RIGHTS AND OBLIGATIONS IN A PRISON

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(in collaboration with Australia's Correctional Administrators)

N.B.

This paper was prepared by the author in collaboration with the Correctional Administrators of all States for the Conference of Ministers responsible for Prisons, Probation and Parole. It is intended for discussion only and does not in any way commit the Ministers who have not yet considered it in detail.

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INTRODUCTION

This paper is intended to promote much wider discussion of a subject which has become increasingly critical in our times - the protection of human rights in a prison setting.

Contrary to much of the current debate, exacerbated by special pleading in the media, human rights and dignities in a prison are not always provided for most efficiently by expanding facilities for grievance procedures, exposing the institutions to indiscriminate media surveillance, appointing royal commissions or providing for legal aid on all sides. These are all useful and sometimes very necessary when powers have been abused or rights ignored. It is contrary to the interests of all concerned, however, to overlook the fact that the prison by definition is a very special type of social environment within which prisoners, officers and administrators are thrown together by circumstances not always of their own making or to their own liking. To a great extent they depend upon each other. They fulfil different roles and in given situations each group feels itself misunderstood, neglected and badly treated by society at large and the authorities in particular. Yet, of necessity they spend hours together, sometimes years and they rely upon their human and social inter-relationships (much more than they are sometimes prepared to admit) for satisfaction, security and peace of mind - all of which are related of course to the development of that understanding and consideration which is necessary for the real (as opposed to the purely formal) protection of human rights.

As the various groups which make up this prison community learn to use the media, exploit the law or to flex their industrial muscle there is a progressive and dangerous polarisation; and each group tends to rely more on conflict than on cooperation to get its way and to promote sectional interests. Justice is an elusive mistress, however, and sometimes the benefits obtained may be of questionable value to human rights in general in a prison setting. This is particularly the case if as a result of continuing conflict, conditions and relationships begin to deteriorate. This can happen - even where physical conditions, educational or vocational programmes and the officers' conditions of service are unexceptionable. There are subtle ways of denying rights (or making them not worth having) which cannot be proved or captured by the camera. These can poison the atmosphere in a prison which cannot be faulted for its overt respect of minimum rules.

Moreover, the risks in prison are growing as the prisons are used less for general offenders and more for those who have to be segregated for the security of society - or who are there because there is no other way of expressing the public repudiation of their conduct. With the death sentence abolished or rarely used and with exile or corporal punishment discontinued the prison as a last resort becomes more difficult to administer. There are far more prisoners requiring special attention. The variety and status of inmates and their attitudes to law breaking are different in a society of plural values. Sophisticated drug traffickers with access to funds outside or professional corporate offenders who still have extensive business

interests are only two of the special groups. Psychologically disturbed, homosexual or physically disabled inmates present classification problems; and the risks which a prisoner may run of being attacked by other prisoners has to be a constant concern of those responsible for these institutions. Prison officers too, no longer disappear into uniformity behind their insignia. They differ in the extent of their experience, in their levels of education and training for the variety of special skills which are needed to cope with situations in a modern prison. They too have diverse attitudes to the requirements of their job and they vary in the extent of their industrial militancy.

The study which is presented here was conducted at the request of the conference of Australian State Ministers in charge of Prisons, Probation and Parole. The paper was compiled in consultation with the Correctional Administrators of the several States of Australia and its publication purely for discussion purposes approved by the Conference of Ministers at their Darwin meeting on 5th May 1982. There have been some minor changes to accommodate recommendations made by the Administrators on their reading of the paper before its final submission to the Ministers - and to bring the paper up to date by references to new legislation.

Rights and obligations in a prison setting are in a state of flux as concepts and standards change - giving new meanings to old conditions and procedures. Yesterdays privileges become today's

rights; and ideas on necessities are affected by lifestyles outside. A publication of this kind will date very quickly therefore. What are unlikely to change are the principles involved and the importance of the inter-relationships to which attention is drawn. However inappropriate and in bad taste it may be to refer to happiness in prisons there are indeed levels of minimum contentment and order which all groups in prison know about - and to which they directly contribute by the way in which they prosecute their rights and fulfil their obligations.

THE BACKGROUND

The Victorian Correctional Services had had problems in obtaining indictments under existing laws - particularly after a serious disturbance in Pentridge. The usual legal definitions of riot and tumult did not apply. This collection of incidents reinforced the previous experience of the Victorian Service that, when such problems arose in prisons, the set of circumstances had not usually been provided for by the law. Moreover, staff were not trained to collect the evidence required in a case. In this case tape recordings had been ruled inadmissible and after the disturbance the areas of disturbance had been conscientiously cleaned - thus destroying evidence.

The matter was discussed by the Victorian Director-General of Social Services with the Director of the Australian Institute of Criminology. After a careful study of the files and the legal advice already tendered to the service, it seemed that behind the cases of troublesome behaviour not covered by law or regulations were much wider issues of the extent to which the general laws needed to be augmented in a prison setting. This, in turn, raised issues of rights and obligations for both prisoners and staff. Accordingly, a proposal for a paper on the subject was prepared for the next Conference of Correctional Administrators. This led to the Ministers for Prisons, Probation and Parole considering the matter and eventually approving for discussion the publication of the present paper.

In the discussion with Administrators it was observed that similar problems had been encountered by all States. In New South Wales, for example, the courts had held that "nuisance" as construed in general law did not apply to "nuisance" in the prisons. It could not be used as a "catch-all" offence. Other remarks were made indicating that there was a concern amongst both staff and administrators that the courts might be "falling over backwards" to help the prisoners. It was said that many prison officers were confused and uncertain. In addition to their own interests and the interests of the prisoners, they had the increasing probem of protecting prisoners against other prisoners - a concern spelt out by the Jenkinson Report in Victoria in 1972. The recent demand of the N.S.W. Prison Officers Association that they be provided with detailed and precise instructions for the use of firearms highlighted the problem. This was not only a symptom of the officers' anxiety about being the "whipping boys" to be held responsible when anything went wrong - even if they had acted in good faith and without malice - but it was another clear indication of the legislators' continuing difficulty in defining the variety of situations likely to arise and providing for the balancing of rights and obligations. Moreover some of the issues arising from the extent to which firearms and constraints should be used or searches conducted were related to the levels of physical security provided by the buildings themselves and to the classification of offenders that was permitted by available types of accommodation. These affected prisoners' rights and the public expectations of those employed to be responsible for prisoners.

Further complicating the modern developments in prisons were the changing values and concepts in society itself, the extensions of ombudsman jurisdiction - or evolving disputes as to the precise limits of ombudsman jurisdiction - and the likelihood that prisoners would usually be granted the legal aid they needed to prosecute appeals. Administrators noted that in New South Wales, the recent extension of legal aid to prisoners wanting to air grievances had actually reduced the number of frivolous appeals or applications for relief which had no merit.

A concern emerged in the discussions which had taken place amongst administrators in Perth and Broome that every time an administrative decision was taken, it was likely to become the subject of an appeal. This had a cost implication as well as a management consequence. With prison administrators having to face up to a series of investigations and royal commissions they might have to spend more time justifying past administration than planning future improvements. Carrying this all the way down the line, the whole tenor of prison work was affected. Routine activities became highly sensitive with both officers and prisoners constantly contemplating the possible grounds for complaint or appeal.

THE ISSUES

Whilst in many ways the subjects discussed below are legal and disciplinary, technical and managerial, they go to the roots of all correctional administration. Though they may seem to approach

the prison issues from the administrators' angle they are vital to the enjoyment of his rights by the prisoner himself. For the different groups inside the prison walls cannot be considered in isolation from each other. Administrators obviously have vested interests but they have been in the vanguard of prison reform - as is shown by the Maconochie era in Norfolk Island by Sir Alexander Patterson's creation of Borstals and far reaching reforms in the U.K. and elsewhere - and, above all, by the fact that the present United Nations Standard Minimum Rules for the Treatment of Prisoners were adopted by the U.N. from a draft prepared by correctional administrators who constituted the International Penal and Penitentiary Commission - in 1929!

This paper addresses the fundamental problems of uncertainty amongst prison officers which cannot be divorced from morale. The implications for prisoners are obvious. It is an unsure officer who may press the trigger. He needs either precise instructions or an assurance that if he acts reasonably as he sees it, he will be supported. At present he often has neither the instructions in detail nor the support. The consideration and understanding he might feel justified in extending to prisoners is qualified by his need to act with caution, to avoid misunderstanding, to obviate the possibility of giving grounds for complaint by those above and those below him. The paper seeks to bring into relief the objectives of imprisonment and the ways in which these can best be affected by making training more efficient and directed towards producing a flexible and more confident prison officer who will know when he can expect to have the full backing of the department and the government - and when he can

be held responsible for the way in which he exercises his responsibility. These clarifications are of great importance for correctional administrators in serving to reduce, if not avoid entirely, confusion over the limits of jurisdiction between the general and prison law, between public service and disciplinary requirements, between the ombudsman and the administrators themselves. They discuss for the first time in Australia (as far as can be ascertained) the issue of rights not only for the prisoners but for all those operating within the constraints of prison walls.

There is practically nothing in the realm of correctional administration which does not reduce eventually to the issues to be clarified in this paper. Sooner or later the questions of funds to be provided, the level of accommodation to be sought, the prevention of riots in correctional institutions and the avoidance of industrial disputes, will revert to a discussion of the laws governing behaviour, the rights involved, and the informal balance of interests upon which the order and good government of correctional institutions depends.

Therefore, if this study is followed up by all concerned, it could result in the production of a valuable basic guide on which training manuals and staff development could eventually be based. It would go deeper than the current disputes which arise on rights and which are likely to be settled eventually by the courts. It would be more specific than the United Nations Standard Minimum Rules for the Treatment of Prisoners. It could, if successfully accomplished by the administrators and the Institute, provide a more explicit and valuable framework for the evolution of a variety of correctional policies to meet local needs.

LAW MAKING AND DEFINITIONS

It would appear that a variety of incidents have occurred in the correctional setting which are not covered by either the general law or by the existing Prison Statutes. This is not only because some of the existing legislation is out of date but because of a general improvement of educational standards and media intervention.(1) The linkages between prisoners inside and penal reform movements outside the prisons have fostered a new form of political advocacy and activism capable of stretching the laws and regulations to an extent unforeseen. Provisions for the practice of religion for example becomes extendable to a variety of irreconcilable doctrines in a society of plural values. Freedom to read or see films becomes controversial when pornographic materials are demanded and in considering conjugal visits the question of who is a relative or girlfriend can be argued. Moreover political affiliations cannot be excluded and limits need to be defined. Or again the changes in prison conditons over time have given rise to situations which have legal implications not previously fully appreciated or provided for.(2)

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(1) In the late 19th century the Gladstone Committee gave thought to allowing prisoners the privileges of talking. South Australian prison regulations still permit the control of whistling and singing. Presumably the ways in which noise can be created by the user of modern electronics needs further attention.

(2) E.g. "Prisoners" may be moving about, within the community on work release schemes. Prisoners' property may become a bigger problem than previously envisaged as more scope is provided for prisoners to have their own property in their cells or as they need help to conduct business outside. The prospect of a prisoner being in the outside community is ignored by the U.N. Standard Minimum Rules for the Treatment of Prisoners - because these date back to 1929. A great many difficulties have arisen about whether a prisoner's mail was a right or a privilege and in what circumstances (in the interests of security) it should be opened. The new legislation in South Australia has over three pages of the Statute devoted to "prisoner's mail". It goes into more detail than most prison regulations.

If prisoners acting in concert but still divided into individual cells cannot constitute the offences of riot, tumult or even nuisance in the general law: and if the prison statute (or the regulations made under the statute) are not adequate to cover the serious nature (for prison order and security) of such concerted action, then the criminal law itself needs to be amended. For example statutes dealing with arson, sedition or official secrets provide for aggravations of the offence when it is committed in places of special vulnerability such as shipyards, airports or on ships or aircraft. Maybe prisons could be special areas gazetted - and gazetted areas could be for special offences. It should be possible for the creation of a disturbance in circumstances likely to endanger the community to carry special penalties. And a commotion in prison likely to mitigate security or endanger lives and property could be in the minds of draftsmen when the offence was being construed. The prisons are special places within which ordinary freedoms may need qualification. For example the freedom enjoyed by citizens outside a prison includes a freedom to commit crime. Crime is a cost of freedom on the outside - but it is not a cost which taxpayers intend to provide for when they build prisons.

Again, there are special by-laws for public parks or in school grounds so that if the prisons were to be regarded as special areas justifying special general laws some of the problems now arising could be met.(3)

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(3) There maybe a corollary from the powers which flow in the law of Property to an owner of land or buildings to impose conditions on those who enter onto his premises. Obviously the prisoner is not a free agent but neither are children undergoing compulsory education or people obliged economically to use public parks rather than clubs.

However it should be noted that if laws were to be made for special groups rather than special places there could be complaints because "prisoners" are not always confined in prisons. By the same token, laws for special places may need to distinguish staff or civilian personnel working there from the prisoners themselves.

Whilst every eventuality cannot be anticipated, it is already clear that a review of criminal statutes and the prison statutes (and the regulations made under such statutes) is a continuing obligation with a view to providing more effectively for the variety of situations which have arisen - and which are likely to arise. It requires administrators (and perhaps prisoners) to list the situations for which adequate cover is not provided in each State - and for legal draftsmen to develop model bills to cover the gaps - not in any piecemeal way, but in accordance with general principles common to the States. Then there should be special prison laws with specific offences to provide for situations which cannot now be dealt with. This has been underlined by the recent use of dogs and firearms and the new problems encountered by the ingenuity employed in smuggling drugs into prisons. To what extent can measures be taken to deal with such problems without infringing the rights of individuals?

In providing for this legislation - or amended legislation, the other sections of this paper on rights and obligations will need to be given very careful consideration. In particular, the rights of officers as well as prisoners would have to be spelled out. Also care would be required to distinguish between rights, privileges and amenities. The first cannot be withdrawn for any reason but the other two may be made conditional on good conduct.

(a) Rights, Privileges and Amenities

Mr Downs, in a paper prepared for the N.S.W. Corrective Services Commission, drew a distinction between (a) rights conferred by law or by the irreducible minima of human dignity (b) privileges which he construed as advantages or immunities beyond the common advantages of others and (c) amenities which were pleasurable features of an estate.

In New South Wales, rights may be conferred by the general law, by the Prisons Act or by the regulations made under the Prison Act. All these were inviolable and enforceable in the courts. Prisoners as citizens were obviously entitled to marry, hold property and could bring actions against other persons in the courts. The Nagle Royal Commission Report on the Prisons in New South Wales had declared that prisoners retain all the rights of citizens except those expressly removed by the sentence - and that their way to protect those rights should be by access to the ordinary courts. On the other hand it had been felt that courts' interference with the ordinary administration of the law was undesirable except through such general remedies as habeas corpus, certiorari, mandamus, etc.

Mr Downs had classified the rights of prisoners in New South Wales as:

1. Absolute.

> e.g. Right to exercise, to proper clothing, to food, to classification according to age or sex, to medical attention, to remission, to adequate accommodation. to personal property, to visits, to civil and political rights, to preservation of human dignity and privacy, to protection from other prisoners etc.

2. Discretionary

e.g. Right to work, removal to hospital, purchase of foodstuffs, dental treatment, optical treatment, attendance at religious services, possession of private property, etc.

As privileges Mr Downs had identified things like periodical absences from prison participation in outside activities, the use of the telephone, access to writing materials, postage of free letters. And as amenities he listed the provisions of sports fields and equipment, tennis courts, indoor games, television, etc.

Mr Downs suggested that within the prison there was an implied social contract whereby the prisoner may prosecute his rights through the courts, ombudsman, or other channels within the system and the prison administration may enforce his obligations by giving orders necessary for discipline and if necessary charging him with breaches of prison rules.

A prisoner's obligations could be interpreted as including submission to medical treatment, the surrender of all private property held, submission to searches, keeping the cell and utensils clean, stating as necessary his religious denomination, not destroying the equipment of the cell or damaging the building - and, in general, conforming to the Prison Act and the prison regulations.

Some administrations abroad had introduced into their Acts or into their Prison Regulations Rule 70 of the UN Standard Minimum Rules on the subject of providing privileges to prisoners. Mr Downs

thought that over a period of time privileges might become rights as inmates sought better terms: but, at any given time, the three categories were distinguishable and needed to be as carefully defined as possible so as to avoid confusion or false expectations. The authorities could withhold amenities and privileges as a penalty for misbehaviour. Amenities and privileges could also be used as a reward for good behaviour to induce order and discipline.

(b) United Nations Standard Minimum Rules

Future legislation would need to take into account international standards like the United Nations Minimum Standard Rules for the Treatment of Prisoners. Mr Downs indicated for example that Rule 70 requiring privileges to be provided which would "encourage good conduct, develop a sense of responsibility and secure the interest and cooperation of the prisoners in their treatment "had been incorporated into the legislation of some European countries - but not yet into the regulations in Australia - although the principle was widely applied.

A survey of the United States compliance with the UN Rules (carried out by the American Bar Association's Commission on Correctional Facilities in 1974) submitted to the UN Secretary General showed that whilst the Rules had not significantly influenced the existing prison law and regulations and were in general not used in training or made available to staff and inmates yet their purpose was embodied to a large extent in the laws and regulations. It

emerged that at least 78% of the Rules were fully implemented, 14% of the Rules were implemented in part and another 4% recognised in principle although not implemented.

Compliance with the Rules is not merely an exercise in international respectability but a useful way of determining precise minima which then permits the exercise of discretion without discrimination. The administrators in stressing the need for discretion to avoid the dangers of "working to rule" or always having to worry about the "rightness" of administrative decisions came back again and again in discussion to the usefulness of recognised minimum standards to avoid over-legislation.

Yet there are areas of consideration where, in Australia, the Rules cannot or perhaps should not apply. The Rules themselves are dated - as has been acknowledged by the UN itself: they remain in their present form largely because of the difficulty of obtaining international agreement to changes. Again they are sometimes very general and their import needs to be given a more precise formulation. Thus the Scandinavian countries, the Council of Europe and the Australian Institute of Criminology - with the cooperation of State Correctional Administrators - have worked on adaptations of the Rules to local conditions. In Australia the amendments are still only in the form of a discussion paper.

However construed, there is a need for some recognition of minimum standards in prisons - partly to determine the levels of accommodation, medical treatment, limits of mobility - but also to provide a basis on which inmate-staff relations can be improved and the public given criteria by which to judge the competing claims from interest groups with access to the media. There is a need for clarification on rights lost as well as gained by prisoners. The right to privacy for example is one right which is at least amended by incarceration. A case now pending in Western Australia should soon clarify the High Court's approach to such questions.

(c) The Human Rights Commission

The Australian Human Rights Commission Act 1981 set up the Human Rights Commission which, in addition to being responsible for discrimination on grounds of sex, race, marital status, religion or ethical belief has the task of promoting the implementation of the provisions of the International Covenant on Civil and Political Rights and the provisions in the Declarations on the Rights of the Child, Mentally Retarded Persons and Disabled Persons. Federal Parliament has endorsed their use as points of reference for the Human Rights Commission. Recent High Court decisions and past efforts to obtain a formal, legal Bill of Rights for Australia make it important for prison administrators to be alive to the implications. It is not only denials of rights which give problems but the allegations. Proven or not they take time and already 50 per cent or more of the

individual applications for protection or help under the provisions of the European Convention on Human Rights come from detained or imprisoned persons.(4)

This matter is discussed in more detail in a paper entitled "A Comparative Survey of Recent Developments in Judicial Attitudes Towards Prisoners' Rights" which Maureen A. Kingshott produced in 1977 for a workshop whilst she was a training officer for the Australian Institute of Criminology. Here only a reference to the implications can be made.

Only 127 of nearly 7,000 petitions from individuals to the European Commission between 1955 and 1974 were entertained(5): but the 1975 case of Golder v The U.K. (Council of Europe : European Court of Human Rights, Golder Case - Judgment (Strasbourg) Feb.21, 1975) a prisoner was considered to have a case for having been refused access to a solicitor for the purpose of instituting a libel suit against two prison officers who had reported him for a disciplinary offence during a goal disturbance in 1969.

This case actually demonstrates the dilemma of an undefined area between ordinary civic rights and the conditions in prison which is referred to above. The European Court of Human Rights in the

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(4) Skoler D.L. "World Implementation of the U.N. Standard Minimum Rules for the Treatment of Prisoners: Journal of International Law and Economics Vol. 10 Aug 1975 p.453-65.

(5) Ibid p.477

Golder Case was asked to look at the denial of access to a lawyer to initiate proceedings as a contravention of both Article 6 and Article 8 of the European Convention on Human Rights. Article 6 states that

> "In the determination of his civil rights and obligations .... everyone is entitled to a fair and public hearing within a reasonable time and by an independent and impartial tribunal established by law."

The Court held that there were no inherent limitations on the right of a convicted prisoner to institute proceedings and therefore to have unrestricted access to a lawyer. However a majority of the Court recognised that there might be some limitation to the right of access .... but did not specify what it might be. It was said only that the limitation must not "injure its substance".

Obviously, with this decision, a European Prison Administrator would probably avoid imposing any limitation for fear of "injuring the substance of the right conferred by Article 6". Yet it is not difficult to imagine situations which would justify a restraint. If, for example the right of access was likely to impinge upon the other rights of other prisoners, disrupt programmes or require the extra services of staff not provided for in the budget. The Convention for example says nothing about the timing - i.e. when access should be accorded - because of course, it is a right originally designed for persons in conditions of freedom. Everyone knows what ought to be a "reasonable" exercise of the right to access but the word "reasonable" needs to be carefully defined in a prison setting.

In the Australian context it needs to be remembered that the International Covenant on Civil and Political Rights provides for freedom of thought, conscience and religion (Article 18), freedom of expression (Article 19) and the exclusion of forced or compulsory labour (Article 8). Limitations and exceptions are provided for - but usually only where these are defined by law. This is therefore another reason why appropriate legislation is required to deal with the special situations which arise in prisons. It is apposite that new legislation for prisons in South Australia accords the prisoner a legal right to access to legal aid and legal services, a legal right to a prescribed number of visits and a legal right to allowances.

(d) Ombudsmen

The relationship between the Parlimentary Commissioners or Ombudsmen and prison administrations in Australia is still being worked out. Questions of jurisdiction have arisen and sometimes been settled by Supreme Courts: and though the figures are not easy to analyse for their significance, it is very clear that prisoners' complaints form a substantial - and increasing - proportion of the work of the Ombudsmen in Australia.

Most of the Ombudsmen began their operations in the first half of the 1970's:-

> In Western Australia by the Parliamentary Commission Act 1971-1976 which came into operation in May 1972 providing the Commissioner with the powers of a Royal Commission.
>
> In Queensland by the Parliamentary Commission Act 1974 which was operative on 8 October 1974.

In Victoria by the creation of the office of Ombudsman in 1973.

In South Australia by the Ombudsman Act 1972-4.

In New South Wales by the Ombudsman Act 1974-76 under which an appointment was made in April 1975.

In Tasmania by the Ombudsman Act 1978 which became operative in mid 1979 providing the Ombudsman with the powers of a Board of Inquiry.

The Office of Commonwealth Ombudsman was established by the Federal Government in mid 1977 to deal with complaints about Commonwealth administration.

In a number of states the Ombudsman's powers have been challenged by departments and eventually settled by the Supreme Court but they are still not always very clear.(6) The Ombudsman will frequently ask for comments even when the complaint is about something which could raise questions of jurisdiction. In the Victorian Year Book for 1980 the Ombudsman acknowledges that, at times, Principal Officers of the Departments raise questions of jurisdiction when he

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(6) See Glenister v Dillon (1976) V.R. 550: Prisoners allegations that Crown Law Department had failed to bring them to trial within a reasonable time was not a matter for the Ombudsman since it concerned "a person acting as a legal adviser for the Crown". Booth v Dillon (1976) V.R. 434: Unauthorised statements about a prisoner made by a senior prison officer were not a "matter of administration" and therefore outside the Ombudsman's jurisdiction. Also distinction drawn between policy (not for the Ombudsman) and administration (which is Ombudsman's concern).

writes to them but usually they do not make it an issue and proceed to process the request for an explanation. He then goes on to say

> "Between 1973 and 1979 the most signficant changes in Administrative practices and procedures mainly brought about by the office have been in the Corrective Services Division of the Department of Community Welfare Services."

The effect of processing large numbers of complaints whether justifiable or not is a substantial responsibility for prison administrations. Apart from the time and labour required to provide adequate explanations there is the impact on staff-prisoner relations. The Ombudsman's presence is certainly felt in all penal institutions and his influence on routine actions and decisions extends far beyond the cases he actually deals with. His jurisdiction varies according to the State but usually he is required to give the department an opportunity to settle a grievance by its own routine procedures. In practise he will sometimes intervene before that. Some prison administrators are of the opinion that the Ombudsman has become the de facto policy adviser and the setter of standards in the prison. Some prison officers take the view that he is an advocate for the prisoners and that they are required to explain why they did not do it the way the prisoners wanted. Certainly in one State he has questioned, on behalf of prisoners in some institutions, why prisoners in other institutions have improved conditions - thus raising the issue for administrations as to whether the basic standards for prisoners should be the minimal or maximum. It is significant therefore that the Royal Commission on the Prisons in New South Wales recommended the appointment of a special Ombudsman for the Prisons in that State.

Yet other administrators of prisons feel that it is futile to question the Ombudsman's privileged right to raise issues. They point out that running any bureaucracy in the 1980s is very different from what it was before: and they believe that the Ombudsman's role has to become an accepted part of the prison system. The problem is the time lag because a very different type of prison officer has to be trained to cope with this stressful situation of uncertainty and sensitivity - knowing that his every action can be legitimately questioned.

Logically one might believe that, as standards improve to take cognizance of the Ombudsman's complaints and the other pressures on institutions to give due and proper recognition of human rights, there must eventually come a point at which the justification of complaints will diminish. This however is not the experience of the past few years - because the facility to complain is important to anyone who is detained. Therefore as the Commissioner of Corrections in California once said "It gets worse when it gets better".

(e) Outstanding Complications

In Victoria the Crimes Act up to 1974 prevented prisoners from taking certain action in civil law. When a person went to prison and had an estate which might need care, a curator was appointed. Sometimes the curators were rather less honest than had been expected. In 1979 full rights over their own property was restored to prisoners. In Tasmania a prisoner cannot enter into a contract and for this purpose he uses the public trustee but there are now moves to eliminate this disability. Yet there are difficult or unresolved questions.

Foremost in these areas of resolved conflict is the control of communications. To what extent can the administration read incoming mail or monitor phone calls? Privacy should not be invaded more than is necessary but obviously there is a need to prevent an abuse of such privileges in certain cases. To what extent can the administration question a prisoner on the money which he may be sending out of prison or the information he may be feeding to the media? If prisoners have property rights at what stage do these become applicable to his own mail, to presents which he receives, or to his personal property? The law of bailment is very complicated and the property of prisoners is increasing - as is the amount of personal property he is allowed to keep in his cell. There is a duty to exercise care in Common Law and to act as fairly and honestly as possible in relation to the property held for someone else. But as the problems increase there may be a need to limit liability by law - as is done for inkeepers. In Victoria provision exists for the authorities to dispose of some prisoners' property like liquor or firearms. There may need to be provision for the disposal of unclaimed property after seven years. Clearly the obligations could extend to substantially increase the prison's function as a property custodian with its own stores and warehouses.

The question of legal aid in relation to prisoners may need consideration. If granted on the same basis as to private citizens, does the lack of income mean that it will always be available or are the merits of the case decided on slightly different criteria?

Special problems arise with the movement of prisoners yet it is accepted that parents have only limited rights of appeal when children are classified or moved around at school. The extent to which freedom to choose makes a justifiable difference should be explored.

It will always be difficult for the prisons to provide for what may be accepted as desirable minima. The provision of suitable or even equal accommodation for all is manifestly impossible. The occurrence of peaks and troughs in the way prison conditions may improve or deteriorate with the sentencing policies or the rates of crime have to be taken into account. There was some discussion of whether a sentence when given should include words to the effect that it was a sentence of imprisonment " ... under prevailing conditions". A majority believed however that this was already implicit in the sentence.

Some problems had arisen in South Australia when judges saw fit to sentence offenders to specific prisons - and (in Victoria) to be employed in prisons on special industries. These could be recommendations only. It has been held in Victoria by Mr Justice Kay that classification does not have to operate within the terms of natural justice. It was suggested that courts were unlikely to become involved in such matters as classification if questions of security arose.

There are difference of practice with regard to the Ombudsman. In Western Australia hearings conducted by superintendents

can be the subject of an appeal to the Ombudsman whereas hearings conducted by visiting justices are not. In some States the Ombudsman has a regular day to visit the prisons to hear complaints. In other States there have to be reasons before he comes. To what extent should complaints be solicited? With inmates with a lot of time on their hands this could be important for questions of discipline - and discipline is equally provided for by the UN Standard Minimum Rules.

RIGHTS IN GENERAL

The study which follows is addressing the social, economic and human situation which exists within all correctional systems. It is an artificial complex of formal and informal pressures, roles, rights and responsibilities which is based upon legal rules and operates administratively within the limits imposed by statute and case-law. Civil rights are carried over by prisoners from the outside. On the other hand some of these are modified by imprisonment e.g. rights to freedom of movement, privacy, freedom from search. Apart from rights they receive privileges and amenities in a trade-off for good behaviour. Prison Officers too carry over their basic civil rights modified to some extent by the risks they took voluntarily when they accepted employment. Their rights are extended by their powers but these cannot be exercised in an arbitrary way. An area which has not been covered adequately is that of violations of prisoners rights by other prisoners. There are civilian remedies of course, but the prison setting makes it difficult for evidence to be obtained or for reprisals for complaints to be prevented in all circumstances.

Despite the laws and the legal nature of the enforced groupings within penal institutions, there is a wide measure of discretion which is essential to the functioning of the systems. The several perceptions of the precise meanings of the laws and regulations which establish and govern the institutions are in constant interaction in routine work and daily contacts between inmates and staff. Not all who are involved see their roles and responsibilities in the same way. There are areas for disagreement and even conflict in the exercise or enjoyment of rights, privileges and amenities as well as in the use of discretion.

Apart from the law, there are managerial, resource and disciplinary constraints which structure this social condition in any prison or place of confinement. These legal and extra-legal definitions of the penal situation, intermingled with the psychological, career and even media sensitivities of everyone involved, develop an odd, if not unique, matrix of social inter-relationships among prisoners and between prisoners, prison officers and administrators. It is this interplay of legal, social, economic and psychological factors which shapes the character of each institution, giving rise to patterns of behaviour, hierarchies, rules, subordinate and superordinate roles, an internal market and a whole complex of pressures, status jealousies and expectations which is not always fully understood. Rights and appeals procedures are only a part of this. They are only partially explained in their legal context. They have a significance within the prisons which may be more social and psychological than legal. Sometimes to be conducting such appeals, especially in the higher courts confers status and may lead to modifications of staff attitudes. Tempers can flare when privileges are construed as rights by prescription. And this accounts for the differences of view often exhibited by human rights reformers and the prison administrators on basic standards. It is sometimes a conflict between what is right and what is possible, between individual rights and the collective enjoyment of these in a disciplinary situation.

When union considerations and industrial action are introduced with corresponding appeals to rights and justice, all the complications of a total society are intensified within the small

compass of four walls. The competition, jealousies and struggles for position, or for benefit and recognition are all reflected and heightened inside the controlled confines of a penal institution. Social problems of community interaction which are easily manageable in society outside, are frequently pressure-cooked in corrections to a dangerous degree.

The Loss of Liberty

Obviously imprisonment means a loss of freedom, a deprivation of liberty; and, short of the death penalty, that is the worst punishment inflicted on anyone by a democracy. The severity of imprisonment is spiritually, if not physically more destructive in a democracy than in a totalitarian state, where the choice is often between the prison inside and the prison outside. And this sensitivity to the lack of freedom is nothing new in the history of parliamentary government. A distinguished Chief Justice in the seventeeth century declared:

> "No restraint be it ever so little but is imprisonment"(7)

There was a time when a person convicted of an offence automatically lost his legal rights. At common law, the person sentenced for a felony was in a state of attainder which signified the loss of his property. The prevailing philosophy was that a criminal by his crime had opted out of his contractual status in his society: by failing in his obligations he had forfeited his rights.

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(7) Edward Coke : Institutes : Commentary on Littleton

With legislation similar to that of the U.K. Forfeiture Act of 1870, the confiscation of a prisoner's property was brought to an end: and since then, there has been a steady development of the notion that a prisoner retains all his civil rights. This was reiterated by the Royal Commission on the Prisons in New South Wales in 1978. A prisoner should not lose his civilian rights except to the extent that such a forfeiture is part of the sentence. In New South Wales a prisoner lost his right to vote if sentence exceeded 12 months: steps are now being taken to restore this right. In Victoria prisoners have the right to vote.

It seems that now the principle is firmly established, that just because he has broken the law, the offender is never deprived of its protection. The legal remedy of habeas corpus to challenge the legality of any form of detention of imprisonment has become a venerable tradition, not only in English Law, but in the legal systems throughout the world which are derived from English Law. But never until the past decade have the ramified implications of these legal safeguards been fully appreciated. It has required a revolt of minorities against discrimination, the spread of a world philosophy of human rights, an explosion in literacy and higher education (after the Second World War), a variety of challenges to the "establishment" (fashionable from the 1960's) and the provision of legal aid to all offenders, to bring into public notice the full implications of prisoner protection.

All these movements have combined to provide and even guarantee the full privileges of democracy to every citizen - even to those citizens who are held in prisons or supervised by other correctional services. In fact the minority concern with rights sometimes means these being interpreted in a way which gives the minorities advantages over majorities. Nearly all aborigines for example now have legal aid if brought to court - though this is not usual for the other persons charged. It may be that a prisoner could seek as a right all the time all the facilities he needed to prosecute a claim whereas a person outside still carrying social and domestic obligations may be more constrained. The tendency with prisoners prosecuting their rights may be for courts and authorities to err always on the side of generosity so as to avoid possible criticism. This makes the hard case the norm rather than the exception.

The Elimination of Injustice

Legal concern with the disadvantaged prisoner who usually carries the burden of proof without all the freedom he requires to prosecute his case, has sometimes led to the financial provisions for legal aid and representation or special leave from work being granted liberally. Moreover, the "raised consciousness" about the predicament of offenders in custody developed by prison action groups or human rights organisations, has sometimes provided additional aid, officially or voluntarily to ensure that there has been no injustice or that an injustice is not continuing. In such situations, the case of any individual prisoner may become a general test case, since the

real intention of prisoners' rights groups is to make examples to affect policy - both inside and outside the system. Nor should it be overlooked that an appeal procedure is sometimes understandably valuable to a prisoner, less for its merit than for its significance as a link with the world beyond the walls. It can also be regarded on the one hand as a means of irritating the administration or, on the other hand, as a safety valve necessary to divert pent-up energy and interest in the constrained confines of a penal institution.

The movement to eliminate even an iota of injustice has been given momentum by the way in which criminologists have castigated the prison system in recent years as a total failure in terms of correction or rehabilitation. Lawyers have challenged the philosophy of "corrections" and debunked the established concepts of "treatment" and there is a strong campaign to prevent further prison building and to allow existing institutions to be used only for safe custody or man-management (any programmes being only those of an educational nature decided upon by the inmate himself). This places the institution firmly within the retribution context, the sentence being what he has deserved, the punishment being according to the crime and not differentiated by any number of individual needs.

This retributive approach to corrections obviously formalises in strict law what was once a looser human betterment orientation advocated originally by philanthropists and religiously-motivated reformers in the 19th century. A "letter of the law" interpretation provides increasing opportunities for complaint about situations and

conditions which are considered inconsistent with the limits of the sentence. It extends the scope for regulations to be challenged as ultra vires or unreasonable in the circumstances. This is not to mention the widening range of grievances and complaints available when specialised individual circumstances or needs are taken into account. It may be possible to sentence strictly according to offence, but it is not always possible to provide for exact equality of conditions within corrections: and even when this can be done, their impact on offenders will differ according to age, sex, educational level, health (mental and physical), family circumstances and economic or social background.(8)

However, the prisoners are not the only ones who feel restrained or confined in institutions. They may be the only ones held against their will, but the warders, staff and administrators are sometimes spending more years there. They are often caught between the expectations of society and the prisoners and the freedom of action they once enjoyed is being steadily reduced by the courts, the lawmakers and the media. Even though their liberty is not legally restrained and they work only certain hours of the day inside the insitutions, they are subject to the constraints and pressures of a

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(8) For example, Ombudsmen in some States have received complaints from prisoners in some institutions about the better conditions given to other prisoners in other institutions - which raises inter alia the right of a prison authority to improve on basic minimal conditions where the security situation permits this.

situation which they find frustrating and unenviable. Royal Commissions and Courts have confirmed some allegations of assaults on prisoners by prison officers. They have vindicated other officers wrongly accused. What is not documented adequately is the daily stress on both prisoners and officers of this public scrutiny which can be manipulated as effectively as it can be used to check abuse. A great many situations once taken for granted or left to discretion now need careful and precise definition if staff are to have the confidence to act responsibly. There is a new concern that the authorities cannot always be depended upon for support. Prisoners are subjected to new and frightening pressures from inmates who know how to make the system serve them. Above all the difficulty which prison authorities have to provide satisfying and rewarding work for every inmate adds inevitably to the emptiness and stress. John Van Groningen who was the Superintendent of H.M. Prison Pentridge in Melbourne, recently wrote -

> "At its constructive best, prison is an unhappy place of apathy, loneliness and paradoxically, of heightening tension and inevitable psychological and physical assaults. Custody, by its very nature, requires restraints, restrictions, submission to authority, deprivation of personal privacy, independent judgment, responsibility and initiative".(9)

It is significant that Mr Van Gronigen transferred out of the Prison service. Many other men employed in prisons cannot readily find other work. Following the modern trend towards aggressive unionism, the prison officers protect themselves by their professional associations and there are confrontations not so much with prisoners,

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(9) John Van Groningen "The Other Side of Prison Reform" ANZ Journal of Criminology, Vol. 12, No. 4, December 1979

but with the prison authorities. They too get legal aid to meet allegations of negligence or misconduct, such as arose during the Royal Commissions on the Prisons, which sat in New South Wales and South Australia. Often the provisions for hearing prisoners' grievances are provisions for complaints against the prison service, whilst meetings of prison officers' associations may be at the expense of prisoners who are locked in their cells whilst the meetings are held. For many, this process is one of gradual polarisation which can only culminate in an explosion or a series of them. Some of the requirements and demands are incapable of being met without vast increases of expenditure on prisons - at the expense obviously of public projects for schools, hospitals, roads, railways or houses. Whether to invest in prison improvement to this extent is a political decision with human rights' connotations. Some demands of prisoners and prison officials coincide - for better tools, programmes, transport, literature etc.; but frequently they are in conflict.

There is a sense of isolation in prisons which affects prisoners and staff alike. There is an impression of being forgotton, except on those occasions when a crisis arises. But when there is a crisis the tension grows and the demands of loyalty or self justification make truth elusive: they erode the mutual respect between prisoners and the prison staff on which the reasonable conduct of the prison depends.

Finally there is the self-image and concern for status in the community which affects prisons and prisoners alike. For prisoners, the need for dignity underlies their demands for

consideration. On the other side invidious comparisons are available in pay and conditions of service between prison officers and the police, or between both of these and the rest of the civil service.

It is this broad context that the issues of rights and appeals needs to be considered.

RIGHTS OF PRISONERS - THE CASE IN LAW

N.B. Whilst care has been taken to keep this section of the paper up to date the law as summarised here is changing very quickly and it is difficult to keep the record abreast of court decisions in all States

The executive function of the state is one which is separated from the legislative and judicial functions by the doctrine of separation of powers. But there could never be an absence of intrusion by one or the other in both theory and practice. In the United Kingdom for example the office of Lord Chancellor, combining as it did the functions of chairmanship of a legislative chamber with head of the judiciary contravened the theory of separation even though it may have been respected in practice. In Australia the practice of Attorneys' General appointing judges gave some opportunity to influence judicial action. However in relation to judicial intervention in that section of the administration dealing with prisons there was for a very long time a marked reluctance by judges to become involved.

Chief Justice Sir Samuel Griffith implied in Horwitze v Connor (1908) 6 CLR 38 that the administration of prisons was a matter for prison administrators. This was the construction of the legislation followed in Flynn v The King (1949) 79 CLR 1. Lord Denning in Becker v Home Office (1972) All E.R. 676 at p. 682 was unequivocal:

> "If the courts have to entertain actions by disgruntled prisoners, the governor's life would be made intolerable. The discipline of the prison would be undermined. The Prison Rules are regulatory only. Even if they are not observed, they do not give rise to a cause of action."

This was a passage used with approval by Lord Widgery in R. v Hull Prison Board of Visitors (1978) 2 All E.R. 198 and by Hutley J.A. in Smith v Commissioner of Corrective Services (1978) 1 N.S.W.L.R. 317.

In Arbon v Anderson (1943) 1 K.B. 252, Lord Goddard stated quite clearly the judicial opinion that:

> "It would be fatal to all discipline in prisons if governors and wardens had to perform their duties always with the fear of an action before their eyes if they in any way deviated from the rules."

Yet only the following year in the United States a policy of protecting prisoners rights was declared in Coffin v Reichard (143 F 2d 443 (6th Circ. 1944) which has gathered momentum in that country and has, in the event, quite dramatically brought about the situation there which was foreseen by Lord Goddard: though whether in fact it has been "fatal to all discipline" is a matter of controversy between the proponents of order as against justice or justice against order. In both England and Australia there are hopes of similar, regular, courts intervention even though such intervention cannot yet be brought under constitutional safeguards as in the U.S.

The legal rights of the prisoner in custody were outlined by Mr J.C. Maddison in an address which he delivered to the Biennial General Meeting of the Australian and New Zealand Society of Criminology in Melbourne in November 1971.(10) At that time he was the Minister of Justice for New South Wales.

> "The sentence to a term of imprisonment of a person convicted of a criminal offence does not operate to deprive the person so sentenced of his ordinary civil rights."(11)

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(10) J.C. Maddison "Justice in Corrections : The Dilemma" ANZ Journal of Criminology : Vol. 5 No. 1 March, 1972.
(11) Ibid p. 7

He had one reservation to this statement. The case of Gibson v Young)1900) 21 N.S.W.L.R. p.7 had held that a prisoner may not bring an action against the Government in respect of an injury caused to the prisoner in gaol through the negligence of gaol officials. However, he explained that by ex-gratia payments it was usual for New South Wales to equate an injured prisoners compensation to that of a person entitled to Workers Compensation. And he pointed out that although Gibson v Young had been considered in the Victorian case of Quinn v Hill (1957) V.R. p. 439, when a plaintiff sought damages for negligence by a prison wardress, it had not been followed. It seems anyway that in most states of Australia no case brought on grounds of negligence will be entertained unless malice can be proved.(12)

Of greater importance was Mr Maddison's citing of the case of Cheetham v McGeechan in which, in November 1971 the New South Wales Supreme Court in Equity had held that the courts could review an administrative decision. Mr Justice Street had granted declaratory relief to have a dispute settled regarding a prisoners entitlement to a remission of sentence. So in Kennedy v McGeechan (1974) (unreported) a case dealing with the legality of glass and wire barriers between prisoners and their lawyers, Mr Justice Sheppard operated on the principle that declaratory relief was applicable.

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(12) But see the case of Albert Leone v Commonwealth of Australia Northern Territory Supreme Court No. 122 of 1973 : The reasons for judgement in this case were given in 1976. Leone was homosexually raped whilst on remand in Fanny Pay Prison and succeeded in recovering general damages of about $10,000 for the prison officers' negligent performance of their duties. See also the new South Australian legislation which limits liability only for members of the Visiting Tribunal.

In N.S.W. R. v Fraser (1977) 2 N.S.W.R.L.R. 867 has established that an appeal lies to the District Court from a decision of a visiting magistrate and Re Lawless an unreported Victorian case of 1977 shows the Full Court calling to the jailor to enjoin on him the need to provide certain facilities - in this case for lawyer-client consultations.

However, there has been a notable change in this flow of relief for prisoners in the case of Dugan v Mirror Newspapers Ltd (1979) 53 A.L.J.R. where the full bench of the High Court of Australia held - with only one judge dissenting that the prisoner appellant was deprived of his status to sue for damages (for defamation). Such a common law disability on capital felons serving life sentences is contrary to modern trends and it seems likely that this obstacle will be removed by legislation - probably in New South Wales - but this had not occurred at the time of writing.(13)

In Stratton v Parn and Others (1978) 52 A.L.J.R. 330 the full High Court of Australia allowed an appeal against a lower court of Australia - an appeal against a lower court decision that the procedural provisions of the W.A. Justices Act did not govern the discharge by magistrates of Justices of their function of hearing a complaint against a prisoner charged with an aggravated prison offence under the Prisons Acts of Western Australia.

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(13) Since this was written the New South Wales Parliament has enacted the Felons (Civil Proceedings) Act removing this common law disability. It became operative on 1st January 1982.

Of course, any person detained, since he is not in full enjoyment of his civil rights may apply for legal redress by such order as Habeas Corpus, Mandamus, Certiorari, etc. and has remedies in tort on contract. He could seek an injunction to prevent administrative authorities from acting ultra vires and it appears from the decision by the High Court of Australia in Howard v Jarvis (1958) 32 A.L.J.R. p.40 that the duty of exercising reasonable care for the safety of prisoners under their control which devolves upon the prison authorities in England (Ellis v Home Office (1953) 2 A.E.R. Jacoby v Prison Commissioners (1940) 3 A.E.R. p. 506, D'Arcy v Prison Commissioners (1956) Crime L.R. p. 56) extends to Australia. The use of Certiorari to remedy failures to observe the dictates of natural justice is illustrated by the case of R. v Hull Prison Board of Visitor's (1978) cited above. Here the prisoners punished for breaches of discipline during a prison riot maintained that the Board of Visitors had not observed the rules of natural justice and successfully applied for order of Certiorari. In the event it was decided by the Divisional Court that the Board was not subject to control by Certiorari. This was reversed by the Court of Appeal.

As shown above, many of these avenues of appeal or legal redress which were available to prisoners were available in name only until the advent of Ombudsmen and legal aid. These two provisions have institutionalised a revolution in the relationship between inmates and staff in an institution - and they have been greatly strengthened by recent shifts of emphasis from the rehabilitative or treatment model of prison routine to a more retributive style of

simply providing the management necessary to implement a sentence set by the courts. The more legalised and strictly retributive the penalty becomes the more arguments are likely as to the precise meanings not only of laws but also of regulations. There was some disagreement in discussions between Correctional Administrators on the role of the Ombudsman. Some administrators felt challenged by the Ombudsman and one administrator thought that Ombudsmen were in such a privileged position that they could sometimes act without responsibility.

Ombudsmen, as one Administrator put it, were not sufficiently accountable for the effects of their investigations on the administration. Other Correctional Administrators however seemed to have developed a useful working relationship and it seemed obvious that, in the relationships with Ombudsmen, personalities play an important role. Undoubtedly there has been a tendency in some States for Ombudsmen to pursue grievances by requests for explanations even where these were not strictly within the limits of their jurisdiction to enquire into the administration. Some prison administrations need legal advice to deal with such extensions of jurisdiction. On the other hand the Nagel Royal Commission in New South Wales recommended the appointment of a special Ombudsman for the Prisons.

Prisoners Action groups would maintain that there has been a lack of appropriate legal aid for prisoners and that the ground won so far has been on the initiatives of the individual prisoners with voluntary legal help. They are calling for more legal aid to enable them to prosecute their rights to free association, communication and

to free speech which could imply "transitional rights leading to full political activity". The United Nations Minimum Standard Rules, the Australian draft of Minimum Standards prepared by a Committee convened by Mr C.R. Bevan[14] and the extended use of Ombudsman power plus persistent challenges in the courts to decisions of prison adminstrators and their staff, indicate a clear and pronounced trend towards an increasing involvement of the courts in prison administrations.

It is doubtful if this will go quite as far as it has in the United States where courts are used to protect, in a wide variety of circumstances, the constitutional rights of prisoners. There are protracted court hearings, in a great number of situations, ranging from the right to be active politically and the right to form religious cells, hold services, propagate doctrines, to the question of dignity flowing from the restrictions on communication, searches, privacy etc. The length of time allowed for eating, for taking showers or receiving visitors are also subject to appeal. This is now extended as prisoners' files become available to them as part of the freedom of information legislation. More recently a number of civil actions have been taken by prisoners helped by prisoners' action groups outside and damages have been recovered for the distress caused by the overcrowded or unsanitary conditions in some institutions. One quadraplegic prisoner obtained release and satisfaction because the

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(14) Assistant Director (Training), Australian Institute of Criminology. This Committee was actually appointed by a special seminar on "penal philosophy" organised by the Australian Institute of Criminology in 1976 with the participation of UN, Swedish and Canadian experts, Australian Correctional Administrators, prison officers and representatives of prisoners' action groups.

prison could not provide adequately for his special needs.

But even if the lack of a constitution specifying individual rights means that the process will be slower, it is already clear that Australia will be moving in a similar direction. The concern with prisoners rights in the West is a movement not limited by geographical barriers. Australia now has its Human Rights Commission Act 1981 which goes a step further than many other such bodies by seeking to implement the International Covenant on Civil and Political Rights as well as other international instruments. And the General Assembly of the United Nations has approved the extention of codes of ethics for the prevention of inhuman treatment of prisoners. More pertinently, His Honour Sir Anthony Mason K.B.E., a Justice of the High Court of Australia has recently shown that Australia is likely to go further than the English Courts have done in granting relief in Declarations. Statutes may have to be interpreted - and they do not exclude the equity jurisdiction of the courts. He quotes Viscount Simonds in Pyx Granite Co. Ltd. v Ministry of Housing and Local Government(1960) dealing with a statutary grant of apparently exclusive jurisdiction to a Minister.

> "It is surely proper that in a case like this involving.....difficult questions of construction of Acts of Parliament, a court of law should declare what are the rights of the subject who claims to have them determined."(15)

- which was followed in the N.S.W.'s case of Forster v Jododex Australia (1972)(16) in which the High Court held that

(15) Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government (1960) A.C. at p. 287.

(16) Forster v. Jododex Australia Pty Ltd. (1972) 127 C.L.R., 42.

statutory provisions did not oust the Supreme Court's jurisdiction to grant declaratory relief and that the discretion to grant relief should be exercised. Sir Anthony also refers to the very wide powers to grant injunctions provided to courts by statutes like the Judicature Acts. He argues that these could be generously interpreted.(17)

With this broad exercise of discretion and the creative use of reserve statutory powers, the courts could become much more deeply involved in corrections. Most of the Statutes dealing with prisoners are challengable in the courts - and since it would be prisoners seeking relief it is very likely that they would be accorded a very reasonable hearing.

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(17) His Honour Sir Anthony Mason K.B.E. "Declarations, Injunctions and Constructive Trusts: Divergent Developments in England and Australia", University of Queensland Law Journal : Vol. 11 No. 2 Dec. 1980 pp. 121-132.

THE RIGHTS OF PRISON OFFICERS

Very little has been written on the rights of persons exercising authority within penal institutions. This is partly because their rights whilst they are within the institution are inextricably interwoven with their powers as these are defined by law and by the subsidiary prison regulations. It is also partly because the definition of their rights and powers is both morally and legally limited by the rights of the persons committed to their custody. Thus a prison officer can use handcuffs to protect himself - but only (as a rule) where such a use of handcuffs is not considered an unreasonable or undignified restraint of the prisoner. Generally, regulations provide for a limitation of the excessive use of physical restraints. Similarly a prison officers right (and power) to protect himself by searching a prisoner for weapons is limited by the extent to which such body searches are regarded as demeaning the personality and an intrusion into the privacy and dignity of the prisoner.(18)

Finally the lack of attention paid to a prison officer's rights flows from the fact that whereas his rights as an individual are the same as those of any other person (i.e. the same as those of the prisoners) his rights as a professional officer have never extended beyond the regulations which provide for his conduct and obligations as a public servant working within an institutional environment. This has been true also of his obligations which are

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(18) As this was being written the Western Australian Prison Act 198 (No. 115 of 1981) was being enacted. Section 14 of this Act empowers a prison officer to "issue to a prisoner such orders as are necessary for the purposes of this Act ... and (he may) use such force as he believes on reasonable grounds to be necessary to ensure that his or other lawful orders are complied with".

prescribed by the regulations which govern his work. There are no standards of ethics governing his professional performance: the limit of his responsibilities are defined by the appropriate statute - and the regulations made in pursuance of the statute. The Prison Officers' position differs in different States. In New South Wales, Victoria, South Australia, Queensland and Tasmania he is a public servant, subject to the Public Service Board: but in Western Australia the Minister is the employing authority. Police and teachers on the other hand are not usually brought under the Public Service Board. Victoria is the only state with an integrated Department of Community Services - including corrections. There, the Director-General is the only authority other than the Minister - but prison officers are public servants. The N.S.W. Royal Commission had suggested in 1978 that prison officers should take an oath of office but that the officers' relationship to the Public Service Board should not be changed. Western Australia now requires recuits to the prison service to swear an oath of office. If, however, there needs to be an oath of office should this not carry the privilege of a distinct public service? Victoria is already developing a code of ethics - which of course would exceed the standards imposed on the usual public servant. And, if there are going to be codes of ethics should these not be part of improved professionalism to be discussed with unions?

Rights as an Individual

The prison officer is entitled to the same human rights as any other person - as these are defined in the United Nations

Declaration of Human Rights and in so far as this becomes part of positive law. He has a right to life, liberty and security of person; a right to education, to work, freedom of movement, thought, belief and the liberty to express his opinion. It is sometimes forgotten that the prison officers freedom to form and join his own trade union for the protection of his interests is enshrined in Article 23(4) of the Universal Declaration of Human Rights.

The implications of these individual human rights of prison officers have never been fully explored. Take, for example, the right to life which must surely cover the right to safety and security of the person. Carried to an extreme, such a right could not merely justify a variety of restraints on prisoners but also a variety of types of electronic controls and forms of isolation which have already been categorised as inhuman for prisoners. In the designing of new prisons, individual prison officers have sometimes opted for maximum contact with the inmates but the unions have sought as little contact as possible between the inmate and staff. The question as to what extent a prison officer should be armed - whether he should carry a baton or a gun is, in another sense, the question of how the prison should be built. What kinds of physical constraints in the building itself could obviate entirely the need for the officer to be armed.

At the extreme, there is a confrontation of the rights of officers and prisoners. The risk implied in the relaxation of security for prisoners could infringe the extent of protection to which not only officers but the members of the public generally are

entitled. It is on that basis that the discussion now rages on parole and it has been rendered more acute by experimental evidence that it is not possible to predict dangerousness with any accuracy. It is a debate which has crystallised in industrial action where the interests of prison officers have seemed to have been subordinated to the interests of prisoners.

In the older style of running prisons a calculated risk was accepted when reforms were introduced. Only in this way was it possible to provide for work release, open camps or furlough. When custody is the highest priority and people are alarmed at escapes however the tendency is to read everything according to the strict letter of the law. The officer has responsibility for the body of the prisoner e.g. Sec 14(a) of the Western Australia Prisons Act 1981 makes every prison officer "liable to answer for the escape of a prisoner placed in his charge" and under the new Prisons Act in South Australia a prison officer "may, for the purposes of exercising his powers or discharging his duties ... use such force ... as is reasonably necessary in the circumstances of the particular case". He has to know therefore precisely what is intended by the expression "the reasonable use of force" since he may die if he hesitates - and be charged with brutality if he anticipates at attack too far ahead. Not to act may be dangerous for an officer, but to act, can be dangerous in another way.

He may not be supported in prosecuting his individual rights against prisoners. For example in New South Wales the Commission has

declined to sponsor an action by a Superintendent against a prisoner for defamation. In this connection the media presents difficult problems. Either the brutality image is stressed or as in one case a local cartoonist lampooned the new Youth Institution showing the young people lounging around and being served by the officers. Experience seems to show that the media needs the negative aspects of corrections in order to make news.

Sometimes the enjoyment of his rights by a prisoner depends upon the attitude and conduct of the prison officer - and on the restraint which he can exercise over reactions to what are blatant provocations i.e. What he may conceive as infringements of his own rights and position. Thus the 1972 Jenkenson Inquiry into Pentridge in Melbourne, Victoria observed:

> "In the crowded divisions of Pentridge, prison officers have to bear not only covert violence and threats to prisoners they feel an obligation to protect, the tormenting of the weak, studied insolence to themselves by gesture and demeanour and the disobedience which is nicely calculated to irritate without evoking a formal disciplinary response. There is also the constant apprehension of violence to prisoners and even prison officers themselves from the perception of which the apparently senseless daily mischief may at any time prove to have been a carefully contrived distraction. This is not an environment which conduces to the recognition by prison officers of the moral and legal rights of prisoners."

It could be added that this threatening environment is one which leads a prison officer to take special measures for the safety of himself and the security of his person to which he is entitled. Drawing the reasonable line which avoids this basic officer protection becoming an infringement of the prisoners rights is never easy.

To what extent does the fact that a prison officer voluntarily chose his profession mean that he must tolerate infringements of his human rights to life, security etc? Clearly a trapeze artist voluntarily choosing to risk his life to earn his living cannot be said to be suffering from a deprivation of his inalienable right to life. He and a racing driver or a stunt artist willingly accept the risk for the benefits likely to accrue. Such benefits need not be material: this is illustrated by the climber of mountains "because they are there", by the person who risks his neck in gliding or stunt flying because it provides the excitement he feels he needs. Such individuals exercise their freedom of choice of occupation: they know the risks and they accept them. Yet even they have a right to basic occupational security measures such as the basic servicing of their equipment, the reduction of risk by reliable support services and the carrying of appropriate insurance to cover their families in case of a mishap.

Therefore, the fact that a prison officer freely chose his profession knowing the risks does not deprive him of elementary safeguards. The problem is to define these and to say to what extent they permit the free association of prisoners with risks to the officers involved. Here is a fine balance of interests which at one time was left to prison authorities themselves to determine but which in recent years have been brought to the courts for guidance. In the past there have been beatings of prisoners by prison staff in the interests of preserving the discipline which officers consider to be one of their best safeguards in a prison setting. Thus the Prison Officers Branch of the New South Wales Public Service Association told

the Royal Commission set up to enquire into the Bathurst riots and the prison system of New South Wales generally that:

> "The Association is strongly opposed to the improper use of force against prisoners. At the same time, the Association recognises that on occasions the use of force may be necessary to ensure that discipline is maintained within the prison system."

There seems little doubt after all the inquiries and Royal Commissions that beatings will never be condoned - even if intended to make recalcitrant prisoners amenable to discipline: but the dilemma does not end there. Force sometimes has to be used - not only against prisoners but sometimes for their own protection. It has in the past been sufficient to define justifiable force as that which may be considered "reasonable in the circumstances". What is to be regarded as reasonable however, differs in different places and at different times. Lawyers and the courts may take months of deliberation to decide the justifiability of an action which the officer himself had only minutes, perhaps only seconds to decide upon. Obviously self-defence would justify a considerable degree of force but the initial peril has to be determined with some accuracy and this is not always possible. What an officer divines as a prisoner's purpose may not be illustratable by evidence until the officer himself is either dead of critically injured. That the prisoner was frustrated in his violence or counter-attacked may easily be presented as a relatively unjustifiable and unprovoked attack by the officer himself - especially if the only witnesses were other prisoners.

Then there are less obvious consequences for prison officers of their responsibilities in the institutions. Sometimes having acted

reasonably in the use of force and perhaps caused the death of a prisoner, an officer may have to undergo the agony of an inquiry. Even if vindicated by officialdom he may be in no condition to continue in his employment. There have been several cases of nervous breakdown. The tendency is to have little sympathy because a person has been killed: but often the scrupulous officer will be his own worst tormentor - and become a nervous wreck. Thus in one Queensland case a Coroner found that the officer who discharged a weapon not only acted lawfully but would have been guilty of an unlawful omission if he had not fired. But the officer who had seen military service in war and was not squeamish was so shattered by the experience that he had to be retired.

It is very clear that despite commendable initiatives in the training of prison officers they frequently do not know the objectives of the prison system. Experienced observers have indicated a discernible gap between the objectives of the department and the prison officers "gut feeling". Officers are often unsure of when they will be supported by authority and scared of having to defend their competence. This can have disastrous consequences when officers have different interpretations. For instance when a dangerous prisoner has to be escorted to hospital, should he be handcuffed to the bed or treated more like a patient. In one case where two officers differed in their interpretations the offender, a murderer, escaped and killed two more people. Disciplinary action was taken but the officers complained about the lack of strict guidelines.

To cover themselves for unforeseeable circumstances the

officers usually demand precise instructions. It is human that they should wish to transfer responsibility to those who draft the orders but so much is difficult to provide for in laws and regulations. Training courses can cover only so much and it is evident that as relationships become more complicated in the prisons an officer has to be part psychologist, part lawyer, part policeman, part counsellor and has to learn to control his own normal reactions under provocation - as forebearingly as any monk. It is going to become increasingly difficult to recruit such paragons of virtue and ability or to keep them in the prison service since they will be in demand outside. It is because they cannot be found easily that there is such an emphasis on the need for precise written instructions.

Yet an administrator who spent a full year consolidating all the rules and regulations in a prison felt confused in the end and was eventually convinced that, in every institution, the system works not by rules but by the climate or order which is maintained by an informal structure of prisoner power. With this, all the regulations in the world cannot succeed. The protection of officers may not therefore be a question of precise rules or guidelines, but a case of promoting an understanding between staff and inmates.

The reason the rules become important is the possible Ombudsman or Royal Commission inquiry or the court procedures which follow an incident. Then the officer who acted conscientiously has to feel that he acted properly "according to the rules" and he looks to the rules for his justification. The looser they are, the more vulnerable he may become: yet the tighter they are the less scope

there is for the discretion necessary to obtain the best use of the informal structure in an institution.

It is because of this problem of determining intentions, getting evidence of objectives and proving justifiable force that, in many prison systems, direct personal confrontation is avoided by staff fearing that their actions may be misunderstood and/or misrepresented. This has enhanced the significance of remote physical controls. Control panels for locks, T.V. cameras, meal services and even supervised recreation have avoided the direct personal contact which could give rise to instances of force difficult to avoid becoming equivocal. By the same token such remote control is being held to be inimical to the best interests of the prisoners themselves. An electronic regime can become a kind of isolation for the prisoner submitting him to the "cruel, inhuman and degrading treatment or punishment" forbidden by the Universal Declaration of Human Rights. Thus in Western Germany as the security isolation of the members of the Baader-Meinhoff gang was intensified (to guard not only against escape but against all kinds of dangerous communication with the outside world) the criticism mounted (and still continues) that these offenders, admittedly dangerous, were, by their control and isolation, being subjected to the equivalent of a punishment of sensory deprivation, that they were too seriously penalised by being cut off from the normal "prison culture".

Nor has sufficient attention been paid to the fact that Article 19 of the Universal Declaration of Human Rights applies both to prison officers and to prisoners. This guarantees everyone's

freedom of opinion and expression including the right:

> "to seek, receive and impart information and ideas through any media regardless of frontiers."

In no society can such rights be absolutely guaranteed. Free speech does not mean freedom to shout "fire" in a crowded auditorium and so cause a panic which may lead to death and destruction. One cannot use one right to destroy another - in this case the right to life. A prisoners exercise of the right to freedom of expression must be limited when it may destroy the discipline of an institution and probably endanger lives inside and outside. But in practice there are far more restraints placed, as a matter of discipline, on the officer's right to expression than on the rights of the prisoner. This is appropriate to a situation where one person is instrumental in restricting the freedom of another: but it was never intended to guarantee a prisoner's freedom to use unlimited vituperation to an officer. If the discipline of an institution requires restraint on the use of insulting words and behaviour this applies to everyone in the institution and not just to those who are hired to work there. Any other interpretation of this rule must have negative implications for discipline.

Access to the media should again be a right guaranteed with an even hand. If this means falsehoods can be propagated to any one side, the other side should have a right of reply. But usually media reports are not tempered by a full account of the conflicting accounts. If incidents in prison are to be put on what amounts to public trial then it is not only what a witness says but his claim to

credibility which has to be taken into account. This, in a court of law, would mean a full exposure of criminal records. But this is not usually possible in a prison situation which probably means that prison officers need not only the right of reply but protection from falsehoods which they may not be able to refute without reference to criminal records. Conversely prisoners should not be disadvantaged by their subordinate position in prisons and should be able to take advantage of any facts which reduce the credibility of an official witness.

The human right to education generally provides for a range of facilities for prisoners to improve their minds and develop their economic position outside. To keep a climate of understanding and mutual sympathy within prison institutions such facilities should also be available to prison officers who wish to use their own time to take advantage of them. This applies not only to general educational improvements but even for specialised instruction in vocational training. Similarly, it is sometimes forgotten that the counselling offered to prisoners would not be lost upon some of the prison officers who may be struggling with unfamiliar roles and responsibilities. In other words, within the prison institution it might be wise to recognise the rights of all by distributing privileges to staff and prisoners alike - if only to avoid the reaction to what may appear to be discrimination by society.

This does not exhaust the implications for prison officers of their rights under the Universal Declaration of Human Rights. There is a great deal more to be written. But sufficient has been

developed here to indicate the importance of bringing the prison officer within the general context of rights within a penal institution. He is not a robot, he is not a simple agent of the authorities. He is not only a power to be trained and restrained - though these approaches have their own value. He is a human being who has rights which cannot be ignored because he happens to be a prison officer.

Civil Rights

A person working as a prison officer is not denied the civil remedies available to any member of the public for wrongs which he feels have been committed against him. He has actions for damages for negligence, slander, defamation assault and breach of contract against the authorities which employ him as well as against fellow officers or inmates who have infringed his rights in law.

Legal aid may help to increase the number of such action in the years to come, making it as necessary for the authorities to pay the same attention to the rights of their officers as to the rights of inmates.

An officer will perhaps be more reluctant to bring an action against a prisoner, not only because the relative positions of power and powerlessness may make it difficult to substantiate an action but also because the damages may be impossible obtain from a "man of straw" as most prisoners are likely to be.

If, however, civil actions against prison officers by prisoners increase it may be expected that, in time, prison officers will have recourse to remedies in civil law - if only to obtain declaratory judgements or perhaps injunctions. It may become necessary for there to be adjustments to the civil law to enable such actions emanating from behind the prison walls to become meaningful for both officer and inmate. And the effect of a proliferation of such actions may help to shape management policy.

Rights Flowing from Authority

The precise rights and obligations flowing from his position as a prison officer are clearly stated in the particular statute and the subsidiary regulations. These differ in different states but there is an underlying similarity. Across the world the moral precepts behind these regulations are set out in the United Nations Standard Minimum Rules.

1. U.N. Standard Minimum Rules for the Treatment of Prisoners

It is not generally known but these universally accepted minimum standards for the treatment of prisoners, these basic principles recognised today as protecting the rights of the prisoner were actually devised and codified by prison officers - if this term "prison officer" can be construed widely enough to include prison administrators. These United Nations Rules are derived from the 1929 Minimum Standard Rules for the Treatment of Prisoners drawn up by the International Penal and Penitentiary Commission - an inter-

governmental organisation of prison administrators founded in the 1870's with the general purpose of penal reform.

They were revised by the I.P.P.C. in 1949 and adopted by the United Nations in 1957. They are not intended to prescribe a model system for a prison. They simply seek:

> "on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions."

The underlining above is not in the original text. It is added here to make the point that these Rules compiled by the then prison administrators are little more than an amalgam of the Prison Rules then existing in the United Kingdom, France, Belgium and the Federal Prison System of the United States.

Whilst these Rules do not prescribe rights for prison staff, by setting down basic principles of management such as;

(a) the keeping of records;

(b) the separation of ages, sexes, convicted and unconvicted, civil and criminal offenders;

(c) individual cells or the night supervision of dormitories;

(d) sanitation, cleanliness;

(e) nutritional food;

(f) exercise and sport for offenders;

(g) medical services etc;

they prescribe basic work conditions for the staff as well as the

offenders. They prescribe as it were the tools for the job. Furthermore it is frequently overlooked that these Rules specify that;

> "Discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life."

Viewed in this way discipline is a recognised requisite of both safe custody and well-ordered community life. It is not needed for its own sake but for its shaping of the style of life of the prison community. In exercising discipline then the staff are not abusing their authority but laying down the ground rules. The question of excessive discipline is presumably decided by the criterion of whether it is necessary for safe custody and well-ordered community life.

These Rules also confirm the prison officer's formal exercise of his authority by specifying that his authority cannot be shared with prisoners:

> "No prisoner shall be employed in the service of the institution in any disciplinary capacity".

Above all the United Nations Standard Minimum Rules for the Treatment of Prisoners provide in a special Annex "Recommendations on the Selection and Training of Personnel for Penal and Correctional Institutions" which describe the personnel as not merely "guards" but as "members of an important social service demanding ability, appropriate training and good teamwork". This Annex calls for more specialists who will however, follow a "coordinated approach". It

protects the civil service status of prison officers, calls for their appointments to be full time not part time, recommends conditions of service that will "attract and retain the best qualified persons", enjoins upon the authorities the responsibility that higher posts will only be given to persons with the appropriate training and experience and that the staff recruited will have access to continuous programmes of staff training. The Prison Officers' Union could do much worse than adopt this Annexe as specifying the rights of prison staff: it is not intended for this purpose and was to serve the needs of management - but it is amenable to reconstruction in a way which would suit the best interests of prisoners as well as prison staff.

2. The Statutes and Regulations

Each state will have a statute governing its prisons. This will lay down the basic legal conditions under which imprisonment is to be provided and served. Indirectly such statutes protect staff by providing them with the right to help draft the regulations (often defining disciplinary offences - including those against prison officers). For instance the Victorian Regulation No. 25 redrafted in 1974 lists disciplinary offences which include offences such as:

(a) assault or threat of assault on any prison officer or prisoners;

(b) making false or malicious allegations against an officer;

(c) failing to obey an officer's lawful order.

One writer has argued that these regulations are often too numerous, out of date and not readily available to prisoners. This,

if true, is hardly likely to conduce to their being useful as protective instruments for prison officers. There is probably a case for the redrafting of regulations in such a way that they are simplified yet cover the needs of the modern situation in prisons especially as to the collection of evidence and the precise interpretation of terms like "a lawful order" or "maliciously". These have given trouble to the best legal minds in the past and the experience already available in the court reports could be profitably used to avoid uncertainty in a prison setting. Properly constructed and used there are ways in which the Prison Regulations could embody the best of the United Nations Rules and provide for all the professional rights that a prison officer may be entrusted with.

In the past, prison rules have often been conglomerations of prison discipline, staff regulations and administrative directions. The growing complexities of prison administration over the years have made this practice inappropriate and N.S.W. (for example) is moving to distinguish different classifications of Rules made under the Statute, some of which are for internal administration only. In that State, each individual prisoner is expected to sign for a document called "Rules of the Prison" - and for any subsequent amendments - so that he knows which Rules apply to him.

When this has been done, however, it has to be recognised that the protection of individual rights enshrined in our legal system means, at all times, an obligation on anyone exercising authority and power to work strictly within his terms of reference. If this means strictly working to the book then the book has to be detailed enough

to provide for an array of situations which, in earlier periods of penal history, would have been left to the administrator's discretion. It would appear from experience with a variety of statutes that however detailed the laws, there will always be scope for discretion. Anyone exercising authority must be wary of acting ultra vires. His authority in a society like ours has of necessity to be strictly defined: and he can do only what he has been authorised to do. At this point, no matter what he may feel his professional rights to be, he is always vulnerable. It will be, in a democracy, a part of his duty to be vulnerable: because only in this way can abuses of power be discouraged before they happen: and checked when they occur.

A Statement of Prison Officers Rights in N.S.W.'s

For the purposes of this paper Mr K. Downs of the N.S.W. Corrective Services Commission prepared the following statement of Prison Officers Rights in that State. No doubt a similar statement could and should be made for all other states.

RIGHTS AND OBLIGATIONS OF PRISON OFFICERS IN NEW SOUTH WALES

PRELIMINARY

Section 7 of the Prisons Act, 1952, provides that the Corrective Services Commission of N.S.W. shall, subject to the Act and subject to the direction of the Minister, have the care, direction control and management of all prisons.

Certain of the powers, authorities, duties and functions of the Commission may be delegated. (Section 48D).

Section 40 of the Act provides that every governor of a prison shall have the charge and superintendence of the prison for which he is appointed and he shall be liable to answer for the escape of any prisoner from his custody whenever such escape shall happen by or through his neglect or default, but not otherwise.

For management purposes, the duties and responsibilities of prison officers attached to each post in a prison are defined.

RIGHTS

Civil and political rights enjoyed by all citizens. As an employee under the Public Service Act, 1979, such rights as are enjoyed by all officers under the Public Service Act and the regulations made thereunder, in relation to conditions of service, promotion, salary, leave, training, etc.

Workers Compensation.

To give lawful orders to prisoners for the purpose of securing the enforcement of observance of the provisions of the Prisons Act and Prisons Regulations. (Section 23 (q)). To maintain discipline in accordance with the provisions of the Prisons Act and Prisons Regulations.

To use force in accordance with the guidelines in the Prison Rules (Rule 4).

To use firearms in accordance with the Regulations. (Part XVIII)

OBLIGATIONS

To give effect to the provisions of the Prisons Act, the Prisons Regulations and the Prison Rules (Section 31). To implement and to give effect to the aims and objectives of the Corrective Services Commission of N.S.W. To exercise in a lawful manner all powers, authorities, duties and functions delegated to him.

PROTECTION

Section 46 of the Prisons Act provides that -

> "No action or claim for damages shall lie against any person for or on account of anything done or commanded to be done by him and purporting to be done for the purpose of carrying out the provisions of this Act, unless it is proved that such act was done or commanded to be done maliciously and without reasonable and probable cause."

Clause 15 of Schedule 3 of the Prisons Act provides that -

> "No matter or thing done, and contract entered into, by the Commission, and no matter or thing done by a Commissioner or by any other person acting under the direction or as a delegate of the Commission or the Chairman shall, if the matter or thing was done, or the contract was entered into, in good faith for the purposes of executing this Act, the regulations made under this Act or the prison rules, subject a Commissioner or person personally to any action, liability, claim or demand."

Western Australia

The 1981 Prisons Act of Western Australia was enacted whilst this paper was in the course of preparation. Section 14 deals with the Powers and Duties of Prison Officers and it reads as follows:

"Every Prison Officer -

(a) has a responsibility to maintain the security of the prison where he is ordered to serve;

(b) is liable to answer for the escape of a prisoner placed in his charge or for whom when on duty he has a responsibility;

(c) shall obey all lawful orders given to him by the superintendent or other officer under whose control or supervision he is placed; and

(d) may issue to a prisoner such orders as are necessary for the purposes of this Act, including the security, good order or management of a prison and may use such force as he believes on reasonable grounds to be necessary to ensure that his or other lawful orders are complied with."

With respect to searches, Section 41 reads:-

"(1) A prison officer may, if so ordered by the superintendent search a prisoner and take from him anything found on his person

(a) which apparently was not issued to him with the approval of the superintendent;

(b) which has been retained by him without the approval of the superintendent; or

(c) which, although issued or retained with the approval of the superintendent, appears to the superintendent to constitute a threat to or breach of the security or good order of the prison.

(2) A prison officer may use such force as is reasonably necessary for the purpose of performing his duty under Sub section (1)."

Then Sub section III provides that

> "No action or claim for damages shall lie against any person for or on account of anything done or ordered or authorised to be done by him which purports to be done for the purpose of carrying out the provisions of this Act unless it is proved that the act was done or ordered to be done, maliciously and without reasonable and probable cause."

Sub section 114 deals with any refusal or failure of a prison officer to carry out or perform any or all of his or their duties under the Act - and provides for pay to be withheld by application to the Western Australian Industrial Commission.

South Australia

South Australia's new 1982 legislation for the Prisons appears to invest the Permanent Head of the Department with all the powers necessary and Section 7 permits him to delegate. It is a superintendent who may cause a prisoner to be searched and whereas Section 87 specifies that

> "Subject to this Act, an officer of the Department or a member of the police force employed in a correctional institution may, for the purposes of exercising his powers or duties under this Act, use such force against any person as is reasonably necessary in the circumstances of the particular case".

Section 37(3) relating to searches provides that

> "The person carrying out a search pursuant to this section may only use such force as is reasonably necessary for the purpose".

There appears to be no limitation of liabilities in the draft bill which was available at the time this paper was written - except

for section 42 of the Bill which provides for immunity from liability of persons who constitute Visiting Tribunals. They are protected in ways similar to the examples given above from New South Wales and Western Australia but unlike these other states, only members of the Visiting Tribunals are covered.

THE RIGHTS OF PRISONERS AGAINST OTHER PRISONERS

Clearly the rights of prisoners against authority will be protected and they will bring such complaints as they have against officers before the various tribunals: but for a long time now there have been known to be abuses of a prisoner's rights and dignities perpetrated by other prisoners. Homosexual rapes are common - and in one case in the Northern Territory a person on remand successfully sued the authorities for neglecting to prevent him being homosexually raped whilst remanded in custody. It was significant that he did not sue the offending prisoners for assault - presumably because they were "men of straw".

In effect there is a reign of fear in any prison generated by the most powerful who can punish physically other prisoners who are likely to inform upon them - even for deliberate and vicious personal attacks. Unless a prisoner dominates this controlling clique or at least is a member of it he is deprived of the basic rights and elementary freedoms which he would have as an ordinary citizen - and he is exposed to risks which he was able to avoid before he went to prison. In effect he is being punished twice - once by being incarcerated and once more by being subject to this ruthless internal regime of terror.

Obviously there are implications for prison administrations. They have an obligation to prevent such risks and violations of rights: but to do this effectively they would not only have to redesign buildings and employ more staff - they would need to intrude more significantly into a prisoner's rights to privacy, communication,

mobility and personal dignity (e.g. policing the showers, inspecting cells at night. curtailing freedom of movement). Perhaps in no other area of prison administration is there such a need for a balancing of standards and rights in accordance with principles which courts can recognise as being fair to all concerned. If not all the prisoner's rights to the inviolability of his person can be protected for 100 per cent of the time, the limitation of the risks he should run need to be spelled out.

The importance of this right may be illustrated by the fact that it was given considerable attention by the assembled delegates at the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders meeting in Caracas, Venezuala in August/September 1980. There, when standards in prisons were being considered, an impassioned plea for the protection of prisoners from other prisoners was made by a private observer attached to the Canadian delegation. He provided horrifying information about the treatment of prisoners in American prisons who had refused to take part in organised riots. Many of them had been fearfully mutilated or suffered indescribably cruel deaths at the hands of other prisoners before the authorities could restore order. And, of course, no evidence was available to allow the authorities to bring anyone to trial for the atrocities.

It is quite clear therefore that too little attention has been paid to this aspect of human rights and the prevention of torture - possibly because these are the very rights for which the victims have no remedy unless they can be sure of protection during and after

the whole period of their sentence.

Whilst it would be possible here to spell out the rights of prisoners against other prisoners as these are provided in the general law, the prison statute or in the regulations made under the statute there are few cases if any on record and the rights provided for are worthless without the capacity of the complainant to prosecute his rights. For him to do this even minimally a great deal more is required of prison administrators than they have been permitted to provide for their charges up to now. Indeed the campaign to provide prisoners with greater scope for prosecuting their rights against the authorities provides the unscruplulous and more powerful inmates with wider scope for depriving fellow prisoners of their basic freedoms and rights - a fact which needs always to be remembered. In the long run the vulnerability of prisoners to more powerful prisoners and the possibility of a sentence being far more severe than was ever intended makes a stronger case than any other arguments for imprisonment being a last resort.

THE RIGHTS AND OBLIGATIONS OF PRISON ADMINISTRATORS

It may seem incongruous to include, in a paper of this kind, the rights of those high ranking officials invested by society with all the authority necessary to manage the prisons. After all they represent the full weight of government power and it is their duty to wield the implements of state control. First it may be thought that they have been entrusted with the administration of far reaching laws which are correspondingly protective of the person at the ultimate level of authority. Secondly, the administrators of prisons operate usually at a distance from the flash points of trouble.

They are more likely to become involved at a later stage in adjudicating the claims and counter claims of their subordinates and the prisoners - or in meting out any penalties made necessary by the events. To what extent then are their rights likely to be infringed?

Of course it depends to some extent upon the level of the administrator himself and the level of his operations. It depends upon whether he is directly involved in the management of an institution or whether he belongs to a headquarters far removed from the institution. But, generally the days are long past when a prison administrator, whatever his level, could avoid or be spared involvement in the real trials and tribulations of prison life. Every problem of significance, sooner or later finds its way to his desk - a process accelerated by the progressive reduction in recent years of discretion by lower ranks and the increasing emphasis on prisoners' rights. Prisoners want to carry their complaints to the highest

levels and improved communications mean that the administrator has to have answers quickly to cases which may have reached the media. Frequently he leaves his office to take personal charge of his staff when emergencies arise. Often he knows his prisoners - or a fair cross-section of them by name. Typically he will be interviewing inmates, negotiating with staff associations, checking the practical effects of administrative decisions he is obliged to make and, of course, as the media become more and more involved, he has to answer for his department not only to his governmental superiors but to the many investigative reporters. Being so obviously in the middle he has become an all too convenient scapegoat for those with grievances - or else a handy sacrifical lamb when political pressures mount. He therefore has to be concerned with the limits of his power as these limits are determined not only by statute but by the case-law: and he is in particular difficulty when situations arise in the prisons for which the existing law has not provided. His is the difficult task of determining the limits of discretion. He may make and interpret regulations in so far as this is permitted by the statutes: and there will be policy directives which he has to follow. In the gap between the needs and resources he has to use ingenuity. The extent to which he can go, has to go, ought to go or should not attempt to go, is an administrator's constant preoccupation.

Historical background

The prison administrator's position has greatly changed over the years. When punishments were physical and the prisons were largely for the custody of those awaiting trials (or for debtors),

the person in charge of the jail was usually left to organise the prison as best he might for his own - not the prisoner's benefit.

When Henry III granted a charter to the citizens of London in 1400 it included a proviso that the sheriff was not to farm out or let the gaol for profit as was then customary:

> " ... instead (he) was to appoint a keeper who was not to pay a premium for his office, nor was he to extort money from the prisoners under his charge by putting on or taking off their irons - a common from of extortion .... He was only to be permitted to exact one perquisite - to take 4d. from each person set at liberty; he was to take no fee upon their entrance."(19)

Not until 1732 was the release fee abandoned but it was still illicitly imposed so that, eventually, acquitted persons were freed in the court - a practice which still continues.(20) Moreover Sheriffs continued to sell the office of Keeper of Newgate. As much as 3,000 pounds (an enormous sum at the time) was paid for the position - and this, and more, was recovered from prisoners by weighting them with fetters which they had to pay to have taken off or even by withholding such vital necessities as food and water. It seems that Keepers were doing so well that they were able to bribe justices of the peace to send them their prisoners; and all kinds of persons employed in prisons got in on the extortion.(21) Even prisoners used by the Keeper and his staff to deal with other prisoners had their price. There is little information however as

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(19) Albert Crew, "London Prisons of Today and Yesterday" London : Ivor Nicholson and Watson Ltd. : 1933. p. 47.
(20) Ibid.
(21) Ibid. p. 48

to how the prisoner got hold of all the money necessary to meet such rapacity. Yet the fact that some of them did so is indicated by the extraordinary liberties allowed to prisoners in Newgate who could drink their fill, purchase better quarters, buy visits and even hold religious services or political meetings. There is evidence that prisons were openly producing loaded dice and marked cards for sale to the underworld during Elizabethan times.

Impoverished prisoners must have lived in such wretched conditions that they did not long survive. When it is remembered that these were generally still unconvicted and therefore still technically innocent peopole, the horrors inflicted were beyond all excuse or Christian justification. The Keeper could sometimes release prisoners altogether - or arrange their escapes for a price. In one Continental prison the Keeper had a special door constructed in a conspicuous place to tantalise prisoners with the knowledge that they could pass through it to freedom if only they could raise the money. At a later date treasurers and tradesmen did very well out of penal institutions and there was little public sympathy for those confined there. However, conditions were not always so bad or Keepers so inhuman. We are told that in the 15th and 16th centuries the Head Jailor or Lockwirt in the German city of Nuremberg was a very responsible person who was required before taking up his post to deposit caution money and perhaps to find respectable burghers as his sureties: and he, his family and his servants were required to take the oath of fidelity. He had to rule his charges severely however and "had

a free hand in any measures he chose to adopt."(22)

John Howard's book on the "State of Prisons" appeared in 1777 i.e. just prior to the sailing of the First Fleet to Australia. A new type of Keeper was emerging. Akerman the Keeper of the New Newgate Prison in 1776 is favourably mentioned not only by Dr William Smith who looked at prison sanitation in that year but by Boswell who says that Akerman bought soup for the prisoners out of his own pocket and ran his prison with firmness, tenderness and a liberal charity. But abuses continued. Fetters were used until 1818 and it was still possible for prisoners to get drink or women by payment. In 1835-36 the first inspectors of prisons were appointed and in 1839 the Prisons Act was enacted. Retired military men were often given charge of prisons. Pentonville was opened as an experimental prison in 1842 and within 6 years fifty-four prisons were built in the model of Pentonville. In Sweden in 1840 Crown Prince Oscar wrote a book advocating the cell system and as a result that country invested an unprecedented proportion of the national income to provide cells for all institutions. In Norfolk Island, Alexander Maconochie in 1840 began his famous experiment designed to punish convicts for the past and train them for the future.

The prison service was also remodelled: humane personnel were recruited: and throughout the 19th Century there occurred that

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(22) C. Clavert "A brief Account of Criminal Procedure in Germany in the Middle Ages", in "A Hangman's Diary: Being the Journal of Master Franz Schmidt, Public Executioner of Nuremberg 1593-1617", (ed) Albrecht Keller : London : Philip Allan and Co. Ltd. 1928. Translated C. Calvert and A.W. Gruner.

great change in prison philosophy which resulted in the prison systems of today. The Christian Churches became more directly involved in penal reform. Moral improvement and rescue from a life of crime became the theme. In 1833 Das Rauhe Haus was established in Horn, a suburb of Hamburg by Johann Henrich Wichern to help save the thieves; and in the U.S. the Boston House of Reformation opened in 1826. New ideas spread: monastic prisons in Italy became a model for the new "penitentiaries". Reform and training became the watchwords so that, by 1872 it was possible for the first international meeting of prison administrators to be held in London. From this grew the International Penal and Penitentiary Commission which held its Congresses every five years until it handed over its work to the United Nations. It still exists in a nuclear form as the International Penal and Penitentiary Foundation.

Prison Administration and the Law

The 19th century breed of prison administrators made great changes - sometimes by stretching existing laws or reinterpreting them: at the same time they were drafting new laws and regulations. Sometimes using their discretion they went ahead with reforms long before these were likely to be approved by the public. Maconochie's enlightened regime provided examples of this but there were many others. The Governorships or superintendencies which had been given to ex-military men were now becoming career appointments attracting well educated and well-connected reformers who could influence as well as implement new government policies. British prison administrators

had gradually reduced the meaning of "hard labour" to insignificance before it was legally abolished in 1948 and it has taken till 1981 for England to repeal the power to transport offenders. The reformers did not wait for such legal recognitions of reality.

As already shown, it was the prison administrators who (after international conferences on the treatment of prisoners from 1872) drafted in 1929 the first basic minimum standards. On the one hand therefore they were resourceful and determined, prepared to bend the law to effect their purposes in getting better prison conditions: sometimes they were also practical reformers: they were in the forefront of reform movements and often instrumental in drafting new legislation. On the other hand they were idealistic - even visionary in their drafting of basic minimum standards for the treatment of prisoners - far ahead of the law and years before their time on the subject of human rights and the protection of human dignity. Early in this century they were setting the standards for the 21st century.

It cannot be denied however that the quality of prison administration was not and never has been uniform. There were horrible exceptions and acts of brutality in the prisons in some areas where official neglect permitted cruelty and the exploitation of prisoners. Atrocious conditions persisted in the areas where authorities were indifferent or where pride was taken in vicious discipline. Chain gangs continued well into the 20th century - as did scandalous conditions and exploitation. There were "devils islands" around the world which were not closed until recent times.

Prison riots occurred more frequently. They drew attention to unsatisfactory conditions but on the other hand they attested to the improvements which had taken place. The earlier fettered, exploited, starved prisoners were more easily guarded and gave far less trouble. When things improved they could protest with some hope of being heard. They could organise and plan both escapes and rebellions. There are few prison riots recorded anyway before the twentieth century. It would appear that when things were at their worst those treated most fearfully were fettered and starved to death: and those who could afford better felt no reason to cause trouble.

So, as things got better they got worse for prison administrators. As they experimented with greater freedom and responsibility for inmates they ran the risk of being blamed for increased escapes or troubles inside the institutions: and amongst inmates they sometimes raised more hopes than could be fulfilled so that, as prisoners' frustrations grew, the administrators were again blamed for the lack of progress.

The period of administrators becoming the "meat in the sandwich" (i.e. caught between the expectations of governments on the one hand and the prisoners on the other) had arrived. In this situation the public is divided. As ever, a majority is apathetic to what happens in prisons. A large minority would like prisoners to be given conditions far more severe than they are now. Another minority regards present prison conditions as disgraceful and beneath basic human standards. Since prison buildings are often out of date

or uniform conditions cannot be invariably provided, there is usually evidence available in any given prison system at some time to justify the different public attitudes. Now into this complicated area for prison administrators a third and fourth pressure have been applied. The prison officers have formed powerful associations or unions prepared to strike when necessary to make the weight of prison officers' opinions felt at policy levels - and seeking to influence public opinion. At the same time the prison administrators' area of jurisdiction is being challenged - sometimes by the courts and sometimes by the Ombudsmen. It is in this context that the rights of prison administrators need to be considered.

Administrators Rights

Obviously the prison administrator is rarely in the same confrontational situation with prisoners as are prison officers but, like prison officers, he loses none of his basic human rights by assuming the functions of an administrator. His vulnerability affects, however his right to work. He is more likely to be dismissed or be displaced regardless of whether he was right or wrong - sometimes merely to demonstrate the arrival of new approaches to penal administration. More seriously, once removed from a top position of this kind in an administration he is labelled in a way which makes it difficult for him to obtain similar employment elsewhere. His right to association does not usually protect him because there are usually too few senior administrators to wield authority; the associations of senior public servants cannot guarantee more than

reasonable terms of dismissal or removal. In any event, these are usually guaranteed by the public service conditions and regulations governing the post which the administrator has accepted.

Even so, such basic job security provision cannot guarantee any similar appointment in another administration. On one view this risk of loss of employment is a risk fully justifiable for an administrator to take. He is aware of it before assuming office and he can hardly complain when he is removed because his recommendations on penal policy are not being accepted. On another view however, he should either not be subjected to such extra risks of loss of employment - or else should be compensated for the possibility of arbitrary removal.

In Victoria on 6 February 1982 there was a fire at the Fairlea Institution. It was necessary to find another superintendent but in the department no one was interested in becoming superintendent of Fairlea. In the words of the Director "They were afraid that if things did not go right their careers would be affected".

It is because of this job vulnerability that administrators need to be clear as to their rights and responsibilities. What they can do and what they can't do becomes vital to their survival as administrators. Even when they are technically right they may be wrong in terms of their own job continuation. They have to be legally correct or they (or their department) may be sued. They have to be fair in their administration which is important for the morale, any

detriment to which could have effects menacing to their own position. Yet if they concentrate too much on protecting their position they are likely to avoid decisions which will be necessary to the discharge of their responsibilities. To work strictly to the book will slow down operations to the frustration of all concerned - a dangerous way of approaching a rapidly changing situation. To use too much discretion will invite criticism and possible trouble for the administrator even when it succeeds. Moreover, the situation is changing. The structured pattern which an administrator enters on appointment begins to be altered as soon as he makes his first decision. The rules by which he could once work no longer apply. Daily he must adjust to changing circumstances.

In fact, the powers which an administrator wields complicate his rights. Like many other officials his increased obligations qualify his exercise of rights. Sometimes he cannot exercise his own rights to freedom of speech or association. These are qualified by his official position.

Sometimes by the regulations he makes or administers he may have to qualify the rights of others - his staff or the inmates in his care.

It is possible to set out, as has been done for prison officers in this paper, the rights of administrators flowing from the common law, the prison statutes, the regulations made under the statutes; but the flexibility required in operating within the necessary legal constraints is very difficult to reflect.

Perhaps of more value would be a series of case studies of the situations which are dilemmas so often facing correctional administrators. Such a collection of case studies has never been made. It is difficult but could be compiled if there was sufficient interest in this type of research and analysis. Another angle would be to study the reasons why correctional administrators leave the service. At the same time more careful analyses are needed of existing laws in relation to administrators and in particular the boundaries of their jurisdiction and those of the Ombudsmen need more careful definition.

MANAGEMENT IMPLICATIONS

The proliferation of appeals and the more frequent uses of a variety of protective procedures by prisoners, supported by legal aid and outside interests has intruded into the normal management of institutions. This is particularly the case where Ombudsmen have taken a special interest in the numerous complaints they receive from prisoners and decided to do something about the administration. This need not be a bad thing because it may be a price of the vigilance necessary to protect individual liberty in our society and avoid abuse. As shown the provision of legal aid can reduce appeals and the prisoner needs more protection than he has received so far from other prisoners. However it would appear that prisoners' complaints are generally against the authorities - not against other inmates. Perhaps this is because the remedies for such breaches of rights by other prisoners are meague and that possibility of reprisals is a real and ever present fear.

Anyway this multiplication of appeals procedures and the burgeoning of industrial negotiations have made it impossible for the rights and conditions of service to be ignored as a transformer of conditions within penal institutions. It is sometimes thought that the prison staff are seeking to determine policy in line with their own requirements. Yet as already demonstrated there is a real anxiety amongst prison officers that they are being expected to act as scapegoats for the righteous when their duties are not spelled out in detail and their own rights are not considered. They seek to be part of the policy making. This may be again a price which will have to be paid for a viable working relationship to be achieved of value to both officer and the inmate.

These are prices however, which have never been adequately measured. An attempt was made for the purpose of this paper to collect the information available to prison administrators on the time spent processing appeals by prisoners - both those against conviction and sentence necessitating escorts, time in court etc., and appeals against decisions within the prison system itself.

No correctional administrator found the data easy to compile but the information available up to the end of March 1980 was as follows.

In the fourth month period 1 September to 31 December 1979 the Tasmanian prisons Department had two appeals processed in outside courts and twelve complaints or grievances were made to Official Visitors. Two of the latter resulted in an appeal against an officer's decision to the Chief Officer of the prison. Approximately six man hours were devoted to the processing of appeals by the Department while thirty-seven complaints were made to the Ombudsman which entailed an additional thirty-four man hours work by Department staff.

The South Australian Department of Correctional Services has ascertained that in the same four month period fifteen appeals were initiated in the Supreme and District and Criminal Courts of that State but advised that Section 50 of the South Australian Prisons Act

> "which states that there shall be no appeal for any order imposing any term of punishment upon any prisoners under Sections 47 and 48 of that Act and that Sections 162 and 163 of the Justices Act 1921 shall not apply to any such order."

has not been challenged and thus still applied in South Australia.[23].

The New South Wales Department of Corrective Services advises that when a prisoner is cited or reported for alleged misconduct he is brought before the Superintendent. If it is a matter which the Superintendent can deal with under Section 23A of the Prisons Act 1952 the prisoner is asked if he consents to the Superintendent dealing with the charge and if he is pleading guilty.

Should a prisoner so consent the Superintendent finalises the matter pursuant to Section 23A (a Superintendent S 23A hearing). When a prisoner does consent then the Superintendent may, under Rule R5B of the Prison Rules, conduct an inquiry into the allegation and if satisfied that an offence has been committed but is such as to not warrant charging the prisoner, deprive the prisoner of amenities for up to one month (a Superintendent R5B hearing). Where a prisoner does not consent and R5B is not invoked, or it is a matter which the Superintendent cannot deal with, the matter is heard and determined by a Visiting Justice (V.J. hearing).

There is no appeal (by way of non-policy decision or legal right) from a Superintendent's R5B or S23A hearing. Before a V.J. hearing there is no right of representation (this being administratively prohibited) but there is an appeal from such a hearing under the Justice Act.

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(23) N.B. See new legislation in South Australia referred to above.

With respect to Superintendent hearings the Department conducted a telephone survey of eight institutions. Seven Superintendents stated that they had invoked R5B to impose a loss of amenities, the frequency of such action varying from "very often" to "once only". Two Superintendents disclosed that prisoners had complained to them or the Visiting Justice about being dealt with under R5B, two were not aware if a prisoner had complained and four stated that prisoners had not complained.

Two Superintendents stated that following a Superintendent S23A hearing, requests had been made by a prisoner to re-open the hearing to re-consider the punishment. Four Superintendents reported that they would not entertain a rehearing or re-consideration, one states that he would only reconsider penalties and two indicated they would be prepared to entertain both, depending on the case.

Departmental records pertaining to all New South Wales institutions disclosed that during the four month period September to December 1979, 417 matters were dealt with by Superintendents and 92 by a Visiting Justice. Of those appealable Visiting Justice hearings, 22 appeals were lodged including one not proceeded with. However, it was pointed out that the Department does not keep any separate record of complaints as all relevant correspondence is retained in individual prisoners' files.

Staff of the legal offices of the Department of Corrective Services have estimated that processing time for appeals would be approximately one hour per appeal or roughly 5-6 hours per month. Actual appearances on appeals by Departmental legal office is, of

course, much more time consuming. No estimates were able to be computed for the Superintendent's preparation and dispatching of appeals.

There can be no full assessment of the significance of the information received so far until it is supplemented by returns from other States. It must be emphasised however, that it is only dealing with one aspect of a more complex situation in the prisons.

There may also be imponderable consequences such as the effect of successful appeals on prison officer morale (i.e. where an officer's decision is not upheld), its effect upon industrial relations. What is clear is that there is a managerial transformation in process engendered and shaped by the emphasis on prisoners' rights during the past decade. It may well be a change for the better. The fact is that we do not yet know because it still has to be measured and evaluated.

RESEARCH NEEDS

The draft paper outlines a situation of "legal lacuna" imprecision and "rights-conflict" in penal institutions - all of which require definition and measurement in terms of costs and benefits. The correctional authorities are forced to seek a delicate balance of interests in a constrained situation. There is, in prisons, a hot-house equivalent of the conflicting interests in our society which needs to be carefully monitored, not only to provide for good management policy but to provide for forward planning. It may be that the price of facilitated appeals or increased protection for prisoners is more staff per prisoner: it may be that prison regulations have to be recast to meet new obligations: it may be that industrial confrontations will be easier to handle if no less frequent once the real implications of the clash of interests on rights have been more clearly set forth.

If research can help to avoid the polarisation of the respective positions then it has a place. The fundamental questions for research to answer are:

1. What are the areas of prison life and conduct not covered by law?

2. What laws and regulations need more detailed specification in terms of their application to actual situations? In this context there would need to be closer consideration of the amount of discretion required and the minimum levels needed to support such discretion.

3. What is the extent of present appeals? How many are they what time to they absorb? How are they decided?

4. What are the attitudes of prisoners and staff to appeals. Do they distinguish between the genuine and frivolous? To what extent is their classification support by the facts?

5. What are the costs for:

   (a) the correctional service,
   (b) the society as a whole.

6. What are the benefits - can these be measured against the costs?

7. What are the implications of the answers to the above questions for future policy in correctional management?