

Prison Disciplinary Systems: Process and Proof

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Abstract

Prison discipline is central to the management of imprisonment; it is also central to a prisoner's experience of imprisonment. This paper examines the process of dealing with offences by prisoners in prison, with primary focus on the Victorian corrections system. Maintaining prison discipline entails the exercise of important discretionary powers, and formal and informal disciplinary processes. Formal disciplinary processes conclude with a Governor's or Manager's hearing, carrying a range of penalties. The procedural requirements of this formal process are commonly set out in some detail in legislation and corrections documents, and are understood to reflect important values of fairness and natural justice. Disciplinary processes have, however, been of limited transparency and have been difficult to challenge, despite the potentially serious implications for the prisoner. Whilst the power to extend time in custody has been removed, available penalties can nevertheless have a substantial impact on the effective sentence served – for instance in relation to applications for parole – and can make the period in custody more severe, with the loss of privileges and the possibility of separating prisoners for extended periods. It is the aim in this paper to reach a clearer understanding of the processes and methods of proof employed in prison disciplinary proceedings.

Outline

1. Background to prison disciplinary systems
2. Prison discipline in Victoria: how it works
3. Statistical pictures: what is known about prison disciplinary processes
4. Specific procedural protections and methods of proof

1. Background to prison disciplinary systems

The role of the prison can be analysed in various ways. In a broad sense it implements – and is the end point of - the varied goals of punishment: deterrence, retribution, rehabilitation. The underlying understanding of the function of the prison

is, however, that it is, at a minimum, about storing people away from the rest of society.

Even official reports nowadays tacitly admit that prisons in Britain have traditionally been used as much for storing away those deemed to be socially useless as they have been used for the incarceration of those deemed to be either deserving of punishment or a danger to the public.¹

Statements of prison goals or objectives reveal the combination of incompatible aims. In similar terms to prison providers elsewhere, CORE, the public sector prison provider in Victoria, states on its website that its services

are aimed at containing prisoners and supervising offenders in a humane and cost effective manner that meets the community's expectations of safety, reparation, and encouragement for offenders to adopt a law-abiding lifestyle.

'Humane' and 'cost effective' create inevitable tensions. CORE's statement redefines the frequently cited 'rehabilitative' aim as 'encouragement for offenders to adopt a law-abiding lifestyle'. This is a goal which, to be at all realistic, requires substantial resourcing for programs, education etc, and usually sits uneasily with notions of 'cost effective' management and with the traditional expectations of a punitive regime, according with the principle of 'lesser eligibility'.

Accepting that the primary or minimal role of imprisonment is maintaining a convicted population securely in custody, the ongoing issue must be the maintenance of order.

Some commentators argue that problems of order in prisons are intrinsic to the nature of prisons - that there can be no solution to the control problem in prisons.² Sparks, Bottoms and Hay agree that clearly prisons are 'dominative institutions' in which 'consensual authority' seems unlikely, but they reject explanations based simply on 'the imposition of order by relentless force'.³ They argue that such explanations on their own make no allowance for the complexities of prison life and for the different forms of social organization in different prisons.

One aspect of such difference ... concerns the extent to which the staff in different prisons succeed or fail in legitimating their deployment of power and

¹ Carlen, 1983, 217.

² See discussion in Sparks, Bottoms and Hay, 34.

³ Sparks, Bottoms and Hay, 35.

authority and the techniques and strategies which they deploy in seeking to secure such legitimacy.⁴

Given the fact that prisons comprise large numbers of people who wish they were anywhere else, who hate or distrust each other, or fight each other, and who ‘manage’ each other in various ways, maintaining order in prisons involves a complex range of relationships and structures. One such structure is a formal disciplinary regime of offences and associated penalties for breach. This is the ‘last resort’ means of promoting order (other than the direct use of external force – police, military). The UK Prior Report concluded in 1985:

It seems to us self-evident that a prison disciplinary system, providing a code of offences, an adjudication process and penalties for committing offences is necessary. Almost all communities have rules and prisons need them more than most. Amongst the functions of such a system are:

- (i) to uphold and enforce rules designed to maintain control, safety and good order;
- (ii) to signal the community’s disapproval of a wrong-doer and discourage repetition;
- (iii) to deter others from breaking the rules; and
- (iv) to discourage people affected by the rule-breaking from taking the law into their own hands in order to get ‘satisfaction’.⁵

The Prior Committee emphasised, however, that the formal discipline system is not the first avenue: prison officers have a central discretion whether to, and how to, exercise these formal powers. Formal power is usually ‘held in reserve’. It is the ‘*ultimate* means by which the rules are upheld’.⁶

All good prison officers recognise the need for some give and take and realise that prison life leads to frustrations which may result in unacceptable behaviour by prisoners. They recognise that cautioning, advice, encouragement, good example or a mere expression of disapproval from someone who has engaged the prisoner’s respect are frequently better ways to deal with wrong-doing. Judging when and when not to resort to disciplinary action is the essence of good prison management (vol 1 para 5.3).

The centrality of the prison officer’s discretion highlights the importance of the skills, training, and personality of staff to make discretion work fairly in a fair prison.⁷

⁴ Sparks, Bottoms and Hay, 1996, 35

⁵ Prior Report, 1985, vol. 1 para 5.2

⁶ Prior Report, vol 1 para 5.4

⁷ Liebling and Price 1998; Loucks, 1994, 204.

Sykes identifies the enormous ostensible grant of power to prison officials, but argues that this appearance of ‘total power’ is quite different from the actuality of daily prison life:

Rather, given that the prison must accomplish complex tasks of self-maintenance and is much more than a simple ‘container’, the guard encounters a series of pressures (the need to get routine jobs done, personal proximity with inmates, the ‘claims of reciprocity’ in human relationships) towards compromise and accommodation... the guard is placed in the position of seeking some tolerable *modus vivendi* with prisoners whilst having limited resources of either reward or punishment at his disposal.⁸

Sykes concludes that ‘order’ in the prison is thus a negotiated order, with the prison being ‘a special kind of bureaucracy... whose single greatest preoccupation is its self-reproduction through the performance of routine tasks’. The agreed importance of informal and discretionary practices and relationships has negative, as well as potentially positive, implications. Loucks, in her study of prison discipline in the UK, France and Sweden, found that

The most noticeable trend throughout has been that, despite differences in policies, the same general *practices* occur – perceived overuse of discretion and interpretation, use of informal measures to make up for perceived shortcomings in formal systems etc – and subsequently result in the same conflicts and complaints across all three systems. The practices ... demonstrate the limited efficacy of formal policies in controlling the use of power in prisons and emphasise the importance of the informal relationships and balance of power between prisoners, staff, and administrators.⁹

The Woolf inquiry into a series of major riots in UK prisons in April 1990 reported in 1991. A central thread in the report’s findings was ‘the conditional nature of *legitimacy* in the maintenance of order in prisons’.¹⁰ Woolf identified as crucial a widely shared sense of lack of justice amongst prisoners, and observed that

Riots happen when the requirements of security, control *and justice* in prisons do not receive proper attention and are not kept in their proper balance.¹¹

The Prior Committee had in 1985 reported research on UK prisons finding that the key area of dissatisfaction of inmates with the disciplinary system then in place was the perception of unfairness – of bias, or lack of impartiality, in the adjudicatory

⁸ Sykes, 1958, 41.

⁹ Loucks, 1994, 204.

¹⁰ Sparks, Bottoms and Hay, 1996, 16

¹¹ Summary, 1991, 11 (my italics)

system.¹² Prison officers interviewed did not share this view, but some Governors did accept that the system was biased, noting that where facts were hard to establish they had to believe their staff. Inmates, officers and Governors all felt that the major component of perceived fairness in the system was the extent to which inmates could 'put their side of the case'. However inmates saw achievement of this goal as inadequate whilst officers and Governors considered it was generally achieved.

Inmates' assessment of the fairness of their own hearings depended primarily on whether they felt that they had been given a reasonable hearing; those who considered their adjudications unfair felt they had not been impartially treated, as their guilt had been assumed and/or the adjudicator had been on the side of the officers. Lack of representation, feeling intimidated by the ritual processes, and failure of the adjudicator to listen, to investigate the circumstances of the case and to elicit mitigating evidence all gave rise to the sense that inmates had not been able properly to present their case.¹³

The Woolf report recommended a range of improvements in prison 'justice', including provision to prisoners of reasons for decisions affecting them, establishment of effective grievance procedures, and provision for appeals from disciplinary decisions.¹⁴

The remainder of this paper will focus on how formal disciplinary processes operate, with particular reference to the Victorian prison system. The paper begins with an overview of the formal disciplinary system; it then analyses the procedural protections governing fact-finding and decision-making in governors' hearings, and the contribution they make to the fairness and legitimacy of the prison justice system.

2. **Prison discipline in Victoria: how it works**

In Victoria, prison offences and disciplinary processes are regulated by Part 7 of the Corrections Act 1986, by the Corrections Regulations under the statute, the relevant prison contract and each prison's Operating Manual.

¹² Ditchfield and Duncan in Prior Report vol 2, 95-99.

¹³ Ibid.

¹⁴ Summary, 1991, 34-5.

Domestic disciplinary processes also operate within a broad national and international context of guidelines and principles. The International Covenant on Civil and Political Rights¹⁵ addresses rights of prisoners in a number of articles, the two main articles being:

Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. ...

Article 10(1): All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

The United Nations *Standard Minimum Rules for the Treatment of Prisoners* adopted in 1955 and endorsed in 1957,¹⁶ and the national *Standard Guidelines for Corrections in Australia* (1996) set out minimum standards for prisons, including prison disciplinary processes.¹⁷

The ICCPR – and international treaties in general – are not binding in themselves, although they have importance in articulating standards and expectations.¹⁸ In Victoria, the contracts of the private prison providers have the SMRs (and other standards) annexed as ‘policy’ which is to be taken into account.¹⁹

First, the range of prison offences should be considered.

¹⁵ The Convention was ratified by Australia in 1980. Complaint can be made to the UN Human Rights Committee pursuant to the first Optional Protocol (1991), by an individual who considers his/her rights have been violated.

¹⁶ See Groves, 2001 for summary and discussion. The SMR set out minimum standards in relation to (inter alia) information concerning rights; grievance procedures; and protection from cruel, inhuman and degrading treatment, including corporal punishment, solitary confinement, and instruments of restraint as punishment.

¹⁷ The Australian Standard Guidelines deal with such matters as disciplinary processes – including the requirement of representation where the prisoner risks further imprisonment - and prohibition of some instruments of restraint, teargas, and dietary restrictions as forms of punishment.

¹⁸ *Dietrich* (1992) 177 CLR 292; per Mason CJ and McHugh J ‘Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions. No such legislation has been passed’ (305). There are significant problems in enforcing international principles: Naylor 2001; Groves 2001.

¹⁹ Annexure M (MWCC) sets out a range of policy documents, including UN Standard Minimum Rules for the Treatment of Prisoners, Standard Guidelines for Corrections in Australia, Royal Commission into Aboriginal Deaths in Custody, and Victorian Prison Drugs Strategy documents as falling within the meaning of ‘policy’ as used in the contract. Clause 43.1, Compliance requirements, then states that ‘the Correctional Services must at all times comply with ... relevant legislation and policy’.

Prison offences

Prison offences are defined as any contravention of the Corrections Act or Regulations.²⁰ Offending behaviour in prison which falls within the general criminal law (assaults, murder) can be referred to the Office of the Public Prosecutor for prosecution outside the prison under the criminal law. Part 4 of the *Corrections Regulations* 1998 deals with 'Prison Discipline'. Specific prison offences are set out in regulation 44.

Offences under regulation 44 include behaviours which are seen as posing a threat to the management and order in the prison, or challenging the authority of prison officers, and which would not otherwise be regarded as offences. Examples include acting in a 'disruptive, abusive or indecent manner' (44(1)(b)), being in a place the prisoner is not permitted to be, or leaving a place they are required to be (44(1)(i)), or disobeying a lawful order of an officer (44(1)(l)), as well as behaviours which might also be dealt with in some form under the criminal law, such as assault (reg 44(1)(a)), and taking or using unauthorised alcohol or drugs (44(1)(e)).²¹

A catch-all offence is also included, of committing an act that is 'contrary to the good order, management or security of the prison' (44(1)(o)). Prison officials have a very broad discretion to define behaviour as falling into this category. This is seen as valuable from a management point of view, but has the potential to give rise to significant injustice. Such general offences provide 'little guidance for prisoners and great scope for abuse'.²² The UK Prior Committee concluded that general 'good order' offences were philosophically unacceptable because of their uncertainty (paras 7.82-7.92). Loucks (1995), in a study of the use of the comparable provision in the UK, concluded that the use of the provision 'acts against the interests of justice and leaves both prisoners and staff unsure of what behaviour constitutes a disciplinary offence'. UK Prison Service guidance to use the rule as a last resort was often ignored: the rule was charged in many cases where a more specific provision already existed. The existence of such rules, Loucks argued, 'clearly shows the priorities of

²⁰ Corrections Act 1986 s.48.

²¹ Use of unauthorised drugs of dependence also triggers the operation of the Victorian Prison Drug Strategy (2002), which imposes automatic loss of contact visits and other sanctions. Important issues about the relationship between the disciplinary process and the Drug Strategy are not dealt with further here, but see *Kaufman* [2001] VSC 420.

²² ALRC, 1987, 31

the Prison Service: the ability of a prison to punish what it defines as misbehaviour overrides the right of a prisoner to know in advance what this definition may be'.²³

Such general 'good order' offences have been abolished in Canada and Scotland, and most recently in the UK.

The ALRC in its 1987 DP on prison discipline noted additional problems with prison offences. Whilst accepting the need to regulate behaviour in prison, 'some offences are so trivial in their nature the invocation of them can only cause resentment amongst prisoners' (1987, 31). The overlap with general criminal law can cause problems. Further, there can be difficulties for prisoners in knowing specifically what the rules proscribe: prisoners are not always given copies of the rules and may not have adequate knowledge of what constitutes an offence.

Commencing the formal disciplinary process

1. Disciplinary Officers

The Victorian disciplinary process occurs in two stages, the first managed by a prison Disciplinary Officer, with the option of escalation to the second stage, managed by the Governor/General Manager.

The Victorian *Corrections Act* 1986, s.50(1), provides that if an officer suspects a prisoner has committed a prison offence he/she must report to the disciplinary officer.²⁴ The disciplinary officer is to investigate the allegation and give the prisoner an opportunity to explain (s.50(2)). He/she can decide to take no further action where the offence is not made out, or where they consider the offence was trivial (s.50(3) and (4)). Otherwise the Disciplinary Officer must record the offence in the register of offences and may also reprimand the prisoner (s.50(5)(a)), or withdraw one of the prisoner's privileges for less than 14 days (s.50(5)(b)), or charge the prisoner with a prison offence (s.50(5)(d)) – in writing and with copies given to the Governor and the

²³ Loucks, 1995, 12.

²⁴ Defined s.48 – nominated by Secretary as Disciplinary Officer.

prisoner. Alternatively the Disciplinary Officer can arrange to have the matter dealt with under the criminal law (s.50(5)(e)).²⁵

Minor matters – such as refusal to come to muster – may be dealt with less formally (recorded in the minor offences register); more serious incidents such as abusing an officer will be formally recorded, and may be referred to the Governor. Officers will inevitably be exercising discretion both at the stage of deciding whether to refer the incident to the Disciplinary Officer, and then by the Disciplinary Officer in deciding on the appropriate response.

2. Governors' hearings

The precise nature of the Governor's hearing has been a matter for debate; it will be briefly addressed here. The characterisation of the hearing has been significant (a) in relation to the willingness of courts to review proceedings, and (b) to the level of procedural protections and forms of fact finding required for a hearing to be lawful.

As noted, disciplinary processes are covered in the legislation and regulations; they are also detailed in the individual prison operating manuals. The CORE Operating Procedures Manual no. 1.16 states as the required outcome:

A just, fair, effective and firm procedure is in place for dealing with prisoners on matters of a disciplinary nature.

The Operating Principles are stated to be:

CORE upholds the right of prisoners to be disciplined in a fair and just manner.

In applying prison discipline, officers will administer the process impartially and equitably at all times. Staff will ensure that prisoners are clearly informed of prison rules, regulations and procedures.²⁶

The conduct of the hearing is outlined further in Regulation 45, which provides that the Governor

²⁵ Whether police are involved, leading to complaint prosecuted in ordinary courts, or as disciplinary offence is largely at discretion of prison authorities. 'In practice, police prosecutions are used in the most serious offences, such as murder, serious assaults and escapes, and the Governor's hearing is used for the less serious offences': Law Handbook 2000, 632. Referral to the police or to governor's hearing are alternative avenues, only after the disciplinary officer is satisfied that a prison offence has occurred: *Crowley v Stewart* [2001] VSC 17.

²⁶ *CORE Operating Procedures Manual* Operating Procedure no. 1.16 10/1/01.

(b) should ensure that the proceedings are conducted with as little formality and technicality and as expeditiously as the requirements of the Act and these Regulations and a proper consideration of the matters before the Governor's hearing permit; and

(c) is not bound by the rules of evidence but may be informed on any matter in such manner as the Governor thinks appropriate.

Despite the punitive effect of the proceeding, Groves argues that these provisions indicate an essentially *administrative* decision making process, in which whilst some procedural protections are provided, the overriding emphasis is 'on the need for hearings to be conducted in a quick and informal fashion'.²⁷

Historically, courts have regarded prison disciplinary proceedings as administrative, even when carried out by visiting justices or magistrates. Their decisions have tended to be very 'hands off' about prison disciplinary powers, emphasising the management function performed by disciplinary processes. As Quinn notes, 'analogies drawn [in UK cases] were between the governor and the commanding officer or sea captain (*Fraser v Mudge* 1975) ... or the manager (*Ex parte King* 1984)'. Governors themselves saw adjudications [ie disciplinary hearings] as an important part of their management role. They were seen as being 'regulatory or managing rather than a simple pursuit of justice'.²⁸ As Lord Denning emphasised in *Fraser v Mudge* [1975] 3 All ER 78, '[i]t is of the first importance that the cases be decided quickly'.

This characterization of prison disciplinary proceedings precluded availability of the prerogative writs, and precluded discussion of the legal principles of natural justice. Beginning with the 1979 UK case of *R v Board of Visitors of Hull Prison; ex parte St Germaine (no. 2)*²⁹ however, the courts came to recognise the similarity of the proceedings to those more conventionally known as 'judicial' or quasi judicial, and both the prerogative writs, and the substantive procedural requirements of natural justice, have been recognised as applying, at least in principle.³⁰

In Australia the application of natural justice was spearheaded by the 1985 High Court case of *Kioa v West*³¹ which stated the foundation of any requirement for

²⁷ Groves, 1998, 342.

²⁸ Quinn, 1993, 193.

²⁹ [1979] 3 All ER 545. The case arose out of the severe disciplinary punishments imposed following major riots in Hull Prison in 1976.

³⁰ See Groves, 1998, 349-356.

³¹ (1985) 159 CLR 550.

natural justice lay, not in the characterisation of the decisionmaker, but in whether the decision ‘affected interests, rights or legitimate expectations’ (absent clear contrary legislative intent) – thus widening availability of both the writs and the remedies.

Recognition of a prima facie entitlement to natural justice – fair procedures – leaves open the ‘content’ of this entitlement. The meaning of ‘fairness’ in a particular situation is still a question decided by the court and may amount to little if the court does not see its role as enforcing detailed and formal procedures. The Governor’s hearing process in Victoria is based on a relatively detailed statutory formulation; this may lead a court to conclude that parliament has turned its mind to the type of hearing required, and that no further protections should be inferred. The nature of the notice requirement, the provision for calling witnesses, and the limited form of representation expressly permitted may all be interpreted in this light, a point which will be considered further below.

Outline of process

Governor’s hearings may in practice be conducted by a senior officer or general manager. When the Governor or general manager gets the charge, he or she has four options:

- to refer the matter back to the Disciplinary Officer to be dealt with under s.50(5);
- to refer the matter to another Governor, if he/she believes he/she has an interest ‘which would prejudice the fair hearing of the charge’ (s.51(b));
- hear the charge;
- take steps to have it dealt with under the criminal law.³²

Form of the Governor’s Hearing

The hearing is to be conducted in accordance with Regulation 45ff of the Corrections Regulations 1998. Prison providers are required to establish their own operating procedures. CORE, the public prison provider operating 13 of the 15 Victorian prisons, states in its Operating Procedure 1.16 para 5.0 that charges should usually be heard within 10 days unless ‘exceptional circumstances apply’.

³² Corrections Act 1986, s.51.

At the hearing, the prisoner is to be informed of the procedure, the charge is to be read out (including name of informant, details of charge, and details of relevant provisions allegedly contravened)³³, and the prisoner must have the opportunity to state his/her plea. The Governor is to give the prisoner ‘reasonable opportunity to call relevant witnesses and cross-examine the person conducting the case against the prisoner and witnesses called by that person’ (*Corrections Act* s.53(2)).

The process is essentially adversarial: the informant is required to present evidence to support the charge; the prisoner has the opportunity to cross-examine the informant and any other witnesses; if the Governor considers there is a case to answer then the prisoner presents his/her case and can call witnesses, who may be cross-examined by the informant.³⁴

The Governor can hear the charge in the absence of the prisoner provided due notice has been given (s.53(3A)).

If the prisoner attends the hearing, he or she may be represented by another prisoner, at the Governor’s discretion (s.53(3)); there is no other provision for representation (an issue which is discussed further below).

Reg 48 sets out the procedure where the prisoner pleads not guilty:³⁵

- the prison officer or informant must present evidence in support of charge and have reasonable opportunity to call witnesses;
- the prisoner (or representative) is to have a reasonable opportunity to cross-examine the informant and any witnesses;
- the Governor is to decide whether there is sufficient evidence to proceed, and must ‘dismiss the charge if he or she decides there is insufficient evidence’;
- Otherwise the prisoner or representative to have reasonable opportunity to present their case, including calling relevant witnesses;
- The informant to have reasonable opportunity to cross-examine the prisoner and witnesses;

³³ Reg 47.

³⁴ Corrections Regulations 1998, Reg 48.

³⁵ See also reg 49 for procedure where prisoner pleads guilty, and reg 50 for the (infrequent) situation where prisoner does not appear.

- Governor is then to dismiss the charge or decide on guilt. If found guilty, Governor to determine penalty.

Issues of proof in disciplinary proceedings are considered in more detail below.

Where the prisoner pleads guilty, procedures for fair decision making are spelt out: the Governor is required to review the circumstances of the case, consider mitigating factors, and invite the prisoner to make a plea on penalty, before determining the penalty: Reg. 49.

Penalties

If the Governor finds the prisoner guilty of the charge (or the prisoner pleads guilty) the Governor must comply with the requirements of Regulation 52 – inform the prisoner of the decision, record the decision on *Governor’s Hearing Register* – and may impose

- a reprimand (which is recorded on PIMS, the Prisoner Information Management System);
- a fine not exceeding one penalty unit (\$100) – a sizeable maximum given that most prisoners earn between \$5 and \$8 per day;
- withdrawal of one or more privileges for up to 14 days for each offence, but not more than a total of 30 days (s.53 (4)).

The Governor can only impose one of the possible penalties for any one offence (s.53(6)).³⁶

Until 1992 Victorian prisoners usually received a ‘remission’ of one-third of sentence as an incentive to good behaviour. This could then be lost for misbehaviour. The effect of imposing loss of remissions as a penalty was to increase the prisoner’s time in custody. This system came to an end with the movement in Victoria and elsewhere to ‘truth in sentencing’.³⁷

³⁶ See *Crowley v Stewart* [2001] VSC 17; *Kaufman* [2001] VSC 420 for discussion of the relationship between disciplinary penalties and Drug Strategy sanctions.

³⁷ See Fox and Freiberg, 1999, 786.

Each year the OCSC is required to approve a list of privileges which can lawfully be withdrawn: see appendix A. The penalty most commonly applied appears to be loss of one or more privileges, such as removal of the prisoner's television or blocking access to telephone calls for a period.

Whilst separation or segregation is not stated to be a penalty, if the Governor decides to withdraw all privileges, he or she can also order separation.³⁸ Withdrawal of privileges may thus mean removal from the mainstream cell and relocation to the management unit, with its limited and austere facilities and short out of cell hours. The implications of a finding of guilt can therefore be extremely significant for the prisoner and the way in which he or she will experience prison.

The regulations state that withdrawal of a privilege as a penalty should not be used 'where other prisoners would be disadvantaged'. The regulations also state that a penalty should not interfere with the prisoner's participation in prison programs.³⁹ This protection is however subject to the reservation 'except where the prison offence has breached the conditions of participation in the program *or where the consequent separation of the prisoner makes program participation impossible*'.⁴⁰

A finding of guilt may also have an impact on parole; decisions about reclassification, and prison accommodation, are also based on offences or alleged offences.⁴¹

Determining the level of penalty for a disciplinary offence

The Victorian Ombudsman in his 2001 Annual Report drew attention to the issue of both the level of fines imposed in disciplinary hearings, and ensuring consistency of their application across the system (2001, p.57). This was a concern also noted by the official Prison Visitors in a report to the OCSC. There are currently no guidelines as to sentencing at Governor's Hearings; nor are there public records of the penalties imposed at Governor's Hearings.

The UK Prison Service similarly does not provide central guidance on appropriate punishments for particular offences, but punishments within a prison, and for multiple

³⁸ CORE Procedure 1.16: art 6.

³⁹ These include work, education, orientation programs, contact visits, drug and alcohol and other treatment programs: CORE Procedure 1.16: art 6.

⁴⁰ CORE Procedure 1.16: art 6 (my italics).

⁴¹ Law Handbook 2000, 6321; see also Groves, 1998, 338.

offenders charged in relation to the same offence, are expected to be consistent. The Prison Discipline Manual suggests that to achieve consistency,

Levels of punishments should be consistent...and governors may wish to establish a local tariff system... The adjudicator should have available a list of recent offences and punishments. Governors should discuss with adjudicators on a regular basis what they consider to be aggravating or mitigating factors for certain offences.⁴²

Right to make submissions: The only reference in the Victorian context to a right to make a submission as to penalty occurs where prisoner pleads guilty. Regulation 49 requires the governor to review the circumstances of the case, to consider mitigating factors, and to invite the prisoner to make a plea as to penalty.⁴³

Reasons: there is no requirement in Victoria that the Governor give reasons for the decision, or for the penalty. There is now such a requirement in the UK. The Prison Discipline Manual (1995) provides that

7.4 Since a prisoner has the right, both internally and through the courts, to challenge an adjudication it is reasonable that he or she should be given sufficient reasons for the decision in order to exercise that right effectively.

The PDM also states that a prisoner found guilty at an adjudication should be provided with copies of the record of the hearing including witness statements (para 9.5)

The giving of reasons for decision is generally seen as an important adjunct to effective judicial review: at Commonwealth and state level statutory provisions for judicial review usually include the right to request reasons.⁴⁴ The obligation to give reasons can improve decision making, by requiring the decision maker to clarify and articulate their decision making processes, and by providing ongoing guidelines and precedents for comparable decision making. It can enhance the legitimacy of the decision, by reassuring the subject of the decision that appropriate matters were

⁴² *Prison Discipline Manual 1995*, para 7.7. The Prison Discipline Manual refers adjudicators to the Home Secretary's annual report on 'Statistics of offences against prison discipline and punishments in England and Wales' which shows the range of punishments at each prison establishment: para 7.8.

⁴³ The Supreme Court in *Rainsford* noted in passing the importance of being able to adequately present a submission on penalty: this was not provided in this case but was not considered fatal – para 86.

⁴⁴ *Administrative Decisions (Judicial Review) Act (Cth) 1977 s.33; Administrative Law Act (Vic) 1978 s.8.*

considered. It can also provide clear indications where appropriate matters were *not* taken into account.⁴⁵

As already noted, there is no appeal mechanism from a Governor's hearing. It is possible in an appropriate case to apply for judicial review, although this can be a slow and technical avenue of redress. Prisoners can also make a complaint to the Ombudsman.⁴⁶ If judicial review is available under the Victorian *Administrative Law Act* 1978, the prisoner would be able to obtain reasons under s.8. There is, however, no right to reasons under the process under the Rules of the Supreme Court.

The UK Prisons and Probation Ombudsman reported in his most recent Annual Report that disciplinary proceedings were the single largest category of complaint, and represented 17% of all eligible complaints.⁴⁷

The UK Prison Discipline Manual section 9 discusses grounds for review, including illegality, irrationality/ irrelevant considerations and procedural impropriety. The Manual outlines the implications of these grounds for proceeding in an adjudication. For example, whilst it is acceptable (and desirable) for decision makers to develop a local tariff of punishments for consistency, it would be a reviewable error – rendering the decision *ultra vires* for improperly fettering the decision maker's discretion – if the existence of the tariff closed the decision maker's mind to the particular circumstances of the case which might require a different tariff.

Informal sanctions should be noted here. Given the virtually total control exercised by the prison institution and its staff, many prison procedures can in practice be employed or withheld to punish (or to reward). Ditchfield and Duncan (in the UK Prior Report, 1985) report that over half (56%) of prison officers interviewed said that informal measures were used to maintain discipline 'a lot'. One-third (39%) of prison governors considered informal measures were used 'a lot'; half (51%) reported that they were used 'a little'.

The main informal measures identified by prisoners and officers as functioning as sanctions or disciplinary mechanisms included transfer to another prison;⁴⁸ informal

⁴⁵ See Aronson and Dyer, 2000, 447.

⁴⁶ UK PDM section 9: disciplinary decisions can also be reviewed as grievance going to area manager. Area manager does not have power to rehear but can quash if clearly in error, and can mitigate punishment if too severe under Prison Rule 56.

⁴⁷ PPO Annual Report, 2001-2002, 8.

warnings; change of work; adverse parole report; change of wing; withdrawal of trusted status; loss of certain privileges; change of cell; a ban on gym; and measures relating to ‘friendship/ consideration/ respect/ fairness’.

In Ditchfield and Duncan’s study, officers and inmates (and to a lesser extent Governors) emphasised the importance of informal warnings or advice. Informal warnings might include an understanding between the officer and inmate that ‘having been warned (and not reported) the inmate “owed him” one in future’.⁴⁹

It should be noted that a possible consequence of increasing the protections and formality of formal disciplinary processes is the greater use of informal (and unaccountable) measures, as noted by Loucks, 1994, above. The ALRC in its 1987 Discussion Paper on sentencing and prisons sounded the warning that

..the shift towards more formalised, open and fair disciplinary proceedings has arguably led to greater reliance upon informal disciplinary practices which are not as open or reviewable... anecdotal evidence from prisoners suggests that there is now greater use of techniques such as ‘shanghais’ (transfers), administrative segregation, classification and parole deferrals and searches as disciplinary measures.⁵⁰

3. Statistical pictures: what is known about prison disciplinary processes

Numbers of incidents and hearings

Victorian prison providers are required to submit monthly reports to the Office of the Correctional Services Commissioner on key aspects of the prison’s management. These include overall numbers of Governors’ hearings and their outcomes: see appendix B. For the five prisons whose returns were analysed for the 2000-2001 year, holding an average of 2127 prisoner in the final month of the financial year, there were a total of 227 governor’s hearings – that is, 10.7% of prisoners across these five prisons had a governor’s hearing during this month. The differences across prisons is striking, in particular the much higher rate at DPFC, the main women’s prison, and the notably low rate at Loddon. This one month was not, however, representative of the number of hearings across the year: it represented 26% of all

⁴⁸ Prisoners, prison officers and governors all agreed this was the most important informal measure available to the prison: Prior Report, 1985, vol 2, 107.

⁴⁹ Prior Report, 1985, vol 2, 107

⁵⁰ ALRC, 1987, 33-34. See also WA Ombudsman, 2000 Annual Report.

hearings at DPFC, but only 4% of hearings at Fulham (for example). Some of these points will be discussed further below.

Of the 227 hearings, 25 were dismissed, a rate of 11%, across the five prisons. Again there was considerable variation by prison, with a high rate of dismissal that month at DPFC and also Barwon prison. The month's figures were also not representative of the picture across the year: the overall dismissal rate was 6.4%.⁵¹

DPFC therefore had a much higher rate of charging that month than the other prisons, but also a higher rate of dismissal. PPP, Fulham and Loddon had lower rates of dismissal – that is, more of the charges were upheld there.

Types of incident

There is no ready access at present to details of the incidents giving rise to prison disciplinary proceedings in Victoria. However a report on Prison Incidents over the period 1992-1994 showed that the largest category of incidents was for the 'possess/use drug/alcohol' category with 508 incidents over 3 months 1992-3, and 233 incidents over 3 months in 1993-4.⁵² The second most frequent incidents were 'good order' and 'disruptive behaviour'. After these were injury, and assault prisoner.⁵³

UK statistics on proven prison offences for 2000 show that the most common offences were disobeying a lawful order, unauthorised drug use, and possessing an unauthorised article.⁵⁴

Statistics on penalties

These are not kept, or at least not publicly available in Victoria. In the UK, the most common penalty was the 'award' (imposition) of extra days, followed by loss of privileges and stoppage or reduction of earnings.⁵⁵

⁵¹ DPFC: 19% dismissed (7% over the year); PPP: 6.6% dismissed (8.9% over the year); Fulham: 7.7% dismissed (5% over the year); Barwon: 13.9% dismissed (5.6% over the year); Loddon: 9% dismissed (5.4% over the year) – based on statistics in Appendix B.

⁵² Victorian Department of Justice, 1994. The Report states that the significantly lower figure in the second period was due to a 'significant reduction in urine testing', when prisons were required to fund testing.

⁵³ Good order: 175 (1992-3); 200 (1993-4). Disruptive behaviour: 174 (1992-3); 174 (1993-4). Injury (123 and 144). Assault prisoner: 111 and 89.

⁵⁴ Home Office *Prison Statistics England and Wales* 2001.

General statistics on prisoners on ‘loss of privileges’ in Victorian prisons are available, as are data on loss of contact visits (see Appendix C). These show that around 1% of prisoners were on loss of privileges in the period under study, with around 7% excluded from contact visits for drug offences or other reasons. In this period, DPFC again appears to have significantly higher rates of ineligibility for contact visits, for drug offence reasons but particularly for ‘other’ reasons. Gender issues are discussed further below. Without further information about the prison or regime at the time, it is difficult to draw conclusions on these data. It should however be noted that DPFC (then the Metropolitan Women’s Correctional Centre) went through major management crises during the 2000-2001 year, midway through which the private contractors were removed and the state corrections provider took over the management of the prison. Disciplinary activity may therefore have increased, or fluctuated, at various points in the period.⁵⁶ The particularly low rate of drug-related loss of contact visits at Loddon is likely to be related to the strict anti-drug regime at that prison.

As a further remark on the ‘punitive’ procedures in prisons, data on the occurrence of strip searching in Appendix C shows high rates of searching per prisoner, and very low rates of discovery of contraband. A total of over 11,000 searches across the five prisons during the one month yielded 33 items. Searches totalling 126,625 over the year identified 311 items. This may mean either that there is little contraband to be found and strip searching is primarily a form of harassment or control, and/or that the bringing in of contraband is in fact being deterred by the occurrence of regular and widespread strip searching – ie that the strategy is working.

Gender

As noted, statistics based on the monthly provider reports presented to the OCSC show significant variations in the number of Governors’ Hearings in the last month of the financial year across the prison system and between the main women’s prison, DPFC, and the male prisons (see appendix B). A different picture appeared in the statistics across the full year. There may be a number of explanations for these variations but they raise clear questions.

⁵⁵ Home Office *Prison Statistics England and Wales* 2001. Imposition of extra days generally refers to a deferral of the prisoner’s eligibility for consideration for parole.

In the main women's prison, 31% of prisoners had been subject to Governor's hearings in June 2001, whilst the larger men's prisons had rates of between 8.7% and 11.7% for that month, and a smaller medium security rural men's prison reports 3.6% of prisoners involved in Governor's hearings during that month. On the other hand, other variations appear across the year, with DPFC reporting 10.34% of prisoners overall having Governor's hearings, PPP 10.3%, Fulham 19%, Barwon 12.4%, and Loddon 5.5%.

The monthly reports also indicate that proportionately many more women prisoners were ineligible for contact visits, both in June 2001 and across the year, especially for reasons other than drug offences (see Appendix C). Relatively fewer women prisoners, however, were on loss of privileges compared to men at the higher security prisons. Contact visits are not included in the list of privileges which can be withdrawn as punishment (see Appendix A). However they are not a 'right' under *Corrections Act* s.47 and can be withdrawn, for example, where there is a concern about the security of the prison or the welfare of the prisoner.⁵⁷

Without further information, these differences are open to several interpretations. Women prisoners may be more violent, more difficult to manage, more resisting of authority, than male prisoners in Victoria. There may have been a particularly difficult group of women prisoners in the prisons at this time, or around the particular months; as noted earlier, this prison had experienced a series of crises – fire, riots, staff shortages, lockdowns – and ultimately the replacement of the management.⁵⁸ Another possibility is that offences were more vigorously pursued in the women's prisons at various times, and/or that the inherent discretions already noted in the system of prison offences was employed to escalate more incidents in the women's prison than in the men's prisons. Prison systems which charge prisoners who self-harm will also have increased offence rates.⁵⁹

⁵⁶ This factor in interpreting the data was suggested by a conference participant.

⁵⁷ Reasons for ineligibility for contact visits (other than due to drug offences) were not specified in the monthly reports.

⁵⁸ See Department of Justice 2000.

⁵⁹ Dobash et al found significant charge rates for self-harm in their study of a Scottish women's prison. The UK Prison Discipline Manual states that self-harm should *not* be charged as a disciplinary offence.

In the UK offences relating to ‘disobedience or disrespect’ (which includes abusive language) represented 40% of all offences in 2000; slightly less for adult male (36%) and adult female (38%) prisons and slightly more for male youth (41%) and female youth (43%) institutions.⁶⁰ The highest level of offending in the UK (of proven charges) was in young offender institutions, and in female establishments. In the year 2000, there were 163 offences per 100 prisoners overall. The breakdown shows significant differences across age and gender. There were 134 per 100 adult males, 211 per 100 per adult females, and – significantly higher – 357 per 100 male youth, and 383 per 100 female youth.⁶¹

A further factor to be considered is race\ethnicity. The UK Home Office statistics showed much *higher* offence rates for black males than for white males, and *lower* offence rates for black females than for white females.

An inquiry in 1991 by the Victorian Equal Opportunity Commissioner into allegations of discrimination against women prisoners at Barwon Prison found higher rates of charges against women than against men. The (then) Office Of Corrections response was that these figures represented actual misbehaviour, as most of the women had been sent to Barwon because of management concerns.⁶² The Commissioner noted that ‘greater surveillance of a smaller population group is likely to increase both tension and opportunities to observe and perceive breaches of prison discipline’ (Report, 1992, p.9). Noting evidence of derogatory attitudes by some staff to the women prisoners and their views on ‘women’s characteristic behaviour’ the Commissioner concluded that

women are less able than men to satisfy prison officers that their behaviour is “appropriate” and that this contributes to their “black book” appearances (Report, 1992, p.10)

A study in Texas prisons, comparing the populations of two female prisons with comparable male prisoners, found that women were more often reported for disciplinary offences than men (eg 43% of male inmates had no reports, compared with only 9.8% of female inmates), that most citations by women were less serious

⁶⁰ Home Office *Prison Statistics England and Wales 2000, 2001.*

⁶¹ Home Office *Prison Statistics England and Wales 2000, 2001.*

⁶² OOC Response to the Issues Paper of the Equal Opportunity Commissioner, February 1992, p. 11.

but women were punished more severely, and that certain rules were closely enforced in women's prisons but ignored in men's prisons.⁶³

Noting that some disruptive prisoners may indeed be involved in large numbers of infractions, the author concluded that the women's institutions in Texas were in fact enforcing rules far more rigorously than the men's institutions – a management decision. This could be interpreted as either a response to female inmate behaviour as highly emotional and expressive and thus requiring greater control, or perhaps as reflecting 'a broader societal belief that women should conform to gender-based stereotypes stressing obedience, dependence and deference' (1994, 88). This is an analysis which has been put forward by writers such as Dobash et al.⁶⁴ They noted the rigorous responses to (eg) swearing in the Scottish women's prison they studied; the tendency to explain women's behaviour as 'hysterical'; the significance of the 'therapeutic' agenda in the women's prison; and the perception of women prisoners as having failed their domestic role.

McClellan concludes that in such a case,

the conscious policy of bringing the full weight of institutional authority to bear on every infraction of rules generates resentment and resistance. As night follows day, omnipresent surveillance elicits the behavior it is installed to control (1994, 88).

Livingstone and Owen also draw attention to the constant and pervasive regulatory role played by disciplinary law in prison, and the particular implications of this in the management of women prisoners.

Most disciplinary charges relate to offending against good order and discipline or disobeying a lawful order, in effect to refusing to comply with the social order designed by the prison administration. The relationship of disciplinary punishments to social control is particularly clear in women's prisons, where prisoners are much more likely to be put on report for swearing, talking back, or even self-mutilation than in male prisons. ... Such conduct was seen as at variance with the images of reformed 'normal' women the prison regime sought to achieve. (1998, 288)

4. Specific procedural protections and methods of proof

⁶³ McClellan (1994)

⁶⁴ (1986) *The Imprisonment of Women* 146-158.

This section addresses (a) the availability of procedures to protect fairness of the process, including the provision for notice and the right to call witnesses; and (b) the procedures dealing with fact finding and proof at Governors' hearings.⁶⁵

(a) Procedural fairness

Notice requirements

Provision of notice is a central element of procedural fairness. It must, fundamentally,

...alert the recipient to the kinds of issues which need to be addressed, and provide the information necessary to allow the manner of participation required to be afforded.⁶⁶

It must also provide sufficient time for the preparation of submissions and collection of evidence.⁶⁷

The *Corrections Act* s.53 requires the Governor to give at least 72 hours' notice of the time, date and place of the hearing. Regulation 46 provides further that where the Governor is required to give notice of the time, date and place of hearing under s.53(1), the Governor must at the same time give written advice as to the charge, and the procedure at the hearing.

At the hearing itself the governor must inform the prisoner of the procedure, and the charge must be read out, including the name of the informant, details of the place of the alleged offence, and details of the relevant provisions allegedly contravened (Reg 47(2)). It is not clear from these provisions how much detail of the substantive allegations must be given to the prisoner; requirements to advise of 'the charge', the statutory provisions and the place of the alleged offence appear to be a minimal form of notice.

UK cases have confirmed the substantive content of the notice requirement. It has been held that notice includes informing the prisoner in sufficient detail such that they

⁶⁵ For more detailed discussions see, for example, Groves 1998 and, for the UK situation, Livingstone and Owen, 1998; Creighton and King 2000.

⁶⁶ Aronson and Dyer, 2000, 411.

⁶⁷ Aronson and Dyer, 2000, 411.

are clear what is alleged; this is not complied with by merely repeating the words of the alleged offence.⁶⁸

The provision of the mandated period of notice was held to be a requirement of natural justice in 1999 in *Henderson v Beltracchi*.⁶⁹ Henderson's urine sample tested positive to cannabinoids and he was charged with an offence under Reg 44(1)(e) of 'take or use alcohol or ... drug of dependence...' He claimed that the positive result was due to passive smoking in the police van between Melbourne and Fulham prison. Henderson was told of his charge, but not given notice of the time and date until the day when he was informed the charge would be heard immediately. He was refused an adjournment for 72 hours; he was also told he could not call as a witness the author of a prison briefing paper on the effect of passive inhalation of cannabis smoke and its impact on urine readings.

Henderson's application for certiorari to quash the disciplinary findings was successful. Mandie J held that there had been a failure to comply with 'the essential framework of fair procedure' under ss.53(1) and (2), in that Henderson had not been given 72 hours' notice as required, and had not been permitted to call the expert witness (a point discussed further below). He quashed the conviction and fine (defendants to pay plaintiff's costs).

Rights to call witnesses

The prisoner has a fundamental right to defend the case against him or her. The inevitable power imbalance at a Governor's hearing makes it the more important that the prisoner is able to call on supporting evidence.⁷⁰ The right to call witnesses in defence, and cross-examine prosecution witnesses, is clearly central to this fundamental right to present a defence, and is expressly provided for by statute in most jurisdictions.

⁶⁸ See Livingstone and Owen, 1998, 270. By contrast with the Victorian notice requirements, prisoners in the UK should be served with the notice of charge 'within 48 hours of the alleged offence being discovered' but are only required to be served 'at least two hours before the adjudication is due to begin', although the Prison Discipline Manual notes that 'Good practice would be for the [notice of charge] and the form explaining the procedure to be followed ... to be served the day before the adjudication' (PDM paras 2.3 and 2.9).

⁶⁹ [1999] VSC 135.

⁷⁰ As noted earlier, Ditchfield and Duncan, in the Prior Report (1985), reported the awareness of prison governors that they did tend to believe their own officers in preference to the prisoner, in cases where it was the word of one against the other.

The *Corrections Act* 1986 provides that a prisoner is to have ‘reasonable opportunity to call relevant witnesses and cross-examine the person conducting the case against the prisoner and witnesses called by that person’ (s.53(2)).

Regulation 48 (c) also states that the prisoner (or representative) is to have ‘reasonable opportunity to cross-examine the informant and any witnesses’. Reg 48(e) requires ‘reasonable opportunity to present the prisoner’s case, including calling relevant witnesses’.

The case law indicates that a witness should be called where their evidence will be relevant and appropriate: failure to do so will be a breach of natural justice. However there is no absolute right to call a witness.⁷¹

Further, there is no power in Victoria to compel attendance of a witness. For example, in the 2000 case of *Rainsford* Eames J held that whilst the prisoner has a right to call a witness, witnesses cannot be compelled to attend, and that there may be good reasons in the prison context why witnesses might not wish to give evidence.⁷² Eames J noted the (possibly) competing obligation on the Governor to ‘take all reasonable steps for the safe custody and welfare of the prisoners’ (*Corrections Act* s.20(2)), citing Groves’ 1998 article in reference to the potential inconvenience and delay which may be caused by calling witnesses and the fact that some prisoners might feel themselves placed in an awkward situation if required to give evidence. Taking account also of the requirement in the Regulations that the hearing be conducted without formality and expeditiously, and that the Governor is not bound by the rules of evidence, Eames adopted Groves’ conclusion that:

[W]here the nature or purpose of the evidence of an intended witness is not reasonably apparent, ... a court will be reluctant to hold a refusal to allow the witness to be called is a denial of natural justice.⁷³

In *Rainsford* the Supreme Court did not even regard as a breach of natural justice the failure to call the alleged victim, to make him available for cross-examination, whilst the Governor had access to a written statement by the victim. The prisoner had not requested the attendance of the victim, and Eames J regarded this omission, and the prisoner’s failure to place emphasis on this ground in his judicial review application,

⁷¹ See cases discussed in Groves 1998, 369ff.

⁷² *Rainsford v Governor of Her Majesty’s Prison at Ararat* [2000] VSC 141.

⁷³ para 39; citing Groves, 1998, 379

as significant factors in concluding there had been no breach. However His Honour also noted that the prisoner may (not unreasonably) simply have assumed that the victim would be called, and that he had not been legally represented – which he noted was a ‘considerable disadvantage in a case like this’ – and thus may not have appreciated that he could or should take such actions (p.9). His Honour’s view of the role of the court was summarised in his comment that:

Whilst the courts must carefully scrutinise the conduct of prison disciplinary hearings which are the subject of complaint, so as to ensure that prisoners are not denied those civil rights to which [sic] are entitled under relevant legislation and at common law, the Courts should also be slow to intrude into the prison disciplinary process unless clear grounds exist for intervention. The dynamics, danger and, at times, irrationality of a prison setting are far removed from the relative tranquillity of the Supreme Court, and the court should be slow to second-guess trained and (in this case) senior prison officers, as to the weight to be given to various factors which might be relevant to the decision as to the calling of witnesses. (p.10)

The case demonstrates a narrow approach to the ‘content’ of natural justice – that it is prima facie required, and is provided for in the governing legislation and regulations, but that its content is limited by the disciplinary/ custodial context.

By contrast, the refusal to call the expert witness in *Henderson* was held to be a breach of natural justice, on the basis that the witness’s evidence was relevant to an issue in the case. As noted above, Henderson claimed that his positive urine result was due to passive smoking in the police van between Melbourne and Fulham prison. He was not permitted to call as a witness Dr Drummer, the author of a paper on the effect of passive inhalation of cannabis smoke. Beltracchi, the Governor’s delegate, heard the charge. He said he was aware of the paper but did not consider it relevant, and that he did not accept the passive smoking defence. The Supreme Court, on review, held that the question of the prisoner’s state of mind was in issue – a point not considered by the Governor at the hearing – and that the expert witness might have been able to raise a reasonable doubt on the issue.⁷⁴

Similarly, in *Crowley v Stewart* Smith J held that refusal by the Governor to play at the hearing a videotape of the search which allegedly located cannabis in the prisoner’s computer was a breach of natural justice (as well as breaching s.53 and reg

⁷⁴ In *Henderson* the Supreme Court held that prison drug offences include a mens rea component – that intention or recklessness may have to be shown. The passive smoking defence, if accepted, would have thrown doubt on whether the prisoner had intentionally used the drug.

48).⁷⁵ The prisoner claimed that prison officers had planted the cannabis. The video apparently showed the dog handler directing the dog to the computer and the dog showing very little interest. Crowley had requested the replay of the video as part of his cross-examination of the handler. Smith J noted that, whilst the courts may have been reluctant to interfere in the management of prisons, this was not the case where there had been a clear breach of the legislation, as occurred here.

In NSW there is provision for the body reviewing the management of serious offenders to ‘obtain information in writing or by electronic means’.⁷⁶ This reinforces due process requirements, whilst minimising inconvenience where prisoners have been moved, and preventing transfer being used to obstruct the giving of evidence.⁷⁷

In the UK the courts have treated the calling of witnesses as a central element of a fair hearing.⁷⁸ By contrast, in the US, the Supreme Court has refused to recognize any right to cross-examination, although ABA Standards and many state prison rules provide for cross-examination.⁷⁹

Access to evidence

A prisoner facing a disciplinary hearing may wish to have access to informant and witness statements, and any other material relating to the charge. As noted above, there are statutory requirements for disclosure of some of these items.

Disclosure of information relevant to the case is an extension of the requirement for notice, and similarly fundamental to a fair hearing.⁸⁰ The parties appearing at the hearing are entitled as a matter of natural justice to access to all material being considered, although there may be an argument that confidentiality or a competing public interest – eg in the protection of prison informants – require non-disclosure of particular material.⁸¹

⁷⁵ [2001] VSC 17.

⁷⁶ *Prisons Act* 1952 (NSW) s.22E(2).

⁷⁷ Groves 1996, 651.

⁷⁸ See generally Livingstone and Owen, 1998, 281.

⁷⁹ Livingstone and Owen, 1998, 281.

⁸⁰ Aronson and Dyer, 2000, 413.

⁸¹ Aronson and Dyer, 2000, 414ff; Groves 1998, 363-6.

In the UK prisoners have generally been unsuccessful in applications to gain access to statements made before the hearing by prison officers or prosecution witnesses, although it is recognised that it would be unfair not to allow access where there is a claim of a discrepancy between what is alleged at the hearing and what was stated on the original report.⁸²

As noted earlier, the Governor is not bound by the rules of evidence and ‘may be informed on any matter in such manner’ as he or she thinks appropriate (Reg. 45(c)). However it is generally recognised that such a formulation does not mean that the rules of evidence can be ignored. They clearly provide useful guidance on the reliability of proposed evidence and, whilst not binding, will still be relevant to the process.⁸³ For example, in *Rainsford* (2000) the Supreme Court observed that Reg. 48(a) and (b) would usually require oral evidence at the Governor’s Hearing, although hearsay evidence would be admissible, provided it was not introduced tactically to prevent cross-examination (para 46).

In the UK it has been held that a Board of Visitors carrying out disciplinary functions would be entitled to admit hearsay evidence, but ‘subject to the overriding obligation to provide the accused with a fair hearing’.⁸⁴ This might require giving the prisoner the opportunity to question the witness giving the hearsay evidence, at least where the evidence was a substantial part of the case against him or her.⁸⁵

The *Prison Discipline Manual* indicates that where a prisoner pleads not guilty, a conviction based solely on hearsay would clearly be unsafe; where the prisoner disputes the hearsay evidence and wishes to question the witness, and this is practically impossible, the decision maker should refuse to admit the evidence (para 5.7).

Eames J in *Rainsford* noted that hearsay evidence would be admissible at a disciplinary hearing but is ‘not the best and most reliable evidence on which to base decisions which can have important consequences for an accused prisoner’ (para 59).

⁸² Livingstone and Owen, 1998, 279.

⁸³ See comments of Eames J in *Rainsford* (2000) para 58ff; see also discussion in Groves 1998, 384-9.

⁸⁴ *R v Board of Visitors of Hull Prison; ex parte St Germaine (no. 2)* [1979] 3 All ER 545, 552.

⁸⁵ *R v Board of Visitors of Hull Prison; ex parte St Germaine (no. 2)* at 553. This is reiterated in PDM para 5.7.

Drug test certificates constitute hearsay evidence, but provide the usual basis for finding a drug offence proven. In the UK it has been confirmed that a conviction can be based on a test certificate as to results of a urine test. However the *Prison Discipline Manual* provides that if the prisoner pleads not guilty, the second sample (routinely taken at the same time as the first, as a precaution – as is the case in Victoria) should be tested. If the prisoner contests the results of the later test he or she may ask for the relevant laboratory scientist to attend and to be questioned (PDM para 6.99).

There is no clear rule on this in Victoria. Groves argues that there could be little point in allowing a prisoner to call and question an experienced chemist about a process which the prisoner (and probably the hearing officer) does not understand, as cross-examination is likely simply to reinforce the strength of the evidence (1998, 389). Presumably if a prisoner was in a position in fact to challenge an aspect of the testing procedure such cross-examination on the certificate should be allowed.

Representation

There is no right to legal representation in Victoria. The *Corrections Act* (Vic) allows a prisoner to be represented by another prisoner if the Governor approves (s.53(3)). Where one component of natural justice is explicitly provided for in the legislation, the courts may conclude that no additional form is to be inferred. Further, general principles of natural justice would suggest that legal representation would not usually be seen as necessary for a fair hearing. Groves (1998, 380, 381) argues that legal representation would probably be excluded under general principles, and should be excluded, on the basis that it would over-legalise the process, that there would be an imbalance of resources between parties, and that it would lead to unacceptable delays. An exception would be where the potential penalty includes additional time in custody, where legal representation should be available.

Legal aid-funded advice can be obtained prior to the hearing, either upon specific application for legal aid, or at the regular visits of legal aid lawyers to the prison for provision of advice.⁸⁶

Lack of skilled representation is nonetheless a serious limitation on the prisoner's capacity to participate in the proceedings and to protect his/ her own interests. Legal

⁸⁶ See Law Handbook 2000, 630-631.

representation can provide professional skills of argument and advocacy; can bring in an element of external scrutiny of the process; can challenge the culture of suspecting the veracity of a prisoner when it was his/her word against that of an officer.

The average level of education in the prison population is not high: less than 10% of male prisoners have completed secondary, trade or tertiary education.⁸⁷ Women prisoners have only relatively higher educational levels, with over 20% having completed secondary, tertiary or some other post-secondary education, and a further 72% reporting some secondary-level schooling.⁸⁸

Prisoners also have limited access to legal information in prison libraries.⁸⁹

The Law Reform Committee of the Parliament of Victoria, in its *Review of Legal Services in Rural and Regional Victoria* (May 2001) recommended review of ‘the procedures for ... Internal Disciplinary Hearings, including the issue of representation for prisoners’ (rec 78), and that ‘the OCSC ... establishes a policy in relation to internal disciplinary hearings which provides for the basic principles of natural justice to be accorded to prisoners’ (rec 80).

The OCSC in an internal report on the Law Reform Committee’s recommendations (11/9/01) noted Prison Visitors’ view that prisoners needed better access to information and representation, in the context of a process which can result in significant punishments for prisoners. The OCSC also noted the Visitors’ concerns about aspects of internal disciplinary proceedings, including lack of consistency in outcomes, perceived lack of independence of the hearing process, perception that the system is ‘simply a rubber stamping process’, lack of compliance with procedural requirements by some staff, and lack of access to appeal avenues.

In the UK disciplinary proceedings can result in the imposition of extra time, and this is recognised to be a strong argument for access to legal representation. The Divisional Court held in *Tarrant* in 1985 that in some circumstances natural justice

⁸⁷ 87% have undertaken some secondary-level schooling: OCSC Stat Profile 1999.

⁸⁸ OCSC Statistical Profile 1999.

⁸⁹ The SMRs require provision of access to a library. Provision varies across the prison system; the private Port Phillip Prison has well-supported library resources, including CD-Rom access to primary and secondary legal materials.

could require access to legal representation in Board of Visitor discipline hearings.⁹⁰ The decision triggered significant review of the prison discipline system, and the establishment of the Prior Committee in 1985.

The Prior Committee ultimately decided against a right of legal representation. It had recommended the establishment of a Prison Disciplinary Tribunal, with a legal chair, and concluded that this structure would ‘protect prisoners against procedural carelessness while the costs and potential delays resulting from having representation in all cases were too much to bear’.⁹¹ It appears that, in the UK, at most the Governor is now required to *consider* any request for representation, but that representation is now rarely granted.⁹² A prisoner can however request attendance of a friend or adviser, who may be allowed to address the tribunal.

In a recent New Zealand case, *Drew v Attorney-General*, the prisoner argued that a disciplinary hearing was ultra vires in that it breached s.24 of the NZ *Bill of Rights Act* 1990, which provided that everyone charged with an offence had the right to consult and instruct a lawyer and to adequate time to prepare a defence.⁹³

The central claim was that prison offences constituted ‘offences’ – criminal offences. The NZ High Court dismissed the argument, adopting the reasoning in a line of Canadian cases that prison disciplinary proceedings were not by their nature criminal, as the prisoner was ‘not being called upon to account to society for a crime which violated the public interest but to a prison official for failing to conduct himself in accordance with internal prison rules’⁹⁴ and that they did not involve the imposition of true penal consequences: loss of remission (as occurred here) was not found to be penal in nature because it was the loss of a privilege.

Further, the NZ High Court considered that even if the *Bill of Rights Act* applied, legal representation was not obligatory in the prison setting as it would cause delays, and

⁹⁰ *R v Sec of State for the Home Dept; ex p Tarrant* [1985] QB 251 – eg where charge and penalty were serious; where difficult points of law might arise; where the prisoner is of limited capacity to run his or her own case.

⁹¹ Livingstone and Owen, 1998, 276.

⁹² Livingstone and Owen, 1998, 278.

⁹³ [2000] 3 NZLR 750.

⁹⁴ [2000] 3 NZLR 750, 751.

was not essential to justice as the proceedings did not result in a further term of imprisonment.⁹⁵

(b) Proof in disciplinary proceedings

Burden of proof

The standard of proof against which the prosecution evidence is to be judged is not spelt out in the Victorian legislation. The conclusion of Mandie J in *Henderson* on the nature of prison offences (see discussion below) suggests that the ‘beyond reasonable doubt’ standard should be applied, although the NZ case discussed above would tend to support the contrary view.

In *R v Visiting Justices of Yatala Labour Prison; ex parte Robinson* the South Australian Supreme Court disapproved strongly of disciplinary proceedings where the Visiting Justices effectively reversed the onus of proof, by cross-examination requiring the prisoner to prove his innocence.⁹⁶ This practice was regarded as ‘most improper’, but not such as to amount to a jurisdictional error justifying a remedy.

In the UK the courts have supported the view that the criminal standard of proof applies in prison discipline hearings.⁹⁷ By contrast, the US Supreme Court has stated that it was sufficient that a conviction was supported by ‘some evidence on the record’.⁹⁸

Elements of prison offences

There is no explicit reference in Reg 44 to whether prison offences include requirement of proof of mens rea, although the language – ‘assault’, ‘threaten’, ‘traffic in’, ‘take or use’ – is readily interpreted as including an element of intentionality, and would be so interpreted in the external justice system. In Victoria prison drug offences have been held to require proof of some level of mens rea. In *Henderson v Beltracchi* (1999) the prisoner argued that his positive urine test was the result of passive inhalation of other prisoners’ smoke. Mandie J concluded that the prison offences under the Victorian Corrections Regs 44, which were stated to be

⁹⁵ A further distinction was that the NZ regulations allowed a lawyer to be consulted and to give advice at the hearing.

⁹⁶ (1981) 28 SASR 276.

⁹⁷ *Tarrant* [1984] 1 All ER 799. See Creighton and King, 111.

⁹⁸ See Livingstone and Owen, 1998, 282.

triable ‘under the criminal law’ (s.50(5), s.51(d)) were summary offences and, if tried in the Magistrates’ Court, punishable by a term of up to two years’ imprisonment. This finding weighed strongly against the prison authority’s argument that the offence of ‘taking or using’ unauthorised substances (reg 44(1)(e)) was an offence of absolute liability. Following cases such as *He Kaw Teh* (1985), and holding that the prisons offences were summary offences for the purposes of the *Sentencing Act*, he concluded that they potentially gave rise to serious penalties, and therefore either required proof of mens rea or at least permitted a defence of honest and reasonable mistake. Dr Drummer’s evidence might have raised a reasonable doubt as to Henderson’s state of mind and thus was relevant to his case. Mandie J added that ‘whilst the penalty was small, the procedural defects were fundamental’.⁹⁹

Generally, however, the offences or rules do not spell out either the standard of proof or the degree of fault required.

In the UK the Prior Report recommended revision of the disciplinary offences to produce a code which was clear and simple for staff to operate, and which

makes clear to prisoners what constitutes an offence, and states clearly the degree of fault, knowledge etc which needs to be proved.

The UK courts have also begun to interpret prison disciplinary offences more strictly, and to indicate that, in line with general criminal principles, they would construe ambiguities in favour of the defendant.¹⁰⁰

Conclusion

Prison discipline is central to the management of imprisonment and the maintenance of order and safe custody in prisons. It is also central to prisoners’ experience of imprisonment. The fairness of the disciplinary process – actual and perceived - is fundamental to its effectiveness and its legitimacy. Formal procedural requirements for fact-finding and decision-making in Victoria are spelt out in the legislation and regulations. They provide an important, if at times minimalist, framework for fair processes. What is known of the application of these procedural requirements shows that the disciplinary context significantly influences their operation in practice.

⁹⁹ [1999] VSC 135, at p.13.

Developments in the UK towards a fuller articulation of disciplinary practice, and towards greater recognition of the obligations of fairness in prisons, have been driven at least in part by European jurisprudence and more recently by the introduction in 2000 of the *Human Rights Act*. Lessons may usefully be drawn from the UK and other European jurisdictions. However the impact of formal procedural and substantive changes on day to day management in prisons and on the practice of discipline – formal and informal - in prisons remains to be examined.

¹⁰⁰ Livingstone and Owen, 1998, 266; and see Levenson 2000.

Appendix A

Privileges which can be withdrawn as sanction for prison offences (see Corrections Act 1986 s.48, Corrections Regulations 1998, Reg 36)

Source: CORE Operating Procedures Manual, Schedule 1.16 (5), 14/4/2000.
Applies for period February 2000 to December 2000.

- Access to private monies;
- Canteen spend items other than essential toiletries;
- Access to canteen items other than essential items;
- Access to telephone calls;
- Access to cigarettes or tobacco products;
- Access in cell to electrical goods (excluding televisions, radios, fan, water heating device and shaver);
- Access to a television;
- Access to organised sporting or recreational activities;
- Access to hobby activities and items;
- Access to extended out-of-cell hours or night activities;
- Access to personal cell property in excess of 50 points;
- Unrestricted access to other prisoners at the same location;
- Access to specialist accommodation.

No additional privileges apply in individual prisons.

Appendix B: Statistics on disciplinary hearings at five Victorian prisons: 2000-2001*

| Prison | DPFC Month; [% of prison pop that month]; (full year figure) | PPP | Fulham | Barwon | Loddon |
|--------------------------------------|---|---|--|--|--|
| Gov Hearing: Charge proven | 43 [25%] (187/yr) | 57 [8%] (762/yr) | 61 [9%] (1364/yr) | 31 [10%] (421/yr) | 10 [3%] (193/yr) |
| Gov Hearing: Charge not proven | 10 [6%] (14) | 4 [0.6%] (74) | 5 [0.8%] (75) | 5 [1.6%] (25) | 1 [0.3%] (11) |
| <i>Total gov hearing</i> | <i>53 [31%] (201/yr: 1.24/prs)</i> | <i>61 [8.7%] (836/yr: 1.24/prs)</i> | <i>66 [10%] (1439/yr: 2.3/prs)</i> | <i>36 [11.7%] (446/yr: 1.49/prs)</i> | <i>11 [3.6%] (204/yr: 0.7/prs)</i> |

Source: Monthly monitoring reports submitted to the OCSC.

*1/7/2000-30/6/2001 for all prisons except Fulham; 7/4/2000-6/4/2001 for Fulham prison.

Prison populations: June 2001

| | | |
|---------------|--------------------------------------|---|
| DPFC | av. Total month's prison population: | 171 (av mthly population for the year : 162) |
| Port Phillip: | av. total month's prison population: | 698 (av mthly population for the year : 676) |
| Fulham | av. total month's prison population | 644 (av mthly population for the year : 627)** |
| Barwon: | av. total month's prison population | 306 (av mthly population for the year : 300) |
| Loddon: | av. total month's prison population | 308 (av mthly population for the year : 307) |
| Total: | | 2127 (av mthly population for the year : 2072) |

** Fulham: the relevant month was March 2001

Appendix C: statistics on disciplinary outcomes and practices at five Victorian prisons: 2000-2001*

| | DPFC Month; [% of prison pop that month]; (full year figure: % across full year) | PPP | Fulham | Barwon | Loddon | Total |
|--|---|---|---|--|---|---|
| Total prisoners on loss of privileges | 1 [0.6%] (23: 14.2% full year) | 14 [2%] (195: 28.8% full year) | 1 [0.16%] (94: 15% full year) | 7 [2.3%] (78: 26% full year) | 1 [0.3%] (14: 4.6% full yr) | 24 [1.1%] (404: 19.5% full year) |
| Prisoners ineligible for contact visits: drug offences | 15 [8.8%] (55: 34% full yr) | 29 [4.2] (344: 50.9% full yr) | 35 [5.4] (343: 54.7% full yr) | 18 [5.9] (249: 83% full yr) | 1 [0.3] (56: 18.2% full yr) | 98 [4.6%] (1047: 50.5%) |
| Prisoners ineligible for contact visits: other reasons | 36 [21%] (141: 87% full year) | 0 [0] (0) | 1 [0.2] (89: 14.2% full year) | 11 [3.6] (96: 32% full year) | 10 [3.3] (130: 42.3% full yr) | 58 [2.7%] (456: 22% full year) |
| Strip searches carried out on prisoners | 1700 [9.9 per pris] (5854: 36.1/pris) | 4859 [7 per pris] (59112: 87.4/pris) | 1683 [2.6 per pris] (20450: 32.6/pris) | 1307 [4.3 per pris] (15252: 50.8/ pris) | 2089 [6.8 per pris] (25957: 84.6/pris) | 11638 [5.5 per prisoner] (126,625: 61.1/pris) |
| Strip searches on prisoners yielding contraband | 0 [0] (0) | 16 [0.3% success] (204: 0.35) | 13 [0.8% success] (93: 0.45) | 4 [0.3% success] (14: 0.09) | 0 [0] (0) | 33 [0.3% success] (311: 0.25) |

Source: Monthly monitoring reports submitted to the OCSC.

*1/7/2000-30/6/2001 for all prisons except Fulham; 7/4/2000-6/4/2001 for Fulham prison.

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