Ombudsman
New South Wales

Investigation into inmate discipline in NSW correctional centres

A special report under section 31 of the Ombudsman Act 1974

Pursuing fairness for
the people of NSW.

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We acknowledge the traditional custodians of the land on which we work and pay our respects to all Elders past and present, and to the children of today who are the Elders of the future.

Artist: Jasmine Sarin, a proud Kamilaroi and Jerrinja woman.

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Ombudsman
New South Wales

The Hon Benjamin Franklin MLC
President
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SYDNEY NSW 2000

The Hon Greg Piper MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Mr Speaker

Pursuant to section 31 of the *Ombudsman Act 1974*, I am providing you with a report titled *Investigation into inmate discipline in NSW correctional centres*.

I draw your attention to section 31AA of the Act in relation to the tabling of this report, and request you make the report public forthwith.

Yours sincerely

Paul Miller
NSW Ombudsman
21 August 2024

OMBUDSMAN
ORTA RECENS QUAM PURA NITES
NEW SOUTH WALES

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Executive summary

This is a report of the NSW Ombudsman's own motion investigation into the administration of the NSW inmate disciplinary system.

Why we investigated

The NSW Ombudsman regularly deals with complaints from inmates about the process and decisions made in relation to correctional centre offences. In some complaints received in recent years, our inquiries led us to conclude that findings of guilt may have been unfair, or even unlawful, and we formally suggested that CSNSW conduct a review. In each case, following review, the findings were overturned.

From 2018 we also began to receive complaints about a new inmate disciplinary policy (the **Policy**). The new Policy provided for all functions in relation to inmate discipline to be delegated to certain officers within centres. Prior to this Policy being adopted, all determinations of disciplinary matters (findings of guilt) and penalties were made by the centre governor personally, following recommendations made by delegates (who only made preliminary decisions, for example as to the charges to be laid).

More recently (and after we commenced the current investigation) we have also conducted a number of specific investigations into complaints made to us by inmates about particular inmate discipline proceedings.[1]

What we investigated

The inmate disciplinary system deals with inmates who, while in a correctional centre, are alleged to have committed a 'correctional centre offence'. These offences are prescribed in the regulations, and there are 71 of them. They include assaults, drug offences, theft and other property offences, as well as various discipline and good order offences, such as 'fight', 'disobey direction', 'fail to clean yards', 'enter other cells' and so on.[2]

Inmate disciplinary processes are administrative in nature, and do not result in criminal charges, convictions or sentences.[3] If found guilty of a correctional centre offence, the penalties that can be imposed include reprimand and caution, deprivation of certain privileges (which include telephone calls, 'buy ups',[4] and contact visits), confinement to cell (with or without deprivation of privileges), and cancellation of the right to receive payments for work done in the centre. Inmates can also be charged compensation for property damage (up to $500).

Findings may also have ramifications for an inmate beyond the immediate penalty – they can impact decisions made about an inmate's placement, classification and parole.[5] In addition, reports about correctional centre offences may be taken into account under the *Crimes (High Risk Offenders) Act*

1 See NSW Ombudsman, Formal investigations – Summary report 2022-2023 (30 October 2023), 12-13; NSW Ombudsman, Casebook July 2024 (30 July 2024) 38-39; and NSW Ombudsman, Investigation into response to incident at Clarence Correctional Centre (21 August 2024).

2 For a full list of prescribed offences, see Schedule 2 Crimes (Administration of Sentences) Regulation 2014 ('CAS Reg').

3 There is one exception to this: if the inquiry into a correctional centre offence is conducted by a Visiting Magistrate (rather than by the governor or a delegate of the governor), the Visiting Magistrate can, as well as the usual administrative penalties, impose a sentence of imprisonment of up to 6 months: s 56 Crimes (Administration of Sentences) Act 1999 ('CAS Act').

4 'Buy ups' refers to the ability to make purchases at the correctional centre shop.

5 CAS Act (n 3) ss 70(1)-(2), 222A, 135; CAS regulation (n 2) regs 20-23; Corrective Services NSW Fact Sheet 9: Classification and Placement, May 2019 <https://correctiveservices.dcj.nsw.gov.au/documents/csnsw-fact- sheets/classification-and-placement.pdf>.

2006, which may in turn affect the Supreme Court's determinations in regard to extended supervision orders or continuing detention orders.

Some conduct that would constitute a correctional centre offence may also constitute a criminal offence. Criminal offences of a serious nature that occur in a correctional centre are required to be reported to police, and may be the subject of criminal proceedings. However, most correctional centre offences are dealt with entirely within the centre.

Following the making of a report of inmate misconduct, which is mandatory for any staff member who suspects that an inmate has committed or about to commit an offence, the correctional centre disciplinary system generally involves the following key steps:

- deciding whether to charge the inmate and the correctional centre offence/s with which they are to be charged
- affording the inmate the opportunity to enter a plea of guilty or not guilty
- if a plea of guilty is made, deciding whether to accept that plea[6]
- if a plea of not guilty (or no plea) is made, conducting an inquiry and determining guilt based on the standard of 'beyond reasonable doubt'
- if guilty, deciding whether, and if so which, permissible penalties should be imposed.

Under the current inmate discipline Policy, all steps in respect of any particular matter are performed by a single delegate of the centre's governor.

Our investigation examined aspects of the end-to-end system, structured around the following topics:

- the conduct of inquiries (including the acceptance of guilty pleas/the making of findings of guilt) (section 2.1)
- the imposition of penalties (section 2.2)
- oversight and review processes (section 2.3)
- the selection and laying of charges (section 2.4)
- record keeping practices and delegate training (section 2.5).

The investigation covered all correctional centres, including both those managed by Corrective Services NSW (**CSNSW**) as well as those managed under contract.[7] The investigation has focused on conduct in the period since 1 January 2018.

How we investigated

As well as focusing on cases where inmates had complained to us, our investigation involved a forensic examination of a sample of inmate 'packages' – over 350 in total – of inmate disciplinary proceedings over the last 5 years, across all correctional centres, relating to a total of 57,618 disciplinary charges. We also examined any related records of those charges in the CSNSW Offender Integrated Management System database.

We also reviewed relevant legislation and policies, staff training and education materials, and information contained in Inmate Handbooks.

[6] As discussed later in this report, in practice it appears that this step is not often executed.

[7] Managers during the relevant period of this investigation are: Serco Australia (Clarence Correctional Centre), MTC Australia (Parklea Correctional Centre, since 2019) and GEO Group (Parklea Correctional Centre (up to 2019) and Junee Correctional Centre).

During the course of the investigation we also obtained legal advice on several questions from Senior Counsel (Simeon Beckett SC).

After forming provisional views, we sought submissions from CSNSW and the contracted centre management companies. Submissions received from CSNSW[8] were taken into account in finalising our findings and recommendations.

What we found

Our overarching conclusion is that:

- There is a systemic failure to follow the requirements of the legislation and the relevant policies in relation to inmate discipline. In some cases, this is leading to unjust outcomes and potentially unlawful decisions.
- We saw maladministration at all steps in the disciplinary process, which was not confined to any particular centres or decision-makers.

Key observations and conclusions include:

In relation to the conduct of inquiries and the making of findings of guilt

- Of the cases we examined where inmates had been found guilty after pleading 'not guilty', we assessed that a finding of guilt was not reasonably open to the delegate to make (to the requisite standard of 'beyond reasonable doubt') in a significant proportion of those cases (14 of 36).
- Most charges (around 70% of those we sampled) are finalised after recording a guilty plea by the inmate. However, in some cases we found evidence that guilty pleas had been recorded in circumstances where it appeared the inmate wished to contest the charges. For example, of the 32 packages we examined where the inmate was noted to have 'refused to sign' the discipline paperwork, half were recorded as pleading guilty.
- We also noted that delegates are required to make a decision whether or not to accept a guilty plea, and in doing so are required to consider whether there is actual prima facie evidence of the offence to support a guilty finding, as well as whether the inmate understands the charge and the plea they are to make. Records do not demonstrate that this is happening.
- It does not appear that all criminal offences of a serious nature are being reported to police as is required by the Policy.
- It appears that, in the last 10 years, no consideration has been given to the referral of any correctional centre offence for hearing by a Visiting Magistrate, as is permitted by the legislation.
- Referrals of inmates who are charged with drug offences to drug intervention programs are not always being made, when the Policy requires them to be made.
- Inmates whose behaviour would more appropriately warrant referral for mental health support (for example, behaviour that is primarily self-harming in nature) are being dealt with through the disciplinary process.

[8] No substantive submissions were received from the contracted management companies.

- Although the CAS Act requires certain inmates (in particular those with relevant intellectual disability or difficulty understanding English) to be given support to ensure they can participate in a fair inquiry (such as an interpreter or support person), it appears this is not happening.
- Although the CAS Act provides that inmates have a right to call witnesses to the inquiry, in multiple cases their requests to do so are refused.

In relation to the imposition of penalties

- Some inmates have been subject to impermissible penalties, including multiple penalties for the same offence and penalties (such as cell confinement and withdrawal of privileges) that exceed the maximum duration of penalties under the CAS Act.
- Some inmates have been subject to compensation orders that exceed $500 – the maximum amount allowable under the law. Some have been impermissibly ordered to reimburse the costs of a Fire and Rescue NSW call-out (even though the Commissioner of CSNSW had, in 2018, assured the Ombudsman that the practice of doing that had been discontinued).
- Insufficient regard is being paid to the requirement that withdrawal of phone calls and contact visits is to be a penalty of last resort.
- Young Aboriginal inmates have been penalised by being confined to cell alone, despite this being prohibited by the Policy and contrary to the recommendations of the Royal Commission into Aboriginal Deaths in Custody.
- Other vulnerable inmates have also been confined to cell; records do not suggest that risk factors are being appropriately assessed. Of the sample packages we examined where confinement to cell was imposed as a penalty (65), a significant number (74%) had one or more vulnerability indicators, including 42% who were Aboriginal.
- CSNSW has a Policy that purports to mandate cell confinement for all inmates in certain circumstances, without any regard to individual facts (such as inmate vulnerability or risks). This impermissibly fetters discretion, and may be inconsistent in practice with other policies (such as the Policy that young Aboriginal inmates should be confined to their cell alone).

In relation to the selection and laying of charges

- Inmates are regularly being charged with incorrect charges for the conduct alleged, with nearly a third (31%) of the sample packages we examined of non-drug related offences being incorrect.
- Inmates are regularly being charged under general ‘catch-all’ offences – typically a ‘failure to comply with correctional centre routine’ or a ‘disobey direction’ – instead of a charge that specifically matches the reported misconduct. The offence of ‘failure to comply with correctional centre routine’ is regularly misused as it is only applicable where an inmate has failed to comply with the hours of work or with the formally determined general routine for the centre as set by the governor under CAS Regulation cl 37.
- Sometimes inmates are invalidly charged with both offences, or with other multiple offences, for exactly the same conduct.

In our investigation we also considered systemic issues, that related to and in some cases may contribute to the above issues. These included:

In relation to review rights and oversight of decisions

- There is no legislated right of review or appeal other than the theoretical possibility of judicial review. That lack of a legislated review right is inherently unfair.
- While governors are empowered to revoke penalties in certain circumstances, there is no provision for them to set aside findings.
- The Policy refers to the possibility of review by the General Manager, Statewide Operations. However, the status of this review avenue is legally problematic, as the General Manager, Statewide Operations has no legal power to unmake, reverse or expunge a legally valid decision, and the question of whether a decision is legally invalid can only be authoritatively determined by a court. In any case, this review avenue is inaccessible and rarely used – there is no reference to it in the Inmate Handbooks and it is not otherwise brought to the attention of inmates. Nor is there any specific process or form by which inmates can apply for such a review.
- Governors, having delegated the inmate disciplinary functions to certain officers within their centres, now lack oversight of disciplinary decisions made in their centres. Similarly, there is no central oversight across the system as a whole.

In relation to record keeping

- The standard of record-keeping in respect of disciplinary matters is exceptionally poor. Many records do not comply with minimum legislative requirements, and are a long way from good administrative practice.
- In cases where findings were reviewed and overturned after an inmate complained to the Ombudsman, relevant records have been deleted ('expunged') rather than notated and corrected. While the Policy states that a record of an offence 'must be expunged' in certain circumstances, there is no statutory power to expunge or delete a record, and doing so contradicts the requirement imposed on the governor by the CAS Act to keep these records at the correctional centre and make them available for inspection.

In relation to delegate training

- Many of the errors we observed above appear at least in part to stem from lack of understanding by delegates of the framework and their obligations when making decisions about inmate discipline. There is no policy statement as to the training or qualifications required of a delegate who performs inmate disciplinary functions (including holding inquiries, making findings and imposing penalties). Existing training materials are inadequate.

Maladministration findings

The Ombudsman has accordingly made findings under s 26(1) of the *Ombudsman Act 1974* that some aspects of the administration of inmate discipline across all custodial facilities are contrary to law, while others are unreasonable, unjust and otherwise wrong.

The Ombudsman has also made a finding in relation to (the lack of) review and appeal rights that, although relevant aspects of the administration are in accordance with law or established practice, the law or practice itself is unreasonable and unjust.

What we have recommended

System reform

The Ombudsman recommended that Corrective Services NSW undertake a comprehensive review of the inmate discipline framework and accompanying processes, including any necessary stakeholder consultation, with the view to reforming the current framework, including through legislative amendment, to improve its fairness and effectiveness.

The review and any subsequent reform should encompass the entire disciplinary process and aim to introduce legislated internal and external review and appeal rights in respect of both findings and penalties.

The Ombudsman also made a range of recommendations aimed at strengthening the current processes in relation to the conduct of inquiries, imposition of penalties, staff training and the information provided to inmates.

Finally, the Ombudsman recommended that a comprehensive and continuous quality assurance program be developed to underpin correct and consistent decision-making and ongoing process improvement.

In its submissions responding to our provisional findings and recommendations, Corrective Services NSW informed us that, following the commencement of our investigation, it has already commenced a review of the system, and remains firmly committed to significantly reforming the inmate discipline process to make it lawful and fair.

Individual inmate discipline matters

The findings of this investigation undermine confidence in disciplinary decisions generally, and particularly so in respect of the recent past since 2018 when all functions have been delegated and no longer performed by centre governors.

Any direct penalties for disciplinary offences, including those that were unlawfully or unreasonably imposed, will have been served.

However, in matters since 2018 where a compensation order was made against an inmate, the Ombudsman has recommended that a review be undertaken to ascertain whether the order was imposed contrary to law or policy (for example by exceeding the prescribed maximum of $500) and, if so, reimburse inmates accordingly.

Further, as noted above, disciplinary findings can have long term indirect impacts on inmates (such as through placement, classification and parole). The findings of this investigation cast a cloud of doubt over disciplinary decisions made in recent years. For these reasons, the Ombudsman has also recommended that, subject to it obtaining legal advice as to what can be done, CSNSW amend its policies and practices so that decisions about an inmate's ongoing management (including parole decisions) should only take into account a disciplinary determination made since 2018 if a review of that determination is made which concludes that the relevant finding may be safely relied upon.

1. Background

On 15 September 2022 in accordance with s 13(1) of the *Ombudsman Act 1974* (the Ombudsman Act), the Ombudsman decided, of his own motion, to make the conduct of Corrective Services NSW (CSNSW) concerning its administration of inmate discipline the subject of an investigation under the Ombudsman Act.

CSNSW outsources the operation of several custodial facilities to 3 private companies - Serco Australia, MTC Australia and GEO Group. Their conduct in relation to the administration of inmate discipline was also made the subject of the investigation.

On 15 September 2022, the heads of CSNSW and Serco Australia, MTC Australia and the GEO Group were given a notice of the investigation under s 16 of the Ombudsman Act. The conduct the subject of investigation was specified as:

> practices from April 2018 to date in applying the provisions of Division 6 of the *Crimes (Administration of Sentences) Act 1999* and the CSNSW Custodial Operations Policy and Procedures (COPP) 14.1 Inmate Discipline, including the charging of inmates with disciplinary drug test offences under COPP 14.4.

On 15 March 2024, CSNSW, and the private providers were given an opportunity to make submissions on proposed adverse comments and provisional findings in accordance with s 24 of the Ombudsman Act. CSNSW made submissions on 15 May 2024. As required by s 25 of the Ombudsman Act, the responsible Minister, the Hon Anoulack Chanthivong MP, was advised of the Ombudsman's intention to make a final report. The Minister requested a consultation, which occurred on 8 August 2024, after which the Ombudsman issued a final report under s 26 of the Ombudsman Act.

This special report contains substantially the same information as the final investigation report, except that names, and other identifying details (of both inmates and correctional centre officers) are omitted from this special report. Where it is necessary to refer to particular inmates, pseudonyms have been adopted.

1.1 Why we investigated

In the decade to 30 June 2023, we received 1,593 actionable complaints alleging that unfair decisions were being made on correctional centre offence charges across centres managed by Corrective Services NSW (CSNSW) and those run privately.[9]

In 2018, the newly revised Inmate Discipline Policy introduced significant changes to the existing process. From this time, inmates complained to us that:

- the same officers who conducted hearings also made determinations of guilt and imposed penalties instead of recommending an outcome to the governor, which was the case previously
- they could no longer appeal to the governor about a determination of guilt, or the penalty imposed[10]

[9] In the 10 years from 1 July 2013 to 30 June 2023, unfair discipline was recorded as a secondary issue in an additional 338 actionable complaints.

[10] NSW Ombudsman, *Responses from NSW Ombudsman to questions on notice from Portfolio Committee No.4 – Legal Affairs* (Inquiry into Parklea Correctional Centre and other operational issues, October 2018) 86. <https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0018/133164/Responses-to-inquiry-into-Parklea-Correctional-Centre-and-other-operational-issues-Oct-2018.pdf>

- they were being inappropriately 'targeted' by less senior staff who were now making determinations.

Between 1 January 2018 and the start of the investigation, we made suggestions to CSNSW under s 31AC of the Ombudsman Act regarding 5 complaints concerning unfair discipline. In each of these cases, CSNSW had agreed to conduct a review and ultimately overturned the guilty findings.

An integral part of the NSW correctional service system, inmate discipline aims to ensure the safety, security and humane treatment of inmates, the safety of prison staff, and the rehabilitation of offenders with a view to their reintegration into the general community.[11]

A finding of guilt for a correctional centre offence has ramifications for an inmate beyond the immediate penalty. Findings may have an impact on decisions made about an inmate's placement, classification and parole.[12] In addition, reports about correctional centre offences may be taken into account under the *Crimes (High Risk Offenders) Act 2006,* which may in turn impact on the Supreme Court's determinations in regard to extended supervision orders or continuing detention orders.

A fair and transparent inmate disciplinary process is therefore critical for maintaining a safe and secure correctional environment, for both inmates and staff. Decisions must be properly evidenced, and penalties proportionate to the offence. In other words, the processes and the decision-making must be grounded in good administrative practice.

Given the concerns identified through individual complaints, and the potential impact of disciplinary decisions on inmates, a decision was made to start this investigation to examine the administration of inmate discipline across all correctional centres.

1.2 How we investigated

We first issued notices to produce pursuant to s 18 of the Ombudsman Act (s 18 Notices) to CSNSW relating to all charges and hearings conducted between 1 January 2018 and 11 October 2022. These notices required a statement of information about the operation of the disciplinary process and data of all disciplinary charges from CSNSW's Offender Integrated Management System (OIMS).

We also required disciplinary 'packages' in relation to 15 particular cases where inmates had complained to us about the way their discipline matters were handled. A package is a term used to refer to a bundle of documents created for the purpose of managing a disciplinary charge from start to finish. It contains the initial misconduct report, any witness reports, records of other evidence of the offence as well as a record of the hearing and a checklist of mandatory actions that are to be completed by the delegated decision-maker.

CSNSW produced an Excel spreadsheet of data from OIMS containing entries for 63,999 individual charges across more than 50 custodial facilities in NSW.

Based on our analysis of the overall charges, we then issued a second s 18 Notice requiring a sample of **398** packages, which were selected to include:

- all correctional centres, excluding court cells, that dealt with a mix of charges, including:

[11] *CAS Act* (n 3) Part 2A.

[12] *CAS Act* (n 3) ss 70(1)-(2), 222A, 135; *Crimes (Administration of Sentences) Regulation 2014* (NSW) regs 20-23 ('*CAS Reg*'); Corrective Services NSW *Fact Sheet 9*: *Classification and Placement,* (May 2019) <https://correctiveservices.dcj.nsw.gov.au/documents/csnsw-fact-sheets/classification-and-placement.pdf>.

    - certain charges for some centres that had a higher proportion of one particular charge
    - randomly selected for those centres where there was no clear trend to the charges
- findings of guilty, not guilty, dismissed, and no outcome recorded
- charges related to the offence of failing a prescribed drug test, which made up a third of the sample.

CSNSW produced **364** packages in response to the second notice. A number of packages could not be located because of how records are kept – packages had to be either retrieved and scanned to create a digital record or separated from the inmate's entire PDF case file into a separate document. There were some duplicates in the bundle of packages produced.

After removing duplicates, our total sample from the 2 notices was **373** packages.

In addition, a s 18 Notice to produce was issued to Justice Health and Forensic Mental Health Network requiring information about urinalysis testing for the presence of drugs in inmates. This information was required to assist us to understand the reasons inmates who had approved prescribed medication appearing in their drug tests were being charged with drug testing offences regardless.

We undertook the following:

- analysed the total sample of **373** packages, which were further broken up into sub-samples for targeted analysis as follows:
    - drug-use related packages – **131**
    - non drug-use related packages – **242**
    - packages with guilty plea - **265**
    - packages with guilty findings - **313**
    - packages with a penalty imposed – **310.**
- analysed OIMS data relating to inmate disciplinary charges. Following removal of duplicates from the 63,999 entries produced by CSNSW, there were **57,618** charges and **51,646** hearings conducted (more than one charge can be heard at a single hearing) across all correctional centres between 1 January 2018 to 11 October 2022.
- reviewed relevant legislation and policies, including staff training and education materials and information about the disciplinary process contained in Inmate Handbooks.[13]
- obtained independent legal advice on several questions from Simeon Beckett, Senior Counsel.

The information produced by CSNSW had several limitations. Both the OIMS data fields and disciplinary package forms were not always completed in full. The OIMS data was provided to us with blank fields, incomplete or irrelevant information, and data was entered in incorrect columns. Some of the packages were missing pages or entire forms or had not been filled out completely.

The investigation methodology is further detailed in **Appendix B.**

Our observations and conclusions, contained in section 2, are based on our review and analysis of the above information. They are supplemented by some examples of individual cases, which have been selected to illustrate the issues discussed.

[13] Corrective Services NSW, *Women's Handbook* (4th ed, 2019); Corrective Services NSW, *Men's Handbook* (January 2022).

1.3 The inmate discipline framework

Correctional centre discipline or inmate discipline is administered within individual correctional centres. It encompasses several components:

- reporting misconduct, required to be done by any custodial or non-custodial staff member who suspects that an inmate has committed or is about to commit an offence
- the charging of the inmate with a correctional centre offence or offences
- conducting an inquiry, which includes a hearing at which the inmate should be present
- determining guilt based on the standard of 'beyond reasonable doubt'
- imposing penalties, if any.

The functions from charging an inmate to imposing a penalty are conferred on governors by legislation. In practice, governors now delegate these functions in full to functional managers and managers of security, with the exception of mobile phone offences, which have not been delegated and continue to be dealt with by governors.

Legislation and policy

The administration of inmate discipline is governed by:

- Part 2 Division 6 of the *Crimes (Administration of Sentences) Act 1999* (the CAS Act)
- the Crimes (Administration of Sentences) Regulation 2014 (the CAS Regulation).

The CAS Act operates within a system of state-based, national and international conventions and rules that set out fundamental principles for the treatment of prisoners, which have been accepted by Australia under international law. These include:

- The NSW *Inspection Standards* for adult custodial services in NSW,[14] which incorporate the Guiding Principles for Corrections in Australia (the **Guiding Principles**), adopted in 2018 by the Corrective Services Administrators' Council (of which the NSW Government is a member).[15]

  These documents provide best practice goals in corrections administration across Australian jurisdictions, and both have regard to the international obligations, including the International Covenant on Civil and Political Rights (ICCPR),[16] the Convention on the Rights of Persons with Disabilities (CRPD)[17] and the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[18]

- The United Nations' Standard Minimum Rules for the Treatment of Prisoners, which were adopted in 1957, and updated by the UN General Assembly in 2015. These are known as the Mandela Rules. While not legally binding, the Mandela Rules set a minimum standard for the treatment of prisoners and a framework for monitoring bodies.

[14] Inspector of Custodial Services (NSW), *Inspection Standards - For adult custodial services in New South Wales* (May 2020) <https://inspectorcustodial.nsw.gov.au/documents/standards/inspection-standards-for-adult-custodial-services-in-new-south-wales.pdf>

[15] Government of Australia, *Guiding Principles for Corrections in Australia* (February 2018).

[16] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[17] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force on 3 May 2008).

[18] *Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment* 1465 UNTS 85 (entered into force on 26 June 1987). (CAT). There are other general obligations in international law in the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), the *International Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) and the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).

- The United Nations Rules for the Treatment of Women Prisoners (the Bangkok Rules), which supplement the Mandela Rules and set out the minimum standards for the treatment of female prisoners.
- The Indigenous Strategic Framework endorsed by the Corrective Services Ministerial Council in 2016, used in conjunction with the Guiding Principles, which provide minimum standard guidelines for the management of Aboriginal inmates.[19]

CSNSW has developed policies and procedures to implement inmate discipline under the CAS Act and the CAS Regulation. The key policy relevant to inmate discipline is the Custodial Operational Policy and Procedures 14.1: Inmate Discipline (the **Inmate Discipline Policy** or the **Policy**).[20]

Other relevant policies include the Custodial Operational Policy and Procedures 14.4: Drug Test Offences and Custodial Operational Policy and Procedures 14.3: Mobile Phone Offences.

Further detail of the legislative and policy framework for the NSW inmate disciplinary system is at **Appendix C**.

Overview of discipline charges 2018 to 2022

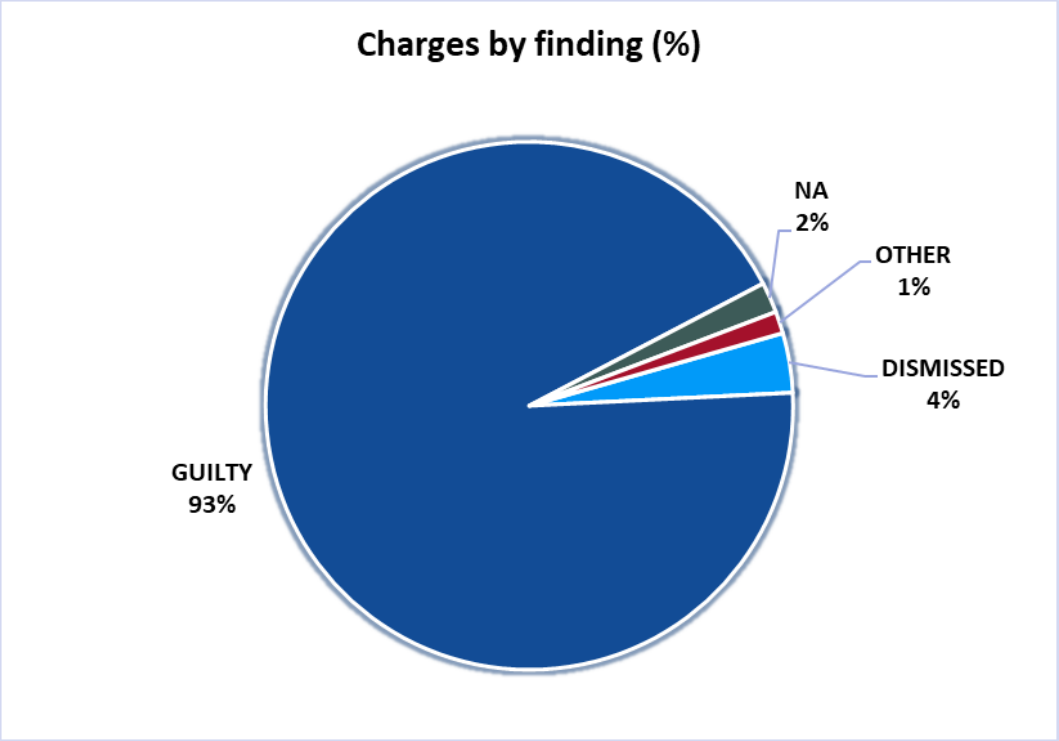
The OIMS data produced by CSNSW for the period 1 January 2018 – 11 October 2022 shows that across all correctional centres in NSW:

- a total of 57,618 charges were made and 51,646 hearings were conducted (noting that multiple charges can be heard at the one hearing)
- 93% of those charges resulted in a finding of guilt (Table 1), with individual centres ranging from 82% to 100% charges resulted in guilty findings.
- a significant proportion of charges related to the category of 'order' (44%), followed by 'drug-related charges' (17%) and 'assaults' (13%) **(Figure 2)**. These offence categories are obtained from CSNSW's OIMS data, which lists charges according to 11 broad categories of offences. A further breakdown of charges by category is found at **Appendix D**.

[19] CSAC Indigenous Issues Working Group, *Indigenous Strategic Framework 2016* (April 2015) <https://www.corrections.vic.gov.au/indigenous-strategic-framework>

[20] Corrective Services NSW, *Custodial Operations Policy and Procedures* (Policy, No 14.1 Inmate discipline, 16 December 2017) 2

Figure 1: All correctional centre disciplinary charges (1 January 2018-11 October 2022) – Findings (Source: OIMS data)



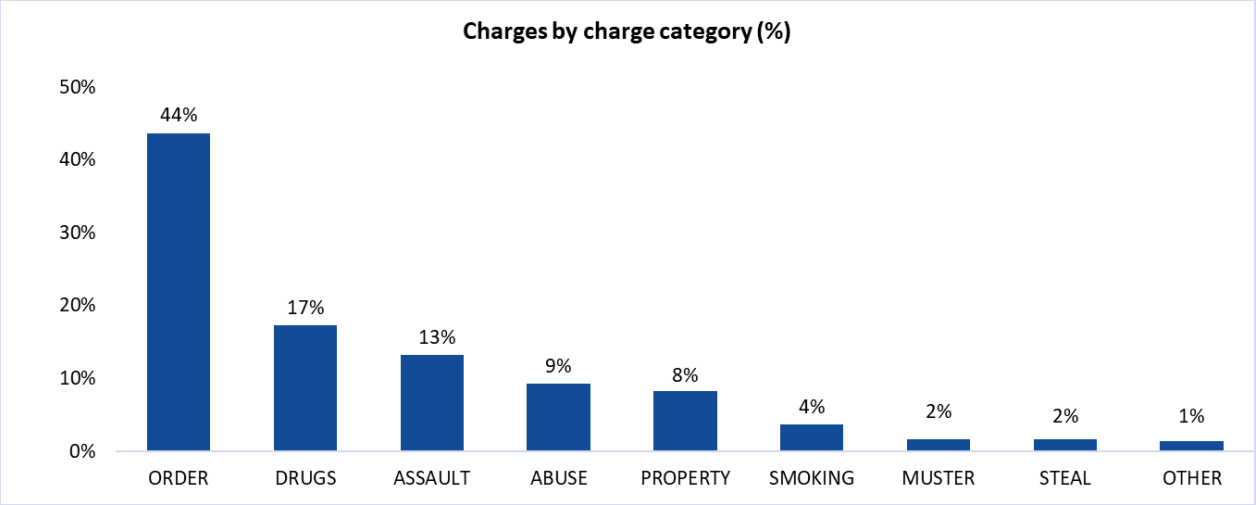
Note: Other combines: Not guilty (1.18%), Suspended (0.08%) and No plea (0.08%)

Table 1: Outcomes from charges by year (Source: OIMS data - January 2018 - October 2022)

Finding	2018	2019	2020	2021	2022	Total Number	Total Percent
GUILTY	11273	11743	11707	11321	7613	53657	93.1%
DISMISSED	331	384	494	523	375	2107	3.7%
NA*	268	253	184	252	123	1080	1.9%
NOT GUILTY	108	102	188	165	118	681	1.2%
SUSPENDED	13	10	6	11	7	47	0.1%
NO PLEA	5	9	4	11	17	46	0.1%
Total	11998	12501	12583	12283	8253	57618	100%

Note: It is not clear in what circumstances delegates use an N/A finding as an outcome for a charge.

Figure 2: All correctional centre disciplinary charges 1 January 2018 - 11 October 2022 (57,618) – Charges by category (Source: OIMS data)



Note: Other combines: Phone (0.74%), Alcohol (0.60%) and Condom (0.02%)

2. Conclusions and observations

Our conclusions and the evidence and reasons supporting them are organised in this document as follows:

- the conduct of inquiries (section 2.1)
- the imposition of penalties, with particular observations about cell confinement practices (section 2.2)
- oversight and review processes (section 2.3)
- the laying of charges (section 2.4)
- record-keeping practices and delegate training (section 2.5)

Overarching conclusion

Having regard to the observations and conclusions set out in the sections below, our over- arching conclusion is that:

There is a systemic failure, which is not limited to any particular correctional centre or centres, to follow the requirements of the legislation and the relevant policies in relation to inmate discipline, which is leading in some cases to unjust outcomes and potentially unlawful decisions.

2.1 The conduct of inquiries

2.1.1 Legislative and policy framework

If, following receipt of a misconduct report, the governor (or, in practice, their delegate) decides to charge an inmate with an offence and conduct an inquiry, the provisions under s 52(2) of the CAS Act apply to the inquiry. Those provisions are repeated in the Policy without further elaboration, as follows:

- the inquiry must be conducted with as little formality and technicality, and with as much expedition, as fairness to the inmate charged, the requirements of the Act and the CAS Regulations and the proper consideration of the charge permit
- the governor [delegate] is not bound by the rules of evidence, but may inform himself or herself of any matter in such manner as the governor thinks fit
- the inmate is entitled to be heard at any hearing during the inquiry and to examine and cross-examine witnesses[21]
- except as provided below, the inmate is not entitled to be represented by an Australian legal practitioner or by any other person
- the governor [delegate] must allow a person (other than an Australian legal practitioner) to represent or assist the inmate if the governor is satisfied—
    - that the inmate does not sufficiently understand the nature of the inquiry, or

[21] *CAS Act* (n 3) s 52(2)(c).

    - that the inmate does not understand English or is otherwise unable to properly represent himself or herself during the inquiry[22]
- if the inmate refuses or fails to attend at any hearing during the inquiry, the governor [delegate] may hear and determine the matter in the inmate's absence[23]
- evidence is not to be given on oath or by affidavit at any hearing during the inquiry
- the governor [delegate] may allow any correctional officer or other person to be present, and to be heard, at any hearing during the inquiry
- the governor [delegate] may transfer the conduct of an inquiry to the governor of another correctional centre to which the inmate has been transferred.

Under the Policy, certain correctional centre offences must first be referred to the police.

The CAS Act provides that offences of a serious nature may be referred to a Visiting Magistrate for hearing and determination.[24]

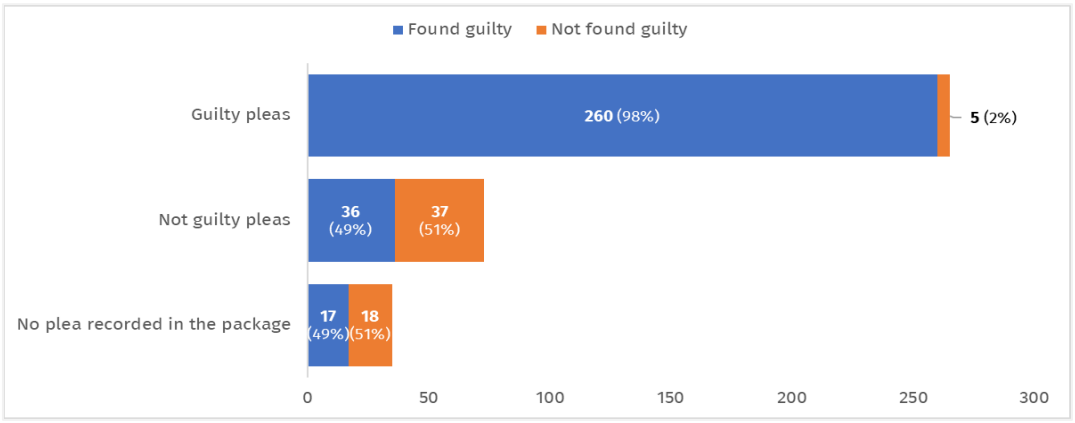
The standard of proof to be applied and the findings which may be made are set out in s 53 of the CAS Act. At the conclusion of the inquiry, the delegate must decide whether they are satisfied beyond reasonable doubt that the inmate is guilty of a correctional centre offence. If they are not satisfied of guilt beyond reasonable doubt, they must dismiss the charge and inform the inmate accordingly.

2.1.2 Findings of guilt beyond reasonable doubt

In the total sample of 373 packages we received, pleadings were as follows:

- **guilty pleas: 265 (71%)** – of which 260 (98%) found guilty.
- **no plea recorded in the package:[25] 35 (9.4%)** – of which 17 (49%) were found guilty.
- **not guilty pleas: 73 (20%)** – of which 36 (49%) were found guilty.

Figure 3: Analysis of pleadings from total sample of 373 packages



[22] Ibid s 52(2)(d)-(e).

[23] Ibid s 52(2)(f).

[24] Ibid s 54.

[25] In 10 IDAFs, the inmates are recorded not to have submitted a plea. 5 of these packages explain this was because the inmate was in lockdown due to COVID-19 and 2 explain that the inmate refused to participate. The remaining 25 IDAFs where the pleas are not recorded were either blank or missing altogether.

In most cases, inmates plead guilty

In our sample review, over two-thirds of inmates pleaded guilty to the offence/s with which they had been charged. In this investigation we did not explore the reason for this guilty plea rate.

Inmate discipline is different to criminal proceedings, in that there is no express incentive under legislation to plead guilty in order to obtain a discount on sentencing/penalty outcome. Although the Policy provides that the delegated officer should consider a lesser penalty for a plea of guilty, in the samples we reviewed, the record did not indicate that a guilty plea from an inmate was a factor routinely taken into account by decision-makers – for example to support the imposition of a more lenient penalty. We also found no documented evidence to suggest any practice of plea bargaining.

Also unlike criminal proceedings, there is little financial or other direct disincentive on an inmate who pleads not guilty, such as the cost or inconvenience of engaging a lawyer for a lengthy hearing (as inmates have no right to legal representation in disciplinary proceedings) or being held on remand awaiting a hearing.

Of course, an obvious reason why inmates might choose to plead guilty is that they are, in fact and evidently, guilty of the offence/s alleged. CSNSW put this suggestion to us:

The legislation envisages that governors will perform all functions of the disciplinary process including both laying charges (presumably on the basis of a prima facie case) and making determinations of guilt. It is therefore anticipated that, in general, charges are only laid when the governor has found there is sufficient prima facie evidence. In that case, it would be anticipated that most charges (if they are laid at all) would result in a finding of guilt, as is the case with the courts. The system as designed by the legislation should have governors (or their delegates) filtering out unsubstantiated allegations without laying charges.[26]

Given the inherent imbalance of power in the correctional environment, however, there are other potential factors that encourage someone to make a guilty plea, including:

- an inmate may know they did something wrong even if not the offences they have been charged with, and either do not understand the difference or consider it pointless to raise the point. (On the problem of incorrect offence charging, see section 2.4.2 below)
- an inmate may have little trust in the process, and believe that a guilty finding is inevitable.
- an inmate may be concerned about longer-term impacts – even if that is just being viewed less favourably or as a more 'difficult' inmate – if they are seen to be 'arguing back'.

In some cases, guilty pleas are being recorded even when it appears the inmate wishes to contest the charges

Of concern, some of the packages we reviewed recorded that guilty pleas had been made, despite the package also containing a record that the inmate had made statements during the hearing that indicated that they in fact contested the charge and/or were refusing to sign the paperwork. For example, 32 packages had a record that the inmate 'refused to sign', yet only half of these were recorded as having plead not guilty.

[26] Corrective Services NSW, Response to Ombudsman's Provisional Findings and Recommendations regarding the administration of inmate discipline, 14 May 2024.

In one recent case we dealt with outside of this investigation, it was confirmed (after we raised the complaint with the relevant governor and an investigation was conducted) that an officer had in fact forged the signatures of 2 inmates to indicate that they had pleaded guilty to offences.[27] We do not suggest that this case was anything but an isolated case of individual officer misconduct.

Most findings of guilt are being made on the basis of guilty pleas

Our review of the packages indicates that, where an inmate is recorded as having plead guilty, a finding of guilt typically follows as a matter of course.

A plea of guilty constitutes an admission to all the essential elements of the offence as charged. That is so even in circumstances where that may have been a 'plea of convenience' (see *Wong v DPP* (2005) 155 A Crim R 37). Consequently, there is no obligation upon a decision-maker to ensure the charge is proven beyond reasonable doubt where an inmate pleads guilty.

However, according to advice we obtained from Senior Counsel:

> …, if the decision-maker, in reviewing the evidence, reaches the view that the evidence does not or is incapable of supporting the charge (e.g a prima facie test), the decision-maker should advise the inmate to withdraw his plea of guilty and instead plead not guilty. However, if after hearing the advice of the decision- maker the inmate refuses to do so, the plea of guilty should be considered final, except in circumstances where ignorance, fear, duress or mistake might call into question whether it is a true admission of guilt. In such cases, the decision-maker must 'direct' that a plea of not guilty be entered [28] and proceed through the liability enquiry: *Maxwell v R* (1996) 184 CLR 501.

That is, a plea of guilty does not constitute a finding of guilt, until it is accepted by the delegate. A plea should only be accepted if the delegate has prima facie that the offence was in fact committed.

CSNSW submitted that the threshold for a prima facie case is low and 'may easily be met wherever there is a relevant officer's report … and an acknowledgement by the inmate that they committed an offence'.

We agree that the threshold for satisfying the prima facie test is not particularly onerous, and also agree that reliance may be placed on the combination of an officer's report and an admission by the inmate. However, this would not, in our view, be sufficient unless both:

a) the officer's report on its face indicated all the elements that make up the particular offence had been met, and
b) the inmate acknowledged that they had committed the offence – not just that they had committed an offence.

We also note that reliance on an acknowledgement of guilt in considering whether the prima facie test is satisfied is reasonable only if the decision-maker is satisfied that the inmate understands the charge and there is no other reason to doubt the reliability or credibility of the plea, or the capacity of the inmate who made it. Those are matters that delegates should ordinarily turn their minds to before accepting a guilty plea.

[27] See complaint handling case study titled Exposing officer misconduct after signatures were forged, NSW Ombudsman Casebook July 2024, 39.

[28] While the language is redolent of a direction to a jury hearing a criminal matter, it would be appropriate for the inquirer to merely record a plea of 'not guilty'.

In sum, although a delegate may accept a guilty plea as conclusive admission of guilt (and does not otherwise need to find the offence proven beyond reasonable doubt), it is imperative that the delegate:

- is satisfied that there is at least prima facie evidence capable of supporting the particular charge that has been laid (for example, an officer's report that indicates that the requisite elements of the particular offence have been met)
- is satisfied the inmate understands the particular charge and the plea they are to make
- accurately records the inmate's plea to the charge.

Inmates (who pleaded not guilty) have been found guilty in circumstances where it was not reasonably open to the decision-maker to find the offence proven beyond reasonable doubt

Inmate disciplinary proceedings are administrative rather than judicial or criminal proceedings. In most administrative contexts, the 'balance of probabilities' is the standard of proof that applies. We therefore sought Senior Counsel's advice on how the 'beyond reasonable doubt' standard should be interpreted in this context. His advice confirmed that it should not be interpreted any differently than it is in a criminal context.

The courts have long considered it unnecessary (and generally undesirable) to provide any further explanation or elucidation of the 'beyond reasonable doubt' standard of proof. The 'vital point' is that the accused must be given the benefit of any reasonable doubt.[29] In cases where there is no direct evidence of guilt (such as an admission or the testimony of witnesses to the offence), guilt can be established beyond reasonable doubt only if such guilt was the only rational inference that could be drawn from the circumstances. In other words, if any inference consistent with innocence is reasonably open on the evidence, a finding of guilty cannot be made.[30]

We undertook a focused review of the 36 packages where inmates pleaded not guilty, but were found guilty. We reviewed the evidence available in the package, including the witness reports, if any, the misconduct report and the Inmate Discipline Action Form (IDAF), which is the record of the hearing and typically includes a summary of evidence and reasons (if they are recorded) for the delegate's decision on guilt and penalties.

80% of the packages where the inmate pleaded not guilty contained no record of reasons for the subsequent guilty finding.

We identified 14 packages out of the 36 reviewed where we concluded the offences as charged were not capable of being proven beyond reasonable doubt on the evidence referenced in the package. In 3 out of the 14 the key offence appeared to have been proven, but additional offences the inmate had been charged with were not. Several of the matters included in the spreadsheet had previously been the subject of complaint to the Ombudsman, and the findings had already been overturned by CSNSW as a result of suggestions made under s 31AC of the Ombudsman Act.

When a plea of not guilty is made by an inmate, the delegate must make appropriate inquiries to obtain evidence that supports all the elements of any given offence, which is then relied on to make a finding. That evidence may include Closed Circuit Television (CCTV) footage, witness statements, urinalysis reports or similar.

[29] *Thomas v The Queen* (1960) CLR 587, 595.

[30] *Shepherd v The Queen* (1990) 170 CLR 573, 578.

For certain offences, the delegate must also be satisfied of mental elements. For example, in order for the offence of stealing to be proven, the inmate's intention to permanently deprive someone of the stolen item is one of the elements that must be proven.

In its submissions, while it did not specifically contest our conclusions as to any of the 14 packages in the sample which we assessed as not capable of supporting a guilty finding, CSNSW made the following general points:

- There may be other evidence not contained in any given written record, such as CCTV or oral evidence, which may make it difficult to conclude that a decision as to guilt is necessarily erroneous or invalid based solely on an insufficiency of the written record.
- If any decision were to be challenged in court, CSNSW would have the opportunity to tender affidavit evidence from relevant staff and provide a further explanatory record of the decision.
- The disciplinary system is required to be administered informally and expeditiously (CAS Act s 52(2)(a)), which tempers the extent to which it is reasonable or practicable to expect delegates to engage in a rigorous process of evidence inquiry, analysis and recording.
- In the absence of a clear statutory requirement, administrative decisions are not required to be supported by written reasons.[31]

It is the case that there is no general common law obligation to record reasons for administrative decisions, and the CAS Act does not expressly state that it is required in this context. However, it is good administrative practice to make some record of the reasoning process, especially in circumstances such as these where there is an adverse impact on an individual, as there is in this case.[32]

We note that IDAFs contain a 'summary of representations' field where some delegates do record simple reasons, and which suggest that CSNSW expects at least some record to be made of the information considered in making the decision. However, over 20% of IDAFs had nothing recorded in the summary of representations field.

We acknowledge that there is a relatively high volume of disciplinary hearings in correctional centres, and a need for the process to be conducted with expediency. However, a record of reasons does not need to be cumbersome or resource intensive, but can simply be a short statement of the rationale for the decision. This can include, for example, a note of what evidence was relied upon other than written reports or statements included with the disciplinary package, such as noting that relevant CCTV footage had been viewed, or an oral interview conducted.

[31] Corrective Services NSW, *Response* (n 18) 3.

[32] See eg *Re Minister for Immigration and Multicultural and Indigenous Affairs* [2003] HCA 56; 216 CLR 212; 201 ALR 327; 77 ALJR 1829 (2 October 2003), where the High Court noted that the giving of reasons for administrative decisions served valuable functions:

> '…they amount to a "salutary discipline for those who have to decide anything that adversely affects others"[56]. They encourage "a careful examination of the relevant issues, the elimination of extraneous considerations, and consistency in decision-making" [57]. They provide guidance for future like decisions. In many cases they promote the acceptance of decisions once made [58]. They facilitate the work of the courts in performing their supervisory functions where they have jurisdiction to do so [59]. They encourage good administration generally by ensuring that a decision is properly considered by the repository of the power [60]. They promote real consideration of the issues and discourage the decision-maker from merely going through the motions [61]. Where the decision effects the redefinition of the status of a person by the agencies of the State, they guard against the arbitrariness that would be involved in such a redefinition without proper reasons [62]. By giving reasons, the repository of public power increases "public confidence in, and the legitimacy of, the administrative process"[63].

The below case studies provide examples of cases where CSNSW conceded that guilt was not established beyond reasonable doubt.

Case Study 1: Found guilty of intimidation

Three inmates, Anton, Ethan and Craig[33] were found guilty of the offence of intimidation (Regulation clause 138).

The misconduct report for all 3 stated that an inmate was assaulted in the yard in the afternoon. The inmate who committed the assault was inciting other inmates while he was being secured until an incident response team (known as an Immediate Action Team, or IAT) arrived. Inmates Anton, Ethan and Craig were seen on the wall and were abusing the reporting officer and trying to intimidate him until the IAT arrived and took control of the situation.

The inmates disputed the evidence against them in a complaint to the Ombudsman. Following our inquiries, the governor overturned the findings and revoked the penalties against all 3 inmates.

In responding to us, the governor made observations about the poor quality of decision-making and record keeping. He noted that the misconduct reports were of poor quality and did not include enough detail to meet the standard of proof beyond reasonable doubt. The governor also observed that the hearing officer should have picked up on the lack of detail in the misconduct report, suspended the hearing when the inmates pleaded not guilty and requested to speak to the reporting officer to get more information.

Case Study 2: Seven inmates charged with riot

Seven inmates were all found guilty of the offence of participating or inciting other inmates to participate in a riot (CAS Regulation clause 140).

The charges and findings were based on viewing CCTV and an officer's misconduct report, which stated:

'[Correctional officers] attended the intelligence office and assisted me in identifying multiple inmates who appeared to be celebrating and laughing immediately after a staff member was assaulted at approximately 14:26 hours on [date] at the spine door entering 1A. Upon review of CCTV camera C1102 I identified inmate known to me as [name of 1 inmate] re-enacting the assault to other inmates. I then identified inmates now known to me as [names of the other 6 inmates] as participating, or inciting other inmates to participate, in assaulting staff members'.

3 of the inmates complained to our office about the finding.

In our letter to the A/Commissioner about this incident, we suggested the matter be referred to the General Manger Statewide Operations to determine if the inmates had been given procedural fairness and the opportunity to exercise their rights at the hearing, and whether the facts proved the charge beyond reasonable doubt. We recommended the charges be overturned if the review found procedural errors.

Upon its review, CSNSW acknowledged there were issues with the way correctional officers applied the Policy. The offences and penalties were expunged from all the inmates' records as a result.

[33] Pseudonyms have been used throughout this report, and other identifying information removed from case studies.

2.1.3 Referrals

It does not appear that serious criminal offences within correctional centres are being reported to the police in accordance with the Policy

Under the Policy, correctional centre offences of a serious nature that might also be criminal offences must be first reported to the police. Where any suspected prohibited substances are found, such as illicit drugs, a report to the police must also be made.[34] No proceedings for the correctional centre offence are to commence or continue while police have carriage of the matter. However, if the police decline to take action, the conduct may then be dealt with as a correctional centre offence, even if this means the inquiry will exceed the usual 28-day timeframe.[35]

Of the total sample of 373 packages, only 2 packages were recorded to have been reported to the police prior to a disciplinary inquiry.

In its submissions, CSNSW emphasised that the policy requirement to report to police arises not merely if the offence might be a criminal offence, but only where it is of a sufficiently serious nature. It noted, for example, that while serious assaults (being those that cause injury or death, are of a sexual nature, or are on a law enforcement officer) must be referred to police, common assaults would not always be referred to police, noting that the policy provides for consultation with the victim regarding whether they want police action.

CSNSW also added that:

> [W]here the matter can be dealt with within the disciplinary system, that may be in the inmate's interests. Although the disciplinary system certainly requires reform, the inmate is not exposed to the risk of criminal conviction or criminal penalties which are significantly more severe. The inmate discipline system can be appropriately utilised as a diversionary scheme to encourage rehabilitation and avoid overburdening the criminal justice system.[36]

Whether having a charge dealt with through the disciplinary process is advantageous to an inmate rather than having it dealt with through ordinary criminal processes might in some cases be debatable, particularly given:

- the limited procedural fairness protections for inmates in the administrative disciplinary regime compared to one that is judicially supervised
- inmates are by definition already within the criminal justice system and, in addition to direct disciplinary penalties, disciplinary offences can have a practical impact on existing criminal penalties (by affecting matters such as placement, classification and parole)
- the issues that have been identified in this investigation – including questions about decisions that are supposed (like criminal proceedings) to be made on the standard of proof beyond reasonable doubt (see 2.1.2).

We appreciate that the Policy requires only offences of a serious nature to be reported to police, and we agree that this is appropriate. However, provided an offence is both a criminal offence and of a serious nature, the Policy currently requires that a report to police must be made. While consideration of discretion may still be warranted even in those circumstances (that is, discretion to have the matter dealt with through disciplinary rather than criminal processes) the Policy appears to contemplate that

[34] Corrective Services NSW, *Custodial Operations Policy and Procedures* (Policy, No 13.11 Discovery and disposal of drugs, under review).

[35] Corrective Services NSW, *Policy 14.1* (n 20) 8, 11.

[36] Corrective Services NSW, *Response* (n 26) 4.

this discretion will be with police, who can decline to take action and remit the matter to be dealt with through disciplinary processes, rather than with CSNSW.

No consideration is given to the discretion to refer serious correctional offences to Visiting Magistrates

The governor or delegate may under the CAS Act refer a correctional centre offence to a Visiting Magistrate for hearing and determination if they consider that, because of the serious nature of the offence, it should be referred. A referral can be made prior to, during or on completion of an inquiry into the offence.[37]

Where a disciplinary offence is referred to a Visiting Magistrate, the magistrate has the function of hearing the charge and imposing any penalty. There are some differences that apply:

a) the inmate is entitled to be represented by an Australian legal practitioner (s 55(4))
b) proceedings are to be conducted in the same way as a summary criminal matter in the local court in accordance with the *Criminal Procedure Act 1986*, subject to such modifications as the magistrate thinks appropriate (s 55(2) and (3)
c) there is express provisions for the hearing to be held in whole or in part by audio-visual link (s 55(5A))
d) there is an express power for the Visiting Magistrate, even if satisfied of guilt beyond reasonable doubt to dismiss the charge if of the opinion that no penalty should be imposed (s 56(3))
e) the penalties that a Visiting Magistrate may impose also include extending an inmate's sentence or non-parole period by up to 6 months, or imposing a sentence of imprisonment of up to 6 months (s 56(1)(e) and (f))
f) the penalty imposed by a Visiting Magistrate may be appealed to the District Court (s 62(1)).

CSNSW has advised that no referral has been made to a Visiting Magistrate for over 10 years, with the last referral made in June 2012 for an assault charge. Referrals ceased after that date although there was no internal directive to do so.[38]

CSNSW's explanation for this was that referrals to a Visiting Magistrate have not been considered necessary since that time because 'there are other options to deal with centre offences of a serious nature', such as police referrals.

There is, however, a difference between reporting a potential **criminal** offence to police (which then pauses the disciplinary offence process, while police decide whether to exercise their discretion to pursue criminal charges) and referring the **disciplinary** offence itself to be heard by a Visiting Magistrate.

Even if all offences of a serious nature were routinely referred to police, as required by the Policy (which our sample review suggests may not be happening), if it was known by police that the offence would, if a criminal prosecution is not pursued, be referred to a Visiting Magistrate, then this may be a relevant consideration for police in deciding not to pursue a criminal prosecution.

That is, referral to a Visiting Magistrate could provide an 'in between' mechanism for dealing with offences where they are sufficiently serious (both in their nature and in the potential penalties issued) to warrant determination by a trained judicial officer. A Visiting Magistrate provides a more formal

[37] *CAS Act* (n 3) s 54(2).

[38] Letter from Kevin Corcoran, Commissioner, Corrective Services NSW to Monica Wolf, Chief Deputy Ombudsman, NSW Ombudsman, 30 January 2023.

hearing process, with legal representation and an explicit right of appeal, in cases where criminal prosecution may not be necessary or warranted (given the availability of this alternative process,[39] and for the reasons given by CSNSW above for why disciplinary proceedings will generally be preferred to criminal proceedings).

Referring matters to a Visiting Magistrate to determine might also be a useful approach in circumstances where it is difficult for the governor or delegate to be impartial, or to disregard extraneous considerations. For example, it may be useful to do so where the offence with which an inmate is charged relates to an alleged assault on staff.

In its submission, CSNSW stated that:

> There are a number of impacts that would need to be considered [if referrals to visiting magistrates were to be reconsidered] not only for CSNSW but for DCJ [Department of Communities and Justice] Legal and the broader criminal justice system including cost and resource implications for courts and the judiciary. Correctional centre infrastructure no longer has dedicated on-site judicial spaces and the AVL system, within the correctional environment is often utilised at capacity.
>
> CSNSW' advice is that s 54(1) conveys a discretion and not a duty upon a governor to refer a case to a visiting magistrate. The fact that a matter had been referred to police may be a relevant factor in deciding not to refer a serious matter to a magistrate. CSNSW's current position is that, where the offence is serious, it is more appropriate to refer the matter to police.[40]

We agree that the legislation confers a discretion and not a duty to refer matters to a Visiting Magistrate, even where matters clearly reach the relevant threshold of seriousness. However, it appears that, in practice, no consideration is ever given to this discretion, and no practical mechanisms have been put in place that would facilitate referral to and hearing by a Visiting Magistrate.

Particularly given the issues we have identified in this report suggesting systemic inadequacies in decision-making by delegates within correctional centres (including an apparent lack of understanding or proper application of the standard of proof beyond reasonable doubt (see section 2.1.2) and an absence of other review and appeal mechanisms (see section 2.3 below)) it is difficult to accept that there are no circumstances in which a disciplinary case might more appropriately be referred to a judicial officer via the Visting Magistrate process even if, for some of the reasons CSNSW has given, doing so may remain a relatively rare occurrence.

Referrals are not being made to drug intervention or addiction programs, in accordance with relevant policy

In accordance with the Custodial Operations Policy and Procedures: 18.1 Testing inmates for drug use, a referral to an appropriate drug intervention or addiction program must be made for all inmates who refuse or fail to supply a drug test sample or fail a prescribed drug test.[41]

131 packages had charges containing the offence of 'refusing or failing to supply a drug test sample' or 'failing a prescribed drug test'. Only 1 recorded a referral to a drug intervention program having been made.

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[39] Noting as well that, although the Visiting Magistrate process is part of the disciplinary process (and so does not, for example, result in any potential criminal conviction), it does pick up some elements of the criminal justice system – including the application of criminal procedures and the ability of the Visiting Magistrate to impose, as well as disciplinary penalties, a 'criminal' sentence (of imprisonment of up to 6 months).

[40] Corrective Services NSW, *Response* (n 26) 5.

[41] Corrective Services NSW, *Custodial Operations Policy and Procedures* (Policy, No 18.1 Testing inmates for drug use, 28 November 2018) 7

The below case study is an example of where a referral should have been made and was in fact requested by the inmate, but there is no record that it was acted on.

Case Study 3: Failing a prescribed drug test

Tina was charged with the offence of failing a prescribed drug test (Regulation clause 153). As recorded in the IDAF, at the hearing conducted 8 days later, Tina stated the following:

'Miss, I told you the truth that it was dirty - You know I have been asking everyone to help me. I've asked for D&A [Drug and Alcohol] Nurse to get back on program.'

There was no record of a referral to the Intensive Drug and Alcohol Treatment Program in either the misconduct package or OIMS.

In its submission, CSNSW advised that Tina from case study 3 was on remand at the time of the offence and that remand inmates are not required to participate in programs. However, CSNSW's Policy requires all inmates to be referred, and makes no exception for remand inmates. In any case, Tina had explicitly asked to be placed on a D&A program, so the fact that she could not be required to do so does not explain why a referral was not made.

Inmates whose behaviour would more appropriately warrant referral for mental health support are being dealt with through the disciplinary process

While not a mandated referral under the Policy, we have come across a small number of packages (2) among those we reviewed where the information suggested that it would have been more appropriate to refer the inmate to medical or mental health support instead of proceeding with a disciplinary charge.

Where there is a notification of self-harm relating to an inmate, CSNSW must develop an immediate support plan (**ISP**), which must 'reflect the level of risk and take into account the principle of least restrictive care' in determining things like cell placement, risk of harm to or from others and access to sharp objects.[42] Referrals to a psychologist, Statewide Disability Services or Justice Health for medication review should also be considered after such an event.[43]

[42] Corrective Services NSW, *Custodial Operations Policy and Procedures* (Policy, No 3.7 Management of inmates at risk of self-harm or suicide, 16 December 2017) 9

[43] Ibid 20.

Case Study 4: Charged with disobeying a direction while self-harming

Kent, an Aboriginal man with a recorded history of self-harm, was charged with, and found guilty of, disobeying a direction (Regulation clause 130) and penalised with 28 days off buy-ups.

The misconduct report stated that Kent was found sitting in his cell with a razor blade and was threatening self-harm. The correctional officer gave 'multiple directions' to Kent to hand over the razor, then threatened to remove it by force or 'chemical munitions' if he did not comply within 2 minutes.

Kent did not comply at first, but eventually put the razor down. The witness statement recorded that Kent was then cuffed and strip searched. According to the case notes he was placed on hourly suicide watch. OIMS contains no record or indication an ISP was developed in response to this incident.

In its submission, CSNSW conceded that it was inappropriate to issue a disciplinary charge in relation to this incident, but pointed out that Risk Intervention Team (**RIT**) protocols were put in place for Inmate Kent, making an ISP redundant.[44] See 2.2.5 for more on RITs and their protocols.

2.1.4 Procedural fairness issues

Some provisions of s 52(2) of the CAS Act concerning the inquiry process, if followed, should ensure that basic elements of procedural fairness are met, and inmates can meaningfully engage in the process.

These include:

1. the inmate's entitlement to be heard during the inquiry, call witnesses and examine and cross-examine witnesses
2. the requirement for certain inmates to be provided with support persons
3. the expectation that hearings should not be conducted in the absence of the inmate unless the inmate refused or failed to attend.

Support is not being provided in all circumstances where it is required by the CAS Act

The CAS Act provides that the delegate, if they are satisfied that the inmate does not sufficiently understand the nature of the inquiry or does not understand English or is otherwise unable to properly represent themselves, '**must allow** a person (other than an Australian legal practitioner) to represent or assist the inmate' (emphasis added)[45]

According to Senior Counsel's advice, 'the use of the word 'must' in s 52(2)(e) imposes, unequivocally, an obligation upon the governor (or delegate)' to provide a support person. Further, it may be necessarily implied that if an inmate didn't understand the nature of the inquiry, they may also not understand their need for representation. As such, once the delegate reached the required state of satisfaction about an inmate's ability to understand the nature of the inquiry or represent themselves, they are obliged to provide representation in form of a support person irrespective of whether the inmate requested it.

[44] Corrective Services NSW, *Response* (n 26) 5.

[45] *CAS Act* (n 3) s 52(2)(e)(i)-(ii), emphasis added.

The Policy requires that a support person is provided to those inmates who do not understand English or have a disability and states that:

4. if at any time the delegate is satisfied that an inmate cannot understand English, the Translator and Interpreter Service (TIS National) must be used.[46]
5. The Manager of the Statewide Disability Services must be informed that an inmate requires a support person for inquiries and interviews if:
    a. the OIMS Disabilities screen provides that an inmate requires a support person for inquiries and interviews; or
    b. the governor or delegate is satisfied that the inmate cannot sufficiently understand the nature of the inquiry, or is unable to properly represent himself or herself because of a possible cognitive impairment or intellectual disability.[47]

Information about whether an inmate needs a support person or interpreter used to be found on the inmate's profile, but will often require looking at other information, such as criminal history, case notes, OIMS alerts, recent behaviour and work history. CSNSW advised us that OIMS has now changed since our investigation and records of whether an inmate requires a support person during an interview is now found on the Disability screen.

We found no record that a support person or interpreter was provided to any of the inmates in the 373 sample packages.

When misconduct reports are prepared, the package should include the inmate profile; however profiles were only attached in one third of the sample packages making it difficult to ascertain whether a support person or interpreter was required. Among those packages that had an inmate profile attached, 2 recorded that the relevant inmate required a support person during interview and 1 recorded a need for an interpreter. All 3 inmates pleaded guilty and were found guilty of the offences they were charged with. The below case study is a summary of 1 of these cases.

Where a support person or interpreter is required to be provided but is not provided, the findings and any penalties may be invalid. This is because the requirement in s 52(2)(e) is expressly mandatory. Reaching a state of satisfaction is not a discretion but acts as a condition, which, if not complied with, may invalidate the decision.

[46] Corrective Services NSW, *Policy 14.1* (n 20) 11.

[47] Ibid.

Case Study 5: Inmate with intellectual disability not provided with a support person

Nassim's inmate profile recorded him as having an intellectual disability and requiring a support person if he was to be 'interviewed as part of a Departmental investigation by Police and/or Corrective Services personnel'.

In 2018, Nassim was charged with the offence of participating in, or inciting other inmates to participate in, a riot (Regulation clause 140).

The only evidence contained in the package was the misconduct report, which stated:

'I was at compound escorting the inmates back from the oval to H block. Inmate's [sic] were asking the reason why there was a half day lock down. As I was answering to the other inmates, inmate now known to me as [Nassim] said "May be we should have a riot". [A senior officer] was advised of the comment made and inmate [Nassim] was secured in his cell. At no time was permission given to inmate [Nassim] to incite a riot'.

Nassim pleaded guilty to the offence and was recorded as stating 'Wonder why people start riots'. He was found guilty and penalised with 56 days withdrawal of all privileges, the maximum time allowable.

There is no record of Nassim having been provided with a support person during the hearing.

Inmate requests to call relevant witnesses are disallowed, despite their right to examine and cross-examine witnesses under the CAS Act

Examining and cross-examining witnesses is a right of inmates conferred by the CAS Act.[48] However, neither the CAS Act, Regulation or the Policy provide guidance on when a delegate may disallow a witness to appear for the inmate.

There was only 1 package in the total sample of 373 where it was recorded that the delegate allowed an inmate to call a witness. Two of the packages record the witnesses requested by the inmates were disallowed. The below case study is an example.

Case Study 6: Inmate not allowed to call a witness

Colin was found guilty of the offence of failing to comply with correctional centre routine (CAS Regulation clause 39) and the offence of intimidation (Regulation clause 138). At the hearing, Colin requested to call a Justice Health nurse as a witness, but the delegate refused his request because he didn't know the nurse's name.

Colin made a complaint to our office about his request to call the nurse. The governor dismissed the charge following our inquiries and recorded on the discipline action form that it was because 'procedural fairness was not afforded to inmate'. He also directed that OIMS be amended to 'reflect dismissal and inmate to be informed.'

CSNSW advised that as hearings are only conducted in person, this can contribute to the difficulty in calling witnesses, particularly given the need to conduct inquiries both expediently and fairly. It pointed to issues where potential witnesses may have since transferred to, or now work at, another correctional centre, or where relevant staff may be on leave.

We note that there may increasingly be opportunities to avoid or reduce the difficulties in calling

[48] *CAS Act* (n 3) s 52(2)(c).

relevant witnesses by the use of audio-visual technology. That said, CSNSW has advised that the current resources are already often utilised for other purposes (such as court appearances and legal visits).

Any refusal to permit witness examination or cross-examination risks the decision being procedurally unfair. Generally, refusal of an inmate's request to call a witness would require the delegate to be duly satisfied that the witness could not provide relevant evidence. Otherwise, the failure to hear relevant evidence may constitute procedural unfairness, particularly if the delegate refuses a request to call a witness but bases their determination of guilt on issues about which the witness could have given evidence.

Nevertheless, the legislation confers a right on inmates to call relevant witnesses and, as CSNSW accepted in its submission, staff should take reasonable steps to facilitate witness participation. Furthermore, if an inmate is prevented from calling a witness whom they submit would be able to provide relevant evidence as to their innocence, the delegate should consider the absence of that evidence when assessing whether the charge has been proven beyond reasonable doubt.

2.2 Imposition of penalties, with particular observations about cell confinement practices

2.2.1 Legislative and policy framework

If the delegate is satisfied the inmate is guilty, they have discretion to decide whether to impose a penalty, or defer a penalty on condition of good behaviour, and/or order payment of compensation for any loss or damage to property caused by a correctional centre offence.[49]

If, after conducting an inquiry, the delegate is satisfied beyond reasonable doubt that the inmate is guilty of a correctional centre offence, they may impose one (but not more than one) of the following penalties under s 53 (1) (a) – (d) of the CAS Act:

1. reprimand and caution
2. deprivation, for up to 56 days, of such withdrawable privileges (as defined by the CAS Regulation[50]) as the governor may determine
3. confinement to a cell for up to 7 days, with or without deprivation of withdrawable privileges
4. cancellation of any right to receive payments under section 7 of the CAS Act for up to 14 days, but to the extent only to which those payments are additional to the payments made at the base rate to inmates generally or to inmates of a class to which the inmate belongs.[51]

The Policy provides a list of factors that delegates should consider before imposing a penalty.[52] The list includes the inmate's recent behaviour, history of correctional centre offending and the nature and seriousness of the offence being determined. The delegate can consider a lesser penalty if a guilty plea is entered and take into consideration any other mitigating circumstances.[53]

[49] Corrective Services NSW, *Policy 14.1* (n 15) 13.

[50] *CAS Regulation* (n 2) reg 163.

[51] *CAS Act* (n 3) s 53(1).

[52] Corrective Services NSW, *Policy 14.1* (n 15) 14.

[53] Ibid.

Specific guidance for the appropriate types and length of penalties is provided by the Policy for drug-use offences.[54] Delegates have discretion not to apply the guideline penalties in exceptional circumstances. There is no guidance for the other types of penalties except to say that contact visits and phone calls, which are one of the withdrawable privileges, should be withdrawn only as a last resort.[55]

To examine how penalties were issued we reviewed **242** packages that excluded any drug-use related offences. Drug-use offences were excluded because under the Drug Test Offences Policy, an inmate found guilty of certain drug offences[56] is to be given a standard penalty depending on whether it is their first or a subsequent offence, unless there are exceptional circumstances.[57]

2.2.2 Multiple penalties and cumulative penalties

Inmates have been subject to separate penalties of cell confinement (for a period of time) and withdrawal of privileges (for a longer period of time), which is impermissible.

Of the 242 non-drug related packages, the majority (203 or 84%) had a penalty imposed. In 2 out of the 3 cases where inmates were charged with only 1 offence and had both privileges withdrawn and confinement to cell, privileges were withdrawn for longer than the cell confinement period.

Although s 53(1)(c) of the CAS Act allows for cell confinement **and** withdrawal of privileges to be imposed as a penalty simultaneously, Senior Counsel advised that in cases where the withdrawal of privileges is imposed for a greater time than the duration of the cell confinement for the one offence, the inmate in fact receives 2 penalties rather than 1 – deprivation of withdrawable privileges pursuant to section 53(1)(b) and cell confinement pursuant to section 53(1)(c).

Senior Counsel advised that imposing 2 penalties for 1 offence in such a way was contrary to the limitation provided for by the CAS Act. Rather, if privileges are to be withdrawn together with confinement, the deprivation of withdrawable privileges must be limited to the same amount of time as the cell confinement, in order to be characterised as part of a single penalty under s 53(1)(c) of the CAS Act.

Inmates have been subject to cumulative penalties which exceed the maximum duration of penalties under the Act

The CAS Act establishes maximum timeframes for penalties. For example, privileges can only be withdrawn for a maximum of 56 days[58] and cell confinement (with or without privilege withdrawal) is limited to 7 days. Section 60 states that:

> [if] an inmate is charged with 2 or more correctional centre offences, and the charges are determined together or arise out of a single incident, any cumulative penalties imposed for those offences must not, in respect of any particular kind of penalty, exceed the maximum penalty that may be imposed in relation to a single correctional centre offence.

[54] Corrective Services NSW, *Custodial Operations Policy and Procedures* (Policy, No 14.4 Drug Test Offences, 16 December 2017) 8

[55] Corrective Services NSW, *Policy 14.1* (n 20) 15.

[56] *CAS Regulation* (n 2) regs 153, 159(3), 160(3).

[57] Corrective Services NSW, *Policy 14.4* (n 54) 8.

[58] *CAS Act* s 53(1)(b), except where they are for drug-use offences, wherein privileges may be withdrawn for up to 6 months pursuant to s 57(2).

The Policy at 4.6 illustrates this cumulative penalty rule with the following example:

> …an inmate confined to a cell for four days for one offence cannot be confined to a cell for more than three days on another offence as this would exceed the maximum seven days confinement to cells.

The delegate is responsible for ensuring that any cumulative penalties imposed do not exceed the maximum allowed for any single penalty.

In addition, in relation to the power to revoke a penalty pursuant to s 53(4) of the CAS Act, the Policy expressly states that a contravention of the cumulative penalty rule is one of the reasons why a penalty can be revoked by a governor.

In the packages we reviewed, we saw 4 cases where inmates were issued cumulative penalties that exceeded the maximum allowable timeframe under the CAS Act. The below case study provides an example.

Case Study 7: Inmate given a cumulative penalty of 112 days off buy ups

Isaac was charged, pleaded guilty and found guilty of participating, or inciting other inmates to participate, in a riot (CAS Regulation clause 140), damaging or destroying property (CAS Regulation clause 142) and failing to comply with correctional centre routine (CAS Regulation clause 39).

The charges arose out of an incident involving a group of inmates. The finding was based on CCTV footage, which was summarised in the package and stated that Isaac was 'on footage assaulting another inmate, inciting and actively participating during RIOT and also property damage to fence and assist in lighting fire'.

He was penalised 56 days off buy ups commencing April, another 56 days off buy ups, commencing June, and ordered to pay $500 in compensation.

Isaac served a cumulative penalty of 112 days off buy ups, in contravention of the cumulative penalty rule.

Compensation for damaged property

Section 59(1) of the CAS Act provides that inmates can be ordered to pay compensation for damaged property arising out of a correctional centre offence:

> **59 Compensation for property damage**
>
> (1) If an inmate causes any loss of or damage to property as a result of committing a correctional centre offence, the governor or Visiting Magistrate may, whether or not a penalty is imposed for the offence, order that the inmate pay to the Crown (or, if the property is owned by some other person, to that other person) a specified amount as compensation for the loss or damage.
>
> (2) The maximum amount of compensation that the governor may order an inmate to pay is $500.
>
> (3) Compensation that an inmate is ordered to pay under this section is payable out of any money held by the governor on behalf of the inmate or out of any other money otherwise payable to the inmate under this Act or the regulations.

Inmates have been subject to compensation orders that cannot be linked to damaged property, and some have exceeded the maximum amount

An order for compensation was made in 40 of the sample packages we examined. we also analysed the OIMS data for compensation orders. We found that:

- none of the packages included supporting evidence for how the amount of compensation was determined
- 4 involved orders for payment of Fire and Rescue NSW call out fees (one of which is described in the below case study)
- in 3 cases, described in the below case studies, the relevant inmates were ordered to pay more than the maximum allowable $500 in compensation
- in 2 cases the inmates were found not guilty of the offence of damage or destroy property (CAS Regulation clause 142) but ordered to pay compensation regardless
- in 2 other cases inmates were charged with an offence (fail to comply with correctional centre routine (CAS Regulation clause 39)) that did not indicate there was damage to or loss of property as required by s 59(1) of the CAS Act.

On 7 March 2018 the then Ombudsman wrote to the then Commissioner making comments under s 31AC of the Ombudsman Act in relation to a complaint about an order to pay for Fire and Rescue NSW call out fees made under s 59(1) of the CAS Act. The then Ombudsman was of the view that orders to pay for Fire and Rescue NSW call out fees were invalid because they did not compensate any actual damage to property. He suggested seeking further advice from Crown Solicitor to confirm that view.

In a letter dated 26 April 2018 the then Commissioner advised us that consideration had been given to the Ombudsman's view and the suggestion, and it was decided to accept that inmates should not be ordered to pay compensation under s 59(1) of the CAS Act for Fire and Rescue NSW callouts. The then Commissioner acknowledged that while the actions of the inmates resulted in a consequential loss to CSNSW, it could not be established there was any loss or damaged to property. That being the case, it was not considered necessary to seek further advice from the Crown Solicitor.

The then Commissioner further noted that he had been advised that imposing compensation on inmates for Fire and Rescue NSW callouts was not a widespread practice. However, he advised that governors would be informed it should not be used in future.

As noted, however, in 4 of the recent sample packages we reviewed in this investigation, inmates had been ordered to pay Fire and Rescue NSW call out fees.

In the course of the investigation, NSW obtained advice from the Crown Solicitor's Officer, which concluded that:

> Although the contrary is arguable, on balance, I prefer the view that an inmate cannot be ordered to pay compensation under s 59(1) for "loss or damage to property" where the asserted loss is CSNSW's payment of a fee for callout of Fire & Rescue NSW services.

Case Study 8: Inmates ordered to pay compensation for Fire and Rescue NSW callout fees

Two inmates were charged with damaging or destroying property (CAS Regulation clause 142) after they set a tin of sardines on fire in the bin outside their cells. Fire and Rescue NSW attended the centre.

They were each ordered to pay $500 compensation for damage and the Fire and Rescue NSW callout fee.

Case Studies 9, 10 and 11: Inmates ordered to pay compensation over the maximum amount

Jasper was charged $604 after being found guilty of damaging or destroying property (CAS Regulation clause 142) at a Correctional Centre.

Todd was found guilty of damaging or destroying property (CAS Regulation clause 142). Todd was ordered to pay $592.11 compensation. It was recorded on OIMS that he was charged '$592.11 for forensic cleaning. Total cost $2960.62 between 5 inmates.' We were unable to identify the other inmates who were charged.

Pricha was found guilty of damaging, destroying or defacing a cell (CAS Regulation clause 58), and ordered to pay $605 compensation.

There is no legal power to order inmates to pay compensation above the maximum amount allowed by the legislation ($500) and for loss other than loss or damage to property as a result of a correctional centre offence.

In the packages we reviewed, even when the amount of compensation ordered was within that allowable by legislation, it is difficult to see how the amount was calculated and whether it was justified.

CSNSW informed us in its submission that its general practice is for governors or delegates to seek advice on the value/replacement/repair cost of items from their centre's Business Manager or Corrective Services Industries (CSI), generally by email. Some centres maintain a list of replacement prices. Maintenance would advise on the cost of a particular repair.[59]

CSNSW told us that, although the calculation is not apparent from inmate discipline packages, it would be able to rely on other records if a compensation order was ever challenged.

2.2.3 Last resort withdrawable privileges

More regard should be paid to the Policy that the withdrawal of phone calls and contact visits should be considered as a penalty of last resort

The Policy states that phone calls and contact visits are to be withdrawn as a last resort.[60] Despite this, we found a high number of cases where either or both of these privileges are denied as a penalty for offences.

Of the 203 packages where a penalty was issued for non-drug use related offences, nearly a quarter (26% or 53) involved the withdrawal of phone calls or contact visits. Of these, 38% (or 20) involved

[59] Corrective Services NSW, *Response* (n 26) 8.

[60] Corrective Services NSW, *Policy 14.1* (n 20) 15.

withdrawal of both phone calls and contact visits.

In response to our provisional findings, CSNSW performed its own data analysis on what appears to be all penalties issued between 2018 and 2023, and said that it found:

- 16% of offences attracted an off contact visits penalty, and
- 6% of offences attracted an off phone calls penalty.[61]

CSNSW conceded that, although its analysis suggested last resort withdrawable privileges were utilised at a lower rate than in the sample we examined, it is likely more staff training is needed on this issue.

Cell confinement as a penalty

Confinement to cell can be imposed as a penalty for a guilty finding on an offence.

An inmate suspected of committing or about to commit a correctional centre offence can also be confined to their cell (or some other appropriate place of confinement) pending instructions on how a correctional centre offence charge should be dealt with – this is usually referred to as 'confinement pending adjudication' by CSNSW staff.

Section 53 (1) (c) of the CAS Act provides that:

> …if, after conducting an inquiry, the governor is satisfied beyond reasonable doubt that the inmate is guilty of a correction centre offence, the governor may impose ….confinement to a cell for up to 7 days, with or without deprivation of withdrawable privileges.

Young Aboriginal inmates have been penalised by being confined to their cell alone, despite this being prohibited by the Policy (and contrary to the recommendations of the Royal Commission into Aboriginal Deaths in Custody)

The Policy is explicit that young Aboriginal inmates should not be confined to cells alone and requires that alternative penalties be considered.[62] 'Young' for these purposes means 26 years old and under.

This prohibition is consistent with recommendations 144 and 181 of the Royal Commission into Aboriginal Deaths in Custody which recognised the extent to which isolation causes Aboriginal inmates distress and anxiety.[63]

We found 4 packages in the sample where young Aboriginal inmates were confined to their cells alone contrary to the requirements of the Policy.[64]

While the Policy prohibits young Aboriginal inmates from being confined in a cell alone, it does not prohibit confinement of all other Aboriginal inmates or other inmates who may be particularly vulnerable.

The Royal Commission into Aboriginal Deaths in Custody recommended that 'Corrective Services should recognise that it is undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention.'[65]

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[61] Corrective Services NSW, *Response* (n 26) 8.

[62] Corrective Services NSW, *Policy 14.1* (n 20) 16.

[63] Department of Prime Minister and Cabinet (Cth), *Review of the implementation of the Royal Commission into Aboriginal Deaths in Custody* (Report, Chapter 7 Prison Safety, August 2018) 357 <https://www.niaa.gov.au/resource-centre/review-implementation-royal-commission-aboriginal-deaths-custody>

[64] Corrective Services NSW, *Policy 14.1* (n 20) 12.

[65] *Royal Commission into Aboriginal Deaths in Custody*, Recommendation 181 (Final Report, 9 May 1991) vol 5.

Vulnerable inmates have been confined to their cells

The Policy provides for extra caution to be taken before imposing a penalty of confinement for inmates who have been referred to the RIT, which usually occurs when an inmate has made threats to themselves or others because of suspected mental health issues. If an inmate has been referred to the RIT, the Policy specifies that the RIT Coordinator's advice should be obtained regarding any RIT Management Plan or ISP. In particular, the Policy cautions that consideration should be given to whether confinement to a cell is appropriate, or an alternative penalty should be imposed instead.[66]

Prior to commencing a penalty of confinement to cell, the following persons must be notified:

- governor
- manager of security or officer in charge (**v**)
- Justice Health & Forensic Mental Health Network medical or nursing officer, and
- the RIT coordinator or RIT member (if the inmate is subject to an ISP or RIT Management Plan).[67]

Before a penalty of confinement to a cell is imposed, the Inmate Discipline Checklist (the **Checklist**) must be completed. The Checklist covers important factors that should be considered before the penalty is imposed such as:

- whether case file has been reviewed
- OIMS alerts
- association
- history of self-harm
- history of violence
- first time in custody
- Aboriginal
- transgender
- juvenile history
- young adult offender
- medical alerts, including self-harm, drug and alcohol issues and mental health notifications.

If the inmate is considered to be at risk of self-harm or suicide, the mandatory notification procedures must also be complied with.[68] These are set out in Section 3 of CSNSW Policy 3.7 Management of inmates at risk of self-harm or suicide and requires the risk be reported to the OIC, who is to develop an ISP and make a record on OIMS.[69]

Approximately 17% of the inmates in our sample were confined to their cell as a penalty.[70] Also in 17% of the sample packages, inmates were locked-in cell pending adjudication.[71]

[66] Corrective Services NSW, *Policy 14.1* (n 20) 16.

[67] Ibid 17.

[68] Ibid 13.

[69] Corrective Services NSW, *Policy 3.7* (n 42) 8.

[70] 65 out of 373 packages had a confine to cell penalty.

[71] 67 packages out of 373.

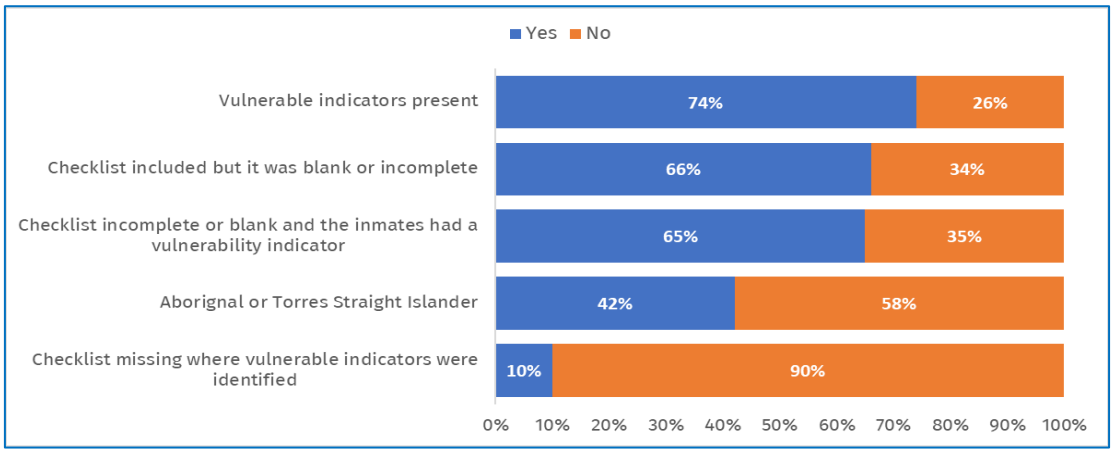
We examined the relevant paperwork in the sample packages that contained a form of cell confinement, whether confined in cell as a penalty or pending adjudication. Where an inmate's profile was not attached, we reviewed the Checklist and the misconduct report, if they were completed. From this, we were able to identify inmates who had one or more of the below vulnerability indicators in their inmate profile:

- Aboriginal
- non-English speaker (profile would include an alert that the inmate required an interpreter)
- a disability
- transgender
- young offender (the age of 26 years and under)
- a mental health alert.

Of the 65 packages that had confinement to cell as a penalty, a significant number (74%) of the inmates had one or more of the above vulnerability indicators. Nearly half of the cohort confined to cell as a penalty (42%) were Aboriginal. Of these 65 packages:

- the Checklist was missing in 10% of packages where vulnerability indicators were identified
- where the Checklist was included, it was left blank or incomplete 66% of the time
- where the Checklist was incomplete or blank, 65% of the inmates had a vulnerability indicator.

Figure 4: Analysis of the 65 packages that where inmate confined to cell as a penalty



The Checklist is an important tool in triggering consideration of whether cell confinement can be safely imposed given it can have a serious negative impact on mental health, especially for inmates with self-harm histories. It also acts as a written assurance that the delegate checked the risk factors before deciding to confine an inmate.

In the absence of a completed Checklist it is not possible to be satisfied that the risk factors were considered in making the decision to confine an inmate to a cell in any given case.

Required notifications to the governor, manager of security or OIC and a Justice Health medical or nursing officer[72] were not recorded in just under half (48%) of the packages that included the Checklist.

[72] The Risk Intervention Team (**RIT**) Coordinator or RIT member should also be contacted where an inmate is subject to a RIT management plan or immediate support plan under Department of Corrective Services NSW, according to Corrective Services NSW, *Policy 14.1* (n 20) 16.

In the packages we reviewed, 3 inmates subject to confinement had a recorded history of self-harm; Glen in Case Study 13 had both a history of self-harm and a mental health alert. We cannot tell if alternative penalties were considered in any of these cases, as required by the Policy, as no reasons for selecting the penalty were recorded in the disciplinary packages.

Case Study 12: Young Aboriginal inmate with history of self-harm confined to cell

Lachlan was charged with, pleaded guilty to and was found guilty of damage, destroy or deface cell (CAS Regulation clause 58) and damage or destroy property (CAS Regulation clause 142) after setting fire to the cell in which he resided alone.

He was penalised 7 days cell confinement and 56 days withdrawal of all privileges, and ordered to pay $500 compensation.

The Checklist recorded he was a young Aboriginal adult offender, with a history of self-harm. The medical information section on the Checklist was left blank. The delegate also recorded on the Checklist that, 'due to poor institutional behaviour max penalty given.'

Case Study 13: Young Aboriginal inmate with mental health alert confined to cell

Glen was charged with, pleaded guilty to and was found guilty of assault (CAS Regulation clause 141), throw article or operate device from which article is projected (CAS Regulation clause 141) and tamper with food or drink (CAS Regulation clause 142).

The misconduct report recorded that Glen started yelling and throwing salmon patties at a correctional officer through the grill of his cell door after a disagreement about the meal.

He was penalised 7 days cell confinement and 56 days off buy ups. The discipline cover sheet recorded that Glen was in medical/segregation unit and the IDAF confirmed that he was in a cell alone.

The Checklist recorded that he is a young Aboriginal adult offender, with a history of self-harm and mental health notifications. The delegate also recorded on the Checklist: 'Self-harm history, mental health history, epileptic, asthmatic, one out cell placement, previously completed cellular confinement, 7 days cells & 56 days off buy-ups.'

It appears the delegate was aware of several risk factors to confining Glen in his cell alone when he decided to impose the penalty.

A penalty of confinement may in practice constitute 'solitary confinement' (as it is understood in international law)

Under the Mandela Rules, 'solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact' (Rule 44).

The CAS Regulation (clause 164(1)(b)) lists solitary confinement as one of the prohibited punishments inmates must not be subjected to, and provides that confining an inmate to cell in accordance with an order under s 53 or 56 of the CAS Act is not solitary confinement.

Although confinement in this case is deemed not to be solitary confinement under the CAS Regulation, as a matter of practice it may meet the definition of solitary confinement under the Mandela Rules. In particular, this may be the case where an inmate is in a cell alone or what is referred to as a 'one out cell'.

Rule 45(1) of the Mandela Rules provides that:

> Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorisation by a competent authority.

Rule 44 prohibits 'prolonged solitary confinement', which is solitary confinement (as defined above) for a time period in excess of 15 days. Given the CAS Regulation permits confinement as a penalty for a maximum of 7 days, it is consistent with this prohibition on prolonged solitary confinement.

2.2.4 Confinement in cell pending adjudication

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

> **244 Suspected offences by inmates**
>
> (a) A correctional officer or departmental officer who suspects that an inmate has committed, or is about to commit, an offence must report that fact to the governor immediately.
>
> (b) A correctional officer may confine an inmate referred to in subclause (1) to his or her cell, or in some other appropriate place of confinement, pending instructions as to how the inmate should be dealt with.
>
> (c) An inmate in respect of whom one or more offences have been reported may be confined under this clause, whether for one or more periods of confinement, for no more than 48 hours in total in respect of those offences.

Two limitations are therefore placed on the ability to confine an inmate under clause 244:

1. that the inmate be confined 'pending instructions as to how the inmate should be dealt with',[73] i.e. while other relevant processes occur such as investigation of the offence, decisions about reclassification, if any
2. for no more than 48 hours.

COPP 14.1 at cl 2.2 further provides that:

> An inmate **may be** locked in a cell pending adjudication for a correctional centre offence if it is necessary for the safety of persons or the security, good order and discipline of the correctional centre.
>
> The only exception is where an inmate is found in possession of a mobile phone, SIM card, phone charger or any part thereof. In these cases, the inmate must be locked in a cell pending reclassification or segregation.[74] (emphasis added)

If an inmate has been locked in a cell pending adjudication, the correctional officer must immediately inform a Justice Health medical or nursing officer as well as the governor or OIC of lock-in cells. Details of the lock-in and persons notified must be recorded in the Inmate Accommodation Journal.[75] Notifications to Justice Health are also recorded in the misconduct report.

[73] *CAS Regulation* (n 2) reg 244(2).

[74] Corrective Services NSW, *Policy 14.1* (n 20) 7.

[75] Ibid.

Decisions to confine inmates pending adjudication of charges are not sufficiently documented

There is no explicit requirement under the regulations or Policy to record reasons for confining an inmate pending adjudication and in practice the packages we reviewed did not routinely record such reasons, including any information about how the relevant inmate presented a risk to the good order, security and discipline of the centre. The below case studies provide examples.

We recognise that misconduct reports cannot capture all the details of an inmate's behaviour and the reporting officer's contextual and subjective evaluation of a threat. However, providing reasons for using this power would help ensure its use is limited to real threats and the decision-making is transparent.

Case Study 14: Not clear if inmate posed a threat to warrant confinement

Dean, an Aboriginal man with a history of self-harm, was charged with the offences of creating or possessing prohibited goods (CAS Regulation clause 45) and smoking in a non-smoking area (CAS Regulation clause 154) from a gaol-made instrument.

Dean was locked in his cell for about a day pending adjudication of the charge.

At the hearing he pleaded guilty, telling the delegate 'he was sorry, and he was stressed'. The delegate penalised Dean with 48 hours cell confinement, although it is not clear from the package whether that included the time already confined. CSNSW advised us Dean's time locked in cell did not exceed 48 hours.

While the misconduct report was clear as to what occurred, it did not describe how Dean posed a threat to the good order and security of the centre. He was not described as violent or abusive and there were no witness reports or other relevant evidence that supported the position that Dean posed a sufficient threat to justify locking him in his cell pending adjudication.

Case Study 15: Not clear why it was necessary to lock inmate in cell pending adjudication

Moses was charged with disobeying direction (CAS Regulation clause 130) after refusing to allow an officer to look between his buttocks during a strip search after the officer suspected he saw a syringe secreted there. Moses objected to the direction, saying that he was not going to do it because he 'was molested as a kid'.

He was then told, 'Just hand over the syringe, you'll get 7 days pound, happy days, if you fail to comply with my directions, you may be segregated for 14 days and regressed'.

Moses was then secured in a segregation cell. It is not clear from the paperwork how long he remained confined and why it was considered necessary to confine him.

At the hearing, Moses is recorded to have pleaded guilty and stated 'I didn't have nothing – was probably toilet paper.' He was found guilty of the offence of disobey direction and penalised 56 days off television, buy-ups and contact visits. There is no record on OIMS for any related charge for the suspected syringe.

Mandatory confinement requirements in the Policy fetter discretion

Clause 1.3 of Custodial Operations Policy and Procedures 14.3 – Mobile Phone Offences (COPP 14.3) requires mandatory confinement for mobile phone offences:

> Any minimum security inmate found in possession of a mobile phone, SIM card, phone charger or any related part **must be** immediately locked in a cell and managed as a medium/maximum security inmate pending the outcome of a classification/ placement review.
>
> Any medium or maximum security inmate found in possession of a mobile phone, SIM card, phone charger or any related part **must be** locked in a cell pending segregation for the good order and security of the correctional centre. (emphasis added)

There is nothing in the legislation that mandates confinement. Any prescribed mandatory process removes discretion from the decision-maker as to whether to confine a particular inmate in each circumstance. Having a policy that requires confinement in all the above circumstances regardless of what the individual facts are may render some decisions unlawful. The removal of discretion is likely to have a particularly detrimental effect on inmates who are vulnerable.

There is also a potential internal inconsistency between clause 4.5 of COPP 14.1 (which provides that young Aboriginal men should not be confined alone) and clause 1.3 of COPP 14.3, which provides that confinement is mandatory for a mobile phone offence, with no exception for young Aboriginal inmates.

2.3 Review rights and oversight of decisions

Ensuring there are avenues available for people to seek a review of a decision, as well as providing clear information about how to ask for a review are basic building blocks of fair processes. A review process provides a way to check that decisions made are consistent, fair and reasonable.

In the case of inmate discipline both internal and external review rights are inadequate. There is no legislated right of review or appeal other than the theoretical possibility of judicial review. The existing internal review mechanism is opaque, ineffective to remedy any errors and likely legally problematic.

There is currently a lack of oversight by governors of decision-making on disciplinary matters in their centres. Similarly, there is no central oversight of decision-making across centres.

2.3.1 Review rights in respect of inmate discipline decisions are limited

Inmates have no right of appeal (internal or external) from a decision of a governor or delegate to make a finding of guilt or to impose a penalty, other than the theoretical possibility of judicial review (for legal error) on an application by the inmate to the Supreme Court.[76]

Section 53(4) of the CAS Act provides that 'a penalty imposed on an inmate by the governor may be revoked by the governor or by the Commissioner'. However, this is not a right of review as such.

In only 1 package, a review was conducted by an OIC, who overturned the finding, although it was not clear from the package or OIMS what prompted the review.

The only other 'reviews' we are aware of are those that have been conducted following a complaint being made to our office, and as a result of our preliminary inquiries about the case. The below case study provides one example.

[76] Custodial Services NSW, *Policy 14.1* (n 20) 20.

Case Study 16: Finding dismissed following review of prescribed medication

Rahim was found guilty of the offence of failing a prescribed drug test (CAS Regulation clause 153). He was penalised 42 days off buy ups.

Rahim complained to the Ombudsman stating that he failed the drug test because he was taking prescribed medication. He said he had told a correctional officer about it prior to calling us but had been told there was nothing they could do about it.

The Manager of Security dismissed the guilty finding after we contacted the centre and after confirming that Rahim was in fact on prescribed medication as claimed.

The Policy purports to impermissibly limit the discretion of the governor to revoke a penalty

Section 6.3 of the Policy attempts to operationalise s 53(4) of the CAS Act, by specifying an exhaustive list of the grounds upon which either the governor or their delegate may revoke a penalty[77] as follows:

- on compassionate grounds
- where an order for compensation is void because it was issued for something other than a loss of or damage to property
- where a penalty was imposed in error (e.g. prescribed penalty was issued for a third drug test offence but records show that it was the inmate's first drug test offence)
- contravention of the cumulative penalty rule, or
- the penalty exceeds the maximum penalty prescribed under CAS Act Pt 2 Div 6.[78]

The grounds on which a governor (or the Commissioner) may revoke a penalty under s 53 (4) of the CAS Act as specified by 6.3 of the Policy fetters a governor's discretion to revoke a penalty.

According to Senior Counsel's advice, notwithstanding what has been stated in the Policy, 'the power to revoke a penalty under the Act is unconstrained other than by its terms, purpose and context' and the basis for a revocation by the governor could include:

- an error of fact
- an error of law
- lack of natural justice
- a manifestly excessive punishment
- consideration of new evidence
- policy related matters such as a change in policy
- unfairness
- lack of uniformity between penalties imposed on inmates
- lack of uniformity between correctional centres.

Although in practice governors have occasionally reviewed and overturned findings, there is a lack of certainty as to the power of governors to review findings, and if so what the relationship of any such review is with penalty revocation. We agree with Senior Counsel's advice that this lack of certainty, 'could be solved through a legislative amendment which clearly states that a decision on both liability (whether the inmate is guilty of a correctional centre offence) and penalty can be reviewed by a particular officer, such as the Commissioner, and a new decision made.'

[77] *CAS Act* (n 3). We assume this is a possibility under s 233(2).

[78] Corrective Services NSW, *Policy 14.1* (n 20) 21.

The process for initiating a review under the Policy is unclear, is neither accessible nor available as of right to inmates, has been used rarely, and may be legally problematic

Section 6.2 of the Policy separately provides that governors may refer a matter to the General Manager, Statewide Operations for review where a penalty has been imposed on an inmate and it is clear that:

- the facts as proven do not constitute an offence
- the inmate was not given an opportunity to be heard at the hearing or to cross-examine any witnesses
- the inmate was unable to represent themselves at the hearing due to language or other difficulties in understanding the proceedings, or
- the proceedings were manifestly unfair for any other reason.[79]

If the General Manager, Statewide Operations determines that any of the above circumstances are made out, the inmate's record for that offence 'must be expunged'. The Policy makes it clear that a review by the General Manager, Statewide Operations is not a merits review, and states that a case will not be reviewed merely because it may have been open for another decision-maker to reach a different conclusion.

In response to our general request for details on any reviews conducted by the General Manager, Statewide Operations under the Policy between 2018-2022, including a request for the number of offences expunged, reasons for decisions on review and nature of errors identified, CSNSW advised that such information was not collected centrally and therefore it was unable to provide it.

The process for how a review by the General Manager, Statewide Operations would be triggered is not clear, as the Policy merely says that 'a governor may refer a matter to the General Manager, Statewide Operations for review'.

The 'correctional centre offences' sections of the current male[80] and female inmate handbooks[81] do not contain any information about how an inmate can initiate a review of a disciplinary offence decision.[82]

In response to a question on whether and how an inmate could seek a review of either a finding or a penalty, CSNSW advised us that inmates could submit a request to the governor about a disciplinary outcome in accordance with standard enquiries, requests and application processes, and that inmates are informed of this in the inmate handbooks.[83]

The relevant 'enquiries, requests, complaints and applications' section of the handbooks does not contain any information about the process for requesting a review of disciplinary outcomes. Instead, the handbooks describe the steps that may be taken generically for any kind of enquiries, requests, complaints and applications, which are:

1. Fill in an inmate request form or inmate application/statement form – these are checked once a week by a Senior Officer

[79] Custodial Services NSW, *Policy 14.1* (n 20) 21.

[80] Corrective Services NSW, *Men's Handbook*, (n 13) 31-35.

[81] Corrective Services NSW, *Women's Handbook* (n 13) 90-91.

[82] *Women's Handbook* (n 13) 59-60; *Men's Handbook* (n 13) 26-27.

[83] Letter from Peter Severin, Commissioner, Corrective Services NSW, to Jennifer Agius, Manager Custodial Services, NSW Ombudsman 23 November 2018.

2. Speak with a wing officer, which may result in a matter being referred onto others and take a few days or longer to get an answer
3. See a senior officer, wing officer or overseer if there is a request to speak with a governor. Some issues must be considered by a senior officer who then refers it to the governor for decision and can take time for a response.[84]

In addition to the above, inmates can contact Corrective Services Support Line (a telephone service that provides advice to inmates and can make inquiries to correctional centres on their behalf), Official Visitors or the Ombudsman. Inmates can raise concerns and challenge outcomes of disciplinary matters through these oversight mechanisms however, none of these are formal avenues of review.

Inmates who knew that the General Manager review process existed could ask for it to occur by following the 'enquiries, requests, complaints and application' steps described in the Inmate Handbooks. However, inmates are not advised of this possibility of a review during or after hearings.

Presumably, if a governor became aware of an error through a complaint by an inmate they could refer the matter for a review to the General Manager, Statewide Operations on their own initiative. However, where a governor does become aware of an error – for example, as a result of a complaint or our inquiries – it appears that they will generally overturn the findings themselves, rather than refer the matter for review by the General Manager, Statewide Operations in accordance with the Policy. This is despite the fact that governors are only empowered under the CAS Act to revoke penalties and not findings (s 53 (4)).

In addition to the review process by the General Manager, Statewide Operations being inaccessible and rarely used, according to CSNSW it is also very likely to be legally problematic. CSNSW submitted that, 'ordinarily, statutory decisions become spent after being made and cannot be unmade, reversed or expunged. Whether a decision could be treated as invalid would depend on the circumstances of the individual case, require case-specific legal advice, and even then, may remain unknown unless determined by a court'.[85]

The lack of a legislated review right is inherently unfair

The lack of avenues for review and appeal on disciplinary decisions is not universal across Australian jurisdictions. For example, in Queensland, the ACT and New Zealand, clear review pathways are provided by their respective legislation:

- In Queensland, review of a decision that a prisoner has committed a breach of discipline must be conducted by a corrective services officer (called the reviewing officer) who holds a more senior office than the deciding officer.[86] The review is done by way of rehearing 'on the material before the deciding officer and any further evidence allowed by the reviewing officer'.[87] Legal representation is not permitted but the person may be assisted 'if the prisoner is disadvantaged by language barriers or impaired mental capacity'.[88] The review must be videotaped if it involves a major offence.[89] The reviewing officer may confirm, vary or set aside the decision and substitute another.[90]

[84] Men's Handbook (n 13) 31-35; Women's Handbook (n 13) 90-91.

[85] Corrective Services NSW, Response (n 26) 11.

[86] Corrective Services Act 2006 (Qld) s 119(1) ('CSA Act').

[87] CSA Act Qld (n 88) s 119(2)(a).

[88] Ibid s 119 (4)-(5).

[89] Ibid s 119(6).

[90] Ibid s 119(7).

- In the ACT, an 'accused' may apply to the director-general (or delegate) for a review of a decision by a presiding officer of a disciplinary breach in relation to him or her.[91] The power is, in fact, delegated to the Assistant Commissioner Custodial Operations.[92] The Assistant Commissioner must conduct a further inquiry to review the decision on such an application or on his or her own initiative[93]. The Assistant Commissioner may confirm the decision, amend the decision or set aside the decision and make a decision in substitution for the decision set aside.[94] The Assistant Commissioner's decision may be further reviewed by an adjudicator[95] being a judge or retired judge, magistrate or retired magistrate or a legal practitioner of at least 5 years.[96] The adjudicator has similar powers to that of the Assistant Commissioner.[97]
- In New Zealand, if a prisoner is dissatisfied with any decision of a hearing adjudicator, the prisoner may appeal to a Visiting Justice within 14 days.[98] If the appeal is against the whole case, the Visiting Justice must rehear the case and reverse the finding or confirm it, and either confirm the penalty or impose another in its place, if any.[99] If the appeal is only against the penalty then the Visiting Justice is to confirm the penalty or impose another in its place, if any.[100]

As noted at the beginning of this report, the Ombudsman regularly receives complaints from inmates about disciplinary processes and outcomes. Particularly since commencing this own motion investigation, we have conducted a number of investigations into complaints that led us to suspect that a disciplinary decision may have constituted or involved unlawful conduct or other maladministration, and made findings accordingly.

In some respects, the practical effect has been to place the Ombudsman in a role of a quasi-review body in respect of disciplinary decisions. This office does not, however, have the capacity and resourcing to sustainably perform such a function going forward. Moreover, a formal 'maladministration' investigation by the Ombudsman is an indirect and inefficient route to an outcome (i.e. to scrutinise and if necessary overturn wrong decisions and the vindication of an inmate's right to procedural fairness) that could more appropriately be achieved by way of a streamlined review or appeal mechanism.

Clear internal and external review rights on both guilt and penalties should be introduced in NSW. CSNSW advised us that it would support legislative reform to provide an avenue for correction, appeal or review.[101]

2.3.2 Governors have limited oversight of the discipline process in practice

Governors have delegated their decision-making powers in relation to the inquiry and determination of correctional centre offences to managers of security or functional managers. Prior to a policy change in 2018, governors made determinations as to guilt and any penalties on the basis of a recommendation by an officer who conducted the inquiry into the charge.

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[91] Corrections Management Act 2007 (ACT) s 171(1) ('CM Act').

[92] Corrective Services (ACT), Corrections Management (Detainee Discipline – Hearings, Operating Procedure 2023, 14 July 2023) 6.

[93] CM Act ACT (n 93) s 175(1)-(2).

[94] Ibid s 176(1).

[95] Ibid s 178(1).

[96] Ibid s 177(4).

[97] Ibid s 180(1).

[98] Corrections Act 2004 (NZ) s 136(1).

[99] Ibid s 136(4).

[100] Ibid s 136(5).

[101] Corrective Services NSW, Response (n 26) 10.

An integral component of the previous policy was that an inmate could, after being told of the recommended finding and proposed penalty, make representations to the governor if they considered the process, the recommended finding, or the recommended penalty against them to have been unfair or unreasonable.[102] This provided a level of centralised oversight by each governor of the administration of inmate discipline in their centres.

Currently governors have no formal oversight of disciplinary decisions made in their centres unless they become aware of a problem through a complaint or through preliminary inquiries by this office. CSNSW also does not monitor the decisions being made across the system.

The lack of oversight coupled with the limited review rights described above severely limits CSNSW's ability to remedy any errors and ensure consistency and fairness in the system. We have recommended the establishment of quality assurance mechanisms to address this gap.

A note about the governor's power to delegate

Prior to 2018, a governor might (and frequently would) delegate to a manager the function of conducting a disciplinary hearing, with the governor then making a decision as to finding and penalty, having regard to a briefing and recommendations from the manager.

The 2018 Policy introduced a new provision requiring that, if the inmate disciplinary process is delegated, then it must be delegated in its entirety to the one individual:

A governor or delegated officer must not make a determination unless he or she conducted the inquiry. A determination must only be made by the same officer who conducted the inquiry.[103]

That is, the delegate who conducts the inquiry into a charge must also make the finding, and decide on the penalty.

CSNSW told us that this change to the policy followed legal advice it had received that 'part' delegation was impermissible. The advice suggested that the previous practice did not accord with the CAS Act, and for that reason the Policy was amended.[104]

We sought advice from Senior Counsel as to whether there was any legal principle that would prevent the delegation by a governor of only part of the correctional centre disciplinary process, leaving some part of the process to be performed by the governor, as per the previous policy. Noting that the inmate discipline process is an administrative and not judicial process, Senior Counsel confirmed that, in administrative decision-making processes, it is permissible and routine to delegate steps within a decision-making process and to separate some aspects of the function's performance from the ultimate decision-making.

According to Senior Counsel, the current arrangements under the Policy (which require the same person to conduct the inquiry, make the determination and impose the penalty) is not a requirement of the CAS Act or the CAS Regulation.[105]

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[102] Severin, *Letter* (n 82).

[103] Corrective Services NSW, *Policy 14.1* (n 20) 6.

[104] Severin, *Letter* (n 82).

[105] We note that, since receiving Senior Counsel's advice, the Court of Appeal handed down its decision in *Berejiklian v NSW* [2024] NSWCA 177, which appears to reinforce this view. In that case, the Court of Appeal said (at 74):

> 'it was *not* contended by the applicant that she was denied procedural fairness by the adoption of a process in which the person making the Commission's findings and assessments was not the person who conducted the public inquiry and could directly make demeanour-based assessments. Whilst natural justice does not permit the implication of authority to delegate

We have recommended that the CSNSW undertake a comprehensive reform of the inmate discipline framework and processes. This could include considering the provisions of the Policy concerning delegation. However, we have not made a specific recommendation that the 2018 change to the Policy necessarily be reversed, as we note that there are other reasons why it is generally desirable to have a single decision-maker performing all relevant functions, even if that is not legally necessary here – for example, avoiding the risk that critical information may be omitted or miscommunicated when a delegate 'hands over' the matter for decision by another decision-maker.

2.4 Laying of charges

2.4.1 Legislative and policy framework

The inmate disciplinary process starts with a report of misconduct, which may be lodged by custodial or non-custodial staff.

The Policy provides that any correctional officer or non-custodial officer who suspects (or has witnessed) that an inmate has committed (or is about to commit) a correctional centre offence must report it to the governor or OIC.

The reporting officer must complete an **Inmate Misconduct Report.** Any other officer who witnessed the alleged offence is required to complete an **Incident/Witness Report.**[106]

When the delegate receives a report, the Policy stipulates that they:

- should check the reports have been prepared correctly and independently
- after considering the reports and any other evidence, may decide to charge an inmate with a correctional centre offence or offences in accordance with Schedule 2 of the CAS Regulation. Schedule 2 to the CAS Regulation sets out 71 discrete correctional centre offences, which appear at different points throughout the CAS Regulation.
- must check the OIMS to ascertain whether the inmate has a cognitive impairment or intellectual disability – this is so that assistance or representation may be provided in any subsequent inquiry.

2.4.2 Incorrect, overused and multiple offences

To review how charges were being laid, we compared each offence and its elements (as specified by the CAS Regulation) with the information that was contained in the inmate misconduct reports. We used a sub-sample of 242 non-drug-use related packages in doing so. Drug-use related offences were excluded because officers have limited discretion in deciding what a drug-related charge is.

Inmates are regularly being charged with incorrect offences for the conduct alleged

Of the 242 packages, nearly a third (31%) contained an incorrect charge or a charge that did not match the conduct as described by the reporting officer in the misconduct report and supporting evidence. The below case studies provide examples.

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the hearing function with respect to the exercise of judicial power, the position is not necessarily the same in relation to an administrative body undertaking an investigative inquiry.'

[106] Different reporting procedures exist for drug test offences under COPP 14.4 Drug test offences.

Case Study 17: Incorrectly charged with offence of obstruction

Kurt was charged with the offence of obstruction (CAS Regulation, clause 156).

The misconduct report recorded the following account of an incident giving rise to the charge against Kurt:

'I was supervising medication round in Neighbourhood 5, Unit 2A when I saw a large number of inmates looking and walking towards Cell 4 where inmates [Ronald and Gerard] reside. I alerted correctional officer 1 to come and take over medication and asked correctional officer 2 to follow me to cell 4. When arriving at cell 4 I saw inmate known to me as [Gerard] sitting down in his cell. I asked inmate to come to the entry of the cell where I noticed red raised marks across his forehead. When questioned, inmate [Gerard] stated he was fine and nothing happened. Senior officer notified.'

The misconduct report further records:

'After footage was reviewed by intelligence, photographs show inmate [Edward] enter cell 4 with black gloves on. Inmate [Kurt] then enters cell and door was closed and held closed by inmate [Kurt].

At no time did I give inmates [Gerard and Edward] permission to fight or engage in physical combat, or inmate [Kurt] to [sentence unfinished]'

Kurt pleaded guilty and was found guilty of the offence of obstruction. Clause 156 of the CAS Regulation states that 'an inmate must not willfully hinder or obstruct a correctional officer in the performance of the officer's duties.' Failure to comply with the clause is an offence.

No evidence was included in the misconduct package to indicate that any officer was present or obstructed when Kurt held the door of cell 4 closed.

Kurt could have alternatively and more appropriately been charged with an offence under clause 40 of the CAS Regulation, which prohibits inmates from entering another inmate's cell (without permission by a governor or correctional officer or in response to a direction).

Case Study 18: Incorrectly charged with avoiding correctional centre routine

Bradley was charged with 2 offences - avoidance of correctional centre routine (CAS Regulation clause 43) and intimidation (CAS Regulation clause 138).

The charges were based on a report that stated that while cleaning the yard for muster, Bradley was talking to other inmates. The officer-on-duty repeatedly asked Bradley to clean the yard, which he ignored. The misconduct report also described threatening and abusive statements made by Bradley to the officer-on-duty.

Bradley pleaded not guilty to the charge of intimidation and was given a warning. Bradley pleaded guilty and was found guilty of the offence of 'avoiding correctional centre routine' under clause 43.

However, clause 43 specifically states that 'an inmate must not pretend to be ill or injured for the purpose of avoiding the inmate's obligations under the CAS Act and the CAS Regulation'. The conduct as described did not fit the charge.

Inmates are regularly charged with general 'catch-all' offences rather than the appropriate specific offence, and are often charged with multiple offences for the same conduct

The offences of failure to comply with correctional centre routine (CAS Regulation clause 39) and the offence of refusing or failure to comply with a direction as to good order and discipline given under clause 130 are often conflated, or used together and in addition to other offences for the same course of conduct.

In other words, these 2 offences are used as catch-all or fallback offences for a wide range of conduct, added onto or instead of another charge that would have more directly matched the reported conduct.

The terms of CAS Regulation clause 39 'Inmate to comply with correction centre routine' are:

> An inmate must comply with the hours of work and general routine for the correctional centre or part of the correctional centre in which the inmate is detained.
>
> Note—
>
> Failure by an inmate to comply with this clause is a correctional centre offence.

Senior Counsel's advice is that a single direction by a correctional officer to an inmate would not constitute a correctional centre routine. In addition, an inmate must know of the general routine in order for the offence to be proven.

Correctional centre routines are those set by CAS Regulation clause 37 - 'The Commissioner is to determine the hours of work and general routine for each correctional centre.' While individual routines may be determined for individual correctional centres, the fact remains that 'routines' are formally determined. Not every instruction from a correctional officer pertains to correctional centre routine.

The offence of 'disobey direction' (CAS Regulation clause 130) relates to a specific direction given by a correctional officer. The terms of the clause are:

> **130 Directions relating to order or discipline**
>
> (1) Directions for the purpose of maintaining good order and discipline—
>
> (a) may be given to inmates by the Commissioner, by the governor of a correctional centre or by a correctional officer, and
>
> (b) may be given orally or in writing.
>
> (2) An inmate must not refuse or fail to comply with a direction under this clause.

The provision is very wide and refusal or failure to comply is a correctional centre offence.

Our analysis of OIMS data produced by CSNSW suggests that these 2 offences are used the most. Over the 4-year period, the 2 offences together made up nearly a quarter (23%) of total charges and are often charged together for the same conduct. The below case studies provide examples.

Case Study 19: Inmate charged with multiple offences for the same conduct

Penelope was subject to the following misconduct report:

'While performing my duties as CO1 Sector 2 on [date] at approximately 8:45am I was on my way to join the other staff to conduct morning let go. When I noticed inmate known to me as [Penelope] jump over the security fence and then jump back over. She was then informed she will be charged and locked in pending charges. She became aggressive and argumentative when informed this was going to happen'.

Penelope was charged with 3 offences:

- failure to comply with correctional centre routine (CAS Regulation clause 39)
- avoidance of correctional centre routine (CAS Regulation clause 43), and
- disobeying direction relating to order or discipline (CAS Regulation clause 130).

Penelope pleaded guilty and was found guilty of all 3 offences and penalised with 56 days withdrawal of all privileges except AVL visits and box visits. The package contained no record of any additional evidence relied on other than the misconduct report.

The 2 charges under clauses 43 and 39 refer to the same conduct. In addition, clause 43 specifically provides that 'an inmate must not pretend to be ill or injured for the purpose of avoiding the inmate's obligations under the CAS Act and this Regulation.' There was no evidence in the package that Penelope was pretending to be ill or injured to avoid her obligations.

According to Senior Counsel's advice when there is duplication of finalised offences, one (or more, if there are multiple charges relating to the same conduct) must be invalid. Although an inmate can be charged with multiple offences for different conduct, laying multiple charges for the same conduct means that the limitation under s 53 of the CAS Act to impose one, but not more than one, penalty for the offence can be circumvented. Incorrect charge selection also means that the offence cannot be proven beyond reasonable doubt.

A lack of guidance on the elements of offences to assist delegates select accurate charges may be contributing to the practice of incorrect charge selection.

2.5 Record keeping practices and delegate training

2.5.1 Record-keeping

For disciplinary offences where a penalty is imposed, the CAS Act requires records to be kept at the correctional centre and made available for inspection by such persons as the Commissioner considers appropriate.[107] Section 61 of the CAS Act prescribes the particulars to be kept as follows:

- the nature and date of the offence
- the name of the inmate
- the date of sentence
- the penalty imposed
- any order for the payment of compensation.

[107] *CAS Act* (n 3) s 61.

The *State Records Act 1998* also contains a general obligation for a public agency to keep full and accurate records of the activities of the agency.[108] This means records of disciplinary decisions should be kept regardless of whether a penalty has been imposed.

CSNSW discharges its recordkeeping obligations by recording details of hearings and penalties for disciplinary offences in the disciplinary package (the IDAF form) and the OIMS database.[109] Correctional officers fill in the IDAF by hand. Hardcopies are stored at correctional centres as part of the inmate's entire file, which can be hundreds of pages containing records created over many years and/or during multiple incarceration periods.

Disciplinary packages are then scanned onto the inmate's electronic file. There is no timeframe in which this upload is required to be completed and the frequency of uploads may differ depending on the correctional centre. Once scanned, the disciplinary package is stored as part of a single PDF document, which can itself be hundreds of pages in length.

The practice of deleting records is contrary to the CAS Act

If a review is conducted by the General Manager, Statewide Operations and they determine that any of the circumstances specified by the Policy (i.e. the facts as proven did not constitute an offence or there are procedural errors) then 'the inmate's record for that offence must be expunged'. We checked OIMS to ascertain how this occurs in practice and confirmed in the several cases where findings were overturned following our preliminary inquiries, that the records were in fact deleted.

Deleting a record contradicts the requirement imposed on the governor by s 61(1) of the CAS Act to keep records as to the nature and date of the offence, the name of the inmate, the date of sentence, the penalty imposed and any order for the payment of compensation. Such records must be kept at the correctional centre concerned and made available for inspection (s 61(2) of the CAS Act and cl 315(1)(h) of the CAS Regulation).

Instead of deleting the records altogether, the inmate's OIMS record should be notated to indicate that the findings were set aside on review and to ensure the original findings are not taken into account in any subsequent decisions about the inmate.

The standard of record-keeping is exceptionally poor

We reviewed all the packages that contained an IDAF against the record-keeping requirements in the CAS Act. We also reviewed the OIMS entries for all hearings conducted between 1 January 2018 to 22 October 2022. We compared the records contained in the disciplinary packages with the corresponding OIMS data for the same disciplinary matters.

As noted above, because of the way hardcopy records are kept, some disciplinary packages were unable to be produced. Record-keeping is generally poor, with many packages not containing certain documents that should be part of the record, such as inmate profiles, IDAFs, etc. In some cases, the record of the penalty on OIMS and the penalty in the corresponding disciplinary package were different. The below case studies provide examples.

[108] State Records Act 1998 (NSW) s 12(1).

[109] Corcoran, Major changes to the inmate discipline process (n 38).

Case Study 20: Mismatch in records

Marius was charged with creating or possessing prohibited goods (CAS Regulation clause 45) and administering a drug (CAS Regulation clause 150).

The delegate found Marius guilty and imposed a penalty of 56 days off telephone calls, buy ups and contact visits, which was later changed by the governor to 21 days.

The dates recorded on the IDAF had the penalties commencing on 24 August and expiring on 19 October which equals 56 days. The OIMS record on the other hand showed the penalty as 56 days off contact visits and 21 days off phone calls and buy ups.

Case Study 21: Incomplete record

Raul was charged with the offence of fighting (Regulation clause 141). The only description of the incident that formed the basis of the charge was recorded in the IDAF as '[Raul] had a fight with' another inmate.

Raul was not present at the hearing and did not enter a plea. He was found guilty and penalised 7 days cell confinement.

The package was missing both the cover page and the misconduct report, and large portions of the IDAF were not completed. There were also no witness statements.

Records of disciplinary outcomes must be both accurate and reliable, not only to meet legal obligations, but also because these records may be considered for classification, parole and other decisions and as such have potential ongoing negative consequences for an inmate.

The split between hard copy and OIMS records means that the complete record is difficult to access and reconstruct and may be incomplete or unreliable. The practice also makes it difficult to demonstrate that a lawful decision was made.

Digitisation of the record creation process may improve record quality, retention, and useability. In addition, digital records could be leveraged to prompt better and more consistent practices by delegates both in the type and quality of information recorded. For example, guided drop down choices could assist delegates with making more accurate choices during the disciplinary process. Given there are 71 different offences, many of which are easily misinterpreted and, as we discuss above, are often mistakenly used, assistance in selecting the correct offences and complying with other compulsory requirements would go some way in improving current practice.

2.5.2 Staff Training

CSNSW offers training to correctional centre staff through its Academy (**CSNSW Academy**), an enterprise registered training organisation. The Custodial Training Unit is responsible for entry level training for correctional officers and also offers a range of courses for more experienced officers and CSNSW staff working in custodial settings.[110]

[110] Department of Communities and Justice (NSW), *Custodial training* (Web page, 21 September 2023) <CTU (nsw.gov.au)>.

The Policy does not contain guidance as to what the training requirements are for staff who implement the inmate disciplinary process. We sought from CSNSW the education curriculum (or similar), including all supporting documents, used to train:

1. delegate/governors in how to conduct the inmate disciplinary process under Division 6 of the *Crimes (Administration of Sentences) Act 1999*
2. correctional officers in how to apply the disciplinary process in line with COPP 14.1, including for writing discipline reports.

We received and reviewed:

- Managing misconduct learning resource[111] consisting of 135 slides covering 5 topics
- Inmate Discipline/Correctional Centre Offences PowerPoint presentation[112] consisting of 20 slides
- Misconduct Report PowerPoint presentation[113] consisting of 34 slides
- 3-page excerpt from the *Learner Guide for correctional officers - Inmate Discipline/Correction Centre Offences*.[114] This appears to be part of a larger manual to support Policy implementation
- 4-page excerpt from *Learner Guide for correctional officers – Report Writing 2 – Misconduct Report*.[115] This appears to be part of a larger manual to support Policy implementation
- Report writing rules learning resource[116] consisting of 6 slideshow screenshots of a misconduct report
- Serco Toolbox talk for supervisors and delegates – Inmate Discipline[117] for Clarence Correctional Centre consisting of a set of 20 slides
- Immediate Support Plan Workshop[118] – for custodial correctional officers working in court/police cells who have identified inmates at risk of suicide or self- harm
- Serco LMS Inmate Discipline Training[119] – 20-page course covering inmate discipline procedures.

We conducted a gap analysis of the above training material and assessed it against the guidance contained in the Policy. There were many sections of the Policy that did not appear to be sufficiently covered by training material. Specifically:

- training on cell confinement and locking inmates in their cell pending adjudication of a charge appears inadequate
- there is no training on how to conduct a review when an error is alleged to have been made
- the materials provide no guidance on giving reasons for decisions (see section 2.1.2 for discussion on giving reasons)

[111] Corrective Services NSW, *Managing Inmate Misconduct* (undated).

[112] Corrective Services NSW Academy, *Inmate Discipline Correctional Centre Offences* (Custodial Operations Policy and Procedures 14.1 Learner Guide, PowerPoint presentation, 1 August 2022).

[113] Corrective Services NSW Academy, *Misconduct Report*, (Custodial Operations Policy and Procedures 14.1 Learner Guide, PowerPoint presentation, 1 August 2022).

[114] Corrective Services NSW, *Learner Guide for Delegated Officers and Governors* (Inmate Discipline/Correction Centre Offences, August 2022) 28 - 30.

[115] Corrective Services NSW, *Learner Guide for Delegated Officers and Governors* (Report Writing 2 – Misconduct Report, August 2022) 49 – 52.

[116] Corrective Services NSW, *SIR Report Writing Rules* (Presentation, September 2022).

[117] Seco/Justice (NSW), *CLA Toolbox Talk* (Accommodation Management – Inmate Discipline, 22 February 2022) 2.

[118] Corrective Services NSW, *Immediate Support Plan Workshop* (Operational Community Program Training Unit, Corrective Services NSW Academy).

[119] Serco, *LMS Inmate Discipline* (Presentation, September 2022).

- guidance on issuing penalties and making compensation orders is lacking.

The Guiding Principles provide general guidance about staff training requirements including that staff receive ongoing, industry specific training to support effective and consistent service delivery, and that training strengthens understanding between people and contributes to cultural competency.[120] The Mandela Rules (74-76) provide more detail, including at a minimum, training for prison officers in:

- relevant national legislation, regulations and policies, as well as applicable international and regional instruments
- rights and duties of prison staff in the exercise of their functions, including respecting the human dignity of all prisoners and the prohibition of certain conduct
- security and safety, including the concept of dynamic security, the use of force and instruments of restraint, and the management of violent offenders, with due consideration of preventive and defusing techniques, such as negotiation and mediation, and
- first aid, the psychosocial needs of prisoners and the corresponding dynamics in prison settings, as well as social care and assistance, including early detection of mental health issues.[121]

Many of the errors discussed in the above sections appear to at least in part stem from lack of understanding by delegates of the framework and their obligations when making decisions about inmate discipline.

[120] Corrective Services Administrators' Council, *Guiding Principles for Corrections in Australia* (1. Governance, Revised 2018) 8.

[121] United Nations Office on Drugs and Crime, *The United Nations Standard Minimum Rules for the Treatment of Prisoners* ('The Mandela Rules', 2015) 2 <https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf>

3. Findings and recommendations

3.1 Findings under s 26 of the Ombudsman Act

Having regard to the facts and observations set out above, the Ombudsman found that the conduct under investigation, being the practices from April 2018 to date in applying the provisions of Division 6 of the *Crimes (Administration of Sentences) Act 1999* and the CSNSW Custodial Operations Policy and Procedures (COPP) 14.1 Inmate Discipline, including the charging of inmates with disciplinary drug test offences under COPP 14.4, has constituted or involved conduct that is:

1. **contrary to law** (by reason of being inconsistent with the CAS Act and/or the CAS Regulation) within the meaning of s 26 (1) (a) of the Ombudsman Act, in respect of the following particulars:
    - findings of guilt are being made in some cases despite not being proven beyond reasonable doubt as required by s 53 (1) of the CAS Act
    - delegates are not consistently providing a person to represent or assist inmates in disciplinary inquiries, who do not sufficiently understand the nature of the inquiry, or do not understand English in accordance with s 52 (2) (e) of the CAS Act
    - multiple charges are in some cases being laid for the same alleged misconduct
    - multiple penalties are in some cases being imposed for the same offence contrary to s 53 (1) of the CAS Act
    - compensation for property damage is in some cases charged when damage does not arise from a correctional centre offence contrary to s 59 (1) of the CAS Act
    - compensation for property damage charged occasionally exceeds the maximum amount allowable by s 59 (2) of the CAS Act
    - record-keeping is not fully in accordance with s 61 of the CAS Act.

2. **unreasonable and unjust, and otherwise wrong** (by reason of being inconsistent with the Policy and/or other relevant policies) within the meaning of s 26 (1) (b) and (g) of the Ombudsman Act, in respect of the following particulars:
    - referrals to drug and alcohol programs are not consistently made contrary to the Policy
    - the internal review process is inaccessible and ineffective in identifying and remedying errors
    - last resort privileges are commonly withdrawn as penalty contrary to the Policy
    - internal guidelines on confining inmates in cells are not consistently followed
    - in some cases young Aboriginal inmates are confined to cell alone contrary to the Policy.

3. **in accordance with law and established practice, but the law or practice is unreasonable and unjust,** in respect of the following particulars:
    - the lack of review and appeal rights on both findings of guilt and imposition of penalties for correctional centre offences.

3.2 Recommendations

The Ombudsman made the following recommendations pursuant to s26(2) of the Ombudsman Act:

System reform

1. Undertake a comprehensive review of the inmate discipline framework and accompanying processes, including through any necessary stakeholder consultation, with the view to reforming the current framework, including through legislative amendment, to improve its fairness and effectiveness.
2. The review and any subsequent reform should encompass the entire disciplinary process and aim to introduce legislated internal and external review and appeal rights on both findings and penalties imposed as a result of correctional centre offences.

Any reforms to the inmate discipline system to address sub-standard or non-compliant processes should be directed to improving those processes, and not to watering down the standards or rules themselves in a way that would adversely affect the rights of inmates overall, such as by a general reduction in the standard of proof required for offences or by curtailing the rights of inmates to fairly participate in the inquiry.

Individual inmate discipline matters

3. Review OIMS to identify all disciplinary determinations where compensation has been ordered since 2018.
   (a) If that preliminary review indicates there are issues such as we have identified in the report, undertake a more thorough review to confirm whether those orders were imposed contrary to law or policy.
   (b) Reimburse any inmates who were unlawfully or unreasonably ordered to make compensation payments.
4. Subject to further legal advice on this matter, amend CSNSW policies and practices so that any adverse disciplinary determinations made in the period from the beginning of 2018 to the date of this investigation cannot be taken into consideration when decisions are made about an inmate's ongoing management, including decisions concerning classification or parole, unless a review of the disciplinary package relating to that determination has been undertaken and the review concludes that the finding can safely be relied upon (that is, was not made contrary to law or contrary to policy).

Offence selection

5. Develop a tool to assist delegates with selecting correct offences.

Conduct of inquiries

6. Consult with the Chief Magistrate of the Local Court and the Department of Communities and Justice to consider the circumstances in which referral of a disciplinary offence to a Visiting Magistrate may be appropriate and should be considered by the governor or delegate, and then make any necessary policy amendments and establish any necessary practical mechanisms accordingly.

7. Develop comprehensive, Plain English guides for delegates on elements of offences that need to be proven for offences to be proven beyond reasonable doubt. Guides should include practical examples.
8. Ensure all criminal offences of a serious nature are referred to the police in accordance with the Policy.
9. Ensure all required internal referrals are made consistently.
10. Ensure support persons are provided to all inmates that require one in line with s 52 (2) (e) of the CAS Act.
11. Consider recording hearings.
12. Consider the use of AVL technology to enable witnesses (including those called by the inmate) to be interviewed, if otherwise impracticable for them to be present for an in person hearing.

Penalties

13. Develop guidelines and criteria for applying penalties.
14. Cease the practice of charging compensation for amounts above the maximum allowable by legislation.
15. Cease the practice of charging compensation for damage where there has not been physical damage to correctional centre property.

Review

16. Propose an amendment to the *Crimes (Administration of Sentences) Act 1999* that a decision on both liability (whether the inmate is guilty of a correctional centre offence) and penalty can be reviewed by a particular officer and a new decision made.
17. Subject to legislative change, create a clear process for triggering and requesting an internal review of findings and penalties due to procedural errors.
18. Amend the Custodial Operations Policy and Procedures 14.1 – Inmate Discipline to ensure it does not limit the grounds upon which governors can revoke a penalty.

Records

19. Cease the practice of deleting records after review by either General Manager, Statewide Operations or governors and delegates. Instead, institute a practice to appropriately notate the OIMS record when decisions are set aside as a result of review.
20. Review and simplify the current forms contained in disciplinary packages. Ensure the forms require a summary of evidence presented in hearings, reasons for the findings and reasons for any penalties imposed.
21. Include a checkbox in the IDAF to ensure the requirement for a support person has been considered.
22. Digitise record creation and record keeping processes to improve record quality, retention, and useability.
23. Amend the policy to explicitly require the governor or delegate to record what evidence was taken into account in making any finding of guilt (including whether CCTV footage was viewed, or oral interviews (not otherwise reduced to writing) were conducted).

Cell confinement

24. Review the policy requirements in relation to confinement to cell as penalty and pending instructions on how to deal with a correctional centre offence and ensure they are in line with the Mandela Rules.
25. Review the mandatory cell confinement requirements under Custodial Operations Policy and Procedures 14.3 – Mobile Phone Offences and ensure they do not improperly limit delegates' discretion and make consistent with other requirements such as the prohibition of confining young Aboriginal inmates in cells alone.
26. Review practices in confining Aboriginal inmates, regardless of age, in cells alone and amend the Custodial Operations Policy and Procedures 14.1 – Inmate Discipline accordingly.
27. Develop guidelines with clear criteria on when inmates should be confined in cell pending adjudication or as a penalty.
28. Require approval by governor prior to confining an inmate in cell pending adjudication or as a penalty.

Staff training

29. Require all delegates who administer inmate discipline to first undertake specialised training and provide refresher training at regular intervals.
30. Review and update the current training packages and accompanying guidelines for administering inmate discipline with particular regard to improving training in:
    (c) meaning of offences
    (d) elements of offences and proving them beyond reasonable doubt
    (e) undertaking sufficient inquiries
    (f) procedural fairness
    (g) when witnesses may be disallowed
    (h) record-keeping requirements
    (i) reasons for decisions
    (j) penalties
    (k) alternatives to disciplinary charges.

Information provided to inmates

31. Review all information provided to inmates about the disciplinary process and ensure that:
    (a) adequate information is provided in Plain English, and community languages as required, about what constitutes an offence, the process, the inmates' rights and obligations, and all the potential consequences of guilty findings on correctional centre offences
    (b) the information is available on admission, in Inmate Handbooks and at the time charges are laid
    (c) the information includes how to request a review
    (d) adequate notice of charges and information to enable an inmate to understand the charges before they enter a plea
    (e) reasons for decisions are provided.

Oversight of the system

32. Establish a quality assurance and oversight program for disciplinary determinations made by all correctional centres, including those operated privately. The program should be administered by each correctional centre and centrally overseen and reported on. The quality assurance program should at a minimum include a regular review of:
    (a) offence selection
    (b) whether required referrals are being made
    (c) whether inmates are provided with support persons for hearings as required
    (d) whether multiple and/or cumulative penalties are being issued for the same conduct
    (e) whether compensation orders are reasonable and in accordance with the law
    (f) whether penalties that include the last resort withdrawable privileges are reasonable
    (g) completeness of records and compliance with record-keeping requirements
    (h) adequacy of reasons for decisions
    (i) whether decisions to confine inmates in cells pending adjudication are justified
    (j) whether penalties involving confinement in cell comply with Policy guidelines
    (k) whether a disciplinary response was the appropriate response in the circumstances.
33. Establish a clear escalation pathway for quality reviewers to refer individual matters for internal review if procedural errors are identified that could lead to the setting aside of findings or revocation of penalties.
34. Collect, analyse and report data on disciplinary determinations across correctional centres to gain insight into how the system operates to inform any necessary ongoing improvements.

3.3 Reporting on the implementation of recommendations

In accordance with section 26(5) of the Ombudsman Act, the Ombudsman has requested that CSNSW provide its final response to the recommendations made in the final report within 2 months and that it advise his office every 3 months on its progress in implementing those recommendations until such date as all accepted recommendations have been implemented.

Appendix A - Glossary

Term	Definition
Aboriginal people	Refers to the First Nations peoples who reside on the land in New South Wales, and includes, where applicable, Torres Strait Islander peoples as well.
AVL	Audio-visual Link
Bangkok Rules	The United Nations Rules for the Treatment of Women Inmates and Non-custodial Measures for Women Offenders
Buy-ups	The ability for inmates to purchase from a canteen/store.
Charge	Correctional centre charge
CCTV	Closed-circuit television used to monitor physical spaces
Classification	Security level classification of inmates: minimum, medium or maximum
Commissioner	A statutory office-holder with responsibility for the NSW's prison, parole and community corrections systems
CAS Act	*Crimes (Administration of Sentences) Act 1999*
CAS Regulation	Crimes (Administration of Sentences) Regulation 1999
COPP	CSNSW Custodial Operational Policy and Procedures
CSNSW	Corrective Services NSW, a division of the Department of Communities and Justice
Delegate	Delegate of the governor
FM	Functional Manager – delegate
GM	General Manager – equivalent to governor in private prisons
Governor	Responsible for the care, direction, control and management of an individual correctional centres, including administration of inmate disciplinary process.
IAT	Immediate Action Team
IDAF	Inmate Discipline Action Form

Term	Definition
ISP	Immediate Support Plan
JH&FMHN	Justice Health & Forensic Mental Health Network
Mandela Rules	The United Nations Standard Minimum Rules for the Treatment of Inmates
MOS	Manager of Security - delegate
MIN	Master Index Number – 6-digit inmate identification number.
Misconduct Package	Package of documents for each disciplinary process for each inmate. This package should include the following forms and documents: • Inmate discipline decision: cover page • Inmate discipline decision form • Inmate discipline decision action form – 3 pages • Inmate misconduct report • Incident/witness report • Inmate discipline checklist • Case notes report • Inmate profile document
Muster	Head count for a wing
Offence	Correctional centre offence
OIC	Officer in Charge
OIMS	Offender Integrated Management System
Parole	A form of early release of a prison inmate where the prisoner agrees to abide by behavioural conditions, or else they may be rearrested and returned to prison
RIT	Risk Intervention Team
Remand	An inmate on 'remand' has had a charge/s laid against them but is unsentenced
SAS	Senior Assistant Superintendent
Segregation	Isolation area for inmates who pose an extreme risk to other inmates or

Term	Definition
	staff
Yard	Exercise yard
Young person/young	Person aged 26 and under

Appendix B - Investigation Methodology

We undertook the following activities:

- reviewed relevant legislation and policies, Including Division 6 of the CAS Act, the CAS Regulation and the Policy, CSNSW legal advice that was relied on to change the Policy in 2017, training and education materials, Inmate Handbooks.
- obtained independent legal advice from Senior Counsel on:
  - The content and relevant legal test of certain correctional centre offences
  - Procedural fairness requirements of the disciplinary process, including providing support people, allowing witnesses and informing inmates about the use of offence outcomes in determining parole and classification
  - The delegation of the entire disciplinary processes to one delegate of the governor
  - The burden of proof required to make a finding of guilty
  - The lawful basis for the practice of locking inmates in their cell pending adjudication of charges.
  - Legislative frameworks for the correctional centre disciplinary process of other national jurisdictions.
- analysed data from the CSNSW Offender Integrated Management System (**OIMS**) on all inmate disciplinary charges across all Correctional Centres for the period 1 January 2018 to 11 October 2022.[122] In total, 57,618 charges were made and 51,646 hearings conducted.
- examined inmate disciplinary packages for 373 cases (131 packages related to the offences of fail or refuse to supply a drug test and 242 packages related to non-drug-use charges). Each 'package' contains 4 specific forms and any other documents relied upon as evidence of the offence:
  1. Inmate Discipline Action Form
  2. Inmate Discipline Checklist – 'the Checklist'
  3. Inmate Misconduct Report
  4. Incident/Witness Report

Data analysis

Offender Integrated Management System (OIMS)

CSNSW provided an Excel spreadsheet containing entries for 63,999 individual charges across 54 Correctional Centres in NSW for the period 1 January 2018 - 11 October 2022. The spreadsheet contained 14 columns including: hearing date, inmate name and MIN, charge, finding, penalty type and length and compensation issued. After removing duplicates, the dataset included 57,618 charges. To remove duplicates, we removed sanction and result related fields. For some hearings there were multiple entries for the same charge category and sub-category. Such charges have been treated as separate charges.

[122] Attachment 5 to Corcoran, *Letter* (n 38).

Inmate disciplinary packages

Our preliminary analysis of the OIMS data, informed the selection of the sample of Inmate Discipline Packages. The sample included all Correctional Centres, except for transitional and intake Centres, and Court Cells. If a centre had a higher proportion of a certain offence type than other centres, we obtained more packages for that centre and offence type. For example, we could see from the OIMS data that female centres had a higher rate of penalties removing access to telephones.

We used the E-Discovery Relativity platform and Microsoft Power BI to collect, collate and analyse data from the 373 packages.[123] We assessed the packages for compliance with the CAS Act, the CAS Regulation and the relevant policies.

We also analysed data contained on each of the 4 forms that make up a disciplinary package:

- inmate's plea – guilty or not guilty
- reasons for decision – guilty or not guilty
- reasons for the penalty
- record of what the inmate has said during the hearing
- record of any evidence provided by witnesses and any questions from the inmate
- whether the inmate signed the paperwork; and
- whether the correct charge had been selected.

Limitations

Both the OIMS data fields and disciplinary package forms were not consistently completed in full. The OIMS data was provided to us with blank fields, incomplete or irrelevant information, and data was entered in incorrect columns. The packages were missing pages or entire forms or had not been filled out completely.

The packages are not a representative of inmate demographics. While Aboriginal inmates make up approximately one-third of the population, we did not seek to sample the discipline packages to reflect this. We also did not seek to represent age, gender, ethnic or religious diversity, or inmates with disabilities or health conditions.

[123] CSNSW was only able to provide 373 packages in response to our total request for 416 packages.

Appendix C - Legislation and Policy

The CAS Act

The Commissioner and governor are responsible for the care, direction, control and management of NSW correctional centres.[124] The governor being under direction and control of the Commissioner.[125] The governor may delegate any of their functions, other than the power of delegation, and other than any function delegated to the governor by the Commissioner.[126] This includes the power to delegate the inmate disciplinary process.

A correctional centre offence means any act or omission by an inmate (whether or not it is also a criminal offence) that occurs while the inmate is within a correctional centre or when in the custody of the governor of a correctional centre, and that is declared by the CAS Regulations.[127] It has geographic (within a correctional setting), custody (in custody of the governor) and regulatory elements. While they are 2 different types of offences, a correctional centre offence may also be a criminal offence.

If it is alleged that an inmate has committed a correctional centre offence, the governor may charge the inmate and conduct an inquiry.[128] The inquiry must be conducted with "as little formality and technicality and, with as much expedition, as fairness to the inmate charged".[129] The inmate is entitled to a hearing where witnesses can give evidence.[130] However, they are not entitled to legal representation.

Where the governor is satisfied that the inmate does not sufficiently understand the nature of the inquiry, does not understand English or is, otherwise, unable to properly represent themselves, assistance may be provided to the inmate.[131] If the inmate refuses or fails to attend any hearing during the inquiry, the governor may determine the matter in their absence.[132] A correctional person, or other person can be present at any hearing during the inquiry.[133]

Where the governor is satisfied "beyond reasonable doubt" that the inmate is guilty of an offence, they may impose one of several penalties:[134]

- reprimand and caution
- deprivation of specified withdrawable privileges[135] for up to 56 days
- confinement in a cell for 7 days (with or without withdrawable privileges) and
- cancellation of any right to receive payments for work done in the correctional centre.[136]

There is no power to impose a fine on an inmate or to extend the inmate's period of incarceration.

Withdrawable privileges are declared by the CAS Regulation and include things such as access to telephone calls, the ability to make purchases at the correctional centre shop (colloquially known as

[124] *CAS Act* (n 3) part 11 div 3.

[125] *Ibid s 233(1)-(2).*

[126] Ibid s 233 (3).

[127] Ibid s 51.

[128] Ibid s 52(1).

[129] Ibid s 52(2)(a).

[130] Ibid s 52(2)(c).

[131] Ibid s 52(2)(d)-(e).

[132] Ibid s 52(2)(f).

[133] Ibid s 52(2)(h).

[134] Ibid s 53.

[135] Ibid reg 163.

[136] Ibid s 53(1).

"buy ups") and conducting contact visits with friends and family.[137]

A governor can find that an inmate is guilty and not impose a penalty. In this circumstance, the governor may dismiss the charge or defer imposing a penalty on condition that the inmate be of good behaviour.[138] Where the governor is not satisfied that the inmate is guilty, the governor must dismiss the charge.[139]

A penalty imposed on an inmate by the governor may be revoked by the governor or by the Commissioner.[140]

If the offence is serious, the governor may refer the charged inmate, (before, during or after an inquiry) to a Visiting Magistrate for hearing and determination.[141] Charges which are referred to the Visiting Magistrate are subject to the *Criminal Procedure Act 1986*.[142] The inmate is entitled to be represented at such proceedings[143] and the proceedings are referred to as a "hearing".[144] The Visiting Magistrate may impose any of the same penalties that the governor may impose under section 53 of the CAS Act but may issue cell confinement for up to 28 days with or without the deprivation of withdrawable privileges and the deprivation of withdrawable privileges for up to 90 days.[145] In addition, they may extend the term of the inmate's sentence or non-parole period [146] or impose a sentence of imprisonment of up to 6 months.[147]

Correctional centre offences involving the use or possession of a mobile phone (and related matters) may result in a penalty of withdrawable privileges for up to 6 months, rather than a standard penalty, as determined by the governor or Visiting Magistrate.[148]

The Visiting Magistrate can terminate the proceedings and order that the inmate be brought before the Local Court if they believe the offence is a criminal offence.[149]

A penalty imposed by a Visiting Magistrate may be the subject of an appeal to the District Court.[150] However, there is no equivalent appeal provision for decisions made or penalties imposed by a governor (or their delegate). Decisions made by a governor must be legally performed and may be judicially reviewed under s 69 of the *Supreme Court Act 1970*.

A finding of guilt for a correctional centre offence has ramifications for an inmate at determination of the inmate's placement, their classification and when the prisoner's parole is considered. The Supreme Court considers CSNSW reports when determining whether to make an extended supervision order or a continuing detention order. These reports are intended to set out the extent to which the offender can be reasonably and practicably managed in the community. Our legal advice highlights that is not uncommon for such a report to include a description of correctional centre offences as a way in which to predict post-incarceration conduct.

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[137] *CAS Act* (n 3) s 51.

[138] *CAS Act* (n 3) s 53(2).

[139] *CAS Act* (n 3) s 53(3).

[140] *CAS Act* (n 3) s 53(4).

[141] *CAS Act* (n 3) s 54(1).

[142] *CAS Act* (n 3) s 55(2).

[143] *CAS Act* (n 3) s 55(14).

[144] *CAS Act* (n 3) s 55(5).

[145] *CAS Act* (n 3) s 56(1)(b) and (c), respectively.

[146] *CAS Act* (n 3) s 56(1)(e).

[147] *CAS Act* (n 3) s 56(1)(f).

[148] *CAS Act* (n 3) s 56A (1)-(2).

[149] *CAS Act* (n 3) s 58.

[150] *Crimes (Appeal and Review) Act 2001* (NSW) s 62(1).

The CAS Regulation

The CAS Regulation outlines underpinning principles for how inmate discipline should be implemented:

- Order and discipline in a correctional centre are to be maintained with firmness, but no more restriction or force than is required for safe custody and well-ordered community life within the centre.
- A correctional officer must endeavour to control inmates by showing them example and leadership and by enlisting their cooperation.
- At all times, inmates are to be treated in a way that encourages self-respect and a sense of personal responsibility.[151]

Part 6 of the CAS Regulation provides further detail about what constitutes a correctional centre offence.[152] It provides general power in the Commissioner, the governor, or a correctional officer to direct an inmate. This is a broad provision where refusal or failure to comply to this direction is made a correctional centre offence.[153]

The CAS Regulation also defines "withdrawable privilege." The following privileges or amenities are declared to be withdrawable privileges for the purposes of Division 6 of Part 2 of the CAS Act—

a. attendance at the showing of films or videos or at concerts or other performances,
b. participation in or attendance at any other organised leisure time activity,
c. use of, or access to, films, video tapes, records, cassettes, CDs or DVDs,
d. use of, or access to, television, radio or video, cassette, CD or DVD players, whether for personal use or for use as a member of a group,
e. use of, or access to, a musical instrument, whether for personal use or for use as a member of a group,
f. use of library facilities, except in so far as the use is necessary to enable study or research to be undertaken by an inmate in the inmate's capacity as a student who is enrolled in a course of study or training,
g. ability to purchase goods (including under clause 177),
h. keeping of approved personal property (including goods purchased or hired under clause 177),
i. pursuit of a hobby,
j. use of telephone, except for calls to legal practitioners and exempt bodies,
k. participation in contact visits,
l. permission to be absent from a correctional centre under a local leave permit or interstate leave permit.

[151] CAS Regulation (n 2) reg 129.

[152] CAS Regulation (n 2) reg 127.

[153] CAS Regulation (n 2) reg 130.

The Inmate Discipline Policy

Introduced in December 2017, the Inmate Discipline Policy applies to all correctional centres and other facilities administered by or on behalf of CSNSW and to all CSNSW employees. It also applies, where relevant, to Justice Health, contractors, subcontractors, and visitors.[154] It clarifies delegations:

- Only governors or delegate may charge inmates with offences and conduct inquiries.[155]
- The governor's functions to deal with these offences must only be delegated to the Manager of Security or the Functional Manager.
- A governor or delegate must not make a determination unless he or she conducted the inquiry. A determination must only be made by the same officer who conducted the inquiry.[156]

It also clarifies the envisaged process:

- A correctional officer or non-custodial officer who suspects an inmate has committed or is about to commit an offence reports the matter to the governor or OIC immediately.
- A reporting officer completes an 'Inmate misconduct report' and any relevant witness an 'Incident/witness report'. Officers must write their reports from their own recollection of events and independently from each other.[157]
- Reports must be submitted "before the end of the watch on the day on which the alleged offence was committed or before the reporting/witnessing officers cease duty."
- Inquiries may be held immediately as inmates can be locked in their cells, for up to 48 hours, pending adjudication.[158]
- Where an alleged offence has occurred, which might also be a criminal offence, then the allegation is to be reported to the police. Any further step in the inquiry or determination of the offence is deferred "while police have carriage of the matter".[159]
- If the alleged offence directly affects the governor, then the matter must be referred to another governor "prior to any charge being laid". If it directly affects the delegate, then it must be reported to the governor who can refer it to another delegate or determine it themself.[160]
- Before the inquiry the Offender Integrated Management System (**OIMS**) must be checked to determine whether the inmate has a cognitive impairment or intellectual disability so that assistance or representation may be provided for the inquiry.[161]
- The Inmate misconduct report must be dealt with "promptly". An inmate may be charged based on the Inmate misconduct report, the incident/witness report and any other evidence.[162]
- After charging an inmate, the governor or delegate may decide the offence is of a serious nature and should be referred to a Visiting Magistrate. A delegate must consult the governor before referring the matter to the Visiting Magistrate.[163]

[154] Corrective Services NSW, *Policy 14.1* (n 20) 2.

[155] Ibid 5.

[156] Ibid 5.

[157] Ibid 6.

[158] Ibid 7.

[159] Ibid 8.

[160] Ibid 8.

[161] Ibid 11.

[162] Ibid 9.

[163] Corrective Services NSW, *Policy 14.1* (n 20) 9.

- An inquiry into an offence should commence within 24 hours of the alleged offence being reported to the governor or delegate officer. The provisions governing inquiries are set out at s. 52(2) of the CAS Act. The parts of the Inmate discipline action form relating to the inquiry process are to be completed during the inquiry.[164]
- An inquiry must not proceed until a support person has been provided for an inmate "who requires a support person", or if the governor or delegate is satisfied "cannot understand the nature of the inquiry" or is unable to properly represent himself or herself because of a possible cognitive impairment or intellectual disability. A person who cannot speak English is considered a relevant person.[165]
- Inquiries are to be completed within 28 days of the offence being reported unless there are exceptional circumstances. Any charge must be dismissed at the end of that period unless there are exceptional circumstances.[166]
- After having conducted an inquiry, the governor or delegate must decide whether he or she is satisfied beyond reasonable doubt that the inmate is guilty of an offence.[167] Penalties set out replicate s.53 (1) of the CAS Act.[168]
- There are considerations that a governor or delegate are required to take into account before imposing penalties. Withdrawal of contact with family and friends should only be a last resort."[169] Before confining an inmate to a cell, all information, as listed on the inmate discipline checklist must be considered. Young Aboriginal inmates should not be confined to cells alone.[170]
- After an inmate has been informed of the determination, the details of the offence, penalty and any order for compensation must be recorded in OIMS. All procedural documents, reports and other documents relied on as evidence of the offence must be placed in the inmate's case management file.[171]
- Where an inmate caused the loss of or damage to property as a result of committing an offence, they may be ordered to pay compensation to the Crown or another person. A governor or delegate may order an inmate to pay a maximum of $500 in compensation.[172]

An inmate has no right of appeal from a decision of a governor or delegate officer to impose a penalty. However, a decision to impose a penalty may be reviewed on an application by the inmate to the Supreme Court.[173]

A governor may refer the matter to the General Manager, Statewide Operations for review in the following circumstances:

- the facts as proven do not constitute an offence,
- the inmate was not given an opportunity to be heard at the hearing or to cross-examine any witness,

[164] Ibid 10.

[165] Ibid 11.

[166] Ibid 11.

[167] Ibid 13-14.

[168] Ibid 14.

[169] Ibid 15-16.

[170] Ibid 16.

[171] Ibid 17.

[172] Ibid 18.

[173] Ibid 120.

- the inmate was unable to properly represent themselves at the hearing due to language or other difficulties in understanding the proceeding, or
- the proceedings were for any other reason manifestly unfair.[174]

If the General Manager, Statewide Operations determines that any of the above circumstances are made out, then the inmate's record for that offence must be expunged.[175]

A governor may revoke a penalty, imposed by the governor or delegate, in the following circumstances:

- on compassionate grounds;
- where an order for compensation is void because it was issued for something other than a loss of or damage to property;
- where a penalty was imposed in error (e.g. prescribed penalty was issued for a third drug test offence but records show that it was the inmate's first drug test offence)
- contravention of the cumulative penalty rule; or
- the penalty exceeds the maximum penalty prescribed under the *Crimes (Administration of Sentences) Act 1999*, pt 2 div 6.[176]

[174] Ibid.

[175] Ibid.

[176] Ibid 21.

Appendix D - Number of charges by charge sub-category and year

Figure 5: Number of charges by charge sub-category and year (Source: OIMS data set)

	Charge category	Charge sub-category	2018	2019	2020	2021	2022	Total	Percent
1	ORDER	DISOBEY DIRECTION (130)	1,067	1,329	1,640	1,643	1,094	6,773	11.8
2	ORDER	FAIL COMPLY CORR CENT ROUTINE (39)	989	1,272	1,497	1,524	938	6,220	10.8
3	DRUGS	POSSESS DRUG IMPLEMENT (151)	980	781	419	352	230	2,762	4.8
4	ASSAULT	FIGHT OR OTHER PHYSICAL COMBAT (141)	957	1,007	1,031	852	598	4,445	7.7
5	DRUGS	FAIL PRESCRIBED DRUG TEST (153)	905	645	355	332	153	2,390	4.1
6	ABUSE	INTIMIDATION (138)	876	916	1,175	1,231	849	5,047	8.8
7	DRUGS	POSSESS DRUG (149)	710	745	492	487	291	2,725	4.7
8	ORDER	CREATE POSSESS PROHIBITED GOODS (45)	665	556	449	356	298	2,324	4
9	ASSAULT	ASSAULTS (141)	555	619	715	731	531	3,151	5.5
10	DRUGS	REFUSE FAIL DRUG SAMPLE (159)	444	466	230	199	115	1,454	2.5
11	PROPERTY	DAMAGE DESTROY PROPERTY (142)	441	375	677	677	548	2,718	4.7
12	SMOKING	POSS TOBACCO E-CIG/E-CIG ACC W/I CC (322)	438	403	278	164	113	1,396	2.4
13	ORDER	POSSESS OFFENSIVE WEAPON/INSTR (137)	341	387	352	267	196	1,543	2.7
14	SMOKING	SMOKE/USE TOBACCO/E-CIG WHEN IN CC (322)	282	229	77	88	44	720	1.2
15	PROPERTY	DAMAGE DESTROY OR DEFACE CELL (58)	221	160	227	176	109	893	1.5
16	ORDER	UNLAW DELIVER/RECEIVE ARTICLE INMATE (44)	203	213	169	224	132	941	1.6
17	ORDER	UNLAWFULLY USE PHONE OR FAX (119)	172	203	333	239	217	1,164	2
18	STEAL	STEAL (142)	170	213	198	256	124	961	1.7
19	ORDER	DEL REC UNAUTH ARTICLE FROM VISITOR (99)	164	173	76	61	30	504	0.9
20	PROPERTY	INTER CORRECT CENT PROP (145)	152	139	171	147	82	691	1.2
21	MUSTER	FAIL TO ATTEND MUSTER (41)	132	175	199	305	155	966	1.7
22	ORDER	ENTER OTHER CELLS (40)	116	177	220	356	250	1,119	1.9
23	PHONE	POSSESS MOBILE, SIM CARD, CHARGER (122)	95	119	83	58	38	393	0.7
24	ORDER	AVOID CORR CENT ROUTINE (43)	90	140	284	242	156	912	1.6

	Charge category	Charge sub-category	2018	2019	2020	2021	2022	Total	Percent
25	ORDER	OBSTRUCT CORR OFFICER (156)	82	87	109	81	82	441	0.8
26	ORDER	RESIST IMPEDE SEARCH (46)	73	94	49	60	57	333	0.6
27	PROPERTY	THROW ARTICLE (141)	63	100	101	82	61	407	0.7
28	DRUGS	REFUSE FAIL DRUG SAMPLE (160)	62	80	66	100	38	346	0.6
29	ORDER	GIVE FALSE MISLEADING INFO (184)	57	83	96	101	73	410	0.7
30	DRUGS	ADMINISTER DRUG (150)	56	57	28	23	17	181	0.3
31	ORDER	TATTOO (146)	49	75	93	130	69	416	0.7
32	ABUSE	INDECENCY (139)	47	57	69	65	54	292	0.5
33	ORDER	SUPPLY FALSE MISLEADING PARTICULARS (4)	34	45	38	42	19	178	0.3
34	ORDER	PARTICIPATE, INCITE RIOT (140)	31	46	116	133	70	396	0.7
35	ORDER	CONTRAVENE LEAVE PERMIT (134)	28	23	8	5	4	68	0.1
36	ORDER	FAIL LOOK AFTER CLOTHING BEDDING ETC (58)	26	61	74	60	108	329	0.6
37	ALCOHOL	PREPARE, MANUFACTURE ALCOHOL (148)	22	23	73	51	55	224	0.4
38	ORDER	POSSESS UNAUTH FOOD (52)	21	45	36	28	20	150	0.3
39	ORDER	MISBEHAVE ATTENDING SERVICE PROGRAM (61)	19	28	37	34	12	130	0.2
40	ORDER	MISUSE OF BELL HOOTER SIREN WHISTLE (42)	19	21	29	39	42	150	0.3
41	DRUGS	SELF INTOXICATION (152)	18	6	13	14	9	60	0.1
42	ORDER	WEAR IMPROPER CLOTHING (57)	17	10	21	42	10	100	0.2
43	PROPERTY	DESCECRATE ABUSE RELIGIOUS OBJECT (69)	15	3	3	7	2	30	0.1
44	PROPERTY	ALTER DAMAGE REMOVE SMOKING SIGN (154)	10	4	8	6	4	32	0.1
45	ALCOHOL	POSSESS CONSUME ALCOHOL (148)	10	7	26	42	38	123	0.2
46	ORDER	FAIL KEEP CLEAN CELL (58)	9	10	9	31	17	76	0.1
47	ORDER	SEND RECEIVE UNAUTH LETTER PARCEL (110)	8	12	40	26	29	115	0.2
48	ORDER	BRIBERY(155)	6	9	20	16	8	59	0.1
49	ORDER	CONCEAL ITEM FOR USE ESCAPE OFFENCE (135)	6	10	1	12	7	36	0.1
50	ORDER	GAMBLE (147)	6	NA	5	1	11	23	0
51	ORDER	COMMUNICATE RESTRICTED ASSOCIATE (119A)	5	3	5	3	3	19	0
52	ORDER	CONCEAL FOR PURPOSE ESCAPE (136)	5	8	8	16	6	43	0.1
53	ORDER	MAKE MISCHIEVOUS COMPLAINT (171)	5	13	8	10	2	38	0.1
54	PHONE	POS CAMERA VIDEO AUDIO RECORD EQUIP (121)	5	13	7	3	6	34	0.1

	Charge category	Charge sub-category	2018	2019	2020	2021	2022	Total	Percent
55	ORDER	UNLAW TRADE FOOD (52)	5	7	2	4	3	21	0
56	CONDOM	UNLAW USE CONDOM OR DENTAL DAM (59)	3	NA	2	1	NA	6	0
57	ORDER	FAIL KEEP PROPERTY TIDY (47)	2	7	9	23	5	46	0.1
58	ORDER	FAIL SURRENDER PROPERTY ON RECEPTION (7)	2	4	3	6	5	20	0
59	ORDER	SEND PROHIB LETTERS OR ARTICLES (111)	2	1	3	3	3	12	0
60	ORDER	CAUSE HARM TO ANIMALS (144)	1	2	3	3	NA	9	0
61	ORDER	CORRESPOND RESTRICTED ASSOCIATE 112A (1)	1	NA	1	NA	2	4	0
62	ORDER	FAIL MAINTAIN PERSONAL CLEANLINESS (56)	1	NA	2	6	5	14	0
63	DRUGS	FAIL PRESCRIBED URINE TEST (143)	1	NA	NA	NA	NA	1	0
64	ORDER	FAIL TO CLEAN YARDS (38)	1	NA	NA	1	NA	2	0
65	ORDER	TAMPER FOOD OR DRINK (142)	NA	2	5	3	4	14	0
66	CONDOM	UNLAW POSS CONDOM OR DENTAL DAM (59)	NA	2	3	NA	NA	5	0
67	ORDER	UNLAW PURCHASE FOOD (52)	NA	1	6	NA	2	9	0
68	ORDER	HINDER OBSTRUCT DOG (143)	NA	NA	1	3	NA	4	0
		Total	**11,998**	**12,501**	**12,583**	**12,283**	**8,253**	**57,618**	**100**

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