

**IN THE MATTER OF
CORRECTIONAL CENTRE DISCIPLINE &
THE OMBUDSMAN ACT 1974**

FURTHER MEMORANDUM OF ADVICE

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7 December 2023

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INTRODUCTION

1. The NSW Ombudsman is inquiring into the exercise by Corrective Services NSW (**CSNSW**) of its functions under Part 2 Division 6 of the *Crimes (Administration of Sentences) Act 1999*¹ (**the CAS Act**) being the correctional centre discipline regime in NSW.
2. On 25 August 2023 we provided legal advice to the Ombudsman about a number of legal aspects of the current operation of that discipline regime (**the first advice**).
3. We are further instructed by [REDACTED], Legal Counsel, Legal Governance and Risk from the Office of the NSW Ombudsman, to provide a **second advice** with respect to the same inquiry following on issues raised in our first advice. The second advice is to consider whether the correctional centre discipline regime in NSW might be improved in certain respects taking into account an inter-jurisdictional comparison of correctional centre discipline regimes.
4. In [REDACTED]'s letter of 30 August 2023, she sets out the further matters upon which she wishes us to advise:
 - 1) Inter-jurisdictional comparison of correctional centre discipline, with a particular focus on Queensland, Victoria, and the United Kingdom in the areas of:
 - a) The delegation of disciplinary procedures
 - b) The inquiry process including provision of procedural fairness and support for vulnerable inmates
 - c) The standard of proof for making findings
 - d) Managing referrals to Police or visiting Magistrate
 - e) Record keeping

¹ This advice is based on the law and the CAS Act as at the date of this advice.

f) Review mechanisms

g) Penalties

2) Elements guidance

3) Authority for locking inmate in their cells pending adjudication of the correctional centre discipline offences.

5. This has been a very detailed exercise because not only did it call for a cross-jurisdictional analysis but also the devising of improvements to the current correctional centre offence regime in NSW. As we set out below, there are a considerable number of differences between the various jurisdictions considered and this has raised a number of possible alternatives for change in NSW. Not all of the decisions we have made will be agreed to by everyone, but we have attempted to recommend changes which promote fairness and just outcomes for prisoners while at the same time ensuring the ‘just, efficient and quick’ operation of the disciplinary process with greater control over consistency and proportionality by governors.

A. GOVERNING PRINCIPLES

6. In order to answer the questions posed by our instructor we have adopted an approach guided by requirements at law, Australia’s obligations under international law, national policy setting in the correctional environment and general principles of good administrative practice.
7. Section 2A of the *Crimes (Administration of Sentences) Act 1999 (CAS Act)* sets out the objects of the CAS Act:

2A Objects of Act

(1) This Act has the following objects—

- (a) to ensure that those offenders who are required to be held in custody are removed from the general community and placed in a safe, secure and humane environment,
- (b) to ensure that other offenders are kept under supervision in a safe, secure and humane manner,
- (c) to ensure that the safety of persons having the custody or supervision of offenders is not endangered,
- (d) to provide for the rehabilitation of offenders with a view to their reintegration into the general community.

- (2) In the pursuit of these objects, due regard must be had to the interests of victims of the offences committed by offenders.
 - (3) Nothing in this section gives rise to any civil cause of action or can be taken into account in any civil proceedings.
8. The CAS Act operates, of course, within a system of legal obligations accepted by Australia under international law. As is set out below, there has been considerable activity in norm setting in international law since the *Universal Declaration of Human Rights* in 1947 and the setting of the *Standard Minimum Rules for the Treatment of Prisoners* of 1957. The relevant conventions and rules set out the fundamental principles which apply to the treatment of prisoners. They are used here to determine the appropriate minimum standards to apply in the context of correctional centre discipline and will provide a framework for analysis.
9. To those might be added national policies such as those agreed upon by the Corrective Services Administrators' Council (of which the NSW Government is a member) in its *Guiding Principles for Corrections in Australia*.² We have also added principles of general application including principles of good administrative practice, efficient decision making and governance, maintenance of security, procedurally fair decision making, consistency and effective implementation.

International law

10. The following international conventions apply to the rights of prisoners and govern their incarceration: the *International Covenant on Civil and Political Rights (ICCPR)*; ³ the *Convention on the Rights of Persons with Disabilities (CRPD)*⁴ and the *Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*.⁵ The ICCPR has been incorporated into Australian law in a limited form in that a complaint may be made to the Australian Human Rights Commission in relation to a contravention of the ICCPR and the

² Government of Australia, *Guiding Principles for Corrections in Australia* (February 2018).

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (**ICCPR**).

⁴ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force in Australia 2008) (**CRPD**).

⁵ *Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment* 1465 UNTS 85 (entered into force in Australia in 1989) (**CAT**). There are other general obligations in international law in the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*, the *International Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)* and the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.

Commission may report to the Commonwealth about any such non-compliance with recommendations.⁶

11. Of greater specificity and relevance to this matter is the United Nations' *Standard Minimum Rules for the Treatment of Prisoners* which were adopted in 1957 and then updated by the UN General Assembly in 2015 and called the *Revised Standard Minimum Rules for the Treatment of Prisoners* (**the Nelson Mandela Rules**). Those rules were considered in the *Guiding Principles for Corrections in Australia*, adopted by the Corrective Services Administrators' Council.⁷
12. Those *Nelson Mandela Rules* work in concert with United Nations' *Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders* (**the Bangkok Rules**) adopted in 2010, the United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* (**the Beijing Rules**) of 1985 and the United Nations' *Rules for the Protection of Juveniles Deprived of their Liberty* (**the Havana Rules**) of 1990. The *Nelson Mandela Rules* are referred to by treaty bodies established under international human rights conventions as an elucidation of the more general rights available under the major conventions.
13. The discussion below focuses on the provisions of the relevant instruments and rules which are directly relevant to the Ombudsman's current investigation.

International Covenant on Civil and Political Rights

14. Article 10 of the ICCPR requires that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." It also requires that the "penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."
15. To be compliant with Article 10 any disciplinary framework within prison would have to be humane in its application and maintain the inherent dignity of the prisoner subject to it. Further, a disciplinary mechanism would be likely inconsistent with Article 10 if it was not compatible with the reform and social rehabilitation of the prisoner.

⁶ A complaint that Australia is not compliant with the ICCPR may also be made to the UN Human Rights Committee established by the ICCPR. Australia is responsible for any non-compliance by its States and territories.

⁷ Government of Australia, *Guiding Principles for Corrections in Australia* (February 2018).

Convention on the Rights of Persons with Disabilities

16. Persons with disabilities are defined as those "who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." Relevantly, Article 13(1) of the Convention requires "effective access to justice" for persons with a disability including "procedural accommodations ... in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages." The provision applies to both criminal proceedings where the inmate is a defendant or witness but also to correctional centre offending at the lower scale. Australia is required to promote "appropriate training for those working in the field of administration of justice, including police and prison staff".⁸

Convention Against Torture and Cruel, Inhuman or Degrading Punishment

17. In addition to the central provisions of the CAT concerning the prohibition and prosecution of torture,⁹ Australia has committed to prevent any "other acts of cruel, inhuman or degrading treatment or punishment ... when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".¹⁰ Those requirements apply to persons subject to "any form of detention, arrest or imprisonment".¹¹

Standard Minimum Rules

18. More detailed provision for the appropriate standards of a prison system can be found in the *Standard Minimum Rules for the Treatment of Prisoners*. The *Standard Minimum Rules* were first adopted in 1955 and approved by the UN Economic and Social Council in 1957. It is not a legally binding document but has become a reference point for the international standard for the treatment of prisoners and framework for monitoring bodies. The rules apply to anyone who is held in any form of custody, not only in a correctional facility, by a public authority.
19. At the time of their adoption in 1957 the *Standard Minimum Rules* dealt with discipline and punishment within prisons including that discipline and order be "maintained with firmness,

⁸ CRPD Article 13(2).

⁹ Defined in CAT Article 1.

¹⁰ CAT Article 16(1).

¹¹ Ibid Articles 10(1) and 11.

but with no more restriction than is necessary for safe custody and well-ordered community life” (Rule 27). The *Standard Minimum Rules* required law or regulations to determine what constitutes a disciplinary offence, what punishment might be inflicted and who was the competent authority to impose such punishment (Rule 29). Corporal punishment, punishment by placing in a dark cell, and all “cruel, inhuman or degrading punishments” were prohibited as punishments for disciplinary offences (Rule 30). Punishment by close confinement or reduction in diet were generally prohibited “unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it” (Rule 32).

The Nelson Mandela Rules

20. In 2011 the UN engaged in a four-year process of revising the outdated *Standard Minimum Rules*.¹² On 17 December 2015 the UN General Assembly unanimously adopted the *Revised Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules).¹³ The *Nelson Mandela Rules* are not a redraft of the *Standard Minimum Rules* but instead a targeted revision of eight areas including disciplinary measures and sanctions. These are addressed thematically below.

a. Discipline offences - general

21. Under the *Nelson Mandela Rules* discipline and order is required to be maintained with no more restriction than is necessary to ensure safe custody, the secure operation of the prison and a well-ordered community life (Rule 36).
22. Rule 37 then sets out the primary features of that disciplinary process:

The following shall always be subject to authorization by law or by the regulation of the competent administrative authority:

- a) Conduct constituting a disciplinary offence;
- b) The types and duration of sanctions that may be imposed;
- c) The authority competent to impose such sanctions;

¹² Review initiated on 21 December 2010: see *Twelfth United Nations Congress on Crime Prevention and Criminal Justice*, GA Res 65/230, UN Doc A/RES/65/230 (1 April 2011, adopted 21 December 2010) 3 at [10].

¹³ *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015) annex (‘*United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*’).

- d) Any form of involuntary separation from the general prison population, such as solitary confinement, isolation, segregation, special care units or restricted housing, whether as a disciplinary sanction or for the maintenance of order and security, including promulgating policies and procedures governing the use and review of, admission to and release from any form of involuntary separation.

23. It is apparent that most if not all of those matters are addressed by the CAS Act and the CAS Regulation and in some respects the *Custodial Operations Policy and Procedures* (**'COPP'**). Comment is made throughout this advice.

b. Alternative dispute resolution

24. Rule 38 of the *Nelson Mandela Rules* encourages the use of alternative dispute resolution: “Prison administrations are encouraged to use, to the extent possible, conflict prevention, mediation or any other alternative dispute resolution mechanism to prevent disciplinary offences or to resolve conflicts”. The UN Special Rapporteur on Torture has emphasised this aspect of the *Nelson Mandela Rules*:

[I]t is essential that the Rules provide for an obligation for prison authorities to use disciplinary measures on an exceptional basis and only when the use of mediation and other dissuasive methods to resolve disputes proves to be inadequate to maintain proper order.¹⁴

25. Rules 75 and 76(1) further require prison staff to receive continued training “reflective of contemporary evidence-based best practice in penal sciences” including training on “dynamic security” including “preventive and defusing techniques, such as negotiation and mediation”.

c. Procedural rights

26. Rule 39 sets out the key procedural safeguards with respect to prison discipline:

1. No prisoner shall be sanctioned except in accordance with the terms of the law or regulation referred to in rule 37 and the principles of fairness and due process. A prisoner shall never be sanctioned twice for the same act or offence.
2. Prison administrations shall ensure proportionality between a disciplinary sanction and the offence for which it is established, and shall keep a proper record of all disciplinary sanctions imposed.

¹⁴ *Torture and other cruel, inhuman or degrading treatment or punishment*, Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/68/295 (9 August 2013) 15 at [57].

3. Before imposing disciplinary sanctions, prison administrations shall consider whether and how a prisoner's mental illness or developmental disability may have contributed to his or her conduct and the commission of the offence or act underlying the disciplinary charge. Prison administrations shall not sanction any conduct of a prisoner that is considered to be the direct result of his or her mental illness or intellectual disability.
27. In the context of Corrective Services NSW those matters are provided in the CAS Act, the CAS Regulation and implemented through the *COPP*. However, it is worth noting the requirement of "proportionality" and how that might best be achieved, as well as the importance of considering "a prisoner's mental illness or developmental disability".
28. Rule 41 then develops those safeguards in some detail:
 1. Any allegation of a disciplinary offence by a prisoner shall be reported promptly to the competent authority, which shall investigate it without undue delay.
 2. Prisoners shall be informed, without delay and in a language that they understand, of the nature of the accusations against them and shall be given adequate time and facilities for the preparation of their defence.
 3. Prisoners shall be allowed to defend themselves in person, or through legal assistance when the interests of justice so require, particularly in cases involving serious disciplinary charges. If the prisoners do not understand or speak the language used at a disciplinary hearing, they shall be assisted by a competent interpreter free of charge.
 4. Prisoners shall have an opportunity to seek judicial review of disciplinary sanctions imposed against them.
 5. In the event that a breach of discipline is prosecuted as a crime, prisoners shall be entitled to all due process guarantees applicable to criminal proceedings, including unimpeded access to a legal adviser.
29. In light of the legal, regulatory and procedural provisions in NSW, the important matters to consider are the provision of evidence to an inmate about the allegations, the provision of adequate time for the preparation of any defence, and the provision of assistance in a language the inmate can understand.
30. The difference between a correctional centre offence and a criminal offence is accommodated in Rule 41(3) and the provision of legal assistance is not presumed for discipline charges which

are not “serious”. Rule 41(5) does not conflict with current arrangements for the hearing of correctional centre offences by a Visiting Magistrate or a Magistrate sitting elsewhere.

31. The UN Committee against Torture, established under the CAT, has provided observations on the *Nelson Mandela Rules*.¹⁵ With regard to fair trial guarantees for prisoners, the Committee observed that these would include “due process rights,¹⁶ including being informed in writing of the [disciplinary] charges against them; being heard in person; being able to call witnesses and examine evidence given against them; being provided with a copy of any disciplinary decision concerning them and an oral explanation of the reasons for the decision and the modalities for lodging an appeal; and being able to appeal to an independent authority against any sanctions imposed”.¹⁷

d. Solitary confinement

32. The UN has directed particular focus to reducing or abolishing solitary confinement where possible. Specifically, the UN General Assembly has called on all nations¹⁸ to avoid the use of solitary confinement where possible and to take steps towards its total abolition.¹⁹
33. Not surprisingly, the *Nelson Mandela Rules* pay particular attention to the use of solitary confinement as a disciplinary tool with prisons. This has application in terms of correctional centre discipline in NSW as “confinement”, whether solitary or otherwise, is a penalty which may be imposed where an inmate is found guilty of a correctional centre offence: up to 7 days by the governor (s. 53(1)(c) CAS Act) and up to 28 days by a Visiting Magistrate (s. 56(1)(c)).
34. Rule 44 of the *Nelson Mandela Rules* provides:

For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged

¹⁵ UN Committee Against Torture, *Observations of the Committee Against Torture on the Revision of the Standard Minimum Rules for the Treatment of Prisoners*, UN Doc CAT/C/51/4 (28 March 2014).

¹⁶ Indicating a procedurally fair disciplinary process.

¹⁷ UN Committee Against Torture, *Observations of the Committee Against Torture on the Revision of the Standard Minimum Rules for the Treatment of Prisoners*, UN Doc CAT/C/51/4 (28 March 2014) 10 at [41].

¹⁸ The terms used is “States” rather than nations, as that is the entity which is bound in international law.

¹⁹ *Basic Principles for the Treatment of Prisoners*, GA Res/45/111, UN Doc A/RES/45/111 (28 March 1991, adopted 14 December 1990) annex (‘*Basic Principles for the Treatment of Prisoners*’) 200, Principle 7; *Torture and other cruel, inhuman or degrading treatment or punishment*, Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/68/268 (5 August 2011) at [82]-[101]; *Torture and other cruel, inhuman or degrading treatment or punishment*, Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/68/295 (9 August 2013) at [60]-[61].

solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.

35. Rule 45 then further provides:

1. Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence.
2. The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement and similar measures in cases involving women and children, as referred to in other United Nations standards and norms in crime prevention and criminal justice, continues to apply.

36. Similarly, Rule 22 of the *Bangkok Rules* which specifically relate to the treatment of women prisoners provides that “[p]unishment by close confinement or disciplinary segregation shall not be applied to pregnant women, women with infants and breastfeeding mothers in prison.”²⁰

e. Contact with family

37. The CAS Regulation declares that “contact visits” are a “withdrawable privilege” and, accordingly, may be imposed as part of a penalty following conviction for a correctional centre offence (cl.53(1) and 56(1)). Such punishments need to be considered in the light of Rules 38 and 43 of *Nelson Mandela Rules* and Rule 26 of the *Bangkok Rules*.

38. Rule 38 of the *Nelson Mandela Rules* states the general rule concerning contact visits:

1. Prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals:
 - (a) By corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and
 - (b) By receiving visits.

²⁰ Although we have not been asked to consider juvenile inmates, it is worth noting that Rule 67 of the *Havana Rules* prohibit placement of juveniles in solitary confinement as a disciplinary measure.

39. That general rule is developed specifically for women in Rule 26 of the *Bangkok Rules*.²¹
40. Rule 43 provides general restrictions on disciplinary sanctions and Rule 43(3) deals specifically with family contact visits:
1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:
 - (a) Indefinite solitary confinement;
 - (b) Prolonged solitary confinement;
 - (c) Placement of a prisoner in a dark or constantly lit cell;
 - (d) Corporal punishment or the reduction of a prisoner's diet or drinking water;
 - (e) Collective punishment.
 2. Instruments of restraint shall never be applied as a sanction for disciplinary offences.
 3. Disciplinary sanctions or restrictive measures shall not include the prohibition of family contact. The means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order.

(emphasis added)

41. In relation to family contact visits the UN Office on Drugs and Crime has stated that, “[t]o deprive prisoners of such contacts as a disciplinary sanction is not acceptable, except where a specific abuse of the exact contact was the offence. Punishment should never include total deprivation from contact with families”.²² It should be noted that Rule 43(3) does not prohibit the withdrawal of contact visits with friends as an allowable punishment. Further, reference to “means” in Rule 43(3) would appear to refer to contacts such as ‘in-person’, AVL, telephone, physical screens or supervised visits.

f. Other relevant provisions

²¹ Rule 26 of the *Bangkok Rules*: “Women prisoners’ contact with their families, including their children, and their children’s guardians and legal representatives shall be encouraged and facilitated by all reasonable means. Where possible, measures shall be taken to counterbalance disadvantages faced by women detained in institutions located far from their homes.”

²² UN Office on Drugs and Crime, *Handbook on Dynamic Security and Prison Intelligence* (December 2015) 22.

42. Rule 54 of the *Nelson Mandela Rules* requires the provision of information to inmates about governing laws and regulations and applicable disciplinary sanctions at the commencement of incarceration:

Upon admission, every prisoner shall be promptly provided with written information about:

- a) The prison law and applicable prison regulations;
 - b) His or her rights, including authorized methods of seeking information, access to legal advice, including through legal aid schemes, and procedures for making requests or complaints;
 - c) His or her obligations, including applicable disciplinary sanctions; and
 - d) All other matters necessary to enable the prisoner to adapt himself or herself to the life of the prison.
43. Such information is to be provided in the “most commonly used languages” of the prison population and interpretative assistance provided otherwise (Rule 55(1)). For illiterate prisoners and those with “sensory disabilities”, information should be provided “in a manner appropriate to their needs” (Rule 55(2)). Relevant information should be displayed in common areas for all to see (Rule 55(3)).
44. Rule 46(1) requires that in relation to the imposition of “disciplinary sanctions” health personnel should pay “particular attention to the health of prisoners held under any form of involuntary separation, including by visiting such prisoners on a daily basis and providing prompt medical assistance and treatment. Such health personnel should report any adverse effect of those sanctions to the “prison director” (Rule 46(2)) and they shall have the ability to recommend changes “to ensure that such separation does not exacerbate the medical condition or mental or physical disability of the prisoner” (Rule 46(3)).
45. In relation to record keeping for disciplinary proceedings the *Nelson Mandela Rules* require that sanctions should be recorded in a prisoner’s file including information related to behaviour and discipline (Rule 8(c)) and the imposition of disciplinary sanctions (Rule 8(e)). Prison authorities should keep a central register of disciplinary sanctions (Rule 39(2)).
46. Finally, Rules 74 to 76 of the *Nelson Mandela Rules* concern employment status protection for and the training of prison officers. Rule 76, in particular, requires training in the legal and regulatory environment which includes disciplinary procedures:

1. Training referred to in paragraph 2 of Rule 75 shall include, at a minimum, training on:
 - (a) Relevant national legislation, regulations and policies, as well as applicable international and regional instruments, the provisions of which must guide the work and interactions of prison staff with inmates;
 - (b) Rights and duties of prison staff in the exercise of their functions, including respecting the human dignity of all prisoners and the prohibition of certain conduct, in particular torture and other cruel, inhuman or degrading treatment or punishment;
 - (c) Security and safety, including the concept of dynamic security, the use of force and instruments of restraint, and the management of violent offenders, with due consideration of preventive and defusing techniques, such as negotiation and mediation;
 - (d) First aid, the psychosocial needs of prisoners and the corresponding dynamics in prison settings, as well as social care and assistance, including early detection of mental health issues.
2. Prison staff who are in charge of working with certain categories of prisoners, or who are assigned other specialized functions, shall receive training that has a corresponding focus.

47. It follows that under the *Nelson Mandela Rules* correctional officers who are likely to be involved in the detection, investigation or adjudication of correctional centre offences ought to receive adequate training, including on what constitutes a disciplinary offence and what the range of permissible sanctions may be.

National corrections policy

48. The *Guiding Principles for Corrections in Australia (the Guiding Principles)* were agreed upon by all correctional services departments in each Australian State and territory in 2018.²³ The Guiding Principles were adopted by the Corrective Services Administrators' Council (CSAC):

The Principles are outcomes focused [on] articulating the impact of correctional services and interventions rather than the processes involved in corrections activities. They support Australian correctional services to achieve best practice in the following outcomes ('Outcomes'):

- Governance

²³ Government of Australia, *Guiding Principles for Corrections in Australia* (February 2018).

- Respect
- Safety and security
- Health and wellbeing
- Rehabilitation and reintegration

The Principles contribute to the achievement of the Outcomes and are strategic statements rather than procedural instructions. They are intended to reflect social expectations of Australian correctional services and are aligned to recognise international best practice.

The Outcomes are seen as critical to achieving results, reducing reoffending and providing value for money across corrections in Australia.

49. The guiding principles relevant to this advice include:

- 1.1.4 Management systems, policies and procedures are evidence based and are informed by human rights principles and operational practice.
- 2.2.1 Prisoners are informed of their rights and obligations upon admission to a correctional facility.
- 2.2.2 Offenders are informed of their rights and obligations while subject to community corrections management, including the consequences of non-compliance.
- 2.3.5 Access to lawyers, legal guardians, consular support and legal resources is provided to all prisoners in a manner consistent with security requirements.
- 3.2.3 Dynamic security practices support and optimise prisoner safety and the good order and management of the prison.

50. Particular safeguards are provided for those who require interpretation:

- 2.3.7 Access to interpreting and translation services is provided to any prisoner/offender who advises of, or is observed to have, difficulties in understanding or communicating in English.

51. The principles for behaviour management are stated at paragraph [3.4]:

- 3.4.1 Rules and routines provided to prisoners encourage their responsible behaviour and support the security, good order and management of the prison.
- 3.4.2 Allegations of prisoner misconduct are investigated and managed appropriately, promptly and fairly.

- 3.4.3 Prisoner discipline is lawful, proportionate and timely. Discipline decisions are based on evidence and are made without bias.
- 3.4.4 Prisoners/offenders are aware of the reasons for any imposed sanctions and acknowledge they understand their rights of appeal. Appeals are facilitated by an independent decision-maker in a timely manner.
- 3.4.5 Responses to non-compliance contribute to offender accountability and maintain community safety.

52. Related principles include:

- 3.3.5 Prisoners who are segregated/separated have daily contact with appropriate staff and their circumstances are reviewed on a regular basis.
- 3.3.6 Signs that a prisoner's physical or mental health has or will be injuriously affected by continued sanctions or segregation/separation are recognised and considered, taking into account the safety of other prisoners and staff and the security and good order of the prison.
- 3.3.7 Prisoners placed in segregation/separation and/ or placed in a management or high security unit are managed under the least restrictive conditions consistent with the reason for their separation and to the extent necessary to minimise the associated risk. Prisoners are informed of the reason for their separation in a form and language they understand.

53. The Guiding Principles directly address training requirements for staff:

- 1.2.1 Correctional services foster diversity in the workforce.
- 1.2.2 Appropriately qualified and trained staff engage with, supervise and manage prisoners/offenders.
- 1.2.3 Staff have access to, and are informed of current policies and procedures including those which set performance and behavioural expectations.
- 1.2.4 Staff receive ongoing, industry specific training to support effective and consistent service delivery.
- 1.2.5 Staff training strengthens understanding between people and contributes to cultural competency.

54. The Guiding Principles conclude by setting out some specific cohorts of prisoner for whom regard must be had:²⁴

Continued and increased overrepresentation of Aboriginal and Torres Strait Islander people across the criminal justice system

Aboriginal and Torres Strait Islander people are dramatically overrepresented in the criminal justice system in each state and territory, making up nearly one-third of the prison population and one-fifth of the community cohort. Correctional practices need to maintain focus on, and continue to address, the systemic issues and disadvantages that Aboriginal and Torres Strait Islanders face as reflected in recommendations of documents including the Indigenous Strategic Framework, the Pathways to Justice Report and the findings of the Royal Commission into Aboriginal Deaths in Custody.

and

The specific needs of particular prisoner cohorts including young adult offenders, aged and frail, female and LGBTIQI offenders, those with disabilities, and remand prisoners

The Principles consider different implications for specific prisoner/offender cohorts. A mainstreaming approach ensures that broad principles reflect the needs of all prisoner/offenders, but with specific principles also included for particular prisoner/offender cohorts who have unique requirements.

55. Finally, the CSAC Indigenous Issues Working Group, of which NSW is a member, developed the *Indigenous Strategic Framework 2016*. Clause 9 addresses the sanctions to be applied:

9. Sanctions must not exclude Indigenous prisoners and offenders from the programs that enable them to address their offending behaviour and their cultural connections. Exclusion from education, criminogenic and rehabilitation programs can create barriers to progression for prisoners to reform their behaviours.

Recommendation considerations:

- Every attempt should be made to keep prisoners and offenders engaged in programs that address anti-social attitudes, offending behaviour and enable reintegration;
- When sanctions are necessary to address noncompliance within prison or community corrections settings, access to rehabilitation, education and programs are able to be maintained within the parameters of the sanction;
- When sanctions are required, considerations should be given to loss of privileges that are deemed important to the Indigenous prisoners and offenders. Consider loss

²⁴ Government of Australia, *Guiding Principles for Corrections in Australia* (February 2018) 29-30.

of engagement in art or artistic endeavours for an agreed amount of time, phone calls or visits privileges. Consideration must however be assessed on a case by case basis; and

- Consideration must be given to potential impacts on mental health and potential deaths in custody. Withdrawal from programs that reduce recidivism should not be considered; unless absolutely necessary to maintaining good order, security and safety of staff or other prisoners.

56. One can readily see that while there may be some important differences between the *Nelson Mandela Rules* and the Guiding Principles, there are many areas of commonality. Both will assist in guiding the comments below about what would be an ideal or preferable model compared to that which currently exists in NSW.

B. INTER-JURISDICTIONAL COMPARISON

57. To assist us in the task of the inter-jurisdictional comparison, we have been provided with the legislative framework for Victoria, Queensland, New Zealand, the United Kingdom and Canada. We have also supplemented that with our own research including the relevant laws, policies and procedures applicable in the ACT which have been recently reformed. It has not generally been possible to review the efficacy of each disciplinary regime and we have proceeded on the basis that each such regime is taken on its face value. As will be apparent, our focus is on the four Australian jurisdictions (NSW, Queensland, Victoria and the ACT) and New Zealand.

58. As a result of our review of different jurisdictions, we have concluded that while there is a considerable degree of variation there is also a wide degree of commonality of principle. The main principles replicated in the jurisdictions considered are as follows:

- That the corrections officer reporting the allegations is not responsible for investigation, reporting, charging or hearing any charges;
- That there be attempts to resolve the relevant matter by alternative dispute resolution;
- That different procedural measures are needed for minor and major allegations;
- That there be a process for referral of criminal allegations to the police;

- That the charges be formulated in writing clearly setting out, in plain English, the alleged offence and particulars;
- That the evidence in support of the charges be provided to the inmate in advance of the proceeding;
- That the hearing be conducted by an appropriately trained independent officer who is not a witness to the relevant acts and is not responsible for the inmate on a day-to-day basis;
- That the hearing proceed as an inquisitorial process rather than an adversarial one;
- That the defendant be able to cross-examine witnesses in support of the charge and be able to call witnesses, adduce written or oral evidence and make submissions;
- That penalties are standardised and proportionate with relevant matters for consideration in the imposition of a penalty clearly set out in legislation or policy;
- That there be external review of the findings and imposition of penalty, particularly for more serious matters;
- That the inmate be informed that he or she has a right of review or appeal and how to exercise it; and
- That there be appropriate supports for vulnerable inmates including cognitively impaired inmates, First Nations inmates, LGBTQI+ inmates, inmates under the age of 25 and those inmates who require an interpreter.

59. We do not propose, and have not been asked, to provide a summary of the prison discipline regimes in each jurisdiction. Indeed, that would be a huge task. Instead, we propose to address relevant provisions from the jurisdictions we have considered and make our comments structured in the following way:

- a) The reporting, investigation and charging process;
- b) The hearing of disciplinary charges;
- c) The imposition of a penalty; and
- d) The review of disciplinary findings and penalties.

60. Each of the matters upon which we have been asked to advise fall within those five categories and will be addressed as part of that structure. As will become apparent, the answers to those questions depend in part on some wider issues of structure and approach.
61. At the end of each of those sections, this advice will address whether NSW should adopt a different process and whether changes ought to be made to the CAS Act, the CAS Regulation or relevant policy.

Our approach to the advice

62. We have been asked to consider whether the correctional centre discipline regime in NSW might be improved in certain respects, taking into account an inter-jurisdictional comparison of correctional centre discipline regimes. As will be apparent from our analysis we have sought to set out the legislative, regulatory and policy requirements in NSW, to compare them with other jurisdictions and then to suggest changes to the current system. We have sought to remain within the current legislative arrangements but in some circumstances, for example in Review (Section F), legislation will be required to properly implement our suggested changes.
63. The suggestions we make throughout this advice have been devised after our inter-jurisdictional comparison and are summarised below. Annexed to this advice and marked “**Annexure A**” is a diagrammatic representation of the hearing process we propose be adopted in NSW. In our view, this system takes the best of the correctional discipline systems of other jurisdictions and aims to balance the need for an expeditious resolution of matters and the rights of an inmate.
64. Set out briefly, the key features of the system we propose are:
- a) The ability for an inmate to be diverted away from the disciplinary process.
 - b) The charge is deemed either a ‘minor offence’ or a ‘major offence’ at the commencement of the proceedings. Minor offences are dealt more expeditiously and only have to be established on the balance of probabilities. By contrast, major offences need to be established to the current standard for correctional centre offences of beyond reasonable doubt.

- c) Any finding of guilt or imposition of penalty for a *minor offence* should not be used against an inmate in subsequent legal proceedings – being sentencing, parole or high-risk offender applications.
 - d) The maximum penalty for a minor offence is 7 days ‘off’ withdrawable privileges.
 - e) A clear review mechanism should be established, depending on whether liability or penalty of a minor or major offence is being reviewed.
65. We have divided the following sections into Reporting, Investigation and Charging (Section C), the Hearing of Disciplinary Charges (Section D), Penalties (Section E), the Review Mechanism (Section F) and Record Keeping (Section G). We have addressed each of the questions at the relevant parts of the process. The final two sections address the questions with respect to record keeping of disciplinary matters (Section G) and Section H provides the requested guidance for the prosecution of selected offences.

C. THE REPORTING, INVESTIGATION AND CHARGING

Information provided on admission

66. It is important that when an inmate is admitted into the correctional centre environment that they be informed of their obligations and the nature of any discipline that might be imposed for a failure to comply with their obligations. It provides the inmate with an express understanding of the rules, and their obligations to abide by those rules, on admission. And it assists – at least to some extent – with compliance with the rules as they are known.
67. The *Nelson Mandela Rules* require that:
- 2.2.1 Prisoners are informed of their rights and obligations upon admission to a correctional facility.
68. The obligation is met by cl.5 of the CAS Regulation which requires information about correctional centre rules (cl.5(a)) and the inmate’s obligations relating to discipline and conduct (cl.5(b)) to be provided to the inmate on admission. We have been provided with a copy of a document entitled ‘*Information about correctional centre discipline*’ which, while detailed appears unduly legalistic for inmates who may have low literacy or poor English skills. While we have not had access to a copy of the ‘correctional centre rules’ which are provided to inmates on admission, we note that the *Information about correctional centre discipline* does

not refer to either specific correctional centre offences (of which there are over 70) or the specific penalties that may be imposed other than where a Visiting Magistrate imposes additional time to serve. We note that Schedule 2 to the CAS Regulation sets out a comprehensive list of correctional centre offences expressed in plain English which could readily be provided to inmates on admission.

Reporting and investigation

69. In our first advice we referred to s.52 of the CAS Act and Part 14.1 of the *Custodial Operations Policy and Procedures (COPP 14.1)*²⁵ as setting out the commencement of the process of disciplining an inmate. Subsection 52(1) of the CAS Act begins with the discretion provided to the governor (or delegate) to charge an inmate.

52(1) If it is alleged that an inmate of a correctional centre has committed a correctional centre offence, the governor of the correctional centre may charge the inmate with the offence and conduct an inquiry into the allegation

70. The process of reporting is set out at cl.2.0 of *COPP 14.1*. A “correctional officer or non-custodial officer who suspects an inmate has committed or is about to commit a correctional centre offence” is required to report the matter to the governor or OIC immediately (cl.2.1). Reporting is to be done by submitting an “*Inmate Misconduct Report*” by the end of the watch (cl.2.1). *COPP 14.1* does not specify who is charged with assessing the report. We presume that such reports are assessed and acted on by a delegate.²⁶
71. The process of reporting is similar to that provided in other jurisdictions. In New Zealand, a “reporting correctional officer” informs the “first presiding officer”²⁷ who then may call for an investigation and determine whether to charge the inmate.²⁸ In Victoria a “Disciplinary Officer” will review all reports, interview staff and witnesses, including other prisoners, seek additional evidence if necessary, interview the prisoner, and check any relevant registers.²⁹

²⁵ Corrective Services NSW, *Custodial Operations Policy and Procedures 14.1 – Inmate Discipline* (version 1.1) (**COPP 14.1**).

²⁶ We have not been provided with a copy of any specific delegation in this respect.

²⁷ An Incident report and a Disciplinary Offence Report is logged on the ‘CORIS’ databases: *Corrections Management (Detainee Discipline) Policy 2023* (NZ) cl.6.2 (**Detainee Discipline Policy**).

²⁸ Ibid cl.2.3; cl.5.4. Once charged the matter goes to a second presiding officer for hearing.

²⁹ Corrections Victoria Commissioner, *Commissioner’s Requirements 2.3.3 - Disciplinary Process and Prisoner Privileges* (2023) cl.5.2.1 (**Commissioner’s Requirements 2.3.3**).

72. Our review of a number of jurisdictions reveals that there are two important innovations which have been adopted elsewhere that impact upon this stage of the disciplinary process:
- a) The provision of alternative dispute resolution, behaviour management or diversion of correctional centre offence allegations, especially for vulnerable groups; and
 - b) A distinction between minor and major correctional centre offending.
73. These innovations have a number of benefits for the administration of correctional centre offending. *First*, they permit early resolution of such allegations, especially where the allegation is minor or at the minor end of the scale of severity or the prisoner is vulnerable. *Second*, the innovations may assist in prison operations by achieving a greater degree of agreement and voluntary compliance by the inmate. *Third*, minor offences should have quicker and simpler procedures leaving more detailed hearing procedures for more serious matters which may attract heavier penalties. *Fourth*, review procedures may be appropriately tailored depending on whether the correctional centre offence is minor or major. *Fifth*, minor offences can be dealt with by more junior officers freeing up more senior officers (including the governor) for the more serious matters, of which there are likely to be less.

Recommendation for NSW

74. Like the current system, in our proposed hearing process an officer will complete *Inmate Misconduct Report* outlining the conduct they witnessed and submit it to a “hearing officer” for consideration. The identity and position of hearing officer is considered in Section D below. This initial report should be considered akin to a witness statement of the reporting officer and it falls upon the hearing officer to determine the appropriate next steps.
75. We have not been provided with any information as to the nature of training in the inquiry, charging and hearing of disciplinary offences by a governor or delegate. *COPP 14.1* is silent as to the training provided. By contrast, in Victoria, there is a requirement set out in policy documentation that “only those staff identified, trained and approved ... can act as a disciplinary officer or hearing officer”.³⁰ It is recommended that NSW adopt a similar requirement in its policy documentation.

³⁰ *Commissioner's Requirements 2.3.3 cl.5.1.4.*

Determination by hearing officer as to how report should proceed

76. *COPP 14.1* does not address what matters the hearing officer (being the governor or delegate) should consider as part of the charging process other than that he or she “should check that the reports have been prepared correctly and independently.”³¹ This differs markedly from the position in other Australian jurisdictions where consideration is given as to whether to charge at all.
77. Following the receipt of the initial report, we propose that the hearing officer is to make a determination of how the report is to be dealt with, choosing from the five following outcomes:
- a) The inmate is diverted away from the disciplinary process including through alternative dispute resolution;
 - b) The matter is considered trivial and no further action is taken on the report;
 - c) A minor offence is charged;
 - d) A major offence is charged; or
 - e) The matter is reported to the NSW Police.
78. These pathways and the considerations to be taken into account by the decision-maker are set out below. This decision is crucial in establishing the process to be undertaken.

Alternatives to charging

79. Neither the CAS Act nor *COPP 14.1* address any mechanisms to resolve the apparent breach informally or by way of alternative-dispute resolution. We consider this an important stage of the process. Several jurisdictions have addressed this by permitting processes which aim at affecting inmate behaviour and maintain prison order but stop short of charging the inmate with an offence. We note that Rule 38 of the *Nelson Mandela Rules* encourages the use of “conflict prevention, mediation or any other alternative dispute resolution mechanism to prevent disciplinary offences or to resolve conflicts.” While there may be an absence of relevant policy or legislative guidance in NSW, we consider it likely that there is currently a process of informally resolving such allegations. However, a formalised process is desirable.

³¹ *COPP 14.1* cl.3.3.

80. In Victoria the statute requires that the “Disciplinary Officer” determine whether “the offence be considered trivial or of an inconsequential nature” and also determine whether no further action ought to be taken or if the person should be reprimanded.³²

81. In Queensland a corrective services officer has a discretion under s.113(2) of the *Corrective Services Act 2006* (Qld) as to whether to start proceedings:

113(2) A corrective services officer need not start proceedings against a prisoner for a breach of discipline if the officer considers the proceedings should not be started having regard to

- (a) the trivial nature of the breach; or
- (b) the circumstances surrounding the commission of the breach; or
- (c) the prisoner’s previous conduct.

(emphasis added)

82. Further, in the ACT, s.158(2) of the *Corrections Management Act 2007* (ACT) permits the presiding officer to take the following steps *instead of* charging the inmate or referring him or her to the police:

158(2) After considering the report and making any further investigation the presiding officer considers appropriate, the presiding officer may, if the presiding officer believes on reasonable grounds it is appropriate, do 1 or more of the following:

- (a) take no further action in relation to the initial report;
- (b) counsel the detainee;
- (c) warn the detainee about committing a disciplinary breach;
- (d) reprimand the detainee;

...

83. In Canada the framework for correctional centre discipline provides for a process of “informal resolution”.³³ Sub-section 41(1) of the *Correctional and Condition Release Act* (SC 1992, c 20) (Can) specifically provides that a charging officer should take “all reasonable steps” to

³² See *Corrections Act 1986* (Vic) ss.50(4)-(5).

³³ *Correctional and Condition Release Act* (SC 1992, c 20) (Can) s.41(1).

attempt to have the matter resolved informally and only if the steps have failed should an inmate be charged with a correctional centre offence.

84. The process of informal resolution in Canada can include the participation of spiritual support, including an Aboriginal Elder or Aboriginal Liaison Officer or the participation of a mental health professional, where these steps are appropriate. The *Correctional Service Canada Commissioner's Directive 580* includes the following informal resolution process:³⁴

12. Informal resolution or attempts at informal resolution will:

- a. be considered by the witnessing staff member completing the offence report as an option, at any point in the process, with the agreement of the parties involved
- b. be documented in a Statement/Observation Report, submitted to the Correctional Manager to demonstrate its consideration and/or application in the process, and where applicable, noted in the unit log book by the witnessing staff member
- c. be reviewed by the Correctional Manager responsible for quality control to ensure informal resolution was considered and attempted where possible
- d. include the participation of others (e.g., Elder/Spiritual Advisor, Elder's Helper, Indigenous Liaison Officer, Citizen Advisory Committee member), where appropriate, and will be documented in the Statement/Observation Report
- e. include the participation of a registered health care professional, where appropriate, which will be documented in the Statement/Observation Report
- f. be considered during the review of the offence report, if new information or mitigating circumstances are identified
- g. include follow-up with the witnessing officer and inmate to determine whether informal resolution is now possible.

85. In our view, a similar mechanism of informal resolution, particularly where an inmate is offered specific support that potentially goes to the core of the behaviour, should be strongly considered for implementation within NSW.

³⁴ Correctional Service Canada, *Commissioner's Directive 580 - Discipline of Inmates* (28 June 2021) at [12].

86. Our review of relevant jurisdictions reveal that the following groups of vulnerable inmates are recognised and accommodated in those jurisdictions (with some variations):
- a) Cognitively impaired inmates;
 - b) First Nations inmates;
 - c) Inmates under the age of 25;
 - d) LGBTQI+ inmates; and
 - e) Culturally and linguistically diverse (**CALD**) inmates.
87. In Victoria there is a Corrections Independent Support Officer (**CISO**) for the intellectually disabled or cognitively impaired,³⁵ interpreters for those where English is a second language,³⁶ and Aboriginal Wellbeing Officer or Aboriginal Liaison Officer or Corrections Victoria’s Naalamba Ganbu and Nerrlinggu Yilam.³⁷
88. In the UK *Prisoner Discipline Procedures (Adjudications)*³⁸ there are special measures for those with disabilities, mental impairments and communication or language difficulties:
- If prisoners have any disability, communication or language difficulty that may impair their ability to understand and participate in the hearing, adjudicators must consider what help may be provided for them, and adjourn as necessary for this to be arranged.³⁹
89. Under the UK measures specific regard should be had for different types of disability such as dementia and mobility issues, deafness, visual or “mental impairments” which might require special facilities.⁴⁰
90. The UK also has special rules for young people including that “[a]ll young people should be signposted to the Independent Monitoring Board (IMB) and Advocacy Service to ensure they fully understand, and are able to engage with the adjudication process.”⁴¹

³⁵ *Commissioner’s Requirements* 2.3.3 cl.4.2.

³⁶ *Ibid* cl.4.1.

³⁷ *Ibid* cl.5.3.5.

³⁸ His Majesty’s Prisons and Probation Service, *Prisoner Discipline Procedures (Adjudications)*, PSI 05/2018 (rev. 11 August 2022) (***Prisoner Discipline Procedures (Adjudications)***).

³⁹ *Ibid* Annex A, 22 at [1.21].

⁴⁰ *Ibid* Annex A, 22-23 at [1.21]-[1.23].

⁴¹ *Ibid* Annex A, 20 at [1.7].

Recommendation for NSW

91. It is accordingly recommended that there be a process in NSW for the resolution of alleged breaches informally or by way of alternative dispute resolution. This may include adopting the measures set out in the ACT at s.158(2) of the *Corrections Management Act 2007* (ACT) or otherwise by stopping the apparent breach of discipline and explaining the nature of the breach to the inmate and, if necessary, instructing the prisoner to correct his or her behaviour.⁴²
92. With regard to vulnerable inmates, each such cohort should be accommodated in order to ensure comprehension and compliance by the inmate and ultimately obtain better control of correctional centres. Importantly, accommodation should be provided in different ways because of the different needs of each cohort. For example, while a psychologist or someone appropriately trained (such as a Victorian CISO) would be appropriate for an inmate with a cognitive impairment, it would be preferable and more effective to have a First Nations elder or organisation to assist First Nations inmates. Such support is also important at the hearing and penalty stages.

Minor versus major correctional centre offences

93. In Queensland, Victoria and New Zealand a distinction is made between minor and major disciplinary offences, either formally or by implication. Once a matter is so classified then the process is different in its investigation, charging, hearing and review. The process may be contrasted with the alternative dispute resolution stage set out above which logically precedes charging.
94. This section considers how one might define “minor” and “major” offences in NSW and in the next section we set out how both the minor and major offences might be heard differently and by whom.
95. Before turning to other jurisdictions, it is worth noting that NSW *does* have a mechanism for referring an alleged correctional offence “of a serious nature” to the Visiting Magistrate but only with the governor’s approval.⁴³ However, we understand that the process has fallen into disuse and none of the matters with which we were briefed included matters dealt with by the Visiting Magistrate.

⁴² See also *Corrections Act 2004* (NZ) s.132(1).

⁴³ *COPP* 14.1 cl.3.4.

96. In Queensland, under s.113(4) of the *Corrective Services Act 2006* (Qld), a corrective services officer must determine whether the offence is a minor or a major breach of discipline:

113(4) If a corrective services officer decides to start proceedings against a prisoner for a breach of discipline, the officer must decide, having regard to the matters mentioned in subsection (2), whether the prisoner should be proceeded against for a major breach of discipline or a minor breach of discipline.

97. Guidance for a corrective services officer about whether an apparent breach should be dealt with as a minor or major breach of discipline is set out at cl.9.3 of the Queensland *Custodial Operations Practice Directive - Breaches of Discipline (COPD)*.⁴⁴

- a) the seriousness of the breach;
- b) whether it has, or is likely to have, an adverse effect on the good order of the corrective services facility or adversely affect the inmate or other inmates;
- c) whether the inmate was observed by other inmates or staff when committing the breach;
- d) whether the inmate's behaviour was intentional or accidental;
- e) the behaviour of other inmates at the time of the breach and other relevant contextual issues;
- f) whether the inmate was aware or ought reasonably to have been aware of the relevant rules;
- g) whether the inmate's behavioural standards complied with the corrective services facility's requirements; and
- h) any other factor which in the opinion of the referring officer is relevant to the seriousness of the breach including past institutional behaviour of the inmate.

98. One can readily appreciate that, apart from (a) and (h), the remainder of the considerations concern management of inmates or general deterrence. In Queensland, the “deciding officer” for a minor disciplinary breach is the same level or rank as an officer referring the breach but must be more senior than a reporting officer if determining a major breach.⁴⁵

99. In Victoria the process works slightly differently to Queensland. The classification of minor and major offences is done by discretion of the disciplinary officer. As mentioned, if the

⁴⁴ Queensland Corrective Services, *Custodial Operations Practice Directive – Breaches of Discipline* (5 October 2023, version 5) cl.9.3 (*‘COPD’*).

⁴⁵ *Ibid* cl.3.

disciplinary officer is satisfied that the offence has been committed but is trivial, the disciplinary officer need take no further action.⁴⁶ However, if after investigating an alleged prison offence, the disciplinary officer is satisfied that the prisoner has committed the offence the disciplinary officer must record the offence in the register of offences and *may*, in addition, reprimand a prisoner or withdraw one of the prisoner's privileges for less than 14 days or charge the prisoner with the prison offence.⁴⁷ If instead, the disciplinary officer charges the prisoner then the matter is dealt with by the governor,⁴⁸ including imposition of a penalty, with greater procedural requirements (explored below).⁴⁹ In the Victorian *Commissioner's Requirements – Disciplinary Process and Prisoner Privileges (Commissioner's Requirements 2.3.3)* there is limited assistance as to how to determine whether a charge should be laid leading to a governor's hearing save that such matters include alleged offending which is "serious".⁵⁰

100. In New Zealand, s.132 of the *Corrections Act 2004* (NZ) sets out a definition of "minor" breach based on the seriousness of the breach and intentionality:

132 Minor or unintentional breaches of discipline

- (1) As far as practicable in the circumstances and if appropriate, an officer must deal with a minor or an unintentional breach of discipline by a prisoner in the following manner:
 - (a) by stopping the breach of discipline and explaining the nature of the breach to the prisoner committing the breach:
 - (b) by instructing the prisoner to correct his or her behaviour:
 - (c) by allowing the prisoner to make amends to any person aggrieved by the breach.
- (2) If a minor or an unintentional breach of discipline is not dealt with under subsection (1), this section does not prevent a prisoner from being charged with a disciplinary offence.

⁴⁶ *Corrections Act 1986* (Vic) s.50(4).

⁴⁷ *Ibid* s.50(5).

⁴⁸ *Ibid* s.51(1).

⁴⁹ See *ibid* s.53.

⁵⁰ Clause 5.3.1 considers General Manager's Disciplinary Hearings (otherwise 'governor's hearings') in the light of where there has been a referral to police of relevant conduct and the police have determined not to charge the inmate but the disciplinary hearing proceeds.

101. Notably, in each of those three jurisdictions a minor charge is dealt with by a corrective services officer below the level of governor.

Recommendation for NSW

102. As is apparent from the discussion above we recommend that NSW should similarly have a division between minor and major alleged correctional centre offences. The relevant matters for determining whether an offence is a major offence include (but should not be limited to) the seriousness of the breach, the intentionality of the inmate and whether charging a matter as a minor offence would have an adverse effect on the good order of the corrective services facility or adversely affect the inmate or other inmates.
103. Logically the determination of whether an offence is minor or major falls after the exhaustion of alternative dispute resolution pathways. The decision of whether an offence is minor or major is also intimately entwined with the decision to charge, dealt with in the next section.
104. The effect of categorisation of an apparent breach as minor or major should be accompanied by a number of procedural consequences. These include the relevant standard of proof, the time in which the hearing should be held and the officer who may make the decision. This is explained further below.

Charging the inmate

105. In NSW consideration of whether to charge an inmate follows after the investigation:

Following consideration of the Inmate misconduct report and incident/witness report(s) and any other evidence, the governor or a delegated officer may decide to charge an inmate with a correctional centre offence or offences.⁵¹

106. The NSW process accords generally with the position adopted in Victoria and Queensland save for the distinction between minor and major offences. However, there is no mention of the nature of the charge or its contents in s.52(1) of the CAS Act, the CAS Regulation or *COPP* 14.1. The contents of the charge is left for the form utilised.
107. In Victoria the *Commissioner's Requirements* 2.3.3 are explicit about the charging process at cl.5.4.1:

⁵¹ *COPP* 14.1 cl 3.3.

The Disciplinary Officer is responsible for providing written information to the prisoner (Notification of Charge of Prison Offence) that the matter will be heard at a General Manager's Disciplinary Hearing. The information will include:

- the prison offence under which the prisoner has been charged and where relevant, the individual items of contraband seized;
- the informant in the matter;
- the time, date and place of hearing;
- the procedure of a Disciplinary Hearing; and
- the name of the General Manager or delegate (Hearing Officer) who will hear the matter.

108. Similarly in the ACT, s.194(2)-(4) of the *Corrections Management Act 2007* (ACT) provide for the provision of like information to that in Victoria although s.194 adds the ability of the accused to make submissions to the presiding officer in any form acceptable to the presiding officer (which must be considered by the presiding officer). A further notice of the hearing, and where and when it will be held, is required to be provided to both the accused and the director-general.⁵²

109. In New Zealand attention has been given to the nature of the charge process and the importance in permitting the inmate to understand exactly the nature of the charge and its particulars. The *Corrections Regulation 2005* (NZ) requires that when a charge in respect of a disciplinary offence is laid the prisoner is given a written notice that includes a description of the incident or circumstances giving rise to the alleged offence and a statement of the provision under which the prisoner is charged.⁵³

110. The New Zealand *Prisons Operation Manual* then develops that obligation by further requiring:⁵⁴

[...] The form must be filled out as follows:

- (i) describe the incident or circumstances giving rise to the alleged disciplinary offence

⁵² *Corrections Management Act 2007* (ACT), ss.200(1), (2).

⁵³ *Corrections Regulation 2005* (NZ) Schedule 7 cl.6.

⁵⁴ Ara Poutama Aotearoa Department of Corrections NZ, *Prison Operations Manual – Filing a Disciplinary Charge Policy*, MC.01.01 cl.4. The final clause (cl.5) concerns technical arrangements under the NZ system.

(ii) the charge is to be written in such a way that the prisoner can be in no doubt as to the offence alleged. Use only the particular words or expressions which accurately describe the offences and can be proven. For example, when charging a prisoner with an offence under section 128(1)(a) of the *Corrections Act 2004* [(NZ)] it is necessary to make it clear whether the charge is that of disobeying a lawful order of an officer or staff member, or, that of failing to comply with a Corrections regulation or a rule of the prison.

(iii) [...]

111. The need for “particulars” of what conduct is said to constitute an offence has long been recognised in a criminal law context. In *PPP v R* (2010) 27 VR 68, Redlich JA provided 7 reasons as to why particulars are essential to a fair trial process. Particularly relevantly for the present context, his Honour noted (at [42]):

The starting point is the proposition that for a trial according to law, the accused must be apprised not only of the offence with which they are charged but must have particulars of the act constituting the offence. These particulars are designed to serve a number of important purposes:

1) [...]

2) To permit the accused to know how the charge might be answered.

[...]

112. The importance of particulars has also been recognised in the *Nelson Mandela Rules*. Rule 37 of which sets out the primary features of that disciplinary process:

The following shall always be subject to authorization by law or by the regulation of the competent administrative authority:

a) Conduct constituting a disciplinary offence;

b) The types and duration of sanctions that may be imposed;

c) The authority competent to impose such sanctions;

[...]

(emphasis added)

113. In the UK, the *Prisoner Discipline Procedures (Adjudications)* stipulates the particulars that must be provided with each correctional centre offence. For example, for the charge of “fighting”, the policy document outlines that the charge must be laid in the following way:

At (time) on (date) in (place) you were fighting with (name).⁵⁵

114. Unlike NSW, several other jurisdictions make clear that a single act or omission should only lead to a single disciplinary offence being laid. For example, s.26 of Canada’s *Correctional and Condition Release Act* provides that only one disciplinary charge should follow from any incident unless substantially different acts have been committed.⁵⁶ As we mentioned in our first advice there appears to be a practice of imposing multiple charges for one act (or omission).

Time for resolution of the charge

115. At present, in NSW, *COPP 14.1* stipulates that inquiries into correctional centre discipline offences should be completed within 28 days.⁵⁷ It is our view that with the bifurcated process between major and minor offences and the clearer hearing policy, these inquiries can be completed in a more truncated timeframe.
116. The time frames mandated in other jurisdictions are generally consistent with a need for an expedited process but they vary. For example:
- In Queensland, a minor breach of discipline is to be dealt with within 24 hours of the time the breach occurred and a major breach, within 14 days;⁵⁸
 - In Victoria, a charge is to be finalised within 14 days;⁵⁹
 - In the UK, there is a 48-hour time limit for laying the charges;⁶⁰ and
 - In Canada, the time between the laying of the charge and the hearing should ordinarily be 10 days.⁶¹

⁵⁵ *Prisoner Discipline Procedures (Adjudications)* Annex B, 51 at [1.21].

⁵⁶ *Correctional and Condition Release Act* (SC 1992, c 20) (Can) s.26.

⁵⁷ *COPP 14.1* cl.3.7.

⁵⁸ *Corrective Services Act 2006* (Qld) s.116(2)(b).

⁵⁹ *Commissioner’s Requirements 2.3.3*, Appendix ‘Checklist for Hearing Officers’ 14.

⁶⁰ *Prisoner Discipline Procedures (Adjudications)* Annex A, 19 at [1.2].

⁶¹ Correctional Service Canada, *Commissioner’s Directive 580 - Discipline of Inmates* (28 June 2021) at [26].

117. In NSW we suggest that if the hearing officer elects to proceed with a major offence, it is our recommendation that from the time of charging to the hearing, it should take no longer than 14 days to conduct a hearing, unless exceptional circumstances exist. For a minor offence, it is our recommendation that this process take no longer than 3 days, unless exceptional circumstances exist.

Recommendation for NSW

118. We recommend that the Victorian and New Zealand approach to charging should be combined and adopted. That is, those matters set out in cl.5.4.1 of the *Commissioner's Requirements 2.3.3* should be provided in the charge and with sufficient particulars so that it is "written in such a way that the prisoner can be in no doubt as to the offence alleged". As in New Zealand the charge should "use only the particular words or expressions which accurately describe the offences and can be proven". It also makes sense that at the time the prisoner is informed of the charge, he or she is also informed of the time, date and place of the hearing in writing.⁶²
119. Where general offences are charged, such as disobey direction (CAS Regulation at cl.130) or failing to comply with correctional centre routine (cl.39), then further particulars are warranted in addition to the specific offence alleged. That is, the exact direction should be set out in the charge or specific part of the routine which it is alleged the inmate has failed to comply with, respectively.
120. We further recommend that the timelines be amended so that proceedings for a minor offence be determined within 72 hours, and within 14 days for a major offence, subject to exceptional circumstances.

Referral to police (Question 1(d))

121. In NSW, the CAS Act does not specify any procedural process for referral of allegations to the police. That issue is left to the *COPP*. There is a requirement at cl.3.1 of *COPP 14.1* that an alleged correctional centre offence which may also be a criminal offence must be reported to police:

⁶² This appears to be provided by the Inmate Discipline Action Form currently utilised.

Correctional centre offences of a serious nature which might also be criminal offences (e.g. assault, major property damage or indecent act) must be reported to the police in the first instance. [...]

No proceedings for a correctional centre offence are to commence or continue while police have carriage of the matter. If police decline to take action, the matter may be dealt with as a correctional centre offence.

122. That approach is entirely appropriate because an attempt by the governor or a correctional services officer to inquire into a correctional centre offence which may also be a criminal offence is likely to compromise any later criminal prosecution. The correct approach is to stay any correctional centre offence procedure until police consideration has been concluded. This is what also occurs in Victoria, Queensland and New Zealand.⁶³ Once police consideration has concluded and a decision made not to prosecute, then the disciplinary process may recommence.
123. The position in Queensland formalises this approach at s.114 of the *Corrective Services Act 2006* (Qld):

114 Breach of discipline constituting an offence

(1) If a corrective services officer observes, or obtains knowledge of, a prisoner's act or omission that could be dealt with either as an offence or as a breach of discipline, the officer must immediately inform the chief executive of the act or omission.

(2) The chief executive must

(a) within 24 hours after receiving the information, tell the prisoner that the matter is to be referred to the commissioner [of police]; and

(b) within 48 hours after telling the prisoner under paragraph (a), refer the matter to the commissioner [of police].

124. It is not clear what the justification for a delay of up to 48 hours for reporting to police after the prisoner is informed. Preferably such actions should be "as soon as possible" with a time limit specified. NSW and Victoria are silent on timing of any such referral.

⁶³ See Victorian *Commissioner's Requirements* 2.3.3 cl.5.3.1; *Corrective Services Act 2006* (Qld) s.114; *Corrections Regulations 2005* (NZ) cl.50(b).

125. In Queensland, once the police have determined not to pursue a criminal charge *and the matter 'returns' for disciplinary proceedings* then a fresh decision is required to be made as to whether to proceed with a correctional centre offence:

In making a determination, the Chief Superintendent or nominee should consider the following factors:

- a) whether there is sufficient evidence likely to result in a finding of guilt in a breach process;
- b) the relative severity of the alleged act or omission by the prisoner;
- c) whether to proceed with the breach process is in the best interests of the centre, having regard for the purpose of prisoner discipline;
- d) individual circumstances of the prisoner, including the prisoner's institutional behaviour since the alleged act or omission occurred;
- e) whether other formal actions have been taken to manage the prisoner's behaviour in the period following the alleged act or omission (i.e. use of an Intensive Management Plan), which negate the need for a breach process;
- f) the amount of time that has elapsed since the alleged act or omission; and
- g) the availability of the prisoner to participate in the breach process.⁶⁴

126. The provision reflects certain important matters such as a long time may have elapsed since the relevant events and that the inmate may have been released from custody.
127. In Victoria, s.51(d) of the *Corrections Act 1986* (Vic) says that the governor "on receiving a copy of a charge for a prison offence ... may ... take steps to have the matter dealt with under the criminal law". It is, of course, less than desirable for the governor to delay any such reporting to police until after the charge has been laid because that alone may have involved some form of correctional centre investigation prior to it being laid. However, there may be occasions where the criminality was not apparent until well into the investigation.

⁶⁴ COPD cl.7.1.

Recommendation for NSW

128. That a requirement to refer an alleged criminal offence to the police should be formalised in the CAS Act and that the policy extracted above at paragraph [125] (cl.7.1 in Queensland's *COPD*) be adopted for allegations which are returned from police.

Punishing an inmate twice

129. In NSW, limited protections are provided to an inmate to stop them being 'punished' twice for the same act. Care needs to be taken because, as indicated in the first advice, a finding of guilt with respect to a correctional centre offence is an administrative finding whereas a finding of guilt by a court is a criminal conviction. It is worth repeating what Gleeson JA (as his Honour then was, Payne and Brereton JJA agreeing) said in *Director of Public Prosecutions (NSW) v Hamzy* [2019] NSWCA 314 (at [76]):

If the governor finds the inmate guilty of a correctional centre offence, the decision is an administrative decision; it is not a conviction. And, if the governor finds an inmate not guilty of the charge, the decision is not a discharge since the inmate could never stand in jeopardy on a charge before a governor on an inquiry: *Island Maritime Limited v Filipowski*; *Kulkarni v Filipowski* (2006) 226 CLR 328; [2006] HCA 30 at [11]-[12] ... In either case, the decision of the governor does not have the status of a judicial determination.

130. That is, a finding of 'guilty' or 'not guilty' with respect to a correctional centre offence would not enable a defendant to plead *autre fois convict* or *autre fois acquit*, respectively, in any criminal proceedings. Although unlikely, the reverse is also true: an inmate could not resist a charge of a correctional centre offence on the basis that the matter had already been the subject of criminal proceedings. As a result, in order to avoid *de facto* double jeopardy the legislature has intervened in NSW and Queensland. The two protections in this respect are, however, different.
131. Section 115 of Queensland's *Corrective Services Act* states:

115 Prisoner not to be punished twice for same act or omission

- (1) A prisoner must not be punished for an act or omission as a breach of discipline if the prisoner has been convicted or acquitted of an offence for the same act or omission.

- (2) A prisoner must not be charged with an offence because of an act or omission if the prisoner has been punished for the act or omission as a breach of discipline.

132. The prohibition on further ‘punishment’ works differently depending on whether one is considering the disciplinary process or the criminal process. In s.115(1), conviction or acquittal prohibits further disciplinary punishment (but arguably not a finding that a breach had occurred), whereas s.115(2) prevents the laying of a criminal charge where the prisoner has been punished already by a disciplinary finding.
133. By contrast, the regime in NSW provides a more limited ‘one-way’ protection. Section 63 of the CAS Act is as follows:

63 Double jeopardy

- (1) For the purpose of determining whether proceedings for a criminal offence may be brought for the act or omission giving rise to a correctional centre offence, the decision of a Visiting Magistrate in proceedings for the correctional centre offence is taken to be the decision of a court in proceedings for a criminal offence.
 - (2) Proceedings for a correctional centre offence are not to be commenced or continued under this Division if proceedings for a criminal offence have been commenced in a court for the act or omission giving rise to the correctional centre offence.
134. Subsection 63(1) operates to preclude an inmate being further charged with a criminal offence where a Visiting Magistrate, in proceedings for the correctional centre offence, has already made a determination with respect to the same act or omission. Subsection 63(2) further precludes commencement or continuation of proceedings for a correctional centre offence, where criminal proceedings have commenced for the same act or omission.
 135. What s.63 does not do is prevent a criminal charge being laid where a person has been found guilty of a correctional centre offence (including being given a penalty) *other than by a* Visiting Magistrate. This was the issue in *DPP v Hamzy* referred to above. In that way s.63 does not provide the same protection against being “punished twice” as is provided by s.115(2) of the *Corrective Services Act 2006* (Qld).
 136. It is difficult to envisage circumstances where double punishment for the same act or omission could be justified. However, there may be circumstances where the act or omission is dealt

with as a trivial offence but it later comes to light that the act was a criminal offence worthy of further action. In any such criminal proceedings, extra-curial punishment must be considered in the sentencing process and that would include any penalty imposed for a finding of guilt with respect to a correctional centre offence.

Referral to Visiting Magistrate

137. We are instructed that the referral of alleged correctional centre offences to the Visiting Magistrate under s.54 of the CAS Act has fallen into disuse. The power to refer exists when the governor considers that, because of the serious nature of the offence, it should be so referred to a Visiting Magistrate. The Visiting Magistrate represents a potential source of independent review outside of the executive and is an important safeguard for both good administration and justice. We do not recommend that the Visiting Magistrate discontinue a role in hearing and determining the most serious correctional centre charges. However, we have not been provided with the reasons for the disuse of this process.
138. As is set out below we recommend that the functions of the Visiting Magistrate be augmented so that he or she may perform a review function for major offences. This issue is further explored below in relation to review mechanisms in Section F.

D. THE HEARING OF DISCIPLINARY CHARGES

139. The majority of the questions asked of us in our letter of instructions concern the hearing procedure(s) in NSW and in other jurisdictions. As one can imagine this has thrown up a considerable variety of ways in which prison disciplinary charges are determined. One of the main differences with many of those jurisdictions and NSW is the distinction between minor and major offences and how each is determined. This has had a distinct impact on our consideration of the hearing process because, as is set out below, there are good reasons for adopting simpler and quicker processes for minor offences. Conversely, where a major offence is being determined it might best be considered by the governor or delegate and then reviewed by the Visiting Magistrate, if required.
140. It is with that approach in mind that we address the main points asked of us, including delegation, procedural fairness, accommodating vulnerable inmates, and standard of proof. Penalties, review and record keeping are dealt with in the succeeding sections.

Hearing officer

141. In this part of Section D we consider the identity, status and functions of the person who is empowered to determine whether a correctional disciplinary offence has occurred and impose penalty. There are a variety of descriptions of that person used in different jurisdictions and for the purposes of this advice we will use the general term “hearing officer”. As is apparent, the duties of the hearing officer are either directly allocated or delegated to mid-level officers.

NSW

142. As discussed at length in our first advice, s.52(1) of the CAS Act mandates that the “governor of the correctional centre may charge the inmate with the offence and conduct an inquiry into the allegation”. Similarly, a finding of guilt beyond reasonable doubt and the imposition of a penalty are matters which are reposed in the governor.⁶⁵ As mentioned in our previous advice, the governor of a correctional centre “may delegate to any person any of the governor’s functions” which includes the governor’s powers in ss.52 and 53 (see s.233(3)). We understand that such delegations are commonplace, though no doubt they vary between correctional centres.
143. *COPP 14.1* specifies that the governor’s functions to deal with a correctional centre offence must only be delegated to the “Manager of Security” or the “Functional Manager”.⁶⁶ It is not apparent from the *COPP* which charges are to be considered by the governor, the Manager of Security or the Functional Manager⁶⁷ save that mobile phone offences may only be heard by the governor.⁶⁸ Accordingly, it appears that some consideration is already given to who may be the “hearing officer” and that decision may be dependent on the seriousness of the charge. The *COPP* does not appear to provide further guidance as to this issue.
144. The second relevant issue is the nature of the hearing. In particular, whether the hearing of a disciplinary charge is inquisitorial or adversarial. *COPP 14.1* sets out the nature of the hearing and it is apparent that no provision is made for a prosecutor or for legal representation either of the Commissioner or of the inmate. As a result, under *COPP 14.1*, the person who investigates the case, hears the case and decides the case is the same person. That is not unusual

⁶⁵ CAS Act s.53(1).

⁶⁶ *COPP 14.1* cl.1.2.

⁶⁷ We have assumed that those three names appear in descending order.

⁶⁸ Corrective Services NSW, *Custodial Operations Policy and Procedures 14.3 – Mobile Phone Offences* (version 1.0) cl.2.3 (*COPP 14.3*).

in administrative decision making but it is worth noting that it is different to the prosecution of an indictable offence where the police investigate, the DPP prosecutes, and a judge decides. By contrast when a correctional centre charge is referred to the Visiting Magistrate the procedure required is an adversarial one because of the application of the *Criminal Procedure Act 1986* (NSW) and the entitlement of the inmate to be legally represented.⁶⁹

145. To summarise the position in NSW, correctional centre offences are determined by the Manager of Security, the Functional Manager or the governor. In practice the governor hears only mobile phone offences. While offences which are serious may be referred to the Visiting Magistrate for determination, in practice this has not occurred for a number of years. As a result, the vast majority of correctional centre offences are determined at the Manager of Security and Functional Manager level by delegation from the governor. The delegated officer is responsible for the entire process from receiving the *Inmate Misconduct Report*, through charge, investigation (called “inquiry”), hearing, determination and imposition of penalty.
146. We turn now to some of the other jurisdictions and the arrangements they have for the hearing of disciplinary offences.

Victoria

147. In Victoria the Secretary may designate a prison officer as a disciplinary officer. The disciplinary officer receives any report alleging an inmate having committed a prison offence.⁷⁰ The disciplinary officer is to investigate⁷¹ and if he or she finds that no offence has been committed or the offence is trivial he or she may take no further action.⁷² However, if the disciplinary officer is satisfied that an offence has been committed may reprimand the prisoner, withdraw privileges for 14 days or charge the prisoner with the prison offence which is then provided to the governor.⁷³
148. The governor is then responsible for giving notice to the prisoner of the time, date and place of the hearing within 72 hours of the hearing.⁷⁴ At a hearing a governor must allow the prisoner reasonable opportunity to call relevant witnesses and cross examine “the person conducting the

⁶⁹ *Criminal Procedure Act 1986* (NSW) ss.55(2)-(4).

⁷⁰ *Corrections Act 1986* (Vic) s.50(1).

⁷¹ See *Corrections Regulation 2019* (Vic) cl.66, which sets out the nature of the investigation including the requirement to “consider whether the prisoner has any special needs or special circumstances.”

⁷² *Corrections Act 1986* (Vic) ss.50(3), (4).

⁷³ *Ibid* ss.50(5), (6).

⁷⁴ *Ibid* s.53(1).

case against the prisoner” and witnesses called by that person.⁷⁵ If the governor finds the person guilty then he or she may impose a reprimand, a fine or a withdrawal of privileges of up to 14 days per offence up to a total of 30 days for more than one offence.⁷⁶ There is no power to confine a prisoner as punishment for a disciplinary offence. The governor may delegate this function.⁷⁷

149. In practice, hearings are conducted (under delegation) by a hearing officer who, like a disciplinary officer, “must be provided with initial training and be across operational, policy and legal changes”. The Governor ⁷⁸ “must also ensure human rights and disciplinary refresher training is provided to staff as required.” According to policy, it is the Disciplinary Officer who provides the s.53(1) notice and not the hearing officer.⁷⁹ It is not clear whether the person “conducting the case against the prisoner” is the reporting officer or the disciplinary officer. We have presumed the latter. The hearing officer then determines whether the inmate is guilty or not and imposes a penalty.⁸⁰

ACT

150. In the ACT the “First Presiding Officer” receives the disciplinary breach report from the reporting correctional officer and determines whether to refer the matter to the Investigator (an independent officer appointed by the Director-General) and/or issue a charge notice to the detainee.⁸¹ The First Presiding Officer must be a “Correctional Officer Grade 3”.⁸² the charge notice must be issued within 3 days of the relevant event and the hearing date must be held 5 days within the date of charge.⁸³
151. The “Second Presiding Officer” inquires into the alleged breach,⁸⁴ conducts the disciplinary hearing and determines the administrative penalty to be imposed.⁸⁵ The penalty must be

⁷⁵ Ibid s.53(2).

⁷⁶ Ibid s.53(4).

⁷⁷ Ibid s.24.

⁷⁸ Referred to in the *Corrections Act 1986* (Vic) as the Governor but the General Manager in the *Commissioner’s Requirements 2.3.3*.

⁷⁹ *Commissioner’s Requirements 2.3.3 cl.5.4.6*.

⁸⁰ Ibid cl.5.4.10.

⁸¹ *Corrections Management Act 2007* (ACT) s.159. Charging is covered by a separate operating procedure contained in the following statutory instrument: *Corrections Management (Detainee Discipline – Laying a Charge) Operating Procedure 2023* (ACT) (12 July 2023) (***Laying a Charge Procedure***).

⁸² *Detainee Discipline Policy cl.5.2*.

⁸³ *Laying a Charge Procedure cl.5.3*

⁸⁴ *Corrections Management Act 2007* (ACT) s. 170(2).

⁸⁵ Ibid s.171(2). See s.183(1) for penalties.

proportionate to the breach and is guided by cl.9.7 of the *Corrections Management (Detainee Discipline) Policy 2023 (Detainee Discipline Policy)* (as to which see Penalties below). The Second Presiding Officer must be a “Correctional Officer Grade 4”.⁸⁶ The investigator, the First and Second Presiding Officers cannot have direct involvement in the incident.⁸⁷

Queensland

152. In Queensland, the distinction is between a “corrective services officer” and a “deciding officer”. No distinction is made between a corrective services officer who observes an act or omission and a corrective services officer who receives a report of an act or omission which could be dealt with either as a criminal offence or as a breach of discipline.⁸⁸ It is the correctives services officer who may decide to start proceedings under s.113 of the *Corrective Services Act 2006* (Qld). For a minor offence the deciding officer is a corrective services officer, whether or not the officer is the same officer who decided to start proceedings.⁸⁹ For a major offence a deciding officer is a corrective services officer who holds a more senior position than the corrective services officer who started the proceedings.⁹⁰ A minor breach must be decided within 24 hours of the alleged breach and a major breach within 14 days of the breach (or knowledge of it).⁹¹
153. The deciding officer must tell the prisoner of any evidence supporting the allegation, give the prisoner a reasonable opportunity to make submissions in the prisoner’s defence including by cross examination of “any witness called by the Chief Executive”, calling his or her own witnesses, and making submissions in mitigation.⁹² Neither party is allowed legal representation, and the rules of evidence do not apply but the prisoner may be helped by someone if the prisoner is disadvantaged by language barriers or impaired mental capacity.⁹³ No distinction is made between the procedures for a minor or major breach of discipline but a hearing into a major breach must be videotaped.⁹⁴ If the prisoner is found guilty then the prisoner may be reprimanded, lose privileges for 24 hours (for a minor breach) or 7 days (for

⁸⁶ *Detainee Discipline Policy* cl.5.2.

⁸⁷ *Ibid* cl.5.4.

⁸⁸ *Corrective Services Act 2006* (Qld), s.114(1). The *COPD* confirms that for minor offences the ‘referring officer’ may be the same as the deciding officer: *COPD* cl.3.

⁸⁹ *Corrective Services Act 2006* (Qld) Schedule 4.

⁹⁰ *Ibid*.

⁹¹ *Ibid* s.116(2)(b).

⁹² *Ibid* s.116(3).

⁹³ *Ibid* s.116(5)-(7).

⁹⁴ *Ibid* s.118(1).

a major breach).⁹⁵ And for either offence the prisoner may be ordered to undergo separate confinement limited to 7 days.⁹⁶ Consideration of penalty is guided by cl.9.8.2 of the *COPD* (as to which see further below concerning Penalties).

New Zealand

154. In New Zealand a disciplinary breach report is reviewed by the “Prosecutor” who determines whether there is sufficient evidence to issue the charge notice. Any staff member may issue the charge notice, set the hearing date and notify the prisoner including a description of the incident or circumstances and the provision under which the prisoner is charged.⁹⁷ However, he or she cannot be the staff member who witnessed the offending conduct.⁹⁸ A Prosecutor is a full-time role that staff are seconded into, generally for a period of four years and who has generally received training in in Corrections legislation, hearing protocols and processes.⁹⁹
155. A “Hearing Adjudicator” always hears the case at first instance, conducts the hearing and determines any penalties to be imposed.¹⁰⁰ The Hearing Adjudicator may refer complex cases or cases that may require higher penalties to a Visiting Justice, who is a District Court judge or a barrister or solicitor of the New Zealand High Court.¹⁰¹ A prisoner may request legal representation at the hearing of a charge alleging an offence against discipline whether before a Hearing Adjudicator or a Visiting Justice.¹⁰² (As is considered below, the decision of a Hearing Adjudicator may be appealed to a Visiting Justice.¹⁰³)
156. Being an Adjudicator is a “voluntary position” that is incorporated into a corrections employee’s other daily tasks. Adjudicators receive training and undergo an assessment to determine their competence to conduct disciplinary hearings.¹⁰⁴ In order to be appointed as a Hearing Adjudicator, the chief executive must be satisfied that the person has received adequate training in holding disciplinary hearings and is competent to hold such hearings.¹⁰⁵

⁹⁵ Ibid s.118(2).

⁹⁶ Ibid s.118(2), subject to s.118(3) for a minor breach and s.112(2) limits confinement to 7 days, with other safeguards.

⁹⁷ *Corrections Regulation* (NZ) cl.205, Schedule 7 cl.6-8.

⁹⁸ Ibid cl.205, Schedule 7 cl.25.

⁹⁹ Ara Poutama Aotearoa Department of Corrections NZ, *Regulatory Impact Statement: Improving rehabilitation, reintegration, reintegration, and safety outcomes in the corrections system* (30 November 2022) 48 at [203] (*‘RIS’*).

¹⁰⁰ *Corrections Act 2004* (NZ) s.133.

¹⁰¹ Ibid ss.3(2), 134(2). The New Zealand High Court is similar to the Supreme Court of NSW in judicial hierarchy.

¹⁰² Ibid s.135(1).

¹⁰³ Ibid s.136(1).

¹⁰⁴ *RIS* 48 at [200].

¹⁰⁵ *Corrections Regulation* (NZ) cl.205, Schedule 7 cl.1.

157. New Zealand has adopted a hearing process which may be characterised as adversarial and where legal representation is available. A recent report of the Te Tari Tirohia Office of the Inspectorate indicates that there have been considerable delays in disciplinary hearings in New Zealand caused in part by not enough prosecutors and adjudicators being available to prosecute misconduct charges.¹⁰⁶ Whether that is due to resourcing constraints or not, that experience may militate against an unduly formalised or cumbersome process.

Delegation and role of the governor in NSW (Question 1(a))

158. In our first advice we considered whether there was a legal requirement for the whole of the disciplinary process to be undertaken by one officer. We also considered whether it was possible to have one officer charge the inmate, inquire into the alleged correctional centre offence and hold a hearing but permit the governor, under s.53 of the CAS Act, to make the finding as to whether the charge was proven beyond reasonable doubt and impose a penalty. One of the concerns expressed to us was that the governors in NSW were not able to impose consistency and proportionality on such decision-making because they were not making decisions, particularly as to penalty. After considering the way in which disciplinary offences are determined in a number of other jurisdictions we are of the view that, while legally possible to split the process, it would not be desirable.
159. This is for a number of reasons. *First*, a split process leads to a need for communication of the investigation and the substance of the hearing to the governor who then makes the decision based on the report provided to him or her. The likelihood of miscommunication in such a process is reasonably high. *Second*, there are inefficiencies and likely delays in such a system in the sense that the governor needs to consider the evidence when one officer has already done so. *Third*, such delays may have an adverse effect on inmates such as has occurred in New Zealand where an absence of prosecutors and adjudicators has led to prisoners being confined for longer than is normal. *Fourth*, none of the jurisdictions considered has split the process between inquiry/hearing and decision/penalty. Generally, the decision is made and the penalty imposed by the hearing officer.
160. Consistency and proportionality could instead be maintained by a different review process developed below at Section F which, insofar as it involves the governor, includes:

¹⁰⁶ Te Tari Tirohia Office of the Inspectorate and Ara Poutama Aotearoa Department of Corrections NZ, *Separation and Isolation: Thematic Report* (March 2023) 63-64 at [221]-[222], [224].

- a) The ability of an inmate to apply for a review by the governor for a finding of guilt with respect to a minor offence;
 - b) The ability of an inmate to apply for a review by the governor of the imposition of a penalty for a major offence; and
 - c) The ability of the governor to initiate an ‘own motion’ review in either circumstance.
161. Where an offence is determined to be serious then the governor should still have the option to either hear the case him or herself or refer it to a Visiting Magistrate. If the governor has such powers together with the review functions set out above, then he or she would have a number of means by which to ensure proportionality and consistency in decision making within the correctional centre concerned.

Hearing process (Question 1(b))

162. Question 1(b) seeks consideration of both procedural fairness at the hearing stage and assistance to vulnerable inmates. It is convenient to deal with procedural fairness first and then separately consider assistance for vulnerable inmates which we do later in this section.

The NSW hearing process

163. Section 52 of the CAS Act sets out the requirements of procedural fairness for correctional centre offences and includes: the rules of evidence are not to apply;¹⁰⁷ the inmate is entitled to be heard at any hearing during the inquiry and to examine and cross-examine witnesses;¹⁰⁸ the inmate is not entitled to legal representation;¹⁰⁹ a person who is not a legal practitioner may assist a person if the governor is satisfied that the inmate does not sufficiently understand the nature of the inquiry, speak English or is unable to represent him or herself.¹¹⁰ Such a hearing is private in the sense that it is not open to the public and the governor may permit or limit the presence of correctional officers and others.¹¹¹ The elements of a hearing are then repeated in *COPP 14.1* at cl.3.5.
164. It is worth noting that *COPP 14.1* does not further elaborate the hearing process. As a result, the following matters are not addressed: location of the hearing, provision of evidence to the inmate in advance of the hearing, form of the evidence, submissions or recording of the hearing.

¹⁰⁷ CAS Act s.52(2)(b).

¹⁰⁸ Ibid s.52(2)(c).

¹⁰⁹ Ibid s.52(2)(d)).

¹¹⁰ Ibid s.52(2)(e).

¹¹¹ Ibid s.52(2)(h).

Some of those matters are dealt with in the forms available which are set out in the table to cl.4.8 of *COPP 14.1*:

- *Inmate discipline action form*;
- *Inmate discipline checklist* (if applicable);
- *Inmate misconduct report*;
- Incident/witness report; and
- Any other documents relied upon as evidence of the offence (e.g. copy of receipts for repair of damage to property.)

Hearings in other jurisdictions

165. The hearing requirements in Victoria are similar to those in NSW: the provision of an opportunity to call relevant witnesses and to cross examine the officer and witnesses; and representation by another prisoner.¹¹² More detailed provisions are provided in the *COPD* at cl.9.7, which may be summarised as follows:

- a prisoner is not allowed any legal or other representation but the prisoner may be helped by someone from the facility if the prisoner is disadvantaged by language barriers or impaired capacity;
- the deciding officer must advise the prisoner of the available evidence that supports the alleged breach of discipline;
- the deciding officer must determine if body worn camera or other recordings will be introduced during the breach hearing;
- the prisoner must be given a reasonable opportunity to make submissions in their defence, including, for example by questioning any witness called by the deciding officer and calling a person within the corrective services facility to give evidence in the prisoner's defence;
- the deciding officer must give consideration to the capacity of the prisoner to effectively participate and understand what is occurring during the hearing, including any language or comprehension difficulties that may exist and may include inviting a suitable person to support the prisoner at the hearing; and

¹¹² *Corrections Act 1986* (Vic) ss.53(2), (3).

- before making a final decision on whether the alleged breach is proven or before making a final decision on penalty, the deciding officer must seek a response from the prisoner including submissions in mitigation of the proposed punishment.

166. In Queensland the deciding officer must tell the prisoner at the disciplinary hearing of any evidence supporting the allegation,¹¹³ give the prisoner a reasonable opportunity to make submissions in the prisoner's defence including questioning any witness and calling a person "within the corrective services facility" to give evidence¹¹⁴ and giving the prisoner a reasonable opportunity to make submissions in mitigation of punishment.¹¹⁵ The prisoner may be helped by someone from the corrective services facility if the prisoner is disadvantaged by language barriers or impaired mental capacity.¹¹⁶ The deciding officer is not bound by the rules of evidence.¹¹⁷ And the consideration of a major breach of discipline must be videotaped.¹¹⁸
167. The ACT provides perhaps the most detailed provisions for the conduct of disciplinary hearings at Parts 11.2 and 11.3 of the *Corrections Management Act 2007* (ACT). The rules of natural justice apply¹¹⁹ and the laws of evidence do not apply.¹²⁰ Whether a hearing is conducted as part of an inquiry is left to the presiding officer to determine.¹²¹ An inquiry must be conducted with as little formality and technicality, and as quickly as possible.¹²² The presiding officer is provided with powers to "require official reports" from the director-general, the DPP, a corrections officer or a public servant.¹²³ The presiding officer may also obtain information or documents or thing by notice.¹²⁴ The presiding officer may issue a notice to the accused and to any else requiring them to appear at the hearing, answer questions and produce a stated document or other thing.¹²⁵ Questions to witnesses at the hearing may be disallowed where unfair, unduly prejudicial or vexatious involves an abuse of the inquiry process.¹²⁶ The accused is entitled to be heard, to examine and cross-examine witnesses, and to make submissions but is not entitled to be represented by a lawyer or anyone else, without the presiding officer's

¹¹³ *Corrective Services Act 2006* (Qld) s.116(3)(a).

¹¹⁴ *Ibid* s.116(3)(b).

¹¹⁵ *Ibid* s.116(3)(c).

¹¹⁶ *Ibid* s.116(6).

¹¹⁷ *Ibid* s.116(7).

¹¹⁸ *Ibid* s.117(1).

¹¹⁹ Our view is that as a finding of misconduct would affect an interest of a prisoner, the rules of natural justice would apply by virtue of the common law.

¹²⁰ *Corrections Management Act 2007* (ACT) ss.192(2)(a), (b).

¹²¹ *Ibid* s.195(2).

¹²² *Ibid* s.195(1).

¹²³ *Ibid* s.196.

¹²⁴ *Ibid* s.197(1).

¹²⁵ *Ibid* ss.200(2), (4).

¹²⁶ *Ibid* s.201(5).

consent.¹²⁷ An accused may be excluded from a hearing for interfering, interrupting or interfering with the hearing or not obeying a reasonable direction.¹²⁸

168. The hearing procedure in the UK follows a comparatively rigid process, more akin to a court room setting than the jurisdictions in Australia. All hearings are to take place in an allocated hearing room. Prior to the commencement of the hearing an adjudicator is to confirm the inmate's fitness to understand the charge and the hearing process.¹²⁹ Inmates are not entitled to legal representation except for in "Independent Adjudicator" hearings, which are similar to the current Visiting Magistrate process in NSW.¹³⁰ An inmate has a right to cross-examine any witness and present any evidence in their own defence.¹³¹ All charges must be proved beyond reasonable doubt.
169. New Zealand's hearing process is relatively similar to that in the UK. At the hearing a "prosecutor" presents the charge and the evidence before the hearing adjudicator and the inmate can seek permission to have a support person or legal representative.¹³² Evidence is presented through either written and oral testimony and an inmate or their representative is entitled to cross-examine.¹³³ All charges must be established to the criminal standard of beyond reasonable doubt.¹³⁴
170. We note at this point that the detailed provisions provided in the ACT, while attractive in many ways, provide a more detailed regime than is likely to be able to be recommended as part of the Ombudsman's inquiry.

Recommendations for NSW

171. As is apparent from our proposed division between minor and major offences, there is a need and an opportunity to simplify the former and to provide some improved procedural protections for the latter. Our suggestions may be summarised as follows:

¹²⁷ Ibid s.202(1).

¹²⁸ Ibid s.202(3).

¹²⁹ *Prisoner Discipline Procedures (Adjudications)* Annex A, 26 at [2.8].

¹³⁰ Ibid 16 at [3.10].

¹³¹ Ibid at [2.45].

¹³² Ara Poutama Aotearoa Department of Corrections NZ, *Prison Operations Manual – Misconduct Pre-Hearing Policy*, MC.02.04 cl.3; MC.02.05 cl.1.

¹³³ Ara Poutama Aotearoa Department of Corrections NZ, *Prison Operations Manual – Misconduct Hearing and Penalty Policy*, MC.03.03 at [5].

¹³⁴ Ibid, MC.03.05 cl.3.

Procedures for the Hearing of Minor and Major Offences

Type of offence/ Procedural safeguard	Minor offence	Major offence
Location of hearing	Hearing room or cell or AVL	Dedicated hearing room
Service of evidence on inmate	24 hours before	72 hours before
Legal representation ¹³⁵	Nil	Nil
Assistant and interpreter ¹³⁶	Yes	Yes
Calling of witnesses ¹³⁷	Yes	Yes
Cross-examination ¹³⁸	Yes	Yes
Recording of decision and penalty ¹³⁹	Yes	Yes
Recording	In writing	Videotaped and in writing
Summary of reasons for decision	Yes	Yes
Time from offence to finalisation of hearing	72 hours	14 days

172. We have not been able to discern where the hearing of disciplinary charges currently take place in NSW. It is our view that the hearing of minor charges should take place in any reasonably convenient location, including an inmate's cell, a common area (where privacy can be afforded), an office, a dedicated hearing room or by AVL where necessary. For the hearing of a major charge, there should be a designated hearing room where such charges are heard, in order to allow for privacy and for the hearing procedure to be video recorded.

173. At present, there appears to be no requirement, either in legislation, regulation or policy, that an inmate be provided with the evidence against them prior to a hearing being conducted. In

¹³⁵ CAS Act s.52(2)(d).

¹³⁶ Ibid s.52(2)(e).

¹³⁷ Ibid s.52(2)(c).

¹³⁸ Ibid.

¹³⁹ Ibid s.61.

our view, in order to ensure procedural fairness is provided to the inmate, the evidence against the inmate should be provided in advance of the hearing. That is likely to comprise the charge details (see Section C on charging), the *Inmate Misconduct Report*, any *Incident/witness report*, and any other documents relied upon as evidence of the offence (e.g. copy of receipts for repair of damage to property.)¹⁴⁰

174. We suggest that for major offences, an inmate is provided with the charge and the evidence against them no later than 3 days before the hearing. For minor offences, our suggestion is that the charge and evidence be provided to them no later than 24 hours before the hearing. Both timelines follow the model in Victoria.¹⁴¹
175. We envisage that evidence in these matters will regularly include CCTV footage and as such, the policy should reflect that proper provision of the evidence includes being given the opportunity and means to view any electronic evidence.
176. Legal representation, provision of assistance and interpreters and the ability to examine and cross-examine are all governed by the CAS Act as mentioned above. We do not consider these provisions ought to be changed. The ability to “examine witnesses” implies an ability to call witnesses for that purpose.
177. The hearings of both minor and major offences should continue to be inquisitorial in nature, as opposed to an adversarial system which applies to a hearing before a Visiting Magistrate. At its core, this means it is the duty of the hearing officer to make inquiries to determine whether a charge has been made out. This can include the hearing officer calling witness, asking questions of witnesses called for the inmate and seeking relevant documents or footage. To the extent practicable, officers should assist inmates in their participation in the hearing.
178. We have been asked whether there should be a requirement or an ability for an inmate to provide written statements by the inmate, or from his or her witnesses. This is an area in which flexibility is important and choosing one over the other is likely to lead to unwelcome rigidities. For example, requiring inmates to provide a written statement is likely to disadvantage inmates

¹⁴⁰ See *COPP 14.1* cl.4.8.

¹⁴¹ In Victoria the time, date and place of the hearing are to be provided 72 hours before the hearing: *Corrections Act 1986* (Vic) s.53(1).

who are illiterate or not proficient at English. The ability for evidence to be given in either written or oral form is presently used in New Zealand.¹⁴²

179. At the end of the hearing, the inmate should be able to make any submissions he or she wishes to on whether the offence is to be found proven and, if found guilty, to be able to make submissions on penalty.
180. It is our view that *COPP 14.1* does not adequately explain the hearing process as it currently exists (save for reciting the requirements of s.52 of the CAS Act) and both officers and inmates would benefit from greater elucidation. Any changes should be set out in a revised *COPP 14.1*.
181. Finally, both minor and major offences need to be adequately recorded to ensure that a process of review can appropriately take place. For both a minor or major offence the hearing officer should record in writing a summary of any evidence given or submissions made, the reasons for decision and the penalty (if any). With respect to a hearing of a major offence, the process should be video recorded so that, on review, the evidence can be watched in full.¹⁴³

Standard of proof (Question 1(c))

182. At present, in NSW, all disciplinary charges need to be proved to the criminal standard beyond a reasonable doubt.¹⁴⁴ As mentioned, both the UK¹⁴⁵ and NZ¹⁴⁶ also require proof to the ‘beyond reasonable doubt’ standard.
183. In the ACT the standard for a finding of a disciplinary offence is the balance of probabilities,¹⁴⁷ whereas in Queensland the standard is the balance of probabilities for a minor offence and beyond reasonable doubt for a major offence.¹⁴⁸ In Victoria our best efforts reveal that the standard applied is “reasonable satisfaction” although that is not set out in either the statute or the *COPD*.¹⁴⁹ Our view is that because correctional centre offending is considered as part of

¹⁴² Ara Poutama Aotearoa Department of Corrections NZ, *Prison Operations Manual – Misconduct Hearing and Penalty Policy*, MC.03.04 cl.4.

¹⁴³ This will also avoid having to recall all relevant witnesses in the review.

¹⁴⁴ CAS Act ss.53(1)-(3).

¹⁴⁵ *Prisoner Discipline Procedures (Adjudications)* at [2.5],[3.8].

¹⁴⁶ *Corrections Regulation* (NZ), Schedule 7 cl.33; Ara Poutama Aotearoa Department of Corrections NZ, *Prison Operations Manual – Misconduct Hearing and Penalty Policy*, POM MC.03.05 at [3].

¹⁴⁷ *Corrections Management Act 2007* (ACT) s.192(2)(d).

¹⁴⁸ *Corrective Services Act 2006* (Qld) s.118(1)(a).

¹⁴⁹ It apparently appears in the *Prison Disciplinary Handbook* (which is not available online).

the parole purpose and may have the effect of prolonging a period of imprisonment, the higher standard of proof should apply for a major offence.

184. The Queensland approach appeals to us as most suitable where a distinction is made between minor and major offences: major offences should continue to be established to the criminal standard of beyond reasonable doubt; but minor offences need only be established to the civil standard on the balance of probabilities. In order to effect such a change the different standard for minor and major offences, s.52 of the CAS Act would need to be amended.
185. The lower standard for minor offences is currently used in the Queensland correctional system and we consider that it allows for less serious offences to be dealt with more expeditiously. Naturally, having a lower standard does come with risks, and for that reason, we propose that any finding of guilty for a minor offence cannot be used in other future legal proceedings, e.g. sentencing proceedings, or parole hearings of high-risk offender applications. We propose that this limitation be included in legislation.

Assistance for vulnerable inmates (*Question 1(b)*)

186. In addition to s.52(2)(e) of the CAS Act, which permits assistance to be given to an inmate during the hearing, further clarification is provided at *COPP 14.1* cl.3.6:

3.6 Assistance or representation for inmates during inquiries

If at any time during the inquiry the Governor or delegated officer is satisfied that an inmate cannot understand English, the Translator and Interpreter Service (TIS National) must be used (Refer to *COPP* section 11.1 Language services).

The Manager of the Statewide Disability Services (SDS) must be informed that an inmate requires a support person for inquiries and interviews if:

- the OIMS Disabilities screen provides that an inmate requires a support person for inquiries and interviews; or
- the Governor or delegated officer is satisfied that the inmate cannot sufficiently understand the nature of the inquiry, or is unable to properly represent himself or herself because of a possible cognitive impairment or intellectual disability.

An inquiry must not proceed until the support person has been provided.

187. We see “vulnerable inmates” as those inmates suffering from cognitive impairments or major mental illnesses, First Nations inmates, inmates under the age of 25, LGBTQI+ inmates, and culturally and linguistically diverse inmates.
188. While in our proposed hearing process we accept that there be no legal representation for inmates, we nonetheless still recognise the importance for special assistance to be provided to vulnerable inmates.
189. Vulnerable inmates should be supported to ensure that they fully understand the charges they face and the hearing process. Naturally, each inmate will need to be individually assessed to see if the hearing process needs to be altered to accommodate a particular inmate, but we envisage accommodations to include:
- Support persons to be mandatory for all vulnerable inmate hearings, unless specifically waived by the inmate;
 - First Nations inmates to be supported by a First Nations support officer;
 - The mandatory use of interpreters for all inmates who are unable to adequately communicate in English; and
 - Hearing processes to be altered such as by the provision of breaks during the hearing process, the use of simple language, including diagrams and illustrations, and limiting the questioning of an inmate.
190. The use in Victoria of CISO officers and First Nations support officers, referred to above, is to be commended.

Investigative confinement (*Question 3*)

191. Confinement of an inmate accused and/or charged with a correctional centre offence is not specifically dealt with in the CAS Act but is in cl.244 of the CAS Regulation:

244 Suspected offences by inmates

- (a) A correctional officer or departmental officer who suspects that an inmate has committed, or is about to commit, an offence must report that fact to the governor immediately.

- (b) A correctional officer may confine an inmate referred to in subclause (1) to his or her cell, or in some other appropriate place of confinement, pending instructions as to how the inmate should be dealt with.
- (c) An inmate in respect of whom one or more offences have been reported may be confined under this clause, whether for one or more periods of confinement, for no more than 48 hours in total in respect of those offences.

192. Two limitations are placed on such an ability to confine: first, that the inmate be confined “pending instructions as to how the inmate should be dealt with”,¹⁵⁰ which indicates while other relevant processes occur such as investigation of the offence, reclassification, and placement of the inmate; and second, for no more than 48 hours.

193. The power to segregate is available to a Commissioner and to a governor under ss.10 and 11 of the CAS Act respectively. The former concerns the ability to direct the segregation of an inmate for the “personal safety of any person”, “the security of a correctional centre” or the “good order and discipline within a correctional centre”.¹⁵¹ The latter section provides a similar protective power to hold a prisoner in “protective custody” where the Commissioner or governor is “of the opinion that the association of the inmate with other inmates constitutes or is likely to constitute a threat to the personal safety of the inmate”. Such powers may be delegated by the Commissioner or the governor.¹⁵² We are, as a result, of the view there is a sufficient legal basis for the governor or delegate to confine a person accused of a correctional centre offence.

194. *COPP 14.1* at cl.2.2 further provides the following:

An inmate may be locked in a cell pending adjudication for a correctional centre offence if it is necessary for the safety of persons or the security, good order and discipline of the correctional centre.

The only exception is where an inmate is found in possession of a mobile phone, SIM card, phone charger or any part thereof. In these cases the inmate must be locked in a cell pending reclassification or segregation.¹⁵³

(emphasis added)

¹⁵⁰ CAS Regulation cl.244(2).

¹⁵¹ A similar provision in the *Corrections Management Act 2007* (ACT) allows for investigative segregation in similar circumstances.

¹⁵² CAS Act ss.232 and 233 respectively.

¹⁵³ The reference in cl.2.2 to *COPP* cl.14.2 should be to cl.14.3 which concerns mobile phone offences.

195. Putting mobile phone offences to one side, it appears that the policy is that inmates are locked in a cell pending adjudication for the purposes of the investigation or where it is also “necessary for the safety of persons or the security, good order and discipline of the correctional centre”.¹⁵⁴ Sections 10 and 11 of the CAS Act and cl.244 of the CAS Regulation is a sufficient legal basis for such investigative confinement to occur.
196. One can readily envisage circumstances where other inmates and correctional centre officers might be threatened by the accused inmate being free to be in the general prison community such as where there has been violent conduct. There may be a need to stop the inmate interfering with a search of his or her cell. There may also be a need to stop the inmate from speaking to or intimidating another inmate who may be a witness to the correctional centre offence or an act which may constitute a criminal offence. All of these examples fit within “the safety of persons or the security, good order and discipline of the correctional centre” and cl.244 of the CAS Regulation.
197. However, consideration should be given to Rule 36 of the *Nelson Mandela Rules* which requires that “no more restriction [is justified] than is necessary to ensure safe custody, the secure operation of the prison and a well-ordered community life”. Confinement outside of those reasons would not comply with Rule 36.
198. Turning then to mobile phone offences, cl.1.3 of *Custodial Operations Policy and Procedures 14.3 – Mobile Phone Offences (COPP 14.3)* requires mandatory lock-in for mobile phone offences:
- Any minimum security inmate found in possession of a mobile phone, SIM card, phone charger or any related part must be immediately locked in a cell and managed as a medium/maximum security inmate pending the outcome of a classification/ placement review.
- Any medium or maximum security inmate found in possession of a mobile phone, SIM card, phone charger or any related part must be locked in a cell pending segregation for the good order and security of the correctional centre.
- (emphasis added)
199. Any *mandatory* process will suffer from rigidity and is likely to adversely and unfairly impact an inmate because it removes discretion from the decision as to whether to confine or not for

¹⁵⁴ COPP 14.1 cl.2.2.

the reasons specified. The same arguments which apply to the imposition of mandatory sentences apply here.¹⁵⁵ With a mandatory provision there is no ability to distinguish between an inmate who needs to be confined and one who does not. There is no ability to determine whether, in fact, “the good order and security of the correctional centre” requires such a lock-in. This is likely to have a particularly detrimental effect on inmates who are vulnerable. For example, while cl.4.5 of *COPP 14.1* acknowledges that young Aboriginal men should not be confined alone, there is no such exception for Aboriginal men accused of a mobile phone offence. Further, Rule 36 of the *Nelson Mandela Rules* is likely to be contravened where there is use of a ‘blanket’ confinement provision and the justification set out in Rule 36 is missing.

E. PENALTIES (Question 1(g))

200. We have undertaken a comparison of the penalties imposed for disciplinary offences in four Australian jurisdictions and in New Zealand as requested. Across the different jurisdictions the types of penalties are similar, although the length of some of the penalties are quite different. The penalties imposed in each of the jurisdictions considered is set out in the attached comparative schedule at Annexure B to this advice. We also set out the privileges available in each jurisdiction, which may be withdrawn as a penalty, at the end of the schedule.

Type and severity of penalty

201. While each jurisdiction imposes slightly differently worded penalties, generally the penalties imposed for a finding of guilt can be placed into the following categories:
- a) Warning, reprimand, caution or dismissal
 - b) Withdrawal of privileges
 - c) Cancellation of the right to receive payments
 - d) Fine or payment of reparation
 - e) Confinement
202. There is a degree of overlap between the first category of penalty and alternative dispute resolution or diversion measures considered above. This is both worthwhile and important because such possible penalties should be available at all stages: before charging, after charging and after hearing of the charge. This is already acknowledged in ss.53(2) and 56(2) of the CAS

¹⁵⁵ *Trenerry v Bradley* (1997) A Crim R 433.

Act which permit the decision maker to dismiss the charge or impose a period of good behaviour *notwithstanding* that the decision maker is satisfied the inmate is guilty of a correctional centre offence beyond reasonable doubt.¹⁵⁶

203. As is apparent from the schedule in Annexure B, the biggest variation between jurisdictions comes in the maximum length of time over which privileges can be withdrawn:
- a) in NSW: 56 days (or 90 days if the decision maker is the Visiting Magistrate) and, for a mobile phone offence, 6 months;¹⁵⁷
 - b) in Victoria: 14 days if the prisoner is not charged or, if charged, up to 14 days for a single offence and up to a maximum of 30 days for multiple offences;
 - c) in the ACT: up to 180 days;
 - d) in Queensland: 24 hours for a minor breach and up to 7 days for a major breach;
 - e) in New Zealand: 28 days where heard by a hearing adjudicator and up to 3 months where heard by a Visiting Justice;
 - f) in the UK: 3 days (minor report) or up to 42 days (report).
204. Accordingly, NSW is towards the upper range for correctional centre offences which do not involve a mobile phone and well above other jurisdictions (other than the ACT) for offences involving a mobile phone. In fact, the ACT stands out on its own in that a penalty of 180 days ‘off privileges’ may be imposed for all disciplinary breaches. It is not clear why such a comparatively harsh punishment may be imposed in the ACT.
205. A penalty of confinement to a cell is also able to be imposed in all jurisdictions. The periods also vary between jurisdictions: 7 days (governor or delegate) or 28 days (Visiting Magistrate) in NSW; 7 days in Victoria; 3 or 7 or 28 days in the ACT; 7 days in Queensland for a major breach (and also for a minor breach in certain limited circumstances)¹⁵⁸; and 7 days in New Zealand (hearing adjudicator) or 28 days (Visiting Justice); and 21 days in the UK.¹⁵⁹

¹⁵⁶ The schedule *COPP 14.1* cl.2.2 does not mention that a charge may be dismissed even where proven.

¹⁵⁷ CAS Act ss.53(1)(b), 56(1)(b) and 56A(1).

¹⁵⁸ See *Corrective Services Act 2006* (Qld) s.118(3).

¹⁵⁹ The comparison with the UK is difficult because of the availability of the penalty of imposing additional days onto the prisoner’s sentence.

206. As concerns periods of confinement which may be imposed by the governor, NSW is the same as Queensland and New Zealand and is similar to the ACT. Where imposed by a Visiting Magistrate, NSW is the same as the ACT and New Zealand (28 days) and more than Queensland and the UK.
207. Multiple penalties can be imposed in NSW, the ACT and New Zealand. While s.53(1) of the CAS Act states that the governor may not impose more than one of a list of penalties, some of those penalties are double penalties: reprimand *and* caution, confinement for 7 days *and* withdrawal of privileges.¹⁶⁰
208. Further, we note that for mobile phone offences, s.56A(2) prohibits the imposition of any other punishment under ss.53(1) or 56(1) (such as confinement) where a withdrawal of privileges has been imposed under s. 56A(1).
209. There are also some anomalous provisions when comparing NSW with other jurisdictions. *First*, NSW permits the Visiting Magistrate or equivalent to impose an additional term of imprisonment of up to 6 months on a finding of guilt for a correctional centre offence. The power is not available in any of the other jurisdictions surveyed, other than the UK.¹⁶¹ *Second*, mobile phone offences receive a comparatively harsh penalty in NSW of up to 6 months withdrawal of privileges when possession of a mobile phone in a correctional centre is a criminal offence under s.253F(1) of the CAS Act. That is, it is unclear why such an apparently serious offence is being dealt with as a disciplinary offence. *Third*, in the ACT a prisoner found to have committed a disciplinary offence can be required to perform extra work.¹⁶²

Guidance for the imposition of penalties

210. Sub-rule 39(2) of the *Nelson Mandela Rules* sets out the key requirement for the imposition of a penalty for a disciplinary offence:

Prison administrations shall ensure proportionality between a disciplinary sanction and the offence for which it is established.

¹⁶⁰ CAS Act ss.53(1)(c), 56(1)(c). The Visiting Magistrate is also prevented from imposing more than one penalty but again some of the penalties have two elements: CAS Act s.56(1).

¹⁶¹ The UK has a system of adding set additional days to a sentence for specific offences.

¹⁶² *Corrections Management Act 2007* (ACT) s.184(c).

211. This in large part is achieved by the guidance provided for the imposition of penalties to a governor or delegate by cl.4.2 of *COPP 14.1*:

Before imposing a penalty, the governor or delegated officer should consider:

- the nature and seriousness of the correctional centre offence;
- the nature, seriousness and frequency of any other offences the inmate has committed in custody, including criminal offences (e.g. assault, destroy or damage property);
- criminal history;
- inmate's case notes;
- OIMS alerts;
- inmate's recent behaviour and work history;
- whether the inmate has already lost a privilege as a result of the offending conduct and the imposition of a penalty might be construed as an additional penalty (e.g. the inmate has been transferred to higher security accommodation or has incurred a reduction in wages);
- a lesser penalty for a plea of guilty; and
- any relevant mitigating circumstances.

212. Similar guidance is provided in the ACT and in Queensland. In the ACT, the Second Presiding Officer (who conducts the hearing and imposes penalty) must ensure that the disciplinary action is proportionate to the breach.¹⁶³ Clause 9.7 of the *ACT Detainee Discipline Policy* sets out the relevant considerations in that regard as does cl.9.8.2 of the Queensland *COPD*.

213. However, both the ACT and Queensland provide specific consideration for vulnerable inmates. The relevant part of the ACT policy reads:

9.7 When determining an appropriate and proportionate administrative penalty in accordance with section 9.7 of this policy and section 183(3) of the *Corrections Management Act 2007* (ACT), the Presiding Officer should consider:

a) [...]

¹⁶³ *Corrections Management Act 2007* (ACT) s.183(2).

- b) any disability, mental health condition, or other physical condition that may have been a contributing factor to the breach or which may be impacted by the proposed penalty
[...]

214. In Queensland, the relevant factor is as follows:

9.8.2 Considerations for whether to impose penalty:

[...]

- e) The individual circumstances of the prisoner are taken into account, including any cultural, special needs and cognitive considerations.

215. It is worth reiterating the relevant part of Rule 39(3) of the *Nelson Mandela Rules* here:

Before imposing disciplinary sanctions, prison administrations shall consider whether and how a prisoner’s mental illness or developmental disability may have contributed to his or her conduct and the commission of the offence or act underlying the disciplinary charge. Prison administrations shall not sanction any conduct of a prisoner that is considered to be the direct result of his or her mental illness or intellectual disability.

216. Although in NSW the “OIMS alerts” may provide relevant history of vulnerability factors, this is an indirect method of assessment of vulnerability. It is preferable that the person imposing the penalty consider issues of vulnerability, including mental illness or developmental disability, like in the ACT and Queensland. Inclusion of such a provision in the COPP would comply with the *first sentence* in Rule 39(3) of the *Nelson Mandela Rules*. In order to comply with the *second sentence* of Rule 39(3) it is necessary to prohibit punishment of an inmate where the governor or delegate considers¹⁶⁴ the offending to be “the direct result of his or her mental illness or intellectual disability”.

217. Such consideration should be integrated with the support mechanisms provided throughout the disciplinary process and detailed above.

Confinement as a penalty

218. Confinement of an inmate for up to 7 days as a penalty appears to be a commonly available response for disciplinary breaches across the Australian and New Zealand jurisdictions

¹⁶⁴ Note that the test is not objective but rather based on the Governor or delegate’s satisfaction.

considered.¹⁶⁵ Some issues arise as to safeguards for vulnerable inmates where confinement is being imposed on an inmate as a penalty.

219. As my instructors are no doubt aware, cl.164(1) of the CAS Regulation requires that “an inmate must not ... be subjected to ...solitary confinement”. However, “confining an inmate to cell in accordance with an order under section 53 or 56 of the Act” is deemed not to be “solitary confinement”. That is, where confinement under ss.53 or 56 results in solitary confinement then that is not prohibited under the CAS Regulation.
220. The penalty of confinement to a cell as a penalty for a correctional centre offence is dealt with at cl.4.5 of *COPP 14.1*. Young Aboriginal men are not to be confined to their cells alone (but does not include young Aboriginal women (or non-binary inmates)). For inmates on a Risk Intervention Team (**BIT**) or Immediate Support Plan (**ISP**), “consideration should be given as to whether confinement to a cell is appropriate or an alternative penalty should be imposed”. Accordingly, solitary confinement remains an available penalty in certain circumstances.
221. The *Nelson Mandela Rules* focus specifically on *solitary* confinement (although attention is also given to other forms of such control such as separation and disciplinary segregation). If NSW is to be compliant with the *Nelson Mandela Rules* then care needs to be taken in the context of disciplinary proceedings not to impose a penalty of confinement which, in effect, means solitary confinement. This may occur where an inmate is in a cell alone or a ‘one out cell’. If that were to be the case, then Rule 45(1) of *Nelson Mandela Rules* applies:
- 45(1) Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority.
222. It is apparent that the COPP does not achieve the same standard as that required by Rule 45(1) of the *Nelson Mandela Rules*. Confinement of an inmate alone is a serious step to take and one which would be worthy of specific consideration in the COPP. While prohibition of the confinement alone for young Aboriginal men is laudable, it is likely that a number of other categories of inmate fall into such a category. In particular, those with a history of mental illness, those with a cognitive disability, LGBTQIA+ inmates, and those inmates under 25. Rule 22 of the *Bangkok Rules* goes further and requires that “[p]unishment by close confinement or disciplinary segregation shall not be applied to pregnant women, women with

¹⁶⁵ The UK approach is not directly comparable because of the more common use of imposing days of extension to sentence.

infants and breastfeeding mothers in prison”.¹⁶⁶ For all other inmates “exceptional circumstances” would be needed to comply with Rule 45(1) and, even then, confinement would only be acceptable for the shortest period where confinement means solitary confinement.

223. As we have indicated above, correctional centre offences should be divided between minor and major offences with the former proven on the balance of probabilities and the latter beyond reasonable doubt. Where minor offences are dealt with quickly it is not appropriate to impose a period of confinement in a cell at all or the loss of privileges for a period longer than 7 days. Greater penalties, including confinement, should be considered only for major offences.

Limitations on withdrawable privileges

224. Two privileges which may be withdrawn are worthy of specific mention: contact visits and personal property.
225. Clause 163 of the CAS Regulation sets out those privileges which are “withdrawable privileges” for the purposes of the disciplinary provisions of the CAS Act and which may be imposed. Clause 163 includes as withdrawable privileges “keeping of approved personal property”¹⁶⁷ and “participation in contact visits”.¹⁶⁸
226. Clause 4.3 of *COPP 14.1* addresses the removal of contact visits as follows:

Contact with family and friends is an integral and effective management tool. An inmate’s contact visit and telephone privileges should only be withdrawn as a last resort.

227. That approach to the removal of contact visits as a disciplinary tool appears to accord with Rule 38(3) of the *Nelson Mandela Rules*, which states:

(3) Disciplinary sanctions or restrictive measures shall not include the prohibition of family contact. The means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order.

228. The dangers of removing contact visits for inmates who are vulnerable, including those on a RIT, is addressed in *COPP 14.1* at cl.4.7, and which we support.

¹⁶⁶ Solitary confinement and confinement of children under the *Children (Detention Centres) Act 1987* is not addressed in this advice.

¹⁶⁷ CAS Regulation cl.163(h).

¹⁶⁸ Ibid cl.163(k).

229. In relation to cl.163(h) of the CAS Regulation, we understand from our experience that such a power has been used from time to time to remove personal property such as family photographs, cards and letters. It is our view that such material should be treated in the same way as contact with family and that *COPP 14.1* should include this in cl.4.3 together with the contact related policies.

Recommendations for NSW

230. On the basis of the above, we recommend:
- a) That proportionality between offence and penalty be included in the CAS Act or *COPP 14.1* to reinforce the guiding principle for the imposition of a penalty for an offence;
 - b) That the penalty for a minor offence be limited to the withdrawal of privileges for 7 days and not include confinement;
 - c) That confinement which will effectively cause solitary confinement be prohibited for vulnerable inmates including First Nations inmates, those with mental illness or a cognitive disability, pregnant women, women with infants and breastfeeding mothers, and be otherwise imposed only in “exceptional circumstances”;
 - d) That the penalty for a mobile phone offence of the withdrawal of privileges be reduced from 180 days to 56 days in alignment with violent correctional centre offenders and recidivists;
 - e) That in determining whether to impose a penalty, consideration of the vulnerability of an inmate be considered;
 - f) That the discretion as to whether to confine an inmate accused of a mobile phone offence be restored in the governor or delegate; and
 - g) That personal property such as letters, cards and photographs from family be treated in the same way as contact visits and that this be specified in *COPP 14.1*.

F. REVIEW MECHANISM (Question 1(f))

231. The issue of review of a disciplinary decision under s.53 of the CAS Act was considered in the first advice at paragraphs [62]-[73]. That consideration revealed that the Commissioner has provided for a limited form of the review by the General Manager, Statewide Operations in

cl.6 of *COPP 14.1*. However, the validity of such a review must be doubted in the absence of a legislative basis for the General Manager's (purported) power to "expunge" an inmate's record for an offence. There is, however, a power in the governor or Commissioner to revoke a penalty which has been imposed by the governor or delegate:

53(4) A penalty imposed on an inmate by the governor may be revoked by the governor or by the Commissioner.

232. In this section we set out the review mechanisms in other jurisdictions that we have considered. We then propose that there be a formal review mechanism which will depend on whether the offence found proven is minor or major. As the CAS Act does not provide for review, any such review mechanism will need to be enshrined in legislation. In short, we propose that:

- a) A finding of guilt for a minor offence and the imposition of a penalty be reviewable by the governor;
- b) The imposition of a penalty for a major offence be reviewed by the governor; and
- c) A finding of guilt for a major offence and the imposition of a penalty for such a finding be reviewable by the Visiting Magistrate.

233. We have not considered appeals from the decision from a Visiting Magistrate which are available under the *Crimes (Appeal and Review) Act 2001*.¹⁶⁹

Review in other jurisdictions

234. In Queensland, review of a decision that a prisoner has committed a breach of discipline must be conducted by a corrective services officer (called the "reviewing officer") who holds a more senior office than the deciding officer.¹⁷⁰ The review is done by way of rehearing "on the material before the deciding officer and any further evidence allowed by the reviewing officer".¹⁷¹ Legal representation is not permitted but the person may be assisted "if the prisoner is disadvantaged by language barriers or impaired mental capacity".¹⁷² The review must be

¹⁶⁹ CAS Act s.62(1).

¹⁷⁰ *Corrective Services Act 2006* (Qld) s.119(1).

¹⁷¹ *Ibid* s.119(2)(a).

¹⁷² *Ibid* ss.119(4), (5).

videotaped if for a major offence.¹⁷³ The reviewing officer may confirm, vary or set aside the decision and substitute another.¹⁷⁴

235. In Victoria, s.50(9) of the *Corrective Services Act 1986* (Vic) states that a decision or purported decision of a disciplinary officer under this section “cannot be appealed against, reviewed, challenged or called in question in any court”. Such a privative clause would not foreclose an application for judicial review for jurisdictional error.¹⁷⁵
236. In the ACT an “accused” may apply to the director-general (or delegate) for a review of a decision by a presiding officer of a disciplinary breach in relation to him or her.¹⁷⁶ The power is, in fact, delegated to the Assistant Commissioner Custodial Operations.¹⁷⁷ The Assistant Commissioner must conduct a further inquiry to review the decision on such an application or on his or her own initiative.¹⁷⁸ The Assistant Commissioner may confirm the decision, amend the decision or set aside the decision and make a decision in substitution for the decision set aside.¹⁷⁹ The Assistant Commissioner’s decision may be further reviewed by an adjudicator¹⁸⁰ being a judge or retired judge, magistrate or retired magistrate or a legal practitioner of at least 5 years.¹⁸¹ The adjudicator has similar powers to that of the Assistant Commissioner.¹⁸²
237. In New Zealand if a prisoner is dissatisfied with any decision of a hearing adjudicator, the prisoner may appeal to a Visiting Justice within 14 days.¹⁸³ If the appeal is against the whole case the Visiting Justice must rehear the case and reverse the finding or confirm it, and either confirm the penalty or impose another in its place, if any.¹⁸⁴ If the appeal is only against penalty then the Visiting Justice is to confirm the penalty or impose another in its place, if any.¹⁸⁵
238. It may be concluded that review/appeal mechanisms exist in Queensland, the ACT and New Zealand. The main difference between jurisdictions is who conducts the review. In Queensland,

¹⁷³ Ibid s.119(6).

¹⁷⁴ Ibid s.119(7).

¹⁷⁵ See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 and *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531.

¹⁷⁶ *Corrections Management Act 2007* (ACT) s.171(1).

¹⁷⁷ *Corrections Management (Detainee Discipline – Hearings) Operating Procedure 2023* (ACT) (14 July 2023) cl.6.2 (**Hearings Procedure**).

¹⁷⁸ *Corrections Management Act 2007* (ACT), ss.175(1), (2).

¹⁷⁹ Ibid s.176(1).

¹⁸⁰ Ibid s.178(1).

¹⁸¹ Ibid s.177(4).

¹⁸² Ibid s.180(1).

¹⁸³ *Corrections Act 2004* (NZ) s.136(1).

¹⁸⁴ Ibid s.136(4).

¹⁸⁵ Ibid s.136(5).

the review is performed by a reviewing officer who is a more senior officer than the hearing officer, but not necessarily at governor level. In the ACT the review goes to an Assistant Commissioner and then externally to an adjudicator. In New Zealand, an appeal lies to a Visiting Justice from the hearing adjudicator if the hearing is not being conducted by a Visiting Justice. There appear to be benefits to either route for review.

Suggested new review process

239. The following factors have guided us in suggesting a new review process be instituted in NSW:
- a) The need for independent review of disciplinary decisions;
 - b) The need for a legislative basis for review of such decisions which permits, at law, the setting aside of an impugned decision or penalty;
 - c) To ensure that reviews of findings of offences are made justly, quickly, efficiently and consistently;
 - d) To ensure that review of minor offences and *penalties* for major offences are made justly, quickly, efficiently and consistently by the governor or delegate; and
 - e) That reviews of decisions about major offences are made by an independent judicial authority, the Visiting Magistrate, with appropriate procedural safeguards.
240. As mentioned, there is considerable merit in having a class of offence which is deemed to be a “minor offence”. Such offences are at the bottom end of culpability and may, in appropriate circumstances be dealt with by diversion, reprimand and caution or by dismissal (as discussed above). Where the offence is proven then penalty should be limited to 7 days withdrawal of privileges. The standard of proof should be on the balance of probabilities, reflecting the minor nature of such offending. Further, finding of guilt with respect to a minor offence should be made inadmissible in the determination of parole, sentencing or high risk offender matters. Such a finding could be made by a mid-level corrections officer, above the rank of the person who made the report of offending conduct.
241. The review of a decision that a minor offence has been found should then be conducted internally within the corrections centre. If the governor is concerned about consistency in decision-making, then the decision (or at least some of them) should be made by him or her. Alternatively, the review could be conducted by an officer more senior than the hearing officer.

The power of the reviewing officer should be the same as it is in Queensland and the ACT: confirm, vary or set aside the decision and substitute another if required.

242. Major offences ought to be treated differently because of the more senior penalties available and that any such findings are to be taken into account for the purposes of the grant of parole, sentencing and high risk offender matters. Certainly the hearing officer needs to be more senior than the reporting officer and have been trained in relevant decision making, the relevant policies and the imposition of penalties. Such hearings in our view should be videotaped so that the evidence is available to the Visiting Magistrate charged with reviewing the decision.
243. The review powers of the Visiting Magistrate for a major offence should be the same as for a minor offence: confirm, vary or set aside the decision and substitute another. As legal representation is available before a Visiting Magistrate¹⁸⁶ such a hearing would be conducted in an adversarial manner. The videotaping of the hearing for a major offence will assist with the timely and efficient review of the matter by the Visiting Magistrate. At the review, the Visiting Magistrate would hear both the videotaped hearing and any new evidence adduced.
244. To further aid with efficiency and input by the governor, an inmate should be able to seek review of a decision by the governor *only on penalty* for a major offence rather than endure the delays likely to be necessary in a review by a Visiting Magistrate.
245. We also suggest that the governor or delegate should have ‘own motion’ powers to review either a minor or major offence to ensure consistency and a degree of control over the process. The process in the ACT commends itself to us in that respect.
246. We consider a review by the Visiting Magistrate a viable option as the Visiting Magistrate is already integrated, at least at a statutory level, into the disciplinary. While many of the above suggested changes could be made by a change in policy, legislative amendment would need to be made to ensure:
- That review is available and is lawful;
 - That the identity of the reviewer is specified, including that the Visiting Magistrate has the power to review the decision of the governor or delegate;

¹⁸⁶ CAS Act s.55(4).

- That the hearing is to be by way of review; and
- That the reviewers have the power to confirm, vary or set aside the decision and substitute another.

247. To conclude, we consider that the detailed review processes found in Queensland, the ACT and New Zealand provide an important way in which to independently review decisions about discipline that NSW should emulate. This will help to ensure not just good administrative practice but also one which is both fair and just.

G. RECORD KEEPING (*Question 1(e)*)

248. In the NSW disciplinary process, the CAS Act and CAS Regulation contain specific record keeping requirements that apply once a penalty has been imposed. Record keeping at the earlier stages of the disciplinary process is set out in *COPP 14.1*.

249. Under s.61(1) of the CAS Act, when a penalty is imposed on an inmate in relation to a correctional centre offence, a record must be made of:

- (a) the nature and date of the offence,
- (b) the name of the inmate,
- (c) the date of sentence,
- (d) the penalty imposed,
- (e) any order for the payment of compensation.

250. Section 61(2) of the CAS Act also provides that this record must be kept at the correctional centre concerned. In satisfaction of the s.61 requirements, cl.4.8 of *COPP 14.1* requires that the details of the offence, penalty and any order for compensation must be recorded in the Offender Integrated Management System (**OIMS**).¹⁸⁷ Clause 4.8 stipulates that all procedural documents, reports and other documents relied on as evidence of the offence should be placed in the inmate's case management file. Those documents comprise the *Inmate misconduct report*, the *Inmate Discipline Action Form*, the *Inmate discipline checklist*, "any

¹⁸⁷ CAS Regulation cl.179 further provides that the governor must send a copy of punishment records to the Commissioner monthly under s.61 of the CAS Act.

incident/witness report and any other documents relied upon as evidence of the offence (e.g. copy of receipts for repair of damage to property).”

251. On the presumption that those records are kept and are readily available, in our opinion s.61 of the CAS Act, cl.179 of the CAS Regulation and cl.4.8 of *COPP 14.1* satisfy the record keeping requirements for disciplinary sanctions in Rules 8(c) and (e)¹⁸⁸ and Rules 38(2) and 39(2) of the *Nelson Mandela Rules*.

Other jurisdictions

252. In Victoria, officers are required under cl.5.9.1 of the *Commissioner’s Requirements 2.3.3* to complete all sections of the relevant form with relevant information and detail required. Clause 5.4.11 requires the Hearing Officer to record “adequate reasons” for the disciplinary hearing outcomes and penalties.¹⁸⁹
253. In the ACT, s.199 of the *Corrections Management Act 2007* specifies that the presiding officer must keep a written record of proceedings at the inquiry.¹⁹⁰
254. In Queensland, ss.117(1) and 119(6) of the *Corrective Services Act 2006* (Qld) require hearings and reviews of major breaches of discipline to be videotaped. Clause 12 of the Queensland *COPD* specifies that the recording must be an electronic visual and audio recording, preferably showing all officers in the hearing, but at a minimum showing the prisoner and the hearing officer. Where the recording is suspended, the hearing officer must provide an explanation on camera as to the reason for the suspension.
255. Similarly, in New Zealand, cl.6 of the *Prisons Operation Manual* MC.03.05 stipulates that the person holding the hearing must record in the *Record of Hearing Form* the findings, reasons for the findings, any penalties imposed, and the reasons for imposing those penalties. This form is to be placed in the prisoner’s file and a copy must be uploaded to the OIMS.¹⁹¹

¹⁸⁸ Rule 8 of the *Nelson Mandela Rules* requires that the prisoner’s file should include records of information relating to certain matters, including behaviour and discipline (Rule 8(c)) and the imposition of disciplinary sanctions (Rule 8(e)).

¹⁸⁹ *Commissioner’s Requirements 2.3.3* cl.10.2.

¹⁹⁰ *Detainee Discipline Policy* cl.11.1.

¹⁹¹ Ara Poutama Aotearoa Department of Corrections NZ, *Prison Operations Manual – Misconduct Hearing and Penalty Policy* MC.03, MC.03.07 cl.5.

Reliance on forms

256. We have been provided with examples of completed NSW discipline packages including *Inmate Misconduct Reports*, *Inmate Discipline Action Forms* and *Inmate Discipline Decisions*. These documents appear to be standardised forms which do not require the officer to provide information such as evidence provided at the hearing or reasons for decision. This is a difference with those jurisdictions above where such reasons are required.

Recommendations for NSW

257. We consider that the current reporting requirements could be improved to include reasons for the disciplinary hearing outcomes and penalties and any other relevant action taken (such as diversion). This could be done by an amendment to the relevant forms mentioned above.
258. In keeping with our suggested division between minor and major offence, we also suggest that the forms distinguish between the two types of offence.
259. In addition to information currently required in the procedural forms, the form should also include a summary of the evidence presented at the hearing, reasons for the findings and reasons for any penalties imposed. While we suggest that the requirement apply to both minor and major offences, we expect that any such summary or reasons will be more detailed for major offences. To facilitate the effectiveness of these forms, we recommend following Victoria in explicitly stipulating that all sections of relevant documentation should be completed with relevant information and requisite detail.
260. We also recommend adopting the position in Queensland that major offence hearings should be videotaped as this will allow the reviewer (the governor or the Visiting Magistrate) to know exactly what evidence was provided at the hearing and the nature of the hearing.

H. ELEMENTS GUIDANCE (Question 2)

261. We have been asked to produce elements guidance for two correctional centre offences prescribed in the CAS Regulation. For the task, we have used the offences of “Possession of drugs” (cl.149) and “Physical Aggression” (cl.141) as examples, as they have been commonly charged.
262. We also note that in the materials provided in relation to other jurisdictions, the United Kingdom has produced an elements guidance document for each correctional centre discipline

offence. We think this is a worthy exercise as it creates consistency and certainty for both decision makers as well as inmates.

Possession of Drugs

263. Clause 149 of the CAS Regulation prohibits the possession of drugs by an inmate is a correctional centre offence. The clause provides:

149 Possession of drugs

(1) An inmate must not have any drug in his or her possession.

(2) An inmate does not contravene this clause if the inmate has the drug in his or her possession for use on the advice of a registered medical practitioner, registered dentist or registered nurse given for medical, dental or nursing reasons.

264. The elements of this offence are:

a. An inmate

265. The term “*inmate*” is defined in section 4 of the CAS Act. Without setting out the section here in full, the term is broadly defined and includes persons who are sentenced, held on remand and held under continuing detention orders.

b. Has a “drug”

266. Clause 3(1) of the CAS Regulation defines “drug” as:

(a) a prohibited drug or prohibited plant within the meaning of the *Drug Misuse and Trafficking Act 1985*, or

(b) a substance declared to be a drug under subclause (3).

267. Subclause 3 says:

(3) For the purposes of the Act, each of the following substances is declared to be a drug—

(a) a substance listed in Schedule 2, 3 or 4 to the Poisons List under the *Poisons and Therapeutic Goods Act 1966*,

(b) any derivative of—

(i) a prohibited drug or prohibited plant within the meaning of the *Drug Misuse and Trafficking Act 1985*, or

(ii) a substance referred to in paragraph (a),

(c) any mixture containing a substance or derivative referred to in paragraph (a) or (b).

c. *In his/her possession*

268. Possession should be taken as having custody and control of the drug but does not necessarily require physical custody.

269. In our previous advice, we provided an analysis of the term “possession.” We noted:

For the purpose of determining the interpretation of possession, our view is that it is appropriate to construe the terms of a provision using the word “possession” according to its terms and in light of the way in which that word has been interpreted by the Courts, including within criminal law contexts.

270. The concept of possession at common law is made up of both a physical *and* a mental element. Both are required in order for possession to be established and “possession” in the Regulation imports both elements. As we set out below, this arises from the construction of the word “possession” not because of a presumption of *mens rea*.

271. Possession will be established when an inmate has both actual possession of an item (the *actus reus*) and knowledge of such possession.

272. Physical custody is not the only manner in which possession can be established. Possession can also be established if a person is said to have “exclusive control” of the item. That “exclusive control” need not mean that the person is the only person with control, instead a range of people can be said to be acting in concert and hold “exclusive control” together. In *Moors v Burke* (1919) 26 CLR 265, the Court said (at 217):

Possession is proved by various acts varying with the nature of the subject matter. But exclusiveness is essential. That, of course, does not mean that several persons may not in concert have and exercise exclusive possession as against the rest of the world.

273. We have been asked whether it is sufficient for corrections officers to equate knowledge with possession. In our view, it is not. Having knowledge of an item does not in any way establish custody or control of that item. It would hardly be uncommon in a correctional environment

for ‘Inmate A’ to have knowledge that ‘Inmate B’ has contraband material. However, it would be unsustainable to suggest that the knowledge gives ‘Inmate A’ custody or control of that contraband material.

274. It is also well established that possession also has an inherent mental element. In *He Kaw Teh v The Queen* (1985) 157 CLR 523, Gibbs CJ said of the mental element of possession (at 539):

[W]here a statute makes it an offence to have possession of particular goods, knowledge by the accused that those goods are in his custody will, in the absence of a sufficient indication of a contrary intention, be a necessary ingredient of the offence, because the words describing the offence (“in his possession”) themselves necessarily import a mental element. In such a case it is unnecessary to rely on the common law presumption that *mens rea* is required.

275. The same may be said of the use of word “possession” in the CAS Regulation. That is, knowledge is an element which follows from a proper construction of the term “possession”.

276. The mental element may be established positively (where the inmate says “yeah that’s mine”) or by inference (presence of the object in the inmate’s pocket). Accordingly, mere custody of an object may be sufficient to establish the mental element. In *Williams v The Queen* (1978) 140 CLR 591, Aickin J said (at 610):

It is necessary to bear in mind that in possession there is a necessary mental element of intention, involving a sufficient knowledge of the presence of the drug by the accused. No doubt in many cases custody of an object may supply sufficient evidence of possession, including the necessary mental element, but that is because the inference of knowledge may often be properly drawn from the surrounding circumstances.

277. Having addressed how the common law would construe the word “possession”, it remains to consider the effect of cl.3(2) of the CAS Regulation:¹⁹²

(2) For the purposes of this Regulation—

- (a) a person who has a thing in his or her custody or under his or her control is taken to have the thing in his or her possession,

[...]

¹⁹² It is not apparent why clause 3(2)(a) is coupled with (b) (which concerns relieving another correctional officer) other than because both are deeming provision.

278. The provision is not, strictly speaking, a definitional provision because, unlike clause 3(1) it does not use the words “In this regulation ‘possession’ means ...”. By using the words “is taken to” it is properly construed as a deeming provision.¹⁹³ It is not exhaustive, meaning that possession may occur other than as set out in the sub-clause and the deeming words operate like the word “includes”.¹⁹⁴
279. The question then arises as to whether the deeming provision excludes a need to prove knowledge of possession. We conclude that it does not have this effect because the following words merely elucidate what possession is: “has a thing in his or her custody” and “has a thing [...] under his or her control”. Neither should be taken as converting “possession” into a strict or absolute liability offence where knowledge need not be proven.
280. The effect of the deeming provision is, accordingly, to confirm that possession is not just having custody of a thing but also control of the thing (including without physical custody).
- d. *Without lawful medical, dental or nursing reason*
281. It is our view that the ‘prosecution’ needs to establish that there was no lawful medical, dental or nursing reason in order to make out the offence.
282. Subclause 149(2) creates a lawful justification for the possession of drugs that means an inmate is not guilty of the offence. The provision is generally silent on whether this is an element of the offence or a defence to the charge. That is, does the prosecution need to prove that the drugs were possessed for a non-medical reason in order to establish the offence, or in the alternative, is it to be considered a defence to the charge?
283. The exemption from liability for medical, dental or nursing reasons is contained within the offence-creating provision and this has led us to the conclusion that it is an element of the offence. This feature has been recognised as a tenet of statutory construction. In *Ex parte Ferguson; Re Alexander* (1994) 45 SR NSW 54, Jordan CJ described the rule of construction as follows (at 66-67):

If the offence were defined as consisting of a single concatenation of facts all were regarded as necessary ingredients of the offence, whether they were positive or negative in their nature; but, if the definition were twofold, in the sense that after a definition of

¹⁹³ Perry Herzfeld and Thomas Prince, *Interpretation* (Thomson Reuters, 2nd ed, 2020) at [3.110].

¹⁹⁴ *Re News Corp Ltd* (1987) 15 FCR 227, 235-254; Perry Herzfeld and Thomas Prince, *Interpretation* (Thomson Reuters, 2nd ed, 2020) at [3.120].

the offence there was a distinct and separate provision exempting from liability in a certain event, only the first part was regarded as defining the ingredients of the offence and the second was regarded as a matter of confession and avoidance available by way of a defence.

Physical Aggression

284. Clause 141 of the CAS Regulation creates the offence of “physical aggression”:

141 Physical aggression

(1) An inmate must not assault any other person or incite any other inmate to assault any other person.

(2) An inmate must not engage in wrestling, sparring, fighting or other physical combat with any other inmate.

(3) An inmate must not throw an article, or operate a device from which an article is projected, so as to cause a risk of injury to any person or of damage to any property.

(4) Subclauses (2) and (3) do not prevent an inmate from engaging in any activity as a necessary incident of taking part in training or a contest or other sporting event organised for inmates by an authorised officer.

(emphasis added)

285. This offence can be established through any one of the following five permutations:

- a) An inmate assaulting another person (**assault offence**)
- b) An inmate inciting another inmate to assault another inmate (**incitement offence**).
- c) An inmate engaging in wrestling, fighting or physical combat (**fighting offence**).
- d) An inmate throwing an article to create risk of injury or damage to property (**throwing article offence**)
- e) An inmate operating a device from which an article can be projected that could cause risk of injury or damage to property (**operating projectile device offence**).

286. We consider the first three offences which arise under cl.141 of the CAS Regulation below.

Assault Offence

287. The assault offence is made up of the following elements:

a. *An inmate*

288. The term “*inmate*” is defined in s.4 of the Act.

b. *Assaults another person*

289. As we outlined in our first advice, the common law can assist in determining the interpretation of certain terms.

290. At common law, an assault can occur through non-physical means if the victim, objectively and reasonably, apprehends the imminent infliction of violence.¹⁹⁵

291. An assault can also take place through physical force, where a person intentionally or recklessly causes unlawful force to be applied to another person.

c. *Without consent*

292. Central to either the non-physical or physical assault is that the ‘victim’ did not consent to the act.¹⁹⁶

Incitement Offence

293. The elements of the incitement offence are:

a. *An inmate*

294. See above.

b. *“Incites” another inmate*

295. In *R v Eade* (2002) 131 A Crim R 390, Smart AJ said the following about the term “incite” (at [59]):

In *Young v Cessells* (1914) 33 NZLR 852, Stout CJ, in an oft quoted passage said: “The word ‘incite’ means to rouse; to stimulate; to urge or spur on; to stir up; to animate”. In *R v Massie* [1999] 1 VR 542 at 554; (1998) 103 A Crim R 551 at 564, Brooking JA, with whom Winneke P and Batt JA agreed, said of “incite”, common forms of behaviour covered by the word are ‘command’, ‘request’, ‘propose’, ‘advise’, ‘encourage’ or ‘authorise’. Whether in a particular case what was said amounts to

¹⁹⁵ *Knight v R* (1988) 35 A Crim R 314.

¹⁹⁶ *R v Bonora* (1994) 35 NSWLR 74.

incitement depends upon the context in which the words were used, and the circumstances.

c. *To assault another inmate*

296. See above.

Fighting Offence

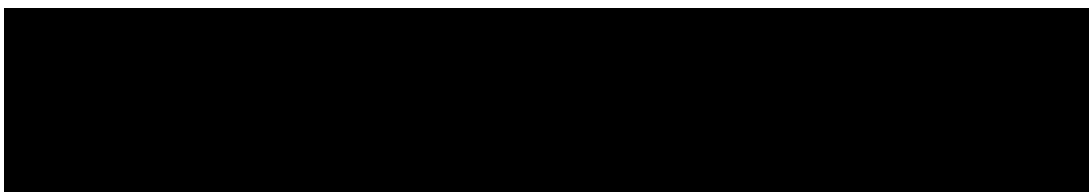
297. This offence contains the same elements as the assault offence but does not require the absence of consent as an element. That is, two people engaging in a consensual fight can still be found guilty of this offence, whereas they cannot be found guilty of the assault offence.

Elements guidance for corrections officers

298. We do not suggest that the detailed nature of the elements guidance above would be suitable for correctional officers who are not legally trained. A simplified version using plain English with examples of application would be appropriate.

I. CONCLUSION

299. In this advice we have attempted to draw out any substantial omission in the NSW correctional centre disciplinary regime revealed as part of a cross-jurisdictional comparison. Considerably more research could be done in that respect but that is beyond the task we have been given. It is hoped that this advice will assist in permitting greater consideration of specific models of correctional discipline in other jurisdictions in our instructors' inquiry into the NSW correctional centre offence regime.



Simeon Beckett SC

Maurice Byers Chambers

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7 December 2023