speak to people who visit correctional centres to obtain their views and perspectives about:

- whether people who visit correctional centres understand the rules about what can be brought into the centres
- the types of searches people visiting correctional centres are subject to
- whether people who visit correctional centres are uncomfortable with any aspects of the searching process, or find any aspects of the searching process unreasonable.

We decided that the best way of obtaining information and opinions from people who visit correctional centres, was to conduct a short face-to-face interview based on a standard questionnaire. This approach allowed us to speak to people of different ages and background, at a number of centres, without causing significant inconvenience to respondents. We recognised that this approach would not allow us to obtain responses from people who do not speak or understand the English language well.

As we recognise that visiting a correctional centre may be a difficult or distressing experience to some people, we decided to make the survey as short and straightforward as possible. In addition, we made a decision to:

- approach people as they were exiting, rather than entering, the centre so that we did not cause people to be late for pre-booked visits
- only approach people who appeared to be at least 18 years old
- not approach people who appeared distressed or agitated, or who were acting in an aggressive or threatening manner
- emphasise to possible respondents that responding to the survey was voluntary and that information which could identify the respondent was not being collected.

Before conducting the survey, we advised the Commissioner of Corrective Services of our intention to do so. The Commissioner responded that he did not support us conducting such a survey as *'[t]he very nature of property and vehicle searches of visitors' property is onerous and intrusive' and '[i]t stands to reason that an anonymous survey taken on a group of people, who by their very nature of their visit are likely to have an antipathy toward law enforcement agencies in general, will produce a fairly predictable response.'*[35] Notwithstanding the Commissioner's reservations we decided to proceed with conducting the survey. We felt that obtaining the views of visitors would help to ensure our review was thorough and balanced.

On five days in January and February 2005 staff from our office attended four metropolitan correctional centres (in pairs) to conduct the surveys. A total of 129 people agreed to participate in the survey.
After the survey was completed, respondents were offered an information sheet, which provided additional information about the review, and a phone number in case they had questions or additional comments.
We have not received any telephone calls in response to the information sheet.

2.8. Review of complaints to our office

The NSW Ombudsman investigates complaints about most public sector agencies and some private sector organisations in NSW. We investigate conduct that may be illegal, unreasonable, unjust or oppressive, improperly discriminatory, based on improper motives or irrelevant grounds, based on mistake of law or fact, or is otherwise wrong. As our office in an office of last resort, our usual practice is to encourage people who contact us to complain directly to the relevant organisation in the first instance, and then to complain to us if they are not satisfied with the agency's response, or the agency fails to respond in a timely manner.

The complaint management software used by our office enables staff to record what agency a complaint refers to and the particular issues involved. This allows us to examine complaint trends and analyse whether there are areas of administration, about which a significant number of complaints are made.

In the two-year review period we received 87 complaints concerning 'visits' in 'prisons'. Thirty one of these complaints (35.63%) were made between 21 February 2002 and 20 February 2003 and 56 complaints (64.37%) were made in the following year. In the year before the legislation under review commenced we received 44 complaints about these issues.

The complaints we receive about visits at correctional facilities cover a variety of issues, including:

- difficulties in organising a visit with an inmate
- inconvenience when a person arrives at a centre to visit an inmate, only to learn that the inmate has moved centres
- lengthy delays while an inmate is brought to the visiting area
- concerns over facilities and conditions in areas where visits are held
- concerns about the reasonableness of visit policies, such as the termination of a visit if a visitor or the inmate wishes to use a toilet.

During the review period we received very few complaints about the conduct of correctional officers stopping, detaining or searching people. In fact it appears that only six complaints during the review period related in some way to these issues. Our office made a decision to decline each of these six complaints, on the basis that there was insufficient evidence to substantiate the claim, or that the complainant sought redress from our office prematurely – in other words, before seeking to have the matter resolved by DCS.

2.9. Audit of contraband finds in correctional facilities

At the beginning of the review period we requested information from DCS about the amount and type of prohibited items detected on visitors to correctional facilities, and such items found within correctional facilities. While DCS initially agreed to provide us with such information,[36] we were subsequently advised that it was not possible to receive comprehensive information about prohibited items detected because information kept by the department is incomplete and therefore unreliable.[37]

DCS has recently implemented a new and improved way of recording information about contraband finds. However, during the review period, the primary way that information about contraband finds was recorded by DCS was by officers who detected contraband, reporting such finds to a DCS duty officer.

The DCS duty officers are responsible for maintaining a database of information about all significant events that occur within the correctional system, such as uses of force, assaults, inmate injuries, lock-downs, and detection of prohibited items. Each day, information from the database is extracted, and a report about significant incidents that have occurred in the previous 24 hour period is produced. This 'daily synopsis' is provided to relevant sections of DCS, as well as to our office.

While information about the detection of prohibited items should be recorded on the DCS Duty Officer Database, extracting and analysing information from the database is neither simple nor straightforward. This is because information is recorded by duty officers in narrative form. In other words, rather than inputting information from specific categories or menus into the database, officers describe an event in their own words. This means that a detection of green vegetable matter (suspected of being a prohibited drug) may be recorded in the database as a finding of green vegetable matter, GVM, marijuana, cannabis, hashish, buds, seeds or some other term. The amount of green vegetable matter detected may be recorded by weight, number (of plants, seeds etc), or by a general description, such as 'two foils', or 'small quantity'.

While we knew that it would be difficult to analyse the information recorded about prohibited items kept by DCS we decided to examine 18 months worth of daily synopsis entries to attempt to gain a greater understanding about the amount and type of contraband being detected within correctional facilities. To determine whether there were significant differences in the amount and type of contraband detected prior to, and in different parts of the review period, we decided to examine records relating to three separate six-month time periods, these being:

- 21 August 2002 – 20 February 2003 (the 6 month period prior to the review period)
- 21 August 2003 – 20 February 2004 (the 6 month period beginning 6 months into the review period)
- 21 August 2003 – 20 February 2004 (the final 6 months of the review period).

Given the vastly different types of prohibited items detected by correctional officers, and the great variety in the way information is recorded in the synopsis, we began by coding prohibited items. The categories (and sub-categories) we used to describe items were chosen because they were commonly used in the daily synopsis to describe prohibited items. The categories we used for the audit were:

- *Green vegetable matter* - this category included entries of green vegetable matter, marijuana, cannabis and hashish.
- *Pills* – this category was divided into amphetamines, anti-depressants, ecstasy, morphine, sedatives, steroids, and unidentified pills.

- *Other drugs* – this category was divided into amphetamines (other than pills), rock, heroin, methadone, crystals, powder, steroids (liquid), unidentified liquid, and unknown (no description recorded).
- *Smoking implements* – this category was divided into bongs, pipes, lighters, cones, stems, and implements (where no further description was recorded).
- *Syringes and needles.*
- *Alcohol and gaol brew*[38] – this category was divided into cans, bottles and litres.
- *Weapons* – this category was divided into knives, shivs (items sharpened for the purpose of being used as a weapon), blades, bars, batons (including clubs and bats), ammunition, scissors, firearms and tattooing implements.
- *Mobile phones and mobile phone accessories* – this category was divided into phones, chargers, batteries and SIM cards.
- *Miscellaneous items* – this category was used for all items that did not fit easily within other categories, and includes items such as box cutters, fireworks, balloons, cigarettes, unauthorised books, tools, excess inmate property, money, and cameras.

As well as describing the prohibited items that were detected by correctional officers, we also felt it was important to indicate, where possible, whether such items were located:

- inside the boundary of a correctional facility (for example, on an inmate, in an inmate's cell, or in an area frequented by inmates)
- in the possession of a visitor to a facility
- in the possession of a staff member or authorised visitor
- outside the boundary of a correctional facility
- in mail addressed to an inmate.

Where this information was not clear, we noted that the location or person in possession of the item was unknown.

We physically examined hard copies of the daily synopsis audit and entered (coded) details about all contraband finds into a spreadsheet. Data entered into the spreadsheet was then analysed so that we could determine, as accurately as possible, the type and amount of different items detected.

The results of our audit[39] should only be used as an approximate guide to the amount and type of contraband detected in or near correctional facilities in the specific timeframes, and should not be relied upon as an accurate description of all items detected. This is because:

- It is unlikely that all contraband finds were reported to the duty officer for inclusion in the daily synopsis.
- There were a small number of days over the eighteen month period that our office did not receive the daily synopsis. We were unable to include in our audit contraband finds recorded on the daily synopsis on these days.
- It is possible that some contraband items were recorded more than once in the daily synopsis. Where it was fairly clear that two entries on the daily synopsis referred to one contraband find, we entered the contraband find only once in our spreadsheet, however, sometimes it was not clear whether records were duplicated.
- There was great variety in the way information was recorded on the daily synopsis. For example, sometimes officers recorded the finding of a 'syringe', other times they noted 'syringe with heroin', and other times 'syringe and needle'. Where two items were specified we recorded both items separately in our spreadsheet.
- When substances are detected by correctional officers and identified as a particular type of drug, the information about the type of drug is usually obtained from the person who possessed the drug. Reliability about this data is questionable because the person may not tell the truth about the type of drug, or the substance might in fact be different to what they think it is.

2.10. Discussion paper

In March 2005 we released a discussion paper that canvassed a range of issues identified throughout the review period. The discussion paper was sent to over 700 stakeholders, including staff of NSW government departments, DCS official visitors, IDCs, Parole Board members, NSW Police local area commanders, judges and magistrates of NSW courts, legal centres, Members of Parliament, victim support groups and academics.

In response to the discussion paper we received 16 submissions. A full list of those who provided submissions is provided at Appendix 2.

2.11. Circulation of draft report to agencies

A confidential draft copy of this report was circulated to DCS, the Attorney General's Department, NSW Police and the Parole Board for comment in August 2005.[40] Agencies indicated that they supported, or substantially supported the majority of our draft recommendations, these being recommendations 1– 8, 10 –11, and 16 – 35.[41]

Some queries or concerns were raised by DCS in relation to the remaining draft recommendations. This material was considered prior to the finalisation of this report. In some instances we have included additional information within the body of the report (in relation to recommendations 9, 12, 13, 14, 15) and in a few instances we have revised the recommendations in light of the submissions received.

Endnotes

19 We have included in the bibliography only media items cited in this report, not all media items examined.

20 Black, M., *Victim Submissions to Parole Boards: The Agenda for Research*, The Australian Institute of Criminology Trends & Issues paper, May 2003.

21 Letter from Bruce Barbour, NSW Ombudsman to Roger B Wilkins, Director General, The Cabinet Office, 11 August 2003.

22 Letter from Roger B Wilkins, Director General, The Cabinet Office to Bruce Barbour, NSW Ombudsman, 14 April 2004.

23 *The Statute Law (Miscellaneous Provisions) Act 2004*, Schedule 1, section 1.8 amended the *Crimes (Administration of Sentences) Act 1999*, section 4(3). This amendment commenced on 6 July 2004.

24 The *Crimes (Administration of Sentences) Act 1999*, section 228 outlines the appointment and role of official visitors.

25 Letter from Greg Andrews, Assistant Ombudsman to DCS official visitors, 15 and 16 July 2004.

26 Official Visitor response No. 3, received 6 August 2004.

27 Official Visitor response No. 2, received 24 July 2004.

28 DCS Operations Procedures Manual, section 7.20.

29 The Commi
advised tha
Woodham, Commissioner, Corrective Services to Greg Andrews, Assistant Ombudsman, 13 January 2005.

30 When we were aware that there was more than one IDC operating in a centre, we sent the letter to each of the IDCs. Similarly, when we were aware of the names of more than one inmate on a particular IDC, we sent the letter to each inmate.

31 This is in accordance with the *Crimes (Administration of Sentences) Regulation 2001*, clause 110.

32 Inmate response record 1, January 2005.

33 This includes one inmate who spoke to us on the telephone as well as writing us a letter.

34 The survey was no
as these centres were either not open or not under the management of DCS at this time.

35 Letter from Ron Woodham, Commissioner, Corrective Services to Greg Andrews, Assistant Ombudsman, 10 January 2005.

36 Information Requirements Agreement, signed by the Ombudsman and the Commissioner of Corrective Services, February 2004. Attached at Appendix 1.

37 Interview record 67, July 2004; Interview record 56, February 2005; Interview record 62, March 2005.

38 Gaol brew is the term used to describe alcohol brewed by inmates themselves.

39 The results

40 The Parole Board was only provided with the introduction, methodology and Part 3 of the draft report.

41 On 5 Octob

Part 2.

Increased powers of correctional officers to stop, detain and search people and vehicles

Chapter 3. Items prohibited from being brought into places of detention ... 19

3.1. Restrictions on inmate property ... 19
3.2. Demand for contraband items ... 20
3.3. Entry of contraband items into places of detention ... 20
3.4. Australian laws banning certain items from places of detention ... 21
3.5. NSW legislation and policies ... 24
3.6. Clarity of NSW provisions ... 25

Chapter 4. Informing people about relevant laws and policies ... 35

4.1. Brochures ... 37
4.2. Signage ... 38
4.3. Additional ways to improve information provision ... 40

Chapter 5. Powers of correctional officers to stop, detain and search people and vehicles ... 43

5.1. Attempts by DCS to prevent prohibited items from being introduced into places of detention ... 43
5.2. Powers of correctional officers in Australian jurisdictions other than NSW ... 43
5.3. Powers of correctional officers in NSW ... 45
5.4. Consequences of existing NSW legislative framework ... 47

Chapter 6. Prerequisites for conducting a search ... 53

6.1. Immediate vicinity of a place of detention ... 53
6.2. Reasonable suspicion ... 56

Chapter 7. Conduct of searches ... 63

7.1. Sex of searching officers ... 64
7.2. Searching of children and vulnerable persons ... 70
7.3. Searches based on consent ... 74
7.4. Use of dogs ... 76

Chapter 8. Safeguards 87
8.1. Appropriateness of safeguards 87
8.2. Improving compliance with safeguards 90
Chapter 9. Detention of people and seizure of items 93
9.1. Detention of people and vehicles 93
9.2. Seizure of items 98
Chapter 10. Use of force and arrest 101
10.1. Use of force 101
10.2. Arrest 104
Chapter 11. Searches of staff and authorised visitors 109
11.1. ICAC investigations 110
11.2. DCS response to ICAC investigations 111
11.3. Searches of staff in practice 113
11.4. Issues arising out of staff searching 116
Chapter 12. Practical effect of stop, detain and search powers 119
12.1. Prohibited items detected in or near correctional facilities 120
12.2. People charged and convicted of introducing prohibited items into correctional facilities 129
12.3. DCS visitor restrictions 131
12.4. Views of stakeholders 132
12.5. Concluding remarks and recommendations 134

Chapter 3. Items prohibited from being brought into places of detention

3.1. Restrictions on inmate property

When inmates are received into a correctional centre they must surrender all property that is in their possession.[42] The type of property each inmate is thereafter permitted to possess is dependent on factors such as the inmate's location, classification and length of sentence. The amount of property inmates are entitled to possess is also strictly limited and regulated. The DCS Operations Procedure Manual contains detailed rules about how inmate property can be received, transferred and disposed of.[43]

An inmate can be charged with a correctional centre offence for creating or having in his or her possession, prohibited goods.[44] Prohibited goods are defined as:

(a) money, or

(b) anything that, in the opinion of a nominated officer, is likely to prejudice the good order and security of a correctional centre, or

(c) any threatening, offensive, indecent, obscene or abusive written or pictorial matter, or

(d) any offensive, indecent or obscene article, or

(e) anything that could constitute a risk to national security (for example, because of a perceived risk that it may be used in connection with terrorist activities).[45]

The *Crimes (Administration of Sentences) Regulation* also states that it is a correctional centre offence for an inmate to have in his or her possession:

- an offensive weapon or instrument[46]
- any alcohol or other intoxicating substance or any substance reasonably capable of becoming (by fermentation or distillation) an intoxicating substance, except if the substance is possessed or consumed on the advice of a registered medical practitioner, registered dentist or registered nurse, for medical, dental or nursing reasons[47]
- any drug, unless it is possessed for use on the advice of a registered medical practitioner, registered dentist or registered nurse given for medical, dental or nursing reasons[48]
- any needle, syringe, smoking accessory or other implement intended for use in the administration of a drug, unless the administration of the drug is in accordance with the instructions of a registered medical practitioner, registered dentist or registered nurse, for medical, dental or nursing reasons[49]
- a camera, or video or audio recording equipment, or a charger for any such equipment[50]
- a mobile phone, SIM card or mobile phone charger or any part of these items (this has been an offence since July 2004).[51]

It is also an offence for an inmate to steal any property belonging to another person, or damage or destroy any property not belonging to the inmate.[52]

There are a number of reasons why inmates' property is strictly limited and regulated. The dangers of having items such as knives, firearms, batons or explosives within a correctional facility are obvious. Such weapons could be used to threaten, injure or kill anyone within the centre, or to assist in an escape attempt. In addition, inmates under the influence of mind-altering substances such as alcohol and drugs may act in an unpredictable, violent or anti-social manner, or become extremely ill, for example, by overdosing.

There are also serious risks when inmates possess drug paraphernalia such as syringes and needles. Needle-stick injuries (intentional or unintentional) can occur and diseases such as HIV and Hepatitis C can be transmitted. In a custodial environment, these risks are not insignificant, given that inmates are often likely to administer drugs in an unsafe way, such as by sharing injecting equipment, and administering drugs quickly or in areas that are not well lit. Inmates may also be likely to store drug paraphernalia in an attempt to ensure that it remains hidden, rather than in a way that will ensure the safety of any person who might find it.

There are also risks when inmates have access to unauthorised mobile phones. As raised in NSW Parliament last year:

> *Mobile phones represent a serious threat to the security, good order and discipline of a correctional centre. An inmate can use a mobile telephone to contact and intimidate correctional centre staff and their families, to contact and intimidate prosecution witnesses, or to organise an escape from custody. In addition to correctional centre-related concerns, an inmate can use a mobile phone to organise or otherwise engage in criminal activity outside a correctional centre. Regrettably, in the current international climate, the activity outside of a correctional centre can include terrorist activity*.[53]

In NSW, phones used by inmates have been linked to major crimes, including conspiracy to murder a Crown witness, control of a city drug syndicate and threats to staff.[54]

Unauthorised use of a camera or recording equipment (including camera phones) within a custodial environment can have serious consequences. For example, photos taken of the lay-out or security features of a centre could be used to assist an inmate attempt to escape from the facility. In addition, an inmate could use an unauthorised camera to take photographs for the purpose of identifying someone they wish to have harmed, or to obtain footage of well-known inmates, for the purpose of circulating such footage to the media. The latter occurred in a NSW periodic detention centre in July 2003.[55]

There are also good reasons why DCS regulates the amount of authorised property kept by inmates. If inmates have a substantial amount of property in their cell, it is easier for them to hide contraband items, and more difficult for officers to search the cells quickly, effectively and safely. Disharmony and violence can also occur when inmates fight over property, steal one another's property, or when inmates 'stand over' other inmates demanding, on threat of violence, money or goods.

3.2. Demand for contraband items

There is a high demand for contraband items among inmates. DCS acknowledges that correctional facilities can be violent places and that inmates often try to make or obtain weapons that can be used to threaten or hurt others, or be used in self-defence:

> *The Department supervises some of the highest risk inmates in the country, including forensic patients in the Long Bay Hospital. It also manages a large number of police cells and court-cell complexes, where people are sometimes inebriated or suffering from drug withdrawal. Under these conditions, the risk of fights and assaults between inmates is very high.*[56]

Nor is it surprising that drugs and alcohol are highly sought given that 84% of female inmates and 80% of male inmates surveyed in the 2001 *New South Wales Inmate Health Survey* reported lifetime use of illicit drugs, and over 60% of male and female inmates surveyed were under the influence of drugs or alcohol at the time of offending.[57] Factors such as isolation, boredom, loneliness, fear or frustration that are likely to be experienced by offenders while incarcerated may actually increase an inmate's desire for these prohibited substances.

Authorised phone calls made by inmates are usually recorded and are sometimes monitored. As mobile phones allow inmates less restricted and unmonitored contact with friends, family and criminal associates, they have become highly sought after in recent years. In 2003, the then Minister for Justice commented that mobile phones have become the hottest contraband item in the correctional system.[58]

3.3. Entry of contraband items into places of detention

There are many ways that inmates can come to possess prohibited goods. Inmates can modify items they are permitted to possess, for example, by sharpening a toothbrush or pen into a knife-like weapon or 'shiv', or by brewing alcohol from fruit or other foodstuffs. Inmates can also sell, swap or steal items amongst themselves.

There are also numerous ways that contraband can be introduced into a correctional facility. Inmates arriving at the centre for the first time, or those who are returning from a court appearance, work or education can secrete items on their person and smuggle them in. Items can be thrown over the fence of a correctional facility, or left at a location for inmates who work inside or outside the centre to collect. Contraband can be posted to an inmate or delivered to the centre through inmate deliveries or 'buy ups'. Contraband can also be passed to inmates during personal or professional visits or introduced into a centre by staff or contractors.

Figure 1 below is a photograph of a mobile phone found by correctional officers secreted in the bottom of a shoe (the sole of the shoe had been cut out to enable the phone to be more effectively hidden).
This illustrates the length to which some people will go to introduce unauthorised items into places of detention.

It is important to note that there are a range of motivations that lead people to introduce prohibited items into a correctional facility. For example some people may wish to provide unauthorised goods to an inmate relative or friend as a favour, or to make life easier for them during their time in custody. Others may provide unauthorised items to an inmate relative or friend because the inmate has threatened harm (to him or herself or others) if the goods are not produced. In addition, some people may be convinced to introduce prohibited items to an inmate because they believe the inmate will be harmed by other inmates, if the goods are not produced.

There is no doubt that some people make a decision to traffic contraband into a facility because payment is promised as a result, and that others bring prohibited items into a correctional facility inadvertently. People in the latter category may not know that a particular item they are carrying is prohibited within a place of detention, or may forget to remove a prohibited item from their person or property before entering the facility.

Figure 1. Photo of mobile phone secreted in shoe

Source: Photo provided by DCS, June 2005.

3.4. Australian laws banning certain items from places of detention

NSW is not alone in its challenge of preventing the entry of unauthorised items into correctional facilities. Each state and territory in Australia has put in place laws to prohibit certain articles from entering institutions, although each approach is slightly different. In some jurisdictions it is an offence to bring only certain specified items into a correctional facility (or to provide inmates with such items). In others, there is less specificity about the particular items that are prohibited, and a broader approach prohibiting all items that might threaten the good order and security of an institution. In some jurisdictions, including NSW, a mixture of these two approaches is utilised. Below is a summary of the legislative approach taken in each jurisdiction.

3.4.1. Victoria

The *Corrections Act 1986* (Vic), states '*A person who without being authorised to do so by this Act or the regulations … takes or sends or attempts to take or send anything into or out of a prison - is guilty of an offence.*'[59] The penalty for this offence is 2 years imprisonment. The *Corrections Regulation 1998* (Vic) defines unauthorised items as all articles and substances, except those that the Act or Regulation or the Secretary has permitted to be brought into a correctional facility, or to be possessed by a prisoner.[60]

The Victorian Department of Justice provided us with an excerpt of the Corrections Victoria Operating Procedures in relation to contraband. This states:

> *Unauthorised articles include weapons, explosive devices, flammable liquids, drugs, alcohol, currency, tools, equipment which may aid an escape effort, materials used for tattooing, restricted publications and audio-visual material, any article not issued to the prisoner.*[61]

3.4.2. Queensland

Section 96 of the *Corrective Services Act 2000* (QLD) states that it is an offence for a person to take, or attempt to take a prohibited thing into a corrective services facility, or to a prisoner; or to cause, or attempt to cause, a prohibited thing to be taken to such a facility or prisoner. The maximum penalty is 100 penalty units or 2 years imprisonment. A person does not commit such an offence if the relevant act was done with the approval of the chief executive or a proper officer of the court.

There is a list of 22 types of prohibited items in the *Corrective Services Regulation 2001* (QLD).[62] These can broadly be categorised as:

- weapons, explosives and flammable substances
- tools or implements to aid or effect an escape
- alcohol, drugs and medicine, and devices capable of administering a drug
- cash, cheques, credit and debit cards
- forms of identification, including passports and false identification
- anything capable of being used to alter a prisoner's appearance
- communication devices, including scanners, phones and computers
- offensive and/or pornographic material
- anything that has been modified so that it can conceal items.

The Regulation also says that *'anything that poses a risk to the security or good order of a corrective services facility, including for example a drawing, plan, or photo of the facility'* is prohibited.[63]

3.4.3. Western Australia

In Western Australia, section 50 of the *Prisons Act 1981* (WA) states that a person who conveys, brings or in any manner introduces any article to a prison (or attempts to do so), with intent to breach the good order, security and good government of a prison, or where the article is of a kind likely to jeopardise the good order, security or good government of a prison, commits an offence. The penalty is $2,000 or 18 months imprisonment or both.

The specific items prohibited from being introduced into a centre are not outlined in the legislation. However, we have been advised that when entering a prison, visitors are required to sign a statutory declaration form that outlines the rules and conditions of entry.[64]

3.4.4. South Australia

Section 51(b) of the *Correctional Services Act 1982* (SA) says that it is an offence if a person other than a prisoner *'delivers to a prisoner, or introduces into a correctional institution without the permission of the manager, any item prohibited by the regulations'*. The maximum penalty for this offence is imprisonment for six months. The *Correctional Services Regulations 2001* (SA) contains a list of all items that are prohibited for the purposes of the Act.[65] These 21 items can broadly be categorised as:

- drugs
- dangerous substances such as liquor, paint, oil, glue, herbicides or insecticides
- pressurised spray canisters
- explosive devices or parts thereof
- guns and weapons
- devices that can inflict injury or assist a prisoner to escape
- books, diagrams, plans or documents that instruct a person to make prohibited items
- syringes and needles
- pornographic material
- cameras or other photographic devices
- mobile telephones.

3.4.5. Tasmania

Section 24(1) of the *Corrections Act 1997* (Tas) says that a person may be fined 20 penalty units or imprisoned for up to 12 months if he or she *'brings into a prison an article or thing that the Director has not authorised to be brought into the prison'.* The Tasmanian legislation does not specify further which items are prohibited. In regard to this issue, the Prison Service Tasmania advised us:

> *The Tasmanian Prison Service does not have a formal list of unauthorised items, however signs are provided at prison reception points to inform visitors that drugs, mobile phones and other items 'not authorised by the Director of Prisons' are prohibited.*[66]

3.4.6. Northern Territory

The *Prisons (Correctional Services) Act* (NT) states that a person who is not a prisoner shall not convey or deliver or allow to be conveyed or delivered to a prisoner liquor or drugs or any money, letter, document, clothing or other article, without the permission of the Director. It is also an offence if such items are left (without the permission of the Director) with the intention of being received or found by a prisoner.[67] The penalty for these offences is $2,000 or imprisonment for two years.

3.4.7. Australian Capital Territory (ACT)

Currently, people sentenced to a period of imprisonment in the ACT serve their sentences in NSW correctional centres as there is no facility in the territory for detaining adults sentenced to full time imprisonment. There are, however, three adult correctional facilities in the ACT: the Belconnen Remand Centre and the Symonston Remand Centre, for those awaiting trial for criminal charges; and the Symonston Periodic Detention Centre, where detainees serve periodic sentences. In the ACT it is an offence to unlawfully convey an article into or out of a remand centre or periodic detention centre, or to or from a detainee. The maximum penalty for doing so is 50 penalty units, imprisonment for six months or both.[68]

In the ACT the laws provide for the person in charge of a correctional facility to issue 'standing orders' about the rules and day-to-day administration of the facilities.[69] The Belconnen Remand Centre, Standing Order No. 13 states that a visitor may not take the following items into the visits area – cigarettes, foodstuffs, bags, keys, sunglasses, prams and bassinettes, any medication or drugs, or *'any other item not approved by the Duty Chief Custodial Officer'.* It is important to note that these restrictions apply only to the visiting area, and not to the entire centre property.

3.4.8. Comparison of Australian jurisdictions

It is interesting to note the different approaches used by each of the Australian jurisdictions in regard to the laws concerning the introduction of prohibited items from a correctional facility. For example:

- In Victoria and Tasmania all items are prohibited, except those specifically permitted.
- In Queensland there is a list of all items prohibited, plus a broad provision that prohibits items that pose a risk to the security or good order of a facility.
- In Western Australia people are prohibited from introducing any item that could threaten the good order and security of the centre. The legislation is silent on what items these may be.
- The South Australian legislation contains an explicit list of all prohibited items.
- In the ACT it is an offence to unlawfully convey an article into a centre or inmate. It is unclear what items this covers, as the standing orders specify only those items that cannot be taken into the visits area.

While we are not in a position to judge how well each of these approaches work in practice, there are certain key elements that would help to ensure laws concerning items prohibited from a correctional facility work well. In particular, the relevant legislative provisions should be reasonable, clear, easy to comprehend and well publicised. These elements would assist people entering correctional facilities to know and understand their obligations. They would also assist correctional staff, police, prosecutors and the judiciary to ensure charges laid against offenders are appropriate and prosecutions successful.

3.5. NSW legislation and policies

3.5.1. Legislation

In NSW the legislative framework incorporates a dual approach of banning specific items from being introduced of a place of detention, and also making it an offence to introduce 'anything' into a correctional facility, or to an inmate, without lawful authority. Sections 27B – E of the *Summary Offences Act* make it is an offence to:

- bring any liquor, prohibited drugs, prohibited plants or other specified substances into a place of detention
- bring a syringe into a place of detention, without permission, or supply a syringe to an inmate
- unlawfully possess an offensive weapon or instrument in a place of detention
- loiter about any place of detention, enter a place of detention, or communicate with an inmate, without lawful authority
- deliver anything to an inmate, or bring anything into a place of detention, without lawful authority
- receive anything for conveyance out of a place of detention, or secrete or leave anything for the purpose of its being found by an inmate, without lawful authority.

The penalties for these offences range from six months imprisonment and/or a fine of up to 10 penalty units ($1,100) for unlawfully introducing spiritous or fermented liquor into a place of detention, to two years imprisonment and a fine of 50 penalty units ($5,500) or both for unlawfully possessing an offensive weapon or instrument, or prohibited drugs or plants in a place of detention.

A full list of offences and penalties included in sections 27B - E of the *Summary Offences Act* is attached at Appendix 3.

For the purposes of the *Summary Offences Act*, a place of detention refers to any premises that have been proclaimed by the Governor of NSW to be a correctional complex, correctional centre (including any police station or court cell complex in which an offender is held in lawful custody), or periodic detention centre.[70] It is important to note that a place of detention can include significant tracts of land surrounding the buildings that incorporate a particular centre, if these lands are owned by the Crown and proclaimed to be part of the place of detention. This means that a person can commit an offence in a place of detention without being inside the centre proper, or a secure area of a correctional facility. It is enough if a person commits an offence somewhere within the boundary of the property, such as having alcohol or syringes in a vehicle parked in the car park of the facility.

3.5.2. DCS policies

The Commissioner of Corrective Services is responsible for the care, direction, control and management of all correctional complexes, correctional centres and periodic detention centres.[71] The *Crimes (Administration of Sentences) Act* provides that:

> *The Commissioner may issue (and from time to time amend or revoke) instructions, not inconsistent with this Act or the regulations, or with the* Public Sector Management Act 1988 *or the regulations made under that Act, to the staff of the Department (including correctional officers) with respect to the management and control of the Department.*[72]

The Commissioner can also delegate his power to issue such instructions, and all other functions (except the power of delegation).[73]

There are a range of departmental policies that supplement the laws about what may and may not be brought into places of detention. Some DCS policies apply state wide. For example, the Commissioner of Corrective Services has issued the following instruction:

> *I have approved, for the purposes of Section 27E (2) (b) that persons have lawful authority to bring a mobile telephone into a correctional complex, or into a police station or court cell complex in which offenders are being held in custody under provisions of the Crimes (Administration of Sentences) Act or any other Act.*
>
> *I have also approved, for the purposes of section 27E (2) (b), that persons have lawful authority to bring a mobile phone into a correctional centre or periodic detention centre, but only on the following conditions:*
>
> - *the mobile telephone is securely locked in their vehicle; or*
> - *the person informs a correctional officer on arrival at the centre that they possess a mobile phone and wish to place it in a locker for safekeeping.*

> *However, persons do not have lawful authority to deliver or attempt to deliver a mobile phone to an inmate in any circumstances. Nor do persons have lawful authority to secrete or leave a mobile phone anywhere inside or outside a place of detention for the purpose of its being found or received by an inmate.*[74]

Some DCS policies are developed by individual centres and only apply locally. Each centre has, for example, different rules about whether people visiting inmates can take items such as coins for vending machines, cigarettes, food and nappies for babies into the visiting areas, and whether visitors can wear jewellery during visits.

Other DCS policies apply to specified people. For example, police officers and legal representatives may take computer laptops and audio and video recording equipment into a visit with an inmate.[75] People making a personal visit may not.

The Commissioner of Corrective Services has the power to ban or restrict any person from visiting any or all NSW correctional facilities for a specified period of time if the Commissioner considers that such a person may prejudice the good order and security of a facility.[76] The department has developed a policy which provides that people who are detected introducing contraband into a place of detention may be banned from visiting some or all NSW correctional facilities for up to five years.[77] This means that if a person within the boundary of a place of detention has in his or her possession unauthorised items the person may not only be subject to criminal sanctions, but may also be prohibited from entering correctional facilities for several months or years. This is one of the very few areas where the department's jurisdiction extends to members of the public.

3.6. Clarity of NSW provisions

In order to be fair and effective the laws and policies prohibiting certain items from being introduced into correctional facilities should be clear and easy to understand. This is particularly the case given the serious penalties that can be imposed on people who introduce prohibited items into a correctional facility.

Throughout the course of our review, we have been made aware of a number of possible issues of concern regarding the clarity of the legislative provisions and departmental policies relating to the introduction of unauthorised items into a place of detention. These issues are discussed below.

3.6.1. Prescription medication

Section 27B(2) of the *Summary Offences Act* says that:

> *A person must not, without lawful authority, bring or attempt by any means whatever to introduce into any place of detention any poison listed in Appendix D of Schedule Four, or in Schedule Eight, to the Poisons List in force under the* Poisons and Therapeutic Goods Act 1966*.*

Schedule Four, Appendix D drugs are prescribed restricted substances including drugs such as anabolic and androgenic steroids, barbiturates, and benzodiazepines. Schedule Eight drugs are substances that are addiction producing or potentially addiction producing, such as codeine, methadone, morphine, pethidine and Ritalin.[78]

From our observations, people entering places of detention commonly carry in their bags, or in their vehicles, medication of some description. It is often easy for correctional officers to verify the type of drug a person is carrying and determine whether the medication is permitted to be brought onto centre grounds. However, sometimes correctional officers have difficulty verifying the type of medication a person is carrying, and whether the person is permitted to carry it. For example, the following notes were made by staff from our office, observing DCS search operations:

> *The second woman being searched was found to be carrying drugs … The woman said that she had a prescription but she didn't have it on her. … A C/O* [correctional officer] *went inside the centre and I was told he contacted a nurse to find out about the medication. I was told the nurse said that this particular drug was dangerous to have 'inside'. The OIC [officer in charge] of the operation said that it was OK for the woman to proceed with her visit but that next time she should bring her prescription or leave the drugs at home.*[79]
>
> *
>
> *A middle aged couple had been hanging around their vehicle for quite a while. The man could speak very little English and the woman was interpreting for him. From what I could tell, the man had a container of pills in his car that he had not declared during the search. There were a number of different types of pills in the container. The man claimed they were prescription medication but there was no label on the container, and he had no prescriptions on him. A police officer identified some of the pills as [type of drug], but couldn't identify any of the others.*

> *Police and correctional officers seemed very unsure what to do. They wanted to take the pills off the man, but he said he needed to have the tablets twice a day for his heart so they were concerned that he would become ill without them. The OIC, Mr* [name] *was consulted. He decided to give the man a warning, but to allow the visit.*[80]

Drugs and medication are highly sought after in custodial environments, and it is understandable that correctional officers attempt to ensure visitors are not in a position to provide inmates with such substances. However, it is also important that people's health is not unnecessarily placed at risk because they are prevented from carrying medication they require.

In our experience, most correctional officers who detect a person possibly in possession of a restricted drug on the property of a correctional facility try to determine what the drug is, and whether the medication has been prescribed to the person carrying it. Officers usually advise the person to leave the prescription drugs at home next time they visit a correctional facility, unless the person is required to take the medication throughout the day. If the person states that he or she needs to carry the medication with them at all times, officers will usually instruct them to ensure the medication remains in its clearly labelled box, and that the person also carry with them a prescription for the medication or a letter from the prescribing doctor.

The approach that correctional officers usually take appears to be reasonable. However, because DCS does not have a policy setting out when people have lawful authority to bring a restricted substance into a place of detention, this approach is not uniform, or widely publicised to visitors. One correctional officer, for example, advised us that he had been involved in successfully prosecuting people in court for introducing a restricted substance into a place of detention, even though the medication in question was prescribed to the person carrying it, and was in a clearly labelled packet.[81]

To ensure officers act in a consistent manner, and visitors to correctional facilities understand exactly what is required of them if they carry medication, it would be useful for DCS to develop a state-wide policy about the carrying of prescription medication into a place of detention. This should specify that for the purpose of section 27(B)(2) of the *Summary Offences Act* a person has lawful authority to carry drugs under Schedule Four, Appendix D, and Schedule Eight, to the Poisons List in force under the *Poisons and Therapeutic Goods Act* if the medication is:

- contained within its original packaging, and is clearly labelled as prescribed to the person carrying it, or the medication is accompanied by a prescription made out to the person carrying it, or by a letter from the prescribing doctor, and
- stored securely in a vehicle or locker.

The policy should also explain which drugs fall within this category, and state that people do not have lawful authority to deliver or attempt to deliver a restricted substance to an inmate in any circumstances, or to secrete or leave such a substance anywhere inside or outside a place of detention for the purpose of its being found or received by an inmate.

Recommendation

1 It is recommended that the Department of Corrective Services develop a policy concerning the carrying of medication into places of detention. At a minimum this should specify that a person has lawful authority to carry drugs under Schedule Four, Appendix D, and Schedule Eight, to the Poisons List in force under the *Poisons and Therapeutic Goods Act* if the medication is:

i) contained within its original packaging, and is clearly labelled as prescribed to the person carrying it, or the medication is accompanied by a prescription made out to the person carrying it, or by a letter from the prescribing doctor, and

ii) stored securely in a vehicle or locker.

3.6.2. Introducing 'anything' into a place of detention

Section 27E(2) of the *Summary Offences Act* makes it an offence for a person, without lawful authority to bring, deliver, convey or secrete 'anything' into a place of detention, or provide 'anything' to an inmate. While it appears reasonable that people should not provide any items to an inmate unless they have received prior permission, the provision prohibiting people from bringing anything into a place of detention is potentially more problematic. People will ordinarily have a number of 'things' with or on them when they enter a place of detention, such as clothes, a vehicle, and a bag or wallet to name a few.

During the review period we have not come across any evidence to suggest that people in a place of detention who are in possession of innocuous items such as handkerchiefs and sunglasses are being charged with the offence of unlawfully bringing an item into a place of detention. However, we became aware of a court case that was concerned with the interpretation and application of section 27E(2)(b) of the *Summary Offences Act.* This section makes it an offence for any person who without lawful authority *'brings or attempts to bring anything into a place of detention'.*

The case of *Police v Yvonne Elaine Keen*[82] arose out of a joint operation conducted by DCS and NSW Police aimed at detecting visitors introducing contraband into Silverwater Correctional Complex. During the operation a female visitor to the centre was found in possession of a Swiss army knife. She was charged with introducing an offensive weapon into a place of detention under section 27D(1) of the *Summary Offences Act*. At court it was decided to change the charge to that of introducing a thing without lawful authority into a place of detention under section 27E(2)(b) of the *Summary Offences Act.* The charge was changed because it was decided that a Swiss army knife did not meet the definition of offensive weapon.

During the hearing the defendant's counsel stated *'I'm somewhat in a quandary because, your Worship, I simply cannot understand the terms of the section that the new charge is brought under. It on its face appears to be so broad as to be without meaning.'* He went on to say that on strict construction, the term 'anything' could include items such as sunglasses and pens.

In response the magistrate said that the issue was whether the person brought the thing into the place of detention '*without lawful authority*'. He said:

> *There has to be some statute evidence, doesn't there, there has to be something in the legislation which says that a person who brings a Swiss army knife into a place of detention does so without lawful authority.*
>
> *You'd have to refer to some legislation because that could only be prescribed by legislation, so presumably one would be looking at something in the Correctional Centres Act or something similar to that.*[83]

As the prosecution could not point to any legislation that specifically stated that the bringing of a Swiss army knife into a place of detention was something done without lawful authority, the magistrate dismissed the charge and ordered the costs of the defendant to be paid by the prosecution. The issue of 'lawful authority' is discussed below in section 3.6.3.

In our discussion paper we asked for submissions about the advantages and disadvantages of the broad approach used in the provision prohibiting people from bringing, or taking out of a place of detention 'anything' without lawful authority. In response to this we received the following comments.

> *The broadness of the legislation makes it easier for operational police to lay and prove charges to ensure successful prosecutions. Further, valuable time is saved in that obtaining a statement from the gaol Superintendent easily proves 'without lawful authority'.*[84]
>
> *
>
> *A broad approach allows new technology or items not previously foreseen to be included without the need for revision or change to legislation.*[85]
>
> *
>
> *The benefits of this statement is* [sic] *apparent in that, the [A]ct literally prohibits bringing anything into a facility. However, the term 'anything' is extremely broad. I believe that the statement should include wording similar to "Anything that the Governor of a facility considers to be an 'at risk' item". In this context a handkerchief could not be considered at risk but a cigarette lighter may well be. One would hope that a common sense approach would apply and in any doubt, a magistrate could ultimately make the determination.*[86]
>
> *
>
> *"Anything" not being more concisely defined makes it difficult not only for visitors but also staff …*[87]

DCS has advised us that it acknowledges the expression 'anything' is very broad in the context of the legislation, and that it could be reviewed and amended. However, it also commented:

> *The advantage of broad terminology is simplicity. Listing all prohibited items by regulation would be extremely complicated, would need regular updating to keep up with new inventions and technology, and risks inadvertently omitting a dangerous item from the list.*
>
> *The disadvantage of broad terminology is consistency of application. The Department recognises that the legislation creates a criminal offence with the serious consequence that a person infringing the legislation incurs*

a criminal conviction and criminal record – a far more severe consequence than a missed visit – and therefore application of the law must be consistent.

It is expected that courts will interpret "anything" narrowly, requiring that an item the subject of a charge be an illegal item (such as a weapon) or an item prohibited to inmates by law (such as a mobile phone), or an item that can clearly be demonstrated as adversely affecting the security or good order of a correctional centre (such as an item that could be used as a weapon – eg a frozen plastic water bottle). The Department has regard to this expected narrow interpretation in applying the provisions of the Summary Offences Act 1988.[88]

3.6.2.1. Application of section 27E(2)(b)

Table 1 indicates the number of people charged under section 27E(2)(b) of the *Summary Offences Act* with introducing a thing into a place of detention without lawful authority, for the two years prior to our legislative review, and the two years during the review.

Table 1. Charges laid under section 27E(2)(b) of the Summary Offences Act - 'bring or attempt to bring thing into place of detention'

Timeframe	21 February 2001 – 20 February 2002	21 February 2002 – 20 February 2003	21 February 2003 – 20 February 2004	21 February 2004 – 20 February 2005
Number of occasions where a charge was laid	8	11	18	43
Total number of charges laid	8	11	23	48

Source: Information downloaded from COPS and provided by NSW Police.

To determine the types of items people are in possession of when they are charged with this offence we examined 20 COPS records relating to incidents where a person was charged under section 27E(2)(b) during the review period (one third of all occasions where a person was charged in this period).[89] Of the records we viewed:

- One related to a correctional officer detected introducing two bags of red tablets (steroids), one mobile phone and one mobile phone charger into a correctional centre.
- Seven related to people who were attending a periodic detention centre in order to serve a periodic detention order. Of these:
  - three were detected carrying a mobile phone (two of these phones were camera phones)
  - one was detected carrying 377 grams of brown sugar
  - one was detected carrying a pocket knife
  - one was detected carrying a $20 note
  - one was detected carrying a key ring with a round of live ammunition attached.
- Twelve related to people who were visiting a place of detention. Of these:
  - three had in their possession (or vehicle) one or more knives
  - three had possession of a SIM card
  - two had possession of a mobile phone
  - one had possession of a disposable camera
  - two had possession of balloons containing green vegetable matter (identified by one accused as 'marijuana' and by the other as 'cannabis')
  - one had possession of a bong or water pipe.

The BOCSAR has advised that charges laid under section 27E(2)(b) of the *Summary Offences Act* in the period 21 February 2001 to 31 December 2004, that have been finalised in the local court, resulted in the following conviction rates:

- 100% of people charged between 21 February 2001 and 20 February 2002 were convicted
- 85.71% of people charged between 21 February 2002 and 20 February 2003 were convicted
- 75% of people charged between 21 February 2003 and 20 February 2004 were convicted
- 95.24% of people charged between 21 February 2004 and 31 December 2004 were convicted.[90]

While these conviction rates appear to be high, it is important to note that most people charged with an offence that will be heard before the local court plead guilty.[91] Doing so means the accused will not have to suffer the inconvenience and costs of attending court, will save on legal fees and may be granted a discounted sentence.[92]

3.6.2.2. Issues arising out of the application of section 27E(2)(b)

It is interesting to note that there was a 273.68% increase in charges laid under section 27E(2)(b) of the *Summary Offences Act* in the review period, compared to the two years prior. This could be for a number of reasons. It is possible that in the latter period there were more people visiting correctional facilities, and more people attempting to introduce contraband items into facilities. Fewer people may be aware of what items they are not permitted to bring into a place of detention, or officers may be conducting more searches, or more effective searches of people entering correctional facilities. Alternatively, it may be that police are choosing to charge people with bringing a prohibited item into a place of detention, when previously charges would not have been laid, and a warning, caution or no action would have been preferred. In practice it is likely that a combination of these factors has led to the increase in charges.

A DCS staff member, periodic detainees and visitors to correctional facilities were all charged with unlawfully bringing a thing into a correctional facility during the review period. While in most cases the police records suggest that the staff member and detainees were clearly intending that the prohibited item(s) be given to or used by an inmate or detainee, the records relating to visitors are less clear. For example, all of the visitors appear to have had their personal possessions and/or vehicles searched prior to entering the secure part of the facility, and before the personal possessions would have been stowed in a locker. It is therefore possible that at least some of these visitors had inadvertently brought the item onto correctional centre property or were intending on placing all their items in a locker and not providing anything to an inmate.

The items that people are most likely to bring into a place of detention, not realising the item should not be introduced, are those that people are permitted to carry in public places, such as mobile telephones, SIM cards, cameras, alcohol, scissors, prescription medications and tools. In our experience it is not uncommon for correctional officers to locate such items in people's possessions, or in their vehicle when they arrive at a correctional facility.

From our observations, in most instances, correctional officers use their discretion when people are detected carrying such items, and ask the person to ensure the item is securely placed in their vehicle or locker prior to entering the visits area. For example, the following notes were made from staff of our office, observing DCS search operations:

> [Search of inmate visitor - woman aged 60+]. *An officer found a pair of small nail scissors and a razor blade … in the woman's bag.*
>
> *Woman: "Oh, I didn't know they were in there."*
>
> *C/O told her not to bring them again because it is an offence. The woman said she wouldn't bring them again and would leave them in the vehicle today. C/O said he'd let her off this time but would just check with his supervisor first whether he needed to confiscate the items. The supervisor came over and explained again to woman that it was an offence to have the items. He gave the scissors and razor back to the woman.*[93]
>
> *
>
> [Search of three inmate visitors – all mid twenties]. *One of the three had a camera phone. C/O told them it was an offence to bring the phone onto the centre and told them to leave it at home next time.* [94]
>
> *
>
> *A woman aged approx in her 40s or early 50s was subjected to a PAD [passive alert dog] search. A dog was then used to search her vehicle. Officers then searched her car. During the vehicle search a small pocket knife was found in the glove box.*
>
> *Officer: "You know you can't bring a knife into a correctional centre."*

Female POI: "Not in a car I didn't. But I didn't even know it was in the car."
Officer: "Is this your vehicle?"

Female POI: "It is my vehicle, but I didn't know it was in there. It could be one of my son's friends. My son doesn't drive but sometimes his friends drive this car around."

Officers left the knife open on the bonnet of the car for several minutes whilst they were talking to the woman and deciding what to do. One police officer told the lady that it was an offence to carry a knife around in public areas, regardless of being in a correctional centre. She nodded, and repeated that she didn't know the knife was there. The woman was very cooperative and the officers seemed to think she was genuine. Eventually it was decided not to charge the woman, and to allow her visit to proceed. The correctional officers confiscated the knife.[95]

It is reasonable that in most instances correctional officers are warning people about carrying certain items into a correctional centre, and advising them not to bring such items into the centre in future. However, the information provided by NSW Police and the BOCSAR, clearly demonstrates that some people are being charged and convicted with possessing similar items. Discrepancies in the way people are dealt with would be minimised if the legislation was clearer about exactly which items are prohibited from being brought into a place of detention, or if DCS had detailed and clear policies providing guidance about this issue, and these policies were widely understood and applied consistently.

During the review period it has become apparent that some DCS policies are not being applied consistently, and that some DCS policies are not as clear as they might be. The policies and procedures concerning the introduction of mobile phones and recording devices are a particular case in point.

3.6.2.3. Mobile telephones and recording devices

Despite the DCS policy which specifies that people can bring a mobile phone into a place of detention on the condition that it is stored in a vehicle or locker, we have become aware that at some correctional centres people visiting inmates are told by correctional officers that they are not permitted to bring a phone onto correctional centre property at all, or that phones must be stored in vehicles. This approach is likely to be particularly problematic for people who are given a lift to the centre, or who arrive on foot or by public transport.

At one regional correctional centre we were told that people sometimes try to hide their phone on the grounds of the correctional centre for the duration of their visit, as lockers are not provided for the purpose of storing telephones. This is problematic because, if officers detect a person hiding a phone, the person may be charged with secreting the phone for the purpose of being found by an inmate. In addition, there is the possibility that an inmate could find the phone, even if it was not left for that purpose, and smuggle it into a secure part of the centre.

In recent times it has become increasingly common for people to carry 'camera phones' capable of taking photographs and recording and transmitting video and audio material almost instantly. Unsurprisingly these devices are of great security concern as photos of inmates, officers or the layout of the centre can be transmitted quickly to remote locations.

The legislation is clear that visitors are not permitted to take photographs of, or operate video or audio recording equipment at a correctional centre without the prior approval of the governor.[96] However, there is nothing in the legislation that specifically prohibits people (other than inmates)[97] bringing cameras or other recording devices onto correctional centre property.

In mid 2003 the Commissioner of Corrective Services issued an order to supplement the 2002 order *Banning of mobile telephones from correctional centres*. This was issued because of the security concerns posed by camera phones and similar recording devices. It says:

After consultations, and in conjunction with … [the order Banning of mobile telephones from correctional centres*] which addresses the issue of mobile telephones and the consequences of taking such an item into a correctional centre, all digital devices … and recording devices that have the capacity to be used for communication purposes, are considered contraband in correctional centres.*[98]

This does not clearly indicate whether people are permitted to store camera phones and other such items in lockers or vehicles, or whether they cannot be brought onto any part of the correctional centre. If people are prohibited from bringing these items onto all correctional centre property it is unclear what people are supposed to do with their phone if they arrive at the centre and inadvertently have a camera phone or other recording device in their possession.

On occasions where we have observed correctional officers detect people carrying camera phones into a place of detention, the people are usually told that it is an offence to bring a recording device onto the centre property, and to keep such items at home. However, the information and instructions given to people are not always consistent with this approach. Inconsistent application of DCS policies may mean that a visitor carrying an item such as a camera phone into a place of detention could be told on one occasion to leave the phone in a locker, and could on another occasion be charged with introducing an item into a place of detention. This seems neither fair nor reasonable.

3.6.2.4. Clarifying the items it is against the law to take into a place of detention

We recognise the flexibility that the provision prohibiting a person from bringing anything into a place of detention provides, and note the difficulties inherent in developing legislation that specifies each and every item that people are prohibited from bringing into a correctional facility. Nevertheless, we feel that this provision is unnecessarily broad and open to inconsistent application. It has also, on occasions caused confusion for visitors, DCS staff and the judiciary.

We feel that it is possible to provide greater clarity and certainty about the items a person is prohibited from bringing into a place of detention, while ensuring officers have the flexibility to charge people with bringing an unusual, new or novel dangerous item into a centre. One way to achieve this would be to amend sections 27E(2)(b) – (e) of the *Summary Offences Act* to make it an offence for a person, without lawful authority, to bring, convey, receive or secrete into (or out of) a correctional facility 'any item that is likely to pose a risk to the good order and security of a place of detention'.

This legislation should be complemented by comprehensive DCS policies that specify, in as much detail as possible, the nature of items that should not be brought into a place of detention. Such policies should be widely circulated to staff and visitors to ensure that people know and understand their obligations when entering a correctional facility, and so that officers treat people who breach the rules in a consistent way. Providing such policies to police officers involved in charging and prosecuting people for introducing unlawful items may also assist to ensure prosecutions are successful.

Recommendations

2 **It is recommended that NSW Parliament consider amending sections 27E(2)(b)-(e) of the *Summary Offences Act* to make it an offence for a person, without lawful authority, to bring, convey, receive or secrete into (or out of) a place of detention any item that is likely to pose a risk to the good order and security of a place of detention.**

3 **It is recommended that the Department of Corrective Services develop policies that specify, in as much detail as possible, the nature of items that it may be illegal to bring, convey, receive or secrete into (or out of) a place of detention, under sections 27E(2)(b)-(e) of the *Summary Offences Act*.**

3.6.3. 'Lawful authority'

Section 27D of the *Summary Offences Act* makes it an offence for a person without reasonable excuse '*proof of which lies on the person'* to have in his or her possession an offensive weapon or instrument in a place of detention. It is an offence for other items in Part 4A of the *Summary Offences Act* (such as spiritous or fermented liquor, poisons, prohibited drugs and plants, or 'anything') to be introduced *'without lawful authority'*. In relation to these latter offences it is unclear who has the onus of establishing whether the person had lawful authority to bring the item into the place of detention.

In October 2004 we received advice from the Crown Solicitor's Office about a number of issues pertaining to the review. In relation to the issue of lawful authority, this stated:

> *Very surprisingly, there is no provision which puts the onus on proving the existence of "lawful authority" upon the accused in any such prosecution. I say surprisingly, because it is generally the case in modern legislation, for obvious reasons, that the legislature provides that the onus lay on the accused to prove that he or she had "lawful authority" for what they did.*[99]

Section 417 of the *Crimes Act 1900*, for example, provides:

> *Wherever, by this Act, doing a particular act or having a specified article or thing in possession without lawful authority or excuse, is made or expressed to be an offence, the proof of such authority or excuse shall lie on the accused.*

As discussed in section 3.6.2 above, in the case of *Police v Yvonne Elaine Keen* the magistrate was required to consider whether a woman in possession of a Swiss army knife in a place of detention was acting unlawfully. In this case the magistrate stated that in order to prove that the woman did not have lawful authority to introduce the knife into a place of detention, the prosecution must be able to point to a legislative provision that specifically states that a person in possession of such an item in a place of detention, is acting without lawful authority. In response to this argument, counsel advised us:

> *I agree with the Magistrate's view that the onus was on the prosecution to establish the absence of lawful authority. His Honour appears to have considered that it was necessary for the prosecution to point to some legislative provision to establish that there was no such lawful authority. I do not think that is the only way to prove that element of the offence. If there was admissible evidence that the Corrective Services Department had lawfully directed that Swiss army knives were not to be taken into a place of detention, then in my view there would be evidence that there was no lawful authority. …*
>
> *Although of the view that it is possible to prove the absence of lawful authority without the need to be able to refer to a statutory provision, doing so in a practical sense on a case by case basis is a cumbersome, difficult, and in many instances, possibly an impossible task.*[100]

Counsel advised that there are a number of approaches that could be used to clarify how the issue of lawful authority should be determined. For example:

- the *Summary Offences Act* could be amended to place the onus of proving lawful authority on the accused
- a regulation could be introduced, listing each item that visitors do not have lawful authority to bring into a place of detention
- the legislation could be amended to provide that a certificate under the hand of the Commissioner, stating that no lawful authority had been granted, is prima facie evidence of the element 'without lawful authority' in any such prosecution.

After receiving the Crown Solicitor's advice, we sought advice from DCS about whether the department intends to take any action to clarify the issue of who has the onus of proving whether the accused had lawful authority to introduce a particular item into a place of detention. In response DCS advised *'It is proposed that the Summary Offences Act 1988 be amended to place the onus of proving lawful authority on the accused*.'[101] As this suggestion would place the onus of proving lawful authority in line with other NSW statutes, this response seems appropriate and reasonable.

Recommendation

4 It is recommended that the Department of Corrective Services proceed with seeking a legislative amendment that places the onus of proving lawful authority on the accused, for offences contained within sections 27B and 27E of the *Summary Offences Act*.

Endnotes

[42] *Crimes (Administration of Sentences) Regulation 2001*, clause 8.
[43] Chapter 9.
[44] *Crimes (Administration of Sentences) Regulation 2001*, clause 45.
[45] *Crimes (Administration of Sentences) Regulation 2001*, dictionary.
[46] Clause 126A.
[47] Clause 137.
[48] Clause 138.
[49] Clause 140.
[50] Clause 113A.
[51] Clause 113B. This provision was inserted into the *Crimes (Administration of Sentences) Regulation 2001* by the *Crimes (Administration of Sentences) Amendment Act 2004*, and commenced on 26 July 2004.
[52] *Crimes (Administration of Sentences) Regulation 2001*, clause 131.
[53] The Hon John Hatzistergos MLC, NSWPD, Legislative Council, 24 June 2004.
[54] Skelsey, M., 'Scanners to silence inmates' *Daily Telegraph*, 5 August 2003.
[55] Police event record No. 62.
[56] DCS Annual Report 2003-04, p. 16.
[57] Butler T., and Milner L., *The 2001 New South Wales Inmate Health Survey*, Corrections Health Service, 2003, pp. 119, 123.

[58] Mitchell A., 'Law change sought to put an end to mobile calls by jail inmates',-*Sun Herald*, 15 June 2003.
[59] Section 32(c).
[60] Clause 5.
[61] Operating Procedure 14, Contraband, p. 1.
[62] Clause 18.
[63] Clause 18(u).
[64] Information received from Acting Superintendent Operations, Prisons Division, WA Department of Justice, by email 1 February 2005.
[65] Clause 9.
[66] Email received from Policy Officer, Prison Service Tasmania, 17 February 2005.
[67] Sections 94(f) and 94(h).
[68] The *Remand Centres Act 1975 (*ACT), section 18(d), and the *Periodic Detention Act 1995* (ACT), section 57(b).
[69] The *Remand Centres Act 1975* (ACT), section 8, and the *Periodic Detention Act 1995* (ACT), section 58.
[70] *Summary Offences Act 1988*, section 27A. See also *Crimes (Administration of Sentences) Act 1999*, part 11, division one.
[71] *Crimes (Administration of Sentences) Act 1999*, section 232(1)(a).
[72] Section 235B.
[73] *Crimes (Administration of Sentences) Act 1999*, section 232(3).
[74] DCS Commissioner's Instructions 010/2004 – *Preventing the delivery of mobile telephones to inmates*, 15 December 2004. This replaced ACO 2002/050, July 2002.
[75] DCS Assistant Commissioner's Order 2003/055, *Use of computer laptops, audit & video recording equipment by the police and legal representatives during interviews with inmates*, 3 September 2003.
[76] *Crimes (Administration of Sentences) Regulation 2001*, clause 105.
[77] DCS Operations Procedures Manual, chapter 15.14, including annexure 15.4, *Hierarchy of sanctions pursuant to the Crimes (Administration of Sentences) Regulation 2001*.
[78] *Poisons and Therapeutic Goods Act 1966*, section 8. See also *Poisons and Therapeutic Goods Regulation 2002*, Appendix D.
[79] Observation record 27, January 2005.
[80] Observation record 2, September 2003.
[81] Interview record 38, August 2004.
[82] Burwood Local Court, Wednesday 11 February 2004.
[83] Magistrate G. Bradd, transcript of hearing at paragraph 45.
[84] Submission 2, NSW Police, Local Area Commander, 29 March 2005.
[85] Submission 9, NSW Police, Duty Officer, 17 April 2005.
[86] Submission 4, NSW Police, Local Area Commander, 19 April 2005.
[87] Submission 7, DCS Superintendent, 26 April 2005.
[88] Submission 13, DCS, 10 May 2005.
[89] COPS records were sorted by date, and we examined every third record.
[90] At the time of writing the BOCSAR was only able to provide us with information about court matters finalised before the end of 2004. We are therefore unable to comment on the outcome of matters finalised in the remainder of the review period, that is 1 January 2005 to 20 February 2005.
[91] In 2003, of court appearances finalised in the NSW local court, 55.6% of people charged were sentenced after a guilty plea, as opposed to 14.1% of people who defended the charges at a hearing. Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2003 – Local Courts*, 2004, p. 22.
[92] Section 22 of the *Crimes (Sentencing Procedure) Act 1999* requires a court to take into account that an offender pleaded guilty and to impose a lesser sentence than would have otherwise been imposed.
[93] Observation record 11, April 2004.
[94] Observation record 21, July 2004.
[95] Observation record 2, September 2003.
[96] *Crimes (Administration of Sentences) Regulation 2001,* clause 96.
[97] *The Crimes (Administration of Sentences) Regulation 2001*, clause 113A provides that it is a correctional centre offence for an inmate to have a camera, or video or audio recording equipment, or a charger for any such equipment, in his or her possession.
[98] DCS Assistant Commissioner's Order 2003/029, *Prohibited possession of Casio wristwatch and camera, and similar digital devices in correctional centres*, 12 June 2003.
[99] Buscombe, M., Memorandum of advice re: stop, search and detention powers of correctional officers, 14 October 2004. Received from the Crown Solicitor's Office.
[100] Ibid.
[101] Letter from Ron Woodham, Commissioner, Corrective Services to Greg Andrews, Assistant Ombudsman, 7 February 2005.

Chapter 4. Informing people about relevant laws and policies

The laws prohibiting unauthorised items entering places of detention will only be fair and effective if people who enter places of detention are aware of, and understand them. This is particularly important as people who enter correctional facilities come from a range of backgrounds, and have different levels of English competency and literacy skills.

The Community Relations Commission has provided us with a submission that states:

> *According to the NSW Inmate Census 2004, undertaken by the Department of Corrective Services on 30 June 2004, 16.9 percent (1,565) of inmates in NSW are born in a non-English speaking country.*
>
> *Given this data and the serious penalties that could be imposed on visitors contravening entry regulations, it is important that provisions are made to assist visitors to detention centres with low levels of English proficiency to understand visiting rules, and in particular which items cannot be taken into a correctional centre.*[102]

In recognition that people with intellectual disabilities sometimes enter correctional facilities to visit inmates, the Department of Ageing, Disability and Homecare has argued *'Information should be provided in formats suitable for people with intellectual disabilities, such as pictorial versions.'*[103]

Throughout the review period, when observing DCS operations to detect people introducing prohibited items, we frequently heard people in possession of an unauthorised item declaring that they were not aware that the item should not be brought into a place of detention.

Over five days in January and February 2005 we conducted short face-to-face interviews with 129 people visiting four metropolitan correctional centres to obtain information about people's experiences and perceptions about being searched when entering a correctional facility. In order to determine how well people understand the laws about what they are not permitted to bring into a correctional facility, as part of the survey we asked the following question *'Can you please tell me all the items you think that it is against the law to bring onto correctional centre property?'* Respondents' answers were coded, and Table 2 indicates the number of people that identified particular items as being prohibited.

Table 2. Items visitors to correctional centres identified as being against the law to bring into a place of detention

Type of item	Number (and percentage) of people who identified the item as prohibited	Number (and percentage) of people who did not identify the item as prohibited
Illegal drugs	105 (81.40%)	24 (18.60%)
Alcohol	25 (19.38%)	104 (80.62%)
Syringes/needles	35 (27.13%)	94 (72.87%)
Weapons	70 (54.26%)	59 (45.74%)
Medication	11 (8.53%)	118 (91.47%)
Recording devices	11 (8.53%)	118 (91.47%)
Tools of escape	6 (4.65%)	123 (95.35%)
Mobile phones, mobile phone parts or accessories	46 (35.66%)	83 (64.34%)
Other	52 (40.31%)	77 (59.69%)

Source: NSW Ombudsman, survey of visitors to correctional centres, Jan-Feb 2005. Coded responses to the question 'Can you please tell me all the items you think that it is against the law to bring onto correctional centre property?'

Other items respondents believed it to be against the law to take into a place of detention were:

A whole heap of things

All illegal things

Anything harmful

Everything

Books, newspapers, mobile phones

Jewellery, paper, money, phones, keys

Paper notes and jewellery

Sharp objects

Smokes, phones, wallet

Tobacco

Mobile phone, watches, handkerchiefs, money, keys.

What these responses indicate, is that while most people are aware that it is against the law to take certain items, such as drugs and weapons, into a place of detention, overall people did not have a good understanding of all, or most of the items that it is illegal to bring into such a place. In addition, many people appeared not to know the distinction between those items that it is against the law to take into a place of detention, and those items that DCS does not permit visitors to take into the visiting area, during visits with inmates.

The fact that visitors we surveyed did not have a good understanding of the laws is of particular concern because 92 respondents (72.66%) advised that they had visited a correctional centre in NSW more than five times and 30 respondents (23.44%) said that they had visited a correctional centre between two and five times. Only five people (3.91%) advised that this was their first visit to a correctional centre.[104]

DCS currently uses a range of approaches to inform people visiting correctional facilities about the legislation and rules concerning places of detention. As part of our survey of visitors to correctional centres we asked respondents the question *'How did you find out about which items it is against the law to bring onto correctional centre property?'* Table 3 summarises respondents' answers to this question.

Table 3. Methods by which visitors to correctional centres were informed about the items it is against the law to bring into a place of detention

Method by which information was obtained	Number (and percentage) of responses
DCS brochure	4 (3.13%)
Family member/friend	9 (7.03%)
I telephoned DCS	10 (7.81%)
Signs	32 (25.00%)
Staff at visit	52 (40.63%)
Other	21 (16.41%)
Total	**128 (100%)**

Source: NSW Ombudsman, survey of visitors to correctional centres, Jan-Feb 2005. Responses to the question 'How did you find out about which items it is against the law to bring onto correctional centre property?

Other responses by visitors included:

I was previously an inmate

Word of mouth

Don't know the rules

Gradual process. The more times you come, the more you learn

Common sense

Legal services updates (this comment was made by a lawyer)

Another inmate's mother rang to explain the rules to me

The internet.

There are numerous ways that DCS could improve the quality of information provided to people who enter correctional facilities. DCS has acknowledged this and advised us that it is currently *'looking at improving the provision of information to visitors in several ways. It is recognised that first-time visitors, in particular, require information about visiting.'*[105] As DCS is currently examining this issue, we have decided not to make specific recommendations about improving provision of information for visitors. Instead, we have noted some areas where improvements could be made, and suggested possible improvements that DCS should consider as part of its review.

4.1. Brochures

Some correctional centres publish a brochure to provide information about visiting regulations to people who visit the centre. These brochures generally provide information about how to book a visit; what identification is required in order to visit an inmate; what visitors should do when they arrive for a visit; and visiting rules, including a summary of banned items. Brochures are written only in English and the amount and quality of information in the different brochures is variable.

Brochures are generally available in the visits reception area of some centres, and presumably DCS staff should be able to post a brochure to people who telephone the centre seeking information. Notwithstanding this, when we anonymously rang two correctional centres that we knew published such brochures, to obtain a copy, one erroneously advised us that the centre did not produce such brochures. The other advised us that they were currently reviewing their brochures and that it would be '*ages*' before any would be available.

In 1994 the DCS Research and Statistics Branch conducted a survey of visitors to NSW correctional facilities. The aim of the study was to develop a social profile of visitors, and to identify the significant issues faced by visitors. To obtain information for the study a questionnaire was developed, and posted to over 5,000 visitors. Over 1,100 surveys were completed and returned. As part of the survey visitors were asked questions about provision of information concerning visiting rights and conditions. In relation to this issue:

> *29% described information supplied by the Department about visiting rights and condition[s] as either poor or non-existent, while a further 29% said it was only fair.*
>
> *Others stated that:*
>
> - *Information was not automatically supplied and was only given when visitors asked for it.*
> - *The only information supplied was provided by the inmate.*
> - *Some were given the wrong advice by officers when they asked for information.*
> - *There was a critical lack of information for inmates in custody for the first time and for their visitors.*[106]

As a result of such findings, the Research and Statistics Branch made the following recommendations:

1. *Standard information packages for correctional centre visiting be developed and printed. These packages should contain standard information on regulations and rules concerning visiting and explicitly list the rights available to visitors. Penalties for bringing in illegal items and illegal behaviour should also be included in this package. This package should be developed in full consultation with community groups working in the area of corrections, as well as the Inmate Development Committees.*
2. *Local additions to the visiting rules concerning conditions at a particular centre (e.g. visiting hours) should be printed and available for insertion into the standard package.*[107]

In 1999 a follow up study was conducted to assist the department in providing appropriate facilities for visitors. The report on this study stated:

> *It is of concern that only 22 percent of the respondents claim to have received written information on visiting times, rules and conditions…*

Having a loved one in a correctional centre can be a stressful and confusing time for those involved. It can be of assistance to visitors if they are briefed on visiting times, rules and conditions. Written information provides visitors with the opportunity to have the information at hand when they need to refer to it.

The importance of written information was emphasised in the Eyland (1996) report and recommendations were made concerning a general pamphlet and specific information pertaining to individual correctional centres. In response to this recommendation the Operations Branch developed a general visitors handbook. Additionally, a visiting package was to be made available for inmates to send to family members and friends nominated by the inmate. This process must have been discontinued as this study found a substantial number of respondents did not receive printed information.[108]

In June 2004 DCS advised us that it was in the process of developing a general information brochure for people who intend to visit any of the correctional centres in NSW, as well as brochures providing specific information about each particular centre. At this time, we were shown early drafts of such documents and advised that the brochures would contain basic information in a number of languages.[109] In May 2005, in response to our discussion paper, DCS commented:

The Department is … investigating the provision of brochures for visitors, including brochures in community languages. …

In providing extensive information to visitors, there is a possibility that, for some visitors, the information may be perceived as "information overload", and they may not attempt to read it. The Department attempts to strike a balance between providing full and complete information, and providing the information that is most relevant to visitors.[110]

We recognise that DCS is currently working to improve the written information that is provided to visitors to correctional facilities. We feel this work should be completed as a matter of priority. It would be beneficial for brochures to be written in plain English as well as relevant community languages and at a minimum they should contain information about:

- the types of items people are prohibited by law from bringing into a place of detention (with an explanation of the term 'place of detention'
- what visitors are expected to do if they are carrying certain restricted items (such as mobile phones, recording devices or prescription medication)
- the types of searches people may be subject to when entering or near a correctional facility
- general visiting rules and procedures (for example, the proof of identification required prior to visiting, as well as dress and behaviour standards)
- the telephone numbers of each correctional facility (so that further information can be obtained if required).

It would also be beneficial for brochures to be updated at least annually so that they remain relatively current, and include relevant changes to legislation, and DCS procedures and policies.

Brochures should be prominently displayed at all visiting area reception rooms at correctional facilities. In addition, DCS should consider asking inmates when they first enter custody whether the inmate would like to nominate any family members or friends who are likely to visit, to receive an information brochure by post. People who telephone DCS for the purpose of making a booking for a visit, or seeking information about visiting conditions, could also be asked whether they wish to be mailed a copy of the visitor information brochure.

4.2. Signage

Standard signs located at or near the entry of correctional facilities provide information about what items should not be brought into a place of detention. These signs summarise the relevant legislative provisions about introducing unauthorised items into a place of detention. Figure 2 below is a photograph of a sign located near the boom gate at Long Bay Correctional Complex.

In our discussion paper we noted the following issues with the existing signs.

- *the signs only contain information about laws, and not departmental policies*
- *the signs at some correctional centres are not located at the entry to the correctional centre*
- *at some centres, the location of the signs, and the size of the print makes it virtually impossible to read the sign, unless you are entering the facility on foot.*[111]

In response DCS advised *'The Department acknowledges the Discussion Paper's comments about signage, and is investigating possible improvements.'*[112]

Figure 2. Photo of sign at Long Bay Correctional Complex boom gate

Source: Photo provided by DCS, March 2003.

4.2.1. Content of signs

Various stakeholders have made comments to us about the content of signs. For example, the Department of Ageing, Disability and Homecare advised:

> *Information should be provided in formats suitable for people with intellectual disabilities, such as pictorial versions.*[113]

An inmate representative of an IDC commented:

> *… I surveyed 76 inmates, 9 non custodial staff and 11 civilians asking them what does a place of detention mean to them. The answer in 97% of times was … inside the jail where inmates are locked up.*
>
> *Those surveyed did not associate the car park with a place of detention as no one is put into detention in the car park. It is misleading when signs state: bring into a place of detention when most … would see a place of detention as the actual part of a jail where the inmates are kept.*
>
> *The signs should state: place of detention includes any departmental property where inmates may or may not be detained [including] any transitional or periodic detention centre. This includes car parks, administration buildings etc.*[114]

In addition, a senior police officer suggested:

> *Perhaps signage setting out a generic list in one colour followed by rules specific to each individual facility in another colour. Clear signage should reduce confusion for visitors who attend various correctional centres and might promote the declaration of inappropriate items.*[115]

We acknowledge that there is a challenge in developing signs that contain enough detail to provide people with useful information, while being short and simple enough that people are likely to read them. This is a particular dilemma if stakeholders believe that information should be provided in different formats, such as in a number of languages, or in a pictorial format.

We understand that DCS is currently in the process of reviewing the content of signage at the perimeter of correctional facilities, with the aim of creating new signs that advise people in clear and simple language that they are on correctional centre property, and may be searched for illegal items. The signs are also likely to state the consequences of being caught with an illegal item, that is a possible criminal sanction, and a ban from visiting correctional facilities.

In order to ensure people on departmental property receive comprehensive information about the rules and regulations relating to correctional facilities, it may be appropriate for DCS to also consider whether it would be beneficial to erect detailed notices, to supplement the signs. These could be placed in prominent positions around correctional facilities, particularly in areas where visitors congregate, such as car parks and visiting area reception rooms. The notices could provide at least basic information in community languages and pictures of prohibited items to make it easier for people who do not have a high level of English proficiency, and for those with an intellectual disability.

4.2.2. Location of signs

Given that it is a criminal offence to bring certain items on to any part of a place of detention it is important that people know when they are entering or in a correctional facility. At the current time a person may be well inside DCS property before they come across a sign advising them of this fact. At Goulburn Correctional Centre, for example, the visitor car park is located within the grounds of DCS property, however, it is outside the centre's perimeter fence. People who leave their vehicles in the designated car park, and who have, for example, a bottle of alcohol in their vehicle, may not know that they are committing a criminal offence, even if they are aware that they are not to take alcohol into a place of detention.

One police officer who has been involved in joint DCS/NSW Police operations to search visitors, commented:

> *I found that the signs posted outside the [Name] Correctional Centre explaining the Summary Offences Act were not adequately displayed for persons entering the Centre.*[116]

However, another police officer stated *'My understanding in regards to this is that signs are clearly visible to those visiting the centre'*.[117]

The Youth Justice Coalition, a network of youth workers, academic and legal professional advocating for the rights of children and young people were of the view:

> *Such signs also need to be visible* before *entry to the detention centres so that visitors will not inadvertently bring in contraband. The signs, therefore, should be located at any gate to the carpark.*[118]

In order to inform people that that they are on correctional centre property, and that there are additional laws that apply in such places, we feel that it is important for signs to be erected at the outer entrance(s) to each correctional facility.

4.3. Additional ways to improve information provision

4.3.1. Staff at centres

While observing DCS operations and touring correctional facilities, we have generally found that DCS staff are helpful to visitors who wish to be provided with information about visiting procedures. The Public Defenders Office has, however, advised us:

> *In our experience not all prison officers know what the new rules are or apply them consistently. Nor are the existing rules applied consistently across institutions.*[119]

It is important for DCS to ensure that all correctional officers and centre staff understand the laws prohibiting certain items from being introduced into a correctional facility. Not only are these people subject to the laws, but they may also have to explain the rules to visitors. This means that the department should work to provide staff (particularly those who have direct contact with visitors) with regular training about the legislation prohibiting people from introducing items into a place of detention, and about DCS policies and procedures. Relevant information should also be kept up-to-date on the department's intranet so that staff can easily respond to queries or check the current status of the regulations.

4.3.2. Internet

The DCS websiteb www.dcs.nsw.gov.au contains a section *'Information for Visitors to Prisons'*. This contains information for visitors about how to prepare for a visit, and what to expect at a visit but with the exception of the following two sentences, it does not contain information about items it is illegal to bring into a place of detention.

> *People who want to get an illegal item or substance into a prison sometimes try to avoid taking it in themselves – if you are pressured by anyone to take anything into a cent[re] illegally, contact the police or the Department.*
> *…*
>
> *Have you left any unnecessary valuables or other items banned from the prison at home?*[120]

It would be useful for visitors who have access to the internet if DCS included a comprehensive list of prohibited items on its website. A simple way to do this might be to place a copy of the general visitor information brochure (when finalised) onto the website.

4.3.3. Information for non-English speaking visitors

The NSW Community Relations Commission has recently informed us that it would:

> *be pleased to advise the Department on how it could develop an effective communication strategy to assist people with low English language proficiency to understand the visiting rules for correctional centres. As well as developing multilingual material, the Department should consider the use of language support and multilingual staff, and utilising partnerships with ethnic community organisations as a means of disseminating information.*[121]

As it is the role of the Community Relations Commission to promote multiculturalism, ethnic affairs, cultural diversity, community unity and harmony in NSW, it is highly likely that the Commission could provide DCS with a significant amount of advice and assistance in relation to improving the dissemination of information to people with low English language proficiency. DCS should therefore consider making use of this resource.

4.3.4. Signed declaration by visitors

In response to our discussion paper questions *'Could the provision of information for people entering places of detention be improved? If so, how?'* some stakeholders have suggested that it would be beneficial if visitors were required to sign a form each time they enter a correctional centre, declaring that they understand the rules and do not have any prohibited items in their possession. Two police officers, for example, provided the following responses:

> *Yes. All visitors entering being given an information sheet and then signing same to indicate they have been informed prior to entry.*[122]

*

> *I do believe that there is room for improvement with regard to information provided to people entering correctional facilities. Again an appropriate document could be produced in all languages, with an acknowledgment section to be signed by the visitor.*[123]

When we visited Junee Correctional Centre, the only private correctional centre in NSW, we were advised that each visitor who passes through the gate-house on the way into the centre, is required to sign a form acknowledging that they have read the centre's conditions of entry. This says in part:

> 4. *Visitors to the Centre should have a thorough knowledge of all articles in their possession. It is an offence for any person, without lawful authority, to introduce or attempt to introduce any spiritous or fermented liquor or any drug into the Centre. Furthermore, it is an offence to introduce or attempt to introduce a syringe into the Centre. It is also an offence to supply an inmate with a syringe.*
> 5. *In accordance with the NSW Crimes (Administration of Sentences) Act 1999, it is an offence for any person without lawful authority, to convey or deliver to an inmate any money, document, clothing or any article or thing. It is also an offence to secret[e] or leave any articles in a place to be collected or found by an inmate.*
> 6. *Unless authorised, visitors are not permitted to convey any camera, recording device or video camera into the Centre.*
> 7. *Visitors may not convey mobile telephones into the Centre under any circumstances.*[124]

We are not aware of a similar process being undertaken at any correctional facilities managed by DCS.

As each person visiting an inmate at a correctional facility must fill in some paperwork (a 'visit slip') prior to the visit, providing their details and the details of the inmate they are visiting, it would not seem overly onerous to require people to sign a statement acknowledging that they have read and understood the rules of entry. The rules could be written at the bottom or reverse side of the visit slip. This would act as a constant reminder for people about what they should not bring into a correctional facility, and may prompt visitors to declare contraband items. The visit slip could also possibly be used as evidence in criminal proceedings if a person signed a statement saying they did not have prohibited items in their possession, and such items were subsequently detected.

It would be important that people with a limited understanding of English were not coerced into signing a statement that they did not fully understand. To overcome this, DCS could publish a list of prohibited items in a number of languages, and show the relevant list to a person. Alternatively, as people with very limited English skills often visit a correctional facility in the company of a person who does speak English, the English speaking visitor could be asked whether he or she was able and willing to translate the list of prohibited items for the non English speaking visitor. In our experience DCS officers often rely on visitors' friends and family members to interpret instructions and directions given by staff, so this would not be an entirely new approach.

Endnotes

[102] Submission 11, NSW Community Relations Commission, 29 April 2005.
[103] Submission 8, Department of Ageing, Disability and Homecare, 21 April 2005.
[104] One person interviewed declined to answer this question, therefore percentages are based on 128 responses.
[105] Submission 13, DCS, 10 May 2005.
[106] Eyland, S., *Inside…Out: A survey of visitors to New South Wales Correctional Centres*, NSW Department of Corrective Services Research Publication No. 36, September 1996, pp. I-II.
[107] Ibid., p. 47.
[108] McHutchison, J., *Visiting the Inside: A survey of visitors to NSW Correctional Centres*, NSW Department of Corrective Services Research Publication No. 43, May 2000, p. 23.
[109] Interview record 40, 17 June 2004.
[110] Submission 13, DCS, 10 May 2005.
[111] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 15.
[112] Submission 13, DCS, 10 May 2005.
[113] Submission 8, Department of Ageing, Disability and Homecare, 26 April 2005.
[114] Submission 1, inmate, undated. Received 1 April 2005.
[115] Submission 14, NSW Police, Assistant Commissioner, Commander, 4 May 2005.
[116] Submission 6, NSW Police, Local Area Commander, 5 April 2005.
[117] Submission 2, NSW Police, Local Area Commander, 29 March 2005.
[118] Submission 16, Youth Justice Coalition, 13 May 2005.
[119] Submission 5, NSW Public Defenders, 11 April 2005.
[120] http://www.dcs.nsw.gov.au/correctional/
[121] Submission 11, NSW Community Relations Commission, 29 April 2005.
[122] Submission 9, NSW Police, Duty Officer, 17 April 2005.
[123] Submission 4, NSW Police, Local Area Commander, 19 April 2005.
[124] Australasian Correctional Management, *Junee Correctional Centre - conditions of entry*. Provided to us 26 November 2003.

Chapter 5. Powers of correctional officers to stop, detain and search people and vehicles

5.1. Attempts by DCS to prevent prohibited items from being introduced into places of detention

As previously mentioned there is a high demand for contraband items in the NSW correctional system. In May 2004 we asked governors of NSW correctional facilities *'What do you believe are the major ways that contraband is introduced into [the correctional centre you manage]?'* Some of their responses were:

> *Usually thrown into the centre; left on outer grounds; introduced by visitors.*
>
> *Items of contraband are carried internally or left outside on the complex and picked up later by inmates working outside. Additionally, it is easy to throw items of contraband over the security fence after hours.*
>
> *Contraband in the vicinity of the centre, to be retrieved when convenient by inmates.*
>
> *Given that the centre is an open institution, covering 150 acres, there exists opportunity for drops to occur in any location. In fact, it is unlikely that any drug would be introduced through visits.*
>
> *Minimum security inmates entering main complex to engage in employment. Visitors (including professional) – contractors – staff.*

These responses demonstrate that there are a myriad of ways that people try to introduce contraband into each correctional facility, and factors such as the location, layout, size and inmate profile of each facility appear to impact on the particular methods utilised.

In recognition that there are a number of ways that unauthorised items can be introduced into places of detention, DCS uses a range of security measures to reduce the flow of contraband into centres. These include measures such as fences, CCTV cameras, motion detectors, intelligence gathering and analysis, security classification and drug testing of inmates. In addition, searches of people and things entering places of detention are conducted on both an ad hoc and targeted basis, and tools such as metal detectors, x-ray machines, and drug detection dogs are used to maximise the effectiveness of searches.

5.2. Powers of correctional officers in Australian jurisdictions other than NSW

Throughout Australia the powers of correctional officers to search inmates are quite different to their powers to search other people entering places of detention (such as visitors, staff and contractors). To enable a comparison of the legislative framework in NSW with other Australian states and territories, we examined the relevant provisions in force around Australia that enable correctional officers to search people visiting places of detention.[125] Below is a summary of these provisions.

5.2.1. Victoria

Section 44 of the *Corrections Act 1986* (Vic) says that a person who wishes to enter or remain in a prison as a visitor must, if asked, submit to a formal search. A formal search is a search to detect the presence of drugs, weapons or metal articles, carried out by an electronic or mechanical device.

In addition, for the security and good order of a prison or prisoners, the governor of the prison may order a prison officer to require a person wishing to enter a prison (other than a judge of the Supreme Court or County Court or a magistrate) to submit to a search and examination of the person, and of any thing in the person's possession or under the person's control. Such searches may be conducted randomly,[126] and may require the person to remove all or most of a person's clothing.[127] In addition, a prison officer can use an approved dog to assist the officer in carrying out searches of visitors.[128]

If a person other than a prisoner or prison officer refuses to submit to be searched while inside the prison, the Governor may order the person to leave the prison immediately. If a person disobeys such an order, they are guilty of an offence.[129]

5.2.2. Queensland

The *Corrective Services Act 2000* (QLD) provides that a corrective services officer may require a visitor to submit to a 'scanning search', and if the visit is to be a contact visit, a 'general search'.[130] A scanning search *'means a search of a person by electronic or other means that does not require a person to remove his or her general clothes or to be touched by another person.'*[131] A general search is defined as a search:

(a) to reveal the contents of the person's outer garments, general clothes or hand luggage without touching the person or the luggage; or

(b) in which a person may be required to-

(i) open his or her mouth for visual inspection; or

(ii) shake his or her hair vigorously.[132]

The *Corrective Services Act* (QLD) also provides that if a person is found committing a security offence, or an officer reasonably suspects that a person has just committed a security offence, the officer may, using reasonable force, conduct a general or scanning search of the person; and search anything in the person's possession, including a motor vehicle.[133] A security offence is defined as an offence that poses a risk to the security or good order of a corrective services facility, or the security of a prisoner.[134]

5.2.3. Western Australia

The *Prisons Act 1981* (WA) states that the superintendent of a prison may require and direct a search of the following people, and the examination of any articles in their possession or under their control:

- a person entering or seeking to enter a prison
- a person outside but near a prison, where in the opinion of the superintendent a search is necessary for the good order and security of the prison
- a person who has just left a prison
- a child accompanying any such person.[135]

The legislation does not specify exactly what type of searches correctional officers can conduct, except to state that a prison dog can be used to conduct a search for drugs,[136] and that strip searches of people can be conducted, if certain procedures are followed.[137]

5.2.4. South Australia

In South Australia, the manager of a correctional institution may cause any person or vehicle that enters the institution to be detained and searched for the presence of prohibited items if there are reasonable grounds for suspecting that the person is in possession of such an item (or such an item is in a vehicle) without the permission of the manager.[138] For the purposes of such a search the person cannot be required to remove his or her clothing but may be required:

(i) to open his or her mouth; or

(ii) to adopt certain postures; or

(iii) to submit to being frisked; or

(iv) to do anything else reasonably necessary for the purposes of the search.[139]

The South Australian Parliament has recently assented to legislation that, when proclaimed, will change the way searches are to be conducted, and clarify the type of searches that can be conducted in different circumstances. Under the changes, any person who enters a correctional institution may, with their consent, be subject to a limited contact search. If the person does not consent to a limited contact search, the manager may cause the person to be refused entry to the centre, and remove the person from the institution. The following provisions will apply to a limited contact search:

(a) the person cannot be required to remove any clothing or to open his or her mouth, and nothing may be introduced into an orifice of the person's body;

(b) any direct contact with the person's flesh that is necessary for the purpose of the search must be minimal and within the bounds of propriety;

(c) the person may be required to adopt certain postures or do anything else reasonably necessary for the purposes of the search, …

(d) the search must be carried out expeditiously and undue humiliation of the person must be avoided.[140]

In addition to being subject to a limited contact search, a person reasonably suspected of being in possession of a prohibited item may be required to remove his or her outer clothing (including footwear and headwear) but no other clothing; to open his or her mouth (force cannot be applied to open the person's mouth); or to submit to being frisk searched.[141]

5.2.5. Tasmania

In Tasmania, a person who wishes to enter or remain in a prison as a visitor must, if asked by a correctional officer, submit to a formal search. A formal search is defined as a search to detect the presence of drugs, weapons or metal articles carried out by an electronic or mechanical device.[142] In addition, the Director may, for the security or good order of the prison or prisoners, order a correctional officer to search and examine a visitor to the prison, anything in the person's possession or under the person's control, and any thing in the prison. Such searches can be conducted randomly.[143] The legislation does not provide any further guidance about how such searches are to be conducted.

5.2.6. Northern Territory

Section 39(5) of the *Prisons (Correctional Services) Act* (NT) says:

> *The Director or an officer may require a person to be searched before entering a prison or police prison as a visitor and that person shall not be received by a prisoner as a visitor unless he or she has been searched accordingly.*

In addition, the legislation states '*The Director may order that such precautions as he or she thinks fit be taken to maintain the security and good order of a prisoner, prison or police prison.*'[144] We have been advised that in accordance with these broad provisions, visitors may be strip searched by correctional officers, and searches involving a drug detection dog may be conducted.[145]

5.2.7. Australian Capital Territory

There are no legislative provisions in the ACT that allow correctional officers to stop, detain or search people entering remand or periodic detention facilities. The Standing Orders for Belconnen Remand Centre do state that all visitors shall, prior to entering the visits area, pass through a metal detector and shall be required to account for any abnormal readings. Visitors may also be subject to an additional search with the aid of a hand-held metal detector. If an abnormal reading is received after a search with a hand-held metal detector, the person may be refused a visit, or granted a non-contact visit.[146]

5.3. Powers of correctional officers in NSW

5.3.1. *The Crimes (Administration of Sentences) Regulation 2001*

Correctional officers in NSW routinely search visitors to correctional facilities and their vehicles, and have done so for a number of years. The *Crimes (Administration of Sentences) Regulation* was the first piece of legislation that explicitly granted them the power to do so. Clause 93(1) of the Regulation states:

> *An authorised officer or the principal security officer may require a visitor:*
>
> *(a) to submit to an inspection and search of personal possessions, to scanning by means of an electronic scanning device and to being sniffed by a dog, and*
>
> *(b) to empty the pockets of the visitor's clothing, and*
>
> *(c) to make available for inspection and search any vehicle under the visitor's control that is on the premises of a correctional centre.*

The Regulation also provides that correctional officers and departmental officers who are on the premises of a correctional facility, may also be subject to such searches.[147]

In May 2002 the (then) NSW Government sought to increase the powers of correctional officers to detect contraband entering correctional facilities. To this end, two Bills, the Crimes (Administration of Sentences) Amendment Bill 2002 and the Summary Offences Amendment (Places of Detention) Bill 2002 were introduced to Parliament. These were intended to supplement the existing provisions about searching of people in places of detention, contained in the Regulation.

While the existing legislative provisions allowed a correctional officer to arrest a person for introducing an unauthorised item into a place of detention, loitering near a place of detention, or committing other similar offences,[148] the laws were considered too limited because they did not allow correctional officers to:

- detain a person if the person refused to comply with a search
- detain a person for a further search by police officers, if correctional officers reasonably suspected the person was concealing contraband that was not found during a search conducted by correctional officers
- search a person suspected of introducing contraband into a place of detention (or their vehicle) if the person or vehicle was near the correctional facility, but not on DCS property
- seize items relating to the commission of an offence
- use reasonable force in exercising their search powers.

In other words, correctional officers did not have the power to conduct some of the processes they felt would assist in determining whether the arrest of a person is warranted and appropriate.

5.3.2. Powers granted by the *Summary Offences Amendment (Places of Detention) Act 2002*

Parliament passed to the Crimes (Administration of Sentences) Amendment Bill 2002 and the Summary Offences Amendment (Places of Detention) Bill 2002 on 25 June 2002 and this legislation commenced on 21 February 2003. With the introduction of this legislation, a new section was inserted into the *Summary Offences Act*. This provides:

> *Section 27F Powers of correctional officers*
>
> *(1) Power to stop, detain and search persons*
>
> *A correctional officer may stop, detain and search a person, and anything in the possession of or under the control of a person, if:*
>
> *(a) the person is in or in the immediate vicinity of a place of detention, and*
>
> *(b) the correctional officer suspects on reasonable grounds that the person has in his or her possession or under his or her control anything that has been used, is being used or is intended to be used in or in connection with the commission of an offence under this Part.*
>
> *(2) Power to stop, detain and search vehicles*
>
> *A correctional officer may stop, detain and search a vehicle that is in or in the immediate vicinity of a place of detention if the correctional officer suspects on reasonable grounds that:*
>
> *(a) the vehicle contains anything that has been used, is being used or is intended to be used in or in connection with the commission of an offence under this Part, or*
>
> *(b) the vehicle has been used, is being used or is intended to be used in or in connection with the commission of an offence under this Part.*

In addition to giving correctional officers the power to stop, detain and search people, the *Summary Offences Act* now provides:

> *27G Conduct of search*
>
> *(1) A correctional officer, in conducting a search under section 27F, may direct a person to do any or all of the following:*
>
> *(a) to submit to scanning by means of an electronic scanning device,*
>
> *(b) to empty the pockets of the person's clothing,*
>
> *(c) to remove any hat, gloves, coat, jacket or shoes worn by the person,*

(d) to empty the contents of any bag or other thing, or to open any thing, that the person has with him or her, or has left in a vehicle,

(e) in the case of a visitor to the place of detention—to make available for inspection and search any item stored in a storage facility allocated to the visitor,

(f) in the case of a correctional officer or a non-correctional member of staff—to make available for inspection and search any room or locker that is under the officer's or member of staff's control at the place of detention,

(g) in the case of an adult accompanying a child or a mentally incapacitated person—to assist the child or mentally incapacitated person to co-operate with a search.

…

(3) In conducting a search of a person under section 27F, a correctional officer:

(a) must conduct the search with due regard to dignity and self-respect and in as seemly a manner as is consistent with the conduct of an effective search, and

(b) must not direct a person to remove any item of clothing being worn by the person, other than a hat, gloves, coat, jacket or shoes, and

(c) must not search a person by running the officer's hands over the person's clothing.

(4) A search of a person conducted by a correctional officer under section 27F must, if practicable, be conducted by a correctional officer of the same sex as the person being searched or by a person of the same sex (being a non-correctional member of staff) under the direction of the correctional officer concerned.

(5) A search of a child or of a mentally incapacitated person must be conducted in the presence of:

(a) an adult who accompanied the child or the mentally incapacitated person to the place of detention (or its immediate vicinity), or

(b) if there is no such adult—a search observation member of staff.

(6) Regulations may be made for or with respect to the manner in which correctional officers are to conduct searches under section 27F.

These provisions are much more detailed and specific than provisions found in comparable legislation in other Australian jurisdictions. This is positive as it gives greater guidance to correctional officers about how searches are to be conducted, and is likely to increase the chances that searches are conducted in a consistent way.

5.4. Consequences of existing NSW legislative framework

The provisions of the *Summary Offences Act* are intended to supplement the provisions outlined in the *Crimes (Administration of Sentences) Regulation*.[149] What this means is that officers who wish to conduct a routine search of a person and/or vehicle entering a correctional facility, are obliged to act under, and in accordance with clause 93 of the *Crimes (Administration of Sentences) Regulation*. However, if an officer reasonably suspects that a person in a correctional facility, or near a correctional facility may be committing or intending to commit a criminal offence, such as introducing contraband into the facility, a search of the person, or their vehicle, must be conducted in line with the provisions of Part 4A of the *Summary Offences Act.*

It may be that, during a routine search being conducted in accordance with the Regulation, an officer forms a reasonable suspicion that an offence is being, or may be conducted, and may deem that a further search, under the *Summary Offences Act* is warranted.

Throughout the review period it has become apparent that having two separate pieces of legislation governing how searches of people and vehicles are to be conducted, has caused confusion for officers. This is not particularly surprising given that the pieces of legislation are similar in some regards, and different in others. In particular, differences arise in relation to:

- where searches can lawfully be conducted
- how searches are to be conducted
- The safeguards that must be adopted during searches.

As raised in our discussion paper:

> *In some respects, section 27F of the* Summary Offences Act *grants correctional officers broader powers than those outlined in clause 93 of the* Crimes (Administration of Sentences) Regulation*. For example people can be asked to remove any hat, gloves, coat, jacket or shoes; and reasonable force can be used to stop, search and detain them. However, in other respects, the powers conferred under section 27 are more limited than those under clause 93. For example, where practicable searches should be conducted by officers of the same sex as the person being searched; searches must be conducted with due regard to dignity and self-respect; and there are special provisions to be followed when children and mentally incapacitated persons are searched.*[150]

From our observations, on occasions correctional officers will conduct searches permitted only under section 27G of the *Summary Offences Act* (such as asking people to remove outer garments, or conducting searches off the grounds of a correctional facility) before the officer has formed any suspicion that the person may be committing an offence. In addition, sometimes an officer will conduct a search because he or she reasonably suspects that an offence has been committed, however, the search does not comply with safeguards outlined in the *Summary Offences Act* (for example, the search may not be conducted by an officer of the same sex as the person being searched, and reasons may not be given for the search).[151]

In addition, some correctional officers we have spoken to appear to be of the view that following the commencement of section 27F of the *Summary Offences Act*, all searches of people (other than inmates) and vehicles fall under these new provisions.

In our discussion paper we asked stakeholders *'What are the benefits and/or disadvantages of having two separate pieces of legislation governing how searches of people and vehicles are to be conducted by correctional officers?'*[152] In response to this issue, we received a range of comments. One police officer was of the view that the provisions in both pieces of legislation should be retained because they are used for different purposes, that is, targeted and routine searches.[153] Another police officer commented *'It would be beneficial to merge the two if possible for the purposes of simplicity.'*[154]

A DCS superintendent advised us:

> *The disadvantages are that it is confusing having two regimes based on two different sets of circumstances and authorising two different search powers and completion of any search in different manners.*[155]

DCS also acknowledges that there is currently some confusion for officers. In its submission, the department states:

> *It is evident that some Departmental officers may not appreciate the distinction between searches under each Act or the basis for a search under each Act. The Department will therefore review its procedures and training to clarify that basic search procedures (as provided in the* Crimes (Administration of Sentences) Regulation 2001) *apply to routine searches, but that the additional provisions of the* Summary Offences Act 1988 *(such as requiring a person to remove any hat, gloves, coat, jacket or shoes) require the officer first to have reasonable grounds for suspicion that the person has in his or her possession or under his or her control anything that has been used, is being used or is intended to be used in or in connection with the introduction of contraband into a place of detention.*[156]

There appear to be two distinct issues that arise out of NSW having two separate laws relating to the searches of people other than inmates at correctional facilities. The first is the issue of whether it is appropriate for routine searches to be conducted differently to targeted searches (searches conducted because of suspicion that an offence has been committed). If there is justification for having separate searching practices, the question remains whether it would be advantageous to have all provisions relating to searches by correctional officers, of people other than inmates, contained in a single piece of legislation, or whether the current approach is appropriate.

5.4.1. Different practices for routine and targeted searches

While different language is used in the *Crimes (Administration of Sentences) Regulation* and the *Summary Offences Act* about how searches of people can be conducted, there are significant similarities in the actual search practices authorised by the two laws. Under both people can be required to:

- be scanned by an electronic device
- submit to an inspection and search of personal possessions
- make available for search and inspection any vehicle under the person's control
- be sniffed by a dog.

While the Regulation does not specifically state that people searched routinely may have to empty a locker, or the contents of any bag or other thing, presumably, the provision requiring them to *'submit to an inspection and search of personal possessions'*[157] could be used as the basis for requiring them to empty such items for inspection.

This means that there are only three things that correctional officers are authorised to do during a targeted search that they should not do during a routine search, these being:

- requiring a person to remove certain items of clothing worn by the person
- conducting a search of a person or vehicle outside the grounds of a correctional facility, but within its immediate vicinity
- using force to search or detain a person or vehicle.

Searching of people and vehicles is by its nature intrusive. Such searches are justified on the basis of ensuring the good order and security of a place of detention, and in particular, attempting to prevent the entry of dangerous items into correctional facilities. However, it is another aim of DCS to ensure the maintenance and development of ties between inmates and their family and friends.[158] Such relationships are considered important for the welfare and rehabilitation of offenders,[159] and visits between inmates and their loved ones, are a primary way that such relationships are forged and maintained. This means that it is a key challenge for DCS to ensure searches are comprehensive and effective while not being so intrusive or offensive to people that they choose not to visit.

The Commissioner of Corrective Services has commented that *'the absolute majority of visitors to our centres are law-abiding citizens and concerned family members for their loved ones inside.'*[160] On this basis, it would not be appropriate for most people visiting inmates to be routinely subject to excessively invasive searching methods. Such searches would be resource intensive, unpleasant for those being searched, and often fruitless.

We note that, with the possible exception of vehicle searches, the routine searches that people within a place of detention in NSW may be subject to are similar in nature to searches people may be subject to in other high security environments, such as airports, courts, or sports stadiums. Therefore, while some people may be embarrassed that they are being subject to a search, or may not agree with the concept of such searches, if officers are courteous and respectful, and explain the purpose of the search, most people should not be especially upset by the procedures followed, or should at least understand the reasons for them.[161]

It seems reasonable that if a person acts in such a way as to raise a correctional officer's suspicion that illegal activity may be taking place, that the person be subject to a more rigorous search than other people entering a correctional facility. This is only the case, however, if the suspicion is based on some factual basis, and is not prejudicial or based on a mere possibility. It would also seem fair that people subject to more intrusive searching methods are provided with appropriate safeguards. We have considered the issues of reasonable suspicion, and the adequacy of safeguards in sections 6.2 and 8.1 respectively.

5.4.1.1. Removal of clothes

Asking a person to remove clothing is intrusive, and can cause some people to be embarrassed, upset or offended. Even though correctional officers are only permitted to require people to remove outer garments, in some cultures the removal of such items is only considered appropriate in certain circumstances, for example, in the absence of persons of the opposite sex. On the other hand, it is recognised that people do use items of clothing to conceal contraband, for the purpose of introducing it into a correctional facility. For this reason it is not unreasonable that correctional officers may, in some circumstances, consider it appropriate to require a person to remove such items so they can be examined.

On balance, it is considered that the current provisions, whereby correctional officers are only authorised to require a person to remove clothing if there is reasonable suspicion that an offence has occurred, or may occur, are reasonable.

5.4.1.2. Searches outside a place of detention

We are of the view that searches of people and vehicles outside a correctional facility, by correctional officers should not occur unless it is reasonably suspected that a person has broken (or may break) the law by trying to introduce contraband to the facility, or unlawfully communicate with an inmate. Routinely searching people in the vicinity of a correctional facility would be inappropriate given that it is the role of correctional officers to maintain the good order and security of a correctional facility, and not to engage in general policing duties in public areas.

Similarly, vehicles parked in public areas should not be the subject of routine searches by correctional officers, even if the occupants of the vehicle enter the correctional facility. People may specifically park on a public street or car park because they have items in their vehicle, such as alcohol or syringes, that they know they are not permitted to bring

into a place of detention. In addition, unless there is some evidence to suggest an item in a vehicle is likely to threaten the good order and security of a correctional facility, it is not the role of correctional officers to become directly involved.

5.4.1.3. Use of force against people who do not comply with a search

Currently correctional officers do not have the power to use force during a routine search of a person. However, they are permitted to use 'such force as is reasonably necessary' when stopping, detaining or searching a person under the *Summary Offences Act.*[162] Similarly, visitors searched under the *Summary Offences Act*, who fail or refuse to comply with a search request, may be charged with a criminal offence. There are, however, no such provisions relating to searches conducted under the Regulation.

In practice it appears that people who fail or refuse to comply with a routine search are treated in the same manner as if they had failed or refused to comply with a targeted search. This is illustrated by the DCS visitor incident report below. There is nothing in the report to indicate that the initial search was anything other than a routine search.

> *[Visitor] was cautioned prior to a property and [dog] search by [correctional officer]. As [visitor] was being directed to the property search area he refused to comply with all directions to submit to a property search. As [officer] attempted to search [visitor's] wallet, [visitor] attempted to snatch the wallet out of [officer's] hand. [Officer] took hold of [visitor] by the arm, forced him to the ground, then handcuffed him behind his back. A search was done of [visitor's] property – nil found. [Visitor] was escorted by [police officer] to … Police station to be charged with refuse to submit to a search under section 27(K) of the Summary Offences Act 1988.*[163]

The most likely reason that correctional officers treat people who refuse to be subject to a routine search and those who refuse to submit to a targeted search the same is because refusal to be searched is likely to lead a correctional officer to suspect that the person may be concealing contraband items. The following excerpt from a brief prepared by DCS when the amendments to the Summary Offences Act were being debated indicates that a refusal to be subject to a random search could be enough to cause a correctional officer to suspect that the person is acting illegally.

> *Correctional officers … currently have the power to search visitors to correctional centres under clause 93 of the* Crimes (Administration of Sentences) Regulation 2001*, but only as a condition of their entry into a correctional centre.*
>
> *If a visitor refuses to be searched, and the correctional officer has no other reason to suspect that the person may be attempting to bring contraband into the correctional centre, the officer cannot arrest the visitor and must let the visitor depart.*
>
> *New section 27F fills this gap by giving correctional officers power to stop, detain and search such a person if the correctional officer reasonably believes the refusal to be searched is because the person is in possession of contraband.*[164]

Given that in practice correctional officers sometimes detain and use force on people who fail or refuse to comply with a routine search, the distinction between the provisions of the *Crimes (Administration of Sentences) Regulation* and the *Summary Offences Act* are illusory. For this reason we feel that the legislation should be amended to state that people who fail or refuse to comply with a routine or targeted search by correctional officers can be detained (using force if necessary), if an officer reasonably suspects that the person may be committing an offence relating to a place of detention. In addition, the legislation should be clarified to state that a person may be charged with failing or refusing to comply with a search request, whether or not the request is related to a routine or targeted search.

It is important to remember that people searched or detained by correctional officers, or charged with failing or refusing to comply with a search request have the option of challenging the legality of the search or detention, or defending the charge in court. In such instances, it is the responsibility of a magistrate or judge to determine whether the suspicion held by the officer, which led to the search or detention, was reasonable.

Recommendation

5 It is recommended that NSW Parliament consider making legislative amendments to clarify that:

i) a person who fails or refuses to comply with a search by correctional officers can be detained (using force if necessary), if an officer reasonably suspects that the person may be committing an offence relating to a place of detention, and

ii) a person may be charged with failing or refusing to comply with a search request, whether or not the request is related to a routine or targeted search.

5.4.2. One or two pieces of legislation dealing with searches

While we are of the view that there are strong justifications for treating routine and targeted searches of visitors differently in some respects, we are not of the view that there needs to be two separate pieces of legislation governing the two searching procedures. In fact, we feel that it would be much simpler if all provisions relating to the stopping, detaining and searching of people other than inmates (and their vehicles) were incorporated into a single piece of legislation.

This would mean that unnecessary duplication in the provisions could be removed and the language relating to searches could be made consistent. In addition, this approach would ensure the rights and responsibilities of officers, and people being searched, were clearer and more easily accessible.

It is suggested that the *Summary Offences Act* is the most appropriate piece of legislation in which to incorporate all provisions concerning the searches of people other than inmates. This is where the majority of relevant provisions are already located, and where the offences that the searching procedures are aimed at detecting, are outlined.

Amongst other things, which will be discussed in more detail throughout the report, it would be appropriate for the single legislative framework to specify that:

- All people in a place of detention are subject to routine searches of their property and vehicles (including a requirement to be scanned by an electronic device, empty pockets, lockers, bags and other items for search and inspection, and to be sniffed by a dog).
- A further search of a person or vehicle may be required if a correctional officer reasonably suspects that a person has or intends to commit an offence relating to a place of detention. This may entail the removal of a person's outer garments of clothing, or the search of a person or vehicle in the immediate vicinity of the correctional facility.

Recommendation

6 It is recommended that NSW Parliament consider incorporating all provisions relating to the stopping, detaining and searching of people other than inmates (and their vehicles) into a single piece of legislation, possibly the *Summary Offences Act*. It would be useful for this consolidated legislation to specify that:

i) all people in a place of detention are subject to routine searches of their property and vehicles (including a requirement to be scanned by an electronic device, empty pockets, lockers, bags and other items for search and inspection, and to be sniffed by a dog)

ii) a further search of a person or vehicle may be required if a correctional officer reasonably suspects that a person has or intends to commit an offence relating to a place of detention. This may entail the removal of a person's outer garments of clothing, or the search of a person or vehicle in the immediate vicinity of the correctional facility.

Endnotes

[125] While we focused on l
including staff and contractors.

[126] *Corrections Act 1986* (Vic), section 45(1)(d)-(e).

[127] *Corrections Regulation 1998* (Vic), clause 63(5).

[128] *Corrections Act 1986* (Vic), section 27(1)(a).

[129] *Corrections Act 1986* (Vic), sections 45(3)-(4).

[130] Section 126(5).

[131] *Corrective Services Act 2000* (QLD), schedule 3.

[132] *Corrective Services Act 2000* (QLD), schedule 3.

[133] Sections 104(1)-(2).

[134] *Corrective Services Act 2000* (QLD), section 104(5).
[135] *Prisons Act 1981* (WA), sections 49(1)-(2).
[136] *Prisons Act 1981* (WA), section 49A.
[137] *Prisons Regulation 1982* (WA), clause 81.
[138] *Correctional Services Act 1982* (SA), sections 85B(1)-(2).
[139] *Correctional Services Act 1982* (SA), section 85B(3).
[140] Correctional Services (Miscellaneous) Amendment Bill 2004 (SA), section 85B(4).
[141] Correctional Services (Miscellaneous) Amendment Bill 2004 (SA), section 85B(5)(a).
[142] *Corrections Act 1997* (Tas), section 20.
[143] *Corrections Act 1997* (Tas), section 22.
[144] *Prisons (Correctional Services) Act* (NT), sSection 60.
[145] Email received from Operational Support and Special Projects, Department of Justice, Correctional Services, Northern Territory, 7 February 2005.
[146] Belconnen Remand Centre, Standing Order No. 13.
[147] Clause 240.
[148] *Summary Offences Act 1988*, old sections 27B(6), 27C(4), 27D(2A), 27E(3). Note, these sections have now been consolidated into section 27F(6) of the *Summary Offences Act 1988*.
[149] *Summary Offences Act 1988,* section 27L.
[150] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 16. Note, the term 'mentally incapacitated person' is defined in the *Summary Offences Act 1988*, section 27A as '*a person who is incapable of managing his or her affairs.'*
[151] Safeguards are set out in the *Summary Offences Act 1988*, sections 27G(3)-(5) and section 27J.
[152] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 17.
[153] Submission 4, NSW Police, Local Area Commander, 19 April 2005.
[154] Submission 2, NSW Police, Local Area Commander, 29 March 2005.
[155] Submission 7, DCS Superintendent, 26 April 2005.
[156] Submission 13, DCS, 10 May 2005.
[157] *Crimes (Administration of Sentences) Regulation 2001*, clause 93(a).
[158] DCS Corporate Plan 2004-2007, p. 6.
[159] Cunningham, A, 'Forgotten families – the impacts of imprisonment', *Family Matters*, No. 59, 2001, p. 39.
[160] General Purpose Standing Committee No. 3, *Examination of proposed expenditure for the portfolio area Justice*, Monday 1 December 2003.
[161] The unique issues posed by searches involving dogs are discussed in section 7.4.
[162] Section 27I.
[163] S&I report number 10.
[164] Notes for government speaker – amendments to Part 4A of the Summary Offences Act 1988, provided by DCS 15 April 2003.

Chapter 6. Prerequisites for conducting a search

6.1. Immediate vicinity of a place of detention

In some Australian jurisdictions, correctional officers have the power to search people who are not on the property of a place of detention, in certain circumstances. In other jurisdictions, correctional officers do not have the power to search people, but have certain powers to remove or arrest people in areas outside a correctional facility.

The Victorian *Corrections Act 1986* states:

> *If the Governor of a prison outside the metropolitan area believes on reasonable grounds that, by reason of any activity outside but near the prison, the security or good order of the prison or the prisoners is threatened, the Governor may order a prison officer to search and examine any thing outside but near the prison and to require a person outside but near the prison to submit to a search.*[165]

In Western Australia, the superintendent of a prison may require and direct a search of a person entering or seeking to enter a prison, or a person who is outside but near a prison, where in the opinion of the superintendent that search is necessary for the good order and security of the prison.[166] In addition, a prison officer or police officer is able to arrest a person who is, or is reasonably suspected of, loitering about or near a prison, or who is in or near some other place where for the time being there are prisoners.[167]

In Queensland, corrective services officers do not have the power to search a person (other than an inmate) who is outside a place of detention. However, if a corrective services officer reasonably believes that a person poses a risk to a prisoner, or to the place in which the prisoner is detained, the officer may require the person to leave the vicinity of the prisoner or place of detention. If the person fails to comply with the requirement (without reasonable excuse), the officer, using reasonable and necessary force may remove the person from the vicinity of the prisoner or the place of detention, or detain the person for up to four hours until the person may be handed over to a police officer.[168]

Correctional officers in South Australia, the Northern Territory,[169] Tasmania and the ACT do not have the power to search people outside of a prison.

In NSW, a correctional officer who suspects that a person has committed, or is likely to commit an offence relating to a place of detention may stop, detain and search the person if the person is in a place of detention, or '*in the immediate vicinity'* of a place of detention.[170] When this legislative provision was being debated, concern was raised in Parliament about how the term 'in the immediate vicinity' would be interpreted, with one member commenting:

> *The Opposition is concerned about the words "in the immediate vicinity of", which are not defined in the legislation. This might lead to a prison officer stopping a vehicle some kilometres from a country gaol, for example, and searching the vehicle even though the vehicle might not be going to attend the gaol.*[171]

This issue was also raised by the NSW Council for Civil Liberties, who noted the potential for correctional officers to abuse their power to search people in the immediate vicinity of a place of detention because of lack of definition in the Bill about the meaning of this term. In response to this concern, the (then) Minister advised:

> *It is the Department's view that the words "in the immediate vicinity" do not need to be defined in the Bill. The Department has pointed out that these words already occur in 23 New South Wales statutes, but that in no statute has the draftsman considered it necessary to define what these words mean.*
>
> *The Department has also referred to section 33 of the* Interpretation Act 1987*, which states:*
>
> *In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule … shall be preferred to a construction that would not promote that purpose or object.*
>
> *…*
>
> *The Department considers that … the power given to a correctional officer to search a person or vehicle "in the immediate vicinity" of a place of detention would be directly related to the ability or potential ability of the person to introduce contraband into the place of detention, or unlawfully communicate with an inmate, from the place where the correctional officer exercises the power. On this basis, the meaning of the words "in the immediate vicinity of" would not extend to a place several kilometres from a correctional centre.*[172]

Throughout the review period, by interviewing a range of DCS employees, we discovered that people have vastly different ideas about how the term immediate vicinity of a place of detention should be interpreted. For example some suggestions we were given about how the term should be defined are:

the distance where people might park their cars and then walk to the centre.[173]

where a tennis ball could be thrown by a person into the centre[174]

[the entire] … precinct, for example the city limits[175]

within communicating distance to inmates.[176]

DCS did not provide any guidance to correctional officers about how the term immediate vicinity of a place of detention should be interpreted until August 2004, when a definition of this term was inserted into the DCS Operations Procedure Manual. Correctional officers are now advised:

"in the immediate vicinity" of a place of detention means in close proximity to a place of detention, e.g. on a road or street immediately adjacent to a place of detention.[177]

It is a matter of some concern that DCS policies about this matter were not finalised until 18 months after the legislative amendments commenced. Until this time, officers were required to use their discretion to determine whether a person or vehicle they wished to search, which was not on the grounds of the correctional facility, was in the immediate vicinity of the facility.

6.1.1. Searches conducted outside a place of detention

In mid 2004 governors of 22 correctional facilities (78.57%) advised us that, to the best of their knowledge, officers based at the correctional facility under their control had not searched people outside the grounds of the correctional facility since February 2003.[178] Four governors (14.29%) advised us that locally based correctional officers had searched people or vehicles in the immediate vicinity of the centre, and reported that these powers had been used respectively one, three, four and six times since February 2003. Two governors (7.14%) were not aware of whether these powers had been used by officers based at the centre under their command.

It is not surprising that local correctional centre staff do not often conduct searches of people outside a correctional facility. Local centre staff are usually involved in processing visitors to the centre, including overseeing static security measures, such as metal detectors and x-ray machines, however, the responsibility for conducting search operations of visitors, primarily falls on officers working for the DCS S&I Branch.

This means that a correctional officer based at a centre would only be likely to search a person or vehicle outside the centre if the person or vehicle was noticed to be acting suspiciously and there were no staff from the S&I Branch, or another specialised DCS unit, available to respond.

6.1.1.1. Reports obtained from S&I Branch

In September 2004 we wrote to DCS seeking information about how often, since February 2003 staff from the DCS security units had searched people or vehicles outside the grounds of correctional facilities. As no such information is centrally collated by DCS, each security unit was required to examine its records, and provide us with relevant information. As outlined in the table below, we were advised that in the relevant time period officers from the S&I Branch searched people in the immediate vicinity of a correctional facility on 47 occasions.

Table 4. Information from DCS security units about the number of times officers from each unit have used the power to stop, detain and search a person or vehicle in the immediate vicinity of a place of detention

Security Unit	Number of times power used February 2003 – January 2005
Drug Detector Dog Unit	11
Northern Security Unit	32
Western Security Unit	1
Metropolitan Security Unit	0
Southern Security Unit	1
Taskforce Con-Targ	2
Total	**47**

Source: Information provided by Commander, Security and Investigations Branch, DCS, 21 January 2005.

We requested that DCS provide us with copies of reports about each of these 47 incidents. However, when we received a range of reports in March 2005 only 31 appeared to be related to searches of people or vehicles conducted in the immediate vicinity of a correctional facility. Of these, only seven clearly indicated that they related to searches outside a place of detention.[179]

Analysis of the 31 reports provided by the security units seems to suggest that there are a number of scenarios that have led correctional officers to stop, detain and search a person or vehicle outside a correctional facility. Below are some examples of occasions where correctional officers have searched people outside DCS property.

- A dog indicated the scent of a prohibited drug on a person. Correctional officers searched the person and then decided to search the person's vehicle, which was located outside the place of detention.
- A male entered a place of detention and was then seen returning to his vehicle (off the premises). After placing something in the vehicle he re-entered the correctional facility.
- Two females were observed by correctional officers communicating with inmates from outside the boundary of a correctional facility.
- A vehicle was seen to enter the grounds of a correctional facility and then turn around and leave.
- A person was seen to be 'acting suspiciously' when she arrived at a correctional centre.

The following are excerpts from security unit reports about searches of people in the immediate vicinity of a place of detention.

S&I report number 9

[Person of Interest (POI)] entered the Area B visits processing Foyer with the intention of visiting inmate [details]. [POI] was approached and searched by Senior Correctional Officer [Name] utilising Correctional dog [Name]. During the course of the search a drug odour was identified on [POI] which resulted in property search being conducted, however the drugs could not be located.

Officers exercising their powers of search under Section 27F, then conducted a search of the vehicle [POI] arrived at the centre in which was parked outside the centre entrance on [Name] St. First Class Correctional Officer [Name] utilising Correctional Dog [Name] then conducted a search of the vehicle which resulted in the seizure 0.8 grams of [green vegetable matter] and 2 drug smoking implements.

S&I report number 3

On [date] Officers from the [Name] Security Unit were conducting a security patrol of [Name] Correctional Centre at 12.45 pm when [POI 1 and POI2] were seen yelling out over the main gaol wall in [Name] street. Officers stopped and questioned [POI1 and POI2]. Officers then informed [POI1 and POI2] that under 27E of the summary offences act it was an offence to communicate, or attempt by any means whatever to communicate, with any inmate. [POI1 and POI2] were then informed that under regulation 27F of the summary offences act that there property and vehicle were to be searched. … Officer [Name] said before I search the car is there any thing you wish to declare. [POI 2] said "No".

During the search of the vehicle searching officers located 3 plastic bags containing 8 grams of white powder and one used and two unused syringes in a first aid kit located in the cars glove compartment. Also located were two used syringes in a pencil case on the back seat. The search was completed with nothing else found.

At 13.05 Senior Constable [Name] of the [Name] Police arrived and questioned [POI2 and POI1]. [POI2] admitted ownership of the syringes and powder. When asked what the powder was by Officer [Name], [POI2] replied "Amphetamines".

S&I report number 28

A [vehicle] entered the [Name] Correctional Centre. The vehicle was observed to turn around prior to entering the area of operation. Officers [Name] and [Name] intercepted the vehicle just outside the entrance gates to [Name] Correctional Centre.

[The two officers] approached the vehicle and identified themselves. There were four male persons and one female, the driver, inside the vehicle. …

When asked why they had turned around and exited the Centre the driver claimed she had taken a wrong turn and was intending to go to the golf course, which is the previous turn. A short time later, Officer [Name] arrived at the scene and conducted a PADD search, utilising Correctional Dog [Name], returning a positive indication to all persons. Officer [Name] then conducted a search of the vehicle however no contraband was found. [Name] Police were contacted and asked to attend.

Officer [Name] departed the area and conducted a search of the area where the vehicle turned around. On the grass beside the road, inside the Centre property, Officer [Name] located 5 x balloons and 1 x sachet containing Green Vegetable Matter. …

[Police attended] … Since no ownership of the drugs could be established and there were no further charges laid, all persons were directed to leave which they did with no further incident.

S&I report number 8

Officers exercising their powers of search under Section 27F, conducted a search of a vehicle owned by inmate visitor [details]. The vehicle, registration number … was located within the vicinity of the centre on [Name] Street. The search was conducted as officers had observed [POI] acting suspiciously prior to the search when she first observed the Drug Detection Dog Teams presence at the visitors centre. However a search of [POIs] property and vehicle resulted in nothing being found and the visit was allowed to proceed as normal.

It appears from these examples, and from the remainder of reports that we received, that when correctional officers conduct a search outside a correctional facility they usually detect illegal items on or near the person or in their vehicle. This was the case for 26 of the 31 reports we examined (83.87%). However, it is important to note that when correctional officers conduct a search of a vehicle outside of a correctional facility and no illegal items are found, or police are not called to attend, correctional officers may not feel that it is necessary to write a report about the incident.

The fact that we were present at operations where vehicles were stopped and/or searched outside of a correctional facility, and that reports about these incidents were not subsequently provided to us suggests that this may be the case. In addition, given that we were advised that staff from the security units used the power to stop, detain and search people outside a correctional facility 47 times, but we were only provided with 31 reports about such incidents also indicates that reports are not always made when such searches are conducted. Alternatively it may be that reports are made about such incidents, but they are not filed in a way that ensures they can be easily accessed.

From the reports that we have examined, it does not appear that correctional officers are unreasonably using their powers to search people in the immediate vicinity of a place of detention. Nor does it appear that correctional officers are conducting searches a significant distance from correctional facilities. However, given that it is likely we have not seen reports about all uses of this power, and also that reports we have reviewed do not contain all relevant information, it is difficult for us to make further comments about the use of the power in practice.

We do feel that there are a number of ways that DCS could improve its reporting about occasions where officers stop, detain and search people outside a correctional facility. In particular:

- Whenever correctional officers stop, detain and search a person outside a correctional facility a report of the incident should be made, whether or not prohibited items are located during the search.
- Reports about incidents where officers stop, detain and search a person or vehicle should clearly state whether the search is conducted on the grounds of a correctional facility, or outside its grounds. If a search is conducted outside a correctional facility the report should specify the location of the search, including the approximate distance from the boundary of the facility.
- Reports should be kept and stored in a way that they can be easily located and reviewed by senior officers.

Improving record keeping will enable senior DCS officers to review whether correctional officers are using their power to stop, detain and search people and vehicles in the immediate vicinity of a place of detention in a way that is consistent, reasonable, fair and effective. Better record keeping will also enable DCS to better determine whether the training and guidelines provided to officers about this issue is sufficient.

We have included our suggestions to improve record keeping about searches conducted in the immediate vicinity of a correctional centre into recommendation 7 below.

6.2. Reasonable suspicion

In order for a correctional officer to lawfully stop, detain and search a person in accordance with section 27F of the *Summary Offences Act*, the officer must suspect on reasonable grounds that the person has in his or her possession or control an item associated with an offence relating to the place of detention.

The term 'reasonable suspicion' is not a new one.[180] After a review of previous authorities, Smart AJ in the NSW Court of Criminal Appeal matter of *R v Rondo* said:

(a) *A reasonable suspicion involves less than a reasonable belief but more than a possibility … a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.*

(b) *Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material, or materials which may be inadmissible as evidence.*

(c) *What is important is the information in the mind of the Police Officer stopping the person or the vehicle or making the arrest at the time he did so. Having ascertained that information, the question is whether that information afforded reasonable grounds for the suspicion which the Police Officer formed. In answering that question, regard must be had to the source of the information and its content, seen in the light of the whole of the surrounding circumstances.*[181]

While this statement applies to the formation of reasonable suspicion by police officers, for the purpose of section 357E of the *Crimes Act*, there is no reason the same principles should not apply in relation to correctional officers using their powers under the *Summary Offences Act*.

This means that before a search of a person or vehicle can be undertaken under section 27F of the *Summary Offences Act*, a correctional officer must form a reasonable suspicion that a particular offence has been or may be committed. The suspicion is subjective, in that the particular officer must form the relevant belief. However, the belief must be a reasonable one. This is an objective standard and is usually determined by a court.

The DCS Operations Procedures Manual says that reasonable grounds:

> *Means that on the basis of known facts, evidence, observations and circumstances there is sufficient reason to suspect that an offence has been, is being, or will be committed, and that a reasonable person in possession of the same information would reach the same conclusion.*[182]

In our discussion paper we asked stakeholders what types of factors could lead a correctional officer to reasonably suspect that offences under Part 4A of the *Summary Offences Act* have been, or may be committed. The following responses were received.

> *I believe that reasonable suspicion would exist when the behaviour or actions of the visitor was out of character with the normal behaviour or actions of visitors. There are numerous indicators that would justify suspicion to a reasonable person but ultimately, a magistrate would determine validity of a search, in border line cases.*[183]

*

- *Behaviour entering a centre*
- *Intelligence obtained, for example, monitored phone call, examined letter, informant information*
- *Physical condition of visitor – under the influence of drugs and/or alcohol.*[184]

*

> *Factors could include intelligence relating to the visitor or the person being visited or even the associates of the visitor as well as observations.*[185]

*

> *… factors could include:*

- *Intelligence*
- *Indications by metal detectors and drug dogs*
- *The behaviour and demeanour of the person.*[186]

DCS advised us that:

> *Such factors include (but are not restricted to): intelligence, suspicious behaviour, prior behaviour, and an indication by a dog (the basis of most instances of reasonable suspicion invoking use of the power).*[187]

We will discuss the issues raised by using drug detection dogs as a factor in determining reasonable suspicion in section 6.2.1.

We were present when a teenage girl arrived at a correctional facility by herself, in the middle of a high visibility search operation being conducted by DCS and NSW Police. The girl was singled out by a correctional officer to be searched, simply because she looked apprehensive when she got out of her car.[188] While it may be appropriate for correctional

officers to take into account a person's behaviour or demeanour in determining suspicion about a possible offence, it may also be important for correctional officers to remember that visiting an inmate in a correctional facility can be a stressful experience for people, and that some visitors are likely to feel apprehensive, nervous or anxious on entry to a place of detention.

Such anxiety is likely to increase if a person entering the centre is met with ten or twenty correctional and police officers conducting a search operation, involving dogs. While we do not wish to diminish the discretion available to correctional officers in determining whether a search under the *Summary Offences Act* is warranted, we do believe that caution should be used before an officer relies on apparent nervousness or anxiety as the sole basis for suspecting that a person is committing an offence.

We agree that there are a number of factors that can indicate to correctional officers that a person may be acting unlawfully, or may threaten the good order and security of the place of detention. As such factors are likely to differ on a case-by-case basis, correctional officers should record details about what led them to suspect a person may have been acting unlawfully. This is important because if a person challenges the legality of a search, or defends a criminal charge in court, a magistrate or judge may have to determine (several months later) the reasonableness of a correctional officer's suspicion in relation to his or her decision to search the person.

During the review period it was not universal practice for correctional officers to write a report each time a person or vehicle was searched and no contraband items were found. While it may not be necessary for correctional officers to keep records about each time a person is scanned with a metal detector, or has their property screened by an x-ray machine, it would be appropriate for records to be kept about any physical searches conducted by correctional officers (those involving examination of a person, their property, or vehicle; and use of a dog).

Correctional officers currently use various forms of search sheets when conducting searches, to record details about people and vehicles that are searched. While the details currently recorded are limited, we feel that it would not be a difficult task for search sheets to be amended, and formatted in such a way as to remind officers of the need to record all relevant details when a person is stopped, searched and detained.

Where searches of people other than inmates are conducted because an officer reasonably suspects that an offence is being committed, it would be appropriate for records to clearly indicate the type of search conducted, and the factors that led to an officer suspecting the commission of an offence. In regard to the latter, it is not sufficient for an officer to simply note that a person or vehicle was 'acting suspiciously' as such a comment is unlikely to assist a court to determine the reasonableness of the suspicion. Instead, officers should record what they observed which led them to believe the person was acting suspiciously.

For example, an officer could state that a person had bloodshot eyes, was slurring her words, and was staggering, which led the officer to conclude that the person may be under the influence of an intoxicating substance. Similarly, rather than noting that an officer was in possession of 'intelligence' about a person, it is more useful for details about the nature of the intelligence to be recorded, for example *'The [intelligence] report stated that this vehicle and [visitor's name] may be involved in an attempt to introduce a firearm and machete into the [Name] complex.'*[189] Recording full details about an event is not only useful in terms of providing comprehensive information in the event of a court case, it is also good administrative practice, and beneficial for the collection of information for intelligence purposes.

Recommendation

7 It is recommended that the Department of Corrective Services amend its policies to specify that records are to be kept about all physical searches conducted by correctional officers (those involving examination of a person, their property, or vehicle; and use of a dog). At a minimum these policies should provide that records are to:

i) be kept regardless of whether any prohibited items are detected during the search

ii) clearly state the location of the search, including the approximate distance of the search from the boundary of the facility (if the search was conducted outside a place of detention)

iii) provide details about the factors which led to the officer suspecting the commission of an offence.

6.2.1. Use of dogs in establishing reasonable suspicion

DCS uses drug detection dogs as a tool to reduce the amount of drugs illegally entering correctional facilities. Dogs are used to detect drugs being carried by people entering centres, drugs that have been left on departmental property, and drugs in the possession of inmates at or returning to a place of detention.

DCS acknowledges that indications by a drug detection dog form the basis of most instances of reasonable suspicion invoking correctional officers' search powers under the *Summary Offences Act.*[190] We have become aware of a number of factors that may make this reliance on drug detection dogs problematic in terms of the existing legislative provisions.

Section 27H of the *Summary Offences Act* says:

> *(1) A correctional officer is authorised to use a dog to conduct any search under section 27F.*

We sought legal advice about:

> *Whether a correctional officer can use a drug detection dog under s27F of the Summary Offences Act before the officer has formed a reasonable suspicion that an offence has been committed under Part 4A of the Act.*[191]

In response, we were advised:

> *The dog may only be used under this provision where a search under s27F of the [Summary] Offences Act is being conducted. It follows that the conditions required for the exercise of the search power under s27F must exist before a dog can be used, if the authority under s27H is to be relied upon. The answer to [the above] question is therefore, No.*[192]

In other words, according to this legal advice, correctional officers are not authorised to use a drug detection dog under section 27H of the *Summary Offences Act* until they already have grounds to reasonably suspect that a person may be committing an offence. A dog cannot be used under this section in order to establish the grounds for suspicion.

Given the current legislative framework, this may not be important given that a correctional officer may require a person to be 'sniffed by a dog' as a condition of entry to the correctional facility under the *Crimes (Administration of Sentences) Regulation.*[193] However, it is not immediately clear whether a dog who sniffs a person in accordance with the regulation, and who indicates the scent of a drug, provides correctional officers with reasonable grounds to suspect that an offence has been committed. DCS clearly acts on the basis that an indication by a drug detection dog does give grounds for reasonable suspicion but this approach may be problematic.

In March 2005 we sought legal advice in relation to another one of our office's legislative reviews.[194] This related to our monitoring of the operation of the *Police Powers (Drug Detection Dogs) Act 2001.*

Like correctional officers, police also use drug detection dogs as a tool to detect illegal drugs. A police officer is authorised to stop, search and detain a person if the officer reasonably suspects that the person is in possession or control of any prohibited plant or prohibited drug. A police officer is also authorised to stop, search and detain a vehicle in which the officer reasonably suspects that there is any prohibited plant or drug, if the vehicle is in the possession or under the control of a person.[195] In addition, police officers are entitled to stop, search and detain any person reasonably suspected of having anything used or intended to be used in the commission of an indictable offence.[196]

Police officers currently use drug detection dogs as a tool to determine whether there are reasonable grounds on which to suspect that a person may be committing a drug related offence. We sought advice on the following issue:

> *In circumstances where a police officer is informed that a dog has 'indicated' a person, will this of itself provide a sufficient basis for the formation of a reasonable suspicion by the police officer that the person may possess a prohibited drug?*[197]

In response, we were advised:

> *In my view, the fact that in the course of general drug detection activities, the dog has 'indicated' a person is clearly a relevant factor in providing a basis for the formation of a reasonable suspicion. Of itself, and without any other fact being taken into account, it is not a sufficient factor to justify the formation of a reasonable suspicion.*[198]

Counsel arrived at this view because in approximately three-quarters of cases where a NSW Police drug detection dog indicated the scent of a prohibited drug, a search of the person did not result in police locating drugs.[199]

Given that DCS does not currently record information about the rate at which indications by a drug detection dog lead to the detection of drugs on a person searched as a result of the detection, it is likely to be even more difficult for the department to demonstrate how a positive indication by a drug detection dog creates sufficient grounds for an officer to reasonably suspect the commission of an offence because the reliability of the tool being utilised is not known.

What this means is that if prohibited items are detected during a search, and that search was conducted solely because an indication by a drug detection dog led a correctional officer to suspect that the person may be committing an offence, a court may decide to exclude the evidence of the offence (the prohibited items) on the basis that it was improperly or illegally obtained.[200] This would lead to the dismissal of charges relating to the introduction of prohibited items into the place of detention.

6.2.1.1. Comments

There are a number of strategies that DCS could consider to increase the likelihood that an indication by a dog would be found by a court to establish reasonable suspicion that an offence has been, or may be, committed. As recommended in section 7.4.3 (recommendation 18), we feel that DCS should begin recording much more detailed information about the training and performance of its dogs (both individually and collectively). If analysis of such recorded information demonstrates that people are found in possession of prohibited drugs in a high proportion of cases where a dog has made a positive indication to the scent of an illegal drug, a court is more likely to find that an indication by a drug detection dog is, on its own, sufficient for an officer to develop reasonable suspicion that an offence has been or may be committed.

There are other ways that correctional officers could strengthen the link between an indication by a drug detection dog and the formation, by a correctional officer, of reasonable suspicion of an offence being committed. For example, if a person was screened in a crowded area with a group of other people, officers could take the person aside for an individual drug detection screening by a dog (we have observed this approach being taken on a number of occasions). Alternatively (or additionally) officers could have the person screened by a second drug detection dog to verify the accuracy of the first indication. This approach is taken when drug detection dogs are used to screen staff of correctional facilities and authorised visitors (see section 11.3) and is unlikely to be onerous in most situations as dog handlers tend to work in teams, which means there is usually more than one dog present at each operation where drug detection dogs are being used.

In addition, it is likely that in many situations where a drug detection dog indicates the scent of a drug, that there are other factors present which could lead a correctional officer to suspect that the person may be committing an offence. For example, the person of interest:

- may be acting or behaving in an anxious, aggressive or otherwise unusual manner, or appear to be under the influence of drugs (slurring words, staggering, or have red eyes or dilated pupils)
- may be visiting an inmate who has a history of being detected with prohibited items
- may have previously been detected or suspected of introducing prohibited items into a correctional facility
- may be the subject of DCS intelligence reports in relation to other matters.

It is likely that some correctional officers involved in search operations, utilising drug detection dogs, currently undertake assessments of factors such as those outlined above, prior to conducting a targeted search of a person that may involve, for example, removal of a person's outer garments of clothing. However, as DCS currently does not record the reasons why a person is searched because they are suspected of committing an offence, the extent to which this occurs is not able to be determined. We reiterate that it is not only good practice for correctional officers to record the reasons that lead them to reasonably suspect that an offence has been, or may be committed, but that such information may be required to be provided to a court to enable a determination about whether or not a search was conducted lawfully and properly.

Given that we have been advised that an indication by a drug detection dog may not be sufficient for a correctional officer to form a reasonable suspicion that an offence has been committed, but that DCS has advised that officers commonly conduct targeted searches of people solely on the basis of an indication by a drug detection dog, it has been suggested that:

> *It would be open to the Parliament to pass legislation which had the effect of providing that where a dog gave an indication, there was an adequate basis for conducting a search of the individual who had been so indicated. This would remove the necessity for the formation by a[n] … officer of a reasonable suspicion prior to undertaking a search of a person.*[201]

If such a recommendation was adopted in relation to the police use of drug detection dogs, this would result in a fundamental shift away from the long established legal principle whereby police are required to form a reasonable suspicion before invoking their stop, search and detention powers in relation to individuals in public places.

However, it may be that such a recommendation is appropriate in the context of drug detection dogs used at correctional facilities. This is because correctional facilities are not public property, and are high security environments. People who enter correctional facilities are required to be subject to routine searches, and may be directed to leave the premises if their presence is considered to be a threat to the good order and security of the place of detention. In addition, the risks posed by items such as drugs in places of detention are generally higher than would be the case in the local community. Drugs are not only likely to be more highly sought in correctional environments, given that such a high proportion of inmates are drug users and/or have committed drug related offences; drug use and possession are directly related to the often unpredictable, unsafe and violent nature of correctional facilities (see section 3.1).

A number of issues would need to be considered before it would be appropriate for a decision to be made enabling an indication by a DCS drug detection dog, to the scent of an illegal drug, to provide sufficient cause for a search of a person to be undertaken, where such a search would usually require the formation by a correctional officer of reasonable suspicion of the commission of an offence. Some key issues that would need to be considered and addressed are outlined below.

- Given the complexity of the existing legislation concerning correctional officers' powers to stop, detain and search people, we are making a number of recommendations in this report that, if implemented, will result in the relevant provisions being simplified. For example, we are recommending that the practices and procedures in relation to routine and targeted searches be clearly delineated (see section 5.4.2, recommendation 6). Introducing a different basis (indication by a dog) on which correctional officers could rely to lawfully conduct certain searches may have the effect of undermining the simplification of the legislative provisions, and lead to confusion for stakeholders.
- Police who are called to a correctional facility to conduct a search of a person or vehicle are only legally entitled to conduct a search if the officer reasonably suspects that an offence has been committed. If a positive indication by a drug detection dog is not sufficient for the establishment of reasonable suspicion, it is questionable whether police who are called to conduct a search in response to a positive indication by a drug detection dog could lawfully search the person, unless there were other factors present that indicated the possible commission of an offence.
- While more stringent security procedures are justified in correctional facilities compared to public places, given their unique high security environments, it is important that any security measures that are implemented do not unduly infringe on the rights of people who attend correctional facilities. People entering places of detention usually have a lawful and proper purpose for doing so, and it would not be reasonable for such people to be subject to searches that are excessive or overly invasive. The legal concept of reasonable suspicion is commonly used as a yardstick by which the coercive powers of the state and the rights of individuals are balanced. Using a lesser standard to justify invasive searches would undoubtedly impact upon the civil liberties of those subject to such searches.

We are of the view that DCS should give further consideration to the role drug detection dogs have in the formulation, by correctional officers, of reasonable suspicion of the commission of an offence. This consideration should take into account the advice we have received which indicates that relying solely on an indication by a drug detection dog (where no records are kept about the performance or reliability of the dog's indications) is likely to be problematic.

It may be that improving record keeping about the use of dogs, and the factors which lead officers to reasonably suspect that an offence is being committed, as well as the development of policies in this area, may be sufficient to overcome this issue. Recording information about the performance of dogs may, for example, demonstrate that prohibited drugs are being detected in a majority of cases where dogs are indicating the scent of an illegal drug. At a minimum, completing comprehensive and accurate records will improve the accountability of correctional officers, and assist a court in determining whether an officer's suspicion on a particular occasion was reasonable in the circumstances. In addition, improved record keeping will enable DCS to have a better understanding about how the stop, detain and search powers are being utilised in practice, and the role dogs play in preventing the entry of prohibited items into correctional facilities.

We note that DCS may continue to hold the view that an indication by a drug detection dog should of itself be enough in every circumstance to justify a search of a person that goes beyond what is permitted in a routine search. If this is the case, the department may wish to consider the merits of recommending legislative change to specify that an indication by a drug detection dog, to the scent of an illegal drug, provides sufficient basis for a search of a person to be undertaken, where such a search would usually require the formation by a correctional officer of reasonable suspicion that an offence has been (or may be) committed.

However, it is our view that pursuing such an option before the department has comprehensive records about the accuracy and reliability of its drug detection dogs would be premature. We also note that, prior to seeking legislative change in this area it would be appropriate for DCS to take into account the issues raised in this report, as well as issues raised in our report on the operation of the *Police Powers (Drug Detection Dogs) Act 2001*. The latter (unpublished at the time of writing) relates to the use of drug detection dogs by police officers, and is likely to identify a number of issues that are relevant to the use of drug detection dogs in custodial environments.

Recommendation

8 It is recommended that the Department of Corrective Services review the role of indications by drug detection dogs in the formulation, by correctional officers, of reasonable suspicion of the commission of an offence.

Endnotes

[165] Section 45(2).
[166] *Prisons Act 1981* (WA), section 49(1).
[167] *Prisons Act 1981* (WA), section 52 (6).
[168] *Corrective Services Act 2000* (QLD), section 103.
[169] Email received from Operational Support and Special Projects, Department of Justice, Correctional Services, Northern Territory, 7 February 2005.
[170] *Summary Offences Act 1988*, section 27F(1).
[171] The Hon Michael Richardson MP, NSWPD, Legislative Assembly, 9 May 2002.
[172] Correspondence from the Hon Richard Amery MP, to the Hon Michael Richardson MP, 27 June 2002. Provided by DCS 15 April 2003.
[173] Observation record 17, June 2004.
[174] Interview record 16, October 2003.
[175] Interview record 17, November 2003.
[176] Interview record 31, July 2004.
[177] DCS Operations Procedures Manual, section 12.10.
[178] One of these governors advised us that officers at the centre had performed 120 such searches, but subsequently noted that these searches were conducted by the Security and Investigations Branch, and not locally based staff.
[179] For further information about provision of reports by the DCS Security and Investigations Branch, see methodology, section 2.7.2.
[180] See Lord Atkin in *Liversidge v Anderson* [1942] A C 206 at 225ff.
[181] *R v Rondo* [2001] NSWCCA 540.
[182] DCS Operations Procedure Manual, section 12.10.
[183] Submission 4, NSW Police, Local Area Commander, 19 April 2005.
[184] Submission 7, DCS Superintendent, 26 April 2005.
[185] Submission 9, NSW Police, Duty Officer, 17 April 2005.
[186] Submission 16, Youth Justice Coalition, 13 May 2005.
[187] Submission 13, DCS, 10 May 2005.
[188] Observation record 8, March 2004.
[189] S&I report number 39.
[190] Submission 13, DCS, 10 May 2005.
[191] Letter from Greg Andrews, Assistant Ombudsman to I. V. Knight, Crown Solicitor, 2 June 2004.
[192] Buscombe, M., Memorandum of advice re: stop, search and detention powers of correctional officers, 14 October 2004. Received from the Crown Solicitor's Office.
[193] Clause 93(1)(a).
[194] Letter from Simon Cohen, Assistant Ombudsman, to Peter Garling SC, 18 March 2005.
[195] *Drug Misuse and Trafficking Act 1985*, section 37(4).
[196] *Crimes Act 1900*, section 357E.
[197] Letter from Simon Cohen, Assistant Ombudsman, to Peter Garling SC, 18 March 2005.
[198] Garling, P.R, Memorandum of advice in the matter of the Police Powers (Drug Detection Dogs) Act 2001, 9 June 2005.
[199] During the twelve month period commencing 22 February 2002 police located drugs in 1,110 (27%) of the 4,078 searches conducted after drug dog indica
cannabis or b
kind of admission in relation to drugs (usually cannabis) was made. See NSW Ombudsman, Discussion Paper *Review of the Police Powers (Drug Detection Dogs) Act*, June 2004, pp. 15-16.
[200] *Evidence Act 1995*, section 138.
[201] Garling, P.R, Memorandum of advice in the matter of the Police Powers (Drug Detection Dogs) Act 2001, 9 June 2005. Note, this statement was made in relation to indications made by police drug detection dogs, and searches by police. However, it is equally applicable to DCS officers and dogs.

Chapter 7. Conduct of searches

The *Summary Offences Act* contains fairly specific provisions outlining the types of searches that correctional officers are able to conduct if a person is in or in the immediate vicinity of a place of detention and a correctional officer reasonably suspects that a person has committed, or may commit, an offence relating to a place of detention. During the review period we have become aware of a number of issues relating to the conduct of searches. These are discussed throughout this chapter.

Over five days in January and February 2005 we conducted short face-to-face interviews of 129 people visiting four metropolitan correctional centres to obtain information about people's experiences and perceptions about being searched when entering a correctional facility. To determine the most common types of searches people are being subject to we asked respondents whether, when on or near correctional property, they had been searched by correctional officers in a number of ways. Visitors' responses are summarised below in Table 5.

Table 5. Types of searches visitors' to correctional facilities have been subject to

Type of search **Responses to question:** '*When you have been on or near correctional centre property, have correctional officers ever [conducted this type of search]?'*	**Number (and percentage) of respondents who answered 'Yes'**	**Number (and percentage) of respondents who answered 'No'**
Scanned you with a metal detector	118 (91.47%)	11 (8.53%)
Scanned your property with an X-ray machine	58 (44.96%)	71 (55.04%)
Searched your locker	12 (9.30%)	117 (90.70%)
Asked or told you to empty your pockets	93 (72.09%)	36 (27.91%)
Searched your bag, wallet or other personal possessions	49 (37.98%)	80 62.02%)
Used a drug detection dog to screen you	109 (84.50%)	20 (15.50%)
Used a drug detection dog to screen your vehicle	24 (18.60%)	105 (81.40%)
Searched your vehicle	27 (20.93%)	102 (79.07%)
Asked or told you to open your mouth	25 (19.38%)	104 (80.62%)
Frisk searched you by running their hands over your clothing	15 (11.63%)	114 (88.37%)
Asked or told you to remove items of clothing	27 (20.93%)	102 (79.07%)

Source: NSW Ombudsman, survey of visitors to correctional centres, Jan-Feb 2005. Responses to question 'When you have been on or near correctional centre property, have correctional officers ever [conducted this type of search]?

We asked the 27 people who informed us that they had been asked or directed to remove items of clothing, which items of clothing they had been asked or directed to remove. Eight people told us that they were asked to remove a jacket, and eight people told us that they were asked to remove a belt. Four people advised they have been strip searched by correctional officers, and two Muslim women advised that they had been asked to remove a head scarf. Other items we were advised people were asked to remove were shoes, a cap, coat, a hair ribbon, jewellery, and a bandana.

Two people advised us that they had been searched in ways other than those listed above. One commented that officers had asked him to hold his socks out from the ankle, so his ankles could be examined. The other was told to lift up his pants to expose his ankles, and put his hands around the waist band of his pants.

7.1. Sex of searching officers

Section 27G(4) of the *Summary Offences Act* stipulates that where practicable, a search is to be conducted by a correctional officer of the same sex as the person being searched, or by a non-correctional member of staff who is of the same sex as the person being searched. Searches by non-correctional members of staff are to be conducted under the direction of a correctional officer.

It is an anomaly with the current legislative framework that the *Summary Offences Act* requires, where practicable, searches to be conducted by an officer of the same sex as the person being searched but that searches conducted under the *Crimes (Administration of Sentences) Regulation* do not have to be conducted by same-sex officers. This is despite the fact that most searching procedures under the two pieces of legislation are the same.

In our discussion paper we noted that in practice, female visitors are regularly searched by male correctional officers, and male visitors are sometimes searched by female correctional officers. In relation to this, we commented:

> *There are significantly more male correctional officers than female officers which may in part explain this.*[202] *However, even when both male and female officers are on duty when visitor searches are being conducted, from our observations it is not usual practice for female officers to concentrate on searching females and male officers to concentrate on searching males. Gender issues generally do not appear to be considered at all, with searches usually conducted by the nearest available officer, or an officer specifically assigned to conducting searches.*
>
> *Despite the fact that correctional officers are not complying with the legislative requirements in regard to same-sex searching we have not witnessed anyone complaining about being searched by an officer of the opposite sex. This could be for a number of reasons, including that people visiting correctional centres:*
>
> - *have no objection to being searched by an officer of the opposite sex given that the searches do not involve the officer touching the person, or the person being required to remove clothing other than outer garments*
> - *may not be aware of the provisions*
> - *are not willing to challenge correctional officers when searches are conducted in a way that do not comply with legislative requirements.*
>
> *It is possible that people's views on this issue may differ according to variables such as age, ethnicity, or background.*[203]

In our discussion paper we asked stakeholders whether it is reasonable for correctional officers to search people of the opposite sex. A senior DCS officer commented:

> *Given that any search conducted does not involve physical contact with the person being searched, it would not appear to be unreasonable for a correctional officer of the opposite sex to conduct a search.*[204]

The Community Relations Commission said:

> *It is the Commission's view that searches, particularly those requiring officers to touch a person, should be carried out with sensitivity to the person's cultural and religious background, and their gender. …*
>
> *Some members of the community, such as Muslim women, would find it inappropriate to be touched by a correctional officer of the opposite gender.*[205]

DCS made the following comments.

> *Section 27G(4) of the Summary Offences Act 1988 … could reasonably be amended to differentiate between an "invasive" search and a basic, "non-invasive" search for the requirement of the searcher being the same sex as the person being searched.*
>
> *It is unrealistic to require same-sex searching for basic searches such as electronic scanning (both hand-held and walk-thru) or emptying pockets. People are subject to such searches in a range of situations, including boarding an airplane and attending courts and major sporting events; and there is no gender-specific requirement for any such searches nor any demand for it.*
>
> *Gender-specific supervision of the removal of outer garments (such as "any hat, gloves, coat, jacket or shoes") and the requirement to empty the content of any bags or other things could be a matter of discretion depending on the circumstances, with a presumption in favour of gender-specificity unless the person to be searched waived it voluntarily (and preferably without being asked). Gender-specificity (and privacy through physical separation from the view of other visitors and staff) would clearly be required if the clothing item to be removed*

was culturally significant (such as a religious headdress), or if the person required to remove the outer garments indicated that they were uncomfortable doing so in the presence of a person of the opposite sex – however, staffing arrangements at some smaller correctional centres could mean that gender-specificity might not always be possible.[206]

Each of the above comments states or implies that the requirement for same-sex searching is more important for some types of searches than for others.

As outlined in section 5.4.2 (recommendation 6) we feel that the existing legislative provisions about searches of people other than inmates, and vehicles, by correctional officers, should be consolidated into a single piece of legislation. For the sake of simplicity and to ensure searches are conducted in a consistent manner, it would be useful if the consolidated provisions specify the type of searches that should be conducted by an officer of the same sex as the person being searched, and the type of searches where this requirement does not apply.

7.1.1. Searching of personal possessions

We agree with DCS that people in a range of situations may be scanned by an electronic device, and asked to remove items from their pockets by a person who is of a different gender. In addition, it is not uncommon for people at airports, courts, sporting or entertainment venues and shops to have their bags or possessions emptied or examined by a person of the opposite sex.

Given that correctional facilities are high security environments, with a high male-female staff ratio, it does not seem unreasonable that scanning searches, and searches of personal possessions (including vehicles) be conducted by either male or female correctional officers, as is current practice. However, it should be noted that some people are clearly uncomfortable having their personal possessions searched by a member of the opposite sex, and on occasions where a person indicates this to be the case, correctional officers should, where possible, ease the person's anxiety by having the search conducted by an officer of the same sex as the person. A provision, to this effect, could be inserted into the DCS Operations Procedure Manual.

7.1.2. Removal of clothes during searches

The *Summary Offences Act* says that, when searching a person in or near a correctional facility, a correctional officer is permitted to direct a person to remove any hat, gloves, coat, jacket or shoes worn by the person.[207] Correctional officers must not direct a person to remove any other items of clothing being worn by the person,[208] and are not to search a person by running their hands over a person's clothing.[209]

Asking a person to remove clothes for the purposes of a search may be much more invasive than searching a person's possessions. While some people have no hesitation in removing, for example, a jacket or gloves in front of a person of the opposite sex, others feel embarrassed, uncomfortable or offended removing even outer garments of clothing in public. This may particularly be the case for people who wear certain types of clothing because of religious or cultural beliefs, especially if the religion or culture has codes governing when and how the clothing should be removed, and these codes differ from standard searching procedures.

Given that clothing can be used to conceal contraband being trafficked into a correctional facility, it is reasonable that officers may wish to search items of a person's clothing if they believe it is being used to secrete a prohibited item. However, because such searches can cause embarrassment or offence, we feel that it is appropriate that searches requiring the removal of clothing by a person, should usually be conducted by an officer of the same sex as the person directed to remove the clothing.

Our preliminary view was that all searches involving the removal of a person's clothing should be conducted by an officer of the same sex as the person being searched. This is because in most circumstances we feel that attempting to preserve the dignity and respect of people attending correctional facilities outweighs the inconvenience that may be caused by attempts to locate, for example, a female correctional officer to conduct a search of a female visitor. DCS, however, has submitted that searches involving the removal of a person's outer garments of clothing should be conducted by an officer of the same sex as the person being searched 'where practicable'. The department noted that this is consistent with current legislative provisions contained in section 27G(4) of the *Summary Offences Act.*[210]

We note that there is an imbalance between male and female correctional officers working at correctional facilities, and that at centres where this discrepancy is significant there are likely to be occasions where it is difficult to obtain the assistance of, for example, a female officer to conduct a search of a female's outer garments of clothing. On occasions where it is clearly not practicable to obtain the assistance of an officer of the same sex as the person being searched it may be reasonable in some circumstances for an officer to conduct a search of the outer garments of a person of the opposite sex. However, it is important to acknowledge that some people may not be comfortable with this approach. As pointed out by the Youth Justice Coalition:

Any lack of complaint by visitors who are searched by officers of the opposite [sex] may be explained by the [visitor's]:

- *lack of knowledge as to their rights*
- *a power imbalance between the officers and those searched*
- *an unwillingness to challenge an officer who may refuse a visit*
- *vulnerability through age or mental disability*
- *vulnerability through refugee experience (persons who have experienced torture at the hands of persons in authority find it traumatic to visit families in prison, and additionally traumatic if it is deemed necessary that they be searched. These persons find it very difficult to make their complaints known to persons seen to be in authority within the system).*
- *language difficulties, especially for visitors from non-English speaking backgrounds*
- *cultural reasons (eg women of certain cultural backgrounds may be unwilling/unable to challenge a male authority figure).*[211]

To overcome these issues DCS has suggested:

The Department could amend its procedures to require the officer to inform the visitor that (s)he has the right to a same-sex officer to conduct the search but one is not available; and that the alternatives open to the visitor are to permit the officer to conduct the search or be offered a non-contact visit.[212]

We feel that such a suggestion is sensible, but note that it will only prove to be an effective safeguard to people's rights if correctional officers actually provide this information and these options to people attending correctional facilities, when, for example, a female correctional officer is not reasonably available. We note that since February 2002 the legislation has required that searches of people which involve the removal of outer garments of clothing, among other types of searches, should be conducted by officers of the same sex as the person being searched 'where practicable'[213] but that our observations indicate this rarely occurs in practice (see section 7.1 above).

Searches conducted by officers of the opposite sex should be the exception rather than the rule, and the 'where practicable' caveat should not be used as an easy way to avoid the primary obligation. To this end we feel that it is appropriate for the Operations Procedure Manual to be amended in the terms suggested by DCS. However, in order to be effective, officers must also receive comprehensive training to ensure that the usual practice for searches involving the removal of items of clothing involves the search being conducted by an officer of the same sex as the person being searched. In addition, as outlined below, we feel that it would be appropriate for additional guidelines to apply to searches involving the removal of clothing that is worn for cultural or religious reasons.

7.1.2.1. Searches of clothing worn for religious or cultural reasons

People who belong to certain cultures, or subscribe to certain faiths, may wear specific types of clothing in order to identify that they have particular beliefs, or belong to a particular social group. For example,

Both [Muslim] men and women are expected to dress in a way that is simple, modest and dignified. … Women were asked to cover themselves during the foundation period of Islam, not to restrict their liberty, but to protect them from harm. Covering the face is not and has never been universal in the Muslim world.[215]

*

A male Sikh must start wearing a turban as soon as he is able to tie it.[216]

Similarly some cultures or religions prescribe that the removal or touching of certain items of clothing is only appropriate in certain circumstances. As a result of this, the Australasian Police Multicultural Advisory Bureau has developed a resource for police officers and emergency services personnel to educate officers about religious diversity, and culturally sensitive provision of services. This provides, for example:

[Muslim] women are permitted to remove their face covering, but should not remove the veil which covers their hair and body.[217]

*

It is an offence to touch the turban of a Sikh without asking his permission.[218]

We note that a correctional officer who suspects that a person may be concealing a prohibited item within an item of clothing that has cultural or religious significance, may be justified in wishing to conduct a search of that item to ensure the maintenance of the good order and security of a place of detention. However, in order for any such search to comply with the *Summary Offences Act*, a correctional officer:

> *Must conduct the search with due regard to dignity and self-respect and in as seemly a manner as is consistent with the conduct of an effective search.*[219]

It is arguable that searches conducted at correctional facilities often do not comply with this provision. This is because correctional officers usually do not take the religious or cultural background of a person into account when conducting searches. For example, male correctional officers have advised us that they sometimes conduct searches of headscarves worn by Muslim women in view of staff and other visitors.[220] This is despite the Community Relations Commission recommending:

> *That searching headscarves worn by a woman for religious purposes be undertaken by a female officer and that provisions be made to conduct the search out of view of male staff or visitors.*[221]

Another submission we received states:

> *Due to the private nature of the head dress, officers should be prohibited from handling the head dress itself.*
>
> *Additionally, provision needs to be made for Muslim men and women who may be reluctant to remove their shoes in the presence of a member of the opposite sex (to whom they are not related). Jewish and Muslim men do not remove hats. …*
>
> *Accordingly, removal of shoes and hats should only be required if the person is permitted to do so only in the presence of members of the same sex.*[222]

Factors that are likely to contribute to the fact that some searches are not being conducted in a culturally sensitive manner are:

- some correctional officers lack knowledge and understanding of different cultures, religions and beliefs
- maintaining the security of the centre may be considered more important than respecting a visitor's right to dignity and self-respect
- taking people to a private place to be searched may be considered to be time consuming or resource intensive
- DCS has no state-wide policy concerning searches of items of cultural significance.

DCS has advised that the department's Multiculturalism Coordinator is developing guidelines concerning searches of clothing and items of cultural or religious significance.

> *The guidelines will reflect that removal of a headdress is a last resort; and the person wearing the headdress is to be offered the opportunity to say why they do not want to remove the headdress. The searching officer should then only insist on removal (by the person) and searching if reasonable grounds for suspicion still exist.*[223]

We feel that in developing guidelines about the searches of clothing and items of cultural significance DCS should consult with the NSW Community Relations Commission and ethnic communities who are likely to be affected by the guidelines.

7.1.3. Searches conducted by non-correctional officers

Section 27G(4) of the *Summary Offences Act* says that a search of a person conducted under section 27F of the Act must, if practicable, be conducted by a correctional officer of the same sex as the person being searched, or by a person of the same sex (being a non-correctional member of staff) under the direction of the correctional officer concerned. As mentioned above in section 7.1.2 we feel that it is only important for an officer to be of the same sex as the person being searched when the search involves the removal of clothing.

Notwithstanding our views about this matter, the current legislative provisions require searches under section 27F of the *Summary Offences Act* to be conducted by a person of the same sex as the person being searched unless this is for some reason, not practicable. If a female visitor is suspected of committing an offence relating to a place of detention, and there is not a female correctional officer available to conduct a search of the person, this means a male correctional officer should contact a female non-correctional officer to conduct the search under his direction.

Despite this provision, through the course of our review we have not been made aware of a single instance where a non-correctional officer has been asked to conduct a search of a person entering a correctional facility. As noted in our discussion paper:

One possible reason why non-correctional members of staff are not being used to search visitors is that these members of staff are often not on duty when visits to inmates are most likely to occur, that is, on weekends and public holidays. Another possible reason is the fact that it appears there has been no training by DCS of non-correctional members of staff about how to conduct searches. When we contacted the Offender Services and Programs Manager at six correctional centres, four had never heard of the provisions about non-correctional members of staff searching people, and two had only vague recollections about the provisions. None of the six managers had received, or was aware of, any training for non-correctional members of staff about searching people or supervising searches.[224]

In our experience, however, correctional officers simply do not seek the assistance of non-correctional members of staff when searches are being conducted, and it is likely that this is the primary reason they are not being utilised.[225]

In our discussion paper we asked '*[w]hat issues arise from the possibility of having non-correctional members of staff conducting searches of people visiting correctional centres?'*[226] We received a range of submissions about this issue, and overwhelmingly these submissions were critical of the use of non-correctional officers to conduct searches. An inmate, for example, commented that non-correctional officers, such as teachers and welfare workers, are usually trusted within the correctional environment because they are not engaged in custodial duties. He felt that using non-correctional staff to conduct searches would cause inmates to be suspicious of, and resentful towards them.[227]

Others commented that unless non-correctional officers have adequate training and experience in conducting searches, they may breach legislative provisions concerning searching, injure someone being searched, or sustain an injury themselves (for example, a needle stick injury).[228]

DCS is of the view that the provision about using non-correctional officers to conduct searches *'was only inserted in relation to children and mentally incapacitated persons, and that the Act should be amended to clarify this issue.'*[229] While we note that there is a separate provision in the legislation requiring non-correctional members of staff to *observe* searches of children and mentally incapacitated people in limited circumstances, [230] the question remains whether it is an appropriate safeguard for non-correctional staff to *conduct* such searches – even if they are conducted under the direction of a correctional officer.

We feel that, on balance, non-correctional members of staff should not be involved in the searching of visitors to correctional facilities. We have arrived at this conclusion because most non-correctional members of staff usually do not work on weekends when most visits take place. In addition, as discussed above in section 7.1.2 we feel that the legislation should prescribe that only searches requiring people to remove items of clothing need to be conducted by correctional officers of the same sex as the person being searched.

In circumstances where correctional officers wish to have a person remove items of clothing so they can be searched, and a correctional officer who is the same sex as the person is unable to be located, correctional officers are able to request that police officers (who are appropriately trained in searching techniques) attend the centre to conduct a search. Alternatively, the person may be offered a non-contact visit: options which are likely to ensure any contraband that may be concealed on the person will not be provided to an inmate.

Recommendations

9 It is recommended that NSW Parliament consider amending section 27G(4) of the *Summary Offences Act* to:

- **i) provide that only searches involving the removal of a person's clothes are to be conducted by a correctional officer of the same sex as the person being searched, where practicable**
- **ii) remove the provision that provides for searches to be conducted by non-correctional members of staff.**

10 It is recommended that the Department of Corrective Services:

- **i) amend its procedures to specify that when a correctional officer wishes to require a person visiting an inmate to remove items of clothing during a search, and an officer of the same-sex as the person being searched is not available, that the officer inform the person that he or she has the right to a same-sex officer to conduct the search but that one is not available, and the alternatives open to the person are to permit the officer to conduct the search or to accept a non-contact visit with the inmate**

ii) proceed with developing guidelines concerning searches of clothing and items of cultural or religious significance. These guidelines should be developed in consultation with the NSW Community Relations Commission and ethnic communities who are likely to be affected by the guidelines.

7.1.4. Strip searching

Correctional officers in NSW are not permitted to strip search people other than inmates. If a correctional officer suspects that a person may be concealing a contraband item, and that contraband will only be revealed by the removal of clothing other than outer garments, our observations indicate that on most occasions the police will be called and requested to conduct a strip search of the person.[231] If the police are unable to attend the centre the person will usually be denied access to the centre and asked to leave the premises.

During the course of our review, some correctional officers have advised us that they would like to have the power to strip search visitors to correctional facilities. This is because:

- *police are sometimes not available to attend a correctional facility to conduct the strip search, or take several hours to arrive*
- *correctional officers are required to supervise the person being detained until the police arrive which ties up resources*
- *if correctional officers could conduct a strip search immediately there would be less opportunity for the person to consume, move or discard any contraband that is on their person or property.*[232]

As in NSW, correctional officers in Queensland, South Australia and the ACT are not authorised to conduct strip searches on people other than inmates. Such searches can, however, be conducted in the Northern Territory,[233] Victoria, Western Australia, and in Tasmania in limited circumstances.

Most jurisdictions provide safeguards that apply when strip searches are conducted. For example, in Victoria, clause 63 the *Corrections Regulation* (Vic) states:

> *(6) A prison officer in conducting a search that requires the removal of all or most of a person's clothing must –*
>
> *(a) ensure that the person is not searched by a person of the opposite sex, except where such a search is urgently required and a person of the same sex as the person to be searched is unavailable to conduct the search; and*
>
> *(b) where consistent with the proper management and security of the prison, ensure that the person is not searched in the sight of any person other than –*
>
> *(i.) the prison officer or prison officers carrying out the search; and*
>
> *(ii.) a person requested to be present … by the person being searched.*

In Western Australia, correctional officers are permitted to conduct searches where the person is required to undress and be searched visually and by hand. Body orifices can also be examined.[234] Where a search is conducted that requires the removal of clothes a number of safeguards apply, including:

- the person who is about to be searched may request that someone of the same sex (not being a prisoner) who is then at the prison be present during the search[235]
- the superintendent may request the presence of a medical officer
- the search shall be conducted in the presence of not more than two officers, unless the superintendent orders otherwise in the interests of security
- the search shall not be conducted by and in the presence or within sight of any person who is not of the same sex as the person being searched
- the search shall be conducted expeditiously, with regard to decency and self-respect
- records should be kept about the person searched, the nature of the search and any articles seized.[236]

The Tasmanian Prison Service has advised us that, in Tasmania, written consent must be obtained before a strip search can be conducted, and consent may be withdrawn at any time.[237] In addition, strip searches of female visitors must be conducted by female officers, in the presence only of females.[238]

In our discussion paper we asked stakeholders *'Are there circumstances under which correctional officers should be permitted to strip search people other than inmates? If yes, what procedures and/or safeguards should govern such searches?'*[239] The responses we received in favour of allowing correctional officers to conduct strip searches primarily came from senior police officers. Four police officers made submissions on this issue, with:

- two commenting that reasonable suspicion should be present for correctional officers to conduct such a search[240]
- two commenting that such searches should be governed by suitable guidelines, such as those governing strip searches by police[241]
- one commenting that such searches should only be conducted in the presence of a senior correctional officer or medical staff such as a doctor or nurse.[242]

A senior correctional officer said:

> *I am not sure of what circumstances but any strip searching should involve the same provisions as imposed on NSW Police – same sex officer; must have reasonable suspicion; conducted in a private area; no touching etc. In my view, it would be better simply to turn the visitor away.*[243]

DCS was emphatic that:

> *There are no circumstances under which correctional officers should be permitted to strip search people other than inmates. Even if the strip search involves the search of a child's nappy (which is a favoured hiding place for contraband), the police should conduct the search.*[244]

Similarly, the Youth Justice Coalition submitted:

> *Under no circumstances should strip searches by correctional officers on non-inmates be permitted. Strip searches are highly invasive and visitor's rights should be protected. The police already have the power to conduct strip searches under specified conditions. The provisions allow correctional staff to call upon the police to conduct such searches.*
>
> *… Inconvenience, which lies behind much of the reasons for the correctional officers' desire of this power, is not reason enough for such a violation of civil rights.*[245]

We agree that the reasons provided by some correctional officers as to why they should be permitted to conduct strip searches relate primarily to expedience and convenience. It is also possible that police officers would like correctional officers to take over the function of strip searching people, other than inmates, at correctional facilities because they feel their time could be better spent on higher priority or more interesting policing duties.

In short, we have not been provided with any information or evidence to suggest that allowing correctional officers to conduct strip searches of people attending a correctional facility would significantly increase the security of a correctional facility. Such evidence should be necessary before serious consideration is given to providing officers with this new and significantly invasive search power. On this basis, we recommend the existing legislative framework regarding removal of clothing during searches be maintained, and we support the existing DCS order that states:

> *Correctional officers are reminded that they have no lawful authority to strip-search visitors to a correctional centre. Correctional officers may act as observers if requested by police, but under no circumstances are they to participate regardless of whether or not the visitor consents to the strip-search.*[246]

7.2. Searching of children and vulnerable persons

The *Summary Offences Act* specifies that searches of children (people under 18 years) and people who are mentally incapacitated must be conducted in the presence of an adult who accompanied the child or mentally incapacitated person, or a search observation member of staff.[247]

The *Summary Offences Regulation 2000* was amended in February 2003 to include the following definition of search observation staff members:

> *The following persons are prescribed for the purposes of the definition of* search observation staff member *in section 27A of the Act:*
>
> *(a) if available at the place of detention or its immediate vicinity where the relevant search is to be conducted—a welfare officer, psychologist, clerk or alcohol and other drug worker (being a person who is a non-correctional member of staff),*
>
> *(b) if a person referred to in paragraph (a) is not so available—any other non-correctional member of staff.*[248]

The vast majority of children who enter correctional facilities do so in the company of an adult. The DCS Operations Procedure Manual provides:

> *Where any doubt exists as to the age of the visitor or the person is known to be under eighteen years of age, s/he may be permitted to visit an inmate only under the following circumstances:*
>
> - *the juvenile must be accompanied by an acceptable adult over the age of eighteen years, or a guardian; or*
> - *if not accompanied by an adult, s/he should produce written evidence of a direct relationship with the inmate e.g. birth certificate, marriage certificate (if married to inmate), adoption documents, or a statutory declaration confirming the relationship.*[249]

We observed 13 operations conducted by correctional officers to search visitors to correctional facilities (several of these involved officers from NSW Police). During these operations it is usual practice for people entering the centre to be directed to line up side-by-side for the purpose of being screened by a drug detection dog. After the screening, those people on whom the dog indicated the scent of an illegal drug are taken aside by officers and are subject to a search of their property and/or person. Sometimes officers also randomly select a number of people to have their property and/or person searched.

Our observations indicate that unless a drug detection dog indicates the scent of an illegal drug on a child, or officers have some other reason to suspect the child (or the adult accompanying the child) is behaving unlawfully, children are not usually selected to have their property searched. In all instances where we observed a person who was clearly under 18 years old being asked by correctional officers to remove outer garments, or to empty their pockets or bags, an adult accompanying the child was present.

While adults usually remain within a metre or two of children accompanying them, occasionally we have seen a child's possessions being searched at the same time as the adult's possessions. This makes it difficult for the adult to watch both searches. To overcome this issue, we feel that DCS should amend its policies to provide, firstly, that when correctional officers wish to conduct a search of a child, the accompanying adult should be requested to observe the search of the child, including a search of the child's property. Secondly, correctional officers should not conduct searches of a child, and an adult who accompanied the child, simultaneously.

It is also a legislative requirement that mentally incapacitated persons who visit a place of detention are to be searched in the presence of an adult who accompanied them or a search observation member of staff. The *Summary Offences Act* defines a mentally incapacitated person as *'a person who is incapable of managing his or her affairs.'*[250] As far as we are aware, we have never observed the search of a person who is 'mentally incapacitated'. In saying this, we note that the definition of mentally incapacitated is problematic in that it is very difficult to determine whether a person fits this description or not. A person is not necessarily 'incapable' simply because he or she has, for example, an intellectual disability, a brain injury or a mental illness.

We have never observed, or been made aware of, any instances where a child, or a mentally incapacitated person has attended a correctional facility without an accompanying adult, and been searched in the presence of a non-correctional member of staff.

In August 2004 we contacted the Offender Services and Programs Manager at six correctional centres to determine whether they were aware that they could be called upon to observe searches of people entering correctional centres. Five of the six were unaware of these provisions, and none had received any training or information in relation to observing searches. The Offender Services and Programs Manager at one regional correctional centre noted that while he is not, in principle, concerned with non-correctional members of staff observing searches, in order for this to be effective staff would need to know why they were observing the search, and what the correct searching procedures are.[251]

In our discussion paper we asked stakeholders whether the provisions concerning searches of children and mentally incapacitated persons are appropriate, and whether there are alternative or additional procedures that should be followed when these, or other vulnerable people, visiting a centre are searched.[252] Most stakeholders advised that they feel the current guidelines and safeguards are appropriate. However, as the following excerpts from submissions demonstrate, stakeholders commented on the difficulty of identifying mentally incapacitated persons, and emphasised the importance of observers being well briefed and trained.

> *There may be difficulties identifying a person who has an intellectual disability and assessing their level of "mental incapacity" by a correctional officer. This may result in an inappropriate search procedure being adopted.*
>
> *Where the individual has been appropriately identified the provision made in the Act is appropriate for a mentally incapacitated person.*[253]

*

The use of the term mentally incapacitated persons is not appropriate. Other legislation dealing with police powers of search/arrest speak of 'vulnerable persons' including children and those with an 'intellectual disability/ 'impaired intellect functioning'. The term 'mentally incapacitated' should be replaced with 'mentally/intellectually disabled'. It is no excuse to suggest that potential embarrassment to the visitor or the searching officer asking whether someone is mentally disabled should prohibit safeguards being given to these vulnerable people.[254]

*

I believe the existing guidelines are appropriate and where possible the parent or carer should be present during the search. If this is not possible then an independent person, not being a corrective services officer, who has received appropriate training in this regard, should be present.[255]

7.2.1. Vulnerable persons

As it is likely to be difficult for a correctional officer to identify a person who falls within the definition of a mentally incapacitated person it may be more appropriate for the legislation to state that an adult or non-correctional member of staff should be present to observe searches of people with 'impaired intellectual functioning'.

The *Crimes (Detention after Arrest) Regulation 1998* defines impaired intellectual functioning to mean:

(a) total or partial loss of a person's mental functions, or

(b) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or

(c) a disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgement, or that results in disturbed behaviour.[256]

NSW Police has developed guidelines to assist police in identifying people with impaired intellectual functioning. These guidelines (relevant excerpt attached at Appendix 5) provide that a person is likely to have impaired intellectual functioning if they have an intellectual disability, mental illness, acquired brain injury, dual diagnosis, or learning difficulties. The guidelines provide explanations of these concepts and outline a number of indicators that can be used to help an officer determine whether someone has impaired intellectual functioning. These indicators include where the person:

- has difficulty understanding questions and instructions
- responds inappropriately or inconsistently to questions
- has a short attention span
- identifies themselves (or a third party such as a carer identifies the person) as someone with impaired intellectual functioning
- is acting in a way that is appropriate to a much younger age group, than the person's age
- displays problems with memory or concentration.[257]

To assist correctional officers accurately identify intellectually impaired persons, DCS could include similar guidelines in its Operations Procedures Manual.

While we feel that it is essential that a third party observe searches of children and people with impaired intellectual functioning, it may also be appropriate for a similar safeguard to apply to searches of other vulnerable people such as visitors with impaired physical functioning, or who through lack of English skills may have difficulty following instructions and understanding the scope of the search. There is, however, practical difficulty in more broadly defining vulnerable people given the need for correctional officers to understand and consistently apply searching procedures.

In this regard, DCS should ensure that officers who deal with members of the public are adequately trained in general customer service skills and understand their obligation to act respectfully and courteously to all those they deal with. In some instances, quality customer service will require officers to provide greater information, assistance or protection to those who appear for one reason or another, to be vulnerable.[258] Searching officers should therefore be encouraged to use their discretion to have third party observers present when conducting searches of other persons they consider display particular vulnerabilities.

Recommendation

11 It is recommended that NSW Parliament consider removing the term 'mentally incapacitated person' from section 27G of the *Summary Offences Act*, and replacing it with the term 'person with impaired intellectual functioning'.

12 It is recommended that the Department of Corrective Services amend its policies to specify that when correctional officers wish to conduct a search of a child or a person with impaired intellectual functioning, (or the property of such a person):

i) an adult accompanying the person or a search observation member of staff should be requested to observe the search

ii) the search should not be conducted at the same time as a search of the accompanying adult (or the adult's property).

13 It is recommended that the Department of Corrective Services review its policies and training materials to ensure that correctional officers understand their obligation to provide quality customer service to members of the public, and have discretion to request a third party observe searches of people considered for some reason to be vulnerable.

7.2.2. Identification and training of search observation members of staff

As raised by stakeholders, it is important for non-correctional members of staff to have appropriate knowledge and training about searching procedures, so they can determine whether a search is being conducted appropriately.

The DCS submission states that only certain senior DCS officers are able to appoint a non-correctional member of staff to act as a search observation member of staff. Further:

> *The primary role of the Non Custodial Staff Member is to ensure the searching officer conducts the search appropriately. Officers nominated to perform this role need to be aware of the legislation and the operational requirements outlined in [the Operations Procedures Manual]. …*
>
> *On completion of the search process the Non Custodial Staff Member is required to enter his/her comments in the Search Register. Information required should include that they observed the search, the reasons for their presence and a comment on how the search was conducted i.e. that the search was/was not conducted lawfully and appropriately.*

DCS concluded:

> *It can therefore be seen that even if a non-correctional staff member is called upon to assist with a search of a child or mentally incapacitated person, and the staff member is untrained in search procedures, the Department's policy manual (available to all staff on the Department's intranet) provides guidance.*[259]

It appears from this information, that if correctional officers wished to search a child or a person they identified as mentally incapacitated, because of suspicion that the person was acting illegally, a senior officer (such as the officer-in-charge of the operation) would appoint a non-correctional member of staff to observe the search of the person. We note that DCS says the non-correctional member of staff could, if untrained, examine the relevant legislation and operational policies prior to observing the search, in order to learn the correct search procedures and understand their role as an observer.

In practice, if a senior correctional officer sought a non-correctional member of staff to assist with a search procedure, it is unlikely the non-correctional member of staff would take the time, prior to the search, to find and examine the relevant legislative procedures, or even be aware that they were supposed to do this. This means there would be a high probability that the non-correctional member of staff would observe the search, not knowing whether it was being conducted in compliance with relevant legislation and policies.

For this reason, our preliminary view was that rather than selecting staff on an ad hoc basis to observe searches, DCS should consider nominating certain staff members, or staff in particular roles to take on the duty of search observation member of staff. We felt that such staff should regularly be available on weekends (when most visits occur) and should be appropriately trained. In response to this suggestion, DCS advised:

The Department does not support this recommendation, having concerns with the resource implications the recommendation has and the fact that, to date, no instances have occurred requiring a search observation staff member. Most non-custodial staff are not … available on weekends, when most visits occur. Staff turnover and leave issues would undermine any attempt to nominate individuals to perform the role.

Nevertheless, the Department will do all it can to ensure that search observation staff members can be appointed with confidence when required. The Department's integrated induction program can be updated to provide an overview role and function of a search observation staff member; and this overview can also be maintained, as a 1-page instruction, at the administrative centre of all correctional centres and provided to all security operations units.[260]

The comments raised by DCS appear to be reasonable and, if implemented, the department's proposals will help to ensure that the safeguard requiring a search observation member of staff to be present during certain searches is meaningful. In addition, we feel that it would be useful for DCS policies to provide that the correctional officer who is seeking a search observation member of staff is responsible for ensuring that the relevant non-correctional officer has received the appropriate information and is adequately briefed about performing the search observation function.

Recommendation

14 It is recommended that the Department of Corrective Services:

i) include training about the role of search observation staff members as part of the department's integrated induction program

ii) produce an instruction sheet about the role of search observation staff members to be kept in the administrative or reception centre at each correctional facility, and by correctional officers involved in search operations

iii) amend its policies to provide that a correctional officer who seeks a non-correctional officer to act as a search observation staff member is responsible for ensuring the non-correctional officer has received information about, and understands what is required for the effective performance of this function.

7.3. Searches based on consent

Throughout the course of the review we have been made aware of a number of searches of people that involve the person being asked or directed to do something which is not specifically provided for in the legislation. For example, people have been requested or directed to:

- open their mouth for inspection[261]
- lift up a shirt and expose the waistband of their trousers[262]
- lift up the legs of jeans or trousers to expose their calves[263]
- remove a belt for inspection.[264]

When people comply with such a request or direction, they are considered to be consenting to the search.

Some stakeholders believe that it is reasonable for correctional officers to conduct searches outside the scope of the legislative provisions, on the basis that the person is consenting to the search. For example, one senior police officer advised us:

I believe that it is appropriate for Corrective Services staff to ask people to consent to searching outside the guidelines of Section 27G as has been described. Such search should have regard to visitor's dignity and dependent on the request, [be] conducted in privacy. Provided such request [would] be considered by most people to be 'reasonable' there should be no objection. Should a person decline a reasonable request, then they should be excluded entry to the facility or such refusal may form the basis of 'reasonable cause' to search.[265]

Others disagree:

It is not appropriate for correctional officers to conduct searches outside the powers given under s 27G, based on 'consent'. … Visitors are often ignorant of their rights and/or have a belief that if they do not agree with an

> *officer they will not be allowed to visit. Any consent given by them is not true or informed consent. Correctional officers should not be allowed to exceed their powers on a basis which could so easily be abused.*[266]

On balance, we feel that it is not appropriate for correctional officers to conduct searches outside the scope legislated by Parliament. In the interests of fairness, searches should be conducted in a consistent manner, and people should be able to know in advance what searches they may be subject to when they enter a correctional facility. In addition, it would not be reasonable for a person who does not consent to such a search, to suffer a negative consequence, such as being denied entry to the centre. In such cases, it would be difficult to say conclusively that people were consenting to such searches. Instead, they may simply be complying because of a wish to avoid the negative consequences that arise from not complying.

Further, it is possible that occasions may arise where prohibited items are found during a search conducted in a manner not envisaged by the legislation, and the person who was searched subsequently claims they did not consent to the search. If such a person was charged with unlawfully introducing items into a place of detention, a court may decide to exclude evidence of the prohibited items, on the basis that such evidence was improperly or illegally obtained.[267] This would be likely to lead to the dismissal of charges relating to the introduction of prohibited items into the place of detention.

In response to our discussion paper DCS advised us that it is not appropriate for correctional officers to conduct searches of people and/or vehicles outside the terms of section 27G of the *Summary Offences Act* and the department commented *'If … the Department identifies trends that suggest the legislation needs amending, it will make appropriate recommendations.'* [268] Consistent with this approach, we suggested that DCS may wish to consider inserting a new provision in its Operations Procedures Manual to ensure correctional officers are aware that the department does not condone searches outside the scope of the legislative provisions.

DCS has subsequently advised us that while strip searches by correctional officers are expressly prohibited under the *Summary Offences Act*, other types of searches, such as those listed above at the beginning of this section are not, and that in certain circumstances, correctional officers should be able to perform such searches. The department submitted:

> *The examples provided … whilst not specifically provided for in the legislation, are not contrary to the legislation either: opening the mouth for inspection, lifting a shirt to expose the waistband of trousers, lifting the legs of jeans or trousers to expose a calf, and removing a belt for inspection. All these body locations are reasonable hiding places for smuggling contraband into a correctional centre … To prevent correctional officers from requesting that a person show these locations would give a green light to offenders to smuggle contraband in those locations with impunity, subject only to the chance that a drug-detector dog might sniff them.*
>
> *It would be unreasonable to give correctional officers unlimited power to require all persons to adjust items of clothing or open the mouth. Nevertheless they should have such power if they form a reasonable suspicion that a person is attempting to conceal contraband, and that a non-intrusive procedure would confirm or remove that reasonable suspicion.*[269]

While we acknowledge that it is possible for people to secrete contraband in areas and in ways that are difficult for correctional officers to detect when utilising their existing search powers, we remain of the view that it is only appropriate for correctional officers to conduct searches of people in ways specifically provided for in the legislation. As well as the issues raised previously, there are a number of reasons for this.

Correctional officers who conduct searches within the scope of the provisions of the *Summary Offences Act*[270] have the power to detain such persons, direct that items detected during such searches be produced, seize items, use force if a person does not comply with a search direction, and arrest a person for not complying with a search direction. The *Summary Offences Act* also provides that correctional officers who conduct searches in accordance with this legislation will not be subject personally to any action, liability, claim or demand.[271] We are of the view that these powers and protections would not apply to searches conducted outside the scope of the legislation.

In addition, the legislation specifically provides that a correctional officer who stops, detains and searches a person in accordance with the *Summary Offences Act* may request a police officer to conduct a further search of the person or vehicle, and may detain a person for this purpose.[272] It appears that Parliament's intention in inserting this provision was that, should a search not provided for in the legislation be considered necessary, the appropriate officers to conduct such a search are officers of NSW Police.

We reiterate that if DCS determines that there are particular types of searches that it believes correctional officers should be able to conduct, and these searches are not covered by the existing legislative provisions, it is open to the department to seek a legislative amendment that expands the powers of correctional officers in this area. Parliament is the appropriate body to determine such issues. In the mean time it would be appropriate for correctional officers to be advised not to exceed their legislated search powers.

Recommendation

15 **It is recommended that the Department of Corrective Services amend its policies to specify that correctional officers are not to conduct searches of people (other than inmates) or vehicles in a manner that is not authorised by the legislation, regardless of whether or not a person consents to being subject to such a search.**

7.4. Use of dogs

DCS uses drug detection dogs as a tool to deter people from bringing drugs into correctional facilities, and to detect drugs that are brought onto departmental property, or that are in the possession of inmates. The scents that the DCS drug detection dogs are trained to indicate include marijuana, cocaine, heroin and amphetamines.[273]

The DDDU was established by the NSW Government in 1981. By 1995 there were 12 dogs and handlers,[274] rising to 37 operational dog and handler teams in mid 2003.[275] Most of the dog and handler teams are based in the metropolitan region, however, there are also dog and handler teams attached to each of the regional security units.

The department uses various breeds of dogs, including German Shepherds, Labrador Retrievers, Border Collies and Springer Spaniels. The German Shepherds are used for security purposes, such as in riots, to escort inmates, and to assist in recapturing escaped inmates. The German Shepherds are trained to bark, bite and attack people in certain circumstances. They are also trained in drug detection and are used to assist officers search cells and perimeters for drugs. When they detect the scent of a drug, the German Shepherds are trained to paw and scratch at the source of the scent. The German Shepherds, which are also known as 'multi-purpose dogs' are not used to search visitors to correctional facilities, but they are sometimes used to search vehicles.

Other breeds of dog used by DCS work exclusively as drug detection dogs. When these dogs are working[276] and they detect the scent of an illegal drug, they are trained to sit next to the source of the scent, and usually look repeatedly towards the scent, and back towards the handler. These dogs are commonly referred to as 'passive alert dogs' because they are trained '*not to growl or show their teeth or bark while working'.*[277]

There are several different legislative provisions providing correctional officers with the power to use dogs to assist them in their work. Section 78 of the *Crimes (Administration of Sentences) Act* states:

> *(1) With the approval of the governor of a correctional centre, a correctional officer may use a dog to assist in maintaining the good order and security of the correctional centre and any correctional complex of which the correctional centre forms part.*

The *Crimes (Administration of Sentences) Regulation* provides that authorised officers or the principal security officer may require visitors to places of detention, or departmental officers to be *'sniffed by a dog'.*[278] In addition, section 27H of the *Summary Offences Act* says:

> *(1) A correctional officer is authorised to use a dog to conduct any search under section 27F [of the* Summary Offences Act*].*
>
> *(2) A correctional officer using a dog to conduct such a search is to take all reasonable precautions to prevent the dog touching a person.*
>
> *(3) A correctional officer is required to keep a dog under control when the officer is using the dog to conduct such a search.*

The DDDU commonly conducts operations to detect visitors introducing drugs into correctional facilities. Often these operations involve only one or two dog and handler teams. However, sometimes the DDDU conducts joint operations with DCS security units, specialist units, and NSW Police.

As we stated in our discussion paper:

> *During an operation where drug detection dogs are being used* [to detect drugs in the possession of people visiting correctional facilities] *a number of fairly standard procedures are followed. Usually the search operation is set up at a designated location on correctional centre property, for example, in a car park. When visitors arrive at the designated location they are asked to line-up and stand still while a drug detection dog screens them. People are usually asked to place their bags by their side, stand with their hands in front of them, and refrain from talking to or touching the dog. If there are young children in the group, adults are usually told they may pick up the children while the dog is working.*
>
> *After cautioning people that it is an offence to introduce certain items into a place of detention, and asking whether anyone has any prohibited items that they wish to declare, a dog handler will usually lead his or her*

dog around the line-up of people twice. If the dog handler advises other correctional officers that the dog has indicated the scent of a narcotic odour on a person in the line, the person will usually be asked to step aside for an informal interview with correctional officers. Correctional officers may also decide to conduct a search of the person's locker or vehicle, and may contact NSW Police to request a further search of the person, possibly including a strip search.[279]

In section 6.2.1 above, we discussed possible issues of concern relating to the reliance by correctional officers on indications by drug detection dogs in the formation of reasonable suspicion that an offence at a place of detention is being committed. Throughout the course of our review we also became aware of a number of other issues relating to the use of drug detection dogs by DCS.

7.4.1. Keeping dogs under control

There is no doubt that some people are genuinely fearful of dogs, and would prefer to avoid them. Some people may choose not to visit an inmate at a correctional facility because of the likelihood of coming into close contact with a dog, while others become visibly anxious when they realise a dog is going to be used to screen them.

In response to our discussion paper, we received submissions commenting:

A lot of people are scared of the dogs who do act in an aggressive manner, jumping around, dragging on the lead & barking.[280]

*

There may be people with [an] intellectual disability who have a fear of dogs which may influence when and if they visit correctional settings. Difficulties may arise when a person with an intellectual disability is unable to express that fear or the manner in which they respond to that fear.[281]

Given that people could pretend to be fearful of dogs as a way of avoiding being screened by a drug detection dog, correctional officers do not permit people to avoid being screened by a dog, on the basis of fear. Our observations indicate, however, that correctional officers usually reassure people that the screening by the dog will be very quick and that the dogs are not aggressive. For example, the following notes were made by staff from our office, observing visitors to correctional centres being screened with drug detection dogs:

…one of the females said she was terrified of dogs, at one point saying she would prefer to not go into the visit at all if she had to stand in the line up and started to back away (she did not appear angry at all, just scared). The dog handler was very professional with her, and he tried to explain to her how she could best get through the experience "just close your eyes and you won't even know he is there". She shut her eyes holding onto the other lady's hand and did the search – no indication.[282]

*

C/O: "Are the kids OK with dogs?"

Young woman: "This one's a bit scared."

C/O: "You can pick her up."[283]

*

The dog was barking quite excessively before the search.

Woman: "He won't bite me will he?"

[Name of officer]: "No, no – he'll just sniff."

Woman: "Good, I'm terrified of dogs."[284]

The *Summary Offences Act* requires that dogs be kept under control, and precautions taken by correctional officers to prevent a dog from touching a person. Under the current legislative provisions, when dogs are used to screen people under the *Crimes (Administration of Sentences) Act* or associated regulation, it is not necessary for a correctional officer to take such precautions. Despite this, we received the following legal advice:

The safeguards [in the Summary Offences Act] really amount to no more than a requirement that the officer act reasonably when using the dog. It would therefore, seem advisable that officers when exercising powers under s78 of the [Crimes (Administration of Sentences) Act] or clause 93 of the [Crimes (Administration of Sentences)] Regulation, observe the requirements contained in s27H of the [Summary] Offences Act, in order to avoid any suggestion that they have acted in an unreasonable manner.[285]

The discrepancies in the legislative provisions concerning precautionary measures to be taken when using dogs should be removed if our recommendation that all provisions relating to the stopping, detaining and searching of people other than inmates (and their vehicles) be incorporated into a single piece of legislation is accepted (see section 5.4.2 and recommendation 6 above).

If consolidation of relevant legislative provisions does not occur, consideration should be given to inserting the safeguards provided for in section 27H of the *Summary Offences Act* into other legislation that deals with use of dogs by correctional officers. This would provide clarity about the precautions officers are required to adopt when using dogs, and would prevent officers from failing to utilise the safeguards provided for in section 27H by claiming they were acting under different legislation.

Recommendation

16 It is recommended that NSW Parliament consider amending the legislation to specify that in all instances where a correctional officer uses a dog to screen people (other than inmates) or vehicles, the officer is to take all reasonable precautions to prevent the dog touching a person, and is required to keep the dog under control.

7.4.1.1. Dogs that bark and are boisterous

We have never observed any of the DCS passive alert dogs acting in an aggressive or threatening manner. However, because the dogs are rewarded with play and games when they indicate the scent of drugs, the dogs are often very playful and boisterous before or during the screening process. In addition, on numerous occasions we have been present when the dogs have barked loudly prior to, and during visitor searches. Often when the dogs are barking during the screening process, the handler will tell people that the dog is simply excited, and will not hurt anyone. However, it is possible, that people who are not familiar with dogs, or who are fearful of them, would find the dog's barking disconcerting, or misinterpret it as a sign of aggression.

Stakeholders have different views about whether it is reasonable for dogs to bark and act boisterously prior to, and during, visitor screenings.

> *I am aware that search dogs do get excited when commencing work and their behaviour could be misconstrued as possible aggression. I believe that the majority of people can judge an aggressive animal as opposed to an excited dog. I believe that there is little that could be done to diminish a dog's enthusiasm. It is the same as riding a fresh horse, they are keen to go before they settle down. The handler should clearly indicate to visitors that the dog is not aggressive.*[286]

*

> *They have to have an active temperament for this type of work and should not be required to be trained DOWN for this reason.*[287]

*

> *The legislature has clearly and specifically made provision for the control of the dog because it understands that many people have a fear of dogs. It is thus not reasonable for a dog to bark or act boisterously (ie not under control) during a visit screening (ie during a search). It is also unreasonable for them to so act before a search. Visitors who are about to be searched should not be put in fear by witnessing the dog who is about to search them acting out of control. This defeats the purpose of the legislation's safeguards*.[288]

DCS has advised that:

> *'The Department has one such dog at the moment, however, anyone witnessing this dog's behaviour will attest that it displays a playful (and not an aggressive) demeanour. The dog is not boisterous while searching – only during the preparation stage when it is not in contact with visitors.'*[289]

While we note the department's comments, on different occasions we have observed at least four DCS passive alert dogs barking in front of visitors.[290] We also agree that the dogs usually appear excitable rather than aggressive, however, for people with a fear of dogs, this distinction may not be so clear. For example, on one occasion when we observed a dog barking before a search of a line-up of visitors, one visitor looked at the dog and stated '*He's gonna rip our asses off'*.[291] To minimise the anxiety caused by dog searches, and to ensure people perceive that the handlers have their dogs under control at all times, we feel that it may be appropriate for handlers to reprimand dogs who bark and act boisterously in front of visitors, and encourage them to work quietly.

7.4.1.2. Dogs that touch people

When correctional officers wish to screen a group of people with a drug detection dog, the people are usually directed to stand side-by-side in a line, as illustrated by Figure 3 below.

When the dogs are screening people they generally walk very close to the line-up of people. This is necessary so the dog can distinguish where a scent originates, as people often stand very close together while being screened. Sometimes during the screening process dogs will nudge or bump people with their nose. The following examples of dogs touching visitors' or their property, were observed by staff from our office:

Figure 3. Photo of drug detection dog screening visitors to correctional facility

Source: Photo provided by DCS, 3 June 2005.

> *Young woman. Lots of sniffing by dog. The dog [name] kept looking back at his handler and back at the girl. Eventually the dog stood on his hind legs to get closer to the girl. The dog lightly put his front paws against the girl but the handler moved him back. After a few seconds of the dog looking back and forth the dog sat. This was clearly an indication to the scent of drugs.*[292]
>
> *
>
> *Dog jumped over the bag and made a clear indication to the man. The dog then stuck his nose right into the bag and nosed around in it for several seconds.*[293]
>
> *
>
> *When the man picked up his helmet he said "Oh, he [the dog] put his snotty nose on it.'*[294]

From our observations, if a dog sniffs too closely, or spends more than a few seconds sniffing a particular person, the handler will usually pull it away. Many people may not be overly upset if a drug detection dog touches them inadvertently, or in a non-aggressive way. However, people who are scared of dogs, or who are from particular backgrounds may find even minimal touching by a dog upsetting or offensive.

The Community Relations Commission has advised us:

> *The Commission is aware that Muslims consider that it is inappropriate for a person to undertake certain religious duties, including entering a mosque, if the person has been touched by a dog. The Commission is also aware that members of some ethnic communities, particularly those from Asia, have a strong fear of large dogs*
>
> *Therefore, the Commission wishes to stress the importance of handlers ensuring that dogs are kept under control and are not permitted to touch people.*[295]

If a dog touches a person, this may not only result in a person being upset, annoyed or offended. It is possible that if a dog touches a person, and the contact is found not to be lawfully justified, this could result in a magistrate or judge excluding any evidence of an offence that was obtained during the search, on the basis that the search was conducted improperly. In addition, it is possible that in some circumstances, if a dog touches a person, the touching could be found to constitute a battery.

The *Summary Offences Act* states that a correctional officer using a dog to conduct such a search is to take all reasonable precautions to prevent the dog touching a person.[296] Given that Parliament did not state that dogs should be prevented from touching people in all circumstances, presumably it was intended that some form of touching by the dogs would be excusable. However, it is not clear from the current legislative provisions whether, and in what circumstances, a dog touching a person during a screening by correctional officers could constitute a trespass to the person (in particular, a battery).

We are not aware of any cases where this issue has been raised in court in relation to dogs used by DCS. However, the issue of battery has been considered in two matters where drug detection dogs being used by NSW Police were found to have touched people in the course of drug detection operations.[297]

In one case a man was sitting at a café with friends, when a drug detection dog under the control of a NSW Police dog handler went under the table and nuzzled the man's groin, and touched his jacket, before sitting down beside the man to indicate the presence of the scent of illegal drugs. A subsequent search of the man by police officers resulted in the detection of 26.1 grams of cannabis leaf in the pocket of the man's jacket.

The man was charged and convicted of possessing a prohibited drug. However, on appeal, the judge found that the evidence (the cannabis) was improperly obtained, and exercised his judicial discretion to exclude it. The judge held that because the dog was a trained police dog under the control of a handler, it was not possible to argue that the contact between the dog and the man was in any way accidental, or one of the *'physical contacts of ordinary life'*. On this basis, the contact by the dog was not lawfully justified in the circumstances.[298] As the evidence of the prohibited drugs was excluded, the appeal was successful and the conviction quashed.

As mentioned above, it appears to have been the intention of Parliament that some touching by drug detection dogs is permissible, however, it is problematic that there is not absolute clarity in the legislative provisions concerning this issue. When we sought legal advice in relation to our review of the *Police Powers (Drug Detection Dogs) Act 2001* we asked senior counsel about how this issue could be resolved.[299]

In response, it was suggested that, in order to remove the existing ambiguity concerning the implications of a dog touching a person, a new provision be inserted into the legislation. It was recommended that this provision clarify that if an officer[300] takes all reasonable precautions to prevent a dog from touching a person, and keeps a dog under control, then any slight or unintentional touching of a person by a dog conducting drug detection work:

- does not constitute a battery, and
- the State is not liable to any action, liability, claim or demand merely because a dog touched a person.[301]

We feel that amending the legislation pertaining to the use of DCS drug detection dogs in this way is a sensible suggestion. It would have the effect of excusing any slight or unintentional contact that a dog may make when undertaking drug detection duties (which appears to have been Parliament's original intention), but it would not excuse excessive or unreasonable contact by the dogs.

Recommendation

17 It is recommended that NSW Parliament consider amending the legislation to specify that if a correctional officer complies with section 27H of the *Summary Offences Act*, any slight or unintentional touching of a person by a dog does not constitute a battery.

7.4.2. Clarity of indications

During training, DCS passive alert dogs are taught to sit when they detect the scent of an illegal drug. In addition, when people ask the dog handlers what a dog would do if it detected the scent of a drug, the handlers usually tell people that the dog will sit.[302] Despite this, as raised in our discussion paper, dogs often do not sit when, according to their handler, they are indicating the scent of an illegal substance on a person.

> *During training the DCS dogs are taught to sit when they detect the scent of a drug. However, handlers have advised us that over time dogs will sometimes indicate the scent of a drug by engaging in some other form of behaviour. For example, members of the DDDU have advised us that a handler may become aware that a dog has detected the scent of a drug because it is "wagging its tail" in a particular way, or "doing a dance" or "looking for its toy".[303] DDDU officers have told us that each handler learns over time and through experience when and how their dog will make an indication to the scent of a drug.[304]*
>
> *Often while observing the dogs working, it has been very difficult for us to tell whether a dog has indicated to its handler that it can detect the scent of a drug on a person or not. Sometimes it appears that the dog is making a positive indication, by sitting next to a person, or spending a lot of time sniffing them, and the handler advises that the dog has not detected the scent of a drug. Other times it seems that the dog has shown little interest in a person, and we presume the dog has not detected the scent of drugs, when the handler advises that the dog has detected the scent of a drug on the person, and that the person should be taken for a further search.[305]*

In response to these comments, DCS responded:

Conferences of all law enforcement and service dog units in Australia have recognised that dogs may indicate by actions other than sitting, even though sitting is the indication that dogs are trained to give. Conditions such as weather, distraction and other stimuli can affect a dog's performance. It has been recognised by all comparable agencies that dogs may indicate by repeatedly returning to a source, stopping, repeatedly glancing at the handler and source area and other behaviours. In these circumstances there is a marked change in the dog's demeanour that is easily recognisable to staff with the most basic of training. Despite this recognition, the Department has put measures in place in dog training and operation procedures for re-enforcement of indication technique, and now requires all dogs to physically sit when indicating. No reward is offered to the dog unless it sits.[306]

We feel that it is a positive step that DCS is attempting to ensure the dogs react in a consistent and anticipated manner when they detect the scent of drugs. As the Youth Justice Coalition has pointed out *'If a clear indication is not adopted, the people searched may reasonably feel wrongly targeted by the apparently arbitrary determination made by the dog's handlers to ambiguous indications.'*[307] If a dog does indicate the scent of drugs on a person in a manner that does not involve the dog sitting, it may be useful for the handler to explain to the person that the dog has made an indication, and the reasons which have led the handler to this conclusion.

7.4.3. Accuracy of dogs

The majority of people screened by DCS drug detection dogs are permitted to proceed on the basis that the dog has not indicated the scent of an illegal drug on the person (unless prohibited items are detected during a subsequent routine search).

On occasions when a dog indicates to its handler that the scent of an illegal drug emanates from a particular person, a search of the person and his or her property will be conducted. This may involve a strip search by police officers. During such searches non-drug related contraband items are sometimes detected by officers. In addition, as raised in our discussion paper, searches can result in:

- *prohibited drugs (or drug paraphernalia)*[308] *being detected on the person or property*
- *permitted drugs (or drug paraphernalia) being detected on the person or property*
- *no drugs (or related paraphernalia) being detected and no admission by the person about the possible source of the drug scent*
- *no drugs (or related paraphernalia) being detected, but an admission by the person about the possible source of the drug scent.*

Staff from our office have observed each of the above scenarios. For example, we have been present when searches of people and their possessions conducted following the positive indication of a drug detection dog have resulted in officers finding prohibited drugs located in items such as a tennis ball,[309] *a packet of baby wipes,*[310] *and a visitor's shoe.*[311] *We have also been present when a dog has indicated the scent of a narcotic substance on a person, which officers subsequently determined emanated from medication the person was permitted to consume or carry.*[312]

Our observations indicate that it is usually the case, that most personal and property searches conducted as a result of an indication by a drug detection dog result in no drugs, or drug related paraphernalia being located. There are several possible reasons for this. For example, the person the dog indicated may:

- be in possession of drugs that officers have been unable to locate
- have previously consumed or handled drugs
- have (knowingly or unknowingly) been around people consuming or handling drugs
- not have been in contact with illegal drugs.

Unless the person makes an admission, such as '*I told you, I had a smoke this morning'*[313] or '*I live with a bloke that smokes pot'*[314] it will generally be impossible for officers to determine which of these scenarios is most likely. Even when admissions are made, it is not usually possible for officers to verify their truthfulness. A person could, for example, state that they were previously in contact with drugs, as a way of attempting to hide the fact that they are currently in possession of drugs.

These variables make it extremely difficult for the accuracy of the dogs at detecting the scent of prohibited drugs to be determined. In addition, as raised in our discussion paper:

The difficulty of measuring the accuracy of the dogs is exacerbated because, unlike NSW Police, DCS does not currently collate information about the performance of the dogs when working in the field. NSW Police records indicate that during the 12 month period commencing 22 February 2002 almost three-quarters of indications by NSW Police dogs did not lead to police locating drugs on a person. However, police records indicate that 61% of all incidents in which no drugs were found, the person searched made some kind of admission that they had used cannabis, or been in the presence of cannabis smokers.[315]

DCS has recently started collecting records about each occasion a particular dog and handler team conduct a search.[316] *However, comprehensive records are not collected about:*

- *whether or not the dog indicates the scent of a drug during each search*
- *whether drugs or drug related contraband is detected by officers after a dog has made a positive indication during a search*
- *whether a person indicated by the dog during a search subsequently admits to recently using or being in contact with drugs.*[317]

This lack of record keeping was criticised by some stakeholders. For example, senior police officers were of the view:

I would have thought it essential that this information be kept as per police practice. How can you assess effectiveness without monitoring and measuring performance and results?[318]

*

I can see no reason why DCS should not keep accurate records re the performance of drug dogs during operations. Obviously such records would be an indicator for training and as an intelligence source.[319]

The Youth Justice Coalition commented:

The benefits [of better recording] would be that DCS would have information available in order to evaluate the effectiveness of the dogs as searching tools. This could assist determine whether dogs should be used or whether further training is required.[320]

DCS has advised:

The Department has expanded the details of its search records, but the expansion has proved inconclusive. (For instance, the Department notes reasons given by visitors when a dog indicates but nothing is found; however, self-interest may mean that a large proportion of reasons given are untrue and the answers may not be reliable.)[321]

While we note that there are limitations with the way information collected about the use of drug detection dogs can be analysed, we are of the view that DCS should, as a matter of priority, begin recording details about:

- the number of times each dog is used to screen a person, property, vehicle or thing
- whether, during a screening, the dog makes an indication to the scent of a drug
- whether, following the screening, a search is conducted of the person, property, vehicle or thing
- whether, during the search prohibited drugs (or drug related paraphernalia) are located on the person, property, vehicle or thing
- the type of drugs located during a search, or a description of the drugs (for example, green vegetable matter, white powder, yellow pills)[322]
- whether, following the search, a person makes an admission concerning past contact with prohibited drugs
- the success rates of individual dogs at detecting drugs during training exercises.

Such data should be entered into a database or spreadsheet so that information about the dogs (individually or collectively) can be analysed. We note that use of such data is limited in a number of ways, for example, one cannot conclude that an indication by a dog was inaccurate simply because no drugs were found on the person. However, we do feel that there are a number of benefits to collecting comprehensive information about the operation of dogs as drug detection tools. Such information, could, for example, assist DCS to determine the individual and overall effectiveness of the dogs in a number of areas, and whether additional training is necessary. For example, the information could shed light on whether:

- the dogs (individually or collectively) appear to be better at detecting some types of drugs as opposed to others
- some dogs are consistently making indications where no drugs are found (while this may not in itself indicate that the dog is not working as effectively as possible, it may be an indicator that further assessment or training of the dog may be useful)
- some dogs appear to be more successful at locating drugs when conducting particular types of searches (for example, searches of people, cells, vehicles or property)
- drugs are often found during searches, following screening by a dog, where the dog failed to indicate the scent of the drug
- there are particular types of medication that people are permitted to carry with a prescription, that the dogs are regularly indicating (false positive indications)
- how often drugs are being detected because dogs are being used as a drug detection tool.

Given that training and maintaining drug detection dogs costs the department a significant amount of money (we were advised it costs approximately $40,000 to train each dog and handler team)[323] DCS should be able to determine how effective they are as a drug detection tool. This will assist the department in determining whether departmental funds would more appropriately be spent on alternative drug detection methods, such as better intelligence capabilities, x-ray machines that detect organic material, or hand-held ion scanners that detect trace amounts of illegal drugs or explosives.

Recommendation

18 It is recommended that the Department of Corrective Services begin collecting and analysing information about the performance of drug detection dogs. At a minimum this should include recording information about:

i) the number of times each dog is used to screen a person, property, vehicle or thing

ii) whether, during a screening, the dog makes a positive indication to the scent of a drug

iii) whether, following the screening, a search is conducted of the person, property, vehicle or thing

iv) whether, during the search prohibited drugs (or drug related paraphernalia) are located on the person, property, vehicle or thing

v) the type of drugs located during a search (or a description of the drugs)

vi) whether, following the search, a person makes an admission concerning past contact with prohibited drugs

vii) the success rates of individual dogs at detecting drugs during training exercises.

Endnotes

[202] Females accounted for 34% of staff at DCS at 30 June 2003 (excluding casual staff). Note, this statistic refers to all departmental staff, not just correctional officers therefore the ratio of male to female correctional officers is probably higher. DCS *Annual Report 2002-03*, p. 121.

[203] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p.20.

[204] Submission 7, DCS Superintendent, 26 April 2005.

[205] Submission 11, NSW Community Relations Commission, 29 April 2005.

[206] Submission 13, DCS, 10 May 2005.

[207] Section 27G(1)(c).

[208] *Summary Offences Act 1988*, section 27G(3)(b).

[209] *Summary Offences Act 1988*, section 27G(3)(c).

[210] DCS comments in response to draft report, 16 October 2005.

[211] Submission 16, Youth Justice Coalition, 13 May 2005.

[212] DCS comments in response to draft report, 16 October 2005.

[213] *Summary Offences Act 1988*, section 27G(4).

[214] Submission 16, Youth Justice Coalition, 13 May 2005.

[215] McCue, H., *Women in Islam: HSC – Studies of Religion Teachers' kit, 2003,* cited Uniya Jesuit Social Justice Centre, *A Background brief on Muslims in Australia*, p. 5.

[216] Australasian Pol
http://www.apmab.gov.au, accessed 21 June 2005, p. 74.

[217] Ibid., p. 55.

[218] Ibid., pp. 74 and 81.

[219] Section 27G(3)(a).

[220] Observation record 25, September 2004.

[221] Submission 11, Community Relations Commission, 29 April 2005.

[222] Submission 16, Youth Justice Commission, 13 May 2005.

[223] Submission 13, DCS, 10 May 2005.

[224] A telephone survey of six Offender Services and Programs Managers was conducted during August 2004.

[225] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 20.

[226] Ibid.

[227] Submission 1, inmate, undated. Received 1 April 2005.

[228] Submission 4, NSW Police, Local Area Commander, 19 April 2005; submission 9, NSW Police, Duty Officer, 17 April 2005; and submission 16, Youth Justice Coalition, 13 May 2005.

[229] Submission 13, DCS, 10 May 2005.

[230] *Summary Offences Act 1988*, section 27G(5)(b).

[231] Under section 357E(a) of the *Crimes Act 1900* an officer of NSW Police may stop, search and detain any person whom he or she reasonably suspects of havi
an indictable offence. Section 37(4)(a) of the *Drug Misuse and Trafficking Act 1985* also allows a NSW Police officer to stop, search and detain any person in whose
prohibited drug.

[232] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 21.

[233] Email received from Operational Support and Special Projects, Department of Justice, Correctional Services, Northern Territory, 7 February 2005.

[234] *Prisons Regulations 1982* (WA), clause 81(6).

[235] *Prisons Regulations 1982* (WA), clause 80(3)(a).

[236] *Prisons Regulation 1982* (WA), clause 81(1)-(5).

[237] Email received from Policy Officer, Prison Service Tasmania, 17 February 2005.

[238] *Corrections Act 1997* (Tas), section 22(4).

[239] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 21.

[240] Submission 2, NSW Police, Local Area Commander, 29 March 2005; and submission 4, NSW Police, Local Area Commander, 19 April 2005.

[241] Submission 4, NSW Police, Local Area Commander, 19 April 2005; and submission 14, NSW Police, Assistant Commissioner, Commander, 4 May 2005.

[242] Submission 9, NSW Police, Duty Officer, 17 April 2005.

[243] Submission 7, DCS Superintendent, 26 April 2005.

[244] Submission 13, DCS, 10 May 2005.

[245] Submission 16, Youth Justice Coalition, 13 May 2005.

[246] DCS Assistant Commissioner's Order 2001/011, 27 February 2001.

[247] *Summary Offences Act 1988*, section 27G(5).

[248] Clause 14B.

[249] Section 15.5.10.

[250] *Summary Offences Act 1988*, section 27A.

[251] Interview record 33, August 2004.

[252] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 23.

[253] Submission 8, Department of Ageing, Disability and Homecare, 21 April 2005.
[254] Submission 16, Youth Justice Coalition, 13 May 2005.
[255] Submission 4, NSW Police, Local Area Commander, 19 April 2005.
[256] Clause 3.
[257] *Guidelines for Police When Interviewing People with Impaired Intellectual Functioning*, accessed from NSW Police intranet, 24 June 2005.
[258] NSW Ombudsman, 'Quality Customer Service', Public Sector Agencies fact sheet No. 17.
[259] Submission 13, DCS, 10 May 2005.
[260] DCS comments in response to draft report, 16 October 2005.
[261] Observation record 8, March 2004.
[262] Ibid.
[263] Submission 16, Youth Justice Coalition, 13 May 2005.
[264] Ibid.
[265] Submission 4, NSW Police, Local Area Commander, 19 April 2005.
[266] Submission 16, Youth Justice Coalition, 13 May 2005.
[267] *Evidence Act 1995*, section 138.
[268] Submission 13, DCS, 10 May 2005.
[269] DCS comments in response to draft report, 16 October 2005.
[270] Part 4A.
[271] Section 27N.
[272] *Summary Offences Act 1988*, section 27F(3).
[273] Interview record 12, August 2003.
[274] The Hon Richard Amery MP, Minister for Corrective Services, Media Release '*Contraband crackdown in NSW prisons'*, 28 February 2002.
[275] Interview record 12, August 2003.
[276] Handlers place a special collar on their dog when the dog is required to undertake drug detection duties. This ~~informs~~is a signal to the dog that it is time to work.
[277] Submission 13, DCS, 10 May 2005.
[278] Clauses 93(1)(a) and 240(a).
[279] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 24.
[280] Submission 1, inmate, undated. Received 1 April 2005.
[281] Submission 8, Department of Ageing, Disability and Homecare, 21 April 2005.
[282] Observation record 24, September 2004.
[283] Observation record 13, May 2004.
[284] Observation record 8, March 2004.
[285] Buscombe, M., Memorandum of advice re: stop, search and detention powers of correctional officers, 14 October 2004. Received from the Crown Solicitor's Office.
[286] Submission 4, NSW Police, Local Area Commander, 19 April 2005.
[287] Submission 9, NSW Police, Duty Officer, 17 April 2005.
[288] Submission 16, Youth Justice Coalition, 13 May 2005.
[289] Submission 13, DCS, 10 May 2005.
[290] Observation
2004.
[291] Observation record 20, July 2004.
[292] Observation record 27, January 2005.
[293] Observation record 13, May 2004.
[294] Observation record 27, January 2005.
[295] Submission 11, Community Relations Commission, 29 April 2005.
[296] Section 27H(2).
[297] *Darby v DPP* [2004] NSWCA 431 (26 November 2004); (2004) 61 NSWLR 558; 158 Crim R 314; and *DPP v Harris*, unreported, Lismore District Court, 11 March 2005.
[298] *DPP v Harris*, unreported, Lismore District Court, 11 March 2005.
[299] Letter from Simon Cohen, Assistant Ombudsman, to Peter Garling SC, 18 March 2005. Note, like correctional officers, police officers using a drug detection dog are required to '*take all reasonable precautions to prevent the dog touching a person'. Police Powers (Drug Detection Dogs) Act 2001*, section 9(1).
[300] This advice was provided in relation to the police use of drug detection dogs, however, it is equally applicable to the use of dogs by ~~DCS~~correctional officers.
[301] Garling, P.R, Memorandum of advice in the matter of the Police Powers (Drug Detection Dogs) Act 2001, 9 June 2005.
[302] Observation record 17, June 2004.
[303] Interview record 12, August 2003;~~,~~ observation record 21, July 2004.
[304] Interview record 12, August 2003.
[305] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 25.
[306] Submission 13, DCS, 10 May 2005.
[307] Submission 16, Youth Justice Coalition, 13 May 2005.
[308] Such as syringes, needles, bongs and balloons.
[309] Observation record 2, September 2003.
[310] Observation record 13, May 2004.
[311] Observation record 11, April 2004.

[312] Observation record 17, June 2004. NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p.26.

[313] Observation record 11, April 2004.

[314] Ibid.

[315] NSW Ombudsman, Discussion Paper *Review of the Police Powers (Drug Detection Dogs) Act*, June 2004, p. 23.

[316] Interview record 43, July 2004.

[317] NSW Ombudsman, Discussion Paper *Review of the Police Powers (Drug Detection Dogs) Act*, June 2004, p. 27.

[318] Submission 2, NSW Police, Local Area Commander, 29 May 2005.

[319] Submission 4, NSW Police, Local Area Commander, 19 April 2005.

[320] Submission 16, Youth Justice Coalition, 13 May 2005.

[321] Submission 13, DCS, 10 May 2005.

[322] Unless a person makes an admission to the type of drug located, correctional officers will generally not know what type of drug a substance is. If police are likely to charge a person in relation to possession of a drug, or introduction of a drug into a correctional facility, the substance will usually be sent to a laboratory for analysis.

[323] Interview record 12, August 2003.

Chapter 8. Safeguards

8.1. Appropriateness of safeguards

Section 27J of the *Summary Offences Act* provides a number of safeguards that correctional officers are supposed to comply with, when conducting searches under section 27F of the *Summary Offences Act*.
In particular:

> *(2) A correctional officer must, before exercising a power to detain, search or arrest a person under section 27F, or as soon as is reasonably practicable after exercising the power, provide the person subject to the exercise of the power with the following:*
>
> *(a) evidence that the correctional officer is a correctional officer (unless the correctional officer is in uniform),*
>
> *(b) the name of the correctional officer,*
>
> *(c) the reason for the exercise of the power,*
>
> *(d) a warning that failure or refusal to comply with a request or direction of the correctional officer, in the exercise of the power, is an offence.*
>
> *(3) Subsection (2) extends to a direction given by a correctional officer to a person in the exercise of a power to stop, detain and search a vehicle.*
>
> *(4) A correctional officer is not required to comply with subsection (2) if the correctional officer believes on reasonable grounds that:*
>
> *(a) the circumstances are of such urgency that complying with subsection (2) would render a search ineffective, or*
>
> *(b) it is not reasonably possible to comply with subsection (2).*

Similar safeguards are not provided for in the *Crimes (Administration of Sentences) Regulation*. This means that under the current legislative provisions, officers conducting routine searches of visitors do not have to state, for example, their name and the reasons for conducting the search. Officers are only subject to such requirements if a search is conducted because an officer reasonably suspects that a person may be committing an offence in relation to a place of detention.

In our discussion paper we stated:

> *We have noted that generally correctional officers do not comply with some of the safeguards listed above, regardless of whether they stop, search and detain people during routine security checks, or because an officer suspects that an offence may be committed (or may have been committed). In particular, we have noted that correctional officers often fail to give their name prior to conducting a search of a person entering a correctional centre, or giving a direction to such a person. Sometimes officers introduce themselves in terms such as "I'd like to inform you, we're officers from the security unit",[324] at other times correctional officers do not introduce themselves at all.*
>
> *Prior to being searched, people visiting a correctional facility are sometimes told that introducing certain items into a place of detention is an offence, and correctional officers may also inform them "[y]ou're all about to be searched by a drug detector dog"[325] or "[we're] just doing a visitor search operation today."[326] However, there does not appear to be any standard phrase used by correctional officers to explain to people that they are going to have their property, person or vehicle searched, and the reasons for the search. Nor do correctional officers routinely warn people that failure or refusal to comply with a request or direction of the correctional officer, in the exercise of the power, is an offence.[327]*

Given that correctional officers do not appear to be complying with the safeguards listed in section 27J of the *Summary Offences Act*, we asked stakeholders whether the safeguards listed are appropriate, and whether there are circumstances in which it might be appropriate for officers to disregard them.[328]
In response, we were advised:

> *I believe the safeguards as outlined in 27J are reasonable.[329]*

*

The safeguards in 27J appear on face value to be sufficient and it would appear that a procedural and training issue is involved here.[330]

*

In my view [the safeguards should be disregarded] only as per section 27J(4). However, I understand that correctional officers are often the subject of, in some cases, malicious complaints, and this may explain their hesitancy in providing their names. They may also have concerns regarding the use of their personal information. Perhaps a number system similar to that utilised by NSW Police may be suitable – providing adequate identification but at the same time protecting the privacy of officers.[331]

*

There are no circumstances in which it is appropriate for correctional officers to disregard the safeguards listed in s27J. Parliament specifically enacted the requirements so that people being searched could be sufficiently made aware of what was happening. Correctional officers are not police officers and ordinarily have no more powers of search than any other ordinary citizen. Thus, in order for them to exercise their novel powers, they should at least make those being searched aware of who they are, provide clear reasons so they are accountable, and inform that it is an offence to not comply.[332]

Stakeholders therefore appear to feel that overall the legislated safeguards are sufficient without being too onerous, with one raising possible privacy concerns about the provision, by correctional officers, of their names.

8.1.1. Provision of names

When we conducted a focus group of officers from the DDDU, some of these officers advised us that they are often reluctant to provide their names during searches. A staff member from our office made the following notes about this issue being discussed during the focus group:

Officers were asked whether they usually give their name when stopping, detaining or searching. Some officers said that they wear name badges which also states the name of the unit they work for. One officer said that he will not give out his name, but will always state the unit he works for. Another said that he won't give his name when conducting PAD line-ups, but if a person is taken aside for a property search, he will state his name at that point.

One officer said that he is reluctant to give his name because of fear that the person may then be able to find out his address and threaten or injure himself or his family. He noted that he has an unusual name and that it would not be difficult for a person to find out further details about him. In making this comment he also noted that many ex-inmates and criminals, and associates of criminals visit correctional centres so the threat could well be real.

One senior officer said that if someone asked for a particular officer's name, he would give his own name, as the officer in charge of the investigation, rather than the individual officer's name.[333]

We recognise that officers may feel reluctant to provide their names to visitors of correctional facilities because of a perceived fear about how visitors may use the information. However, there are a number of reasons why safeguards such as this are imposed on officers who have significant powers in relation to other people. In particular, it is important that people searched by correctional officers know up front that the person conducting the search is authorised to do so. In addition, people searched by correctional officers should be able to identify relevant officers if they have a concern with, or complaint about, the way the search was conducted.

While officers may feel that providing their name will encourage vexatious complaints to be made against them, provision of this information will actually assist DCS to quickly and thoroughly investigate the veracity of any allegations made about inappropriate conduct of officers, and to ensure that officers are not erroneously identified where the complainant is not aware of the relevant officer's name.

We also note that correctional officers sometimes believe that by providing their name prior to a search, a person could use this information to identify them for the purpose of attempting to harm them. A similar argument could possibly be made by police officers. Despite this, police officers in NSW must also provide their names to people in certain circumstances. For example, the *Crimes Act 1900* and the *Police Powers (Vehicles) Act 1998* require police officers to provide their name and place of duty before requesting certain people disclose their identity.[334]

In addition, in December 2005 when the *Law Enforcement (Powers and Responsibilities) Act 2002* commences, police exercising a wide range of powers (including searching people, premises, vehicles, vessels or aircraft, and seizing items) will have to provide:

(a) *evidence that the police officer is a police officer (unless the police officer is in uniform),*

(b) *the name of the police officer and his or her place of duty,*

(c) *the reason for the exercise of the power,*

(d) *a warning that failure or refusal to comply with a request of the police officer, in the exercise of the power, may be an offence.*[335]

Given that the powers of correctional officers to stop, detain and search people other than inmates are similar in many respects to the search powers of police officers, we feel that it is reasonable that correctional officers are subject to similar provisions concerning identifying themselves. This is particularly the case as the risk of harm to correctional officers because of providing their name prior to a search is unlikely to be higher than that for police.

If evidence did come to light that correctional officers were being placed at significant risk of harm because of the requirement to identify themselves prior to conducting searches, DCS could consider recommending legislative change that would allow officers to provide people with the serial number on their identification card, rather than their name, prior to a search. However, we feel that such a scenario is unlikely to eventuate, and that the current requirements are reasonable.

8.1.2. Applicability of safeguards to routine searches

In our discussion paper, we asked stakeholders whether correctional officers should also comply with the safeguards listed in section 27J of the *Summary Offences Act* when conducting routine searches of people and vehicles entering correctional facilities.[336] One police officer advised:

> *The obvious benefits of [extending the provisions of 27J to routine searches] would be that the visitor would clearly know who he was speaking to, the reason why he was stopped and what the Officer intended to do. When explained that it is an offence to refuse the visitor could not later use a defence in Court that a) he didn't know who the person was and b) didn't know it was offence not to comply. I can see no disadvantages in complying with Sec 27J.*[337]

As outlined in section 5.4.2 and recommendation 6 we feel that the existing legislative provisions about searches of people other than inmates, and vehicles, by correctional officers, should be consolidated into a single piece of legislation, and that this should specify the types of searches correctional officers can conduct on a routine basis, and those which require reasonable suspicion of an offence. If this recommendation is accepted, we feel that the legislation should also specify the types of searches the safeguards currently outlined in section 27J of the *Summary Offences Act* should apply to.

In making a decision about the type of searches where safeguards should apply, we feel that it is more appropriate to consider the invasiveness of the search procedure, rather than the issue of whether a particular search is to be conducted on a routine or targeted basis.

While it may not serve any useful purpose, or be practicable for correctional officers to identify themselves each time a person is scanned with an electronic device (such as walking through a metal detector), we feel that it is not unreasonable for correctional officers to state their name, the reason they are conducting a search, and the fact that refusal to comply with the search is an offence, if the search procedure involves a physical search of the person or their property, or if the person is detained for the purpose of a search. This would include any search that involves:

- inspection or examination, by a correctional officer, of a person, or their property or vehicle
- a person being requested or directed to remove outer garments of clothing
- screening by a dog (if people are screened by a dog in a group, officers would not need to address members of the group individually)
- correctional officers stopping and detaining a person or vehicle located outside a place of detention.

It is our experience that correctional officers usually give some form of introduction or explanation when they conduct such searches of a person or vehicle therefore we do not feel this requirement would be overly onerous. It would, however, ensure people being searched were provided with consistent information, and allow them to have knowledge of the purpose of a proposed search, the identity of the officer(s) conducting the search, and the repercussions of failing to comply with the search.

Recommendation

19 **It is recommended that NSW Parliament consider amending the legislation to provide that the safeguards outlined in section 27J of the *Summary Offences Act 1988* apply only to those searches (conducted on a routine or targeted basis) that:**

   i) involve a person, their property or vehicle being physically examined

   ii) require a person to remove outer garments of clothing

   iii) involve a dog attempting to detect the scent of prohibited items

   iv) are conducted outside a place of detention.

8.2. Improving compliance with safeguards

As mentioned above in section 8.1 many correctional officers are not complying with the safeguards outlined in section 27J of the *Summary Offences Act* when conducting searches under section 27F of this legislation. If correctional officers are expected to comply with legislated safeguards and act in a consistent manner when providing information and explanations to people being searched, they must be well informed about the legislative provisions, and have received adequate training about how their powers should appropriately be used.

8.2.1. Guidelines and training about safeguards

We examined the DCS Operations Procedures Manual to determine how much assistance it provides to correctional officers about ensuring relevant safeguards are complied with. At present, the manual is unlikely to provide any assistance to officers. This is because it merely reiterates what the safeguards are.[338] It does not, for example, give officers guidance about phrases they can use in order to comply with the safeguards, or provide examples of situations where an officer might reasonably disregard the safeguards. The usefulness of the manual would be greatly increased if it included such information.

In mid 2004 the DCS Specialised Training Unit developed training material about the powers of correctional officers to stop, detain and search people and vehicles under the *Summary Offences Act.* This material can be utilised by training officers at each of the correctional facilities (or DCS specialised units) who decide to conduct training for staff at the centre or unit, about these powers.[339] The training material we were provided with includes a protocol to be followed if officers feel it is necessary to stop, detain and search a person or vehicle. This provides guidance to officers about appropriate wording they can use when utilising their powers:

> *Officer: I have observed you within (or in the immediate vicinity of) this place of detention and I have formed the opinion that you may have committed an offence under the Summary Offences Act 1988. I am requesting you to submit to a search of your person/property/vehicle.*
>
> *[Protocol says that if person refuses to submit to a search, the correctional officer will advise the person of the intention to call police, and request the person to remain pending the arrival of police. If the person refuses to remain, the correctional officer will direct the person to remain.]*
>
> *Officer: I direct you to remain here pending the arrival of police so that a search may be made of your person/property/vehicle. It is an offence under the Summary Offences Act 1988 for you to refuse or fail to comply with my direction.*[340]

It is positive that the Specialised Training Unit has included material in the training package that aims to provide guidance to correctional officers about phrases that should be adopted when using their powers to stop, detain and search. However, it is problematic that this protocol:

- does not remind correctional officers to provide evidence that they are such an officer if they are not in uniform
- does not prompt correctional officers to give their name prior to using these powers
- only prompts correctional officers to warn people it is an offence to refuse to comply with a request or direction given by an officer once the person has already refused to remain for a search.

When we spoke to members of the DDDU in February 2005 they advised that they have not received any formal training about the stop, detain and search powers provided in the *Summary Offences Act,* and that they have, in effect, learnt about the powers through *'trial and error'*.[341] It is a matter of some concern that two years after the legislation commenced, key officers who exercise these powers, have not received any training about the powers, and that the department's Operations Procedures Manual does not provide any assistance to officers about interpretation of the legislation, or guidance about how the safeguards should be implemented in practice.

To rectify this issue DCS should, as a matter of priority, review the training material and Operations Procedures Manual in relation to searches of people (other than inmates) and vehicles, and ensure that information contained in this material provides adequate advice and assistance to officers about compliance with relevant safeguards. DCS should also ensure that officers most likely to use the stop, detain and search powers receive training in this area.

These suggestions are incorporated into recommendations 26 and 27 below (see section 12.5).

8.2.2. Recording and monitoring correctional officers' compliance with safeguards

We feel that it would be appropriate for records about searches of people other than inmates (and their property) to indicate whether correctional officers complied with relevant safeguards during the search.
This could simply involve officers ticking a box to indicate whether they complied with safeguards, and if not, noting the reason why.

Requiring such records to be kept is likely to:

- remind correctional officers about the requirement to comply with the safeguards
- assist correctional officers demonstrate to a magistrate or judge that a search was conducted lawfully and properly, if such an issue comes before a court
- assist DCS to investigate any complaints received about the conduct of a search
- provide DCS with the ability to audit officers' compliance with the safeguards.

Recommendation

20 It is recommended that the Department of Corrective Services require correctional officers to begin recording information about whether or not they have complied with legislated safeguards when stopping, detaining or searching a person (other than an inmate) or their property, and noting any reasons why the safeguards were not complied with.

Once correctional officers have been provided with adequate training about the stop, search and detention powers, and the Operations Procedure Manual contains comprehensive guidance to officers about appropriate use of the powers, it may be useful for DCS to consider auditing correctional officers' compliance with the safeguards, and reviewing their reasons for non-compliance. This would assist the department to determine whether further training of, or guidance to, correctional officers is necessary, and whether there are any other factors that prevent officers from complying with the safeguards. This suggestion is incorporated into recommendation 25 below (see section 12.5).

Endnotes

[324] Observation record 21, July 2004.
[325] Observation record 9, April 2004.
[326] Observation record 21, July 2004.
[327] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 28.
[328] Ibid.
[329] Submission 4, NSW Police, Local Area Commander, 19 April 2005.
[330] Submission 14, NSW Police, Assistant Commissioner, Commander, 4 May 2005.
[331] Submission 7, DCS Superintendent, 26 April 2005.
[332] Submission 16, Youth Justice Coalition, 13 May 2005.
[333] Notes from focus group of dog handlers, 15 February 2005.
[334] *Crimes Act 1900*, section 563 and *Police Powers (Vehicles) Act 1998*, section 6.
[335] Section 201.
[336] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 28.
[337] Submission 4, NSW Police, Local Area Commander, 19 April 2005.
[338] DCS Operations Procedures Manual, section 12.10.2.
[339] We were advised that training officers at each centre decide which training to conduct at their particular centre. There is no requirement that training about the stop, detain and search powers be conducted. Interview record 31, July 2004.
[340] Material provided by DCS, 23 July 2004.
[341] Notes from focus group of dog handlers, 15 February 2005.

Chapter 9. Detention of people and seizure of items

9.1. Detention of people and vehicles

In various Australian jurisdictions correctional officers have the power to detain a person for the purpose of conducting a search, or ensuring the person remains until police arrive.

In Queensland a person can be detained by corrective services officers for up to four hours, until the person is handed over to a police officer, if the person is detected, or suspected of, committing a security offence, or if the person refuses to comply with a direction by a corrective services officer to leave the vicinity of a prisoner, or a place of detention.[342]

In South Australia the manager of a correctional facility may cause a person to be detained and handed over into the custody of a member of the police force as soon as reasonably practicable, if:

- a prohibited item is found on the person, or
- no prohibited item is found on the person but it is suspected on reasonable grounds that a prohibited item may be concealed on or in the person's body.[343]

If a person is so detained, the manager must forthwith cause a member of the police force to be notified of that fact.[344] In addition, the South Australian Department of Justice, Correctional Services, is required to include in its annual report information about the number of such persons detained and handed over to police, and the duration of such detentions.[345]

In Tasmania, if a person is found to have brought an article into a prison, that the Director has not authorised, correctional officers may detain the person pending the arrival of a police officer.[346]

In Western Australia prison officers have the power to arrest a person found to be introducing unauthorised items, without a warrant. A prison officer who arrests such a person is required to deliver that person into the custody of a police officer.[347] We have been advised that prison officers are also authorised to detain the person until police attend the prison.[348]

The Victorian legislation provides that prison officers who believe on reasonable grounds, that a person has committed an offence related to prison security, *'may apprehend the person without a warrant'*[349]and *'as soon as possible deliver the person to the custody of a member of the police force to be dealt with according to law.'*[350]

In the Northern Territory, correctional officers are only able to detain people until police arrive at the prison.[351] Correctional officers in the ACT do not have the power to detain people other than those who are in custody on remand, or those who are serving a sentence of periodic detention.[352]

9.1.1. Detention of people in NSW

In NSW, the *Summary Offences Act* states:

> *(3) A correctional officer who stops and detains a person or a vehicle under this section (whether or not the correctional officer searches the person or vehicle) may request a police officer to conduct a search or a further search of the person or vehicle, and may detain the person or vehicle while waiting for the arrival of a police officer at the place where the person or vehicle is being detained for the police officer to conduct the search.*
>
> *(4) A request to a police officer under subsection (3) must be made as soon as practicable after the correctional officer stops and detains the person or vehicle, or searches the person or vehicle.*[353]

Section 27J (1) provides:

> *A correctional officer who detains a person in the exercise of a power under section 27F must not detain the person any longer than is reasonably necessary for the purpose, and in any event for no longer than 4 hours.*

If police are present when correctional officers suspect that a person may be concealing a contraband item, and a search by the correctional officers fails to locate any contraband, the police will usually conduct a further search of the

person or their vehicle. This may involve the police taking the person to a private room and conducting a strip search of the person.

If police are not present during an operation and correctional officers suspect that a person is concealing a contraband item they have been unable to find, the officers will usually contact NSW Police and request that police officers attend the centre to conduct a further search of the person or the person's vehicle. If a police officer advises that there are insufficient resources for officers to attend the centre in a timely manner, correctional officers will usually deny the person a visit to the correctional centre for the day (if they were at the centre for the purpose of visiting an inmate) and ask the person to leave the premises immediately.

When police agree to attend a correctional facility for the purpose of conducting a search of a person suspected of acting unlawfully, it may take some time before police arrive at the centre. This may be for a variety of reasons, including that they are required to finish another task before attending the centre, the centre may be a significant distance from the police station, or traffic may be heavy.

In our experience correctional officers usually appear to be aware that they are only able to detain people for up to four hours, and we have not been made aware of any occasions where this provision has been breached. In saying this, it is possible that some people have been detained in contravention of this provision as DCS does not keep comprehensive records about when a person is detained, and any records that are kept about the detention of a person are generally kept by the staff who detained the person, or at the centre where the detention occurred.

In other words there is no central register that records when people are detained, how long they are detained for, and how they were supervised and treated during the period of detention. This meant it was not possible for us to determine how many people and vehicles were detained during the review period, and whether people were detained in compliance with relevant legislative provisions.

In May 2004, as part of our survey to governors, we asked each governor the following question:

> *Are you aware of any occasions since the beginning of February 2003 that a visitor has been detained by officers rostered on duty at [Name] Correctional Centre while waiting for police to arrive at the correctional centre?*

Fifteen respondents (53.57%) advised that they were not aware of the power being used, two (7.14%) did not know whether the power had been used and 11 (39.29%) advised that officers at the centre had detained people during this time period. Of the 11 governors who advised that people had been detained by staff at their centre:

- two advised one person was detained
- two advised three people were detained
- three advised four people were detained
- one advised six people were detained
- one advised 62 people were detained
- two failed to indicate how many people were detained.

We also asked governors of correctional facilities where visitors are usually detained (or would be likely to be detained) while waiting for police to arrive at the centre, and how they are usually (or would likely be) supervised. We received a range of responses to this question, including:

> *Visits waiting room.*
>
> *Visits centre – supervised by officers.*
>
> *An officer would be assigned to remain with the visitor until the police arrived.*
>
> *Visitors held in an open area until police arrive then taken to a private area.*
>
> *Generally the visitors are removed away from the area where the incident [took place] and wait for the Police to attend.*
>
> *… They are asked to stay at the boom gate until police arrive.*
>
> *Can be locked in gym area. Coke machine's in there too.*
>
> *In the staff meal room adjacent to the Deputy Governor's Office where suitable amenities are available away from inmates. Supervised by a correctional officer at all times.*

Several governors noted that officers from the security units are usually responsible for detaining and supervising people, and centre based staff do not perform this task. Staff from the security units usually detain people during operations conducted to detect visitors introducing contraband into the centre. As raised in our discussion paper:

> *Our observations indicate that when people are detained during visitor interdiction operations they are sometimes taken into a room to be detained. On other occasions, however, people are requested or directed to remain at the site of the operation (usually a car park). This allows the supervising officers to continue to actively participate in the operation. We have also been told that detaining people at or near the site of the operation helps to ensure that the detainee has fewer opportunities to consume or tamper with contraband they may be concealing, or discard it.*
>
> *While a decision to detain a person or group of people near the operation is understandable, we have observed people, including young children, being directed to sit on a gutter, or on the ground in unsheltered areas. Rarely are these people offered a drink, and sometimes they are denied access to toilets.*[354]

The DCS Operations Procedures Manual provides some guidance to correctional officers about the detention of people and vehicles. This states that a person or vehicle must be detained at the place where they were first stopped, unless for safety or security reasons the person or vehicle must be moved. If a person is moved, this must be done under the constant supervision and monitoring of a correctional officer and the person (or vehicle) must be taken to a location as close as possible to the place where the person or vehicle was stopped. This is to ensure the preservation of a possible crime scene, and the 'chain of evidence'.[355]

The Operations Procedure Manual also states:

> *The person is to be detained for no longer than four hours. An officer should remain with the person to ensure that the person does not dispose of any contraband, however, force should only be used to detain a person in extreme circumstances and as an option of last resort – generally, only if a person's safety is at risk. If the police do not arrive within a reasonable timeframe and reasonable grounds to suspect the likely commission of an offence are not present, the person is to be immediately advised that he/she is no longer being detained. However, if circumstances exist that establish reasonable grounds for suspecting the actual commission of an offence, the formal arrest of the person should be considered.*[356]

These guidelines do not specify how people are to be treated during the period they are detained by correctional officers. In our discussion paper we asked stakeholders whether guidelines should be developed about the treatment of people and vehicles detained by correctional officers, and if so, what issues should be considered in developing such guidelines.[357] The following are some of the responses we received:

> *I do believe that guidelines should be developed that address the welfare of the person of interest and children as well as preserving evidence.*[358]
>
> *
>
> *Yes guidelines may assist. Things to be covered in drafting guidelines include*
>
> - *staffing arrangements;*
> - *centre facilities with regards where a person could be detained and what amenities can be provided to them;*
> - *relationship with the local police – local arrangements to ensure waiting time is decreased as much as possible.*[359]
>
> *
>
> *Guidelines need to be developed in relation to the treatment of people and/or vehicles. This is particularly important from a policing point of view when and if items are found as there is a need to preserve the evidence. ... Addition[al] considerations include preservation of the crime scene and victims' rights, as waiting could take considerable time and admissions or overt acts could take place whilst waiting for Police to attend.*[360]
>
> *
>
> *Guidelines should be developed so that dignity and rights of a person so detained are respected. Guidance can be gained by reference to the detention after arrest legislation governing police (cf Pt 10A Crimes Act). There are certain key issues such as the provision of interpreters, medical assistance, access to food and water, and sanitation. Vulnerable people, especially children, should also have constant access to an independent adult support person.*[361]

9.1.1.1. Preservation of evidence and crime scenes

In 2002 DCS commissioned a review into its exhibit handling procedures. During this review numerous deficiencies were identified about how exhibits (items that may be used as evidence in court or disciplinary proceedings, including drug and non-drug contraband items) are handled by correctional officers, and the importance of accounting for items at all times, from the discovery or seizure until the time of disposal.[362] DCS has agreed to implement a range of improvements in this area that should strengthen the ability of correctional officers to preserve evidence, and possible crime scenes. [363]

These improvements, including updating standard operating procedures, provision of better equipment (such as evidence bags and scales for weighing drugs) and improving record keeping, should help to rectify stakeholders' concerns about the preservation of evidence, and possible crime scenes that can arise during or following the detention of a person or vehicle.

9.1.1.2. Treatment of detainees

DCS has acknowledged that the current procedures in the Operations Procedure Manual do not address the issue of the comfort of children accompanying a detained adult, and that the department *'will address this issue at the earliest opportunity.'*[364] While this is a positive step, we feel that it would also be prudent for DCS to develop broader guidelines about the treatment of all people detained, not just children.

Part 10A of the *Crimes Act* governs the conditions under which police may detain people after arrest for the purposes of investigation. This provides that people may only be detained for a maximum of four hours, unless this period is extended by a detention warrant.[365] People detained by police are provided with a range of safeguards during the detention period for example, they are generally entitled to:

- inform a person of their whereabouts, and request the person to attend
- an interpreter if this is considered necessary, and is practicable
- medical attention if required or reasonably requested
- reasonable refreshments and access to toilet facilities (including an entitlement to wash, shower, and bathe where practicable).[366]

While it may not be practicable for correctional officers to provide each of these facilities and amenities to people they detain, it does not seem unreasonable for officers to ensure that in the interests of a person's comfort and wellbeing they have access to a chair in an area that is sheltered from rain, sun or wind; as well as reasonable access to refreshments (particularly drinks); and toilet facilities. This is particularly important given that some correctional facilities in NSW are located in areas that suffer from extreme weather conditions.

Where practicable, officers should also attempt to detain a person in a private area, away from the view of other visitors. As outlined in the following submission, being detained in a public area can cause people to feel embarrassed and distressed.

> *KM was detained by correctional officers so that police could arrive to strip search her and do a further vehicle search. She had visited [Centre] with her 15 year old daughter. They had gotten a lift in a friend's car to the centre. [Centre] is at least one hour's drive from Sydney. KM was detained by DCS for at least two hours. Her young daughter, who had not been detained for any purpose, effectively had to stay as well.*
>
> *They were required to wait in the 'gate' building. KM Felt humiliated by having to wait here in public view. She could see other visitors going in and coming out of the centre and looking at her. …*[367]

We acknowledge that moving a person away from the area where they were first detained may increase the ability of the person to discard any contraband that is in their possession, and that correctional officers may need to be specifically allocated to supervise detainees, if detainees are moved away from the site of the search operation. However, the health, safety and dignity of a person (who may not have committed any offence) should be one factor that is considered when a decision is made about where he or she is to be detained.

We also feel that if a person is detained by a correctional officer, the correctional officer should, at the first opportunity inform the person that they are being detained until the police arrive, and as such are not free to leave. In addition, the person should be informed:

- about the reasons for the detention
- that detention will be for a maximum of four hours (noting the time detention began)
- the consequences of not complying with the requirement to remain in accordance with an officer's direction.

Recommendation

21 **It is recommended that the Department of Corrective Services develop guidelines about the treatment of people (other than inmates) who are detained. At a minimum, these guidelines should provide that detainees are to be:**

   i) **provided with a chair in an area that is sheltered, and if possible out of view of other people visiting the facility**

   ii) **provided with reasonable access to refreshments and toilet facilities**

   iii) **informed about the reasons for the detention, the time limits of the detention, and the consequences of not complying with lawful directions.**

9.1.1.3. Reports about detention of people and vehicles

The DCS Operations Procedures Manual states that whenever a correctional officer stops, detains or searches a person or vehicle under section 27F of the *Summary Offences Act*, the officer exercising the power must submit a report in writing. If this involves the detention of a person:

- *… the report must state where the person was detained, the time that detention commenced and the time of arrival of police, and whether the person was observed throughout the period of detention. Note – the officer who authorised the detention must also sign the report.*
- *If the person was let go from detention prior to the arrival of police, the report must state the time detention ceased, the reason for the decision to cease detention, and the name of the officer who authorised the detention to cease.*[368]

The extent to which officers are complying with these reporting requirements is not clear, as records are not centrally collated by DCS about people and vehicles that are detained. We feel that reports about the detention of people other than inmates should be filed centrally, in such a way as to enable a senior officer to audit whether officers across the correctional system are complying with relevant legislation and policy provisions. To enable comprehensive audits to take place, we feel that correctional officers who detain people should also be required to record details about:

- the reason for the detention
- whether refreshments and access to a toilet were provided
- whether prohibited items were detected in the possession of the person detained, or within a detained vehicle.

Recommendation

22 **It is recommended that the Department of Corrective Services amend its Operations Procedures Manual to require correctional officers to record additional information when a person (other than an inmate) is detained. In particular, officers should be required to record:**

   i) **the reason for the detention**

   ii) **whether refreshments and access to a toilet were provided**

   iii) **whether prohibited items were detected in the possession of the person detained, or within a detained vehicle.**

Given that the power of correctional officers to detain civilians and their vehicles is a significant one, we feel that regular audits should be conducted by DCS about the circumstances in which people and vehicles are detained, and the adequacy of reporting about such incidents. This will help to identify whether people are being unreasonably detained, or detained in contravention of the legislation. This suggestion is incorporated into recommendation 25 (section 12.5) below.

9.2. Seizure of items

In February 2003 the law was amended to allow correctional officers to seize certain items. Section 27F(4) of the *Summary Offences Act* now provides:

> *A correctional officer may seize all or part of a thing that the correctional officer suspects on reasonable grounds may provide evidence of the commission of an offence under this Part found as a result of a search under this section.*

At the same time, the *Crimes (Administration of Sentences) Act* was amended to state that regulations may be made to make provision for, or with respect to:

> *the seizure, forfeiture and disposal of property brought into a correctional centre in contravention of this Act, the regulations or any other law,*[369]

When this legislation was being debated in Parliament, the then Minister for Corrective Services stated:

> *… if a person consistently tried to bring a camera into a correctional centre, officers would ultimately be able to seize and destroy the camera. Disposal of the camera would deter future attempts to bring a camera into a correctional centre without authority.*
>
> *… Correctional officers would not unnecessarily seize or dispose of a camera or other property inadvertently brought into a correctional centre. But where a person persistently tried to bring a camera into a correctional centre knowing that it was against the law, and one day actually succeeded, then mere confiscation of the film and banning the person from future visits would not be a sufficient deterrent.*[370]

In response, another Member of Parliament commented,

> *I was mildly encouraged to hear the Minister say in his second reading speech that correctional officers would not unnecessarily seize or dispose of a camera or other property inadvertently brought into a correctional centre. But there is a world of difference between the Minister's words and what might happen in practice.*[371]

When this legislation was introduced, correctional officers already had the power to seize items brought into a correctional centre in contravention of the law. Clause 115A of the *Crimes (Administration of Sentences) Regulation* states:

> *(1) Any property brought into a correctional centre in contravention of the Act, this Regulation or any other law may be confiscated by the governor of the correctional centre.*
>
> *(2) Property that is confiscated under this clause becomes the property of the State, to be disposed of as the Commissioner may direct.*

However, amending the Act did provide correctional officers with broader powers of seizure, as under the Regulation officers are only permitted to seize prohibited items, whereas the Act allows for seizure of anything that may provide evidence of an offence relating to a place of detention.

As discussed in section 3.6.2 of this report, the *Summary Offences Act* currently provides that it is against the law to bring, deliver, convey or secrete anything into (or out of) a place of detention, or to provide anything to an inmate, without lawful authority.[372] We noted that the broad nature of this provision means that there is often inconsistency about the way people are dealt with when they are detected in a place of detention, in possession of certain items. This is particularly relevant in relation to those items it is legal to possess outside a place of detention, for example, cameras, mobile phones, medication and scissors. Usually, people carrying such items are warned to leave them at home in future, but sometimes the items are seized and people are charged with bringing an item into a correctional facility without lawful authority. On other occasions, the item is seized but no further action is taken.[373]

There are a number of changes that we believe could be made to help ensure people are treated more fairly and consistently when they are detected in possession of certain items in a place of detention.

9.2.1. Clearer legislative and policy provisions

As discussed in section 3.6.2 of this report (recommendations 2 and 3), we recommend:

- amending sections 27E(2)(b) – (e) of the *Summary Offences Act* to make it an offence for a person, without lawful authority, to bring, convey, receive or secrete into (or out of) a correctional facility 'any item that is likely to pose a risk to the good order and security of a place of detention', and

- the development of comprehensive DCS policies that specify, in as much detail as possible, the nature of items that should not be brought into a place of detention.

We feel that, if accepted, these recommendations will help to clarify the particular items that should not be brought into correctional facilities. This will make it easier for people to know what items they are not supposed to bring with them when they enter a correctional facility, and will help to ensure people in possession of certain items are treated in a more consistent manner.

9.2.2. Recorded warnings

In line with current practices we feel that in most instances it is appropriate for correctional officers to provide people detected bringing an item that it is legal to carry elsewhere, into a correctional facility, with a warning in the first instance, rather than charging them with unlawfully introducing an item into a place of detention. However, correctional officers have advised us that on occasions they become extremely frustrated because some people are repeatedly warned not to bring certain items into the place of detention, and such warnings are simply ignored.[374]

Currently no records are kept when a person is provided with a warning not to carry a particular item into a correctional facility. This means, correctional officers are not able to determine whether a person has previously received such a warning, or a number of warnings about carrying particular items. One way to overcome this issue would be for correctional officers to make a record each time a person is detected carrying an item and they are advised not to bring the item into the facility again on the basis that having such an item in a place of detention may constitute an offence.

When such a warning is given to a person, this could be noted on the Offender Management System, a state-wide system that records information about inmates, as well as details about people visiting inmates. This would mean that if a person was detected carrying an item, such as a recording device or nail scissors, an officer could check the Offender Management System to determine whether the person had previously been warned not to carry such an item while visiting a place of detention. If the officer discovered that the person had received previous warnings, this information could assist the officer in making a decision about whether or not to seize the item in question, and commence proceedings to have the person charged with a criminal offence.

Centrally recording warnings given to people about carrying prohibited items may also assist in the successful prosecution of people charged with bringing an item into a place of detention unlawfully. This is because information about the warnings given may be able to be used as evidence in relevant criminal proceedings.

We note that if DCS decides to formalise the system of providing warnings to people carrying certain items into places of detention, before such a system is implemented, policies should be developed and disseminated to officers about the appropriate utilisation of warnings.

Recommendation

23 It is recommended that the Department of Corrective Services consider whether to begin recording information about each time correctional officers provide a person with a warning for possessing a prohibited item within a place of detention.

9.2.3. Improved record keeping about storage and destruction of seized items

During the review period comprehensive records were not kept about items seized from visitors. As is discussed below in section 12.1.2 of this report DCS has recently begun improving the way it records information about contraband finds and seizures. We feel that, as well as keeping records about when an item has been seized from a person, the department should also keep information about who has responsibility for the item following seizure, and any information about destruction of the item, and who authorised destruction.

Recommendation

24 It is recommended that the Department of Corrective Services begin recording details about items seized from people (other than inmates). In particular, details should be kept about the type of item seized, the person responsible for the seized item, and information relating to the destruction of the item.

Endnotes

[342] *Corrective Services Act 2000* (QLD) sections 103(4)-(5), and 104(3)-(4).
[343] *Correctional Services Act 1982* (SA), sections 85B(5)(a) and 85B(6).
[344] *Correctional Services Act 1982* (SA), section 85B(7).
[345] *Correctional Services Act 1982* (SA), section 85B(8).
[346] *Corrections Act 1997* (Tas), section 24(3).
[347] *Prisons Act 1981* (WA), section 50(6).
[348] Email received from Acting Superintendent, Operations, Department of Justice, Prison Services Division, Western Australia, 1 February 2005.
[349] *Corrections Act 1986* (Vic), section 32(4).
[350] *Corrections Act 1986* (Vic), section 32(4A).
[351] Email received from Operational Support and Special Projects, Department of Justice, Correctional Services, Northern Territory, 7 February 2005.
[352] Email received from Manager, Business, Policy & Coordination, ACT Corrective Services, 14 February 2005. As mentioned in section 3.4.7 the only peo eople sentenced to full time detention in the ACT serve their sentences in NSW.
[353] Section 27F(3).
[354] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 30.
[355] DCS Operations Procedure Manual, section 12.10.3.
[356] DCS Operations Procedure Manual, section 12.10.3.
[357] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 30.
[358] Submission 4, NSW Police, Local Area Commander, 19 April 2005.
[359] Submission 7, DCS Superintendent, 26 April 2005.
[360] Submission 14, NSW Police, Assistant Commissioner, Commander, 4 May 2005.
[361] Submission 16, Youth Justice Coalition, 13 May 2005.
[362] Sulman, L.M., *Review of Exhibit Handling by Correctional Facilities of the NSW Department of Corrective Services*, 8 April 2003.
[363] Information provided by DCS 26 August 2003.
[364] Submission 13, DCS, 10 May 2005.
[365] *Crimes Act 1900*, section 356D.
[366] *Crimes Act 1900*, sections 356N, 356S, 356T, 356U.
[367] Submission 16, Youth Justice Coalition, 13 May 2005.
[368] DCS Operations Procedures Manual, section 12.10.9.
[369] Section 79(h2).
[370] The Hon Richard Amery MP, NSWPD, Legislative Assembly, 8 May 2002.
[371] The Hon Michael Richardson MP, NSWPD, Legislative Assembly, 28 May 2002.
[372] Section 27E(2).
[373] Observation record 21, July 2004.
[374] Interview record 39, August 2004.

Chapter 10. Use of force and arrest

10.1. Use of force

In some Australian jurisdictions, correctional officers are authorised to use force to ensure a visitor to the facility complies with a search. In others, force is authorised only when it is used to remove a person from the facility if they refuse to comply with a search request, or pose a risk to the security and good order of the centre.

Each correctional officer in the Northern Territory (while acting as such) is deemed to be a member of the police force, and has all the powers and privileges of such a member for the purposes of the performance of his or her duties.[375] Despite this, we have been told that correctional officers in the Northern Territory do not use force to attempt to obtain a visitor's compliance with a search. If a person refuses to be searched, they will simply be refused a visit.[376]

In the ACT correctional officers do not have the power to search people entering a remand centre or periodic detention centre (with the exception that people may be scanned with a metal detector). If the Superintendent of a centre considers it necessary to safeguard the health of a detainee, or the security and good order of a centre, he or she may refuse to allow a person to visit the detainee, or require a person to leave the centre. If a person refuses to leave a centre, a custodial officer may use such force as is necessary to remove the person from the centre.[377] Similarly, in Victoria, force can be used to compel a person to leave a prison, if a person disobeys a Governor's order to do so.[378]

In Tasmania and Western Australia if a person refuses to be searched, correctional officers may use such force as is considered *'reasonably necessary'* for the purpose of conducting the search.[379] In Queensland, corrective services officers can use force to remove a person from the vicinity of a prisoner or place of detention, if it is reasonably believed the person may pose a risk to the security of a prisoner, or the place where the prisoner is detained.[380] In addition, officers can use force to search a person who has committed a security offence, and can use force to detain such a person.[381]

In South Australia the current legislative provisions allow reasonable force to be used against a person if the person does not comply with a requirement to be searched, or a requirement that a vehicle they have driven be searched. In such circumstances, force is to be used to secure a person's compliance with the search.[382] The South Australian Parliament has, however, recently agreed to amend the legislative provisions so that reasonable force can no longer be used to ensure compliance with a search. When recently passed amendments are proclaimed, force will only be able to be used to remove a person from the institution if, for example, a person refuses to comply with a search.[383]

We spoke to a senior officer at the South Australian Department of Corrective Services who explained to us why the South Australian legislation was being amended. The following is a summary of what he told us.

> *The existing SA legislation allows correctional officers to use force to search people on correctional centre property. A couple of years ago a drug detection dog indicated the scent of a narcotic odour on a woman waiting for a visit. Officers told her that they wished to search her but she refused, and said that she wished to leave the centre. Officers told her that she would be searched, and that force could be used to search her. A couple of 'blokes' with the woman told the officers not to touch the woman and that she was going to leave the centre. In the end a brawl broke out in the visiting area and "people were hurt".*
>
> *As a result of this event, correctional officers in South Australia generally stopped using their power to 'use force' to search visitors. They have taken the attitude that correctional officers are not police, and as long as the contraband is not being trafficked into the centre, then officers have done their job. So, instead of using force to search a visitor who wants to leave, the person will simply be allowed to leave the premises. If force is to be used, it is simply used to make the person leave.*[384]

10.1.1. Use of force in NSW

Correctional officers who stop, detain or search a person in accordance with Part 4A of the *Summary Offences Act 'may use such force as is reasonably necessary to exercise the function.'*[385]

The DCS Operations Procedures Manual states:

> *The use of force should only occur in extreme circumstances and as an option of last resort. The standard of justification for the use of force on a visitor is far greater than for an inmate. Immediately after the use of force, a person on whom force was used must be asked if they require medical assistance (whether they appear to be injured or not), and if the person requests medical assistance or is obviously injured, then appropriate medical assistance must be called. Officers must also be aware that they cannot "forcibly" search a visitor i.e. put hands on them.*[386]

Correctional officers who use force against a person being stopped, detained and searched are required to write a report outlining:

> *the amount of force used, the reason why force was used, the identity of all officers involved in the use of force, whether the person was offered medical assistance after the use of force, and their response to an offer of medical assistance.*[387]

Staff from our office have never observed a correctional officer using force against a visitor to a correctional facility. When we asked governors of correctional facilities across NSW whether staff based at their centre had used force on a visitor between February 2003 and May 2004, 27 out of 28 (96%) said that to the best of their knowledge, staff had not used force against a visitor in this time period. The one governor who reported use of force, by centre-based staff, towards visitors during this period, said that force had been used on approximately three occasions. We have since been advised that on each of these occasions force was used to separate fighting visitors, and restrain a visitor from assaulting an inmate in the visits area, and was not used in relation to officers' stop, detain and search powers.[388]

In September 2004 we requested information from DCS about the number of times, since February 2003 staff from the DCS security units had used force when stopping, detaining or searching a person other than an inmate. According to the reports provided, force was used on 16 occasions during this time period. In all but two of these incidents, force was used against one person. In the remaining cases, force was used against two people.

Of the 16 incidents where force was used:

- Eleven (68.75%), involved force being used on a person (or people) visiting an inmate at the correctional facility.
- One (6.25%) involved force being used on a person depositing money into an inmate's account.
- One (6.25%) involved an ex-inmate who had been granted bail and was attending the centre to collect his property.
- One (6.25%) involved three people who were on the property of a correctional complex, but who refused to state their names and explain to officers what they were doing on the property.
- Two (12.50%) involved people outside of a correctional facility. Of these, one incident involved a man standing near a correctional centre, who was alleged to have provided drugs to a person visiting an inmate at the centre. The other involved a man who appeared to be under the influence of alcohol, who was walking adjacent to the boundary of a correctional complex.

Of the reports about the 16 incidents involving use of force by correctional officers from the security units, all gave at least a general account about the events leading up to the use of force, a description of the type of force used, and an explanation about why force was used. Below are several excerpts of security unit reports about incidents where force was used on a person other than an inmate.

> ***S&I report number 7***
>
> *[During search of visitor] "Show me inside your mouth." I looked up and saw that [POI] appeared to be choking. Officer [Name] grabbed hold of [POI] by the left arm and asked him, "Are you OK?" [POI] started to struggle and as he did so he pushed Officer [Name] away and attempted to move toward the doorway. Officer [Name] restrained [POI] by grabbing his upper torso. I restrained [POI] by grabbing his left arm. At this time Officer [Name] entered the room and assisted us in restraining [POI] grabbing his right arm.*
>
> *During the struggle, a green balloon fell from [POI's] mouth. I retrieved the green balloon from the floor and retained it. A short time later after [POI] calmed down, Officer [Name] said to [POI], "What is in the balloon?". [POI] said "Pot." Officer [Name] said, "what did you swallow?" [POI] said, "One balloon with pot in it." Officer [Name] then cautioned [POI].*
>
> *The clinic staff were contacted. [Corrections Health Nurse Name] attended the gate. [POI] was offered medical attention but he refused.*
>
> ***S&I report number 10***
>
> *As [POI] was being directed to the property search area he refused to comply with all directions to submit to a property search. As [Officer Name] attempted to search [POI's] wallet, [POI] attempted to snatch the wallet out of Officer [Name's] hand. [Officer Name] took hold of [POI] by the arm, forced him to the ground, then handcuffed him behind his back. A search was done of [POI's] property – nil found.*

S&I report number 46

[Visitor was asked to leave the premises as he appeared to be under the influence of alcohol. He started swearing at officers and threatening them.]

At 14.25 Hrs [POI] put his backpack on his back. He then spat at my person hitting me in the chest. He then threw his closed right fist towards my face. I evaded [POI's] punch and struck [POI] in the face with the palm of my hand.

Officer [Name] and [Name] immediately took hold of [POI's] arms. [POI] was moved onto the ground, so that he was lying face down. [POI] struggled against officers [Name] and [Name] whilst he was on the ground. [POI's] wrists were then placed into a pair of handcuffs. Officers pleaded with [POI] to calm down and stop struggling. [POI] continued thrashing his arms and legs and banging his head onto the concrete path. [POI] was then placed into a Departmental van that had a secure cage in the back seat with air-conditioning.

[Approximately 10 minutes later police arrived, and POI was taken into police custody].

S&I report number 47

[POI was found with packet of green vegetable matter (GVM). Officer began cautioning him]. As officer [Name] was saying this [POI] stepped forward and lunged towards the GVM, in an attempt to grab it. First Class Correctional Officer [Name] who was standing behind [POI] grabbed both of his arms and turned him away from the desk so that he was facing a sofa. I grabbed [POI's] right arm and pushed him towards the sofa. I helped officer [Name] to place his arms into a pair of handcuffs behind his back. I then instructed [POI] to sit on the chair. Once he had calmed down, officer [Name] removed the handcuffs with my help [and] placed them so that [POI's] hands were in front of him. [POI] was then instructed to sit down.

Two registered nurses attended the … office and examined [POI]. They found no injuries but gave [POI] two Panadol for a headache.

It is positive to note that most of the reports we examined (14 or 87.50%) appeared to include the names of all correctional officers involved in the use of force. However, it is a matter of some concern that only three reports (18.75%) included information about whether medical assistance was offered and received. Of the three instances where medical assistance was offered, it was accepted on two occasions. On one occasion Panadol was offered to the person.[389] Reports do not indicate what medical attention was provided on the other occasion.[390]

It is interesting to note that of the 16 reported incidents involving uses of force, 11 of these (68.75%) involved a person being restrained using handcuffs, and one (6.25%) involved officers unsuccessfully attempting to restrain a person by using handcuffs.

The DCS Operations Procedures Manual states:

Restraints are only to be used in circumstances where the actions of the person who has been detained are so severe that there is a risk of injury to that person, bystanders or to the officers involved. The person being detained is only to be restrained for as long as necessary in the circumstances.[391]

While it is positive to note that correctional officers who use or attempt to use handcuffs to restrain a person appear to be making reports about such incidents, it is potentially problematic that handcuffs are used in such a high proportion of cases involving uses of force against people other than inmates.

The high percentage of uses of force involving restraint by handcuffs could, for example, indicate that correctional officers are not making reports about less invasive uses of force against people. Alternatively, it could indicate that correctional officers are using handcuffs to restrain people when it may be more appropriate for a less invasive form of restraint to be utilised. Our examination of reports about incidents where handcuffs were used suggests that in most instances, handcuffs do not appear to have been used unreasonably. However, on at least some occasions, reports do not clearly demonstrate that the person's behaviour was so '***severe***' that there was a risk of injury to the person or others that necessitated the use of handcuffs.

It may be useful for DCS to remind officers that when dealing with members of the public, force should be used only as a last resort, and that the least amount of force to effectively restrain or control the person, should be used. In addition, officers should be reminded that after force is used, medical attention is to be offered to the person whether or not they appear to be injured. This training would be particularly useful for officers who work in the security units, as they are the most likely to be in situations where force may be used on visitors. Our suggestion for further training in this area is incorporated in recommendation 27 below.

We also feel that it would also be useful for records about uses of force against people other than inmates to be centrally stored, and audits of such records periodically undertaken by the department. This will enable DCS to examine, on an ongoing basis, whether force is being used in a reasonable and consistent manner, and

whether comprehensive reports made about such incidents are completed. This suggestion is incorporated into recommendation 25 below.

10.2. Arrest

The *Crimes Act* provides all people, including correctional officers, with limited powers of arrest. In particular, section 352 provides:

> *(1) Any constable or other person may without warrant apprehend,*
>
> *(a) any person in the act of committing, or immediately after having committed, an offence punishable, whether by indictment, or on summary conviction, under any Act,*
>
> *(b) any person who has committed a serious indictable offence for which the person has not been tried,*
>
> *and take the person, and any property found upon the person, before an authorised Justice to be dealt with according to law.*

Authorised justices are magistrates, registrars of a court, and certain employees of the Attorney General's Department.[392]

Correctional officers are not only endowed with the power to make what is commonly regarded as a 'citizen's arrest'. The *Summary Offences Act* also provides that in regard to offences relating to places of detention *'the powers of arrest of a police officer may be exercised by a correctional officer.'*[393] Correctional officers who arrest a person in accordance with the *Summary Offences Act* must, as soon as practicable, take the person, and any property found on the person to a police officer, or before an authorised justice to be dealt with according to law.[394]

In our experience, when correctional officers believe a person is acting unlawfully in a place of detention, in the vast majority of cases the correctional officers will detain the person and request that NSW Police attend the centre and deal with the person. If police advise that they are unable to attend, correctional officers will usually seize any prohibited items from the person, record the person's details and information about the items seized, and direct the person to leave the centre. When police officers become available, they will usually attend the centre to collect the prohibited items, obtain relevant information from the correctional officers involved, and if considered appropriate, may locate the person and charge them with a criminal offence.

If police attend a correctional facility because correctional officers have detected prohibited items, or suspect that a person may be in possession of prohibited items, the police will usually conduct a further search of the person and their vehicle (if they arrived at the centre in a private vehicle). Police will then question the person, weigh and describe any evidence of the offence (usually the prohibited items), secure and record exhibits in view of the suspected offender, and make a decision (sometimes in consultation with correctional officers) about how to proceed.

Police officers have a range of options about how to deal with a person suspected of committing a criminal offence. If the offender is a child, the *Young Offenders Act 1997* offers a number of options to deal with offending behaviour. Police can, for example, issue a warning or caution, or seek a conference involving the offender, his or her family, the victim and other invited persons. If these options are deemed inappropriate, the police may commence criminal proceedings against the young person.

For offences involving adults, police have the (unlegislated) option of issuing a warning or caution, or if the offence is more serious, issuing a Court Attendance Notice (CAN) either at the location where the offence was committed, or back at the police station. When police wish to charge someone for committing a criminal offence, they usually proceed by using the least restrictive approach. This means people are usually formally arrested and taken to a police station to be charged only in more serious matters, or where police wish to further investigate the matter. The NSW Police Code of Conduct advises officers:

> *Be mindful of competing requirements between the rights of individuals to be free and the need to use the extreme action of **arrest** so you can charge people who break the law. Do not, for the purpose of charging, **arrest** for a minor offence when it is clear a summons or court attendance notice (field) will ensure attendance at court. Also keep in mind your ability to issue infringement notices for many offences.*[395]

As discussed in section 9.1.1.2 above, when police do arrest a person and take him or her back to the police station, and the person is detained while further investigations are conducted, the police must follow a number of procedures set out in Part 10A of the *Crimes Act.* For example, the person must be cautioned that they do not have to say or do anything but that anything they say or do may be used in evidence,[396] and they must be informed that they have a right to attempt to communicate with a friend, relative, guardian, independent person or legal practitioner.[397] In addition, where appropriate, police are to provide the person with access to consular officials, an interpreter, medical assistance, as well as refreshments and toilet facilities.[398] Police officers are also required to keep detailed records about the detention of the person.[399]

Police are subject to these detailed provisions because of the recognition that arresting and detaining a person, and thereby removing their right to be free, is a significant power. To ensure this power is not abused, officers are required to treat people reasonably and be accountable for their actions.

10.2.1. Guidance to correctional officers about their arrest powers

The DCS Operations Procedure Manual has relatively detailed provisions concerning correctional officers' arrest powers. It states:

> *It is to be clearly understood that the option to arrest is always an act of last resort. Refusal to be searched or to await the arrival of police, in itself, is not sufficient cause for arrest.*[400]
>
> *An arrest is the taking or apprehending of a person by authority of the law. It may be made by seizing or touching the body, but it is sufficient if the party is within the power of the officer and submits to the arrest. Mere words do not constitute an arrest unless the person intended to be arrested goes with the person arresting him/her.*
>
> *The following scenarios provide guidance to correctional officers on circumstances where the power of arrest may be utilised:-*
>
> *(1) discovery of contraband on the person and there is a refusal to await police arrival,*
>
> *(2) discovery of contraband in a vehicle which contains only one occupant,*
>
> *(3) discovery of contraband in a vehicle containing multiple occupants and an admission of ownership of the contraband by one or more occupants,*
>
> *(4) discovery of a person(s) caught in the act of introducing or attempting to introduce contraband into a place of detention and there is a refusal to await police arrival,*
>
> *(5) refusal to be searched on exit from a place of detention where there has been a refusal to wait for police to attend and the person has given reasonable cause for the correctional officer to suspect that an offence has been committed which is punishable by indictment, or on summary conviction under any Act.*[401]

The DCS Operations Procedures Manual also advises correctional officers of points to be observed when it becomes necessary to effect an arrest. In particular, officers are advised that:

- An arrest must be effected in the quietest possible manner, using no more force than is absolutely necessary.
- The arrested person must be told at the first available opportunity the true reason for his/her arrest, unless the circumstances are such that he/she must know the general nature of the alleged offence for which he/she has been arrested.
- If not already present, the police must be called, and the arrested person handed over to police custody. Police must be given a full account of the arrest, the grounds for arrest and any contraband seized.[402]

The following protocol is included in the DCS Operations Procedure Manual about how an arrest is to be effected:

> *Officer: My name is Correctional Officer (state name). I have observed you within/in the immediate vicinity of this place of detention and I have seen you acting suspiciously. I have formed the opinion that you have attempted to introduce contraband into a place of detention and I intend to call the police. I am requesting you to accompany me and await the arrival of police.*
>
> *Person: Refusal.*
>
> *Officer: Be aware that if you do not comply with my request for you to accompany me, you may be subject to arrest.*
>
> *Person: Continued refusal and inability to offer a reasonable excuse for behaviour and/or observation of suspicious activity, item or additional behaviour that strongly suggest the commission of an offence.*
>
> *Officer: I am directing you to accompany me to await the arrival of police. It is an offence for you to refuse my direction.*
>
> *Person: Refusal to await the arrival of the police.*
>
> *Officer: I arrest you under section 27 F of the Summary Offences Act 1988, because I believe you have attempted to introduce contraband into this place of detention.*
>
> *Immediately following an arrest the following warning is to be stated: -*

"I have formed the view that you may have committed an offence contrary to the Summary Offences Act 1988. You are not obliged to say or do anything unless you wish to do so but anything you do say or do, will be recorded and may be given in evidence. Do you understand?[403]

10.2.1. Arrest of suspected offenders by correctional officers

We have not been able to precisely determine how often correctional officers use their powers to arrest people other than inmates, as such records are not centrally collated by DCS. However, it does not appear to be a common occurrence for correctional officers to utilise their powers of arrest. As mentioned above in section 9.1.1 when a correctional officer suspects that a person has committed, or is committing a criminal offence, the officer will usually detain the person for up to four hours until police arrive, rather than arrest the person. Alternatively, the person may be permitted to leave, with police following up the matter later if this is considered appropriate.

In September 2004 we requested information from DCS about the number of times, since February 2003 that staff from the DCS security units had arrested a person for committing an offence in relation to a place of detention. In response, we were advised that 11 such arrests had been made during this time period. We note that this is a very small number given that there are approximately 419,000 visits to correctional facilities each year.[404]

When we requested reports about each of these incidents, we were provided with reports about two incidents where a correctional officer had arrested a person other than an inmate. Below are excerpts from the two relevant reports.

S&I report number 51

[Two males and one female person were observed within a metropolitan correctional complex. The persons of interest refused to provide officers with their names, or explain why they were on the premises. They initially refused to leave the complex when directed to do so, and swore and made threatening gestures to officers. After much prompting the three persons left the complex.]

Upon reaching the [centre] I turned around and saw the two asian males come back onto the complex. Officer [Name] and the officers from [Name Emergency Response Unit] headed towards the two asian males. I walked towards the officers and met them all in the top carpark out the front of the Periodic Detention Centre in front of a [vehicle]. Officer [Name] spoke to the taller asian male, [h]e said "It is an offence to introduce into any correctional centre a drug, alcohol, syringe, weapons of any sort or medication. Do you have anything to declare?". The tall asian male spoke, He said "Yeah. I have some syringes in the car, I use drugs alright". I had a conversation with Officer [Name] and we contacted the Police.

The asian males became abusive towards Officer [Name] and I. The smaller asian male in the hat said "Leave us alone you fucking idiots, we are leaving". I said "You are not to leave the complex, you have re-entered the complex, I am placing you under arrest. You have trespassed on enclosed lands and are in possession of syringes. You must wait until Police arrive". The taller asian male said "Fuck off I am leaving, let's go." I said "Sit down, you are under arrest and are not going anywhere". The males both complied with my instructions. The taller asian male then commenced using his mobile phone, I immediately took the mobile phone off him. He spoke, he said "Give me back my fucking phone". I said "You are under arrest, therefore you will not be permitted to use your mobile phone". Both then stood up and attempted to leave the complex again of which I then with the assistance of [officers from the Emergency Response Unit] detained them and placed handcuffs on them. …

[Police arrived and the correctional officers began to search the males' vehicle. Inside were three syringes in a black container. It is not clear what, if any, action police took in relation to charging these individuals.]

S&I report number 35

[Officer finished searching under bonnet of POI's vehicle]. I was standing approximately 2 metres from [POI] when he flicked a lit rolly cigarette at me, striking me in the right leg and moved toward me in what I considered a threatening manner.

When [POI] came within arms reach of me, with flailing arms, I perceived imminent danger toward myself, and restrained him. [POI] and I had a short struggle until he was restrained on the ground.

I told [POI] he was under arrest for assault. Officer [Name] retrieved some handcuffs as [POI] was still struggling, and assisted me in the restraint of [POI].

…

A short time later Senior Constable [Name] attended the centre in relation to the incident and informed [POI] that he would be summonsed to court for Assault on [date].

It is our view that the DCS Operations Procedure Manual contains appropriate and adequate guidance to correctional officers about their powers of arrest. The manual also requires that when correctional officers arrest a person, reports are to be made by all officers concerned, and any other relevant witnesses.[405] Despite this, we were not provided with reports in 81.82% of cases where we told that officers from the DCS security units arrested a person other than an inmate.

In addition, the two reports that we were provided with did not include all relevant information required by the DCS Operations Procedure Manual. For example, both reports do not indicate whether cautions were given to suspected offenders, and one report does not indicate whether the person was advised why he was being placed under arrest. In addition, for one of the two arrests we received reports by all relevant officers provided to us. In relation to the other arrest we only received one report, although it was clear that numerous officers were involved.

We understand that correctional officers seem to be exercising their arrest powers very rarely, and we believe this is appropriate given that correctional officers have the power to detain people, without arresting them, until police officers arrive. Despite the fact that the arrest power is not being used often, it is extremely important that when it is used, arrests are made in accordance with legislative provisions and policy documents. In addition, comprehensive reports about such events must be written by relevant officers, and stored in a way that ensures they are easily accessible and able to be reviewed.

We feel that officers should be reminded about the appropriate procedures that must be followed when an arrest is made, and that officers should also be reminded about reporting requirements. This training would be particularly useful for officers who work in the security units, as they are the most likely to be in situations where arrests may be made. In addition, to enable DCS to determine on an ongoing basis how often correctional officers are using their powers of arrest, and whether such powers are being used properly, we feel that reports about arrests should be centrally collated and periodically audited by a senior officer. These suggestions are incorporated into recommendations 27 and 25 below (see section 12.5).

Endnotes

375 *Prisons (Correctional Services) Act* (NT), section 9.

376 Email received from Operational Support and Special Projects, Department of Justice, Correctional Services, Northern Territory, 7 February 2005.

377 *Remand Centres Regulation 1976* (ACT), clause 16.

378 *Corrections Act 1986* (Vic), sections 43(3) and 45(5).

379 *Corrections Act 1997* (Tas), section 22(5) and *Prisons Act 1981* (WA), section 49(8).

380 *Corrective Services Act 2000* (QLD), section 103.

381 *Corrective Services Act 2000* (QLD) sections 104(1)-(3). A security offence is defined in section 104(5) of the *Corrective Services Act* as an offence that poses a risk to the security and good order of a corrective services facility, or the security of a prisoner.

382 *Correctional Services Act 1982* (SA), sections 85B(3)-(4).

383 The Correctional Services (Miscellaneous) Amendment Bill 2004 was assented to on 24 February 2005 but has not yet commenced. See sections 85B(5) and 85B(6)(b).

384 Interview 57, 11 March 2005. Notes taken by Ombudsman officer following conversation.

385 *Summary Offences Act* 1988, section 27I.

386 DCS Operations Procedures Manual, section 12.10.2.

387 Ibid., section 12.10.9.

388 Submission 13, DCS, 10 May 2005.

389 S&I report number 47.

390 S&I report number 36 simply states '*medical treatment was afforded*'' to two visitors by a Justice Health nurse.

391 DCS Operations Procedures Manual, section 12.10.2.

392 *Crimes Act 1900*, section 352(5). See also, *Criminal Procedure Act 1986*, section 3.

393 *Summary Offences Act 1988*, section 27F(6).

394 *Summary Offences Act 1988*, section 27F(7).

395 NSW Police, *Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME)*, accessed NSW Police intranet, 19 July 2005.

396 *Crimes Act 1900*, section 356M(1)(a).

397 *Crimes Act 1900*, section 356N.

398 *Crimes Act 1900*, section 356O, and sections 356S – 356U.

399 *Crimes Act 1900*, section 356V.

400 In the DCS Operations Procedure Manual, this paragraph is written in capital letters, and in bold font.

401 DCS Operations Procedures Manual, section 12.10.8.

402 DCS Operations Procedure Manual, section 12.10.8.2.

403 DCS Operations Procedure Manual, section 12.10.8.2.

404 Information received from DCS throughout the review period indicates that between 21 February 2003 and 20 February 2005 there were 837,828 visits to correctional facilities.

405 DCS Operations Procedure Manual, section 12.10.2.

Chapter 11. Searches of staff and authorised visitors

There is no doubt that some people who work in correctional facilities, or attend facilities for official business are involved in providing prohibited items to inmates. While it is likely to be a small number of people who engage in such activities, it is probable that these people may find it easier to introduce greater amounts of contraband, or more dangerous items, than would usually be introduced, for example, by people passing items to inmates during personal visits. This is because staff and authorised visitors are likely to have greater access to inmates, they are more likely to be familiar with the correctional environment, security procedures and routines, and may be less likely to be thoroughly searched because they occupy a position of responsibility and trust within the correctional system.

In recognition that DCS employees might introduce contraband items into a place of detention, the *Crimes (Administration of Sentences) Regulation* provides:

> *The governor of a correctional centre or the principal security officer may require a correctional officer or Departmental officer who is on the premises of the centre:*
>
> *(a) to submit to an inspection and search of personal possessions, to scanning by means of an electronic scanning device and to being sniffed by a dog, and*
>
> *(b) to empty the pockets of the officer's clothing, and*
>
> *(c) to make available for inspection and search any room, locker or vehicle that is under the officer's control at the centre.*[406]

In addition, when correctional officers were granted powers to stop, detain and search people other than inmates, with the commencement of amendments to the *Summary Offences Act* in February 2003, this legislation specifically provided:

> *Nothing in this section prevents the powers that may be exercised in relation to a person from being exercised in relation to a correctional officer.*[407]

In spite of the existence of these provisions, at the beginning of the review period it was not common practice for staff across the correctional system to be searched when entering or leaving a correctional facility, or while they were on duty. The ability of DCS to implement a state-wide system of searching staff has historically been hampered because of resistance by correctional officers to be searched, or conduct staff searches of each other, resistance which has been supported by relevant unions.[408]

At the beginning of the review period some searches of staff were being conducted by correctional officers, however, this occurred on an ad hoc basis, and practices varied significantly from centre to centre. As raised in our discussion paper:

> *When we contacted governors of correctional facilities in May 2004 to determine the practices used at each centre to search staff, contractors and authorised visitors, we were advised that at some correctional facilities all staff and contractors entering the centre are subject to some form of personal search, such as being asked to remove a hat, gloves, coat, jacket or shoes, and/or to empty the contents of his or her pockets or a bag. At other centres staff and contractors are rarely or never searched. In addition, only some centres keep records about the number of searches conducted of staff, contractors and official visitors, and who is searched.*
>
> *We were also advised that all members of staff at 14 correctional facilities (50%) are required to carry any personal items they take into a secure area of the centre, in a clear plastic bag. This policy is aimed at making it easier for nominated staff to view the personal possessions being carried by staff. Staff at 12 correctional facilities (43%) are not required to carry their personal items in clear plastic bags, and two centres (7%) have a policy whereby some staff, but not others, are required to use a clear bag for carrying personal items.*[409]

During 2004 the ICAC released two reports about trafficking of contraband into correctional centres by correctional officers. Both correctional officers the subject of investigation admitted to the ICAC that they trafficked contraband into inmates.[410]

These reports publicly highlighted the fact that staff of correctional facilities do sometimes introduce prohibited items to inmates (some of whom are housed in extremely secure facilities), a situation which places other staff, as well as inmates and visitors in extremely dangerous situations. Following the ICAC investigations into the two correctional officers, DCS introduced new searching procedures for staff, and other initiatives designed to detect and reduce corrupt activities committed by staff members.

11.1. ICAC investigations

11.1.1. Introduction of contraband into the High Risk Management Unit at Goulburn Correctional Centre

In February 2004 the ICAC released its report on an investigation into the introduction of contraband into the High Risk Management Unit (HRMU) at Goulburn Correctional Centre. The HRMU is a high security facility that is designed to house up to 75 inmates who are assessed as posing a significant risk to the community, DCS staff or other inmates.

The ICAC report found that in the first week of 2003 a male correctional officer met with an associate of an inmate on two occasions. On each of these two occasions the correctional officer was paid $4,000 in cash and given items of contraband to be taken inside the HRMU. Several days later the correctional officer took four mobile phones, six SIM cards, a mobile phone charger, a miniature digital camera that can be used with a mobile phone, and a miniature ratchet device into the inmate's cell.

On 28 June 2003 the correctional officer agreed to accept $4,000 for taking steroids into the HRMU for delivery to the inmate. At a meeting with the inmate's associate, the officer accepted $4,000 and ten tablets. On this date, the officer agreed to take further quantities of tablets into the HRMU in return for the payment of $4,000 on each occasion,[411] however, he was apprehended by NSW Police officers and officers from the ICAC that afternoon.

The correctional officer advised the ICAC that he carried the prohibited items into the HRMU in one load, and that they were carried in his pockets, and *'AIDS pouch'*.[412] The ICAC report states:

> *At the time [officer] took the phones into the HRMU, correctional officers had to pass through an airport-style metal detector as they entered the prison. [Officer] said that he set off the alarm, as was usually the case, but no one challenged him. He said that the alarm always went off when staff went through but there were no staff to stop and search other officers.*[413]

It its report about this incident, the ICAC stated:

> *A correctional officer may choose to engage in corrupt conduct no matter what counter-measures are in place. However, this is more likely to occur if the work environment is such that security measures and monitoring arrangements are inadequate, and the risk of detection is thus reduced. In such circumstances, an officer may conclude that the rewards of engaging in such conduct outweigh the associated risks.*[414]

The ICAC report contained a number of recommendations designed to reduce the trafficking of contraband into correctional facilities. In particular, it recommended:

> *That as a priority a comprehensive and consistent state-wide staff search policy be developed and implemented, with particular focus on searches of staff in correctional centres holding high-risk inmates in maximum security, and on means of detecting organic contraband. To maintain the deterrent effect at optimum levels, the search system should be subject to regular monitoring, audit and review.*[415]

11.1.2. Introduction of contraband into the Metropolitan Remand and Reception Centre, Silverwater

In September 2004, the ICAC released another report about a correctional officer who was found to have introduced contraband into a maximum security correctional facility.[416] When detected introducing contraband in July 2003, the relevant officer had been a DCS employee for over ten years, was a member of the Prison Officers Vocational Branch of the Public Service Association, and was on the executive council of the union within the Metropolitan Remand and Reception Centre (MRRC) where he was working.[417]

According to the ICAC report the correctional officer formed a friendship with an inmate, with whom he had common interests. The officer started providing some of his food to the inmate, and then began collecting food from the inmate's mother and delivering it to the inmate. Subsequently the inmate started requesting that the officer provide him with items other than food, and between April and December 2003 the officer introduced into the centre steroid

tablets, cocaine, marijuana, a Game Boy, audio tapes and five or six mobile phones. For this he received payment of $5,000 from a friend of the inmate.

In December 2003 the officer received payment of $1,000 from an associate of the inmate. The next day he attempted to take a mobile phone and 100 steroid tablets into the MRRC hidden in his underpants, however, he was intercepted and subsequently arrested by officers from the DCS Corrective Services Investigation Unit[418] and the ICAC.

The ICAC found that there were a number of factors that contributed to the attitude and conduct of the correctional officer in introducing contraband into the MRRC. In particular:

- The officer formed inappropriate associations with inmates and family members of inmates.
- The officer was a heavy user of illegal drugs, including marijuana, cocaine and ecstasy. This is likely to have increased his vulnerability to pressure from inmates, and impacted upon his judgment.
- The procedures for searching staff entering the MRRC were not effective.[419]

In relation to staff searching, the officer advised that prior to June 2003 officers were required to walk through a metal detector when entering the MRRC. However, even though the alarm was operative and was usually activated when officers passed through it, searches were generally not conducted. After June 2003 (when the officer was detected introducing contraband into the HRMU) correctional officers were required to take their personal items into the MRRC in a clear plastic bag. Bags were to be opened and inspected whenever requested. In addition, six officers a day were to be taken aside for searches of their pockets and bags.

The correctional officer advised that the new searching procedures did not deter him from introducing contraband. This is demonstrated by the following dialogue between the officer and Counsel Assisting, during the ICAC investigation.

> *Q: Between August and December you've told us you were still taking things into the gaol?*
>
> *A: Yeah.*
>
> *Q: So even though you knew that other warders may search you, you still took it upon yourself to undertake this activity?*
>
> *A: Well, they're not going to strip search me, are they? Where was everything coming in, through me underpants, so – the search policy is moot anyway. I mean what is it going to achieve? If you're going to bring something in you're not going to have it in your clear plastic bag, are you?*[420]

11.2. DCS response to ICAC investigations

11.2.1. Introduction of staff searching regime at all correctional facilities

The ICAC investigations proved to be a catalyst for a number of changes in relation to searching of staff members and authorised visitors. For example, in August 2003 the Public Service Association advised DCS that the Association had rescinded its previous decision not to support members of the Prison Officers Vocational Board (the branch of the union representing correctional officers) conducting searches of other members. The Association advised *'Full compliance with the legislation will now occur.'*[421] In addition, in August 2004 legislation commenced allowing for drug and alcohol testing of staff,[422] and testing of staff has since commenced.[423]

Further, DCS accepted the ICAC's main recommendation stemming from the investigation into the introduction of contraband into the HRMU. In other words, it agreed to develop a comprehensive state-wide staff search policy that would be subject to regular monitoring, audit and review.

In August 2004 the DCS Operations Procedure Manual was updated to make provision for regular staff searching, and recording of information about such searches. This provides that searches of staff and authorised visitors may be conducted on a routine or targeted basis, and that signs must be prominently displayed warning that property in the possession of an employee or authorised visitor is liable to be searched, and refusal to permit a search is an offence.[424]

The Manual states:

> *1) Governors/OIC's will determine the method of selecting those employees and authorised visitors to be searched. Each day, a number of employees and authorised visitors to a correctional facility or place of detention will be subject to random searches.*

> (2) *Governors/OIC's will ensure that a discrete area away from public view is used for random searches. The search will be conducted with due regard to decency and self-respect. Officers conducting the search will be professional and carry out their duties tactfully.*
>
> 3) *Officers are to ensure that other employees/authorised visitors do not inadvertently enter into the search area (if necessary, by delaying such other persons from entering or leaving the correctional facility).*
>
> 4) *A random search is to be undertaken by two officers. One officer is to conduct the search and the other officer is to act as an observer/witness. One or both of these officers are to be the Gatekeeper or Delegated officer.*[425]

Prior to a search, searching officers are to explain the authority for the search, ask the person if they are aware about the contents of the property in their possession, and ask if there is any item the person wishes to declare. Following this,

> *The Gatekeeper or Delegated Officer will closely examine the contents of all containers surrendered and any possessions which the employee or authorised visitor has stored in the pockets of the clothes they are wearing. The contents of all containers and pockets are to be placed onto a desk/table to facilitate ease of inspection. Documents carried by an employee or authorised visitor may also be examined but not read unless they are identified as possible contraband items.*[426]

The Operations Procedure Manual also states:

> 4) *If an employee refuses to submit to a search on entry to or exit from a correctional facility or place of detention, there may be reasonable grounds for suspecting that the employee may be attempting to introduce contraband into the correctional centre/place of detention without lawful authority.*
>
> 5) *In these circumstances, a local order should immediately be issued directing that the employee be refused entry to the correctional centre or place of detention. Further, written reports will be submitted within 24 hours to the Commander who will promptly submit them to the Investigations Review Committee (IRC) to determine whether the incident should be formally investigated.*
>
> 6) *Without exception, under the provisions of Part 4A of the [Summary Offences] Act any person found in possession of contraband, or departmental property being removed without lawful authority, or trafficking into or out of any correctional facility or place of detention, will be arrested and charged. In the case of employees, disciplinary action will also be considered.*[427]

The DCS operations Procedure Manual requires that records about searches be maintained on a search register, which is to include details about unauthorised items discovered during a search, and details of any complaint made about a search.[428]

DCS has recognised that:

> *To be effective, the policy must be applied consistently to all employees and authorised visitors. It is vital for senior staff to lead by example in insisting their belongings and those of others are randomly and routinely searched. Senior staff need to stringently monitor the application of this policy in their areas of responsibility.*[429]

In addition to developing a more comprehensive and consistent system of staff searching by locally based correctional officers, in order to better address the issues of staff corruption and serious misconduct, and the introduction of contraband into correctional facilities, the Commissioner of Corrective Services established two taskforces in February 2004.[430]

11.2.2. Introduction of taskforces to detect the introduction of contraband

Taskforce Sky was established to identify and investigate corruption and serious misconduct by staff of DCS. The taskforce's primary role is to collect intelligence and evidence and pass this on to relevant branches of DCS (such as the Corrections Intelligence Group and Professional Conduct Management Committee) and also to external agencies such as the ICAC.[431]

Taskforce Con-Targ was established to address the issue of contraband within the correctional system. It is staffed by correctional officers (including a dog handler) as well as intelligence analysts and support staff, and is responsible for:

- co-ordinating and conducting operations to detect contraband being introduced by staff, authorised visitors, contractors and visitors to centres
- collecting and collating all intelligence concerning contraband

- developing systems to prevent the entry of contraband into places of detention[432]
- developing and maintaining an information system for capturing data about searches conducted, contraband found and resulting action taken.[433]

11.3. Searches of staff in practice

In mid 2004 Taskforce Con-Targ began conducting operations to search staff and authorised visitors entering correctional facilities. Correctional officers from other units (such as the DDDU) often assist the taskforce in conducting such operations. Standard Operating Procedures were developed to regulate the conduct of such operations.[434]

In the months surrounding the introduction of staff search operations, senior staff from Taskforce Con-Targ visited correctional facilities around the state to inform both custodial and non-custodial staff about the role of the taskforce, and explain the rationale for operations aimed at searching staff and authorised visitors. Staff were also informed about the procedures that would be followed during staff searches. It was hoped that explaining the new procedures, and the reason they were being implemented would make staff feel more comfortable during searches, and reduce any resistance to the new processes.

Taskforce Con-Targ advised us that successfully implementing a comprehensive staff searching regime would require a cultural change among correctional officers (both those conducting searches and those being searched), and that the aim of searching officers was to be *'friendly rather than firm'*.[435]

The approach taken by Taskforce Con-Targ is for officers to turn up unannounced at a correctional facility usually prior to the start of a shift. Those staff, contractors and authorised visitors who enter the centre around this time are taken aside and told they will be subject to a search of their person and property. People are taken one by one into a room and individually searched. Those searched can choose to take a support person or observer with them into the search room if they wish.

Staff from our office observed three operations to search staff and authorised visitors conducted by officers from Taskforce Con-Targ. Our observations indicate that such operations are usually conducted in a very standardised way. There are usually four Taskforce Con-Targ officers involved in conducting each search, as well as a number of officers supervising people waiting to be searched. The officers involved in the searching process have the following roles:

- One officer (usually the officer in charge) introduces the officers involved in the operation to the person being searched, explains the searching process and cautions the person being searched. Sometimes this officer will provide assistance in searching the property of the person being searched.
- One officer conducts a search of the person and his or her property.
- One officer acts as a scribe and records details about the person searched, and other relevant information. This officer may be required to operate the video recorder if the officer in charge of the operation or the person being searched advises that they would like the search to be recorded.
- One officer is a dog handler who uses a passive alert drug detection dog to screen the person for the scent of illegal drugs.

With the exception of the dog handler, each of the officers remains in the room throughout the search. The dog and dog handler are only in the room for a short period, generally the amount of time it takes for the dog to circle the person twice.

The general process that is followed is:

- The employee (or authorised visitor) will be taken to a room in a private location. Three officers will be waiting within the room. One officer will introduce the searching officers (and, when we were present, the observer from our office) to the person being searched. An officer will explain that there is a video recorder in the room, but that this will remain turned off unless the person being searched requests that it be turned on, or if the officer in charge of the operation believes that it should be turned on.
- An officer will explain the searching process, advise the person of the items they should not be carrying, and ask the person if they are carrying any prohibited items that they wish to declare.
- The dog handler and drug detection dog enter the room and circle the person twice. The dog handler will then advise the officer in charge of the operation advise whether the dog has indicated the scent of drugs on the person. If the handler believes the dog has indicated the scent of drugs on the person, the person will be questioned about this, and a second drug detection dog may be brought into the room to circle the person, to verify the first dog's indication.

- When the dog and handler have left the room the person will be screened with a hand-held metal detector.
- The person will be asked to observe a search of their property, and officers will then examine the contents of the person's pockets, bags, containers (such as lunch boxes) and wallets.
- An officer will record details about the person searched, and any prohibited items detected during the search.
- On occasions where no contraband items are found, and there is no reason to suspect the person may be committing an offence, the person will be thanked for their cooperation, and provided with a form outlining the procedures to follow if they have a complaint about the way the search was conducted. They will then be allowed to leave the room.
- On occasions where a person has been found with an item they should not be carrying, the officer in charge will speak to the person and determine the most appropriate course of action.

We were present on a small number of occasions where staff members were found to be in possession of items they were not authorised to bring into the correctional facility, or where officers suspected the person may have been in possession of drugs. The following notes were made by a member of staff from our office, observing searches of DCS staff and authorised visitors at a metropolitan correctional facility.

> ***Observation record 23(1)***
>
> *Female … staff member aged approx early 30s. Introduced by [OIC] to everyone in the room. She looked very nervous.*
>
> *POI: "I feel like I'm being interrogated" when everyone was introduced to her. [OIC] said he was just letting her know who was in the room so she felt comfortable. … The contents of her pockets were examined.*
>
> *...*
>
> *During a search of the POI's bag, officers detected a mobile phone SIM card attached to a brochure. When questioned about why she was carrying the SIM card, the POI explained that she'd recently had her phone stolen in London and had bought a new phone when she got home. She had tried the previous night to activate her SIM card, by telephoning the provider of the phone, but had failed to get through after waiting for half an hour. She'd brought the SIM card in to try to activate at work. She said she'd left her phone in the car as she was supposed to.*
>
> *POI kept repeating "'I can't believe I'm so stupid. I didn't think at all."*
>
> *She was told she'd have to have the SIM card taken off her, and [the Corrective Services Investigation Unit] would be contacted. POI asked what would happen next. [OIC] said this would depend on what [the Corrective Services Investigation Unit] said but that he would try to get in contact with her by lunch time. [OIC] did say that he believed what she was saying.*
>
> *After she left the room … [officer] confirmed to [OIC] that the SIM card had not been used.*
>
> *During the de-briefing [after the searches had finished, OIC] said to the Deputy Governor that he believed the POI's story, and that he would be leaving the SIM card with the Deputy to return to her after her shift. [OIC] said he thought the POI should be formally cautioned, but said she was most likely simply naïve. The Deputy said that he'd heard the POI was over in the wing crying her eyes out, and had been for the last few hours, because she thought she would be going to gaol for two years. The Deputy said he would go and speak to her.*
>
> ***Observation record 23(2)***
>
> *Male .. worker. Full warning/caution. Told it was a random search directed by the Commissioner, consistent with the legislation. Asked if he was scared of dogs. Said no.*
>
> *[Dog] lots of sniffing and looking back at handler. [Dog handler 1] said "Yes" as he went to leave the room. [OIC] thought this meant everything was OK and there was no indication but [dog handler 1] told him that it was a positive indication. [OIC] called [dog handler 2] in to conduct a second PAD search. [Second dog] sat clearly by the man's left foot. [Dog handler 2] said "where?" to the dog, who then dropped to the ground nosing the man's shoe. The dog was praised by the handler before they left the room.*
>
> *[OIC] explained to the POI that there had been two positive indications by the dogs, the [OIC] asked if he knew why this would occur. POI said no.*
>
> *The rest of the search was then conducted with the man being asked to remove his shoes and lift up the bottom of his jeans (no-one searched the man's shoes).*
>
> *The man was asked whether he packed everything himself, and whether anyone else had put stuff in his property. POI replied "not that I'm aware of."*
>
> *[OIC] left the room for a minute, and returned with [dog handler 1] and the Deputy Governor. They were introduced to the POI. The man was told the video was being turned on, and that [OIC] would be asking some questions.*

When asked whether he has been anywhere lately, like a pub, where people could have been using drugs, the POI said he goes to the same pub every afternoon, and had been there the day before, wearing the same jeans as he was presently wearing.

The man was asked whether he could smell people smoking marijuana while he was in the pub. He said that the smoke was so thick he didn't know what was being smoked.

The POI was asked whether he had a vehicle at the centre. Replied yes, and said he was willing to have his vehicle searched.

[OIC] told the POI that he should be conscious of where he worked, and that he shouldn't wear the same clothes to work as he wore to places where there could be the odour of drugs present. [OIC] said he was confident the dogs' indications were positive and not false. He told the POI that the matter would not be taken any further, but to "be careful what places you habitat"

POI: "I don't know what to say…"

[OIC]: "You don't have to say anything, I'm allowing you to proceed."

[OIC] then said that these moments can get pretty embarrassing and that he should be careful about where he goes after work.

POI: "Yeh, it is [embarrassing], and as I say, I'd be more than happy, I'd prefer to have tests to demonstrate that I don't touch anything illegal." He said he would be willing to do urinalysis or a blood test.

[OIC] said that wasn't necessary and that this wouldn't be taken any further.

During the debriefing [after the searches had finished], [dog handler 1] said that he thought the man was not carrying anything on him but that he'd definitely been in contact with drugs much more recently and directly than last night in a pub. [OIC] said that next time random searches are conducted at [centre name] they would try to do a targeted search of the man.

Observation record 23(3)

Male non-custodial, aged 60+.

C/O: "Have you got any items not prescribed?" Said he had a SIM card in his notebook. When asked why, POI said that he keeps his phone in the car but likes to keep his SIM card separate.

POI was asked if he was aware of the legislation that says bringing SIM cards into centres is an offence. POI said yes, but that he's never thought about it until he was sitting outside the office prior to the search.

The POI was asked whether he was scared of dogs. He said no, but asked whether the dog would react to the scent of his cat.

[Dog] sat during the PAD search but [dog handler 1] said that he was not making an indication. [OIC] called [dog handler 2] in for a second opinion. The POI asked whether he was just getting a second opinion, or whether the second dog was doing something different. [OIC] confirmed he was just getting a second opinion.

[Second dog] sniffed the man a lot, following which [dog handler 2] said that there were obviously lots of scents on the man, but no really clear indication ([dog handler 2] made a so-so indication with his hand).

The man showed C/Os where the SIM card was located in his notebook. It was a very old SIM card (large) and the man said he'd had it from 1997.

[OIC] told the man he'd have to take the card and "interrogate it." He said he was going to check out the 'subscriber'. The POI asked what he meant by this, and [correctional officer] said "the person who pays the bill".

POI: "When you say interrogate, do you mean me or the phone?"

C/O: "the SIM card."

[OIC] told the man that he had to be aware of every item he carried into the centre. The POI said that most people put their phones in their locker. He said he keeps his phone in his car but wants to keep the SIM card separate so that if someone breaks into his car they won't be able to use his phone. The man said the Governor told staff it was OK for them to put their phones in their locker. He then said that head office hasn't thought about the fact that some people come to the gaol on public transport and have no option but to put their phone in a locker.

The POI was told that he'd be contacted later in the day about any further action that would be taken.

In the debriefing [after the searches had finished, OIC] told the Deputy Governor that he could give the SIM card back to the man at the end of his shift, but that he should be formally cautioned, and the Deputy might want to reiterate that you can't carry things like that into the gaol.

Overall, when we observed searches by officers from Taskforce Con-Targ of staff and authorised visitors we found:

- Some people being searched were clearly nervous or embarrassed during the searching process. For example,

  POI: "I'm used to doing this [searching] other people. I'm not used to having it done to myself." [436]

  *

  POI: "Still horrible that this is done. I don't have a problem with it and I know it has to be done, but it's strange being searched as an officer."[437]

- Officers involved in searching people were professional and courteous at all times, often actively engaging those being searched in conversation in an attempt to make them feel more at ease. For example,

  Female C/O. Looked quite uncomfortable when she entered the room, for example, she was giving short, curt answers and was not very chatty. During the search the woman became far more chatty, most likely as a result of the Con-Targ officers engaging her in conversation.[438]

- Some officers clearly did not approve of being searched, but many others commented that they supported the staff searching procedures. For example,

  When asked to outstretch his arms for a scan by the metal detector the POI rolled his eyes.[439]

  *

  The man was asked to empty his wallet and was told this was standard procedure. He replied … "Yeh, I'm surprised they haven't done this previously. If you don't like it you should resign."[440]

- Many people who were searched were carrying a significant amount of personal property into the correctional facility, some of which they were not aware of because the bag had not been cleaned out for a period of time, and some of which was excess to what they are authorised to bring into the centre. For example,

  When asked if she had any items to declare,
  POI: "Not to my knowledge"

  C/O: "Did you pack your bag today?"

  POI: "Yes, but some of it's been in there for awhile."[441]

  *

  "The only thing I'm worried about is that I have two [cigarette] lighters rather than one this morning."[442]

11.4. Issues arising out of staff searching

11.4.1. Different practices for searching staff and authorised visitors compared to inmate visitors

In our discussion paper we noted that the approach taken during searches of staff and authorised visitors is somewhat different from searches of visitors entering correctional facilities. In particular:

- *staff and authorised visitors are searched individually in a private room*
- *if a drug detection dog indicates the scent of a narcotic odour on a member of staff or an authorised visitor, a second dog will be used to screen the person to confirm the accuracy of the initial indication*
- *only in rare circumstances will the locker or vehicle of a staff member or authorised visitor be searched*
- *staff or authorised visitors who are indicated by a drug detection dog or found with contraband may be treated more leniently than visitors. For example, following an indication by a drug detection dog, our observations indicate they will be more likely to be permitted to remain in the centre, and they are more likely to have unauthorised items returned to them.*[443]

In response to these comments, DCS acknowledged that there are currently differences in the way staff and authorised visitors are searched compared to the way inmate visitors are searched, and the department advised:

> *The different searching regime for staff arose from industrial relations issues in implementing the legislation: the acceptance by staff of the principle of staff searches, and consequent absence of industrial action, was balanced by an emphasis on privacy during searches and 'back-up' confirmation of any positive indication.*
>
> *In due course, given that correctional staff have come to increasingly recognise and accept the practical necessity for being searched (as well as the legislative provision) and have come to increasingly respect the integrity of search procedure, staff searches will revert to the same standards as searches of visitors.*[444]

11.4.2. Safety of searching officers

In our discussion paper we also indicated that several correctional officers who had conducted, or were likely to be required to conduct staff searches had advised us that they were worried about the ramifications of searching fellow officers. One officer who spoke to us said:

> *All due respect to the system, they've managed to bring the riots down by segregating parts of the gaol, but if someone's determined to kill you, they will kill you if you don't have that backup, and we rely on the goodwill of the officers to watch our backs … There's good officers and there's hopeless officers, but I'm telling you, I might just be barking up the wrong tree here, but I seriously don't want to search other officers. But people like [Name] has stuffed it up for us big time. I've got to try and see it from the hierarchy's point of view as well, but the hierarchy does not have to live with the fact that, I don't just have to rely on the guys that work in this gaol. I have to rely on five or six gaols worth of officers that will look after me. Now they're asking me to search them.*[445]

In response to our discussion paper, we did not receive any additional evidence or information from stakeholders to indicate that correctional officers had experienced, or were likely to experience, hostility, aggression, or lack of assistance from fellow officers because of their role in conducting staff searches.

The department's view about the risks to officers from conducting staff searches is as follows.

> *The Department can understand the sentiments expressed and quoted in the Discussion Paper, however it is considered most unlikely that a correctional officer would refuse to come to the aid of an officer being attacked by an inmate for any reason. In the heat of the moment, officers come to the aid of another officer simply because of the shared uniform, not because of the identity of the person wearing the uniform; and the corollary applies – an officer would not first see who was being attacked and then decide whether or not to assist. The Department has never had a situation where an officer was being attacked by an inmate and another officer refused to assist.*[446]

11.4.3. Comments

During the review period the efforts of DCS to implement a comprehensive regime for searching staff and authorised visitors have been commendable. Implementing routine and targeted searches of the personal property of staff at individual centres, as well as more comprehensive searches conducted by Taskforce Con-Targ demonstrate the department's commitment to reducing the introduction of prohibited items by employees.

Regular searching of employees will help to ensure that staff members remain aware of, and vigilant about, the items they bring with them to work. In conjunction with other anti-corruption measures being implemented by the department, regular searches are also likely to act as a deterrent to those considering trafficking items in to inmates, and a higher likelihood that those who do introduce prohibited items are detected and dealt with accordingly. We feel that the system of staff searching should continue to become increasingly effective if different branches within the department continue to gather and share intelligence information, as appropriate.

While we note that some people may question the fairness of having different searching procedures in place for staff and authorised visitors, compared to inmate visitors, we feel that at the current time there is adequate justification for the use of the different approaches. There has been significant industrial resistance to the concept of staff searching in the past, and it is not surprising that it will take some time before staff become used to, and comfortable with these processes. In the mean time it is not unreasonable for additional safeguards to be utilised during staff searches.

Endnotes

[406] Clause 240.

[407] *Summary Offences Act 1988*, section 27F(8).

[408] Executive officers are represented by the Commissioned Officers Vocational Branch of the Public Service Association, and correctional officers are represented by the Prison Officers Vocational Branch of the Public Service Association.

[409] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 32.

[410] Officers gave evidence to the commission under objection. This means that under section 38 of the *Independent Commission Against Corruption Act 1988*, the admissions cannot be used against the officers in any criminal proceedings relating to the admissions.

[411] Independent Commission Against Corruption, *Report on investigation into the introduction of contraband into the High Risk Management Unit at Goulburn Correctional Centre,* February 2004, p. 21.

[412] Correctional officers carry a small bag attached to their belt which contains items (such as gloves) that enable officers to safely deal with situations where they may come into contact with a person's bodily fluids, such as blood. This bag is commonly referred to by officers as an AIDS pouch.

[413] Independent Commission Against Corruption, *Report on investigation into the introduction of contraband into the High Risk Management Unit at Goulburn Correctional Centre,* February 2004, p. 20.

[414] Ibid., p. 23.

[415] Ibid., p. 29.

[416] Independent Commission Against Corruption, *Report on investigation into the introduction of contraband into the Metropolitan Remand and Reception Centre, Silverwater*, September 2004.

[417] Ibid., p. 11.

[418] The Corrective Services Investigation Unit investigates DCS staff suspected of committing criminal activities. The unit is staffed by NSW Police officers who are seconded to DCS.

[419] Independent Commission Against Corruption, *Report on investigation into the introduction of contraband into the Metropolitan Remand and Reception Centre, Silverwater*, September 2004, chapter 4.

[420] Ibid., p. 15.

[421] Letter from J. Cahill, Acting General Secretary, Public Service Association to D. Hunter, Director Workforce Relations, DCS, 13 August 2003.

[422] *Crimes (Administration of Sentences) Further Amendment Act 2002*. Relevant sections commenced 2 August 2004.

[423] Interview record 67, August 2004.

[424] DCS Operations Procedure Manual, section 12.5.3.1(9).

[425] Ibid., section 12.5.4.3.

[426] Ibid., section 12.5.4.3(6).

[427] Ibid., section 12.5.2.2(6).

[428] Ibid., section 12.5.6.

[429] Ibid., section 12.5.1.

[430] Nicholls, S., 'Jail officers targeted on contraband, corruption', *Sydney Morning Herald,* 27 February 2004.

[431] Interview record 67, August 2004.

[432] Interview record 28, May 2004.

[433] Interview record 62, March 2005.

[434] Taskforce Con-Targ, Standard Operating Procedure, *Searching Employees and Authorised Visitors at Entry and Exit Points of Departmental Premises*, issued 20 May 2004, and updated 10 September 2004.

[435] Interview record 45, August 2004.

[436] Observation record 26, December 2004.

[437] Observation record 30, February 2005.

[438] Ibid.

[439] Observation record 23, September 2004.

[440] Observation record 26, December 2004.

[441] Ibid.

[442] Observation record 23, September 2004. Note, inmates are not permitted to possess cigarette lighters.

[443] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 33.

[444] Submission 13, DCS, 10 May 2005.

[445] Interview record 39, August 2004. NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 33.

[446] Submission 13, DCS, 10 May 2005.

Chapter 12. Practical effect of stop, detain and search powers

In order to determine how effective the new powers of correctional officers to stop, detain and search people in or in the immediate vicinity of a place of detention have been, it is important to look at the reasons why the new powers were introduced.

When the legislation was being debated in Parliament, the then Minister for Corrective Services stated:

> *The circumstances in which contraband can be trafficked into correctional centres are not limited to visiting inmates. Contraband can be hidden inside tennis balls or other items and thrown over the perimeter walls. Contraband can also be left hidden in areas near correctional centres – for example, in car parks or under bushes – for later collection by inmates engaged in ground maintenance. Despite the best efforts and vigilance of correctional officers in detecting contraband, some contraband still gets through to inmates. Therefore, the existing powers of correctional officers to detect contraband need to be increased.*[447]

This comment demonstrates that reducing the amount of contraband entering correctional facilities was a primary goal of the new legislative provisions. In order to achieve this goal, it is likely that the new laws were intended to:

- lead to more people being detected introducing prohibited items into correctional facilities, and where appropriate that such people would be successfully prosecuted and subject to criminal sanctions, and
- act as an added disincentive for people considering introducing prohibited items (given that people acting illegally would be more likely to be detected).

It is extremely difficult to determine the overall effectiveness of the new stop, detain and search powers of correctional officers throughout the review period, when measured against these goals. The reasons for this include that:

- DCS has not kept comprehensive and easily accessible information about the type and amount of contraband detected within the correctional system.
- DCS has not kept comprehensive records about the number of times correctional officers have stopped, detained and searched people and vehicles.
- When records of searches have been kept, it is usually not clear whether searching officers were utilising the existing search powers outlined in the *Crimes (Administration of Sentences) Regulation*, or the new powers outlined in the *Summary Offences Act*.

Even if accurate records were kept about these issues, the effectiveness of the new laws would remain difficult to evaluate. This is because the stop, detain and search provisions are only one way that DCS is working to reduce the amount of contraband in correctional facilities.

In addition, the correctional system is an extremely dynamic environment and there are many variables that impact on the amount, type and location of searches conducted and contraband detected. For example, different contraband is in demand at different times; new methods are constantly devised of introducing prohibited items; officers may spend more time searching inmates one month and visitors or staff the next; and inmates known for frequently possessing or attempting to possess unauthorised items may leave or re-enter the correctional system, or move between institutions.

Further, a reduction in the contraband detected in a correctional facility may initially seem to be a positive thing because of the assumption that there is less contraband in the centre to be found. However, such a scenario may indicate one of a number of things, including that:

- fewer people introduced or attempted to introduce prohibited items
- fewer searches were conducted
- the searches conducted were less thorough
- prohibited items were more effectively hidden.

It is also essential to note that while a significant amount of contraband is introduced into correctional facilities, inmates frequently construct prohibited items, for example, by brewing alcohol, sharpening items into weapons, and making smoking implements. While it is possible to reliably assume that some prohibited items originate within the correctional system (such as 'gaol brew'), and others have been introduced (such as mobile phones) it is not possible to conclusively determine whether many items detected inside a correctional facility have been introduced from outside the correctional system or made by inmates.

Given these barriers to accurately evaluating the effectiveness of the stop, detain and search powers, we have instead decided to comment only on the practical effect of the legislation. To this end, below we have provided information about:

- the amount and type of prohibited items detected within the correctional system before and during the review period
- measures being implemented by DCS to improve record keeping about searches conducted and prohibited items detected in the correctional system
- the number of people charged and convicted for committing offences relating to places of detention, as well as information about the penalties received by convicted offenders
- the number of people banned from entering correctional facilities
- the views of stakeholders about the stop, detain and search powers of correctional officers.

We have also made some broad recommendations that, if implemented, should significantly improve the overall implementation and monitoring of the stop, detain and search powers.

12.1. Prohibited items detected in or near correctional facilities

In accordance with the Information Requirements Agreement developed at the beginning of the review period, the Commissioner of Corrective Services agreed to provide us with quarterly reports of the following information:

6. *Statistics on the amount and generic type of drugs confiscated from visitors to NSW correctional centres (referable to each correctional centre).*
7. *Statistics on the amount and type of contraband (other than drugs) confiscated from visitors, referable to each correctional centre, together with a schedule of items returned after confiscation and items disposed of after confiscation (including items destroyed).*
8. *Statistics on the amount and generic type of drugs found within NSW correctional centres (referable to each correctional centre).*
9. *Statistics on the amount and type of contraband (other than drugs) found within NSW correctional centres, referable to each correctional centre.*[448]

As it turns out, the department was not able to provide this specific information. Each quarter we did receive some information from DCS about prohibited items detected (usually from the security units), but there were a number of problems with the integrity of the information for purposes of analysis. For example, in some instances:

- it was not possible to tell which unit or centre the information provided related to
- it was not clear whether the information related to contraband found on visitors or in centres
- it was not clear whether the information provided to us was duplicated
- we were not provided with information about contraband found within individual correctional centres.

During the review we raised these shortcomings with our liaison officer at the department, who confirmed that the information we had been provided with was incomplete and unable to be analysed. The officer advised that DCS does not keep complete records about finds and seizures of prohibited goods.[449]

During the review period the department did have some limited capacity to centrally record information about prohibited items that have been detected in or near a correctional facility. When contraband is found, or an item is seized from a visitor, this information should be reported by relevant correctional officers to a duty officer. The duty officer then enters this information into a database. At the end of each day a running-sheet (or daily synopsis) is produced by the duty officer that contains relevant information about all incidents that occurred within the correctional system on that particular day.

A member of the DCS media unit advised us that he regularly extracts data from a hard copy of the daily synopsis and provides this extracted information to the Minister or Parliament when information about searches and contraband finds in the correctional system is sought. However, he acknowledged that the task of collating evidence about searches and contraband finds should be conducted systematically by an officer with operational and research experience as current statistics are likely to under-report contraband finds. This is because some data may not be entered into the database, and he may miss relevant records by trawling through hard copy documents.[450] Another senior officer advised that information currently provided to the Minister is *'embarrassing because of its unreliability'*.[451]

12.1.1. Daily synopsis audit

In the absence of a dedicated system to record the detection of contraband during the whole review period, the daily synopsis of the Duty Office Database is the best source of data on contraband finds, both within, and in the vicinity of correctional facilities, for this period.

Despite the fact that there are a number of problems with the Duty Officer Database that hinder the accurate recording and retrieval of information, we felt that it would be useful for us to determine, as accurately as possible, the amount and type of contraband being detected in NSW correctional facilities during the review period. We also felt that it would be useful to examine similar records in a period prior to the review period, so that we could determine whether there were any significant changes in the amount or type of contraband being detected.

We selected three separate six month periods and examined all daily synopsis entries within these periods to determine the different types of prohibited items that were found:

- inside the boundary of a correctional facility (for example, on an inmate, in an inmate's cell, or in an area frequented by inmates)
- in the possession of a visitor to a facility
- in the possession of a staff member or authorised visitor
- outside the boundary of a correctional facility
- in mail addressed to an inmate.

Where possible we noted the amount of prohibited items found (by weight or number). When this information was not provided we noted the number of times a record was made about a particular item being detected.

For further information about how we conducted the audit, and its limitations, see methodology, at section 2.9.

The results of the audit are outlined in Table 6 to Table 13:

Table 6. Results of daily synopsis audit – green vegetable matter

GREEN VEGETABLE MATTER*

INSIDE	20 Aug 2002-20 Feb 03	21 Aug 2003-20 Feb 04	21 Aug 2004-20 Feb 05
Grams	645.06	404.95	543.25
Plants	1	-	-
Seeds	107	48	6
Reefers/joints	-	1	-
Packets/bags	-	-	-
Balloons	-	2	-
Small quantity/small amount	x 29 instances	x 17 instances	x 12 instances
Quantity/amount or large quantity/large amount	-	x 3 instances	x 2 instances
Residue	-		x 3 instances
No details	-	x 13	x 7 instances
Other	-	-	x 1 instance

VISITOR	20 Aug 2002- 20 Feb 03	21 Aug 2003- 20 Feb 04	21 Aug 2004- 20 Feb 05
Grams	1359.93	557.05	503.2
Plants	-	-	-
Seeds	-	25	86.5
Reefers/joints	-	-	-
Packets/bags	-	-	3
Balloons	-	-	
Small quantity/small amount	x 6 instances	x 2 instances	x 4 instances
Quantity/amount or large quantity/large amount	-	-	x 1 instance
Residue	-	-	x 8 instances
No details	x 4 instances	x 4 instances	x 2 instances
Other	-	-	-
OUTSIDE			
Grams	-	1.3	-
Small quantity/small amount	x 2 instances	-	-
No details	x 1 instance	x 1 instance	-
MAIL			
Grams	-	1	5.2
Packets/bags	-	-	3

* Green vegetable matter includes references to marijuana, cannabis and hashish.
Records suggest that no green vegetable matter was found on staff or authorised visitors, or in an unspecified location.

Source: NSW Ombudsman examination of DCS daily synopsis. Results should be treated as a guide only.

Table 7. Results of daily synopsis audit – pills

PILLS*

INSIDE	20 Aug 2002- 20 Feb 03	21 Aug 2003 -20 Feb 04	21 Aug 2004- 20 Feb 05
Amphetamines	1	-	14
Anti-depressants	14	32	2
Ecstasy	18	193	1 small bag
Morphine	2	-	-
Pills (unidentified)	185.5	217	392, 41.9 grams
Sedatives	62	-	100
Steroids	11, 1 box	-	-
Other	-	x 4 instances	x 1 instance

VISITOR	20 Aug 2002- 20 Feb 03	21 Aug 2003- 20 Feb 04	21 Aug 2004- 20 Feb 05
Amphetamines	8	2.1 grams	
Anti-depressants	26, 2 packets		10
Ecstasy	8, 1 x instance 'small amount'	17	59.5
Morphine	3		
Pills (unidentified)	20.5	7, 8.7 grams	317, 1 card, 5 packets
Sedatives	161	51	330, 1 bottle
Steroids	10	4, 2 vials	
Other			x 1 instance
OUTSIDE			
Pills (unidentified)	-	76	-
Sedatives	-	125	-
LOCATION UNKNOWN			
Pills (unidentified)	6	-	-

*** Pills are quantified by number, unless otherwise specified.**
Records suggest that no pills were found on staff or authorised visitors, or in the mail system.

Source: NSW Ombudsman examination of DCS daily synopsis. Results should be treated as a guide only.

Table 8. Results of daily synopsis audit – other drugs

OTHER DRUGS

INSIDE	20 Aug 2002- 20 Feb 03	21 Aug 2003- 20 Feb 04	21 Aug 2004- 20 Feb 05
Amphetamines	23.6 grams	-	x 1 instance 'small bag'
Rock	7.66 grams	17.9 grams, x 1 instance no details	-
Heroin/opiate	0.3 grams	5 ml, x 1 instance 'small amount'	-
Methadone	x 1 instance no details	-	x 2 instances no details
Crystals	2.52 grams	0.8 grams	x 1 instance no details
Powder	19.57 grams, x 4 instances 'small amount', x 3 no details	65.11 grams, x 1 instance 'quantity', x 7 instances 'small amount', x 4 instances no details	73.36 grams, 1 teaspoon, 1 small bag, 2 packets, 8 satchels, x 1 instance 'quantity', x 1 instance 'residue', x 1 instance 'small amount

(Continued) INSIDE	20 Aug 2002- 20 Feb 03	21 Aug 2003- 20 Feb 04	21 Aug 2004- 20 Feb 05
Steroids (liquid)	-	146 ml	20 ml
Liquid (unidentified)	-	3 ml	-
Unknown	6.2 grams	-	-
VISITOR			
Amphetamines	5.9 grams, x 1 instance 'quantity'	3.8 grams, 5 mls	11.6 grams, x 1 instance 'residue'
Rock	0.33 grams, 2 pieces		2.4 grams
Heroin/opiate	3.33 grams, 30 units, x 2 instances no details	12.92 grams	1.9 grams, 15 mls, 2 balloons
Methadone	1 bottle, 1 tab	250 ml	0.5 jar, x 2 instances 'small amount'
Crystals	1 gram	0.34 grams	0.4 grams
Powder	8.25 grams, 2 foils, x 2 instances 'small amount'	31.29 grams, 4 packets, x 3 instances 'small amount', x 1 instance 'quantity', x 1 instance 'residue	31.8 grams, x 1 instance 'quantity', x 2 instances 'residue', x 1 instance 'several bags',
Steroids (liquid)	-	-	-
Liquid (unidentified)	-	-	50 ml, x 1 instance 'residue'
Unknown	x 1 instance no details, x 1 instance 'small amount'	-	-
STAFF/AUTHORISED VISITOR			
Amphetamines	-	-	0.3 grams
MAIL			
Crystals	-	-	1.3 grams
Powder	0.1 gram	04 grams, x 1 'small amount	1.2 grams,
Liquid (unidentified)	-	-	1.2 ml
LOCATION UNKNOWN			
Powder	-	3.1 grams	-
Liquid (unidentified)	-	20 mls	-

Records suggest that drugs were not found outside a correctional facility.

Source: NSW Ombudsman examination of DCS daily synopsis. Results should be treated as a guide only.

Table 9. Results of daily synopsis audit – smoking implements

SMOKING IMPLEMENTS

INSIDE	20 Aug 2002- 20 Feb 03	21 Aug 2003- 20 Feb 04	21 Aug 2004- 20 Feb 05
Bong	72	56, x 1 instance 'many'	29
Pipe	4	3	2
Lighter	22	36, x 1 instance no details	88
Cone	55	37	39
Stem	37	-	5
Implement (no description)	132	85, x 1 instance 'many', x 1 instance no details	160
VISITOR			
Bong	7	12	17
Pipe	1	-	1
Lighter	1	4	1
Cone	10	8	13
Stem	2	2	2
Implement (no description)	9	37, x 1 instance no details	50
LOCATION UNKNOWN			
Bong	-	8	-
Pipe	-	-	-
Lighter	-	5	1
Cone	-	5	-
Stem	-	6	-
Implement (no description)	4	-	-

Records suggest no smoking implements were found on staff or authorised visitors, outside a correctional facility, or in the mail system.

Source: NSW Ombudsman examination of DCS daily synopsis. Results should be treated as a guide only.

Table 10. Results of daily synopsis audit – syringes and needles

SYRINGES AND NEEDLES

INSIDE	20 Aug 2002-20 Feb 03	21 Aug 2003-20 Feb 04	21 Aug 2004-20 Feb 05
Syringe	127, 4 bundles	244, x 1 instance no details	156
Needle	40	121	96, x 1 instance 'quantity'
VISITOR			
Syringe	251	193	236, x 1 instance 'quantity'
Needle	33	281	21
OUTSIDE			
Syringe	-	3	7
Needle	-	-	-
LOCATION UNKNOWN			
Syringe	4	4	-
Needle	-	1	-

Records suggest no syringes or needles were found on staff or authorised visitors, or in the mail system.

Source: NSW Ombudsman examination of DCS daily synopsis. Results should be treated as a guide only.

Table 11. Results of daily synopsis audit – alcohol and gaol brew

ALCOHOL AND GAOL BREW

INSIDE	20 Aug 2002-20 Feb 03	21 Aug 2003-20 Feb 04	21 Aug 2004-20 Feb 05
Alcohol Cans	-	-	2
Alcohol bottles	20	3	23
Alcohol litres	1.8	4, x 1 instance 'quantity'	0.75
Gaol brew bottles	-	-	5
Gaol brew litres	269.55, x 1 instance no details	174.5, x 4 instances no details	199.6, x 1 instance 'quantity', x 2 instances no details
VISITOR			
Alcohol Cans	3	8	64
Alcohol bottles	15	2	74
Alcohol litres	0.84	8.2, x 1 instance 'quantity'	-
OUTSIDE			
Alcohol bottles	2	-	-

Table 12. Results of daily synopsis audit - weapons

WEAPONS

INSIDE	20 Aug 2002-20 Feb 03	21 Aug 2003-20 Feb 04	21 Aug 2004-20 Feb 05
Knives	23	32	47, x 1 instance 'quantity'
Shivs	143	116	116
Blades	40, x 1 instance no details	19, x 2 instances 'quantity', x 1 instance no details	50
Bars	9	31	46
Batons	-	11, 3 x instance 'quantity'	52, x 1 instance 'numerous'
Ammunition	-	1 round	-
Scissors	17	34	44.5
Tattoo implement	16	-	29, x 1 instance '3 canisters', x 1 no details
Firearms	1 glock pistol matchstick model	-	-
VISITOR			
Knives	24	62	57, x 1 'several'
Shivs	1	1	2
Blades	-	3	-
Bars	-	1	6
Batons	4	8	11
Ammunition	-	50 rounds, 1 bullet, x 1 instance 'quantity'	140 rounds, x 2 instances 'large amount'
Scissors	9	5	20
Tattoo implement	-	-	-
Firearms	1 replica pistol	1 replica pistol, 1 rifle	1 automatic pistol
LOCATION UNKNOWN			
Shivs	-	8	-
Tattoo implement	-	1	-
Scissors	-	2	-

Records suggest no weapons were found on staff or authorised visitors, in the mail system, or outside a correctional facility.

Source: NSW Ombudsman examination of DCS daily synopsis. Results should be treated as a guide only.

Table 13. Results of daily synopsis audit – weapons

MOBILE PHONES

INSIDE	20 Aug 2002-20 Feb 03	21 Aug 2003-20 Feb 04	21 Aug 2004-20 Feb 05
Mobile phones	50, x 1 instance no details	74	40, x 1 instance no details
Phone chargers	14	35	17
SIM cards	49	33	23
Phone batteries	2	6	6
VISITOR			
Mobile phones	6	3	17
Phone chargers	-	1	2
SIM cards	4	3	13
Phone batteries	1	-	-
STAFF/AUTHORISED VISITOR			
SIM cards	-	-	2
OUTSIDE			
Mobile phones	-	3	1
SIM cards	-		1
LOCATION UNKNOWN			
Mobile phones	-	1	-
Phone chargers	-	1	-
SIM cards	1	-	-

Records suggest no mobile phones or related items were in the mail system.

Source: NSW Ombudsman examination of DCS daily synopsis. Results should be treated as a guide only.

12.1.1.1. Comments about results of Daily Synopsis Audit

The DCS daily synopsis also includes information about prohibited items detected in correctional facilities that do not fall within the categories we have listed above. We have included the results of our audit of the daily synopsis for these miscellaneous items in Appendix 4.

Given the difficulties in analysing the information contained within the DCS daily synopsis,[452] the number of comments we can make about the results of our audit of daily synopsis records are limited. We do note, however, that before and during the review period significant amounts of prohibited items were detected on visitors entering correctional facilities, and inside correctional facilities.

We found that for most categories of items there was no identifiable upward or downward trend in the amount of items being detected in the periods August 2002-February 2003, August 2003-February 2004, and August 2004-February 2005. However, the available data does suggest that over these periods there may have been:

- a decrease in the amount of green vegetable matter detected, especially in relation to green vegetable matter detected on visitors

- an increase in the amount of pills detected by correctional officers, particularly those that were identified as sedatives, and those where the type of pill was not identified
- an increase in the amount of unidentified powder (assumed to be drugs) detected
- an increase in the amount of bongs detected on visitors, and a decrease in the amount of bongs detected inside correctional facilities
- an increase in the number of cigarette lighters found inside correctional facilities
- an increase in the amount of alcohol detected on visitors to correctional facilities
- an increase in the amount of weapons detected by correctional officers.

We reiterate that there are a number of factors that could have led to these results, including variations in the demand or supply of certain prohibited items, changeable reporting practices, and variations in the frequency of searches, or the types of searches conducted.

12.1.2. Taskforce Con-Targ Information Management System

DCS recognised that *'practices in recording, reporting and managing information relating to searches is eroded through inconsistencies and under reporting, which results in the unreliability of current information'.*[453] Therefore in 2004 Taskforce Con-Targ began developing a system that would allow records about searches conducted and contraband finds to be effectively recorded and audited. This system was approved in February 2004, after which, the new system began to be rolled out across the correctional system.[454] The purpose of the new system:

> *… is to ensure that all searches undertaken within departmental premises are correctly and accurately recorded reflecting the necessary details and including essential audit capabilities both at the local level and centrally.*[455]

The new system requires information about all searches and contraband finds to be forwarded in a standardised format to a designated person at each correctional facility. This person (usually the centre's Intelligence Officer) will verify the information in the report and forward relevant details to Taskforce Con-Targ to be entered into a database. The new system requires information about actions taken following the finding of a prohibited item to also be recorded. This means information will be recorded about whether a person was denied entry to a correctional facility, whether officers intend to recommend that a person receive a visitor ban, and any action the police take following a contraband find.

We have been told that the system which has been developed allows *'an infinite number of reports'* to be produced about searches and contraband finds.[456] For example, each month a report will be produced that states what has happened in response to any contraband finds. In addition, at regular intervals reports will be produced that detail outstanding matters to be followed up. This will allow correctional officers to find out, for example, the outcome of relevant police charges. Reports will also be able to be produced about the characteristics of inmates and visitors found with certain items.

The system which has been developed will allow DCS to have a much better understanding about the number of searches being conducted in the correctional system, and the amount and type of contraband found in different centres, and by different staff (local centre staff and staff from the security units).

This in turn will provide DCS with the ability to be much more strategic when deciding where to conduct searches, who to conduct searches of, and the most effective types of searches to conduct. It will also allow the department to determine more accurately trends in the amount of prohibited items being found on visitors, staff and authorised visitors, and within correctional facilities. While improvements to the new information management system are still being considered,[457] the new system appears to fulfil the ICAC's recommendation:

> *That a system-wide audit regime be developed and implemented to perform statistical analysis on intelligence in relation to the discovery of contraband within correctional centres. This information should be used to provide strategic direction for searches and the tracking of contraband trafficking into and between correctional centres.*[458]

12.2. People charged and convicted of introducing prohibited items into correctional facilities

Sections 27B – 27E of the *Summary Offences Act* contain the various offences relating to places of detention. These include offences relating to the unlawful introduction of items into (or out of) a place of detention, or to an inmate; as

well as offences relating to unlawfully communicating with an inmate, unlawfully loitering near a correctional facility, or unlawfully entering a place of detention. The full list of offences relating to places of detention is outlined in Appendix 3.

The BOCSAR provided us with information about the number of people charged with offences relating to places of detention, and finalised in the local court in the two years before the review period and most of the two years of the review period (up to 31 December 2004).[459] Table 14 illustrates that the number of people charged with offences relating to places of detention increased markedly during this period, with 326 charges finalised in the two years before the review period, and 785 matters finalised in the review period, up until the end of 2004 (an increase of 140.80%).

Table 14 also shows that while the number of people before the courts increased, conviction rates did not vary significantly over this period. This is perhaps not surprising given that in the local court, guilty pleas represent by far the most common outcome because pleading not guilty means the defendant may incur costly legal fees and a possible loss of sentence discounts if ultimately found guilty.[460]

Table 14. Number and outcome of charges relating to places of detention* finalised in the local court between 21 February 2001 and 31 December 2004.

Time period	Number of charges	Number of convictions**	Percentage of convictions	Number of non-convictions***	Percentage of non-convictions
21 Feb 2001 – 20 Feb 2002	139	125	89.93%	14	10.07%
21 Feb 2002 – 20 Feb 2003	187	160	85.56%	27	14.44%
21 Feb 2003 – 20 Feb 2004	403	334	82.88%	69	17.12%
21 Feb 2004 – 31 Dec 2004	382	334	87.43%	48	12.57%

*** Offences contained in sections 27B – 27E of the** *Summary Offences Act 1988.*

**** Convictions include matters finalised by way of 'Conviction' or 'Conviction ex parte'.**

***** Non-convictions include matters 'dismissed after hearing', 'withdrawn – no evidence', 'Non-appearance of parties', 'Stood out of list', 'Arrest warrant issued', 'Adjourned to Drug Court', and 'miscoded values'.**

Source: NSW Bureau of Crime Statistics and Research. Information provided 19 May 2005.

It is not clear why, during 2004, the local courts heard more matters concerning offences relating to places of detention. While it appears that over the review period the amount of some types of contraband detected increased, available information suggests that the amount of other items detected decreased or did not alter significantly. It may be that a greater number of people are being detected introducing prohibited items, however, given that information about the number of searches resulting in contraband finds was not kept during the review period, this is not possible to determine. Other factors, such as changes in policing activity may also have impacted on these results. For example, in more recent times police may be choosing to charge people with bringing a prohibited item into a place of detention, when previously charges would not have been laid, and a warning, caution or no action would have been the approach used.

Table 15 provides information about the penalties imposed upon people convicted of offences relating to places of detention. The information in the table demonstrates that magistrates are imposing a variety of penalties upon offenders, with the most common penalty imposed being a fine, and the next common penalty being a sentence of imprisonment.

Table 15. Penalties for convictions of offences relating to places of detention* finalised in the local court between 21 February 2001 and 31 December 2004.**

Outcome	21 Feb 2001 – 20 Feb 2002	21 Feb 2002 – 20 Feb 2003	21 Feb 2003 – 20 Feb 2004	21 Feb 2004 – 31 Dec 2004
No penalty	13 (10.40%)	30 (18.75%)	65 (19.46%)	53 (15.87%)
Offence proved, dismissed, s. 10 or 19B (Commonwealth)	4 (3.20%)	2 (1.25%)	5 (1.50%)	5 (1.50%)
Offence proved, discharged with recognizance, S.10 or 19B	1 (0.80%)	3 (1.88%)	7 (2.10%)	7 (2.10%)
Nominal sentence (sentence until rising of the court)	1 (0.80%)	3 (1.88%)	1 (0.30%)	4 (1.20%)
Fine	50 (40.00%)	54 (33.75%)	97 (29.04%)	93 (27.84%)
S. 9 Good Behaviour Bond	10 (8.00%)	7 (4.38%)	30 (8.98%)	40 (11.98%)
S. 9 Good Behaviour Bond with supervision	3 (2.40%)	8 (5.00%)	9 (2.69%)	11 (3.29%)
Community Service Orders	2 (1.60%)	6 (3.75%)	7 (2.10%)	9 (2.69%)
S. 12 suspended sentence	1 (0.80%)	2 (1.25%)	16 (4.79%)	18 (5.39%)
S. 12 Suspended sentence with supervision	3 (2.40%)	4 (2.50%)	8 (2.40%)	7 (2.10%)
Imprisonment	33 (26.40%)	41 (25.63%)	78 (23.35%)	82 (24.55%)
Home detention	1 (0.80%)	0 (0.00%)	1 (0.30%)	1 (0.30%)
Periodic detention	3 (2.40%)	0 (0.00%)	10 (2.99%)	4 (1.20%)
Total	**125 (100%)**	**160 (100%)**	**334 (100%)**	**334 (100%)**

* Offences contained in sections 27B – 27E of the *Summary Offences Act 1988.*
** If there is more than one penalty for the charge, the first penalty is selected.
Source: NSW Bureau of Crime Statistics and Research. Information provided 19 May 2005.

12.3. DCS visitor restrictions

When a person is detected committing an offence in relation to a place of detention, they may not only be subject to criminal proceedings. The Commissioner of Corrective Services also has the power to ban or restrict any person from visiting any or all NSW correctional facilities for a specified period of time if the Commissioner considers that such a person may prejudice the good order and security of a facility.[461] The department has developed a policy which provides that people who are detected introducing contraband into a place of detention may be banned from visiting some or all NSW correctional facilities for up to five years.[462] A ban may be imposed irrespective of whether police decide to prosecute the person for committing an offence.

It is important to note that people may be banned from visiting correctional facilities for reasons other than introducing contraband. For example, a ban may be imposed because a person has acted in a threatening manner towards staff, inmates or other visitors; because a visitor has engaged in inappropriate or indecent behaviour with an inmate during a visit; or because a person has used or attempted to use false identification when entering a correctional facility.

We have been advised that:

- 398 people were banned from visiting correctional facilities for a period of time in 2001
- 483 people were banned from visiting correctional facilities for a period of time in 2002
- 510 people were banned from visiting correctional facilities for a period of time in 2003
- 656 people were banned from visiting correctional facilities for a period of time in 2004.[463]

It is not possible for us to conclusively say that the increase in visitor bans over this four year period was due to an increase in the number of people detected introducing prohibited items into correctional facilities. However, information obtained by this office during an investigation into visitor restrictions and bans imposed by DCS in 2001 and 2002 suggests that the vast majority of visitor bans are imposed in response to a person being detected in possession of prohibited items on DCS property.[464]

12.4. Views of stakeholders

In considering the effect of the legislative provisions concerning the stop, detain and search powers of correctional officers, we feel it is not only important to consider the amount of contraband being detected in correctional facilities, and the amount of people being prosecuted for such offences. We also believe that it is important to obtain the opinions and perspectives of people using the powers, and those subject to them, about how the powers are operating in practice.

Ideally, those using the new powers should find them easy to understand and use, as well as effective in achieving their purpose. Those subject to the powers should find that they are being implemented fairly, consistently and reasonably.

12.4.1. Comments made by staff of DCS

During the review period we spoke to a range of DCS staff about the powers of correctional officers to stop, detain and search people. Most DCS staff we spoke to recognised the difficulties involved in preventing the entry of contraband into correctional facilities, and also recognised the dangers posed by the introduction of prohibited items.

Overwhelmingly staff of DCS supported the introduction of the new powers and believed they would assist in detecting the introduction of contraband into correctional facilities. Officers generally did not provide us with information about any difficulties or problems they had experienced in using their stop, detain and search powers. This is positive, however, the lack of concerns raised may have been influenced by the fact that correctional officers conducting searches are often unaware of, or do not comply with some provisions in the *Summary Offences Act*, and in practice there has been little change in the way searches of visitors to correctional facilities are conducted compared to the way searches were conducted prior to new powers being introduced.

Broadly speaking, comments made to us by DCS staff tended to focus on how existing powers could be more effectively used, and additional strategies the department should consider to reduce the amount of contraband being introduced into correctional facilities. For example, some comments we repeatedly heard throughout the review period were:

- it is important to provide appropriate education and training for correctional officers (including senior officers) about the stop, detain and search powers
- more searches should be conducted outside normal business hours
- consideration should be given to stationing drug detection dogs at every correctional centre
- the amount of static security equipment (such as x-ray machines, CCTV cameras, metal detectors and fences) should be increased, and new technologies introduced when available
- staff should be thoroughly searched, as well as screened for drug and alcohol use
- a zero-tolerance approach to introduction of contraband must be adopted
- more invasive search powers should be considered (such as strip searching members of the public).

Some staff noted that they believed DCS was doing everything possible to prevent the detection of contraband entering centres given resource constraints.

Where staff of DCS made comments to us about specific issues considered during our review we have included them in relevant sections of this report.

12.4.2. Comments made by visitors to correctional facilities

It is important that people subject to the stop, detention and search powers feel that the powers are not unreasonable, and that when they are stopped, detained and searched they are treated with courtesy and respect.

When we surveyed visitors to correctional centres in January 2005 we asked respondents *'When conducting searches of you and your property, how would you best describe the demeanour of most correctional officers?'* Respondents were asked to indicate whether they felt officers were usually *'polite or friendly', 'neutral or business-like', 'impolite or unfriendly',* or *'it varies'*. The responses we received are summarised in Table 16.

Table 16. Visitors' views about the demeanour of most correctional officers

Demeanour of most correctional officers	Number of responses	Percentage of responses
Polite or friendly	44	34.11%
Neutral or business-like	39	30.23%
Impolite or unfriendly	5	3.88%
It varies	39	30.23%
Other	2	1.55%
Total	**129**	**100%**

Source: NSW Ombudsman, survey of visitors to correctional centres, Jan-Feb 2005. Responses to question 'When conducting searches of you and your property, how would you best describe the demeanour of most correctional officers?'

Of the two people who responded 'other' one commented that most correctional officers were '*exemplary*'. The other stated that officers are normally polite, but on that day the correctional officer who asked her to remove her headscarf was rude.

Some people provided additional comments about the demeanour of correctional officers. These include:

> *Depends on officers*
>
> *Every visit is traumatic because you don't know what they're going to do – to you or him [inmate]. It depends on the officer*
>
> *Some are really good and some are dickheads with bad attitudes*
>
> *They're brilliant*
>
> *Very professional, always treated me politely*
>
> *Treat visitors like criminals – you feel scared.*

It is positive that 64.34 % of respondents advised us that most correctional officers are polite or friendly, or neutral or business-like. However, it appears that there is room for at least some officers to improve the way they deal with people visiting correctional facilities given that nearly 4% of respondents indicated that correctional officers were usually impolite or unfriendly and over 30% advised that the demeanour of officers is variable (suggesting that some encounters they have had with correctional officers have been negative).

In our survey to visitors of correctional facilities, we also asked respondents *'Are there any aspects of the searching process that you find to be unreasonable, or which make you (or children who accompany you) feel particularly uncomfortable?'* Table 17 illustrates the responses we received to this question.

Table 17. Visitors' views about the reasonableness of searching practices

Aspects of the searching process found to be unreasonable	Number of responses	Percentage of responses
Yes	28	21.88%
No	100	78.13%
Total	**128**	**100%***

*** One person did not provide a response to this question. Percentages are based on the 128 responses provided.**

Source: NSW Ombudsman, survey of visitors to correctional centres, Jan-Feb 2005. Responses to question ' Are there any aspects of the searching process that you find to be unreasonable, or which make you (or children who accompany you) feel particularly uncomfortable?'

Many people provided additional comments about the reasonableness, or otherwise of the searches they had been subject to. Some comments made to us include:

> *Feels a bit intrusive*
>
> *I panicked a bit when I first entered the car park and the officer gave his spiel. This is my first visit*
>
> *It all has to be done*
>
> *It's fine. It's part of the rules*
>
> *Sometimes I feel offended because I wouldn't do anything wrong but I understand the need for searches*
>
> *[We are] frightened of dogs, the children are especially frightened of them*
>
> *The searching process makes you feel like a criminal yourself. The first time is a bit daunting but you get used to it*
>
> *I feel sorry for the kids who are searched*
>
> *It is demeaning and degrading*
>
> *It has to be done but it's inconvenient*
>
> *[I'm] intimidated by the whole procedure, but it's a good thing because it keeps drugs etc out.*

These responses indicate that most people searched when they visit a correctional facility appear to find the searching processes reasonable, and understand the necessity of being subjected to the searching process, even if they find it to be embarrassing or upsetting. Research conducted by the DCS Research and Statistics Branch in 2000 indicated that 43 per cent of visitors were 'very' satisfied with security checks and 34 per cent were 'mostly' satisfied.[465] It is pleasing to note that the introduction of the new powers does not seem to have impacted negatively on people's perceptions about being searched.

12.5. Concluding remarks and recommendations

While no significant concerns have been raised throughout the review period about the way correctional officers use their stop, detain and search powers, it has become apparent that correctional officers are not always acting in compliance with the relevant legislative provisions, or policy documents. Throughout Part Two of this report we have made a number of recommendations that should, if implemented, provide greater clarity about the items people are not authorised to bring into a correctional facility, and improve the way correctional officers are utilising their powers.

We note that we have made a number of recommendations that will, if accepted, require correctional officers to improve the way they keep records about searches conducted, and make reports about serious incidents. For example, we have recommended that officers be required to make records about the location of searches and any factors that led to a correctional officer suspecting that a person was committing or had committed an offence, and that details be recorded about compliance with safeguards, and seizure of items. In addition, we have suggested that it would be appropriate for records to be improved in instances where force has been used against a person, or a person has been detained or arrested. While we note that improving record keeping will have an impact on officers' time, we do not feel that the additional reporting requirements are likely to be overly onerous or time consuming.

Correctional officers currently use various forms of search sheets when conducting searches, to record details about people and vehicles that are searched. While the details currently recorded are limited, we feel that it would not be

a difficult task for search sheets to be amended, and formatted in such a way as to remind officers of the need to record all relevant details when a person is stopped, searched and detained, including details about the type of search conducted. Much of this information could be recorded by requiring officers to simply tick boxes.

As well as requiring officers to record additional information, we also feel that it would be useful for DCS to require all records and reports about the stop, detain and search powers to be stored centrally, and for senior officers to periodically audit the records, with the aim of determining whether officers are complying with relevant legislative and policy provisions (including reporting requirements). This would assist the department to determine whether further training of, or guidance to, correctional officers is necessary, and whether there are any other factors that prevent officers from complying with relevant provisions.

It may be possible for additional records about the stop, detain and search powers to be incorporated into the centralised search information management system recently developed by Taskforce Con-Targ. However, we recognise that the department is in the best position to determine the most appropriate way of collating and auditing its own records.

Recommendation

25 It is recommended that the Department of Corrective Services:

- **i) centrally store records and reports made by correctional officers about incidents where people (other than inmates) or vehicles have been stopped, detained and searched**
- **ii) require senior officers to periodically audit records and reports made by correctional officers about incidents where people (other than inmates) or vehicles have been stopped, detained and searched to determine whether officers are complying with legislative and policy requirements. Priority should be given to auditing records concerning compliance with safeguards, incidents involving detention, uses of force and arrests made by correctional officers.**

In various sections of this report, we have made a number of comments suggesting that:

- the amount and quality of information for officers contained within the DCS Operations Procedures Manual about the stop, detain and search powers could be improved, and
- there is a need for training material about the stop, detain and search powers to be reviewed, and for officers to receive additional training about their powers and responsibilities in this area.

Rather than making individual recommendations in relation to each of the areas where we feel correctional officers require additional guidance and training, we are of the view that it is more appropriate for the department review and improve the overall training and guidance that officers receive in relation to the stop, detain and search powers, and that in conducting such reviews particular attention be paid to issues raised throughout this report.

Recommendations

26 It is recommended that the Department of Corrective Services review its Operations Procedure Manual with the aim of providing additional guidance to correctional officers about their powers and responsibilities in relation to stopping, detaining and searching of people (other than inmates) and vehicles.

27 It is recommended that the Department of Corrective Services review and update its training material in relation to the stop, detain and search powers of correctional officers, and ensure correctional officers who are likely to use these powers have received adequate training about their powers and responsibilities in this area. In addition to covering standard search procedures, training should focus on the areas where correctional officers' powers are the most significant, such as those relating to detention, use of force and arrest.

Endnotes

[447] The Hon Richard Amery, NSWPD, Legislative Assembly, 8 May 2002.
[448] Information Requirements Agreement, signed by the Ombudsman and the Commissioner of Corrective Services, February 2004. Attached at Appendix 1.
[449] Interview record 56, February 2005.
[450] Interview record 67, July 2004.
[451] Interview record 62, March 2005.
[452] For information about limitations, see methodology section 2.9.
[453] DCS Senior Assistant Commissioner's Direction: 2005/017, *Search Information and Management System* (undated).
[454] Ibid.
[455] Ibid.
[456] Interview record 62, March 2005.
[457] DCS Senior Assistant Commissioner's Direction: 2005/023, *Search Information & Management System Workshops*, June 2005.
[458] Independent Commission Against Corruption, *Report on investigation into the introduction of contraband into the High Risk Management Unit at Goulburn Correctional Centre,* February 2004, p. 29.
[459] At the time of writing the BOCSAR was only able to provide us with information about court matters finalised before the end of 2004. We are therefore unable to comment on the outcome of matters finalised in the final two months of the review period, that is 1 January 2005 to 20 February 2005.
[460] Section 22 of the *Crimes (Sentencing Procedure) Act 1999* requires a court to take into account that an offender pleaded guilty and to impose a lesser sentence than would have otherwise been imposed.
[461] *Crimes (Administration of Sentences) Regulation 2001*, clause 105.
[462] DCS Operations Procedures Manual, chapter 15.14, including annexure 15.4, *Hierarchy of sanctions pursuant to the Crimes (Administration of Sentences) Regulation 2001*.
[463] Interview record 68, August 2005.
[464] NSW Ombudsman, *F*
visits to inmates and correctional centres", March 2004. Note, this is not a public document.
[465] McHutchison, Judy., *Visiting the Inside: A survey of visitors to NSW Correctional Centres*, DCS Research Publication No. 43, May 2000, p. 22.

Part 3.

The right of victims of serious offences to make oral submissions at parole hearings

Chapter 13. The parole process.......... 139

13.1. The parole process and the role of victims 139

13.2. Recently enacted changes to the parole process.......... 141

Chapter 14. Victim submissions 143

14.1. Victims who are entitled to make a victim submission.......... 143

14.2. Informing victims about their right to make a victim submission 144

14.3. The role of victim submissions 148

14.4. The content of victim submissions 151

14.5. Assistance for victims who make a submission.......... 153

Chapter 13. The parole process

13.1. The parole process and the role of victims

When an offender is sentenced by a court to a period of imprisonment, the court may impose a sentence with a non-parole period. The non-parole period is the minimum time the offender must serve in custody, after which the offender may, in certain circumstances, be released to serve the remainder of his or her sentence in the community on parole. While on parole, an offender will be living in the community in conditional liberty. In other words, the offender must comply with all conditions imposed in the parole order, otherwise the offender may be returned to custody. Conditions may include, for example, that the offender must live at a certain location, abstain from drug and alcohol use, and must not come within a certain distance of the home of a victim. While on parole offenders are managed, supervised and assisted by the DCS Probation and Parole Service.[466]

If an offender is sentenced to a period of imprisonment of three years or less, and the sentence specifies a non-parole period, parole will usually be granted to the offender automatically at the expiry of the non-parole period.[467] When an offender is sentenced to a period of imprisonment that is greater than three years, and the sentence includes a non-parole period, at the expiry of the non-parole period the offender must apply to be released on parole.

The NSW Parole Board is the body that considers applications for offenders to be released on parole.[468]
The Parole Board is constituted of at least:

- four judicially qualified persons
- one police officer
- one officer from the DCS Probation and Parole Service
- ten persons *'who reflect as closely as possible the composition of the community at large'*.[469]

Section 135 of the *Crimes (Administration of Sentences) Act* sets out the general duty of the Parole Board. This states:

> *(1) The Parole Board may not make a parole order for an offender unless it has decided that the release of the offender is appropriate, having regard to the principle that the public interest is of primary importance.*
>
> *(2) In making a decision under this section, the Parole Board must have regard to the following matters:*
>
> *(a) any relevant comments made by the sentencing court,*
>
> *(b) the offender's antecedents,*
>
> *(c) the likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole,*
>
> *(d) any report prepared by or on behalf of the Crown in relation to the granting of parole to the offender,*
>
> *(e) any report required by the regulations to be furnished to the Parole Board in relation to the granting of parole to the offender,*
>
> *(f) the offender's conduct to date while serving his or her sentence, including:*
>
> *(i) the attitudes expressed by the offender, and*
>
> *(ii) the offender's willingness to participate in rehabilitation programs,*
>
> *(g) the availability to the offender of family, community or government support,*
>
> *(h) the likelihood that, if granted parole, the offender will be able:*
>
> *(i) to benefit from participation in a rehabilitation program, and*
>
> *(ii) to adapt to normal lawful community life,*
>
> *(i) any special circumstances of the case,*
>
> *(j) such other matters as the Parole Board considers relevant.*

When considering the issue of whether to grant an offender parole, certain procedures must be followed if the offender is classified as a 'serious offender'. The term serious offender is defined in the legislation[470] and refers to offenders serving a life sentence, offenders who have had a life sentence redetermined into a number of years,[471] offenders serving a non-parole period of 12 years or more, and offenders serving a sentence of any length for murder.

In particular, victims of serious offenders have the right to make a submission to the Parole Board when the Board is considering whether to release an offender on parole.[472] This is consistent with the NSW Charter of Victims Rights,[473] which states:

> *A victim should, on request, be provided with the opportunity to make submissions concerning the granting of parole to a serious offender or any change in security classification that would result in a serious offender being eligible for unescorted absence from custody.*[474]

It was recognised that victims who wished to make a submission would need to be contacted and informed that the offender was eligible for parole. To this end, in 1996 the NSW Government passed legislation requiring the establishment of a Victims Register. During the parliamentary debates on this issue, the then Minister for Corrective Services stated:

> *A victims register is essential so that the Parole Board can be confident that all victims who wish to make submissions have been duly notified of impending parole consideration. Similarly, a victims register is essential so that the board will not inadvertently contact those victims who have made it clear that they would rather have nothing more to do with the matter.*[475]

The Victims Register is comprised of an active register and an inactive register. Victims on the active register are those registered against an offender who remains in custody. Victims on the inactive register are those who are registered against an offender who is on parole, but who may be returned to custody if his or her parole conditions are breached and the parole order is revoked. If the offender is returned to custody for breaching parole, the victim will be placed back on the active register. As at 30 June 2003 there were 690 victims on the active register and 720 victims on the inactive register.[476] By 20 February 2005 the number of victims on the active register had increased to 825, and the number of victims on the inactive register had increased to 932.[477]

Part 6, subdivision 3 of the *Crimes (Administration of Sentences) Act* outlines the process the Parole Board must follow when considering whether or not to release a serious offender on parole. The general process to be followed is:

- At least 60 days before the day on which the offender becomes eligible for parole the Parole Board must give preliminary consideration as to whether or not a serious offender should be released on parole.[478]
- After giving preliminary consideration about whether the offender should be released on parole, the Parole Board must formulate and record its initial intention to either make a parole order in relation to the offender (an initial intention to grant the offender parole), or to not make such an order (an initial intention to refuse the offender parole).
- If after preliminary consideration of the matter the Parole Board records an initial intention to grant the offender parole, the Parole Board must write to victims of the offender whose names are recorded in the Victims Register, and advise the victims of the Board's initial intention. The Board must inform victims that if they wish to make a submission about the Board's initial intention, they must inform the Parole Board, within a certain timeframe, that they intend to make a submission.[479]
- If after preliminary consideration of the matter, the Parole Board records an initial intention to refuse the offender parole, the Parole Board must advise the offender of this initial intention, and inform the offender that if he or she wishes to make a submission about the Board's initial intention, the offender must inform the Parole Board, within a certain timeframe, that he or she intends to make a submission.
- If a victim notifies the Parole Board that he or she wishes to make a submission about the possible release of the offender on parole, the offender must be notified of this fact, and provided with an opportunity to make a submission. Similarly, if an offender notifies the Board that he or she intends to make a submission, any registered victims must be notified of this fact, and provided with the opportunity to make a submission. In either of these circumstances the Parole Board:

  (b) *must set a date (occurring as soon as practicable) on which the Parole Board will conduct a hearing for the purpose of receiving and considering both offender submissions and victims submissions, and*

  (c) *must notify the offender and any such victim of the date, time and place for the hearing.*[480]

In 1996 when Parliament decided to give victims the right to make submissions about the possible release of serious offenders on parole, it was decided that submissions made by victims could be made in writing, and presented to the Parole Board in advance of the parole hearing. Alternatively, and only with the approval of the Parole Board, victims could make submissions orally at the parole hearing.[481] In relation to this issue, the then Minister for Corrective Services said:

> *There are two major reasons for giving the board discretion as to whether it will entertain oral submissions from a victim of crime or, in the case of a deceased, incapacitated or child victim, from a relative of a victim. One is,*

regrettably, that in the experience of the board disputes occur from time to time within the families of victims, exacerbated no doubt by the tragedy they have experienced. The estranged husband of a murdered woman may wish to give evidence to the board; the dead woman's mother may not wish any submissions to be made. The situation becomes still more complicated, for example, in the case of some ethnic communities where the wishes of the extended family need to be taken into account. The board needs to have discretion to balance the competing interests of the various members of the family and, if necessary, decline to allow oral submissions from a particular person.

> *The other major reason for giving the board discretion to decline oral submissions from victims is that the parole hearing is not a retrial of the circumstances of the offence. From time to time victims will seek to introduce extraneous information about the history of various persons which runs the risk of reducing the hearing to an adversarial process.*[482]

In June 2002 Parliament agreed to allow victims of serious offenders the right to make an oral submission about the possible release of an offender on parole, without requiring the prior approval of the Parole Board. During the Parliamentary debates about the proposed legislative change, the then Minister for Corrective Services said:

> *This is an important change that will benefit the victims of serious offenders. … I believe that victims will welcome this change. Often, victims prefer to make a personal approach at a parole hearing to explain their personal circumstances and concerns. Making a personal approach can often demonstrate a victim's concerns far more clearly than a written submission.*[483]

Some concerns were raised about this new approach in Parliament. For example:

> *The Crimes (Administration of Sentences) Amendment Bill further entrenches the rights of victims to influence the outcome in Parole Board decisions. The Greens are concerned about the trend to give victims more rights in outcomes regarding the parole of inmates. A crime has been committed and the person should be appropriately punished. The penalty should be determined by looking at the crime, the nature and circumstances of the crime, any mitigating circumstances, the defendant's contrition, and any other sentencing principles. Once the individual has been incarcerated, his or her appropriateness to return to society can vary enormously depending on the circumstances of the prisoner. He or she could be a model inmate or they could find the gaol environment extremely difficult. The appropriate people to assess whether an inmate is ready to be released on parole are the members of the Parole Board. At this stage of the process victims input should be confined to the minimum. Their views and input may have been relevant during the original sentencing but, in the Greens view, the major emphasis should be on whether the prisoner has been rehabilitated enough to be released on parole. The primary consideration should be on whether the prisoner is likely to commit further crimes and, if released on parole, whether they are able to adapt to community life.*[484]

When the *Crimes (Administration of Sentences) Amendment Act 2002* commenced on 21 February 2003, our office was instructed by Parliament to keep the operation of the new provisions relating to victim submissions under scrutiny.

13.2. Recently enacted changes to the parole process

During 2003 the NSW Parliament considered further changes to the administration of the parole process. As a result, the *Crimes (Administration of Sentences) Amendment (Parole) Act 2004* received assent on 15 December 2004. Relevant parts of this legislation commenced on 10 October 2005. The changes:

- Reconstitute the Parole Board as the Parole Authority.[485]
- Restate the functions of the Parole Authority and provide that it may, from time to time (in consultation with the Minister) establish guidelines in relation to the exercise of its functions.[486]
- Require at least one of the 'community members' of the Parole Authority to be '*a person who, in the opinion of the Minister, has an appreciation or understanding of the interests of victims of crime*.'[487]
- Restate the matters to which the Parole Authority should give consideration when deciding whether to release an offender on parole, and emphasise that an offender should not be released unless the Board is satisfied that the release of the offender is in the public interest.[488]
- Require the Probation and Parole Service to prepare a report for the Parole Authority to consider when deciding whether or not to release an offender. Each report is to cover, among other things, aspects of the offender's behaviour and attitude in custody; measures to be taken to reduce the possibility that the offender will re-offend while on parole; and '*the offender's attitude to any victim of the offence to which his or her sentence relates, and to the family of any such victim*'.[489]

- Remove the provisions that state a hearing will automatically be held if a victim or offender wishes to make a submission. In some circumstances, offenders who make a submission will be required to state whether they request a hearing, and a hearing will only be held if the Parole Authority is satisfied that a hearing is warranted.[490] Victims who make a submission will be required to state whether or not they request a hearing. When victims request a hearing, a hearing will be held.[491]
- Allow victims of a serious offender to be given access to most documents held by or on behalf of the Parole Authority in relation to the offender.[492] Victims will not be able to access documents if provision of the documents would adversely affect the security, discipline or good order of a correctional centre; endanger any person; jeopardise the conduct of any lawful investigation; prejudice the public interest; adversely affect the supervision of any offender who has been released on parole; or disclose the contents of any offender's medical, psychiatric or psychological report.
- Allow the Commissioner of Corrective Services and the State to make submissions to the Parole Authority concerning the release on parole of an offender, after the Parole Authority has made a final decision regarding parole (but before the offender is released), as well as before a final decision has been made. If such submissions are made after a final decision has been made by the Parole Authority, the Authority must consider whether it should revoke its decision.[493]
- Require the Parole Authority to give reasons for its decisions in all cases.[494]

Except where directly relevant to issues that have come to our attention in scrutinising the implementation of the *Crimes (Administration of Sentences) Amendment Act 1999*, we have not considered these changes to the Parole Board and parole process.

Endnotes

466 DCS internet site, http://www.dcs.nsw.gov.au/probation/ accessed 7 August 2005.
467 The offender will not be released if he or she is serving another custodial sentence. *Crimes (Administration of Sentences) Act 1999,* section 158.
468 The *Crimes (Administration of Sentences) Amendment (Parole) Act 2004* commenced on 10 October 2005. This Act renamed, the Parole Board as the State Parole Authority. For further information about recently enacted changes to the administration of the Parole Board, and the procedures followed throughout the parole process, see section 13.2 of this report.
469 *Crimes (Administration of Sentences) Act 1999*, section 183.
470 *Crimes (Administration of Sentences) Act 1999*, section 3(1).
471 Provisions concerning the redetermination of sentences are set out in Schedule 1 of the *Crimes (Sentencing Procedure) Act 1999.*
472 *Crimes (Administration of Sentences) Act 1999*, section 147(1).
473 The Charter of Victims Rights specifies how NSW government agencies are to treat victims of crime. It covers a range of areas, including victims' access to information, victim impact statements, victims' compensation, and return of property to a victim.
474 *Victims Rights Act 1996*, section 6.16.
475 The Hon Robert Debus MP, NSWPD Legislative Assembly, 30 October 1996.
476 Material provided by DCS on 3 July 2003.
477 Information provided by DCS on 21 June 2005.
478 This can be deferred to 21 days before the offender becomes eligible for parole if, for example, the Board has not been provided with a relevant report. *Crimes (Administration of Sentences) Act 1999*, section 143(2).
479 Victims and offenders must be given at least 14 days to inform the Secretary of the Parole Board if they wish to make a submission. *Crimes (Administration of Sentences) Act 1999*, sections 145(2)(c), and 146(2)(c).
480 *Crimes (Administration of Sentences) Act 1999*, sections 145(3) and 146(3).
481 *Crimes (Administration of Sentences) Act 1999*, sections 147(3)(a) and (b). Note, these provisions were originally set out in section 22H(5) of the *Sentencing Amendment (Parole) Act 1996*.
482 The Hon Robert Debus MP, NSWPD, Legislative Assembly, 30 October 1996.
483 The Hon Richard Amery MP, NSWPD, Legislative Assembly, 8 May 2002.
484 The Hon Ian Cohen MLC, NSWPD, Legislative Council, 8 May 2002.
485 Schedule 1[1].
486 Schedule 1[53].
487 Schedule 1[51].
488 Schedule 1[16].
489 Schedule 1[16].
490 Schedule 1[22].
491 Schedule 1[27].
492 Schedule 1[56].
493 Schedule 1 [22] and [37].
494 Schedule 1[56].

Chapter 14. Victim submissions

14.1. Victims who are entitled to make a victim submission

The definition of a victim, for the purposes of the Victims Register is:

> (a) *a victim of an offence for which the offender has been sentenced or of any offence taken into account [during sentencing], or*
>
> (b) *a family representative of such a victim (if the victim is dead or under any incapacity or in such circumstances as may be prescribed by the regulations),*
>
> *and includes a person who suffers actual physical bodily harm, mental illness or nervous shock, or whose property is deliberately taken, destroyed or damaged, as a direct result of an act committed, or apparently committed, by the offender in the course of a criminal offence.*[495]

We noted in our discussion paper that this definition may prevent some people who believe they are legitimate victims of the offender from being able to present a victim submission. The following people, for example, do not fall within the definition of a victim and are not entitled to make a victim submission: *'a friend of a murder victim; a spouse of an assault victim where the assault victim is not incapacitated; and a person who was a victim of a crime previously committed by the offender.'*[496]

We also noted that the provision relating to a family representative of a victim is potentially problematic. This is because:

- *There is currently no guidance about who may claim to be a family representative of a victim for the purpose of the Victims Register.*[497]
- *The legislation provides that only one family member of a victim is to be listed on the Victims Register. However, in some cases more than one family member may wish to be registered. For example, if a person dies during the commission of an offence, and the victim's parents are separated, both may wish to be placed on the register so that they can be informed of the movements of the offender and notified when the offender is eligible for parole.*[498]

In practice, discretion is used by the Victims Register and the Parole Board to determine which family members are eligible to be listed on the register, whether to allow more than one family member to register, and whether additional interested parties may make victim submissions. For example, in the past the Parole Board has allowed victims of non-serious offenders to make an oral submission during a parole hearing, and has, on at least one occasion, permitted a friend of a murder victim to make an oral submission, although the friend was not eligible to be listed on the Victims Register.[499]

DCS has advised that its Restorative Justice Unit (the unit responsible for the Victims Register) has recommended that the definition of victim, for the purpose of the register, be amended. In particular, the Restorative Justice Unit feels that the definition of family member should be brought into line with that in the ***Victims Support and Rehabilitation Act 1996,*** which provides:

> *(3) A* ***member of the immediate family*** *of a primary victim is:*
>
> *(a) the victim's spouse, or*
>
> *(b) the victim's de facto spouse, or partner of the same sex, who has cohabited with the victim for at least 2 years, or*
>
> *(c) a parent, guardian or step-parent of the victim, or*
>
> *(d) a child or step-child of the victim or some other child of whom the victim is the guardian, or*
>
> *(e) a brother, sister, step-brother or step-sister of the victim.*[500]

DCS has further advised:

> *The [Restorative Justice Unit] also supports the inclusion of an additional category of "interested party" to encompass certain other persons who can establish that they have a genuine interest in the case based on their personal connection to a defined victim, or who can satisfy the Victims Register that they have an interest in obtaining information about a particular offender similar to that of a victim, because of a reasonable and genuine*

> *fear of the offender – eg, a witness who testified against the offender, or a person who suffered harm as a direct result of an earlier act committed by the offender.*
>
> *Flexibility in allowing family members to be listed on the Victims Register would considerably reduce stress and tension between family branches where there is disagreement over a nominated family member. Multiple representations would assist such families to concentrate their concerns and energy on the offender rather than on conflict with each other. The Department notes that on many occasions the Parole Board has dealt with more than one family member in relation to a serious offender.*[501]

The Parole Board has advised that it *'would support the submission from the Victims Register to amend the current legislation to expand the definition of a victim'.*[502]

Support for broadening the legislation is not, however, universal. Legal Aid has advised:

> *The current definition of 'victim of offender' is appropriate. If it was wider there would be potential for a large number of 'victims' to be present at the hearing making submission[s]. This would protract the hearings which, in any event, include evidence from, at a minimum, the Probation and Parole Service, the Serious Offenders Review Council and the offender. Further, the more 'victims' who make submissions, the more likely the possibility of conflict between them as to what they think should happen to the offender. This is not something the Parole Board should have to hear and resolve.*[503]

While we note the concerns raised by Legal Aid, we feel it would be appropriate for the legislation to specify more clearly those who are entitled to act as a family representative of a victim, and that more than one family representative may be included on the Victims Register. In order to be fair, any new definition of 'family representative' or 'interested party' should be specific enough so that victims and offenders can be reasonably clear about who would be eligible to be registered as a victim, but flexible enough to cater for victims, families or affected people in unusual circumstances.

We also feel that, in line with current practice, families should (where appropriate) continue to be encouraged to make a joint submission to the Parole Board, and that victims be required to provide adequate information about their identity, and their claim to be a victim. This will ensure that parole proceedings are not unduly lengthened by the consideration of numerous victim submissions. In addition, it will help to ensure that that offenders applying for parole are not disadvantaged by having victim submissions presented by a range of people only slightly or indirectly affected by the offence.

Recommendation

28 It is recommended that the definition of victim, in section 256(5) of the *Crimes (Administration of Sentences) Act* be amended to specify:

i) who may claim to be a family representative of a victim

ii) that more than one person may claim to be a family representative of a victim

iii) that 'interested parties' may be included on the Victims Register, if considered appropriate.

14.2. Informing victims about their right to make a victim submission

14.2.1. Provision of information about the Victims Register

The fact that some victims of crime now have an automatic right to make an oral submission at a parole hearing will only be meaningful if victims are informed about this right, and given sufficient information to assist them in choosing to exercise it. In order for victims to place their details on the Victims Register they must be aware that the register exists, and know how to contact Victims Register staff.

In 2001 DCS and the Attorney-General's Department developed a brochure entitled *'Submissions Concerning Offenders in Custody: Information Package'.* There are a number of ways that victims of crime can learn about the Victims Register, or obtain a copy of the information package. For example,

- *the Office of the Director of Public Prosecutions provides victims information about the register when they appear as witnesses during criminal trials at the Supreme or District Courts*

- *people may learn about the register by contacting a group which has been established to provide support, advice and information to victims of crime*
- *the Victims Services Division of the NSW Attorney-General's Department provides information and advice to victims of crime across a range of areas, with a 24-hour telephone information, support and referral service for victims of crime that is operated by the Victims of Crime Bureau in partnership with Mission Australia*
- *information can be obtained electronically via the DCS website or the Attorney General's Department website.*[504]

The brochure says:

> *This information package is provided to assist victims of crime who are considering whether or not to make a submission regarding an offender to the Parole Board or the Department of Corrective Services. The purpose of the package is to explain the roles of the NSW Department of Corrective Services and the Parole Board and to develop an understanding of the processes involved. Victims of crime are encouraged to contact the relevant agency, which will be determined after reading this information package, to discuss the information or to ask any questions.*[505]

The brochure contains information about:

- the parole process, including the parole hearing
- the role of the Victims Register
- the people who are entitled to make a submission
- what should be included in a victim submission
- how to contact relevant NSW government departments and victim support groups.

Given that the brochure was produced in 2001, it contains some information that is no longer current. For example, it states:

> *Oral submissions may be made at a public hearing but only where you, as the victim of a serious offender, have lodged a notice of intention to make an oral submission and only when given approval from the Parole Board.*[506]

While we note that staff of the Victims Register, or victims support groups could provide victims with updated information about this issue, we feel that, in order to avoid confusion or uncertainty, it is important that information provided to victims is accurate and up-to-date. To this end, we feel that DCS should, in consultation with the Attorney General's Department, review and update the information package about submissions concerning offenders in custody. Given that further legislative amendments concerning the parole process have recently been enacted (see section 13.2) it will be appropriate for the review to take these changes into account.

Recommendation

29 It is recommended that the Department of Corrective Services, in consultation with the Attorney General's Department, review and update the information package, *Submissions Concerning Offenders in Custody*.

We noted in our discussion paper that the Parole Board does not keep records about how many victims make submissions, or the characteristics of people who choose to make submissions. In order to find out more about the characteristics of people who make submissions, we spoke to seven members of the Parole Board during May and June 2004. Of the seven members, one was a judicial member of the board, four were community representatives, one was a representative of NSW Police, and one a representative of the DCS Probation and Parole Service. It was the perception of members we spoke to that:

- *the most common offences for which people make a victim submission are murder, and sex offences, particularly sex offences against children*
- *males and females make roughly the same number of submissions, with males possibly choosing to make oral submissions more often than females*
- *it is uncommon for people from a non English speaking background to make a victim submission and it is even rarer for Aboriginal or Torres Strait Islander people to make submissions*

- *people who live in rural areas are as likely, or more likely, than people who live in urban areas to make victim submissions.* [507]

It is not surprising that people who are the victims of extremely serious offences are the most likely to make a victim submission. It is likely to take such people a long time to recover physically, mentally and emotionally (if at all) after such a crime has been committed, and many years after the event, victims of such offences may retain feelings of distress about the offence, and fear or anger toward the offender. In addition, people who live in rural or remote locations may be more likely to present a victim submission because of the likelihood that the offender may wish to return to the local community if released, and the high possibility that the victim and offender may come into contact with each other if both are living in the same small community.

It is not clear whether people who do not make a victim submission are:

- unaware that they are entitled to participate in the parole process
- choosing to exclude themselves from the process because they would prefer not to be involved
- deciding not to make a submission because they are nervous or fearful about the process.

In relation to this issue, DCS commented:

> *It is difficult to assess how many people from non-English speaking backgrounds, Aboriginal or Torres Strait Islander heritage and other minority groups do not participate in the parole process, as the [Restorative Justice Unit] does not keep statistics on the background of persons on the Victims Register. The Unit expects, however, that difficulty of expression (language skills), distrust of the legal system, the absence of community language brochures, and "fear" of the Department within some groups could impact on their ability and willingness to become involved.*
>
> *The [Restorative Justice Unit] recognises that this issue needs to be addressed, and will approach the Department's Multiculturalism Unit to arrange for translation of its brochures into community languages. Community language brochures will then be distributed to the most appropriate community agencies.*
>
> *The [Restorative Justice Unit] will also make separate enquiries through the Victims of Crime Bureau and Aboriginal Community Organisations on how best to disseminate information to Aboriginal and Torres Strait Islander people.*[508]

The Community Relations Commission advised us that attempts have been made in the past to educate victims from minority groups about services available to them:

> *In 2002, the Victims of Crime Bureau and the Community Relations Commission developed a partnership to facilitate eight forums in Sydney and around rural and regional NSW to inform service providers and community organisations of services available throughout the State for victims of crime. Three of the forums (held in Sydney) target[ed] specific language groups – Arabic-speaking, Chinese-speaking and Vietnamese-speaking.* [509]

Despite these initiatives, the Parole Board has acknowledged that individuals from certain cultural backgrounds, and people with limited English skills, do not seek to participate in the parole process as readily as other members of the community. The Board has suggested that brochures printed in community languages could overcome this issue, and it may also be beneficial for networks be established with the Department of Aboriginal Affairs and the Community Relations Commission.[510]

The Community Relations Commission agrees that more could be done to educate victims:

> *From the issues raised in the discussion paper, it would appear that there is a need for more community education about the rights of victims to make a submission to the Parole Board. It may be appropriate for the Bureau to consider building on previous community education campaigns, working in partnership with organisations representing ethnic communities with significant representation within the NSW prison population.*[511]

While we acknowledge that the creation of brochures in community languages and increased liaison among relevant agencies may not necessarily increase the number of people from different backgrounds choosing to participate in the parole process, these initiatives should help to ensure that people from different backgrounds are provided with appropriate and adequate information about the parole process, and assist such people to make an informed choice about whether they would like to have a say regarding an offender's possible release on parole.

Liaising with relevant departments may also provide DCS with a greater understanding about why certain people may be choosing not to become involved in the parole process, and whether or not this is an issue that should be further addressed.

It may also be useful for DCS to begin recording information about the characteristics of people on the Victims Register. Collecting information about people's age, ethnicity, disabilities, and the language spoken at home, for example, may assist staff to better understand the practical needs of people on the register. This will also ensure appropriate assistance (such as an interpreter or wheel chair access) is provided should the victim wish to make an oral submission at a parole hearing. We note that some victims may not wish to provide certain information about themselves to the Victims Register, and therefore provision of information by victims should be optional.

Recommendations

30 It is recommended that the Department of Corrective Services develop brochures in community languages about the right of victims to make submissions concerning offenders in custody.

31 It is recommended that the Department of Corrective Services consider consulting with relevant agencies, such as the Attorney General's Department, Community Relations Commission and Department of Aboriginal Affairs, about whether additional measures could appropriately be taken to inform victims from different cultural backgrounds about the parole process.

32 It is recommended that the Department of Corrective Services consider whether it would be appropriate for additional information about people who are listed on the Victims Register to be collected for the purposes of:

i) increasing the department's understanding of the type of people who are choosing to be included on the register,

ii) improving the provision of services to registered people.

14.2.2. Provision of information for people on the Victims Register

DCS has advised us that when a person's details are initially included on the Victims Register:

> *information is sent to them advising the sentence length and non-parole period applicable to the relevant offender. They are advised that the Department will contact them 6-8 weeks prior to the expiry of the non-parole period.*[512]

Martha Jabour, Homicide Victims Support Group, has raised concerns that, following this initial contact made by the Victims Register, a victim does not receive any further information about the offender or the parole process until a short period before the offender is eligible for parole. She believes that writing to a victim six weeks before an offender is eligible for parole does not provide the victim with sufficient time to develop an understanding of the parole process, come to terms with the fact that the offender may be released, and decide whether or not to make a victim submission. As a result, Ms Jabour suggested that it might be appropriate for the Victims Register to contact victims six to 12 months before the offender becomes eligible for parole.[513]

In response to this DCS has advised that even if victims are given more than six weeks notice of an upcoming parole hearing, and they provide a submission to the Parole Board well in advance of the date when the offender becomes eligible for parole, the Parole Board will be unable to consider the submission until the date submissions are due. The department has pointed out that *'the delay in response time could create further distress for the victim.'*[514]

DCS has advised that it has received no complaints from victims groups that victims have had insufficient time to prepare submissions, or that victims wanted more notice that an offender was becoming eligible for parole. Notwithstanding this, the department has advised that given the concerns raised by the Homicide Victims Support Group, it has amended the correspondence that is sent to victims when they join the Victims Register. An excerpt from the letter sent to victims is included below. The final sentence of the excerpt is the section that has recently been included.

> *The Parole Board is responsible for determining applications by inmates for release on parole, which it must consider at least sixty (60) days before the expiration of the non-parole period.*
>
> *We would propose to write to you about 6-8 weeks prior to that time and advise you concerning the parole consideration process. You will then be given the opportunity to make … submissions to the Parole Board if you wish, as to any concerns you may have about the release of the offender, or as to parole conditions. If you wish to be written to earlier than that please let us know.*[515]

The Parole Board has advised that it believes the current arrangements are sufficient, given that victims are advised that they can contact the Victims Register at any time, and that:

> *[T]he Parole Board Secretariat also deals directly with victims, advises them of the process and particularly in the case of serious offenders, confirms via correspondence the Board's most recent decision and encourages them to make submissions, if they so wish.*[516]

On balance, we believe that the current arrangements to advise victims about the parole process, and their right to make a submission are adequate.

14.3. The role of victim submissions

In 2003 the Australian Institute of Criminology published a report about the presentation of victim submissions to Parole Boards in Australian jurisdictions.[517] A paper presented on this research states:

> *Half of the Australian states and territories now have active models of victim involvement in the parole process, giving victims a chance to be heard in parole decisions. One noticeable aspect of these jurisdictions is a lack of legislative guidelines on how victim submissions should be used in the parole decision-making process. It is often unclear whether the parliaments intended that victim submissions should be an important consideration in parole decisions or not. There is no legislative guidance on what weight submissions should be given.*[518]

This paper suggests that the major question that is yet to be decisively addressed about victim submissions is:

> *what is the purpose of victim submissions to parole boards? Is the goal to improve the satisfaction or recovery of victims? Is the goal to influence parole decision outcomes?*[519]

In NSW the *Crimes (Administration of Sentences) Act* and *Crimes (Administration of Sentences) Regulation* do not explain the purpose of victim submissions, or outline how much weight the Parole Board ought to give to submissions. Without clear guidance about these issues there is the possibility that stakeholders will be confused about the role of victim submissions, and submissions may be used inconsistently. This in turn may lead to victims of crime being disillusioned, angry or upset with their involvement in the parole process, and offenders being treated in a disparate manner.

There are arguments for suggesting that victim submissions should have some impact on the Parole Board's decision. One member of Parliament has argued *'if an oral statement carries no weight whatsoever with the Parole Board, this legislation is just window dressing and will not provide a real benefit to victims of crime.'*[520] However, legitimate concerns arise if victim submissions are given too much weight in parole proceedings. As the Australian Institute of Criminology has stated:

> *If victim submissions are likely to have a large impact on parole decisions, disparity may arise between offenders whose victims make submissions and those whose victims do not. The mere presence of a victim submission seems small justification for treating an offender more harshly.*[521]

Results obtained in a United States study appear to demonstrate that this concern is a valid one.

> *The study found that parole was refused in 43 per cent of the victim impact statement cases and seven per cent of the non-statement cases. This contrasted with the board's own decision-making guidelines that suggested parole should have been denied to 10 per cent of the victim impact statement cases and seven per cent of the non-statement cases.*
>
> *In summary, the presence of a victim impact statement had a significant impact on the parole outcome across all types of offence, offender and victim.*
>
> *Apparently, the mere presence of a victim impact statement predisposed the board towards denying parole.*[522]

14.3.1. Stakeholders' views on the purpose of victim submissions

Stakeholders have different views about the role of victim submissions. Howard Brown, Victims of Crime Assistance League, advised us:

> *I think that the ultimate purpose of making a submission is refocusing the Parole Board's attention to the issues which led to the crime being committed in the first place – which is one of the reasons why we rely very heavily on judgement of the sentencing judge. Because unfortunately and regrettably because of the passage of time, the seriousness of the crime is often diluted by that process of time. Our function is to refocus the Parole Board and say 'hey, this is a person who has assaulted 13 people that we know about. …*

Basically, it's bringing the time of the offence to a contemporary period, and getting them to refocus it, because one of the things we have found with the Parole Board in the past is that they've tended to focus on the most recent reports of the prisoner in relation to his activities within the correctional system, without actually looking and saying 'is … this what was the concern of the sentencing judge of the time? So, for instance if you have an offender who has committed 13 previous offences of which 8 are alcohol related, and you find that what's he's been doing in the last 3 years is participated in an anger management program and in getting a forklift driver's thing, and at no time addressing his alcoholism, well these functions and abilities that you've given him may be of some assistance, but unless you attack the root cause, you still sending him out to fail because you haven't dealt with the real cause of why the crime was committed in the first place.[523]

Martha Jabour, Homicide Victims Support group, was of the view that:

[the purpose of a victim submission is] not dissimilar to a Victim Impact Statement. The purpose I feel is for families to put across to the Parole Board the impact of the crime on them and what it's been like. I think it's important that – the bigger of the purposes of the submission is for the family to talk about any fears that they might have, especially if the person is coming back to live in the same town as them, things, I don't want the offender to live next door to me, I don't want him to come anywhere near my family, especially if it is another family member. …

The other important purpose is for the victims to hear what the offender has done in gaol to rehabilitate themself, and to be able to have some input into that as well.[524]

It is the view of the Public Defenders that:

Although s.135 Crimes (Administration of Sentences) Act 1999 allows [the Parole Board] to have regard to the effect on a victim or a victim's family of release to parole, this power relates primarily to any risk that the prisoner may pose to them directly, not to any desire that the victim or family may have for a prisoner to receive additional punishment. It does not and should not be seen as giving the victim or their family a role in punishment. This is not the role of the Parole Board. Only the courts can impose punishment. A court must act dispassionately and in accordance with consistent legal principles.[525]

Staff members of the Victims Register have advised that:

A key element in our discussions with victims is not to raise their expectations and not to give them the impression that the hearing or their statements are designed to stop the offender from being released to parole. We encourage victims to make written submissions and oral statements if it will assist them to "move on".[526]

The seven members of the Parole Board we spoke to in mid 2004 expressed slightly different views about the purpose of a victim submission. In our discussion paper we noted that several themes emerged from their comments, and that members were generally of the view that submissions:

- *allow victims to express their feelings and have input into the parole process*
- *allow the Board to see the impact of the crime on the victim at the current time*
- *help the Board understand any fears the victim has about the release of the offender*
- *enable the Board to place appropriate conditions on the offender, if parole is granted.*[527]

The Parole Board has advised:

I believe that it is important to make a clear distinction between a "Victim Impact Statement" to the Court and a victim submission to the Parole Board.

The Victim Impact Statement assists the presiding Judge or Magistrate to better appreciate the fear, trepidation, loss, anger and grief experienced by the victim and the total impact that the crime has had on the family as a whole. The Judge or Magistrate is then in a position to utilise this information to make a more informed and appropriate sentencing determination.

The victim statement to the Parole Board should not be seen as a further opportunity by the victim or victim's family to influence or change the sentencing process or the determination of the sentencing court.

The Parole Board is not a court of review.

…

In respect of the "purpose" of a victim submission, I would agree with the themes identified by Parole Board members that are contained within the [discussion paper]. In particular the Board is greatly assisted by advice regarding the fears the victim or victim's family has about the release of the offender and any issues of concern

to the victim or family that would assist in the identification of appropriate conditions on release. Particular attention is given to setting conditions on the parole order which ensure that the victim is free from violence or harassment.[528]

It is the view of DCS that the purpose of a victim's submission is to enable the Parole Board to consider *'the likely effect on any victim, and on any such victim's family, of the offender being released on parole'*.[529] The department notes that this consideration is part of the Board's overall duty to *'have regard to the principle that the public interest is of primary importance'*[530] in deciding whether the release of the offender is appropriate.[531]

In our discussion paper we asked stakeholders whether policies should be developed that specify more clearly the purpose of a victim submission, and how much weight submissions should be given when considered by the Parole Board. Two senior police officers advised us that they felt it was important for the Parole Board to have guidelines about the use of victim submissions. One was of the view that guidelines should address the weight of victim submissions,[532] and the other suggested guidelines should cover issues such as what information should be included in a victim submission.[533]

Both DCS and the Parole Board were of the view that the provisions in section 135 of the *Crimes (Administration of Sentences) Act* operate as guidelines applicable to the release of offenders from custody. The Parole Board also noted that it has recently developed operating guidelines that remind members of the necessity to take victims' concerns and recommendations into account before making a final determination about whether to release an offender on parole.[534] DCS and the Parole Board have advised that they would not support the development of guidelines that would further fetter the discretion of the board to make determinations:

The Parole Board would not support any measure that would limit its authority to carry out the determinations of the sentencing court.[535]

*

Any further guidelines should not restrict the Parole Board's ability to function as an independent quasi-judicial body whose function is to carry out the determination of a sentencing court.[536]

We agree that it would not be appropriate for guidelines to be developed that restrict the ability of the Parole Board to make considerations concerning parole in accordance with relevant legislative provisions. However, we do feel that it is important for victim submissions to be used in a way that is reasonable, fair and consistent, and that meets with stakeholders' expectations. As discussed below, in section 14.3.2 records currently kept by the Parole Board did not enable us to undertake a comprehensive evaluation of how victim submissions are being used in practice. Therefore it is unclear at this stage whether additional guidelines are necessary or desirable.

As raised below, we feel it would be beneficial for the Parole Board to begin collecting and recording data in relation to the participation of victims in parole proceedings. This will enable a review to be undertaken in the future to examine more fully whether victim submissions are being used appropriately. Such a review could also be used to inform the Board about whether additional guidelines about the role of victim submissions would be useful.

14.3.2. The role of victim submissions in practice

The Parole Board does not currently keep records about how often victim submissions are presented during parole proceedings, or the outcome of proceedings when victim submissions are presented. In addition, during the review period, the Parole Board was not required to record reasons for its decisions. These factors have meant that it has not been possible for us to comprehensively examine or evaluate how submissions are being used in practice, and the impact they have had on the outcome of parole proceedings.

Anecdotally, it appears that victim submissions are most often used to assist the Parole Board in determining appropriate conditions to impose on an offender who is being released on parole. For example, the Chair of the Parole Board has advised us that it is common for the Board to impose conditions that prevent an offender from residing within 100 kilometres of any victims.[537] In addition, we were present at one parole hearing where the Board agreed to release an offender from custody, on the conditions that the offender was prohibited from having contact with the victim's family, and that he was prohibited from having any associations with the industry in which both the offender and victim's families were involved.[538] At another hearing where we were present the Board imposed conditions that forbade an offender from entering a particular region in which a victim was employed.[539]

It is not clear how often, if at all, the Parole Board changes its initial intention to grant parole solely (or substantially) because of information contained within a victim submission. Nor is it clear the type of information that a victim could provide that would be likely to produce such an outcome.

Given that it is currently unclear what role victim submissions are having on the outcome of parole proceedings, we feel that it would be beneficial for the Parole Board to start recording more detailed information about the participation of victims in the parole process. The Chair of the Parole Board has acknowledged that in the past statistics kept about parole proceedings have been *'appalling'*[540] and that in the future, following an upgrade of the Offender Management System, the Board intends to start recording more detailed information about parole proceedings, including information about the participation of victims.

We feel that the Parole Board Secretariat should begin recording information about:

- how often victims choose to make submissions
- the offences for which victims usually choose to make submissions
- whether victims are choosing to make written or oral submissions (or both)
- how often parole is refused when a victim submission is presented to the Board
- how often parole is granted when a victim submission is presented to the Board
- whether any conditions are imposed on a parole order in response to concerns raised by a victim in a victim submission.

Recording such information will enable a review to be undertaken in the future to examine how victim submissions are being used in practice, and the extent to which they are having an effect on the outcome of parole hearings. It is important for the Board to have information about these issues given that there are implications for victims, offenders and the community if victim submissions are being used inconsistently, unreasonably, or in a way that does not meet with stakeholders' expectations.

Recommendation

33 It is recommended that the Parole Board Secretariat start recording more detailed information about the participation of victims in the parole process. In particular, details should be kept about:

i) how often victims choose to make submissions

ii) the offences for which victims usually choose to make submissions

iii) whether victims are choosing to make written or oral submissions (or both)

iv) how often parole is refused when a victim submission is presented to the Board

v) how often parole is granted when a victim submission is presented to the Board

vi) whether any conditions are imposed on a parole order in response to concerns raised by a victim in a victim submission.

14.4. The content of victim submissions

The NSW legislation does not provide any guidance about what information should appropriately be included (or not included) in victim submissions presented to the Parole Board.

In 1996 the NSW Law Reform Commission released a discussion paper proposing examples of information that could legitimately be included in victim submissions, including:

> *threats made to harm the victim, the victim's family, witnesses or any other person; the victim's fears relating to the offender's behaviour on release; evidence of the circumstances of the offence which has come to light since, or was not revealed at, the trial; and evidence of the offender's behaviour during the time in custody.*[541]

These suggestions refer to the victim presenting the Parole Board with predominantly new evidence. However, the information package provided to victims by the Victims Register discourages people from introducing new evidence as part of their submission. This is because the purpose of the parole hearing *'is not to rehear the original trial, but to make a decision regarding parole.*[542]

The only written guidance to victims about the information they should include within their submission is outlined in the brochure *Submissions Concerning Offenders in Custody: Information Package'* produced by DCS and the Attorney General's Department. This advises victims who wish to make a submission to the Parole Board:

> *The submission should state how you, the victim, feel about the impending release of the offender. The submission should not include any additional evidence. It is important to understand that the purpose of the submission is to give the Parole Board information for its consideration. Any submission should be brief and to the point. The submission should reflect your own feelings.*[543]

While the brochure notes that no new evidence should be submitted with the victim submission, it also states that:

> *If the submission contains evidence, the person making the submission will be sworn in and placed on the witness stand. This would only occur if the victim wanted to make an allegation, for example, allegations of continuing harassment by the offender or significant events concerning the offender that may have happened since the conviction.*
>
> *A victim who only wanted to express how they felt about the pending release of the offender would not normally give evidence, and therefore would not be open to cross examination.*[544]

In each instance when we have been present at parole hearings where victims have made an oral submission to the Parole Board, the victims making submissions were relatives of a person who died during or as a result of the commission of an offence. Each of these victims stated their opposition to the release of the offender. Submissions also contained information about:

- who the person making the submission was speaking on behalf of (usually the person who died during or as a result of the commission of the offence, and his or her family)
- the personal characteristics and qualities of the victim, the fact that this person's life was prematurely taken, and how this has affected the victim's family and friends
- the offence and the offender, for example, the apparent premeditation of the offence and the offender's seeming lack of contrition or remorse since that time
- the fears of the victim's family in relation to the possible release of the offender, in particular victims stated that they did not want the offender living near them, or likely to come into contact with them.[545]

We have not been present at any parole proceedings where victims have:

- attempted to include information in their submission that was clearly irrelevant
- threatened, harassed, intimidated or otherwise act inappropriately toward the offender when giving a victim submission, or during a parole hearing
- used their submission to express their anger and distress about the inadequacy of the sentence imposed on the offender, and requested that the Parole Board to effectively re-sentence the offender.

Parole Board members have advised that each of these scenarios do sometimes occur. One Board member has advised that if a victim appears to be straying off the point a Board member will be gently and courteously remind them to ensure their comments are relevant.[546]

In our discussion paper we asked stakeholders whether there should be more detailed guidelines for victims about what information their victim submissions should contain, and if so, what sort of information these guidelines would appropriately contain.[547] In response DCS advised:

> *… Victims are encouraged to contact the Department's Victim Support Officer or Community Liaison Officer to discuss any questions they may have. Assistance in writing, proof reading or structuring a submission is offered. Staff are also available to do home visits to assist victims who indicate a wish to lodge a submission.*
>
> *The [Restorative Justice Unit] has been reluctant to adopt a more formal basis for submissions, such as is the case with Victim Impact Statements, believing that it could be construed as a conflict of interest if the Department were to impose a "formal structure" on victims and possibly restrict what they might want to say. A more formal basis for submissions could also impact on the personal nature of submissions.*[548]

The Parole Board was of the view:

> *As the parole process can appear to be very complex to people outside the criminal justice system, I believe it is more important to have resources available to speak to victims, clarify issues and assist in the development of submissions than to provide a set of detailed guidelines.*[549]

We agree that the parole process is complex, and that DCS offers a significant amount of support and assistance to people who choose to make victim submissions (this will be further discussed below at section 14.5). Nevertheless, it may be beneficial for greater detail to be included in the information package, *Submissions Concerning Offenders in Custody* about the type of information that victims should appropriately include when preparing a victim submission. The current information provided in the brochure on this issue is very scant, and we feel additional guidance could be offered, without being too prescriptive. For example, the information package could be amended to advise victims:

- that they may wish to include in their submission information about any fears the victim has concerning the release of the offender, and any conditions that the victim would like placed on the parole order if parole is granted
- that submissions should not contain anything that is offensive, threatening, intimidating or harassing towards the offender
- that the Parole Board is not able to lengthen an offender's sentence, and therefore the Board will be unable to act upon submissions seeking this outcome.

We have recommended above, in section 14.2.1 that DCS, in conjunction with the Attorney General's Department, review and update the information package, *Submissions Concerning Offenders in Custody* (recommendation 29). If the department proceeds with such a review, we feel that consideration should be given to providing additional information in the brochure about information that is suitable or unsuitable for inclusion in a victim submission.

14.5. Assistance for victims who make a submission

DCS has recognised that in order for victims to prepare and present submissions to the Parole Board, they are likely to require assistance and support. This is currently provided by staff of the DCS Restorative Justice Unit, as well as various victims support groups. The Parole Board, and the Victims of Crime Bureau, within the Attorney General's Department can also provide information and referral advice to victims.

The victims support groups we spoke to (Homicide Victims Support Group, Victims of Crime Assistance League, and Enough is Enough) each demonstrated a good understanding of the parole process, and advised that they provide advice to victims of crime about the criminal justice system, including the parole process, and assist victims to prepare submissions. These groups indicated that they also sometimes attend parole hearings with victims, and act as support for the victims throughout the proceedings.

In May 2002 when Parliament was debating the proposed legislative amendments to enable victims of serious offenders to make oral victim submissions without the prior approval of the Parole Board, the then Minister for Corrective Services stated:

> *For the record, the Government will also establish a new part-time position of Victims Support Officer. … This officer will develop and run information sessions for victims of crimes to help them understand the process and procedures [relating to parole consideration].*[550]

The position of Victims Support Officer, DCS, was filled in mid 2003[551] and we have been advised that the appointed officer has spent considerable time liaising with victims support groups and making presentations to community groups about the Victims Register and other issues of interest to victims.[552]

The Homicide Victims Support Group advised that when this position was first filled, victims were sometimes reluctant to approach DCS to seek assistance because they preferred dealing with a person they were already familiar with. However, to overcome this issue, staff from the Restorative Justice Unit have regularly been attending meetings held by the victim support group, and getting to know victims.[553]

DCS currently provides victims with advice about structuring and writing submissions, and offers to proof read draft submissions.[554] In addition, an employee of the Restorative Justice Unit advised us:

> *We invite the registered victims to contact us to discuss the matter if they wish, and if they intend to make a submission. If they do contact us we 'walk them through' the parole consideration process and the Review (Public) Hearing process if that applies. If a public hearing is to be held, and the victim indicates they wish to attend, we can arrange to [g]o with them to Court 17 (Parole Board's court) on a day other than their actual hearing day to familiarise them with the court.*[555]

Victims who would like to make a submission, or attend the parole hearing and who do not speak English as their first language, or whose speech or hearing is impaired may ask for an officially accredited interpreter to be available. An interpreter can also be used to translate written submissions.[556] The Chair of the Parole Board has advised that

while it would not be a problem if a victim wished to use an interpreter during a parole hearing he is not aware of any occasions where this has actually occurred.[557]

Victims who wish to make an oral submission at a parole hearing are encouraged to present their own submission. There are a number of reasons for this. Presenting a victim submission may assist a victim's recovery following the commission of an offence. In addition, hearing from the victim personally is likely to provide the Parole Board with greater insight into the victim's experiences and opinions, than a submission presented by a person representing the victim.

The information package to victims states:

> *You can ask permission from the Parole Board to have another person speak on your behalf. However, the submission to the Board is about your feelings as a victim of crime and if you decide you want to make an oral submission to the Board, you should consider the merits of making this submission yourself.*[558]

The information package also states that *'[i]t is important to know that as a general rule a submission made by the victim personally is likely to have more impact than one made by a lawyer.'*[559] In practice, the Parole Board will usually allow a representative to speak on behalf of the victim if this is what the victim desires. Howard Brown, Victims of Crime Assistance League, advised us that in his experience, the Parole Board also usually allows a support person to provide direct assistance to a victim during the presentation of an oral submission if the victim is having difficulties:

> *if during the middle of their oral submission they get a little tongue-tied we find the Parole Board excellent. … One of the things we do appreciate about the Parole Board, is that if a victim does become flummoxed half way through the process there is no difficulty with me standing up, going to them and speaking to them – I excuse myself to the Board – and refocus … and redirect them. On one occasion [the victim] said to the Board 'I can't continue, can my advocate?' And they said 'yeh, sure, no problem' and then we just carried on.*[560]

When victims choose to present an oral submission at a parole hearing, their experience is more likely to be a positive one if they are treated with courtesy and respect. In our experience, during parole hearings members of the Parole Board are usually polite and courteous to victims, and court staff attempt to make victims feel as comfortable as possible. For example, we have observed victims being offered water to drink, and staff advising victims where to sit if they wish to remain out of view of an offender appearing at the hearing by way of video-link.[561]

Our research suggests that the advice provided to victims about the parole process, and the assistance they receive in preparing victim submissions, and attending parole hearings is appropriate and reasonable. This may further be enhanced by implementation of the recommendations we have made in section 14.2.1 above, concerning revising the information contained in the brochure *Submissions Concerning Offenders in Custody: Information Package'* and improving the provision of information to victims from certain minority groups (recommendations 29 – 31).

Endnotes

[495] *Crimes (Administration of Sentences) Act 1999*, section 256(5).

[496] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 38.

[497] *Crimes (Administration of Sentences) Act 1999* section 256(4)(c)(i) specifies that regulations may be made about the determination of people who are family representatives of victims, however, the regulations are currently silent on this issue.

[498] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 38.

[499] Interview record 15, September 2003.

[500] *Victims Support and Rehabilitation Act 1996*, section 9(3).

[501] Submission 13, DCS, 10 May 2005.

[502] Submission 3, Parole Board, 21 April 2005. A senior police officer also advised that he believes it is appropriate that family representatives should include any '*first generation relative of the victim'*. Submission 9, NSW Police, Duty Officer, 17 April 2005.

[503] Submission 12, Legal Aid, 4 May 2005.

[504] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, pp. 36-37.

[505] *Submissions Concerning Offenders in Custody*, Information Package jointly produced by Victims of Crime Bureau and DCS, January 2001, p. 1.

[506] *Submissions Concerning Offenders in Custody*, Information Package jointly produced by Victims of Crime Bureau and DCS, January 2001, p. 4.

[507] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 39.

[508] Submission 13, DCS, 10 May 2005.

[509] Submission 11, Community Relations Commission, 29 April 2005.

[510] Submission 3, Parole Board, 21 April 2005.

[511] Submission 11, Community Relations Commission, 29 April 2005.

[512] Submission 13, DCS, 10 May 2005.

[513] Interview record 23, March 2004.
[514] Ibid.
[515] Submission 13, DCS, 10 May 2005.
[516] Submission 3, Parole Board, 21 April 2005.
[517] Black, M., *Victim Submissions to Parole Boards: The Agenda for Research*, The Australian Institute of Criminology Trends & Issues paper, May 2003.
[518] Black, M., *Victim Submissions to Parole Boards: Trends and Practices in Australia*, a paper presented at 'Innovation: Promising practices for Victims and Witnesses in the Criminal Justice System – A National Conference', University House, Canberra, 23-24 October 2003, p. 8.
[519] Ibid., p. 12.
[520] The Hon Michael Richardson MP, NSWPD, Legislative Assembly, 28 May 2002.
[521] Black, M., "Victim Submissions to Parole Boards: The Agenda for Research" The Australian Institute of Criminology Trends & Issues paper, May 2003, p. 3.
[522] Parsonage, W H., Bernat, F P., and Helfgott, J., 1992, 'Victim impact testimony and Pennsylvania's parole decision-making process: A pilot study', *Criminal Justice Policy* Review, vol. 6, cited Ibid., p. 2.
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[528] Submission 3, Parole Board, 21 April 2005.
[529] *Crimes (Administration of Sentences) Act 1999*, section 135(2)(c).
[530] *Crimes (Administration of Sentences) Act 1999*, section 135(1).
[531] Submission 13, DCS, 10 May 2005.
[532] Submission 4, NSW Police, Local Area Commander, 19 April 2005.
[533] Submission 2, NSW Police, Local Area Commander, 29 March 2005.
[534] Submission 3, Parole Board, 21 April 2005.
[535] Ibid.
[536] Submission 13, DCS, 10 May 2005.
[537] Interview record 24, March 2004.
[538] Observation record 16, June 2004.
[539] Observation record 3, September 2003.
[540] Interview record 24, March 2004.
[541] Law Reform Commission NSW Discussion Paper 33, *Sentencing*, 1996, chapter 11.66. Accessed at www.lawlink.nsw.gov.au/lrc.nsw/pages/DP33CHP11 on 13 December 2004.
[542] *Submissions Concerning Offenders in Custody*, Information Package jointly produced by Victims of Crime Bureau and DCS, January 2001, p. 5.
[543] Page 3.
[544] *Submissions Concerning Offenders in Custody*, Information Package jointly produced by Victims of Crime Bureau and DCS, January 2001, p. 5.
[545] Observation r
[546] Telephone interviews with seven Parole Board members were conducted during May and June 2004.
[547] NSW Ombudsman, discussion paper, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and the Summary Offences Amendment (Places of Detention) Act 2002*, March 2005, p. 41.
[548] Submission 13, DCS, 10 May 2005.
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[553] Interview record 23, March 2004.
[554] Submission 13, DCS, 10 May 2005.
[555] Material provided by Victims Register, DCS, 3 July 2003.
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[557] Interview record 24, March 2004.
[558] *Submissions Concerning Offenders in Custody*, Information Package jointly produced by Victims of Crime Bureau and DCS, January 2001, p. 4.
[559] Ibid., p. 5.
[560] Interview record 25, March 2004.
[561] Observation record 19, July 2004.

Part 4.

Recapture of escaped inmates

Chapter 15. Legislation concerning 'escapees' 159

15.1. Offences concerning escape from lawful custody 159

15.2. A seminal incident 160

15.3. Legislative change 161

Chapter 16. Processes followed after an escaped inmate has been recaptured 165

16.1. Arresting escaped inmates 165

16.2. Charging escaped inmates 166

Chapter 15. Legislation concerning ‘escapees’

15.1. Offences concerning escape from lawful custody

In NSW certain government agencies have the power to keep people in custody, against their will, in certain circumstances. These powers are generally invoked when it is suspected or proven that a person has committed a criminal offence. For example:

- Part 10 A of the *Crimes Act* authorises police officers to detain people after they have been arrested, and before they have been brought before a court or authorised officer, for the purpose of investigating the person’s involvement in the commission of an offence
- a court has the power to issue a warrant to commit a person to a correctional centre or other place after a person has been charged with an offence, but before they have been convicted[562]
- after a person has been sentenced to a period of imprisonment, a court must issue a warrant for the committal of the offender to a correctional centre[563]
- if a child is found guilty of certain offences, the Children’s Court may make an order that the child be detained in a detention centre under the responsibility of the Minister for Juvenile Justice.[564]

In some instances people remain in lawful custody even when they are not at the place or centre where they are designated to reside. For example, inmates held in custody at a correctional centre remain in custody when they are absent from the centre because they are being transferred between centres, treated in hospital, or are absent in accordance with a leave permit or order issued by the Commissioner of Corrective Services (such as an education or work permit).[565]

If a person who is being held in lawful custody leaves or attempts to leave the place where they are being held, without the approval of the appropriate authority, or goes to a place they are not authorised to go, they may be charged with a criminal offence. There are a range of offences in NSW relating to people escaping from lawful custody, and these different offences have penalties of varying severity. For example:

- A person who escapes from police custody, during or after an arrest, or from a court during a hearing, can be charged with the common law offence of escape from lawful custody.[566] A person convicted of this offence can be penalised by fine or imprisonment. However, ‘*a sentence exceeding two years for a common law misdemeanour should only be imposed in serious cases or where the misdemeanour is an attempt to commit a serious crime.”*[567]
- A detainee who escapes or attempts to escape from a detention centre under the responsibility of the Minister for Juvenile Justice is guilty of an offence under the *Children (Detention Centres) Act 1987*[568] and is liable to imprisonment for a period not exceeding 3 months.
- A person serving a periodic detention order who escapes from lawful custody may be liable to pay a fine of 10 penalty units (currently $1,100) and/or be imprisoned for 12 months.[569]

In addition, in relation to people imprisoned by way of full time detention, section 310D of the *Crimes Act* states:

> *Any inmate:*
>
> *(a) Who escapes or attempts to escape from lawful custody, or*
>
> *(b) Who, having been temporarily released from lawful custody, fails to return to lawful custody at the end of the time for which the inmate has been released,*
>
> *Is guilty of an offence.*
>
> *Maximum penalty: imprisonment for 10 years.*[570]

DCS has detailed policies and procedures that are to be followed in the event of an inmate escaping. In particular, the police are to be notified of the escape, and provided with all relevant information.[571]

Section 39(1) of the Crimes (Administration of Sentences) Act says:

A police officer or correctional officer may, with or without a warrant, arrest an inmate:

(a) who has contravened, or has manifested an intention to contravene, a condition of a local leave order, local leave permit or interstate leave permit, or

(b) whose local leave order, local leave permit or interstate leave permit has been revoked, or

(c) who has not returned to a correctional centre at the expiry of the period specified in a local leave order, local leave permit or interstate leave permit, or

(d) who has escaped from custody.

Prior to February 2003, a police officer or correctional officer who arrested an inmate absent from lawful custody, in accordance with section 39(1) was to convey the inmate to the nearest appropriate correctional centre.[572]

15.2. A seminal incident

In March 2001 a man was remanded in DCS custody charged with shooting offences, 'wound with intent to murder' and 'shoot with intent to cause grievous bodily harm'. He appeared before the local court in respect of these charges a number of times throughout 2001. Each time, the court refused him bail and issued a warrant requiring him to remain in the custody of DCS.

On 15 November 2001 the man appeared again before the local court in relation to the shooting offences. Before the magistrate could adjourn the matter, and refuse bail,[573] the man escaped from the courtroom. He was recaptured later that day and taken to hospital before being returned to a correctional centre, by police, in accordance with the (then) provisions of the *Crimes (Administration of Sentences) Act.*[574]

He had not, however, been charged with escaping lawful custody. In addition, there had been no warrant issued requiring him to remain in DCS custody in relation to the shooting offences, because before the court issued such a warrant he had escaped, and it could not be issued in his absence.[575] As a result DCS had no authority to lawfully detain the man in relation to the shooting offences. His detention by DCS was lawful because he was also serving a custodial sentence for an unrelated driving offence. His release date for the driving offence was 21 December 2001.

In late November, NSW Police re-commenced the charges against the man in relation to the shooting offences. However, the man was not ordered to appear in court in relation to this matter, and as he did not appear in court, a bail determination was not made. Subsequently the court issued a section 77 order requiring him to appear in court on 21 December in relation to the shooting offences.[576] Such an order does not give DCS lawful authority to detain a person. In December 2001 it was usual practice for DCS to advise an inmate, before discharging them, of when he or she was required to attend court in relation to an outstanding section 77 order.

Accordingly, the man was released from custody on 21 December 2001, but he did not attend court that day as ordered. He remained at large until 23 January 2002, when NSW Police arrested and conveyed him to Penrith Police Station where he was charged with a number of offences, including escaping from lawful custody.[577]

In relation to the release of this man, the Commissioner of Corrective Services stated *'…it would appear that this unfortunate incident was caused by a combination of deficient procedures concerning the release of inmates and human error.'*[578] Relevant factors include:

- The man escaped before the court proceedings were concluded so the court was unable to issue a further warrant in relation to this matter until the police went through the process of laying information before the court and securing the offender's attendance.
- When the man was recaptured he was not charged with escaping lawful custody.
- When re-commencing the proceedings in relation to the shooting offences, the prosecution did not seek a court order requiring the man's attendance at court.
- There was a lack of communication between DCS and court staff prior to the man's release.

Following the problematic release of this man, the administrative policies and practices concerning the release of inmates from DCS custody were reviewed and amended. For example, in January 2002, the Commissioner of Corrective Services, revised the procedures for discharging inmates.

New procedures require DCS staff, where an inmate's warrant file contains a section 77 order, to contact the issuing court no later than the day before the scheduled release, and advise the court of the inmate's pending release. If the section 77 order requires the inmate's appearance at court on the day he or she is due to be discharged from custody, the inmate is to be escorted to court by DCS officers unless the court specifies in writing that this is

not necessary. If the section 77 order requires the inmate's appearance at court on a day after the inmate is due to be released, the court must be asked if it intends to issue an order, which authorises the inmate's continued detention beyond his or her release date. If the court does not issue a further order, the inmate may be released as scheduled.[579]

In addition to these administrative changes, Parliament decided to amend the legislation dealing with the recapture of escaped inmates by police or correctional officers.

15.3. Legislative change

As previously mentioned, until February 2003, the *Crimes (Administration of Sentences) Act* required police or correctional officers who recaptured an inmate unlawfully at large to *'convey the inmate to the nearest appropriate correctional centre'*.[580] In other words, inmates who had escaped from custody, and those who had breached a leave order or permit, for example, by returning late to a correctional facility, were to be treated the same way.

In February 2003, largely in response to the erroneous release of the inmate, discussed above, Parliament decided to amend the *Crimes (Administration of Sentences) Act* so that following recapture, escaped inmates were no longer to be conveyed to a correctional centre. Section 39 now provides:

> *(2) A police officer who arrests an inmate …*
>
> > *(a) in the case of an inmate who has escaped from custody—is to take the inmate before an authorised justice to be dealt with according to law, or*
> >
> > *(b) in any other case—is to convey the inmate to the nearest appropriate correctional centre.*
>
> *(3) A correctional officer who arrests an inmate …*
>
> > *(a) in the case of an inmate who has escaped from custody—is to take the inmate to a police officer, or before an authorised justice to be dealt with according to law, or*
> >
> > *(b) in any other case—is to convey the inmate to the nearest appropriate correctional centre.*

An authorised justice, for the purpose of this legislation is:

> *(a) a Magistrate, or*
>
> *(b) a registrar of a Local Court or the registrar of the Drug Court, or*
>
> *(c) a person who is employed in the Attorney General's Department and who is declared (whether by name or by reference to the holder of a particular office), by the Minister administering this Act by instrument in writing or by order published in the Gazette, to be an authorised justice for the purposes of this Act.*[581]

The primary purpose of the legislative change was to ensure that inmates who escape from custody are charged under the criminal law before being returned to custody, while inmates who commit the lesser offence of breaching a leave order or permit are returned to the correctional centre to be disciplined.

According to papers provided by DCS, a second reason for the legislative change was to ensure consistency between provisions about recapturing people in the ***Crimes** (Administration of Sentences) Act* and the *Crimes Act*. A DCS report about the erroneous release of the inmate described above, says in part:

> *Section 39 appears to be in conflict with section 352AA of the Crimes Act 1900 which provides for a person who is "unlawfully at large" to be apprehended with or without a warrant and then taken before an authorised Justice who may, <u>by warrant</u>, commit the person to their former custody.*[582]

However, close reading of these two pieces of legislation illustrates that tensions remain between them. Section 352AA of the *Crimes Act* states:

> *(1) Any constable may, with or without warrant, apprehend any person whom the constable, with reasonable cause, suspects of being a prisoner unlawfully at large and take the person before an authorised Justice …*
>
> *(2) A reference in subsection (1) to a prisoner unlawfully at large is a reference to a person who is at large* ***(otherwise than by reason of having escaped from lawful custody)*** *at a time when the person is required by law to be in custody in prison.*[583]

This means that the *Crimes (Administration of Sentences) Act* requires a police officer who arrests an inmate for being unlawfully at large, but who is not an escapee,[584] to return the inmate to the nearest appropriate correctional centre. The *Crimes Act*, however, requires a police officer to take such an inmate before an authorised justice.

In our discussion paper, we asked stakeholders *'Are the laws regarding the processes to be followed after inmates unlawfully at large are recaptured unclear and/or ambiguous? If so, how could they be improved?'*
In response to this, NSW Police responded '***no***'.[585] NSW Police did not provide any additional information to explain or substantiate their view on this issue.

Some individual police officers wrote to us advising that they felt the existing laws were in some way inconsistent or inadequate. For example, one local area commander commented:

> *I do believe that the laws relating to inmates unlawfully at large and recaptured are ambiguous and should be reproduced in a clear and concise format and made available for Police and Correctional Officers generally.*[586]

Other comments we received were:

> *[a]ll persons should go before a magistrate.*[587]

*

> *… it is believed a Magistrate should be able to issue a warrant and/or bail refuse a person without them being present when that person has committed overt acts to avoid the outcome.*[588]

DCS advised us:

> *The Department acknowledges the inconsistency between section 39 of the Crimes (Administration of Sentences) Act 1999 [CAS Act] and section 352AA of the Crimes Act 1900 with respect to inmates who are unlawfully at large. A correctional officer is required, under the CAS Act, to convey the inmate to a correctional centre in some (but not all) circumstances, while a police officer is required to take the inmate to a correctional centre (in some circumstances under the CAS Act) and before an authorised justice (under the Crimes Act).*
>
> *Section 39(1)(a)-(c) [of the CAS Act] lists various scenarios by which an inmate may be unlawfully at large (and therefore subject to section 39), but does not purport to define "unlawfully at large." In any case, it excludes erroneous release as a reason for the inmate to be arrested under section 39 – a person unlawfully at large due to erroneous release must be arrested by a constable (with or without a warrant) under section 352AA of the Crimes Act 1900.*
>
> *A person may also be unlawfully at large if they are subject to a conditional release order [a parole order, periodic detention order, or home detention order] which has been revoked by the Parole Board. If it revokes a conditional release order, the Parole Board may issue a warrant, under section 181 of the CAS Act, "committing the offender to a correctional centre to serve the remainder of the sentence". Under section 181(3) of the CAS Act, such a warrant "is sufficient authority (a) for any police officer to arrest, or have custody of, the offender named in the warrant, to convey the offender to the correctional centre specified in the warrant and to deliver the offender into the custody of the governor of that correctional centre…". Section 181 of the CAS Act is also therefore inconsistent with section 352AA of the Crimes Act in the same way as section 39.*
>
> *The purpose of the requirement to take a person unlawfully at large before an authorised justice is to enable a formal order to be made for the person's imprisonment. In almost all circumstances, however, such a formal order already exists: either a warrant issued by the Parole Board committing the offender to a correctional centre, or the original warrant committing the inmate to prison, which has never ceased to apply – any leave order or leave permit has been granted subject to that warrant's requirement that the inmate return at the expiry of the leave, and erroneous release does not invalidate a warrant of imprisonment. Where a lawful detainer exists, it would make sense if there were only a requirement that the person be conveyed to a correctional centre.*
>
> *In practice, most inmates who fail to return from leave are arrested by correctional officers who follow up the inmate's absence, and those inmates are conveyed to a correctional centre. Police generally are reluctant to arrest a person (or assist a correctional officer to arrest a person) without an arrest warrant, notwithstanding that the person may be unlawfully at large: police usually only proceed once the legal detainer is faxed to the Police by the Department. Police officers also may not always be fully cognisant of the distinction between an escaped inmate and an inmate unlawfully at large.*
>
> *The Department is considering several options to remove the inconsistencies between the two Acts, and will consult with both the Police and Attorney General's Department before recommending which legislation should be amended, and how.*[589]

It is positive that DCS has recognised a number of problems with the current operation of the *Crimes (Administration of Sentences) Act* and the *Crimes Act* in relation to inmates unlawfully at large, and that the department is acting to rectify these issues. We agree that relevant agencies should be consulted in determining the most appropriate way to overcome the existing anomalies.

Recommendation

34 **It is recommended that the Department of Corrective Services, in consultation with NSW Police and the Attorney General's Department, proceed with investigating the most appropriate way to remove the inconsistencies between the *Crimes (Administration of Sentences) Act* and the *Crimes Act* concerning inmates who are unlawfully at large.**

Endnotes

[562] *Criminal Procedure Act 1986*, section 241. Note, this is subject to the provisions of the *Bail Act 1978*.
[563] *Crimes (Sentencing Procedure) Act 1999*, section 62.
[564] *Children (Criminal Proceedings) Act 1987*, section 33(1)(g).
[565] *Crimes (Administration of Sentences) Act 1999*, section 38.
[566] The *Crimes Act 1900*, section 343(a) expressly preserves the common law offence of escaping from lawful custody.
[567] Watson, R., Blackmore, A M., and Hosking, G S., *Criminal Law NSW*, Lawbook Co, 2002, at 3.120.
[568] Section 33.
[569] *Crimes (Administration of Sentences) Act 1999*, section 95(1)(d).
[570] The *Crimes Act*, section 310H says that section 310D does not apply to people serving a periodic detention order, or home detention order, or a detainee within the meaning of the *Children (Detention Centres) Act 1987*.
[571] DCS Operations Procedure Manual, section 13.7.2.
[572] *Crimes (Administration of Sentences) Act 1999*, old section 39(2). This section was omitted from the legislation when the *Crimes (Administration of Sentences) Amendment Act 2002* commenced on 21 February 2003.
[573] Bail had been refused on 10 previous appearances before the local court in respect of the charges. DCS Submission to Minister, 10 January 2002.
[574] Old section 39(2).
[575] The *Bail Act 1978,* section 23, says that a magistrate or authorised justice may '*grant bail to a person brought or appearing before the magistrate or authorised justice and accused of an offence'*.
[576] An order under section 77 of the *Crimes (Administration of Sentences) Act* requires an inmate to appear before a court on a future date, usually to answer charges or give evidence as a witness.
[577] Police event record 3.
[578] DCS Submission to Minister, 10 January 2002.
[579] DCS Operations Procedure Manual, chapter 11. See also DCS Commissioner's Instruction 02/2002, *Release of Inmates from Custody.*
[580] Old section 39(2).
[581] *Search Warrants Act 1985*, section 3. Note, the *Crimes (Administration of Sentences) Act 1999*, section 39(7) provides that, for the purpose of this section, the definition of authorised justice has the same meaning as in the *Search Warrants Act 1985*.
[582] DCS submission to Minister, 10 January 2002.
[583] Emphasis added.
[584] For example, a person whose parole order has been revoked but who has not yet been taken into custody, or an inmate late returning to a correctional centre from work release or day release, because of traffic congestion.
[585] Submission 15, Ministry for Police, 23 May 2005.
[586] Submission 4, NSW Police, Local Area Commander, 19 April 2005.
[587] Submission 9, NSW Police, Duty Officer, 17 April 2005.
[588] Submission 14, NSW Police, Assistant Commissioner, Commander, 4 May 2005.
[589] Submission 13, DCS, 10 May 2005.

Chapter 16. Processes followed after an escaped inmate has been recaptured

In order to monitor the operation of the amendments concerning the recapture of escaped inmates, we:

- interviewed a number of officers from DCS and NSW Police about the practices followed after an escaped inmate has been recaptured
- examined NSW Police COPS records[590] about each inmate DCS advised us had escaped and/or been recaptured during the review period.
- examined NSW Police COPS records about each person charged under section 310D of the *Crimes Act* (the charge applicable to inmates who escape from lawful custody or fail to return to custody after they have been temporarily released from lawful custody) in the first twelve months of the review period.
- included a chapter about the processes followed subsequent to the recapture of escaped inmates in our discussion paper, and invited submissions on this issue.

16.1. Arresting escaped inmates

We spoke to four NSW Police local area commanders to determine whether they had any comments or concerns regarding the requirement for escaped inmates to be taken to a police station or before an authorised justice, following recapture. Each of the officers advised that it is not a common occurrence for police to deal with escaped inmates, but in the event of becoming aware of an escaped inmate, the usual practice would be to take the inmate back to a police station to be charged. One officer noted that this approach was taken *'as a matter of course'*[591] while another noted that in his experience, recaptured inmates have always been dealt with this way.[592] Each of the commanders advised that they were not aware of any significant problems or issues of concern with this approach, with one noting the current system is sensible, and in-line with current practice,[593] and another commenting it *'[this] strikes me as a logical way to do it, to stop people falling through the cracks.'*[594]

We also spoke to a range of DCS staff about the processes followed after an escaped inmate is recaptured. It was also the view of DCS staff that when an escaped inmate is recaptured, he or she would, as a matter of course, be taken to a police station rather than returned to a correctional facility.[595] No issues of concern were raised about this approach.

DCS advised us that there were 49 inmates who escaped from DCS custody during the review period. In the same period, 52 escapees were recaptured and returned to DCS custody (including six inmates who escaped before the start of the review period). To determine whether, during the review period, escaped inmates who were recaptured, were taken to a police station or to an authorised justice, before being returned to a correctional facility, we examined COPS records relating to 56 escaped inmates. According to DCS, of these:

- 46 people had escaped and been recaptured (and returned to DCS custody) within the review period
- six people had escaped before the review period and were recaptured (and returned to DCS) during the review period
- three people escaped during the review period, and if they were recaptured have not been returned to DCS custody
- one person escaped during the review period and was recaptured and returned to DCS after the review period.

We conducted a search of the NSW Police COPS database for each person DCS advised us had escaped and/or been recaptured during the review period. We then examined the narrative section of each COPS record we could locate, that related to the escape and/or recapture of the inmate. Most of the entries on COPS contained some details about the recapture of the inmate, usually noting whether the person was taken to a police station and charged with escaping lawful custody.

From the 56 COPS records we examined about inmates who escaped from custody, we ascertained:

- Thirty nine inmates (69.64%) were recaptured and taken to a police station to be charged with escaping lawful custody. This includes those who police apprehended because the person was a known escapee, and those

who were spoken to or arrested by police in relation to unrelated matters, and police subsequently determined were wanted for escaping lawful custody.

- Five inmates (8.93%) handed themselves in to police. Four were subsequently charged with escaping lawful custody, and one was charged with failing to comply with routine.
- Four inmates (7.14%) were arrested interstate on unrelated charges. At the time of writing, two have been extradited back to NSW and subsequently charged with escaping lawful custody. One remains in custody in Queensland, and NSW Police are seeking an arrest warrant pending his release from custody in Queensland. The fourth inmate was arrested and remanded in custody in Victoria. It is unclear whether he remains there.
- Police records do not indicate whether three recaptured inmates (5.36%) were taken to a police station or before an authorised justice immediately after they were recaptured. All three were, however, charged with escaping lawful custody, at the time of, or some time following, their recapture.
- One inmate (1.79%) who escaped from court after he was refused bail, was restrained by police in the complex courtyard. He was returned to DCS custody (the court cell area) and was interviewed and charged by police.
- It is not clear whether four inmates (7.14%) were recaptured, and charged with escaping lawful custody.

These records indicate that in the majority of cases, when an escaped inmate is recaptured, or comes to police attention for unrelated matters, the person is taken to a police station and charged in relation to the escape. This is consistent with the legislative requirements in the *Crimes (Administration of Sentences) Act*.

We have not been made aware of any cases during the review period, where a recaptured inmate has been erroneously released from a correctional facility because of a failure to charge the inmate with escaping lawful custody.

16.2. Charging escaped inmates

According to NSW Police records, in the first twelve months of the review period, 38 people were charged under section 310D(a) of the *Crimes Act*. People should be charged with this offence (inmate escape/attempt to escape from lawful custody) if they are imprisoned by way of full-time detention, and escape from lawful custody.

When we examined records in COPS about these charges it became apparent that some people being charged with this offence were not people who were imprisoned by way of full-time detention, when they escaped, or attempted to escape. For example, at least six were people who escaped while they were in police custody, and at least two were detainees who escaped while in the custody of the Department of Juvenile Justice.[596] As discussed in section 15.1 the former should be charged under the common law offence of 'escape from lawful custody' and the latter under the *Children (Detention Centres) Act*.

When we spoke to four NSW Police local area commanders about this issue, none were surprised to hear that people are sometimes being charged with the wrong offence. One commander noted that this problem is not unique to the charge of escape lawful custody, and that in relation to traffic offences, for example, sometimes there is confusion and/or wrong decisions made about whether to charge someone with driving while their licence is disqualified, cancelled or suspended.[597] Another commander explained that confusion may occur in relation to charging escapees as it is not common for police to make such arrests.[598]

Commanders advised us that:

- it is usually the arresting police officer, or custody manager who decides which is the appropriate charge
- the charging officer should look at '*proofs of the legislation*' before charging someone, however, this may not always occur
- there is a 24 hour legal service available to police if they are unsure which offence a person should be charged with
- if a person is charged with the wrong offence, this will usually be picked up during the legal proceedings, for example, by the prosecutor or the defence lawyer
- if, during legal proceedings, it became apparent that the person had been charged with the wrong offence, the charge would be withdrawn and the prosecution would proceed with the correct charge
- it is foreseeable that on some occasions the error may not be picked up at all, for example, if the person pleads guilty to the charge.

Of the eight cases we looked at, where people allegedly escaped from police custody, or a juvenile detention centre, but were charged with escaping from full-time detention, the offence was proved in court in four instances (50%).

None of these instances resulted in a harsher sentence being imposed than one which could have been imposed, if the person had been charged with the appropriate offence. However, it is not inconceivable that wrongly charging people could result in more serious penalties being imposed than would otherwise have been the case.

To overcome this issue, NSW Police should consider whether officers are receiving sufficient training and guidance about the appropriate offence people should be charged with, if they escape from lawful custody.

Recommendation

35 It is recommended that NSW Police consider whether police officers should be provided with additional training and guidance about charging people with offences relating to escaping from lawful custody.

Endnotes

[590] For further information about the COPS database, see methodology, section 2.5.3.
[591] Interview record 59, March 2005.
[592] Interview record 61, April 2005.
[593] Ibid.
[594] Interview record 60, March 2005.
[595] Interview record 10, August 2003; interview record 16, October 2003; and interview record 65, September 2004.
[596] Police records do not always clearly indicate whose custody the person escaped from.
[597] Interview record 61, April 2005.
[598] Interview record 59, March 2005.

Appendices

Appendix 1 – Information Requirements Agreement 171
Information to be provided each quarter 171
Information to be provided on an ad hoc basis 172
Information already available to the Ombudsman 172
Field Research 172

Appendix 2 – Submissions received in response to discussion paper 175

Appendix 3 – Offences relating to places of detention 177
Sections 27B-27E of the Summary Offences Act 1988 177
27B Trafficking 177
27C Introduction or supply of syringes 177
27D Unlawful possession of offensive weapons or instruments 178
27E Miscellaneous offences 178

Appendix 4 – Daily synopsis audit results (miscellaneous items) 179

Appendix 5 – Guidelines for Police when interviewing people with impaired intellectual functioning (excerpt) 187

Acknowledgements 193

Appendix 1 – Information Requirements Agreement

NSW OMBUDSMAN - NSW DEPARTMENT OF CORRECTIVE SERVICES

INFORMATION REQUIREMENTS FOR MONITORING OF

Crimes (Administration of Sentences) Amendment Act 2002

Summary Offences Amendment (Places of Detention) Act 2002

Information to be provided each quarter

To enable effective monitoring of the above legislation, copies of the following documents are to be provided by the NSW Department of Corrective Services to the NSW Ombudsman on a quarterly basis.

1. Quarterly offender population report, prepared by the Corporate Research, Evaluation and Statistics Unit.
2. Quarterly updates of Victims Register statistics, prepared by the Community Liaison Officer, Restorative Justice Unit, including:
    - Number of inmates on register (active)
    - Number of inmates on register (inactive)
    - Number of serious offenders on register (including inactive)
    - Number of victims on register (active)
    - Number of victims on register (inactive)
    - Number of new inmates added for the reporting period
    - Number of new victims added for the reporting period
3. Quarterly summary of escapes and recaptures, prepared by the Corporate Research, Evaluation and Statistics Unit.
4. Any report that reviews the escape and recapture of an inmate and details the procedures taken following recapture.
5. A report on the number of people who have visited NSW correctional centres, by reference to
    - correctional centre visited
    - type of visit (legal visit, personal visit)
6. Statistics on the amount and generic type of drugs confiscated from visitors to NSW correctional centres (referable to each correctional centre).
7. Statistics on the amount and type of contraband (other than drugs) confiscated from visitors, referable to each correctional centre, together with a schedule of items returned after confiscation and items disposed of after confiscation (including items destroyed).
8. Statistics on the amount and generic type of drugs found within NSW correctional centres (referable to each correctional centre).
9. Statistics on the amount and type of contraband (other than drugs) found within NSW correctional centres, referable to each correctional centre.
10. Monthly report compiled by the Drug Detector Dog Unit.
11. Monthly statistics compiled by the Corrections Intelligence Group relating to instances of information forwarded from correctional centres.
12. Monthly reports on results of urinalysis testing, prepared by the Urinalysis Unit.

13. Any reports or reviews conducted by, or on behalf of, the Department of Corrective Services relating to the stop, detain and search powers of correctional officers, the escape and recapture of inmates, applications by victims of offenders to make submissions to the Parole Board or attempts to minimise the introduction of contraband into correctional centres.

    The information requirements in items 1 to 13 of this agreement will need to be provided for the period from 21 February 2003 to 20 February 2005. Information for the period 21 February 2003 to the end of the first reporting period should be provided as soon as possible. Thereafter, where possible, information should be provided according to the following schedule:

    - Information covering the period 1 October 2003 to 31 December 2003 should be provided by 31 January 2004
    - Information covering the period 1 January 2004 to 31 March 2004 should be provided by 30 April 2004
    - Information covering the period 1 April 2004 to 30 June 2004 should be provided by 31 July 2004
    - Information covering the period 1 July 2004 to 30 September 2004 should be provided by 31 October 2004
    - Information covering the period 1 October 2004 to 31 December 2004 should be provided by 31 January 2005
    - Information covering the period 1 January 2005 to 20 February 2005 should be provided by 31 March 2005.

Information to be provided on an ad hoc basis

The NSW Ombudsman may require access to the following information for the purpose of scrutiny required by the legislation. The Ombudsman will give reasonable notice before requiring access to these items, and will organise the viewing and, if necessary, copying of these documents with relevant senior Departmental staff:

14. Files relating to Parole Board proceedings where a victim has made (or stated an intention to make) an oral submission at a parole hearing.
15. Operational orders and operational reports of the Drug Detector Dog Unit or Serious Emergency Response Teams, and the Drug Detector Dog Unit database.
16. The duty officer's daily synopsis database.
17. Gatekeeper register of the details of correctional officers, departmental officers, employees of other government agencies, contractors, authorised visitors, and official visitors randomly searched.
18. Records relating to the suspected or proven introduction of contraband into a correctional centre by correctional officers, departmental officers, employees of other government agencies, contractors, authorised visitors, and official visitors.
19. Videos of incidents relating to the use of correctional officers' powers that are subject to scrutiny (eg use of force against a visitor).

Information already available to the Ombudsman

The following information is already available to select staff at the Ombudsman's Office. Information obtained through these sources may be used for the purpose of monitoring required by the legislation.

20. The Offender Management System
21. The Daily Synopsis prepared by the Duty Officer (hard copy)
22. All policy and procedural changes, including Assistant Commissioner's Orders

Field Research

23. For the purposes of monitoring the amending legislation, observation will be conducted at a range of correctional centres. This will be arranged in advance with the governor of a correctional centre, or a person nominated by the governor.
24. Officers of the Ombudsman will also conduct observation of operations and training conducted by relevant units of the Department of Corrective Services, such as the Drug Dog Detector Unit. The arrangements for such

observations will be organised in advance with the officer in charge of the relevant unit, or a person nominated by the officer in charge.

25. Throughout the course of the legislative monitoring, officers of the Ombudsman will attend a number of Parole Board hearings and meetings at which the Board gives preliminary consideration as to whether a serious offender should be released to parole, and meetings at which the Board considers notices of intention to lodge a submission to the Board. Prior to attending such hearings and meetings, officers of the Ombudsman will liaise with the Chairperson of the Parole Board and staff of the Restorative Justice Unit.

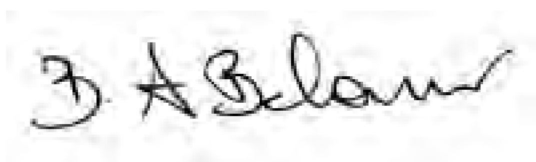
26. Officers of the Ombudsman will arrange with the Principal, Corrective Services Academy to attend classes involving the training of correctional officers.

27. Meetings have been held, and will continue to be held, with relevant officers from the Department of Corrective Services. It is possible that focus groups with relevant officers will be held, and/or that officers will be requested to complete surveys about the implementation and operation of the legislative provisions.

Where possible, the information requested will be provided in electronic form.

Throughout the course of the monitoring, the Ombudsman may become aware of additional information that may assist the effective monitoring of the implementation of the legislation. Negotiations about the provision of such additional information will be held should such an occasion arise.

Information that the Department of Corrective Services deems to be sensitive or confidential will be kept securely within the Ombudsman's Office. Access to such information will be limited to a small number of key staff.



BRUCE BARBOUR

NSW Ombudsman

RON WOODHAM

Commissioner of Corrective Services

Appendix 2 – Submissions received in response to discussion paper

A Harding, Superintendent, Commander Flemington Local Area Command, NSW Police

B Scott-Young, Duty Officer, Wagga Wagga Local Area Command, NSW Police

Charles Haggett, Commander, Lower Hunter Local Area Command, NSW Police

Community Relations Commission

D Cushway, Superintendent, New England Local Area Command, NSW Police

Department of Ageing, Disability and Homecare

Department of Community Services

Department of Corrective Services (this submission was supported by the Hon John Hatzistergos, MLC, Minister for Justice)

G Donnelly, Acting Local Area Commander, Macquarie Fields Local Area Command, NSW Police

Inmate (name withheld)

Legal Aid

Ministry for Police

NSW Parole Board

Public Defenders

RJ Waites APM, Assistant Commissioner, Commander Inner Metropolitan Region, NSW Police

Tony Hodgetts, Superintendent, Taskforce Sky, Department of Corrective Services

Youth Justice Coalition

<u>Acknowledgements received in response to discussion paper</u>

Department of Juvenile Justice

Human Rights and Equal Opportunity Commission

The Hon Carmel Tebbutt MLC, Minister for Education and Training

Appendix 3 – Offences relating to places of detention

Sections 27B-27E of the Summary Offences Act 1988

27B Trafficking

(1) A person must not, without lawful authority, bring or attempt by any means whatever to introduce into any place of detention any spiritous or fermented liquor.

Maximum penalty: imprisonment for 6 months or 10 penalty units, or both.

(2) A person must not, without lawful authority, bring or attempt by any means whatever to introduce into any place of detention any poison listed in Appendix D of Schedule Four, or in Schedule Eight, to the Poisons List in force under the *Poisons and Therapeutic Goods Act 1966*.

Maximum penalty: imprisonment for 2 years or 20 penalty units, or both.

(3) Section 40 of the *Poisons and Therapeutic Goods Act 1966* applies to proceedings for an offence under subsection (2) in the same way as it applies to legal proceedings under that Act.

(4) A person must not, without lawful authority, bring or attempt by any means whatever to introduce into any place of detention a quantity of any prohibited drug or prohibited plant within the meaning of the *Drug Misuse and Trafficking Act 1985* that constitutes a small quantity (or constitutes less than a small quantity) of the drug or plant concerned within the meaning of that Act.

Maximum penalty: imprisonment for 2 years or 50 penalty units, or both.

(5) Section 43 of the *Drug Misuse and Trafficking Act 1985* applies to proceedings for an offence under subsection (4) in the same way as it applies to legal proceedings under that Act.

(6) (Repealed)

27C Introduction or supply of syringes

(1) A person:

(a) who brings or attempts by any means whatever to introduce a syringe into a place of detention, or

(b) who supplies or attempts by any means whatever to supply a syringe to an inmate who is in lawful custody, is guilty of an offence.

Maximum penalty: imprisonment for 2 years.

(2) A person is not guilty of an offence of bringing or attempting to introduce a syringe into a place of detention if the person satisfies the court that the officer in charge of the place of detention had consented to the person's bringing or introducing the syringe into the place of detention.

(3) A person is not guilty of an offence of supplying or attempting to supply a syringe to an inmate in lawful custody if the person satisfies the court:

(a) that the supply was authorised on medical grounds by a registered medical practitioner, and

(b) if the inmate is in lawful custody in a place of detention, that the officer in charge of the place of detention had consented in writing to the supply.

(4) (Repealed)

(5) While absent from a place of detention in any of the circumstances referred to in section 38 (1) of the *Crimes (Administration of Sentences) Act 1999*, an inmate is taken to be in lawful custody for the purposes of an offence under this section only if the inmate is being escorted by a correctional officer (within the meaning of that section) or a police officer.

(6) In this section, syringe means a hypodermic syringe, and includes:

(a) anything designed for use or intended to be used as part of such a syringe, and

(b) a needle designed for use or intended to be used in connection with such a syringe.

27D Unlawful possession of offensive weapons or instruments

(1) A person must not, without reasonable excuse (proof of which lies on the person), have in his or her possession an offensive weapon or instrument in a place of detention.

Maximum penalty: imprisonment for 2 years or 50 penalty units, or both.

(2) If a person is convicted of an offence under this section, the court may, in addition to any penalty it may impose, make an order that the offensive weapon or instrument be forfeited to the Crown, and the weapon or instrument is forfeited accordingly.

(2A) (Repealed)

(3) In this section, offensive weapon or instrument has the same meaning as it has in the *Crimes Act 1900*.

27DA Inmate possession of a mobile phone

(1) An inmate must not, without reasonable excuse (proof of which lies on the inmate), have in his or her possession in a place of detention a mobile phone or any part of it, a mobile phone SIM card or any part of it, or a mobile phone charger or any part of it.

Maximum penalty: imprisonment for 2 years or 50 penalty units, or both.

(2) In this section, mobile phone includes any device that may be used, in whole or in part, for the purpose of sending or receiving voice or other data over a mobile telephone network, whether or not it may be used for any other purpose.

27E Miscellaneous offences

(1) Any person who without lawful authority:

(a) loiters about or near any place of detention, or

(b) enters or attempts by any means whatever to enter any place of detention, or

(c) communicates, or attempts by any means whatever to communicate, with any inmate, is guilty of an offence.

Maximum penalty: imprisonment for 6 months or 10 penalty units, or both.

(2) Any person who without lawful authority:

(a) delivers or attempts to deliver anything to an inmate, or

(b) brings or attempts to bring anything into a place of detention, or

(c) conveys or attempts to convey anything out of a place of detention, or

(d) receives or attempts to receive anything for conveyance out of a place of detention, or

(e) secretes or leaves anything at any place (whether inside or outside a place of detention) for the purpose of its being found or received by an inmate, is guilty of an offence.

Maximum penalty: imprisonment for 2 years or 20 penalty units, or both.

Appendix 4 – Daily synopsis audit results (miscellaneous items)

The table below illustrates the items recorded in the DCS daily synopsis that do not fit within the specific categories of contraband we developed (that is: green vegetable matter; pills; other drugs; smoking implements; syringes and needles; alcohol and gaol brew; weapons; mobile phones and phone accessories).

The miscellaneous items are listed as being found inside correctional facilities, in the possession of visitors to correctional facilities, and in other locations (such as in the mail or outside a correctional facility) for the time periods 21 August 2002 – 20 February 2003; 21 August 2003 – 20 February 2004; and 21 August 2004 – 20 February 2005.

MISCELLANEOUS ITEMS

21 August 2002 - 20 February 2003

INSIDE Description	Quantity	INSIDE (Continued) Description	Quantity
Araldite tubes	4	Medication - excess	?
Balloons	5	Medication - heart	Quantity
Black ink	2	Metal buckets	?
Blank pass		Metal butter knife	1
Blue ink	1 bottle	Metal cutlery	
Boil up kit	7	Metal spike	1
Book re bomb making	1	Metal spoons	2
Broken pen stems	2	Miscellaneous furniture	?
Butter knife - metal		Money	$300
Catrapres 8.3gms		Money Order	$100
CD rom in sealed box	1	Needle exchange container	1
CD roms	Quantity	Nike shoes	1 pair
Cigarettes	17	Oranges	14
Clear liquid	Jar	Padlock with 3 keys	
Clear liquid in urine container	?	Paint scraper	1
Clothing soaking in bleach		Painting equipment	
Compact discs	89	Photocopier cartridge (full)	1
Condom of urine	1	Pornographic video	
Cut up cigarettes		Power packs	?
Dart firing equipment	1	Quantity of foil	
Deca 50	10ml bottle	Red fluid in syringe	
Drug paraphernalia		Remote control for CD	1
DVD players	2	Rice cooker	1
Electrical wiring	Quantity	Roll of upholstery strapping	1
Electrical wiring & circuits	?	Sandwich maker	1
Empty beer bottles	2	screw drivers	?
Excess fruit	?	Sewing needle	2
Fan	1	Sharpened toothbrushes	

INSIDE (Continued) Description	Quantity	INSIDE (Continued) Description	Quantity
Flare gun	1	Sharpening stone	1
Flat head screwdriver	1	Shifting spanners	?
Forks - metal	4	Sling shot	3
Gambling materials		Solvent glue	1 jar
Gaol made speaker		Steel fork	1
Gas extension lead	1	Stones	Quantity
Glo stick	1	Sunbeam Express jug	1
Gvm and bowl	13.9 grams	Supa glue	3ml
Hair clippers	2	Thinners	Sml amnt
Hair cutting equipment	2	Tools	Quantity
Hammer	1	Tools and drill bits	Quantity
Hand made tools	Quantity	Turps	75ml
Inmate ID cards	12	Varnish	200ml
Item civilian clothing	1	Watch	1
Jewellery	3	White liquid (in syringe)	5ml
Jug	1	White OX	quantity
Knife sharpener	1	Wrist camera	1
LCD hand held game	1	Wrist watches	3
VISITOR Description	**Quantity**	**VISITOR (Continued) Description**	**Quantity**
Alcohol swabs	?	Money	
Blank prescription form	2	Mull bowl	1
Blood infusion kit	1	Plastic bag with GVM residue	2
Bottles - empty	4	Radio scanner	1
Box cutter	1	Re-sealable bags	large amnt
Camera	2	Re-sealable bags	3
Cannabis caution	2	Set of scales	1
Caution cutting implement	3	Spoons plastic with white residue	6
Cigarettes	1	Tally Ho papers	2 packs
Deal balloons	Quantity	Water balloon swallowed	1
Drug paraphernalia	large amt	White Ox tobacco	1 pack
Fireworks		White residue (pwdr or liquid?)	sml amnt
Meat axe	1	IV Water vials	6
OTHER LOCATION Description	**Quantity**	**OTHER LOCATION (Continued) Description**	**Quantity**
Cigarettes	11	Camera	1

MISCELLANEOUS ITEMS

21 August 2003 - 20 February 2004

INSIDE Description	Quantity	INSIDE (Continued) Description	Quantity
20 litre container	1	Metal instrument sharpened at one end.	
Adaptor/chargers		Metal window louvres	Many
Aerosol fly spray cans	quantity	Money	$1,207
Aluminium strips	quantity	Needle - sewing	1
		Non-prescribed property	Quantity
Antenna for mobile phone	1	Padlock	1
Apple mulch	quantity	Paint scraper	1
Apples	22 + 1 bag	Photos of officers	3
Balloon of M swallowed and regurgitated		Pins and needles	several
Balloons	13	Plastic bags	32
Bank accounts - numbers and names.	quantity	Pliers - long nosed	1
Black Stick - believed to be drug	quantity	Power board	2
Boil up kit	3	Power pack	1
Bond	1	Rabbit trap	1
Bricks	4	Radio	1
Camera - 35mm (from Activities)	1	Razors	
CD player	1	Red back spiders	10
CDs	6	Re-sealable plastic bags	quantity
Cigarettes		Rope - 100 metres	100 metres
Computer disk	1	Sandpaper	Quantity
Computer speaker amplified system	1	Screwdrivers	
Condoms	number	Sharpening stone	1
Dart blow gun	1	Shaver - Phillips	1
Deca 50 oily injection bottles 10ml	2	Sling shot	3
Deep Heat	1 tube	Spanner	2
Desk light	1	Spiders - red back	4
Drill bit	2	Spoon	1
Earring	1	Stanley knife	
Electrical and hardware goods	1 bag	Sticky tape	Quantity
Excessive food stocks		Sugar	8.5 kg
File	1	Sunglasses	3
Foreign coins	3	Swabs	quantity
Frozen drink bottles	quantity	Syringe canister - black	1
Frozen water bottles	quantity	Medi-swabs	10

Gold coloured ring	1	Tattoo ink	?
Gold stud earrings	3	Tattooing black powder	Quantity
Handcuff key - exact trace with thickness	1	Tobacco	
Headphones - Sony	1	Tobacco pouch	1
Hobby items	excess	Tools	7
Ilium stanabolilc androgenic bottle 20ml	1	Torch	2
Jam	30 sml jars	Tourniquet	1
Liquid - clear in vial	5 ml	Two 750 ml bottles	
Liquid - cloudy, white	5 ml	Two x 2 litre bottles	
Metal (Aluminium) strips	14	Metal cutlery	quantity
Material cut for tourniquet	1	Urine	1 bottle
Medication	excess	Watch	1
Medication - non prescribed	Quantity	Water bomb balloons	40
VISITOR Description	**Quantity**	**VISITOR (Continued) Description**	**Quantity**
Cigarettes		Plastic spoon	1
Drug paraphernalia		Prep wipes, spoons and tourniquet	
Hacksaw blade		Re-sealable bags with residue	2
Handcuff key	1	Scalpel	1
House breaking implement	1	Spoons and balloons	quantity
Knuckle dusters	?	Tobacco	1 pkt
Liquid - clear in syringe	7 ml	Unknown substance in balloon.	
Medication - non-prescribed	Quantity	Visitor handed sim card in -found in yard	
Metal (Aluminium) strips	14	Metal cutlery	quantity
Money	$10,405	Water balloons	1 pkt
Night scope	1	Water vials injectable	5
OTHER LOCATION Description	**Quantity**	**OTHER LOCATION (Continued) Description**	**Quantity**
Fire crackers	3	White	
Liquid nails	100 gm	Money	$200
Tools	6	Live grenade	1

MISCELLANEOUS ITEMS

21 August 2004 - 20 February 2005

VISITOR (Continued) Description	Quantity	INSIDE (Continued) Description	Quantity
$50 note		Mixed fruit	quantity
Metal fork	1	Mobile phone keypad	1
Balloons suspect containing drugs	2	Money	$884
Bottles of hair dye	2 bottles	Mouthwash	1
Slingshots	2	Multi charger - modified	
Photos of Mulawa perimeter fence	2	Multigrips	1
Metal spoons	3	Nails	quantity
Singlets	3	Needle - machine	1
Excess ID cards	6	Needles - sewing	2
Adaptor - modified	1	New runners	4 pr
Adjustable spanner	1	Ninja Starr	1
Aerosol fly spray	3 cans	Non prescibed property	Quantity
Alcohol based aftershave	1	Nuisance items	Quantity
Alcohol wipes	50	Nun-chuck - partial	1
Allan key	1	Nuts, bolts and screws	1 bag
Allan key - home made	1	Oil - 3 in 1	88.7 ml
Aluminium foil	Quantity	Packet cigarettes	1
Ampoule water	1	Paint scraper	1
Antenna - gaol made	2	Pencil	1
Anti-perspirant 50 ml	2	Pepper	quantity
Balloons	9	permanent markers	9
Bed board	1	Petrol	10 ml
Bed sheet	9 mtrs	Phillips head screw attachments	2
Bed sheet - ripped and tied	6 mtre	Photos of officers with inmates	3
Blank CD's	3	Plan of Area 4	1
Blocks of ice - 3 kgs each	2	Plastic bottles filled with frozen water	
Boil up kit	11	Plastic chairs	3
Bottles - various	5	Plastic conduit	90 cm
Bowl with GVM residue		Plastic spoon	1
Boxing focus gloves	1pr	Plastic tub	1
Boxing gloves	1pr	Play station	2
Burnt CDs	2	Pliers	2
Cable and electrical wire	sml amnt	Pointed can opener	1
Cable ties	3	Pornographic material	Large amnt
Cans of coke	6	Power adaptors	5
Cassette tapes	18	Power board	1
CD players	?	Power boards - gaol made	5

INSIDE (Continued) Description	Quantity	INSIDE (Continued) Description	Quantity
CD's	77	Power cords tripe ended	2
Ceramic bowls	4	Power pack	1
Ceramic jugs	8	Radio	2
Chairs	Excess	RAM sticks for computer	4
Chewing gum	1 pkt	Rations	excess
Cigarettes		Red back spiders	1 jar
Cleaning products	?	Resealable plastic bag	1
Co-axial cable - modified	Quantity	Rice cookers	?
Coaxial cable, wire, string, cord	quantity	Ripped sheets	Quantity
Coffee - excess	1 bag	Roll of glad wrap in freezer	
Colour TV	4	Rolls Gladwrap - 150 metre	3
Confiscated property	Large amnt	Rope	Quantity
Cooking tongs	1	Rope - gaol made	3 metre
Copper security wire	2 rolls	Safety pin	1
Copper wire	Quantity	Sandpaper	Quantity
Cordless Audioline phone	1	Sandpaper, paint & glue	qty
Cordless toothbrush	1	Sandwich maker - broken	1
Cup and tin lid	1	Sandwich makers	?
Dark blue aprons	3	Scraper - metal	1
Doonas	?	Screwdrivers	
Dried fruit	quantity	Scrubbing brush	1
Dumbbells	4	Security key - Bi Lock	1
Electric fry pans	2	Sharpening stones	?
Electrical property - unauthorised	?	Shavers cordless	1
Electrical wire	Quantity	Shavers electric	2
Empty 50 ml alcohol bottles	3	Shaving brush	1
Empty coke bottles 1.25 L	40	Sheath for knife	1
Excess food & furniture		Sheet strips,	7 mtrs
Excess ID cards	7	Shifting spanner	1
Excess linen	Quantity	Shoes -pair not belong	1
Excess medication	Quantity	Skipping rope	1
Excess plastic cutlery		Sling shot	1
Excess property	quantity	Solder	1 roll
Excessive foodstuffs	excess	Soldering iron	2
Extension cord	1	Sony Walkman	1
Fabric strips	4	Spanner	1
Fans	3	Spider in jar	1
Floppy disk	21	Spoon	1
Foil	sml amnt	Spoons - 1 teaspn, 1 serving spn	2
Foodstuffs	excess	Stationary	Quantity

INSIDE (Continued) Description	Quantity	INSIDE (Continued) Description	Quantity
Found mobile phone back cover	1	String	large quantity
Frozen water bottles	large no.	String, wood boards and wire	Quantity
Funnell web spider	1	Sugar	quantity
Gameboy	1	Swipes - alcohol	7
Gaol ID cards	2	Tape	3 rolls
Gaol made weapon - garotte style	1	Tattooing ink	sml amnt
Gaol made weights	1	Tea - excess	1 bag
Garden hose	2 metre	Telephone cable	1 mtre
Gillette razor	1	Thin wire	1 ball
Glass louvre	1	Thinners	100 ml
Hacksaws		Tobacco	
Hair clippers	4	Tools unspecified	12
Headphone sets	2	Tourniquet	2
Headset - broken	1	Transformer - modified	1
ID cards	excess	TV remote control	4
Ink	sml bottle	TV's	?
Insect spray cans	9	TV's, kettles,fans, watches etc	Large amnt
Irrigation solution	1	Tv's,radios, guitars,fans,crates etc	Large amnt
Key-opener from can	1	Tweezers - clinical	1
Keys	4	Unauthorised clothing	Quantity
Leather gloves- riggers	1 pr	Urine	2 jars
Light tube - broken	1	Urine specimen container	1
Linen	excess	Vacuum vials	5
Liquid nails in rubber glove	1	Various items of new clothing	
M&M's	250 gm	Various sauces, Oyster, fish etc	3
Makeshift weights	?	Video tape - music	1
Measuring spoon	1	Walkman TEAC	1
Medication	excess	Watches	6
Metal cutlery	quantity	Water bottle "weights"	7
Metal fork and spoon	1	Weight bags filled with water	
Metal nibs - 2.5 cms	3	Whipper snipper cord	2 mtrs
Metal nibs - 6 cms	3	White tee shirts	Quantity
Metal spoons	11	Wire and screws	?
Metal window winders	2	Wiring	excess
Meterial from textiles workshop		Wooden boards	2
Milk crates	?	Wrist watch	1
Mirror - broken	2		

VISITOR Description	Quantity	VISITOR (Continued) Description	Quantity
Air rifle	1	Grenades - home made	2
Alcohol swabs	10	Joint - GVM	1
Alcohol swabs, plastic bags	Quantity	Knuckle duster - steel	1
Ampoules water for injection 5ml	4	Kosh - leather	1
Axe	1	Kronica camera	1
Balloon	5	Leatherman tool	1
Bank keycards	2	Lemon Ruski	300 ml
Boltcutters	2	Lengths of fuse	6
Bowl	1	Machette	1
Cable - black insulation	75 cm	Medication - not prescribed	
Camera	1	Medi-filter units	3
Capped		Metal plunger	1
Cigarette filters	2 bags	Money	$11,200
Cigarettes	16	Personal capsicum spray	1
Clothing	?	Plastic bag	3
Deal bags	quantity	Red balloon with powder residue	1
Detonator - electric	1	Re-sealable bags	43
Digital scales	1	Rifles - lock	2
Disposable camera	3	Sharps container	2
Driver's licence of another person	1	Sling shot	1
Drug paraphernalia	?	Spoon	5
Empty alcohol bottles	2	Syringe cap	1
Fire cracker	1	Tobacco	1 pouch
Firework rockets	6	Tomahawk	1
Fireworks	9	Tools	large qty
Flash drive memory stick	1	Unidentified 'items'	19 gm
Gaol ID cards	5	Water balloons	
Golf club	1		
OTHER LOCATION Description	**Quantity**	**OTHER LOCATION (Continued) Description**	**Quantity**
Money	$50	Discman - damaged	1
Alcohol swabs	5	Electrical leads	various

Appendix 5 – Guidelines for Police when interviewing people with impaired intellectual functioning (excerpt)

The CRIME (Custody, Rights, Investigation, Management & Evidence) Code of Practice defines impaired intellectual functioning as:

- Total or partial loss of a person's mental functions;
- A disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction;
- A disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgement, or that results in disturbed behavior.

The guidelines have been developed to enhance communication between police and people with:

- **Intellectual Disability**: a slowness to learn and process information which can affect how a person functions in society, for example down syndrome;
- **Mental Illness**: a condition which seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterized by the presence in the person of one or more symptoms including delusions, hallucinations, serious disorder of thought form, a severe disturbance of mood, sustained or repeated irrational behavior indicating the presence of any one or more of the symptoms listed;
- **Acquired Brain Injury (ABI):** a loss of brain function caused by accidents, poisoning, stroke, brain tumors, infections or lack of oxygen which can result in changes to a persons personality, thinking, learning and physical abilities;
- **Learning Difficulties:** for example Attention Deficit Disorder, dyslexia;
- **A Dual Diagnosis:** where more than one of the above is present. One example of this may be mental illness combined with substance abuse disorder.

The Code states that in considering whether someone has impaired intellectual functioning, the following indicators are to be considered, whether the person:

- Has difficulty understanding questions and instructions;
- Responds inappropriately or inconsistently to questions:
- Has a short attention span;
- Receives a disability support pension;
- Resides at a group home or institution, or is employed at a sheltered workshop;
- Is undertaking education, or has been educated at a special school or in special education classes at a mainstream school;
- Has an inability to understand the caution.

There may be other indicators of impaired intellectual functioning, these are:

- Where the person identifies themselves as someone with impaired intellectual functioning;
- Where a third party, such as a carer, family member or friend tells you that the person is, or may be someone with impaired intellectual functioning;
- Exhibits inappropriate social distance, such as being overly friendly and anxious to please;
- Acting in a way that is appropriate to a much younger age group, than the person's age group;
- The person is dressed inappropriately for the season or occasion;
- Has difficulty reading and writing;
- Has difficulty identifying money values or calculating change;
- Has difficulty in finding their telephone number in a directory;
- Where the person displays problems with memory or concentration.

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