1973–74

VICTORIA

REPORT

OF THE

BOARD OF INQUIRY

INTO

SEVERAL MATTERS CONCERNING H.M. PRISON PENTRIDGE AND THE MAINTENANCE OF DISCIPLINE IN PRISONS

PRESENTED TO BOTH HOUSES OF PARLIAMENT BY
HIS EXCELLENCY'S COMMAND

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To His Excellency Major-General Sir Rohan Delacombe, Knight Commander of the Most Distinguished Order of St. Michael and St. George, Knight Commander of the Royal Victorian Order, Knight Commander of the Most Excellent Order of the British Empire, Companion of the Most Honorable Order of the Bath, Companion of the Most Distinguished Service Order, Knight of Grace of the Most Venerable Order of the Hospital of St. John of Jerusalem, Governor of the State of Victoria and its dependencies in the Commonwealth of Australia.

MAY IT PLEASE YOUR EXCELLENCY :

I, KENNETH JOSEPH JENKINSON, one of Her Majesty's Counsel, having been constituted and appointed by Order in Council made on the 23rd day of May, 1972 and published in the Victoria *Government Gazette* No. 38 dated the 24th day of May, 1972, to be a Board to inquire into and report upon several matters concerning Her Majesty's Prison, Pentridge, including, by paragraph (*b*) of the said Order in Council whether the provisions of Part IV. of the *Social Welfare Act* 1970 relating to—

(i) the maintenance of discipline in prisons ;

(ii) the formulation, hearing and determination of charges against prisoners ;

(iii) the punishment of prisoners for offences committed in prisons ;

should be amended in any and what respect and whether provision should be made for the representation of prisoners and prison officers at the hearing of charges, and by paragraph (*c*) of the said Order in Council whether a further or different provision should be made for the remission, as an incentive to or reward for good conduct or industry, of sentences in respect of which a minimum term has been fixed, and having pursuant to and in accordance with the said Order in Council previously inquired into and reported upon the matters to which I was directed by paragraph (*a*) of the said Order in Council HAVE THE HONOUR TO REPORT that, pursuant to and in accordance with the said Order in Council, I have inquired into and I herein report upon the matters to which I have been by the said paragraphs (*b*) and (*c*) of the Order in Council directed.

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CHAPTER 1.

RELEVANCE OF PREVIOUS REPORT—BIAS AND SCOPE OF THIS REPORT.

1.1. The report which the Board has previously made, with respect to the matters which are the subject of paragraph (*a*) of the Order in Council, narrated the course which its proceedings took and gave some account of the prisoners and staff of the principal Victorian prison. The Board therefore begs to refer to the first three chapters of that report, as a prologue to this report, as well as to the alphabetical list of witnesses and the list of exhibits which are appended to the former report. The Board hopes that the remainder of its first report may also be found relevant, in some degree, to what follows herein.

1.2.1. Paragraphs (*b*) and (*c*) of the Order in Council, which are the subject of this report, are concerned with legislative provisions, some of which the Board thought it would be convenient to reproduce, for ease of reference, in an appendix to its report. Appendix A to this report contains selected parts of the *Social Welfare Act* 1970 and of the Social Welfare Regulations 1962, as amended.

1.2.2. Written submissions were made to the Board on behalf of the Social Welfare Department, with respect to the matters raised for inquiry by each of paragraphs (*b*) and (*c*) of the Order in Council. They are reproduced in Appendices B and C.

1.3.1. The habits of thought, attitudes, experience and prejudices of an inquirer inevitably exercise a great influence on his findings about questions of social policy and moral responsibility. It may be helpful if the Board indicates that its own pre-conceptions are expressed with persuasive lucidity in three lectures prepared by Sir John Barry and published posthumously in a book called " The Courts and Criminal Punishments ". (New Zealand Government Printer : 1969.)

1.3.2. As Sir John Barry concedes, the validity of the basic assumptions upon which penal imprisonment is morally justified as well as the validity of the further assumptions upon which its practical administration is fashioned, are threatened by the deepening comprehension of human behaviour which genetic, medical and sociological study are now providing. But they are not, in the Board's opinion, assumptions, which it is practicable yet to discard.

1.3.3. Upon the basis of those assumptions, which are expounded in his lectures (and some of which are quoted in paragraph 6.1.1. of this report), Sir John Barry was able justly to claim : " The measures needed for the constructive improvement of the penal system are well known and commonly accepted by penal administrators. They . . . . have been discussed in books for general information . . . . Basically what is needed to transform a penal system is a constructive and realistic attitude of mind in administrators, and in the public as well, and a sufficiency of money. Prison administrators have the attitude of mind ; as a general rule, they are unsentimental but humane. They recognize the problems of re-educating social deviants, and they are prepared for the inevitable failures and discouragements. Improving the approach of the public presents considerable difficulties, but there are encouraging signs of a greater awareness and a willingness to participate in the restoration of offenders to society.

Getting adequate funds from the public purse that is subject to many urgent and superficially more attractive demands is, of course, a thorny and perennial problem. But money, sensibly expended, is the means to bring about new institutions and better trained correctional personnel. Improvements in staff training and outlook in the last 20 years have been dramatic. This is as it should be, for in the final resort the worth and effectiveness of a penal system depends upon the quality and enthusiasm and dedication of its staff." (Op. cit., pp. 82, 89.)

1.3.4. The measures for improvement of the penal system, of which Sir John Barry and others have written, wait for their implementation on no legislative fiat except financial appropriation, which perhaps waits upon public approval. Nor, as a general rule, will the implementation of those measures be in the Board's opinion much hastened, in our community, either by statutory declaration of good intentions or by an elaborate setting of custodians to watch the custodians of the prisoners.

1.4. Part IV. of the *Social Welfare Act* 1970, concerning which paragraph (*b*) of the Order in Council directs inquiry, is largely derived from legislation of the last century, and is woven into the complex fabric of the criminal law and of the common law relating to execution of judicial process and sentence. The Board has not taken paragraph (*b*) of the Order in Council as inviting a technical reconstruction of the provisions in Part IV., as an exercise in modernizing legislative revision. Neither the terms of the Order nor the circumstances in which it was made gave reason to suppose that a task was being set for the Board which might tax the skills of Parliamentary Counsel and statute law revision agencies. Nor has the Board attempted any prevenient drafting of the amendments to Part IV. which it has proposed, although its report is not wholly free of suggestions on the subject. The Board has understood its duty to lie in proposing the substance of amendment for what it thinks to be in substance capable of improvement.

1.5. Reference is made in this report to several provisions of the *Justices Act* 1958 which were repealed and substantially re-enacted by the *Magistrates' Courts Act* 1971 (which commenced on 12th June, 1972), as though those provisions were still in force.

CHAPTER 2.

PARAGRAPH (*b*) OF ORDER IN COUNCIL—SCOPE OF INQUIRY.

2.1.1. Paragraph (*b*) of the Order in Council requires that the Board inquire into and report upon whether the provisions of Part IV. of the *Social Welfare Act* 1970 relating to—

(i) the maintenance of discipline in prisons ;

(ii) the formulation, hearing and determination of charges against prisoners ;

(iii) the punishment of prisoners for offences committed in prisons ;

should be amended in any and what respect and whether provision should be made for the representation of prisoners and prison officers at the hearing of charges.

2.1.2. The word " discipline " has acquired several denotations in its long history. In the Order in Council it is taken by the Board to mean ready compliance by prisoners with the laws governing them. The provisions of Part IV. of the *Social Welfare Act* 1970 as well as the context which paragraph (*b*) of the Order in Council supplies seem to the Board to be inconsistent with a less restricted meaning of the word in that paragraph ; and a comparison of the provisions of the *Social Welfare Act* 1970 and the *Public Service Act* 1958 has pursuaded the Board that it is the discipline of prisoners only, not prisoners and prison officers, to which paragraph (*b*) refers.

2.2.1. Part IV. of the *Social Welfare Act* 1970 consists of five Divisions. In Division 1 are two sections, by which the constitution and the functions of the Prisons Division as a Division of the Social Welfare Department are declared. Division 2 of Part IV. makes provision in seven of its nine sections for the formal designation as prisons and police gaols of places from time to time selected for those uses by the Executive Government, preserves the powers of the sheriff of the Supreme Court in respect of certain prisoners, commits to the legal custody of the Director-General of Social Welfare every prisoner who is under sentence of imprisonment or on remand awaiting trial and reserves to the Governor in Council the appointment of a governor of each prison, while empowering the Director-General to direct any suitable prison officer to act as governor when the appointed governor is absent. The other two sections of Division 2, 120 and 121, are concerned with the visitation of prisons. Section 126, which is in Division 3, empowers the Director-General to order any persons sentenced to imprisonment or committed to prison in default of payment of a fine or sum of money to be set to some labour. By section 130 he is empowered to make inquiry and to take evidence on oath or otherwise as to the conduct of any prison officer and as to the treatment and conduct of the prisoners and as to any alleged abuse within the prison or in connexion therewith. The other seven sections of Division 3 consist of technical provisions concerning computation of sentences, legal custody of prisoners who are being moved, release by the Executive Government of prisoners imprisoned for non-payment of money or in default of finding sureties for good behaviour, and several other subjects which are irrelevant to the inquiry directed by paragraph (*b*) of the Order in Council. Division 4 is concerned with criminal conduct with respect to prisons, as its title, " Offences ", suggests. Two of the three sections of Division 5 have no relevance, in the Board's opinion, to the inquiry directed by the Order in Council. Section 145 might be relevant if it were desired to facilitate judicial review of administrative action in relation to prisoners.

2.2.2. Section 182 of the *Social Welfare Act* 1970 empowers the Governor in Council to make regulations for or with respect to a number of subjects which are germane to the maintenance of discipline in prisons. The Board begs to refer to those parts of section 182 which are reproduced in Appendix A. Section 182 is not in Part IV. of the Act, but in Part VIII.

2.2.3. The Board is indicating what is, and what is not, contained in Part IV. of the Act, because the Board has been influenced by those considerations to limit the extent of its inquiry, which paragraph (*b*) of the Order in Council confines to amendment of Part IV., except in relation to the representation of prisoners and prison officers at the hearing of charges. It is generally believed that prisoners' discipline—their ready compliance with the laws applicable to their condition—is greatly influenced by the substance of those laws, but Part IV. of the Act has little to say on that subject : it is concerned rather with provision for the penal consequences of indiscipline and with the prohibition of activities by free citizens which facilitate indiscipline by prisoners. In Division 1 of Part IV. the legislature has expressed its aspiration to the rehabilitation of all prisoners, but it is in Part IV. of the *Crimes Act* 1958 and Part VII. of the *Social Welfare Act* 1970 that provision is made for parole and in Division III. of the Social Welfare Regulations 1962 are found the laws by which prisoners' lives are regulated. Having regard to the dispersion beyond Part IV. of the *Social Welfare Act* 1970 of so much of the law which prescribes both the treatment and the required conduct of prisoners, the Board found no warrant in the terms of paragraph (*b*) (i) of the Order in Council for contemplating the introduction into Part IV. of legislation with respect to the treatment of prisoners or with respect to the conduct or management or supervision of prisons, except in relation to subjects with which Part IV. presently deals.

2.3. The same considerations, which induced the Board thus to limit the extent of its inquiry, have had a substantial influence on the formulation of its recommendations. The Board has felt itself constrained to assume that no radical alteration is presently contemplated, of the general intendment of those laws relating to prisons and prisoners which are found outside Part IV. of the *Social Welfare Act* 1970, for it is not to be supposed that direction would be given for an inquiry about amendment of the particular and ancillary laws concerning the treatment of prisoners which are contained in Part IV., by an inquirer ignorant of the general policies which are to reform the administration of the penal system. The Board has therefore looked to the existing law, outside Divisions 2, 3, 4 and 5 of Part IV., by which that system is constituted, and to the present administration of the system, except the administration of what is ordained by Divisions 2, 3, 4 and 5 of Part IV., for an understanding of those policies. And the Board has recommended only such amendment of the provisions of Part IV. as it thought capable of introduction into that system and of reconciliation with those policies.

CHAPTER 3.

OFFENCES BY FREE CITIZENS.

3.1. Division 4 of Part IV. of the *Social Welfare Act* 1970 proscribes certain conduct, by sections 132, 133, 134, 135, 137 and 138 ; confers power on certain persons to hear and determine certain charges, by sections 131, 133, 135, 137 and 138 ; and contains certain procedural, evidentiary and technical provisions which are ancillary to the other enactments in the Division.

3.2.1. Some of the conduct proscribed by sections 132, 133, 134 and 135 could be committed only by persons who are themselves at large in the free community : harboring a person under sentence of imprisonment and illegally at large, for example. Other conduct is proscribed in those sections, which it would not be impossible for a prisoner to commit in a prison, but which would commonly be committed by a free citizen and is proscribed in terms which suggest that the legislature contemplated its commission by a free citizen and not by a prisoner : section 135 provides examples. The conduct which sections 132, 133, 134 and 135 make criminal, by whomsoever the conduct is committed, is that which results in, or facilitates the escape of prisoners or which facilitates the unauthorized possession by prisoners of things they should not have or the unauthorized transmission to or from prisoners of material objects and intelligence.

3.2.2. No evidence or argument was presented to the Board that those four sections required amendment. They are derived from legislation of the last century and their terminology and structure may not wholly accord with contemporary standards of legislative drafting, nor quite satisfy the technical requirements of a sophisticated criminal lawyer. But the Board thinks that any imperfections of that kind are best reformed by consultation between the law officers of the Crown.

3.3.1. Section 134 is derived from section 19 of the Statute of Gaols 1864 and has been part of Victorian statute law since then. Until 1970 the statute law made escape by a person under sentence of imprisonment a felony, so that most serious instances of harboring a person under such a sentence and illegally at large would until 1970 have constituted the offender an accessory after the fact to that felony and have rendered him liable to imprisonment. While the law stood thus, the monetary penalty of $100 which section 19 of the Statute of Gaols 1864 and the corresponding section in succeeding statutes prescribed for the offence which is now found in section 134 was perhaps appropriate. But the Board believes that the substitution of $1,000 for $100 which was effected when the *Social Welfare Act* 1970 was enacted did not satisfactorily provide for the changed circumstances created by the conversion of the statutory offence of escaping from felony to misdemeanour. (That conversion can be seen upon a comparison of the terms of section 132 of the *Social Welfare Act* 1970 with the terms of the corresponding provision, section 35 of the *Gaols Act* 1958, which the *Social Welfare Act* 1970 repealed). Since escape by a prisoner under sentence of imprisonment may now be effected without commission of a felony, a person may harbor such an escaper without committing an offence punishable by imprisonment. It is in the Board's opinion conducive to the maintenance of discipline in prisons that it should be an offence punishable by imprisonment for a person, who knows that another person is illegally at large after having escaped from prison, or from lawful custody while a prisoner (within the meaning of that word which section 3 of the *Social Welfare Act* 1970 prescribes), to harbor the escaper or otherwise to assist the escaper to remain at large.

3.3.2. In Chapter 7 of its first report the Board adverted to some of the effects of escapes on prison discipline and administration. By no means every measure designed to diminish the incidence of escapes is without a countervailing disadvantage to the maintenance of prison discipline. Nor would every instance of harboring or assisting an escaper merit imprisonment. But an escape by one or several prisoners is sometimes the result of an elaborate conspiracy among a number of criminals, some of them incarcerated with the men whose escape is planned and others at large in the community. One of the difficulties which the conspirators desire to overcome is that the identities and residences of many of the escapers' associates are often known to the police, who can be expected to seek the escapers at those residences and to interrogate, and to follow the movements of, those associates. If the escapers are harbored by persons about whose activities the police are ordinarily incurious and who are not known to be connected with the escapers, the risk of re-capture is sensibly diminished. Persons of that description are recruited, at the conspirators' behest, to harbor or otherwise to assist the escaping beneficiaries of the conspiracy. Conspiracies thus implemented are commonly formed among restless, bold and experienced criminals, who are greatly encouraged by the successful organization of an escape to maintain and to press, in planning escape and in other unlawful activities, the campaign against prison discipline which absorbs so much of their attention. The existence of a penalty of imprisonment for harboring or otherwise assisting escapers would, if conventional thought on the deterrent efficacy of punishment be correct, diminish the number of those willing to commit the crime and might also deter criminals from drawing into serious criminality relatives and associates of good or slightly flawed reputation.

3.3.3. The Board does not know of any reason why the maximum penalties prescribed by section 133 of the *Social Welfare Act* 1970 for the offences which are constituted by that section, and which may be compendiously described as assisting or attempting to assist a prisoner to escape, should be inappropriate in respect of the offence which it has recommended that Part IV. contain, and which may be compendiously described as assisting an escaped prisoner to remain at large.

3.3.4. Section 134, like section 132, is concerned only with the case of a person under sentence of imprisonment, not with the case of a person charged with a crime and not sentenced, or even convicted, but not admitted to bail. But section 8 (*b*) of the *Vagrancy Act* 1966 supplies that omission in relation to section 132, as the Board believes the provision which it has recommended in paragraph 3.3.1. would supply the omission in relation to section 134. Section 8 (*b*) of the *Vagrancy Act* 1966 provides that any person who escapes or attempts to escape from a lock-up, watch-house or like place wherein he is lawfully detained or from any person in whose legal custody he is or by whom he is lawfully detained shall be guilty of an offence, which is punishable on summary conviction by imprisonment for not more than three years. (It might perhaps be desirable to insert, for greater caution, the word " prison " in section 8 (*b*), after the word " watch-house ".)

3.3.5. The Board does not suggest that section 134 is not a useful provision. But it ought, in the Board's opinion, to be supplementary to the provision recommended in paragraph 3.3.1.

CHAPTER 4.

OFFENCES BY PRISONERS IN PRISONS—PUBLIC JUDICIAL ADJUDICATION—DESCRIPTION OF OFFENCES.

4.1. The provision which Part IV. makes for the interdiction of misconduct by prisoners and for trying charges of their misconduct strongly emphasises both the segregation from the free community which imprisonment occasions and the degraded status of the imprisoned convict. A number of offences by prisoners which are either created or mentioned in Part IV. are by that Part committed to jurisdictions which are to be exercised, either by a governor in pursuance of section 131 or by a visiting justice in pursuance of section 137 or 138, within the confines of prisons, not in the courts where the criminal law is publicly administered among free citizens. The catalogue of offences includes conduct for the description of which the nineteenth century draftsman of Part IV. used language redolent of the abasement which it was in that century thought desirable that convicts should experience : " insubordination ", " idleness insolence refusal to work disobedience of orders ", " improper language ", " any other misconduct " are specified as offences for the punishment of which imprisonment may be ordered by a visiting justice.

4.2. Mr. Stanley W. Johnston, the Reader in Charge of the Criminology Department of the University of Melbourne, gave evidence before the Board in conference with other expert witnesses and, like them, he had previously furnished the Board and Mr. Kelly, and the other expert witnesses, with a written statement of opinion on the subjects with which paragraphs (*b*) and (*c*) of the Order in Council are concerned. In his statement (exhibit 162), Mr. Johnston made the following observations about the provisions of Part IV. to which paragraph (*b*) of the Order refers :

> " . . . these provisions are belittling, and act as an impediment to the attainment of that sound discipline which will minimize recidivism and advance the reconciliation of the prisoner and society.
>
> My remarks here may be confined to Sections 120 and 131–142 of the Social Welfare Act. However, I should like to point out that, in general, sentencing administration itself is poorly disciplined. The legislation on sentencing in Victoria is unco-ordinated ; with rare exceptions, judges and magistrates are uninterested in the efficacy of their sentencing and indeed sometimes decry the value of the imprisonment that they order ; and prison administrators tend to be unable to define the objective of imprisonment. By normal standards of public administration, sentencing administration sets a bad example where, of all places, an example of good discipline is most wanted.
>
> I would recommend that we move—as gradually as the exigencies of preserving good order require—towards abandoning the system of the visiting magistrate and of prison governor's punishments. The petty retributivism and psychological distancing which this system of negative discipline has engendered tend to infantilize the imprisonment experience and to divert attention away from the real discipline which should bind staff and inmates, namely the unceasing pursuit of common cause with each prisoner. Such a reactionary system should be no more necessary in a prison than in a mental hospital. If every prisoner is seen simply as being under continuous discipline anyway, his freedom of movement is constantly being enlarged or restricted according as he handles it responsibly. A prisoner should be no more liable to (further) imprisonment than is a free citizen ; and if a prisoner commits a crime for which it is expedient he should be tried, I submit that the trial should be held in an ordinary court open to the public. The present system of governors' punishments tends to operate only within the term of the initial sentence anyway ; and thus is inculcated a belief that remissions are a right rather than a privilege, and will be denied only by a quasi-judicial process rather than by administrative discretion directed without let to release planning. Not only is that belief erroneous, it has the unfortunate effect of limiting the authority, the responsibility and the initiative of the prison's administration . . .
>
> Under Sections 137 and 138, and Regulations 25 and 26, a visiting justice may sentence a prisoner to long terms of imprisonment—up to six months, eighteen months and two years ; with ' hard labour ' ; and with ' solitary confinement ' of up to 21 days, 30 days or ' three months in periods none of which shall exceed one month and which shall be at intervals of at least one month '—for misconduct which is not criminal outside and which may not only set inappropriately saintly standards of behaviour for inmates but also permit and promote arbitrary (i.e. undisciplined) demands by staff. For instance, it is a breach of Regulation 26 if a prisoner ' quarrels with any other prisoner ' or gambles. Though even suicide is no longer a crime in Victoria, it is an offence for a prisoner wilfully to injure himself or to alter or remove a tattoo or other mark (whether natural or otherwise) on his body ; it might be thought that such behaviour and the circumstances leading to it, need pity and understanding rather than punishment. ' Insubordination ' or ' tumult ' may be punished with up to two years'

imprisonment. Idleness, insolence, refusal to work, or disobedience of orders (assuming these can be distinguished from insubordination) may attract up to six months' imprisonment. For a free person, indecent or abusive language is punishable by no more than a fine of $100 or imprisonment for two months (*Summary Offences Act* 1966 Section 17) ; but a prisoner guilty of indecent, abusive ' or improper language ' is liable to up to six months. Six months is the possible sentence also for ' breach of any rule or regulation or any other misconduct ' ; but there are no prison rules so called, and the reference to any other misconduct is uncharacteristically sweeping as a description of any offence, let alone an offence punishable so severely. This constantly reiterated emphasis on insubordination, insolence, refusal to work, disobedience of orders, failing to obey a lawful order given by an officer, and then finally the possibility of a charge for ' any other misconduct ' not mentioned in the legislation, is characteristic of, and is calculated to engender, the nervous authoritarian personality who is ill-equipped to handle the very problems for which inmates are confined in prison. In this respect, I feel that the legislation is unrealistic and dysfunctional.

The correction of this ' indiscipline at the top ' will be a gradual matter, depending primarily upon a radical improvement in the training of prison staff. Prison administration calls upon management skills which the Social Welfare Training Institute is not yet sufficiently funded to provide. I am myself involved in prison staff training in Victoria, both as Chairman of the Social Welfare Training Council and as an examiner in Penology III., and I am bound to say that this training is inferior to our courses for child care and youth workers and to prison courses run by the Australian Foreign Affairs Department, by Wakefield Staff College in England and by other prison services. I can see no worthwhile improvement in prison discipline that will not begin with the better discipline of staff through education in criminology and penology. Changes in the mere form of the hearings of charges against prisoners can be no more than temporizing.

In short, therefore, in my opinion we should work towards replacing the present quasi-judicial system with purely administrative management ; and any charges of crime which it is important to prefer against a person who is already undergoing the discipline of imprisonment should be tried in the ordinary court system."

4.3. In at least one respect Mr. Johnston's views were similar to those which were expressed in a written submission by the Director of Prisons (Mr. E. V. Shade) and the Deputy Director of Prisons (Mr. B. D. Bodna) on behalf of the Social Welfare Department (reproduced in Appendix B), and with the substance of which no disagreement was expressed to the Board. There was a general agreement that jurisdiction to hear and determine a charge against a prisoner of the commission of an offence punishable by a term of imprisonment cumulative upon any other term of imprisonment should be vested in a judicial tribunal and that, except in cases heard in the County Court or the Supreme Court, the exercise of that jurisdiction should be in substantial accordance with the law which regulates the exercise of the summary criminal jurisdiction of a magistrates' court constituted under the Justices Act.

4.4.1. Part IV. of the *Social Welfare Act* 1970 satisfies the requirement that jurisdiction to impose further imprisonment on a prisoner be vested in a judicial tribunal. The power which is conferred by section 131 on the governor of a prison to punish by " postponing the discharge of the prisoner under the regulations or the release of the prisoner on parole for any period not exceeding seven days " can be exercised to extend the period of imprisonment only within a term of imprisonment imposed by judicial sentence. Sections 137 and 138 have been taken to confer on a visiting justice a jurisdiction which is essentially judicial, and convictions imposed in the exercise of the jurisdiction have been regarded as subject to the appeal from summary conviction to the County Court which section 141 of the *Justices Act* 1958 provides. But the law which regulates the exercise of that jurisdiction is different in several respects from the law which governs the exercise of the summary criminal jurisdiction of magistrates' courts. One justice, being a visiting justice appointed under section 120 of the *Social Welfare Act* 1970, is authorised to exercise the jurisdiction conferred by sections 137 and 138 of that Act, whereas section 66 of the *Justices Act* 1958 requires that, except where otherwise expressly enacted, every magistrates' court shall consist—

" (*a*) of not less than two and not more than five justices, of whom two at least shall be present and acting together during the whole time of the hearing and determination of the case ; or

(*b*) of a stipendiary magistrate ; or

(*c*) of a single justice other than a stipendiary magistrate if all parties to the proceedings consent that such justice shall hear and determine the case. Such consent shall be forthwith entered upon the minutes of the court by such justice or by the clerk of the court."

Every magistrates' court is open to the public, except in certain uncommon circumstances. The Judicial Committee of the Privy Council has declared that " publicity is the authentic hall-mark of judicial as distinct from administrative procedure." (*McPherson* v. *McPherson* (1936) A.C. 166 at 200.) The visiting justice exercises his summary criminal jurisdiction within the prison, where the written record of the proceedings which section 141 prescribes is kept, and where the public may not enter. A person charged with the commission of an offence before a magistrates' court is by section 91 (1) of the *Justices Act* 1958 granted the right to representation by a lawyer. No such express provision is made for the legal representation of a prisoner charged before a visiting justice and the Board is not aware of an appearance by a lawyer on behalf of a prisoner so charged.

4.4.2. There is at present no practical significance in the fact that a single visiting justice is empowered to exercise the jurisdiction conferred by sections 137 and 138 of the *Social Welfare Act* 1970, for in practice the visiting justices appointed to Victorian prisons are stipendiary magistrates, who regularly constitute magistrates' courts without the company of any other justice. The Board will discuss in Chapter 7 of this report whether the public interest would be better served by granting prisoners a statutory right to legal representation than by leaving them to invoke the exercise by a visiting justice of the discretionary power, which in the Board's opinion resides in him, to allow them to be represented by a lawyer in proceedings under sections 137 and 138. The exclusion of the public from proceedings under sections 137 and 138 is a consequence which, in the Board's opinion, Parliament must be taken to have intended when it provided for the hearing and determination of charges under those sections by a visiting justice and directed that the record of those proceedings be kept in the prison. If, therefore, public access to the room where those proceedings take place is considered desirable, provision to that end should be expressly made by amendment of Part IV., not by regulation or by administrative act of the Director-General of Social Welfare.

4.5.1. The Board does regard it as desirable that the place where jurisdiction to impose a sentence of imprisonment on a prisoner is exercised should be open to the public. That conclusion was not influenced by any supposition that the present stipendiary magistrates might discharge their judicial functions under Part IV. in any way differently if members of the public were observing them. The Board's conclusion, that prisoners should be tried in public on charges which place them in jeopardy of further imprisonment, proceeds from its conviction that the considerations against public trial of prisoners are insufficient to outweigh the considerations which have long maintained the public administration of justice as a cardinal principle of social organization in this community. Those latter considerations may perhaps be subsumed under three propositions : first, that those who are taking part in the judicial process—witnesses, judge, lawyers, jury and parties—are generally influenced by a consciousness of public scrutiny to behave in ways which favour the attainment of justice ; second, that the members of the community are influenced, by the knowledge they gain of the proceedings of courts, both to intervene, individually, with information relevant to particular cases and to strengthen, collectively, their commitment to the fundamental social values which the rule of law expresses ; third, that the detection and correction of error and wrong-doing by those who administer justice and by those whose conduct is in question before the courts can best be achieved by public scrutiny of courts' proceedings.

4.5.2. It might be objected that no significant departure from the general principle of publicity in the administration of justice is involved if a small number of cases are tried privately in prisons, from which it is inconvenient to remove prisoners to a court, and to which it is inconvenient that members of the public should be admitted. Those inconveniences will rarely be trivial, the Board believes, and may at times be very great. But prisoners are placed in a situation which in the Board's opinion magnifies the need to uphold the principle in relation to them.

4.5.3. Contemporary discussion of the morality and utility of incarceration for crime affords proposals which may be regarded, perhaps mistakenly, as antithetical : imprison so that the prisoner may be cured of his criminal tendencies, or inhibited from expressing them, by psychological therapy, and release him when that cure or inhibition has been effected or when release will better serve that therapeutic purpose than the prolongation of his imprisonment : ———— : imprison so that the prisoner or others may be thereby persuaded to abstain from crime, or so that he may be prevented for the term of his imprisonment from repeating his crime, or so that the community's abhorrence of the crime may find socially beneficial expression, and release him when the term of imprisonment, fixed at the time of his conviction, has expired ; upon conviction, leave the period of imprisonment to the future administrative determination of those who are seeking the prisoner's cure : ———— : upon conviction, irrevocably determine that period by judicial sentence. The Victorian legislature has accommodated those apparently antithetical currents of thought (to none of which justice has been done in the Board's brief statement) by committing to public judicial determination the maximum period of every sentence for crime (except the privately pronounced sentences of visiting justices and Children's Courts) and by vesting in administrative agencies a very substantial discretionary power, exercisable in private, to curtail, by remission and parole, the maximum period judicially determined at the time of conviction. While that rationale informs the Victorian criminal justice system, it is in the Board's opinion desirable that prisoners and the members of the free community should be

enabled clearly to perceive the important distinctions between judicial and administrative control of prisoners' lives. Many prisoners find it hard to admit, even to themselves, that remission and parole are discretionary administrative powers, not benefits to which they have an entitlement, deniable only for proven misconduct. Their attitudes to the persons who implement the community's administrative programme for their reformation in prison—prison officers, parole officers and Classification Committee—reflect the cherished misconception that they may extract from those persons the plenitude of concession only by relentless assertion of what they pretend, even to themselves, are their legal rights. The eradication of those attitudes is, as Mr. Johnston pointed out in his statement, an important part of the process of motivating prisoners to collaboration with the administrators in that work of reformation. They are attitudes to the formation of which personal experience of the police and the public judicial system strongly influences many prisoners, the Board believes. When the judicial system, in the person of a magistrate, is perceived by the prisoners to be working inside the prison, out of public sight, they can be pardoned for supposing that prison officers, policemen, parole officers, Parole Boards, judges and classification committees are but different parts of a legal apparatus for the successful manipulation of which cunning and perseverant assertion of rights is essential. But if the magistrate exercises his judicial function, whether inside or beyond the prison walls, in a court open to the public, one obvious and important difference is perceived between the court which pronounces sentence of imprisonment and the administrative agencies which regulate the prisoner's life during his sentence. That difference being apparent, the prisoner may be prepared to entertain the idea that other differences exist, and that an attitude may profitably be adopted towards the prison officer, the parole officer and the Parole Board which he would not consider it appropriate to adopt towards the policeman or the judge. Whether or not that desirable change eventuated, both prisoners and free citizens would perceive, in the public administration of criminal justice for prisoners, an indication that prisoners are no further denied the rights and privileges of citizenship than is reasonably necessary for the protection of society and for the reformation of the prisoners ; and that the judicial determination of any question involving a prisoner's right to freedom, after he has served any term of imprisonment which he is undergoing, is as much the subject of public interest and scrutiny as the trial of such a question in respect of a free citizen. Indications of that kind, to prisoners and free citizens, the Board believes to have real value in promoting the reconciliation of the criminal with society.

4.5.4. A number of the prisoners at Pentridge who have personal experience of the summary jurisdiction of the visiting justice persistently denigrate the system and induce in other prisoners a distrust of the visiting justice by impugning his impartiality and by asserting that he has denied them procedural rights which they enjoy in the ordinary criminal courts. No doubt some prisoners would make similar imputations against any public disciplinary tribunal, but the Board thinks that they would be less readily believed by other prisoners than they now are.

4.5.5. A public courtroom would probably be welcomed by a number of prisoners who derive satisfaction from conflict with the prison authorities : they would gain opportunities for publicised slander of prison officers and for public condemnation of prison conditions. Some thoughtful citizens believe that improvement of the penal system will be hastened by the knowledge and concern which even the silliest sensational report about prisons is said to generate in the community. Furthermore, the Board thinks it much more likely that serious misconduct by prison officers, such as the Board found to have occurred in H. Division, would be denounced by prisoners in a public courtroom than in a place from which public and press are excluded.

4.6. The disadvantages, of requiring that the trial of charges against prisoners for offences punishable by imprisonment be held in public, are chiefly economic. Objects of minute size and substances in minimal quantity are now included in the catalogue of things which must be kept from prisoners. Whenever a prisoner is in physical proximity to members of the public or has access to a place in which members of the public have been, careful and expensive measures must be taken to prevent the prisoner from acquiring possession of such objects and substances. The choice of the best means of preventing such illicit commerce will be influenced by a wide variety of circumstances. Each Victorian prison presents its own particular problems of security.

4.7. A courtroom in which a magistrates' court ordinarily held its sittings would, in the Board's opinion, be the appropriate place for the conduct of summary criminal proceedings against prisoners charged with offences punishable by imprisonment, if the requirements of security did not make such a courtroom a significantly more expensive venue than the prison. However, there is, in the Board's opinion, no consideration against conducting such proceedings in a prison which would outweigh the disadvantage of any such additional public expense, occasioned by using a magistrates' court building outside the prison, provided that accommodation of the magistrate and his clerks within the prison is so arranged that their complete segregation from the prison staff can be plainly demonstrated to prisoners.

4.8. Various considerations, not least those of security, might severely limit the number of citizens who would be able to exercise the right of public access to a place of hearing within the prison. But no courtroom has accommodation for a multitude and some rooms in which magistrates' courts hold sittings can barely accommodate the parties and their lawyers, as

section 91 (1) of the *Justices Act* 1958 might be thought to have recognised—" The room or place in which the justices constituting the magistrates' court sit to hear and try any information or complaint shall be deemed an open and public court to which the public generally may subject to the provisions in this Act contained have access so far as the same can conveniently contain them." What is in the Board's opinion important is that the right of access be established, not that its enjoyment by as many as should choose to exercise it be immediately facilitated by any large expenditure of limited public funds on the building of court accommodation.

4.9.1. It was suggested by Messieurs Shade and Bodna, in their submission on behalf of the Department of Social Welfare, that " the continuing presence of stipendiary magistrates as visiting justices, the uncertainty about correct procedures to be followed by a visiting justice's tribunal, and the acceptance of the principle that sentences imposed by the visiting justice are of the same order as those imposed by magistrates' courts, altogether suggest that there is little purpose in continuing the special nature of the visiting justice's summary inquiry into particular charges against prisoners. It is suggested that present anomalies would be eliminated if the hearing of such charges were given the full status of a magistrates' court hearing and was subject to all statutes, rules and procedures common to that court." The Board does not oppose the adoption of such a measure, if it were thought to be administratively convenient. But the Board suspects that the administrative expense of complying strictly with the procedural requirements of the *Justices Act* 1958, particularly Part II., Subdivision 1 of Division 2 of Part IV. and Division 3 of Part IV., would not be inconsiderable and would not be productive of any significant advantage. Exercising a summary criminal jurisdiction with which he is quite familiar, a stipendiary magistrate would no doubt enforce substantial compliance with those procedural requirements of the Justices Act which justice demands, without yearning for the guidance of precise statutory directions and forms. Nor is it clear to the Board that prison officers, who may be apprehensive about taking part in a public judicial process, would be greatly assisted to play their parts well by concentrating their attention on the formalities, rather than on the underlying principles, of a fair procedural and administrative system. If it is found to be desirable that rules should be made with respect to the formulation and notification of charges, or with respect to procedure at the hearing of those charges, the rules should in the Board's opinion be prescribed by the Governor in Council, not the Parliament, so that they may readily be modified in the light of experience and may, if necessary, make different provision for several localities in Victoria. In the formulation and modification of such rules the Executive Government would have the great benefit of consultation between stipendiary magistrates and senior officers of the Prisons Division.

4.9.2. There are certain powers with which it is desirable that the tribunal constituted to try charges under sections 137 and 138 in public should be invested. These powers, conferred on magistrates' courts by sections 211, 212, 213 and 214 of the *Justices Act* 1958, are to punish for contempt, to exclude, for particular reasons, persons and classes of persons from the place where the court is sitting, and to prohibit publication of a report of proceedings on the ground of public decency and morality.

4.10. The Board is not aware of any reason why the provisions of Division 2 of Part IV. of the *Crimes Act* 1958, by which courts are empowered to fix minimum terms, should not be made applicable to sentences of imprisonment imposed under sections 137 and 138 of the *Social Welfare Act* 1970. But that is a matter of amendment of that Division, not amendment of Part IV. of the *Social Welfare Act* 1970.

4.11. If it were determined by the Parliament that the particular jurisdiction conferred on visiting justices by sections 137 and 138 should be wholly supplanted by the summary jurisdiction of magistrates' courts, and that the magistrates' court should not hold its sittings in a prison, it would nevertheless be prudent, in the Board's opinion, to leave those sections unrepealed, so that if in a time of dangerous unrest in a prison it was found to be desirable that a summary jurisdiction, of the kind which those sections provide, should be promptly exercised in the prison, there would be no need to wait for the Governor in Council to constitute a magistrates' court within the prison in accordance with the requirements of the Justices Act. Except in circumstances of that kind, the Executive Government could simply refrain from invoking the exercise of the jurisdiction conferred by sections 137 and 138.

4.12. Section 141 of the *Social Welfare Act* 1970 makes provision for the recording of adjudications made in exercise of the jurisdiction conferred by sections 137 and 138. If that jurisdiction is abolished, or if its exercise is made subject to the procedural requirements which the *Justices Act* 1958 prescribes in relation to magistrates' courts, section 141 will suffer consequential repeal. If sections 137 and 138 are retained and the operation of section 141 is not to be affected by any other provision, the section will in the Board's opinion require amendment consequential upon the opening to the public of proceedings under sections 137 and 138. Section 86 of the *Justices Act* 1958 provides :

> " 86. (1) Subject to the *Public Service Act* 1958 there may be appointed a clerk for every magistrates' court ; and such clerk shall attend to discharge the duties of his office at the place or places for which he is appointed.

(2) The clerk of every magistrates' court shall keep a register of the minutes or memoranda of all the convictions and orders of such court and of such other proceedings as are directed by any rule under this Act to be registered, and shall keep the same with such particulars and in such form as may be from time to time directed by a rule under this Act.

(3) Such register and also any extract from such register certified by the clerk of the court for the time being having the custody of the same to be a true extract shall be *prima facie* evidence of the matters entered therein ; and every document purporting to be such an extract and to be so certified shall be taken to be such extract and so certified unless the contrary is made to appear.

(4) The register kept by every clerk in pursuance of this section may be distinguished by such name or description as may be directed by a rule under this Act.

(5) The entries relating to each minute memorandum or proceeding shall be signed by the justices or one of the justices constituting the court by or before whom the conviction or order or proceeding referred to in the minute or memorandum was made or had.

(6) Every such register shall be open for inspection without fee or reward by any justice and by any person authorized in that behalf by a justice or by a law officer and so far as relates to the proceedings in any particular matter by any person who is a party to such proceedings."

Section 141 makes provision, which the Board thinks to be substantially adequate, for the matters with which sub-sections (2), (4) and (5) of section 86 of the Justices Act deal, except that section 141 does not expressly designate a custodian of the " Conviction Book ". But section 141 makes no provision for access by members of the public to that book. In the Board's opinion the formal record of summary criminal proceedings against prisoners before a judicial tribunal should be available for public inspection, and for inspection by the parties to such proceedings, on terms no more restrictive than those which section 86 (6) of the *Justices Act* 1958 prescribes. The choice of a custodian of those records may be made by reference to considerations of administrative convenience, but designation of the custodian should be by statutory provision, as is made by sub-sections (1) and (2) of section 86 of the Justices Act. The choice of places at which the records are to be kept available for inspection may be made by reference to the convenience of those who may inspect them and to administrative expense. It does not seem necessary that the places be designated by statute. If hearings are conducted in prisons, provision should also be made for publication, in a mode convenient to the public, of notice of proceedings, so that the names of the parties and the nature of the charges can be known before the hearing takes place. The form of register prescribed by section 141 and Schedule Four lacks provision for entry of the name of the person who makes the charge, of the adjudication on which particulars are to be entered. In the Board's opinion that omission should be supplied by amendment of Schedule Four. It would no doubt be desirable that a provision of the kind which is found in sub-section (3) of section 86 of the Justices Act should be enacted in relation to the " Conviction Book " prescribed by section 141. And there might be a psychological benefit to be derived from the elimination of the prolepsis which mars the name of the book.

4.13. The offences in respect of which jurisdiction is conferred on a visiting justice by sections 137 and 138 are :

(i) " escaping " (sec. 137) ;

(ii) " attempting to escape " (sec. 138) ;

(iii) " insubordination " (sec. 137) ;

(iv) " assault upon . . . any officer " (sec. 137) ;

(v) " assault upon . . . any . . . prisoner " (sec. 137) ;

(vi) " attempt to do any bodily injury to any officer " (sec. 137) ;

(vii) " attempt to do any bodily injury to any . . . prisoner " (sec. 137) ;

(viii) " any riot . . . in a prison or other place where prisoners are in custody " (sec. 137) ;

(ix) " any . . . tumult in a prison or other place where prisoners are in custody " (sec. 137) ;

(x) " any wilful and malicious destruction . . . of any . . . prison or any furniture thereof or of any public works or of any implements used thereon " (sec. 137) ;

(xi) " any wilful and malicious . . . injury of . . . any . . . prison or any furniture thereof or of any public works or of any implements used thereon " (sec. 137) ;

(xii) attempt at any of the offences referred to in clauses (x) and (xi) (sec. 137) ;

(xiii) " idleness " (sec. 138) ;

(xiv) " insolence " (sec. 138) ;

(xv) " refusal to work " (sec. 138) ;

(xvi) " disobedience of orders " (sec. 138) ;

(xvii) " use of indecent language " (sec. 138) ;

(xviii) " use of abusive language " (sec. 138) ;

(xix) " use of improper language " (sec. 138) ;

(xx) " breach of any rule " (sec. 138) ;

(xxi) " breach of any . . . regulation " (sec. 138) ;

(xxii) " any other misconduct " (sec. 138).

4.14. The Board found persuasive the opinions of Mr. Johnston which have been quoted in paragraph 4.2., about a number of those offences. However convenient, administratively, it may be to specify criminal conduct by the phrase " any other misconduct " (clause xxii.), its vagueness would not be tolerated, the Board thinks, in any criminal statute of general application to free citizens. The Board believes its use in relation to prisoners ought not to be continued. Similar considerations have led the Board to the same conclusion about the use of the words " improper " (clause xix.), " insolence " (clause xiv.) and " idleness " (clause xiii.). Some of those pejorative words could appositely be used for generic description of some of the conduct which is specified in Regulations 25 and 26 of Division III. of the Social Welfare Regulations 1962. Each of those two Regulations declares the acts therein described to be breaches of the Social Welfare Regulations 1962, so that jurisdiction to try charges of the commission of those acts by prisoners is conferred by section 138 on a visiting justice : see clause (xxi.). The Social Welfare (Prisons) Regulations 1972 (S.R. 172, No. 152) substituted new Regulations 25 and 26 of Division III. of the Social Welfare Regulations 1962. The substituted regulations omitted reference to " improper language ", " false statements ", " careless or improper use of Government property ", " idling during labour hours " and " any other act of misconduct ". Those phrases had been used in Regulations 25 and 26, before the substitution effected in 1972, to designate offences by prisoners. Furthermore, the recommendations made to the Board by Messieurs Shade and Bodna on behalf of the Department of Social Welfare, for the amendment of Part IV., include deletion from Part IV. of the offences specified in clauses (xiii.), (xiv.), (xix.) and (xxii.).

4.15. Sections 137 and 138 contain other expressions which in common usage are perhaps as imprecise as those proposed by the Board for deletion : " abusive language " (clause (xviii.)), " indecent language " (clause (xvii.)), " wilful and malicious " (clauses (x.), (xi.) and (xii.)), " tumult " (clause (ix.)) and " insubordination " (clause (iii.)) are examples. But all of those examples are expressions not unfamiliar to the law. All but the latter two have long been used in statutory description of general criminal offences and their legal meanings have been expounded by the courts. The latter two words, " tumult " and " insubordination ", have also been judicially considered, and legislatively employed for the description of criminal conduct. When a number of prisoners indulge in concerted acts of indiscipline, as occurred at Pentridge in 1972, those two words may well be legally appropriate for characterisation of some of their offences. The Board is not convinced that either word should be deleted from the catalogue of offences prescribed in Part IV.

4.16. Deletion from section 138 of the words " refusal to work disobedience of orders " (clauses (xv.) and (xvi.)) is in the Board's opinion desirable. The misconduct of which those words is descriptive may be made the subject of a charge under section 138 by treating it as a breach of a regulation, for Regulation 26 (*j*) of the Social Welfare Regulations 1962 provides that any prisoner who fails to obey a lawful order given by an officer shall be guilty of a breach of those Regulations and section 126 of the *Social Welfare Act* 1972 provides that the Director-General of Social Welfare may order any persons sentenced to imprisonment or committed to prison in default of payment of a fine or sum of money to be set to some labour.

4.17. The expression " any rule " in section 138 means, in the Board's opinion, any rule made by the Governor in Council. Although the expression might be thought otiose, having regard to the presence in section 138 of the expression " or regulation ", no substantial criticism of its use in that section (or, in the plural, in section 131) can in the Board's opinion be made.

4.18.1. Messieurs Shade and Bodna recommended, in their submission, that charges against prisoners of conduct which constituted a criminal offence wherever it might be committed, as contravening the general criminal law, should be directed by Part IV. to be tried by a visiting justice and that charges against them of conduct which was criminal only if committed by a prisoner should be reserved to the hearing and determination of a governor's court. To the application of this general principle they would allow exceptions : jurisdiction to try charges of

" insubordination " they would vest in the visiting justice, although it is not an offence known to Victorian law, except by force of section 137, so far as the Board is aware. Their recommendation of this principle is discussed in paragraph 3.1 of their submission and is coupled with a recommendation in paragraph 4.5.2 of the submission, that the maximum punishment for each offence in proceedings before a visiting justice should be that which is prescribed by the general law for that offence, not the punishment which is at present prescribed by sections 137 and 138.

4.18.2. Both those recommendations would, if implemented, provide further indication of the community's willingness to treat prisoners as members of the community, not as outcasts subject to discriminatory legislation. The Board reiterates its sense of the value to prisoners and to the community of reconciliatory declarations of that kind. But the Board does not believe that either recommendation should be implemented.

4.18.3. Conduct which in the free community would constitute no offence at all or, at most, an offence for the punishment of which a very moderate penalty would be appropriate, may in particular circumstances constitute, in prison, a very serious offence, for the punishment of which the maximum prescribed by section 138 would not be inappropriate. Evidence which the Board heard during its inquiry into the matters which are the subject of paragraph (*a*) of the Order in Council provides examples of such conduct. In Chapter 7 of the Board's report in response to that paragraph are quoted samples of statements made by prisoners to a Prison Officer Daniels, at night, from their cells, Daniels being then the only prison officer in the cell block with the prisoners. On one occasion in 1972 the Board listened to H. Division prisoners knocking in unison on their cell doors and, during pauses in the knocking, making statements to the attendant prison officer in terms similar to those made to Mr. Daniels. Evidence which the Board accepted showed that conduct of that kind was repeated in H. Division many times over a period of hours at night and on a number of successive nights. It was conduct which would constitute a criminal offence outside prison (if the commission of such conduct outside prison can be imagined) only if it occurred " in or near a public place or within the view of hearing of any person being or passing therein or thereon ". The maximum punishment prescribed by section 17 of the *Summary Offences Act* 1966, for such an offence, is two months' imprisonment. In that section the prohibited conduct is described as the use of " profane indecent or obscene language or threatening abusive and insulting words " and as behaving " in a riotous indecent offensive or insulting manner ". If the Pentridge prison officers had chosen to devote their time to the task, many charges in respect of the repeated acts of misconduct by H. Division prisoners which have been described could have been preferred before a visiting justice, whose repeated imposition of a sentence of not more than two months' imprisonment would no doubt have had an influence on the behaviour of those prisoners. But the administrative inconvenience would have considerable and the psychological efficacy of such a course of action would in the Board's opinion have been quite inferior to the effect on discipline in H. Division of one or two terms of imprisonment of greater length, imposed on the intelligent and calculating leaders of the rebellion, after they had been carefully warned to desist from the campaign they were conducting against selected prison officers. Whether or not it is correct in that opinion, the Board is convinced that a sentence of two months' imprisonment would be quite inadequate for the punishment of the behaviour it heard in H. Division, or of the behaviour to which it found that Mr. Daniels and other prison officers had been subjected, if that behaviour was continued by intelligent, mature prisoners after a careful warning to desist. When prisoners engage in concerted, but not riotous or tumultuous, acts of disobedience, as occurred in D. Division on the 26th February, 1972 and in B. Division on the 1st October, 1972, they may commit no act which would constitute an offence if it were committed by free men. Nor would presentment before a jury for conspiracy be an appropriate response to that kind of misconduct. Once it was known that no sentence of imprisonment could be incurred by passive disobedience, the Board believes that not a few prisoners would modify their behaviour to take advantage of that circumstance. The Board is not confident that the word " insubordination " in section 137 would be held to comprehend, in law, extensive categories of behaviour, notwithstanding that in common speech the word might be used in description of a very wide variety of conduct. Mr. Johnston observed, in a passage which the Board has quoted from his statement, that a prisoner who wilfully injures himself needs pity and understanding rather than punishment. The Board heard evidence which movingly confirmed that observation, if it be taken for a general rule. But the Board also heard evidence which convinced it that occasionally a self-inflicted injury is a rational act, by a prisoner in little need of pity, calculated to achieve an end which the prisoner desires but which is unlawful : an escape, for example. The infliction of the injury would not constitute, in law, an attempt to escape, nor any criminal offence if it were committed by a free citizen. Yet in certain circumstances such an act may in the Board's opinion merit the punishment of a term of imprisonment.

4.18.4. The examples which the Board has discussed in the preceding paragraph, of conduct which in a prison may merit imprisonment, but which in the free community is either not criminal at all or is leniently punished, are among the subjects dealt with by Regulations 25 and 26 of the Social Welfare Regulations 1962. It will be observed that wilfully self-inflicted injury and the making, alteration and removal of marks on a prisoner's body (which may have a rational, unlawful purpose) are breaches of the Regulations which the Governor in Council regarded in 1972 as suitable for the jurisdiction of a visiting justice, and not of a governor's

court : see Regulation 26A. In the opinion of the Board, the breaches of Regulations specified in paragraphs (*d*), (*g*), (*h*), (*i*), (*j*) and (*k*) of Regulation 26 may be committed in circumstances which would render quite inadequate for their punishment the penalties which section 131 empowers a governor to impose. Yet breaches of those paragraphs, committed in circumstances of that description, would not infrequently involve no breach of the criminal law which is applicable generally in the free community. The evidence presented to the Board provided examples in respect of each of those paragraphs. If it be objected that the evidence was concerned with a period of quite extraordinary indiscipline, the Board's regretful rejoinder is that, in its opinion, gross indiscipline will probably occur in Victorian prisons, and in the prisons of similar communities, for a number of years to come.

4.18.5. There is a further consideration against the proposal under discussion. A prisoner who is not undergoing a sentence of imprisonment, but is awaiting trial in prison, cannot be subjected to the punishment of " postponing the discharge of the prisoner under the regulations or the release of the prisoner on parole " which section 131 empowers a governor to inflict. Even if it be assumed not improper for a governor to postpone either the hearing of a charge against such a prisoner or the passing of sentence on him, until he had been sentenced to a term of imprisonment by a court (upon the further assumption that such a sentence eventuated), such a delay would often deprive the proceeding before the governor of its disciplinary efficacy. Promptness of disciplinary response to misconduct in prison is generally believed to be of great importance. Such a delay would no doubt evoke bitter resentment among prisoners. The other sanctions available to a governor by virtue of section 131, as presently in force or as Messieurs Shade and Bodna would have it amended, would in some circumstances be quite inadequate. Aggressive, intractable prisoners, well practised in exploitation of other prisoners, are among the men in D. and F. Divisions at Pentridge who are not under sentence of imprisonment. Neither solitary nor close confinement, nor yet the stopping of a gratuity, would be an adequate punitive response by the governor of Pentridge, in the exercise of his jurisdiction under section 131, to the misconduct which those prisoners could contrive in D. Division without committing an offence known to the general criminal law.

4.18.6. It is, of course, true, as Mr. Johnston has pointed out in a passage quoted by the Board from his statement, that some of the breaches of the Social Welfare Regulations 1962 which are specified in Regulation 26 could never merit a sentence of imprisonment. Nor is it easy to imagine circumstances in which the jurisdiction of a visiting justice would be appropriately invoked for the hearing and determination of a charge that a prisoner had, without the permission of an officer, smoked tobacco. Yet Regulation 26 (*b*) declares unauthorized smoking to be a breach of the Regulations and section 138 confers on a visiting justice jurisdiction to hear the charge and to punish the breach by imprisonment for six months or, in the case of a second or subsequent breach, for eighteen months. One means of obviating what might be thought to be undesirable consequences of conferring jurisdiction on a visiting justice to hear any charge of a breach of any regulation would be to limit the jurisdiction conferred by section 138 to breaches of regulations specified by regulation as the subject of that jurisdiction. However, neither the evidence presented to the Board nor the information contained in the submission of Messieurs Shade and Bodna raises any suspicion that prison officers might lay trivial charges before a visiting justice. The more convenient course, in the Board's opinion, is to leave unrestricted by statute the visiting justice's jurisdiction over all breaches of regulations and to allow the invocation of that jurisdiction to be controlled by the administrative discretion of prison governors, who will no doubt be guided by the Director-General of Social Welfare and the Director of Prisons.

4.19. The Board believes that there should be not only deletions from the catalogue of offences in section 138, but also an addition. Threatening language should in the Board's opinion be an offence punishable in a prisoner by imprisonment, as it is punishable in a free citizen by virtue of section 17 of the *Summary Offences Act* 1966 when voiced in or near a public place or within the view or hearing of any person being or passing therein or thereon. Threat by a prisoner to assault or do any bodily injury to any officer or prisoner is declared by Regulation 25 (*a*) of the Social Welfare Regulations 1962 to be a breach of those Regulations, and is therefore an offence within section 138. But threats of other kinds may be made, and may in some circumstances constitute serious misconduct, as the evidence by Mr. Daniels, to which reference has been made, clearly demonstrates.

4.20. It may be convenient now to set out the terms in which sub-section (1) of section 138 would be expressed if the amendments so far proposed by the Board were made. Section 138 (1) would then read :

> " A visiting justice may inquire in a summary way into any charge of attempting to escape use of indecent abusive or threatening language or breach of any rule or regulation against a prisoner ".

No amendment of section 137 (1) has been yet proposed by the Board.

4.21. Provision for the public exercise of the jurisdiction conferred by sections 137 and 138, and for any procedural regulation of its exercise, which was thought necessary could be made by enlarging amendment of section 141.

4.22. The present practice of ensuring, by administrative means, that the jurisdiction conferred by sections 137 and 138 will be exercised only by a stipendiary magistrate, ought in the Board's opinion to receive the express approval of Parliament. That could be achieved, the Board thinks, by inserting in section 137 (1) and in section 138 (1), after the words " visiting justice ", the words " who is a stipendiary magistrate " ; and by deleting from section 141 the words " or justices " (wherever occurring) and the words " or their " and the words " or names ". In the Board's opinion the jurisdiction requires for its successful exercise legal knowledge, long experience of summary criminal procedure and familiarity with the behaviour and attitudes of recidivists.

4.23. A stipendiary magistrate who is exercising, or has recently exercised, at Pentridge, the visitatorial function prescribed by section 120 should not, in the Board's opinion, exercise in Melbourne the judicial function prescribed by sections 137 and 138. A judge should avoid association with those whom he judges, for in such an association there is risk of embarrassment, misunderstanding, distrust and resentment. It may be impracticable to preclude performance of both functions by the same magistrate in most of the country prisons, but in localities where it is not impracticable to assign the two functions to different magistrates, that should be done. This suggestion would be appropriately implemented, the Board thinks, not by legislative provision, but by direction of the Executive Government.

CHAPTER 5.

ADMINISTRATIVE DETERMINATIONS—PARTICIPATION BY PRISONERS—MODES OF PARTICIPATION—REVIEW OF DETERMINATIONS.

5.1. To the extent to which public judicial regulation of prisoners' lives is practicable, it may in the Board's opinion be expected to operate satisfactorily and to find acceptance with the prisoners' their custodians and the general public. But no responsible opinion suggests that it is practicable to commit to judicial agencies any extensive function in the routine administration of a penal system, or even in the system of prison disciplinary tribunals. Except when a prisoner stands in peril of further imprisonment, an administrative body will have the function of enlarging or restricting the amenities of his daily life and of curtailing or extending, within the period of his sentence, the duration of his incarceration, by parole and remission. The administrative exercise of those functions vitally affects the most cherished interests of every prisoner—his freedom of choice within prison and the time of his release from prison. Dissatisfaction among prisoners about such matters tends to induce indiscipline. To all but a small number of prisoners the jurisdiction of the visiting justice, and of the governor in the formal disciplinary role in which section 131 of the *Social Welfare Act* 1970 casts him, will rarely be of personal interest. But the administration of the parole system and the grant or denial of remission are the subject of poignant concern to many prisoners. The strong pressures for public formulation and promulgation of the criteria to govern the exercise of those administrative functions, and for judicial review and supervision of their exercise, which are already so evident in the United States of America, may soon be felt in this State. Although in the United States those pressures are intensified, and are afforded ready means of legal expression, by constitutional provisions which have no counterpart in Australia (see the Journal of Criminal Law, Criminology and Police Science (Northwestern University School of Law) June, 1972), the source of those pressures is not in any legal document, but in cultural processes which may be discerned as plainly here as in America. While technical legal considerations and popular prejudices may cause attention to be focused initially on the protection of what are asserted to be the rights of prisoners before administrative disciplinary tribunals, it is in the Board's opinion important to keep in mind that the prejudice which a prisoner may suffer at the hands of such tribunal is insignificant in comparison with the prejudice which the Parole Board, by denial of parole, and the Director-General of Social Welfare, by refusal of remission, have power to inflict. Those latter two administrative agencies enjoy a status and public regard much higher than the governor of a prison who exercises the disciplinary function conferred by section 131. But they are dependent, to an extent which no governor is dependent, upon the honesty and understanding of subordinate administrative officers for the correctness and adequacy of the information upon which they make their determinations.

5.2. Mr. Johnston's opinion that " we should work towards replacing the present quasi-judicial system with purely administrative management" did not betoken any lack of concern for justice, or for the appearance of justice, in the process whereby disputed facts about the conduct of prisoners are to be administratively ascertained when serious prejudice to prisoners may attend administrative decisions based upon those findings of fact. It is to the administrative process of finding what the conduct of prisoners has been, particularly under section 131, that the Board now directs its attention, postponing consideration of what Mr. Johnston and other penologists would condemn as " the petty retributivism and psychological distancing " which the punitive provisions of section 131 are said to involve.

5.3. The Board was very fortunate in the assistance which it received from the four expert witnesses who dealt with the subject in their evidence. Mr. Johnston's academic position has been mentioned. As a Victorian barrister trained in English law, Mr. Johnston amply justified, in the Board's opinion, Sir Alexander Paterson's preference for a lawyer as the head of a University Department of Criminology. (See Cross : *Punishment, Prison and the Public* (Stevens, 1971) pp. 36–37.) Mrs. G. N. Frost has long maintained both a scholarly and a practical interest in penology, rendering valued service on statutory and voluntary bodies engaged in penal administration and in the rehabilitation of criminals particularly women. Dr. R. L. Misner combined high academic legal qualifications with experience as counsel for the State of Oregon, when he was engaged in litigation with respect to the assertion of prisoners' rights and upon the drafting of prison disciplinary rules and procedures. His thorough understanding and admiration of the American legal doctrines which exalt individual right against governmental coercion were matched by his realistic appreciation of the requirements of effective penal administration. Mr. David Hundley had served for six years as a prison officer at Pentridge, for four years as a probation and parole officer and for ten years as a supervisor of classifications and treatment in the Victorian prison service. He was academically qualified in three disciplines : criminology, social studies and psychology.

5.4. The problems are many which beset any attempt to involve the prisoner in the administrative determination of his own future in prison. That the attempt is worth making and the problems worth tackling, no contemporary penologist denies. Considerations of justice and discipline aside, the attempt is justified as an important aspect of the quest for reformation of the

prisoner himself. Mr. E. J. Flannery, the Chairman of the Penal Reform Group of the Victorian Council for Civil Liberties, cited in evidence before the Board an eloquent statement of the dilemma which incarceration for crime presents to penal administrators and to the community :

> " We remove people from a free community so that we may teach them to live in a free community.
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> We want them to live normal sexual and marital lives, and we isolate them from contact with the opposite sex.
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> We want them to make their own wise decisions and accept responsibility for these decisions once made. To accomplish this, we place them in an environment where they are forbidden to make even simple decisions. We tell them when they will arise, bathe, go to breakfast, to the shop, to bed, even to the toilet. We decide when they shall talk and when not, when they may walk through a doorway or gate. We tell them what they will wear, to whom they may write, and how often.
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> We want prisoners to learn good work habits, so that they may support themselves and their dependants on the outside, but we keep most of them idle in institutions, put a good many to relatively meaningless maintenance work, and assign the rest to trade training which, if it exists at all, is likely to leave much to be desired.
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> We want prisoners to be ' normal ', to which end we place them in an abnormal environment, unlike anything else on the outside, in daily contact with fellow inmates, many of them abnormal by any definition. Even the best managed institution is an abnormal environment for human beings and no way yet devised has overcome that handicap. Take away from a man his freedom, his right to make decisions, his opportunity for sexual and family life, and you deprive him of three of the most precious things in life. The longer his sentence, the more likely a prisoner is to be corrupted by the institutional climate."
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> (The Hon. J. C. Maddison, citing D. Dressler : The *Theory and Practice of Probation and Parole ;* N.S.W. Parl. Debates, 30.8.1972.)

5.5. The problems, as they relate to questions which paragraph (*b*) of the Order in Council poses for the Board, may be subsumed under two categories. First, if it be proposed that a prisoner should be given an opportunity to be heard with respect to any administrative decision which may seriously disadvantage him, the question arises as to what should be admitted to be such a serious disadvantage. Questions of parole and remission come immediately to mind. In the Board's opinion parole is a subject outside the purview of Part IV. of the *Social Welfare Act* 1970 and outside the ambit of the inquiry directed by paragraph (*b*) of the Order. The grant of remission is a discretionary function exercisable by the Director-General. The statutory provisions and the regulations which deal with the subject of remission are outside Part IV. of the *Social Welfare Act* 1970. Paragraph (*c*) of the Order in Council does not in the Board's opinion authorize any general examination of that subject, merely a consideration of a particular problem which experience of the system has revealed. In any event, the Board supports the principle upon which the system of remissions rests in Victoria, that no right to any remission can be gained by prisoners, to whom grant of remission is a discretionary indulgence. (In New South Wales remission is a matter of legal entitlement : See *Cheetham* v. *McGeecham* (1971) 2 N.S.W.L.R. 222.) But the grant of remission is conditioned by Regulations 97 and 98 of Division III. of the Social Welfare Regulations 1962 upon the prisoner's good conduct and industry, so that the Director-General must inform himself, before he exercises the discretion, as to what the conduct of the prisoner has been. A finding adverse to a prisoner on that question is therefore of very serious consequence to him, and likely to influence him to indiscipline. Paragraph (*b*) of the Order in Council might therefore authorize a recommendation that Part IV. be amended to require that the prisoner be heard on the question.

5.6. Although he is not at present required to hear the prisoner on the question, the Director-General is, in the Board's opinion, already adequately empowered by Part IV. to establish a system for such hearings. Section 130 of the *Social Welfare Act* 1970 empowers him to " make inquiry and take evidence on oath or otherwise as to the conduct of any prison officer and as to the treatment and conduct of the prisoners ". Section 10 (2) of that Act enables him, with the approval of the Minister for Social Welfare, to " assign in writing to any Director or senior officer of the Department any of the statutory functions or duties of the Director-General either generally or in any particular case ". In the Board's opinion section 10 (2) would authorize assignment, to the governors of Victorian prisons, of the functions designated in section 130, for the purpose of hearing the evidence of prisoners and officers upon questions relevant to the exercise of the Director-General's power to grant remission. Sections 130 and 10 (2) would also empower the Director-General, with the Minister's approval, to institute an administrative hearing of prisoners' and officers' evidence on most, if not all matters of serious concern to prisoners.

5.7. That is, in the Board's opinion, as far as statutory provision should go, at present. Even if it be assumed that adequately trained staff would be available to administer, in respect of remission, a system of inquiry into prisoners' conduct in which the prisoners were entitled to

participate, prescription of the circumstances in which, and of the means by which, that participation should be effected cannot in the Board's opinion be effectively achieved by Parliament : it ought to be left to regulation by the Governor in Council and to the Director-General's administrative direction.

5.8.1. Re-classification of a prisoner to H. Division, or to other divisions of Pentridge or a country prison, is another administrative decision which is for many prisoners a matter of very great importance. Relegation to H. Division is plainly a real disadvantage to most prisoners, and when it is effected, as it sometimes is, without assignment of any reason more specific than that which the word " security " conveys, resentment and a conviction that he has been unjustly treated is generated in the prisoner, even if he is in no real doubt as to the reason or as to its validity. If departmental resources were adequate for the administrative work involved, and if effective segregation of incompatible categories of prisoners were possible, administrative hearings to which the prisoner had some access should, and no doubt would, precede any re-classification to which he objected. (The wishes of prisoners in relation to classification are in many circumstances given careful consideration at present.) But while Pentridge serves as many purposes for as many classes of prisoner as it presently does, and while the numbers and the vocational training of prison staff remain at their present levels, unexplained re-classification of prisoners cannot be avoided. To create a statutory obligation to hear representation by a prisoner before re-classifying him would in present circumstances impede rather than further the attainment of justice and efficiency in classification, in the Board's opinion.

5.8.2. Although paragraph (*b*) of the Order in Council limits recommendation by the Board by this subject to statutory prescription, the Board cannot repress the observation that, in its opinion, a prisoner who is relegated to H. Division should be brought before the governor within 48 hours of his induction into the division ; should be informed by the governor of the reasons for his confinement in the division (unless the governor judges it to be unwise to disclose the reasons) ; should be offered the opportunity of stating to the governor his objection to confinement in the division and, briefly, any argument he wishes to advance against that confinement ; and should be assured by the governor that any such argument will be communicated by the governor to the Classification Committee. The substantial equivalent of that procedure has in a number of instances occurred in the past. H. Division prisoners have been permitted to see the governor and to ask him for an explanation of the reason for their relegation to the division. But ordinarily it was a meeting which the prisoner sought. A decision of such consequence to a prisoner as relegation to H. Division should, if possible, be communicated to him by the governor and his views solicited. The comparatively small number of inductions into H. Division would make it possible, in the Board's opinion, to observe that procedure in relation to those inductions. In a number of instances, the Board does not doubt, the interview will be a mere charade, each party knowing not only what the other will say, but also what he is thinking. Even in those instances, the Board thinks, the time will not have been wasted : there will be in the meeting a recognition, by the community which the governor represents, of the prisoner's value as a person, which may help the prisoner himself to find that value.

5.8.3. Confinement of a prisoner in H. Division, or under any comparable regimen, ought not in the Board's opinion to continue longer than the governor and a superior of the governor of high departmental status are convinced is necessary. Close personal investigation of the case of each prisoner so confined ought in the Board's opinion to be undertaken by such a superior at frequent, regular intervals. And it is important, in the Board's opinion, that during each investigation the superior should hear what the prisoner has to say to him, out of the hearing of every person employed in the prison, including the governor.

5.9.1. The second category under which the problems of participation by the prisoner in administrative disposition of him may be subsumed, relates to the modes by which the prisoner is to engage in dialogue with the administrative organization through which the disposition will be made. Section 131 illustrates some of the problems, in relation to remission. Under that section a prisoner charged and found guilty by a governor of misconduct specified to the prisoner may be detained in prison by the governor for seven days longer than he would have been detained if he had not been found guilty. In such a case the prisoner will come face to face with the person who makes that decision, he will be made aware of the allegation upon proof of which the decision is to be made and he will have an opportunity of speaking to the question whether the allegation is true, and to the question whether, if it be true, the decision to detain him longer should be made. But decisions of no less importance to the prisoner could be made about the grant or denial of remission by the Director-General, in whose discretionary grant remission has been placed by Regulations 97 and 98 of Division III. of the Social Welfare Regulations 1962. Even if the prisoner were granted the right to address the Director-General, or a governor to whom the Director-General had delegated the function of making the decision, it would not infrequently happen that disclosure to the prisoner of misconduct alleged against him could not go further than a general indication without endangering the physical safety of another prisoner. For that reason no charge of that misconduct would be laid under section 131. (Similar considerations apply to many decisions to relegate prisoners to H. Division or to another prison.) The prisoner, however, would have been denied information

about the allegation which might have enabled him to refute it. Unless a prisoner knows the circumstances which are influencing the administrator's decision, any right accorded him to address the administrator on the question for decision is of limited value to him. But unless prison administrators can keep their own counsel about much of the information they acquire concerning prisoners' conduct in prison, the maintenance of discipline will be made very difficult.

5.9.2. Within prisons, if not throughout the organization by which a penal system is administered, powerful influences inhibit open acceptance by any member of the staff of assertions by a prisoner in contradiction of another member of the staff, and restrain staff members from openly providing corroboration of such an assertion. Similar influences may be seen to operate in other occupational and social groups, notably among prisoners and, it is said, among the members of police forces and of two of the three professions formerly allowed learned. Nowhere are such influences stronger than in a prison. Those influences militate against a correct determination of disputed questions of fact in a prison and prevent acceptance of the determination by members of the group which " loses ". Penal administrators have been driven, in some places outside Victoria, to resort to procedural devices of various kinds in attempts to circumvent, or to distract attention from this unpalatable reality : except in a rare case a prison tribunal will not openly accept the assertions of prisoners against the word of a member of the staff, nor will one member of the staff openly contradict the assertion of another member of staff before such a tribunal. Therefore, when a prisoner is required to communicate, to a person whose decision may adversely affect him seriously, his version of a disputed question of fact in an intra-mural proceeding of a prison tribunal, the obstacles which impede truthful and effective communication are very great. To the obstacles already indicated must be added those which the prisoners' code of conduct imposes on the protagonist and on other prisoners who have information relevant to the question in dispute.

5.9.3. When the proceeding in which the question in dispute is a disciplinary hearing such as section 131 prescribes, there is a further complex of psychological pressures upon the person or persons who constitute the tribunal. Mr. Hundley confirmed, from his personal experience of Victorian prisons, the strong testimony of published material that prison officers bring prisoners before such tribunals in confident expectation of the moral support which punishment awarded by the tribunal will afford them in their dealings with the prisoners who are punished and with other prisoners ; and that, if their expectation is disappointed in any but extraordinary circumstances on rare occasions, they bitterly resent the betrayal which they conceive dismissal of a charge to be, and are tempted to substitute for formal disciplinary procedures the infliction of unlawful punishment at their own hands.

5.9.4. For the solution of the problems which the Board has attempted to indicate in the three preceding paragraphs, a number of measures have been tried, but with limited success. Even in penal systems which are much more liberally funded than any Australian system, solution of the problems has been frustrated by the pervasive behaviour patterns which cause those problems. (Sociological study of prison cultures is being intensively pursued in the United States : See, for example, *Deviant Behaviour and Social Process*, ed. W.A. Rushing (Rand McNally and Co., 1969), Ch. 4.) In 1970 a United States Federal court made a decree imposing on the State of Rhode Island a code of disciplinary and classification procedures in respect of the State's prison for adult male convicts, designed to ensure fairness in the prison's disciplinary proceedings by establishing a variety of procedural safeguards. The court retained and exercised the power to modify the provisions of the code in the light of experience of its implementation. The operation of the code and the court's role in its introduction were the subject of an elaborate and sophisticated study by the Harvard Center for Criminal Justice, the findings of which were published in the June, 1972 issue of the Journal of Criminal Law, Criminology and Police Science, published by Northwestern University School of Law. The Board found this article very helpful and sets out some parts of it :

> " The court's decree approaches prison disciplinary procedures in a basically unidimensional manner, imposing intricate fact-finding procedures as preconditions to disciplinary actions. Although the similarity of this procedural due process approach to the judicial trend toward insuring procedural regularity in our criminal system is apparent, the dissimilarities between the prison disciplinary setting and the criminal trial setting are equally apparent. Prison disciplinary processes often serve multiple if not conflicting purposes. Any analysis of such correctional processes must therefore be viewed in the context of these multiple objectives.
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> Perhaps the most significant factor observed by our researchers was that the disciplinary processes at the A.C.I. (the abbreviated name of the prison) were pervasively dispositional in nature. The critical problem, therefore, in applying a procedural due process model to the A.C.I. is that such a model is designed to insure the integrity and fairness of the fact-finding, and not the dispositional, process. Certainly, where there is a dispute as to the facts of a particular case, fair procedures in resolving that dispute are desirable. However, the value of these procedures may be considered against their possible interference with other functions and the purposes of the disciplinary process.
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> We have already examined some of the reasons why fact-finding is minimized at the A.C.I. Primary among them is the preservation of staff morale, especially custodial

staff morale. The presumption of credibility must be against the inmate if the members of the Disciplinary Board are to continue to be on " good terms " with the charging and superior officers with whom they work daily. This maintenance of staff morale is reflected not only in the minimization of the fact-finding process, but also in the types of conduct subject to disciplinary action. Well over one-third of the misconduct incidents for which inmates were brought before the Disciplinary Board involved conflicts with guards and staff.

Scrutiny of the types of behaviour subject to disciplinary action reveals that the maintenance of control is another critical purpose of the disciplinary process at the A.C.I. Discipline contributes to control, not only by curtailing potentially disruptive incidents, but also by creating a substantial deterrent to such disruption. Clearly, the maintenance of tight control is a paramount concern of all prison administrators. However, at the A.C.I. almost all ' rule infractions ' were viewed as threats to control and institutional authority. Such rigidity of response and attitude may well exacerbate rather than ease the control problem.

Traditionally prisons are isolated and of low visibility to the outside world. This pervasive ' closed ' atmosphere has diverse effects upon the prison disciplinary system. The closed nature of the institution makes it inevitable that Disciplinary Board members bring personal knowledge of each inmate to the hearings. Although, in many instances this personal information may have some dispositional value, often it taints the proceedings with unfair prejudice.

Furthermore, an inmate who chooses to defend himself vigorously by directly challenging a guard's veracity may, because of the nature of the institution, find himself subject to harmful and perhaps unanticipated repercussions. Unlike the court defendant, who may never again come into contact with the arresting officer, in most instances the inmate must return to his same cell or shop area, under the supervision of the officer whose charge brought him before the Disciplinary Board, and whose credibility he has challenged. With proper training and restraint, an officer of the institution may learn to disregard this challenge. It is at least equally possible, however, that an offended officer may harass and intimidate the inmate, especially in those rare cases where, the inmate has, in effect, won at the Disciplinary Board hearing.

In the final analysis, the success or failure of any new correctional program depends upon the underlying attitudes of the custodial as well as the administrative staff toward the change. Where there is antagonism, no amount of care in drafting meticulous provisions and structuring intricate processes will achieve the objective of a fair and impartially administered disciplinary system.

Perhaps the most pervasive limitation which plagues the A.C.I. is the inadequacy of its resources. Due to the structural limitations of the A.C.I.'s maximum and medium-minimum security institutions, inmates of vastly different criminal backgrounds and degrees of institutional ' adjustment ' are all lumped together. These inadequate living conditions, compounded by the almost complete absence of training programs, exacerbate disciplinary problems. Where resources allocated by the State legislature remain entirely inadequate, any judicial decree, however thoughtfully designed, cannot remedy these fundamental ills which go to the very core of the prison disciplinary system."

5.10.1. The first question which the Board poses in relation to section 131, or in relation to any other provision which might be introduced into Part IV., is whether an administrative tribunal empowered to determine what the conduct of a prisoner has been in circumstances which expose the prisoner to serious prejudice if the determination is adverse to him, should be composed of a person or persons other than the governor of the prison where the prisoner is incarcerated.

5.10.2. If the choice of a person to constitute such a tribunal was designed only to ensure that the tribunal would be unresponsive to the demands for loyalty and support which prison staff make upon such tribunals, a visiting justice or some other person who was quite dissociated from the Social Welfare Department would no doubt be selected. Within the Department, the choice might in those circumstances fall upon the highest ranking officer available, as being the least susceptible to the pressure of those demands. The Board's belief is that the pressure will not be greatly diminished, nor the quality of administrative justice ameliorated, by passing to those who are outside the Department the function of making factual determinations of the kind which are under consideration. To withdraw those responsibilities from departmental officers would in the Board's opinion tend to reinforce the immature attitudes from which spring the demands of prison staff for uncritical support by disciplinary tribunals. Such a denial of responsibility would be inconsistent, the Board thinks, with commitment to the adequate education and training of prison staff for their very difficult vocation which is in the Board's opinion the essential prerequisite of improvement in our penal system. Within the Department, no more suitable person to constitute such a tribunal can at present be found than the governor of the prison, in the Board's opinion. It must be conceded

that his working relationship with his subordinates, which makes him dependent on their loyal co-operation for success in running the prison, magnifies the intensity of the pressures on him to exercise his disciplinary function with reciprocal loyalty to them. But those psychological pressures on prison officers who are subordinate to the governor would in the Board's opinion be even more intense. Officers of the Prisons Division of the Department above the rank of governor may at present be counted on some of the fingers of one hand. Were their numbers to be increased, so that one or more of them could be assigned to disciplinary tribunals, there might yet for some time be difficulty in finding among them a man with the appropriate experience of prison life. If the head office of the Prisons Division included in its staff officers who had served at a senior level in prisons, they might more effectively constitute a prison disciplinary tribunal than the governor. Until such men are available, the Board believes that the governor is the best choice. In order to provide for what the Board hopes will be a rapid development of the resources of the Prisons Division in the future, the Board recommends that there be inserted in section 131, after the words " governor of a prison ", the words " or a senior officer of the Department appointed by the Director-General ", and after the words " governor of the prison ", the words " or a senior officer so appointed ". If the latter amendment is made, it would be necessary at the same time to amend Regulation 26A of Division III. of the Social Welfare Regulations 1962.

5.11.1. The second question which the Board poses in relation to section 131, or in relation to any other provision which might be introduced into Part IV., is whether an administrative tribunal empowered to determine what the conduct of a prisoner has been, in circumstances which expose the prisoner to serious prejudice if the determination is adverse to him, should receive from Parliament statutory direction as to the procedure which the tribunal is to follow in reaching its determination.

5.11.2. Dr. Misner provided the Board, from his extensive knowledge and practical experience, with a penetrating discussion of the various procedural rules and techniques by means of which justice may be more nearly attained by prison disciplinary tribunals. The evidence which the Board heard and the material which it read brought it to a firm conviction that a statute is not the appropriate repository of procedural rules of that kind. The development and adaptation of such rules to varying circumstances and localities is in the Board's opinion a task for penal administrators to keep constantly in hand, so that they modify and adjust those rules from time to time in response to experience of the practical operation of the rules in different prisons and, it is to be hoped, in response to the development in prison officers of appreciation and acceptance of the principles of administrative justice which better vocational training would nourish.

5.12.1. The conclusion stated in the preceding paragraph excludes from the ambit of the Board's inquiry further consideration of the question as to what procedural rules (other than rules regulating legal representation of prisoners and prison officers at the hearing of charges) should govern the exercise of the function conferred on prison governors by section 131 and the exercise of any similar administrative function by which a prisoner may be seriously prejudiced. Paragraph (*b*) of the Order in Council, although it makes specific reference in sub-paragraph (ii) thereof to the formulation and hearing of charges against prisoners, limits the quest for administrative justice to prisoners by reference to amendment of Part IV. of the *Social Welfare Act* 1970, except in respect of representation of prisoners and prison officers at the hearing of charges. Parliament has in the Board's opinion already provided in the *Social Welfare Act* 1970, and particularly in sections 5 (1), 111, 112 (*b*), 130, 10 (2), 182 (*j*), 182 (*k*), 182 (*m*), 182 (*n*), 182 (*w*), 182 (*ac*) and 182 (*ae*) and Part VI., an adequate statutory basis for the attainment of justice in those spheres of penal administration with which Part IV. is concerned, provided only that sufficient money is appropriated for that purpose, and should leave the prescription of procedural rules to the Governor in Council and the Director-General of Social Welfare. Yet the Board is reluctant to leave a subject from consideration of which it has thus excluded itself without making some observations on that subject. They may be prefaced with the warning that the American experience may soon be repeated in this State. Notwithstanding the considerable differences between American and Victorian legal modes of attracting judicial scrutiny and control of administrative activities, ways may be found to involve the Supreme Court of Victoria in the supervision of administrative determinations which seriously affect the period or the conditions of penal incarceration. The first observation, outside its terms of reference, which the Board hopes may be helpful is that, if a prisoner is to be afforded an opportunity of speaking upon a question which is of serious consequence to him and which is to be administratively determined (the question of his guilt or innocence of a charge under section 131, for example), it ought to be regarded as essential that the prisoner have adequate prior notice (not in any event less than 48 hours) of what precisely the question is (for example, what precisely he is charged with having done or failed to do, under section 131) ; and that when the question is whether or not the prisoner did or failed to do a particular act (as will be the case in proceedings under section 131), any other prisoner who is asserted to have knowledge relevant to the determination of that question should be given the opportunity of communicating with the person by whom the question is to be decided. Observance of those two requirements may well encourage the fabrication of falsehoods by prisoners and result in lengthening of proceedings under section 131 and of other administrative inquiries. But they are in the Board's opinion requirements, disregard of which

must often induce in the prisoner's mind a rational conviction that his declared right to be heard upon the question for decision is illusory and, sometimes, a conviction that the inquiry is a sham. To some, the selection of only those two specific procedural requirements for recommendation may seem ill-advised and inadequate. To ensure compliance with those two requirements would perhaps be only a short, first step. The Board believes it would be a step well worth taking immediately, but the Board is not convinced that it would be wise to impose more elaborate procedural requirements until governors have acquired a fuller understanding of the principles which underlie such requirements.

5.12.2. By far the best means of ensuring fair and effective procedural regulation of proceedings under section 131 and of other administrative determinations of serious consequence to prisoners, in the Board's opinion, is the education of those who will preside over the proceedings and make the determinations. Underlying procedural requirements and the intricate technical reasoning of the courts about judicial supervision of administrative action are a small number of rational principles, by observance of which an administrative tribunal will preserve itself from doing injustice of a kind which the law does not tolerate. The Board does not doubt that an understanding of those principles and of the techniques by which their observance may be ensured could be inculcated in mature prison officers aspiring to appointment as governor or to other senior posts, by instruction under supervision of the Social Welfare Training Council. (That instruction ought in the Board's opinion to be undertaken during hours of duty. At present the only vocational curriculum of study provided by the Department for prison officers after their initial three-month period of training must be pursued by correspondence in their own time.) A very useful course of instruction could in the Board's opinion be completed in a period of less than three months, or in several periods aggregating no more than three months. If thus instructed, and observed from time to time during the exercise of their quasi-judicial functions by a suitably qualified supervisor, governors and other senior departmental officers would discharge those functions immeasurably better than they now do, in the Board's opinion. Mr. E. V. Shade, the Director of Prisons, devotes what time he can to guide and counsel governors concerning the exercise of their functions under section 131, but it is impossible for him to undertake, in the time available to him, adequate training of his subordinates in that work.

5.13.1. The third question which the Board poses in relation to section 131, or in relation to any other provision which might be introduced into Part IV., is whether decisions of an administrative tribunal which determine what the conduct of a prisoner has been, in circumstances which expose the prisoner to serious prejudice if the determination is adverse to him, should be subjected by statutory provision to appellate or other mode of review.

5.13.2. The exercise of any administrative function is subject to one mode of review : examination and criticism by an administrative superior. Another mode of review, which renders the decision in any particular case liable to alteration, re-commits to another administrative tribunal or to a judicial tribunal the exercise of that function, at the request of a person with a particular interest in the decision. In other modes of review an administrative decision may be nullified by demonstrating to the judicial or administrative reviewing tribunal that error of a specified description has marred the exercise of the decisional function. Any mode of formal review which may result in alteration of the particular decision reviewed is expensive : what has been done once will, or may, have to be done again. There is, in the Board's opinion, no administrative function, of the kind which is under present consideration, on which that expense is justifiable in present circumstances. In particular, the public expense involved in providing a statutory right to review of a governor's decision under section 131, as a result of which the decision might be nullified or altered, cannot in the Board's opinion be justified. There are in the Board's opinion many other ways in which justice for prisoners and their rehabilitation ought to be pursued, at a cost to the community in excess of what will easily be borne, before the decision of questions under section 131 is made subject, by statute, to reversal or alteration by judicial or administrative review. Until governors have been provided with adequate instruction in the work which section 131 requires them to do and until it has become unnecessary for the Director-General of Social Welfare to report to the Minister for Social Welfare, as he did report pursuant to section 11 (1) of the *Social Welfare Act* 1970 on the 30th September, 1972 (in the Board's opinion, with complete accuracy), that the only effective means of meeting the situation in which he found the prison system " is by very substantial increases and improvements in accommodation, facilities and staff, including specialists in the fields of training, welfare and rehabilitation " ; until those and other things have been achieved, public expenditure on formal review of decisions made under section 131 is in the Board's opinion quite unjustified. The Board thinks that the same answer ought to be given, for the same reasons, to any suggestion that disciplinary functions such as section 131 confers should be exercised by someone unconnected with the Social Welfare Department, such as a visiting justice, or that a prisoner charged under section 131 should have the right to elect for trial of the charge in public by a stipendiary magistrate under section 138.

5.13.3. There is a further reason against legislating for a formal review of decisions under section 131. If recommendations which are made later in this report gain acceptance, the only serious consequence to a prisoner of an adverse decision under section 131 will be loss of

remission and the prejudice which the decision may work against the prisoner with the Parole Board or the Classification Committee. In those spheres of influence on the lives of prisoners, the Board has earlier remarked, Victorian legislation outside Part IV. of the *Social Welfare Act* 1970 adheres, in the Board's opinion wisely, to a policy of entirely discretionary administration. It would in the Board's opinion be a pointless and confusing contradiction of that policy to adorn proceedings under section 131 with more indicia of judicial process than the section presently exhibits. The lack of such adornments will not in the Board's opinion attenuate the striving of governors and their superiors for administrative justice, nor discourage careful administrative review by those superiors of decisions under section 131, if they have the appropriate resources.

CHAPTER 6.

MODES OF PUNISHMENT—JUDICIAL—ADMINISTRATIVE.

6.1.1. By way of introduction to the subject of punishment of prisoners for offences committed in prisons, the Board refers again to the observations of Mr. Johnston which it quoted in paragraph 4.2 of this report and invites comparison of those observations with the following statements by Sir John Barry :

> " Dr. Leon Radzinowicz has rightly observed that the criminal law is fundamentally ' but a social instrument wielded under the authority of the State to secure collective and individual protection against crime '. It is a social instrument whose character is determined by its practical purposes and its practical limitations. It has to employ methods which are, in important respects, rough and ready, and in the nature of things it cannot take fully into account mere individual limitations and the philosophical considerations involved in the theory of moral, as distinct from legal, responsibility. It must be operated within society as a going concern. To achieve even a minimal degree of effectiveness, it should avoid excessive subtleties and refinements. It must be administered publicly in such a fashion that its activities can be understood by ordinary citizens and regarded by them as conforming with the community's generally accepted standards of what is fair and just. Thus it is a fundamental requirement of a sound legal system that it should reflect and correspond with the sensible ideas about right and wrong of the society it controls, and this requirement has an important influence on the way in which the judges discharge the function of imposing punishments upon persons convicted of crime. The essential postulate of the criminal law was stated by Sir Matthew Hale in the seventeenth century, that, ' Man is naturally endowed with two great faculties, understanding and liberty of will. . . The consent of the will is that which renders human actions either commendable or culpable. . . ' It may be true that freedom of the will is a subjective illusion, as the Positivist School of Criminology and a significant body of psychiatrists have claimed, but the everyday affairs of mankind are grounded on the assumption that the normal individual is free to choose between good conduct and bad. All moral systems of any practical importance in the world assume that the will of man is free, and that it is therefore rational and equitable to reward him when he does what is currently regarded as good, and to punish him when he does what is considered to be evil. Without that assumption, which intuitively seems right, group living would be impossible and society would disintegrate. In presuming that in the absence of evidence to the contrary human actions are voluntary, the criminal law accords with the common experience and customary behaviour of mankind. This is true also of the assumption which underlies the use of punishment, that the conduct of human beings can be influenced by the threat and, where necessary, the infliction of a painful experience ; in short, as the proverb has it, that a burnt child dreads the fire. But it is part of wisdom to recognise that the more knowledge we accumulate about human behaviour, the narrower the field of free will seems to be, and that, as foresight is often lacking, and taking risks is a human characteristic, control by fear or intimidation, which is the true meaning of deterrence, is much less effective than it is often assumed to be.
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> The assumptions on which the courts act in imposing punishments owe more to practical considerations than to philosophical speculations. None of them is universally true, but broadly speaking they accord with human experience. They are, firstly, that it is just and in accordance with the sentiments of sensible and law-abiding persons to retaliate by punishment for the criminal harm done by the offender ; secondly, that the retaliation is likely to deter the offender from repeating criminal conduct because of fear of suffering it again ; thirdly, that the fear of suffering a fate similar to that of the offender is likely to deter other persons from committing criminal acts ; and finally, that through the punitive experience the reformation of the offender may be achieved. Criminal punishment thus looks both backward and forward. It is imposed on a wrongdoer because on a past occasion he has misused for a bad or evil purpose a capacity or faculty which belongs to him for the attainment of good, and it aims at future prevention by seeking to teach him and others that human capacities must be used for good and not for evil ends.
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> I believe that the explanation of this expectation that in some way, though inevitably roughly and crudely, punishment will be proportioned to the gravity of the offence, is to be found in the circumstance that legal punishment is, in origin, vindictive, expressing the rooted desire of mankind that he who inflicts suffering unjustifiably and unlawfully should himself be made to suffer, and that it still retains that characteristic. Commenting that the answers to the questions, Why do we punish ? Whom do we punish ? How do we punish ? constitute the whole of the criminal law, an acute writer on criminal responsibility, Dr. Charles Mercier, a psychiatrist of eminence at the opening of the twentieth century, observed :
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> > ' We are driven to allow that Retribution is one of the main aims of punishment ; and . . . we must admit it takes precedence, not only in time,

but in importance, of Reformation and Determent . . . there are crimes which would not be punished at all, or would be punished with what we feel would be inadequate severity, if Reformation or Determent were the only aims of punishment. There is no explanation for the feeling of injustice and inadequacy with which we regard such treatment of crime, except in the imperative desire that those who do wrong should be made to suffer.'

The consequences of a punishment imposed by judicial sentence are intended to reinforce the general law-abiding sentiment that is essential if order and social stability are to be maintained As social beings, people need love and approval, and normally ostracism exerts significant pressures upon the individual to induce conformity with community standards. Imprisonment, the only drastic punishment remaining in societies that have progressed to the stage of abandoning the penalties of death and whipping and mutilation and chaining in dungeons, is in reality expulsion of the wrongdoer from the community for the duration of his sentence. The sentence is a solemn censure and a condemnation of an unworthiness that has been manifested by the criminal conduct, and the length of the sentence is the judge's estimate of the degree of that unworthiness. Deprivation of liberty, humiliation, subjection to the will of his keepers, and loss of significant civil rights, are features consequential upon the condemnation expressed by the sentence, and in combination they constitute criminal punishment. This is so because society wants it so, and regards it as just that it should be so. The test of a civilised society, however, is that it should exhibit restraint in the degree of suffering and humilation it imposes upon offenders, for as Alexander Maconochie contended, there is no greater mistake than the studied imposition of avoidable degradation as a portion of punishment. Awareness that by the penalties imposed the judiciary will express the abhorrence of the community is a powerful influence towards that restraint.

I do not claim that the retalitory feature of the criminal law are necessarily good or morally acceptable, though I think that for the purposes of maintaining order and internal peace there is more to be said for them than some humanitarian critics are willing to concede. I do contend, however, that it is bad science and worse sociology to disregard social realities and the actualities of the criminal process, and that the improvement of the criminal law and its inseparable adjuct, the punitive process, is not likely to be achieved if we delude ourselves about their essential characteristics and the factors that bring them about. . . . .

The reclamation and rehabilitation of criminal wrongdoers is, of course, a praiseworthy and necessary objective, and it is proper to pursue it with vigour provided the complexities of the social organization are recognised, and it takes its place within the whole scheme of civilised living. It is a grave and difficult social problem, but, after all, it is only one of many seemingly intractable problems with which society is confronted, and it must find its place in the scale of priorities to be given to the protection and education of the young, and the care and treatment of the sick, the afflicted, the aged, and the mentally deranged " (J. V. W. Barry : *The Courts and Criminal Punishments* (New Zealand Government Printer, 1969) pp. 14—16, 20—22, 48.)

6.1.2. The Board believes that the passages quoted from Sir John Barry's posthumously published lecture express the opinion of the great majority of the Victorian community ; and that, therefore legislative provisions with respect to the criminal law in prisons, as with respect to that law generally, ought not to be made in direct and extensive contradiction of that opinion, which prevails as generally, the Board suspects, among prisoners themselves as it does in the free community.

6.2. Holding those beliefs, the Board cannot recommend at this time the repeal of section 131 as an element in a system which, Mr. Johnston says, engenders " petty retributivism and psychological distancing ". The Board would hope to see the section fall into desuetude, as the changes which he advocates reform the attitudes of prison officers and enhance the skills needed to achieve the collaborative discipline which authoritative penological opinion envisages. But Mr. Johnston recognises that the changes will be gradual. A proceeding such as section 131 prescribes will in the Board's opinion remain for some years a necessary disciplinary technique.

6.3.1. The Board recommends deletion from section 131 (1) of all reference to solitary confinement, close confinement and dietary deprivations ; and deletion from sections 137 (2) and sections 138 (2) of all reference to solitary confinement.

6.3.2. Section 476 (*d*) of the *Crimes Act* 1958 authorizes the punishment of solitary confinement, when imposed by a court before whom the offender has been convicted of an indictable offence for which imprisonment could be awarded. And section 124 (2) of the *Justices Act* 1958 provides that whenever imprisonment may be awarded for any offence punishable on summary conviction involving threats indecent or insulting behaviour or wilful and malicious injury to property the court or justices may direct that the offender be kept in solitary confinement for periods which are specified in the sub-section, to which is appended a proviso that the period of solitary confinement

shall be preceded by examination by the medical officer of the gaol and shall not continue for a longer time than in that officer's opinion the offender can be kept in solitary confinement without permanent injury to his health. The existence of those provisions, outside Part IV. of the *Social Welfare Act* 1970, raised a doubt in the Board, hesitantly resolved, as to whether its duty to comply with paragraph (*b*) of the Order in Council required or authorised a recommendation at variance with the general policy which those provisions may be thought to express.

6.3.3. The Board is convinced that, in Part IV., no useful purpose is served by punitively imposed solitary or close confinement which cannot be as effectively achieved by other means. On the other hand, the Board believes that the imposition of those measures, by expressly punitive declaration, is likely to induce or exacerbate bitter resentment of penal authorities and of the law-abiding community which those authorities represent, as well as a strong sense of degradation, rejection, loss of human dignity and isolation : the very sentiments which nourish criminality and indiscipline in prison.

6.3.4. The Board acknowledges the need for a discretionary administrative power, which Regulation 105 of Division III. of the Social Welfare Regulations 1962 confers, to keep a prisoner apart from other prisoners. Nor is there any denial of the administrative power to determine where precisely in the prison a prisoner shall at any time be. The exercise of those powers enables the Director-General and his Departmental delegates lawfully to keep a prisoner in solitary or close confinement for as long as the Executive Government and the Parliament abstain from interference, provided that the provisions of Regulation 106 concerning daily exercise in the open air are observed. Not only do those administrative powers exist : they have been habitually exercised in H. Division and, less frequently, elsewhere in Victorian prisons. In Chapter 7 of its report in response to paragraph (*a*) of the Order in Council the Board described in some detail the regimen of prisoners' lives in H. Division. In the Board's opinion the conditions under which many prisoners who worked in labour yards lived in H. Division during 1970 and 1971 answered both the description " close confinement " and the description " solitary confinement ", although the prisoners were not commonly subjected to the dietary deprivation prescribed by Regulation 29 of Division III. of the Social Welfare Regulations 1962. Relegation to H. Division and to work in a labour yard therein was commonly by administrative direction, not pursuant to any punitive sentence. Indeed, there was sometimes no communication to the prisoner of any reason for his transfer to H. Division except what the word " security " conveys.

6.3.5. If the opinions expressed in the preceding paragraph are correct, a prisoner may lawfully be subjected to much longer periods of solitary confinement and of close confinement by an informally propounded administrative decision, from participation in the making of which the prisoner may be wholly excluded, than by judicial direction under section 476 (*d*) of the *Crimes Act* 1958, section 124 (2) of the Justices Act or section 137 or 138 of the Social Welfare Act, or by formal administrative disciplinary order under section 131. Notwithstanding that paradox, the Board thinks it right to leave the dispositional power with administrators, yet to deny both courts and administrators the power to set a fixed period of solitary or close confinement as a declared punishment. Restraints, deprivations and isolation, of various kinds and in varying degree, beyond what is imposed on prisoners generally, are measures of which, in the present state of knowledge, there is need in penal institutions : that melancholy proposition is generally admitted. The practical extent of such measures varies, from " tiger cages " to brief deprivation of television. The lawful procedures and deprivations of H. Division are not significantly different from, nor more rigorous than, procedures and deprivations which are practised elsewhere in Australia, and in the United Kingdom and the United States. Nor do they in the Board's opinion extend, save for dietary deprivation, beyond what may be needed in the present situation of the Victorian penal system. (The Board expresses no opinion as to whether particular prisoners, or classes of prisoner, have been wisely treated by confining them in H. Division for periods as long as the evidence presented to the Board indicated ; or, in some instances, by confining them in H. Division at all.) Isolation, restraint and deprivation must at times, for reasons of security and good order, be applied in response to the prisoner's conduct in prison. As Mr. Johnston observed : " If every prisoner is seen simply as being under continuous discipline anyway, his freedom of movement is constantly being enlarged or restricted according as he handles it responsibly." (The word " discipline " in that sentence is to be understood, the Board believes, in its older, nobler sense of mental and moral training.) The Chief and Senior Prison Officers of H. Division expressed a similar conception of what the Board thinks to be the right use of the lawful measures taken with prisoners in the Division when they exhorted their prisoners to work their way out of the Division. Solitary confinement may in certain circumstances be, for the present, the appropriate response to a prisoner's misbehaviour. If inflicted for so long only as no better alternative mode of treatment is available, and if explained to the prisoner as an unwelcome necessity which will be discarded or modified as soon as an available alternative is seen to be appropriate, having regard to the prisoner's behaviour, solitary confinement is in the Board's opinion a tolerable, although deplorably inadequate, instrument of social control. If inflicted for a pre-determined and unalterable period and explained to the prisoner as that which society regards as the appropriate punishment of his past misbehaviour, regardless of his future conduct, solitary confinement is, in the Board's opinion, harmful to prisoners and therefore inadvisable.

6.3.6. The Model Act for the Protection of Rights of Prisoners, which the National Council on Crime and Deliquency in America sponsored and published last year, makes the following provision with respect to isolation in solitary confinement :

" A prisoner may be placed in solitary confinement—segregation in a special cell or room—only under the following conditions :

(*a*) During such confinement, the prisoner shall receive daily at least 2,500 calories of food in the normal diet of prisoners not in isolation.

(*b*) The cell in which the prisoner is confined in solitary shall be at least as large as other cells in the institution and shall be adequately lighted during daylight hours. All of the necessities of civilized existence, such as a toilet, bedding, and water for drinking and washing, shall be provided. Normal room temperatures for comfortable living shall be maintained. If any of these necessities are removed temporarily, such removal shall be only to prevent suicide or self-destructive acts, or damage to the cell and its equipment.

(*c*) Under no circumstances shall a prisoner confined in solitary be deprived of normal prison clothing except for his own protection. If any such deprivation is temporarily necessary, he shall be provided with body clothing and bedding adequate to protect his health.

(*d*) A prisoner may not be confined in a solitary cell for punishment, and may be so confined only under conditions of emergency for his own protection or that of personnel or other prisoners. Confinement under such circumstances shall not be continued for longer than is necessary for the emergency. A prisoner's right to communicate with his attorney or the person or agency provided for in section 5 to receive complaints shall not be interfered with.

(*e*) No prisoner shall be kept in a solitary cell for longer than one hour without the approval of the highest ranking officer on duty in the institution at the time.

(*f*) No prisoner may be kept in a solitary cell for any reason for longer than forty-eight hours without being examined by a medical doctor or other medical personnel under the doctor's direction.

(*g*) A log in a bound book shall be maintained at or near any solitary cell or cells, and employees in charge of such cells or cell shall be responsible for recording all admissions, releases, visits to the cell, and other events except those of the most routine nature."

The nine distinguished members of the committee which prepared the Model Act included three penal administrators and a judge of a superior court.

6.4.1. Punitive dietary deprivation, such as is prescribed in section 131, is supposed to influence intractable prisoners to obedience. Sir Frederick Lawton, at present a Lord Justice of the Court of Appeal in England, communicated to the Royal Commission on the Penal System in England and Wales the opinion he had from his father, who was Governor of Wandsworth Prison, that in the latter's " long experience of hardened criminals there is nothing like ' chokey ' (i.e. solitary confinement) and ' 14 days No. 1 ' (i.e. bread and water) for taming the truculent and unruly ". (See *Royal Commission on the Penal System in England and Wales :* Written Evidence, vol. IV., p. 24. (H.M.S.O. 1967) The Royal Commission never reported and was dissolved in April 1966, in circumstances which are discussed by R. Cross : *Punishment Prison and The Public* (Stevens and Sons, 1971), pp. 188–190.)

6.4.2. It may be that misbehaviour of a gross kind, prompted by psychological or physiological mechanisms which are quite abnormal, will be judged by a legally qualified medical practitioner likely to moderate in response to some limitation of diet, without countervailing harm to the physical or mental welfare of the prisoner. If such a judgment were made by a doctor, limitation of the diet of the prisoner on the personal order of the governor or of an officer superior to the governor would in the Board's opinion be justified. It may be also that prolonged inactivity, occasioned by illness or by confinement in a cell for disciplinary reasons, may render medically advisable a reduction of food consumption below the level appropriate for working prisoners. That also is a matter of medical judgment, which penal authorities would properly accept. But dietary deprivation as a punitive sanction or as a lay technique in controlling misbehaviour, the Board believes to be unjustified. The denial of food is in the Board's opinion so extreme a humiliation and rejection, so emphatic a denial of the social bond between the prisoner and the community, that our community should renounce it as an instrument of social control, whatever its utility may be.

6.5. In paragraph 4.3 of their submission on behalf of the Department, Messieurs Shade and Bodna discuss the punishment which section 131 expresses in these words : " by stopping any gratuity which would otherwise be accruing to the prisoner for any period not exceeding one month ". Having regard to the doubts expressed in that paragraph, the Board recommends that they be removed by deleting those words and by inserting in section 131 (1) the following : " or by depriving the prisoner for any period not exceeding one month of any financial or other benefit privilege or advantage (other than remission or parole) which would or might otherwise accrue or be granted to him ".

6.6. Messieurs Shade and Bodna recommend, in paragraph 4.5.3 of their submission on behalf of the Department, that the governor be empowered by section 131 to impose, in proceedings under that section, the penalty of " reprimand " and the penalty of " denial of privileges ". The Board accepts those suggestions and recommends their implementation. The latter punishment has been comprehended by the amendment proposed in the preceding paragraph.

6.7. The Board has no other recommendation for amendment of section 131 or 137 or 138. If the recommendations it has made were implemented, those sections would read :

" 131. (1) The governor of a prison or a senior officer of the Department appointed by the Director-General may hear and determine all charges against a prisoner for any minor breach of the rules or regulations as by the rules or regulations made by the Governor in Council under this Act are directed to be submitted to the decision of the governor of the prison or a senior officer so appointed, and may punish such prisoner by reprimand or by postponing the discharge of the prisoner under the regulations or the release of the prisoner on parole for any period not exceeding seven days or by depriving the prisoner for any period not exceeding one month of any financial or other benefit privilege or advantage (other than remission or parole) which would or might otherwise accrue or be granted to him.

(2) A record of all such punishments shall be kept by the governor and forwarded every month by him to the Director-General and no prisoner shall be punishable upon a second charge for the same offence before a visiting justice.

137. (1) A visiting justice who is a stipendiary magistrate may inquire in a summary way into any charge of escaping insubordination assault upon or attempt to do any bodily injury to any officer or prisoner or any riot or tumult in a prison or other place where prisoners are in custody or any wilful and malicious destruction or injury of or attempt at the wilful and malicious destruction or injury of any such prison or any furniture thereof or of any public works or of any implements used thereon brought against any prisoner.

(2) The justice may upon convicting a prisoner sentence him to be kept to hard labour for a term of not more than two years.

138. (1) A visiting justice who is a stipendiary magistrate may inquire in a summary way into any charge of attempting to escape use of indecent abusive or threatening language or breach of any rule or regulation against a prisoner.

(2) The justice may upon convicting a prisoner sentence him to be imprisoned for a term of not more than six months for a first offence, and of not more than eighteen months for a second or subsequent offence."

The verbal transposition, and deletion of the word " visiting ", in the opening words of section 138 (2) is intended to bring the sub-section into correspondence with the phrasing of section 137 (2).

CHAPTER 7.

REPRESENTATION AT HEARINGS—PRISONERS—PRISON OFFICERS.

7.1. Paragraph (*b*) of the Order in Council directs inquiry and report as to " whether provision should be made for the representation of prisoners and prison officers at the hearing of charges ". The Board understands the word " charges " in that clause to refer to charges against prisoners of offences alleged to have been committed in prisons.

7.2. A person charged with the commission of a criminal offence in a Victorian court exercising a general criminal jurisdiction has the right to be represented by a lawyer. In the Board's opinion no distinction ought to be drawn, in respect of representation of prisoners, between proceedings under section 137 or 138 of the *Social Welfare Act* 1970 and summary criminal proceedings before a magistrates' court. In each proceeding a criminal charge is submitted to judicial determination, the accused standing in peril of punishment, by imprisonment before a visiting justice and by a fine and, in some cases, imprisonment before a magistrates' court. Since the right of an accused person to legal representation in the latter proceeding is expressly declared by section 91 (1) of the *Justices Act* 1958, it is in the Board's opinion desirable that a declaration to the like effect should be enacted in respect of proceedings under section 137 and 138. That could conveniently be achieved, the Board thinks, by amendment of section 141 of the *Social Welfare Act* 1970.

7.3. The *Legal Aid Act* 1969 facilitates the legal representation of persons accused of crime whose financial circumstances would make it difficult for them to secure appropriate legal representation without the assistance for which the Act makes provision. The assistance provided in pursuance of that Act is available to prisoners as well as other citizens. The Board is not aware of any reason why a further or different provision should be made for prisoners. Nor does the Board know of any reason why applications by prisoners, charged under sections 137 and 138, for assistance under the provisions of the *Legal Aid Act* 1969 would not be judged by reference to the same criteria as applications for such assistance by prisoners and free citizens charged under the provisions of the general criminal law before magistrates' courts. That is in the Board's opinion, as it should be. Assistance, to the prisoner and the free citizen alike, will be proportioned to the financial circumstances of each applicant, without regard to moral worth ; and indigence will not disable either from obtaining legal representation.

7.4.1. No doubt the confined condition of prisoners necessitates administrative arrangements which would ensure ready access by prisoners to the Secretary to the Law Department and to the Legal Aid Committee and to lawyers by whom assistance under the Act is arranged and provided. Appropriate statutory authority for such arrangements is provided by section 23 of the *Legal Aid Act* 1969, which reads :

> " The Governor in Council may make regulations for or with respect to—
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> (*a*) disseminating information to the public concerning the provisions of this Act ;
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> (*b*) prescribing forms to be used and procedures to be followed under this Act ; and
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> (*c*) generally all matters authorized or required to be prescribed for carrying into effect the provisions of this Act."

7.4.2. There are particular difficulties concerning communication between prisoners and persons who arrange, or provided them with, legal services. Those difficulties are likely to be more worrying when the subject of communication is a charge of an offence within a prison. In order to prevent illicit transmission of information and material between prisoners and free citizens, and in order to guard against escape, restrictions have been placed on oral and written communication with a prisoner by Part VIII. and Part IX. of Division III. of the Social Welfare Regulations 1962 (the relevant sections of which are reproduced in Appendix A). It is in the Board's opinion necessary for the effective legal representation of prisoners—

(i) that oral communication with those who arrange and those who provide legal representation be permitted in prison out of hearing of other persons ;

(ii) that written communication by the prisoner to those whose assistance he seeks, pursuant to the *Legal Aid Act* 1969, to arrange legal representation for him, should be permitted to pass unexamined by any officer of the Social Welfare Department in an envelope addressed to the Secretary to the Law Department or to the Secretary to the Legal Aid Committee.

The necessity for such privacy derives from the need for frankness on the part of the person seeking or receiving legal assistance and advice. Frankness can hardly be expected of a prisoner who believes that his communication will come to the knowledge of prison staff.

7.4.3. The Board does not understand the final clause of paragraph (*b*) of the Order in Council to limit the Board to consideration of statutory provision for representation at the hearing of charges, and therefore the Board recommends amendment of the Social Welfare Regulations 1962 to achieve the privacy of communication which it has specified in the preceding paragraph. The recommendation does not extend to reception by prisoners of unexamined written communications, nor to dispatch from prison of unexamined written communications by prisoners to their legal ad-advisers, because the Board does not believe that the public expense ensuring that illicit communication was not being contrived, under cover of correspondence by prisoners with so numerous a class of persons, would be recompensed by the advantages to be derived by permitting such correspondence.

7.5.1. Appearance by a lawyer in a legal proceeding on behalf of a person is ordinarily made in performance of a contract between the practitioner who appears and the person for whom he appears. From the contract of retained derive obligations on the parties which are in the opinion of the Board as appropriate when the client is a prisoner as when he is free a citizen of full legal capacity. Yet section 549 of the *Crimes Act* 1958 denies to a person against whom judgment of death or of imprisonment or of detention with hard labour has been pronounced or recorded by any court of competent jurisdiction in Victoria upon any charge of treason or felony, the capacity of making any contract or alienating or charging any property from the time of his suffering such a judgment until he has died or has been adjudicated bankrupt or has suffered any punishment to which sentence of death if pronounced or recorded against him may have been commuted or has undergone the full term of imprisonment or detention with hard labour for which judgment has been pronounced or recorded or such other punishment as may by competent authority have been substituted for such full term or has received a pardon for the treason or felony of which he has been convicted. (Section 549 is within Part V. of the *Crimes Act* 1958, verbiage from which constitutes most of the preceding sentence). That Part is largely a reproduction of the English Forfeiture Act 1870 (33 and 34 Vict. C. 23), which was criticised by Sir James Stephen in his History of the Criminal Law in England (MacMillan 1883 ; vol. 1, pp. 488—489), and most of which was repealed in England by the *Criminal Justice Act* 1948 (11 and 12 Vict. C. 58).

7.5.2. In the Board's opinion proper provision is not made for legal representation of prisoners under sentence for felony when they lack the capacity either to contract for the services of a lawyer or to alienate or charge their property in order to pay for those services. It is true that provision is made in Part V. of the *Crimes Act* 1958 for committal by the Governor in Council of the custody and management of such a prisoner's property to a curator to be appointed by the Governor in Council ; and that other provisions of Part V. empower the curator to deal with the prisoner's property. But in the Board's opinion those provisions do not satisfactorily answer the needs of a prisoner who requires legal representation at short notice on the hearing of a charge in respect of an offence alleged to have been committed in prison. If it is thought unwise to effect a substantial repeal of Part V. of the *Crimes Act* 1958, as was done in England, the Board recommends that the provisions of Part V. be amended to confer on a prisoner who is subject to its operation the capacity both to contract for legal representation at the hearing of charges in respect of offences alleged to have been committed by him in prison and to alienate and charge his property for the purpose of paying for such representation.

7.6.1. The Board does not recommend that any provision be made for the representation of prisoners at the hearing of charges against them before administrative disciplinary tribunals such as section 131 of the *Social Welfare Act* 1970 constitutes. (The Board expresses no opinion as to whether denial, by tribunal exercising the function conferred by section 131, of legal or lay representation to a prisoner charged before it would render the proceeding liable to corrective order by the Supreme Court of Victoria : that is a question upon which it is possible that legal opinion might differ, and to the resolution of which section 145 of the *Social Welfare Act* 1970 might be relevant.) The Board has already asserted its belief that other administrative determinations, in relation to parole and remission, could work far greater advantage or disadvantage to the prisoner than any determination under section 131. The question whether provision should be made for the representation of prisoners in proceedings under section 131 ought not in the Board's opinion to be considered without regard to the circumstances that those more serious determinations are commonly made without direct participation by the prisoner and are invariably made, so far as the Board is aware, without participation by a representative of the prisoner. Nor is there any present prospect, the Board believes, that those circumstances will alter. Representation of prisoners will in the Board's opinion inevitably occasion additional public expense, if only by lengthening proceedings in which representation is enjoyed and thereby increasing the cost of staffing prisons. To allocate funds to enable representation of prisoners in proceedings under section 131 while participation of prisoners in much more serious administrative inquiries is limited or excluded could not in the Board's opinion be justified unless some particular advantage was expected to derive from that grant of representation.

7.6.2. One advantage may be conceded : the representative is to be presumed better skilled than the accused prisoner in procuring a decision favourable to the prisoner. Against that advantage, the Board thinks that a number of probable disadvantages should be weighed :

representation by a lawyer (and the Board does not think that any other suitable class of representatives is at present available) could be expected to sharpen adversarial attitudes in the participants, to intensify the psychological pressures to which reference has been made in paragraphs 5.9.2 and 5.9.3 and, in particular, to increase the risk that the prisoner would persevere in prolonged resentment of the prison officers who participated against him at the hearing, if he were found guilty of the charge. On balance, the Board thinks that the ends of justice, and of reformation of prisoners, are for the present better served by witholding than by granting to prisoners the right to representation in proceedings under section 131. In considering problems such as this, the Board thinks it prudent to give weight to a substantial body of penological opinion which was forcefully expressed in an occasional address in November 1971 by the Minister of Justice in New South Wales, the Honourable J. C. Maddison :

> " The volatile nature of the prison society—becoming rapidly more volatile as refinement processes treat increasing numbers of offenders in non-custodial, semi-custodial and minimum custodial ways—calls for special rules, procedural and otherwise, not to be found in the free society. The setting up of judicial processes mirroring those which prevail in the courts, or giving access or recourse to the courts as of right, would create a monster which would undoubtedly destroy any system of correction as presently structured." (5 Aust. and N.Z. *Journal of Criminology*, p. 13.)

7.7. Representation of prison officers at the hearing of charges against prisoners cannot, in the Board's opinion, be justified as a measure for the protection of their personal interests or their morale. Their personal interests they can adequately protect by keeping calm and telling the truth. Their morale can be more efficiently improved by training in court procedure under the supervision of the Social Welfare Training Council (of which Mr. S. W. Johnston, who has practised as a barrister, is presently the chairman) than by providing them with a representative at the hearing of charges against prisoners. It is, however, desirable, as conducive to the more effective administration of justice, that some competent person appear to prosecute charges before the visiting justice under sections 137 and 138. It is not in the Board's opinion necessary that he be a lawyer. The Board recommends that the amendments which it has already suggested—and particularly the amendment proposed in paragraph 7.2 to confer a right to legal representation on prisoners charged under section 137 or 138—should be so framed as to leave undisturbed the discretionary power inherent in a court to permit parties to proceedings before it to be represented by persons who are not legal practitioners. Such a power, incident to the exercise by a court of control over its proceedings, should in the Board's opinion not be denied to the visiting justice when he is exercising the jurisdiction conferred by section 137 or section 138. It may be thought necessary, in order to assure that power to the visiting justice, to declare in Part IV. that he constitutes a court when he exercises that jurisdiction. The Board does not suppose that it will ever be found desirable to exercise the power in respect of a prisoner. But the Board hopes that it would be found practicable for prison officers of higher rank to be trained to undertake the conduct of proceedings before the visiting justice, as police officers conduct prosecutions in magistrates' courts. Both the training and the work itself would constitute, in the Board's opinion, a valuable preparation for high rank in the prison service. However, reference to the table in paragraph 5.2.4 of the submission by Messieurs Shade and Bodna suggests that the expense of providing that training might not be recouped, so small is the number of proceedings under sections 137 and 138. The training of policemen to conduct prosecutions in magistrates' courts is facilitated, and rendered less expensive, by their habitual participation in court proceedings as witnesses. If prison officers cannot conveniently conduct prosecutions under sections 137 and 138, either at all or in particular circumstances or localities, consideration ought to be given, the Board thinks, to assigning sergeants and senior constables of police to those duties, which they would be quite competent to perform at short notice as occasion arose. If a lawyer who was an officer of the Department of Social Welfare was able to combine the occasional duty of conducting such prosecutions with his other Departmental work, that arrangement might be found satisfactory. Except in a rare case of difficulty, which is usually recognised before the hearing and for the prosecution of which the Crown Solicitor could provide a lawyer, a proceeding under section 137 or 138 may in the Board's opinion be effectively conducted on behalf of the prison officer who makes the charge by a member of the Police Force or by an officer of the Public Service who is not a lawyer, but who has been trained to the competence which sergeants and senior constables of police daily exercise in the prosecution of similar charges in magistrates' courts.

CHAPTER 8.

PRISON VISITATION.

8.1. Surveillance of penal administration, by persons who are not employed in the organization which is charged with that administration, may serve a variety of purposes. The Board is concerned principally with legislative provision for such surveillance as may tend to maintain discipline.

8.2. The provision which is presently made, by section 120 of the *Social Welfare Act* 1970 and Part XXIV. of Division III. of the Social Welfare Regulations 1962, gives no clear indication of the purposes for which surveillance by visiting justices is to be exercised. They are left free by those provisions to communicate on any subject relating to prisons with either the administrative or the political head of the Department of Social Welfare. (The references in Part XXIV. of Division III. of the Social Welfare Regulations 1962 to the Chief Secretary must now be understood as references to the Minister for Social Welfare, by reason of the provisions of section 9 (3) (*a*) of the *Social Welfare Act* 1970.) In practice, the stipendiary magistrates who exercise the visitatorial function in Victorian prisons hear a wide variety of requests and inquiries from prisoners who apply to them. They interview prisoners who seek their help in the presence of the governor or of another senior officer. A great proportion of the requests arise out of the prisoner's involvement with an administrative or judicial agency of government outside the prison and pose problems for the solution of which a stipendiary magistrate's long and extensive experience of such agencies, before his appointment to the magistracy, very well qualifies him. Further, the magistrate has the assistance of a clerk who accompanies him on his visits to the prison and who is able, at public expense, to make such informal inquiries and requests to officers of those agencies, and to other persons outside prison, as the magistrate thinks appropriate. In that way administrative procedures are expertly manipulated to solve many problems of great concern to prisoners, whose ignorance and isolation in prison prevents them from initiating any effective action by themselves.

8.3. For the performance of those functions the Board thinks no more suitable person than a stipendiary magistrate could be found. Distrust by prisoners of Departmental officers would lessen their effectiveness. And few persons not in governmental employment would have the knowledge of administrative procedures which a magistrate and his clerk utilise so effectively. It is the combination in the one person of the appropriate knowledge and experience and of an independent status recognised by prisoners which so well qualifies the stipendiary magistrate for the performance of those functions and in the Board's opinion does much to allay anxiety in prisoners and thereby promotes good discipline.

8.4.1. Mrs. G. N. Frost recommended the introduction into prison visitation of " ordinary people of some standing in the community and in whom the community has some confidence ". (See exhibit 159.) She pointed to the operation of such a system in England, which had been acknowledged by the English Prison Commissioners to place " at the disposal of the Home Secretary and the Prison Commissioners knowledge and ideas about the working of the system from experienced public men and women who see it with a fresher eye, than those who are immersed in its daily work." (See exhibit 159 and in camera transcript pp. 436–442.) The Board thinks that there is only one impediment to the introduction of such a system. It was succinctly expressed by Mr. Hundley : " Maybe there are not too many Mrs. Frosts." A prison community—particularly a large community of different types of prisoner, such as Pentridge accommodates—cannot safely be exposed to visitation by persons who lack experience and understanding of the people they will be meeting. That kind of experience is quite uncommon. Those who lack it may unwittingly contribute to indiscipline in a prison like Pentridge. For example, a proportion of prisoners will devote considerable ingenuity to exploiting any prison visitor to whom they have access. The consequences of successful exploitation are likely to include quite serious impairment of discipline. Very many of the people whose standing in the community and whose altruism would otherwise qualify them for appointment as prison visitors have been denied experience of criminal depravity and mendacity and are therefore susceptible to exploitation. For another example, some strongly altruistic people are antipathetic to bureaucratic modes of action and attitudes. But very little can be achieved within our penal system, and serious harm can be caused to the system, by contention or undisguised impatience with the officers of the Prisons Division, particularly those who staff the prisons. They cannot be expected to welcome officious visitation. And it is upon them that the community relies for the maintenance of the system. In a society not specially celebrated for hypercritical appraisal of the quality of work done by employees, careful consideration ought in the Board's opinion to be given to the effect on the morale of prison officers which any proposed system of prison visitation might be likely to have.

8.4.2. If persons of suitable knowledge, attitude and experience are available, visitation of prisons by them, in addition to stipendiary magistrates, would in the Board's opinion conduce to the maintenance of good discipline in prisons, as well as serving other purposes to the public benefit. Such persons may nowadays be found outside the ranks of justices of the peace and

the Board therefore recommends that the words " being justices " be deleted from section 120 (1). If that recommendation is implemented, it may be thought desirable to substitute, for the description " visiting justice ", some other title.

8.5.1. There was evidence that prisoners sometimes, but infrequently, complained to the visiting magistrate of serious ill-treatment by prison officers. During the 19 months preceding the 23rd December 1971 four complaints of assault by a prison officer were noted in the book which records personal applications by H. Division prisoners to the visiting magistrate (exhibit 153). If the findings of the Board which are reported in Chapter 7 of its report in response to paragraph (*a*) of the Order in Council, concerning the ill-treatment of H. Division prisoners by prison officers during that period, are substantially correct, the question arises as to whether some amendment of the system of prison visitation would result in a more effective disclosure and eradication of ill-treatment of that kind. Consideration of that question should be prefaced by recognition of the truth, as the Board thinks, of the following observations of Sir John Barry :

> " Though humanitarians recoil from it, the existence of a punishment block—the Hole, as it is known to American convicts—where rigorous discipline can be applied to intractable inmates seems to be an unavoidable adjunct to an effective penal system. Its use should be carefully controlled, of course, for Lord Acton's aphorism, all power tends to corrupt and absolute power corrupts absolutely, has a very real meaning in a penal system. Limitation of the punitive powers of the prison administration is a first and wise step, but it is the administrators' sense of justice that will determine the fairness with which inmates are treated. The safeguarding of the inmate against official oppression and abuse of authority is primarily the task of the prison governor and of the director or controller of the entire penal system, and the protective regulations get their true meaning from the quality of the head officials and their influence on their staff." (Op. cit., p. 84.)

8.5.2. Most of the functions of the visiting justice, or of any other extra-Departmental visitor substituted for him, can be effectively performed only with the cordial co-operation of the prison staff, particularly the higher ranks and the governor. The governor sits with the visiting magistrate and co-operates with him in many ways. If serious misbehaviour by prison officers is to be unmasked, that task cannot be combined satisfactorily, in the Board's opinion, with the other functions of the extra-Departmental visitor. If one person seriously attempted to do both, he would be unable to do either of them well. Some misconduct will be brought to light in the course of ordinary prison visitation. But for the exposure of a systematic course of criminal conduct of which nearly everybody in the prison has heard, but of the existence of which official ignorance is asserted, a particular kind of visitor with particular powers would be needed, in the Board's opinion. Hesitantly, and after much anxious consideration, the Board abstains from recommending surveillance of that kind.

8.5.3. Such a visitor would need experience of criminals and expert knowledge of the criminal law. Outside the ranks of the judiciary, a small number of lawyers would be found with those qualifications. A police officer with those qualifications could not be chosen, because he would be distrusted by many prisoners. Such a visitor would require the power to go anywhere within any Victorian prison at any time ; to hold private communication with any prisoner at any time ; to direct the immediate removal of a prisoner out of the custody of the Director-General of Social Welfare and into the custody of the police ; to direct police to escort prisoners to hospitals and other places away from prisons and police gaols ; to communicate directly with the Attorney-General and the Solicitor-General, as well as with the Minister for Social Welfare and the Director-General of Social Welfare ; to lay charges against officers of the Prisons Division of the Social Welfare Department under section 55 of the *Public Service Act* 1958 and thereafter to exercise, without the consent of the Director-General, the function conferred on the Director-General by section 55 (2) (*a*) and (*b*) of deciding whether a report pursuant to those sub-paragraphs ought to be made to the Minister ; and to exercise the functions conferred on the Director-General by section 130 of the *Social Welfare Act* 1970.

8.5.5. Subjection of the Prisons Division to such surveillance would single out its officers for a humiliating declaration of distrust which, notwithstanding its findings about H. Division, the Board does not think necessary. If other governmental agencies which have the custody of citizens were subject to a similar surveillance, prison officers might bear such scrutiny with resignation. In the present state of Victorian administrative law and organization, the safeguarding of prisoners against official oppressive and abuse of authority ought in the Board's opinion to be entrusted to those who can, if they will, best achieve it : the prison governors and their administrative superiors.

8.6. Of one thing the Board is convinced : if good discipline is to be preserved, serious ill-treatment of prisoners can be inhibited either by effective supervision within the Prisons Division or by subjecting the officers of the Division to extra-governmental surveillance of the severity and efficiency indicated in paragraph 8.5.4., but not by giving prisoners access to sympathetic, penologically unqualified auditors of their complaints.

CHAPTER 9.

REMISSION.

9.1. Paragraph (*c*) of the Order in Council directs inquiry and report by the Board as to whether a further or different provision should be made for the remission, as an incentive to or reward for good conduct or industry, of sentences in respect of which a minimum term has been fixed.

9.2. The reason for the inquiry directed by paragraph (*c*) of the Order will be apparent when the lucid submission by the Director-General, on behalf of the Department of Social Welfare, which is contained in Appendix C has been read. The Board accepts as correct the contents of the first eight paragraphs of that submission and need not repeat them here.

9.3.1. The principal cause of dissatisfaction with the provision which is presently made for remission is the comparatively short period of remission of sentence which can be granted to prisoners in respect of sentences to which a minimum term has been attached. The Director-General's submission demonstrates that this consideration is unlikely to cause much dissatisfaction in many prisoners under such sentences who have never been released on parole, for few of them are denied parole and therefore few of them are deeply concerned about remission of sentence. Prisoners under such sentences who have previously been released on parole, however, have good reason to fear that they may not be paroled again. Their fear may be expected to increase in proportion to the number of times they have previously been paroled. Their concern about remission of sentence may be expected to increase in the same proportion. The evidence which the Board heard, as well as its knowledge of events in the criminal courts, unequivocally confirmed the inferences which the provisions with respect to remission and the statistical information in paragraph 7 of the Director-General's submission raise. Prisoners who have previously been granted parole commonly ask the sentencing tribunal to abstain from fixing a minimum term—they ask for what is called " a straight sentence "—so that they may qualify for grant of the substantial remission of sentence authorized by Regulation 97 of Division III. of the Social Welfare Regulations 1962. The worse the prisoner's record, particularly in relation to breach of previous parole, the more likely he is to seek a " straight sentence ". But the consideration which influences the prisoner to ask that no minimum term be fixed—the probability that the Parole Board will deny him parole or defer his release until his sentence has been substantially served—is a consideration which the sentencing tribunal is not permitted by the law to take into account in determining whether to fix a minimum term, if the term of the sentence which it has imposed is not less than 24 months. (See *R.* v. *Bruce* (1971) *V.R.* 656.)

9.3.2. It is in the class of prisoners thus disadvantaged—saddled with minimum terms which their bad records render useless to them and denied the opportunity of gaining by good conduct more than 6 days remission of sentence for each month served—that the worst behaved prisoners are commonly found. In that category are many of the " hard core " of Pentridge prisoners who cause most of the trouble in that prison. It is not to be supposed that their conduct would become uniformly good if by being well behaved they could gain very substantial remissions. But it is to be expected, in the Board's opinion, that the conduct of many of them would not be as bad as it has been.

9.4.1. It must be recognized that, in the foreseeable future, remission will continue to be utilized as a means of inducing prisoners to behave themselves in prisons, not as a means of facilitating the reformation of prisoners. Good conduct and industry in prison, upon which the grant of remission is conditioned, are not invariably reliable indicators of reformation, nor accurately predictive of conduct or industry after release. If remission is granted automatically on fulfilment of those conditions, it may be argued that the remission system will tend generally to hinder rather than further the attempt to reform, by fostering in prison officers and prisoners alike a complacent attitude of cynical disengagement instead of collaborative endeavour.

9.4.2. In the present situation of our penal system, however, the Board accepts the need for remission as an inducement to good conduct in prison. While that is its purpose, the system should in the Board's opinion be so framed as to serve that purpose effectively. That object is in the Board's opinion not at present being achieved.

9.5.1. The Board recommends that the same provision be made for remission of a sentence in respect of which a minimum term has been fixed as is made for remission of a sentence in respect of which a minimum term has not been fixed, but that no remission of sentence should effect any reduction from the minimum term fixed in respect of that sentence.

9.5.2. The recommendation specified in the preceding paragraph is designed to avoid contradictory operation of a judicial order and remission provisions. If a minimum term of 10 years were fixed in respect of a sentence of 12 years' imprisonment and the remission scale suggested by the Director-General in paragraph 9 (6) of his submission—15 days for each calendar month served—were applied to the sentence, the prisoner could become eligible for release, in consequence of remission granted, after he had served about 8 years' imprisonment, yet the minimum term during

which he would be not eligible for parole—10 years—would not then have been served. The minimum term has been fixed by a judicial tribunal as the period within which the prisoner should not be released. In fixing the minimum term, as in determining the term of the sentence, the judicial tribunal will ordinarily have ignored the provisions with respect to remission, as being irrelevant to the decisions to be made by it. It might therefore be argued that there is no greater contradiction of a judicial decision in release of the prisoner before the expiration of the minimum term than in release before the expiration of the sentence. Such an argument is fortified by the circumstance that a minimum term itself, like the sentence, may at present be reduced by remission. Yet the Board cannot accept the argument, or reconcile itself to release before the expiration of the minimum term, or of the minimum term as itself reduced by remission therefrom. It cannot in the Board's opinion be an insignificant consideration in the fixing of a minimum term that the period fixed is thought to be that within which the prisoner ought not on any account to be released. One might suppose that to be the only consideration relevant to determination of a minimum term. At all events, it ought not in the Board's opinion to be possible to set at nought that consideration, judicially weighed by the sentencing tribunal, by grant of remission of the term of the sentence.

9.6. The contradiction between judicial order and remission which is discussed in the preceding paragraph would rarely occur, if current sentencing habits are not changed : the difference between the minimum term and the term of the sentence is usually sufficient to preclude such a contradiction. No such contradiction could occur if the recommendations made by the Director-General in paragraphs 9 (5) and 9 (6) of his submission were adopted : that each remission granted be applied to both the minimum term and the term of the sentence. But the Board cannot accept those recommendations. The Board thinks that a minimum term ought to mean, if not exactly what it says, at least as nearly what it says as can be contrived without loss of effective inducement to good conduct by means of remission. The Board is not persuaded that the present scale—6 days' reduction from the minimum term for each calendar month served—is an inadequate inducement to good conduct on the part of those prisoners who have an expectation that they may be granted parole shortly after they have served the minimum term. For prisoners without that expectation remission of the sentence, not of the minimum term, must provide the inducement to good conduct.

9.7. The provisions relating to reduction from the minimum term by remission, contained in Regulation 48 of Division VI. and Regulation 98 of Division III., as well as the other remission provisions in Regulation 97 of Division III., distinguished between a primary remission and a further remission, not exceeding three days per month, which is conditioned upon " special merit in the performance of a prisoner ". This distinction the Board thinks an unwise fetter on the Director-General's discretion. Further, the " special merit " remission may be misused, the Board thinks as an inducement not to special merit, but to the exercise by a prisoner of a skill or talent of which the prison officers have pressing need. The Board therefore adopts the recommendation of the Director-General that " both ordinary and special merit remissions should be combined into the one form of remission ". (See paragraph 9 (4) of the Director-General's submission.).

9.8. The Board has already stated its opinion, expressed also by the Director-General in paragraph 9 (2) of his submission, that the grant or denial of remission should lie in his discretion. The Board thinks that the exercise of the discretion should not be regarded as having been completed until the expiration of the term of the sentence in respect of which the grant is made. In particular, a prisoner released on parole and thereafter required to resume serving a sentence of imprisonment should not have any accrued entitlement to remission of that term when he resumes serving it, notwithstanding tnat the Director-General may have formed, and communicated to the prisoner, an opinion that remission would be granted in respect of some or all of the term served before release on parole. By those observations the Board must not be taken to suggest that remission ought in practice to be " taken away ", otherwise than by punishment under section 131, after it has been " given " or, as the Director-General expresses it in paragraphs 9 (2) and 9 (3) of his submission, " earned ". As the Director-General there states, an administrative withdrawal of the benefit of a remission " earned " would only be contemplated in exceptional circumstances. But the Board is concerned to emphasize that the power should be legally available for exercise if such circumstances arose.

9.9. The Board cannot entertain the Director-General's recommendation, which is included in paragraph 9 (1) of his submission, that a prisoner serving a sentence in lieu of the payment of fines should also be eligible for the same remission as prisoners under sentences of imprisonment. It is in the Board's opinion not a recommendation which falls within the term of reference defined by paragraph (*c*) of the Order in Council and there was no evidence that would justify the recommendation, under paragraph (*b*) of the Order in Council, as conducive to the maintenance of discipline in prisons. Section 124 of the *Social Welfare Act* 1970 reposes on the Governor in Council a discretionary power to order the discharge from prison of any person who is imprisoned for non-payment of a fine. No evidence was presented to the Board which suggested that the section should be amended or supplemented by any other provision in relief of such prisoners.

9.10. Regulation 97 empowers the Director-General to grant remission, not exceeding one quarter, of a sentence in respect of which a minimum term has not been fixed and to grant an additional remission of three days per month for " special merit ". The Board accepts so much of the Director-General's proposals in paragraphs 9 (5) and 9 (6) of his submission as relates to remission

from the term of the sentence : that the Director-General be empowered to grant remission not exceeding 15 days for each calender month served (and pro rata remission for part of a month), from the term of a sentence in respect of which a minimum term has been fixed. That recommendation is subject to the condition, which the term of reference specified by paragraph (*c*) of the Order in Council makes necessary, that the Director-General be empowered to grant the same remission of the term of a sentence in respect of which no minimum term has been fixed. The Board's intention is that, whatever remission of the term of the sentence is available to prisoners for whom no minimum term has been fixed, the same remission of the term of the sentence should be available to prisoners for whom a minimum term has been fixed.

9.11. Paragraphs 9 (3) and 9 (7) of the Director-General's submission refer to aspects of the administration of the remission of sentences. In Division 3 of Part IV. of the *Social Welfare Act* 1970 there are several provisions by which the precise order in which, and the date from which, several terms of imprisonment, imposed under different statutory provisions and by different judicial tribunals, are to be served. Another provision of that kind, with respect to the appropriate order when a prisoner is subject to several minimum terms, in section 535 of the *Crimes Act* 1958. For the accurate computation of the respective dates on which a prisoner sentenced to several terms of imprisonment will have completed serving those sentences, before and after reduction by remission, and will have served any minimum terms fixed in respect thereof, before and after remission, it is necessary to have accurate information as to what orders each judicial tribunal made as well as information relevant to the application of section 122 of the *Social Welfare Act* 1970 and knowledge of remission " earned " at the date when the computation is made. Much of that information many prisoners do not have or have wrong. Some prisoners are incapable of making what is sometimes a difficult computation even when they have the relevent information. There was evidence presented to the Board that the prison officers at Pentridge, whose duty it is to make such computations are sometimes in like case with prisoners. Ignorance or mistake on this subject, so vitally important to prisoners, causes them acute anxiety, frustration and sometimes bitterness and anger. Although the Board thought it convenient to discuss this subject in a Chapter concerning remission, its real relevance is to the maintenance of discipline, which is impaired by the psychological tension generated in prisoners by uncertainty about these dates which are of such importance to them. So harmful to good discipline does the Board think uncertainty of that kind to be, that it considered recommending the imposition, in Division 3 of Part IV. of the *Social Welfare Act* 1970, of a statutory obligation upon the Director-General of Social Welfare to give to each prisoner, within 30 days of the date on which any sentence of imprisonment exceeding in its term 6 months is imposed on the prisoner, notice in writing of the respective dates on which each term of each sentence, and each minimum term, would expire if no remission were granted nor any further sentence were imposed after the date of imposition of the sentence which had occasioned the notice. In paragraph 4.2. of the Director-General's submission there is set out the text of Regulation 49 of Division VI. of the Social Welfare Regulations 1962, by which an obligation to certify that kind of information to the Chief Parole Officer is imposed on the governor of the gaol. The Board has refrained from making the recommendation it contemplated, because it is of the opinion that a provision of that kind is more appropriately made by regulation than by statute. Paragraph (*c*) of the Order in Council does no- in the Board's opinion authorize a formal recommendation that such a regulation be made, for the question posed by paragraph (*c*) does not comprehend administrative arrangements of that kind. However, the Board suggests that consideration ought to be given to the proposal. Section 182 of the *Social Welfare Act* 1970 empowers the Governor in Council to make such a provision. The obligation should in the Board's opinion be imposed on the Director-General, not on the gaol governor. Notification of the dates which the Board has mentioned cannot be properly made unless sentences are pronounced in conformity with law and are accurately communicated to the persons who calculate the dates. Persons outside the Public Service, Public Service officers outside the Social Welfare Department and officers of that Department who are not responsible to the governor of the gaol must all avoid error if accurate notification is to be made to prisoners. In those circumstances formal responsibility for the notification should not in the Board's opinion rest on humbler shoulders than those of the Director-General.

9.12. In Appendix D is reproduced a written submission by counsel who assisted the Board, Mr. W. M. R. Kelly, concerning matters relating to paragraph (*c*) of the Order in Council. The written submission is but the final expression of a deep concern about those matters, which Mr. Kelly's experience of prisoners' attitudes had occasioned. During the many hours which he spent in conference with prisoners at Pentridge, in preparation of evidence to be presented to the Board, Mr. Kelly had opportunities to understand and evaluate the attitudes of prisoners which were rarely afforded in the theatrical setting of a courtroom, where the Board sat, or in the stilted prose of prisoners' written statements, which the Board read. (The extent to which those opportunities reached may be judged by reference to Chapter 2 of the Board's previous report.) The paths along which Mr. Kelly's reflections have led him go beyond the ambit of the Board's authorized inquiry, as in his submission he concedes, but those reflections have a substantial relevance to the inquiry directed by paragraph (*c*) and are, in the Board's opinion, worth very careful consideration.

CHAPTER 10.

SUMMARY STATEMENT OF RECOMMENDATIONS REQUIRING LEGISLATIVE IMPLEMENTATION.

10.1. Those of its recommendations which require for their implementation a legislative provision, either by the Parliament or by the Governor in Council, the Board now states summarily.

10.2. That section 120 (1) of the *Social Welfare Act* 1970 be amended to enable the appointment as visiting justices of persons who are not justices appointed under the provisions of Part III. of the *Magistrates' Courts Act* 1971. *Paragraph* 8.4.

10.3. That Part IV. of the *Social Welfare Act* 1970 be amended to provide that the summary criminal jurisdiction conferred on a visiting justice by sections 137 and 138 of that Act—

(*a*) be exercised only by a stipendiary magistrate; 4.2.2.

(*b*) be exercised in a room or place deemed an open and public court to which the public generally may, subject to the provisions specified in paragraph (*c*) of this recommendation, have access so far as the same can conveniently contain them ; 4.5.–4.8.

(*c*) be enlarged, and its exercise facilitated, by conferring on a visiting justice who is exercising the jurisdiction the powers which are by sections 46, 47 and 48 of the *Magistrates' Courts Act* 1971 conferred on a magistrates' court. 4.9.2.

10.4.1. That Part IV. and Schedule Four of the *Social Welfare Act* 1970 be amended to make in respect of proceedings before a visiting justice under sections 137 and 138 of that Act provision for—

(*a*) the proper custody of the Conviction Book referred to in section 141 of the Act; 4.12.

(*b*) inspection of the said Conviction Book without fee or reward, by any justice of the peace and by any person authorized in that behalf by a justice or by a law officer and so far as relates to the proceedings in any particular matter by any person who is a party to such proceedings; 4.12.

(*c*) publication outside prisons of prior notice of any such proceedings as are to be heard within prisons (including notice of the names of the parties and the nature of the charges); 4.12.

(*d*) entry in the said Conviction Book of the name of each informant; 4.12.

(*e*) the right of the person against whom information for an offence is laid to representation in the proceeding by a legal practitioner. 7.2.

10.4.2. That a visiting justice exercising the jurisdiction conferred by section 137 or by section 138 have the power which a magistrates' court has to allow any person to act as an advocate before it and that, if it be necessary, the power be assured by amendment of Part IV. of the *Social Welfare Act* 1970. 7.7.

10.5.1. That Part V. of the *Crimes Act* 1958 be amended to enable prisoners, while subject to the operation of that Part, to contract for legal representation on the hearing of charges of the commission of offences in prisons and to alienate and charge their property for the purpose of paying for such representation. 7.5.

10.5.2. That Parts VIII. and IX. of Division III. of the Social Welfare Regulations 1962 be amended to assure prisoners charged with the commission of offences in prisons—

(*a*) of the right to hold, out of the hearing of other persons, oral communication in prisons with legal practitioners engaged to represent them at the hearing of such charges;

(*b*) of the right to send from prisons in envelopes addressed to the Secretary to the Law Department or to the Secretary to the Legal Aid Committee written communications which shall not be examined by any officer of the Social Welfare Department, for the purpose of procuring assistance pursuant to the *Legal Aid Act* 1969, in obtaining legal representation at the hearing of such charges. 7.4.

10.6. That Part IV. of the *Social Welfare Act* 1970 be amended to provide that it shall be an offence punishable upon conviction before a magistrates' court, by any of the penalties prescribed in section 133 (2) of the Act, to harbor or otherwise to assist a person

who is illegally at large after having escaped from a prison or from lawful custody while a prisoner within the meaning of the said Act, knowing that person to be illegally at large after having so escaped. *Paragraph* 3.3.

10.7. That section 131 of the *Social Welfare Act* 1970 be amended—

(*a*) to enable senior officers of the Social Welfare Department, other than governors of prisons, who have been appointed by the Director-General of Social Welfare in that behalf, to exercise the functions which are by that section conferred on the governor of a prison ; 5.10.

(*b*) by deleting from that section all reference to solitary confinement, close confinement and dietary deprivation ; 6.3., 6.4.

(*c*) by authorizing as punishments under the section reprimand of the prisoner and the deprivation, for any period not exceeding one month, of any financial or other benefit privilege or advantage (other than remission or parole) which would or might otherwise accrue or be granted to the prisoner. 6.5., 6.6.

10.8. That section 137 of the *Social Welfare Act* 1970 be amended by deleting therefrom all reference to solitary confinement. 6.3.

10.9. That section 138 of the *Social Welfare Act* 1970 be amended—

(*a*) by deleting therefrom the words " idleness insolence refusal to work disobedience of orders " ; and by deleting therefrom the word " improper " ; and by deleting therefrom the words " or any other misconduct " ; and by inserting therein, after the words " abusive or ", the word " threatening " ; 4.14., 4.16., 4.19.

(*b*) by deleting therefrom all reference to solitary confinement. 6.3.

10.10.1. That the Social Welfare Regulations 1962 be amended so as to make the same provision for remission of the terms of sentences in respect of which a minimum term has been fixed as is made for remission of the terms of sentences in respect of which a minimum term has not been fixed, but subject to the proviso that no remission of the term of a sentence shall effect any reduction from the minimum term fixed in respect of that sentence. 9.5.

10.10.2. That no provision with respect to remission of a minimum term should permit a reduction from the minimum term of more than 6 days for each calendar month served, with a proportionate reduction for part of a month. 9.6.

10.10.3. That all remission be conditioned only upon the satisfaction of the Director-General as to good conduct and industry and response to the treatment programme of the prisoner, and not upon special merit in the performance of a prisoner. 9.7.

10.10.4. That the maximum reduction from the term of any sentence be 15 days for each calendar month served, with a proportionate reduction for part of a month. 9.10.

10.10.5. That, if the recommendations specified in paragraphs 10.10.3. and 10.10.4. are acceptable in relation to sentences in respect of which a minimum term has not been fixed, the Social Welfare Regulations 1962 be amended to give effect to the recommendations specified in paragraphs 10.10.2., 10.10.3. and 10.10.4. 9.6.–9.10.

CHAPTER 11.

ACKNOWLEDGMENTS.

The Board renews the expression of its gratitude to those who are named in Chapter 10 of its report upon the matters specified in paragraph (*a*) of the Order in Council, to which Chapter it begs leave to refer.

The four expert witnesses who gave the Board the benefit of their written opinions and, later, of their oral evidence in a conference with the Board and counsel have been mentioned, and some of their qualifications have been indicated, in paragraph 5.3. Mrs. G. N. Frost, C.B.E., J.P., Mr. David Hundley, B.A., Dip. Crim., Dip. Soc. Stud., Mr. S. W. Johnston, B.A., LL.B., M.A.C.E. and Dr. R. L. Misner were unsparing of their time, their very considerable talents, and their patience in assisting the Board to an understanding of problems they had long studied and of which they all had practical experience.

Two other witnesses, who had also devoted much thought and study to the problems which paragraphs (*b*) and (*c*) of the Order in Council raise, gave valuable evidence before the Board : Mr. E. J. Flannery, Chairman of the Penal Reform Group of the Victorian Council for Civil Liberties and Mr. N. D. Howard B.A., Dip. Soc. Stud., Senior Probation and Parole Officer of the Probation and Parole Division of the Social Welfare Department.

The President of the National Council of Women of Victoria, Mrs. V. R. C. Brown, B.Sc., Dip. Ed., J.P., presented to the Board a helpful written submission on behalf of the Council.

The Vice-President of the Victorian Section of Amnesty International, Dr. P. U. A. Grossman, kindly furnished the Board with copies of a number of publications relevant to its inquiry.

The Comptroller-General of Prisons in the State of Queensland, Mr. S. Kerr, and senior officers of his Department gave generously of their time, in discussion and in showing the Board penal establishments near Brisbane, to assist the Board's inquiry.

Miss Kathleen Kane, whose melancholy fate it was to suffer temporary conversion from a a barrister's secretary to a Board's typist, cheerfully and efficiently worked harder than either a barrister or a Board has any right to expect.

The Board is very grateful to them all.

K. JENKINSON.

Owen Dixon Chambers.
2nd April, 1973.

APPENDIX A.

PARTS OF THE SOCIAL WELFARE ACT 1970.
No. 8089

An Act to establish a Social Welfare Department, to make Provision with respect to the Functions of that Department, to re-enact with Amendments certain Provisions of the *Children's Welfare Act* 1958, the *Gaols Act* 1958, the *Street Trading Act* 1958, the *Youth Organizations Assistance Act* 1958, and the *Social Welfare Act* 1960 and for other purposes.
[22*nd December*, 1970.]

BE it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):—

1. This Act may be cited as the *Social Welfare Act* 1970 and shall come into operation on a day to be fixed by proclamation of the Governor in Council published in the *Government Gazette* and is divided into Parts as follows :—

Part I.—Social Welfare Department ss. 5–11.

Part II.—Family Welfare Division ss. 12–85.

Division 1.—Administration and Functions ss. 12–14.

Division 2.—Family Assistance ss. 15–26.

Division 3.—Children's Reception Centres and Homes ss. 27–30.

Division 4.—Admission of Children and Young Persons to the Care of the Department ss. 31–35.

Division 5.—Guardianship and Placement of Children and Young Persons admitted to the Care of the Department ss. 36–44.

Division 6.—Interstate Movement of Children and Young Persons s. 45.

Division 7.—Liability of Parents for Maintenance ss. 46–63.

Division 8.—Protection of Infants ss. 64–74.

Division 9.—Employment of Children ss. 75–80.

Division 10.—Miscellaneous Provisions ss. 81–84.

Part III.—Youth Welfare Division ss. 85–110.

Division 1.—Administration and Functions ss. 85–86.

Division 2.—Youth Advisory Council ss. 87–91.

Division 3.—Remand Centres, Youth Training Centres, Youth Hostels, and Youth Welfare Services ss. 92–94.

Division 4.—Detention of Young Persons ss. 95–99.

Division 5.—Admission of Young Persons ss. 100–104.

Division 6.—Placement and Supervision of Young Persons ss. 105–107.

Division 7.—Miscellaneous Provisions ss. 108–110.

Part IV.—Prisons Division ss. 111–145.

Division 1.—Administration and Functions ss. 111–112.

Division 2.—Constitution and Officers ss. 113–121.

Division 3.—Treatment of Prisoners ss. 122–130.

Division 4.—Offences ss. 131–142.

Division 5.—Miscellaneous ss. 143–145.

Part V.—Research and Statistics Division ss. 146–147.

Part VI.—Training Division ss. 148–152.

Division 1.—Administration and Functions ss. 148–150.

Division 2.—Social Welfare Training Council ss. 151–152.

Part VII.—Probation and Parole Division ss. 153–177.

Division 1.—Interpretation s. 153.

Division 2.—Administration and Functions ss. 154–155.

Division 3.—Youth Parole Board ss. 156–177.

Part VIII.—General ss. 178–182.

. . . . . .

3. In this Act unless inconsistent with the context or subject-matter—

. . . . . .

" Department " means the Social Welfare Department established under this Act.

" Director-General " means the Director-General of Social Welfare appointed or continuing in office under this Act.

" Governor " means governor, keeper, gaoler, officer, or other person for the time being in charge of a prison but does not include the keeper of a police gaol or any person acting in his stead.

" Minister " means Minister for Social Welfare.

" Part " means Part of this Act.

" Prescribed " means prescribed by the regulations.

" Prisoner " includes any person detained in custody in a prison or a police gaol irrespective of the cause of such detention.

" Regulations " means regulations made under this Act or continued in force under this Act.

. . . . . .

PART I.—SOCIAL WELFARE DEPARTMENT.

5. (1) For strengthening and expanding all existing services provided by and through the Government of Victoria for the social welfare of the community and providing further services, for co-ordinating the activities of Government municipal and voluntary organizations engaged in social work in the community and planning the effective use of their resources, for advancing the interests of deprived or underprivileged children, young persons, and adults by modern methods and treatment, for providing and maintaining training and research facilities for or towards any of the purposes of this Act and for the better promotion and development of services organizations and institutions relating to the social welfare of the community and in particular of children and young persons there shall be a Department of State called the " Social Welfare Department " consisting of—

(*a*) a Minister for Social Welfare who shall be a responsible Minister of the Crown ;

(*b*) a Director-General of Social Welfare ; and

(*c*) such other officers and employés as are necessary for the purposes of the Department.

. . . . . .

7. (1) The Director-General shall—

(*a*) for the purposes of the *Public Service Act* 1958 be the permanent head of the Department and subject to the Minister shall have the responsibility of administering the Department ; and

(*b*) be an officer in the First Division of the public service in addition to the other officers therein.

. . . . . .

10. (1) . . . . . .

(2) With the approval of the Minister the Director-General may assign in writing to any Director or senior officer of the Department any of the statutory functions and duties of the Director-General either generally or in any particular case and may at any time in writing revoke the assignment.

. . . . . .

PART IV.—PRISONS DIVISION.

DIVISION 1.—ADMINISTRATION AND FUNCTIONS.

111. (1) There shall be a Division of the Department to be known as the " Prisons Division ".

(2) The Director-General shall, subject to the provisions hereafter in this Part contained, and to the control of the Governor in Council, have the care charge and direction of all prisons within the meaning of this Act.

(3) Subject to the *Public Service Act* 1958 there shall be appointed an officer to be called the " Director of Prisons ".

(4) The person holding office immediately prior to the commencement of this Act as Director of Prisons under the *Social Welfare Act* 1960 shall be Director of Prisons for the purposes of this Act.

(5) The Director of Prisons shall administer the Prisons Division subject to the control and direction of the Director-General.

112. The functions of the Prisons Division shall be—

(*a*) to control and supervise all persons imprisoned or detained in prisons ;

(*b*) to assist in the rehabilitation of all prisoners and all persons released from a prison or police gaol ;

(*c*) to provide welfare services to prisoners and their families ; and

(*d*) to assist and promote co-operation between private organizations and Government departments concerned with the welfare and after-care of prisoners.

DIVISION 2.—CONSTITUTION AND OFFICERS.

113. All buildings erections houses enclosed places and premises heretofore maintained by the public as and for gaols and police gaols within Victoria which have been proclaimed by the Governor in Council by notice published in the *Government Gazette* to be gaols or police gaols and all buildings erections houses enclosed places and premises which are from time to time proclaimed under this Act by notice published in the *Government Gazette* to be prisons or police gaols shall from and after the publication of such notice be severally deemed and taken to be prisons and police gaols respectively (hereafter in this Part called " prisons ") and shall be subject to the several provisions made for the regulation discipline management and care of prisons and of prisoners confined therein.

114. The Governor in Council may from time to time by notice published in the *Government Gazette* revoke any proclamation heretofore made or which hereafter may be made under section 114 or any corresponding previous enactment or under any other authority in that behalf which has notified any building erection house enclosure place or premises to be a prison or police gaol and thereupon the building erection house enclosed place or premises referred to in the notice shall cease to be a prison or police gaol accordingly.

115. (1) Whenever it appears to the Director-General after consultation with the Chief Commissioner of Police to be necessary so to do the Director-General may recommend to the Minister that a lock-up is fit for the reception of prisoners sentenced to imprisonment for a term not exceeding the term the Director-General thinks fit and specifies in his recommendation.

(2) Upon receiving any such recommendation the Minister may by notice published in the *Government Gazette* proclaim any police lock-up so recommended to be a " police gaol " for the reception of prisoners for any term not exceeding the term specified in the notice but not in any case exceeding thirty days.

(3) Upon the publication of any such notice the provisions of this Act then in force relating to prisons and the rules and regulations made thereunder shall so far as those provisions are applicable apply to police gaols.

(4) A prisoner sentenced to imprisonment for a longer term than is specified under this section in relation to a lock-up shall not be detained in that lock-up except for the period which elapses before he can conveniently be conveyed to a prison.

(5) The Minister may from time to time by notice published in the *Government Gazette* revoke or vary any proclamation made under this section.

116. Nothing in this Part contained shall deprive the sheriff of any right or power or relieve him of any duty or liability vested in or imposed upon him by or under any Act or law or usage in respect of any person committed to or confined in any prison, not being a prisoner under sentence for some indictable offence or an adjudication of imprisonment for some offence punishable on summary conviction.

117. The Governor in Council may from time to time make regulations for enabling the sheriff to exercise his powers and fulfil his duties within or with respect to prisons or the confinement therein or the release therefrom of prisoners.

118. Every prisoner who is in custody whether under a sentence of imprisonment or on remand awaiting trial shall be deemed to be in the legal custody of the Director-General.

119. (1) Subject to the provisions of the *Public Service Act* 1958 the Governor in Council may appoint a governor of each prison.

(2) During the absence of the governor the Director-General may direct any suitable prison officer to act as governor and such officer shall have all the powers and perform all the duties pertaining to the office of governor.

120. (1) The Governor in Council may appoint any number of fit and proper persons being justices to be visiting justices of a prison and may remove any visiting justice.

(2) Every visiting justice shall unless prevented by illness or other sufficient cause—

(*a*) visit the prison, in rotation with other visiting justices, not more than once in every week ;

(*b*) make such reports as are from time to time required by Order of the Governor in Council ; and

(*c*) shall have and may exercise all the powers and authority of a visiting justice appointed under this Act.

(3) Every stipendiary magistrate shall by virtue of his office and without further appointment or authority than this Act be a visiting justice of every prison and shall have and may exercise at or in relation to a prison all the powers and authority of a visiting justice.

121. Nothing in this Act shall be taken to abridge or affect the power of any judge of the Supreme Court or of any justice to visit and examine any prison as he thinks fit.

DIVISION 3.—TREATMENT OF PRISONERS.

122. (1) Subject to the provisions of this section and section 124 sentences of imprisonment or of imprisonment with hard labour shall commence upon and be reckoned from the days following, namely—

(*a*) where the sentence is imposed at a sitting of the Supreme Court or the County Court and the court does not otherwise order—the first day of the sitting at which the offender is convicted or pleads guilty ; and

(*b*) in any other case—

(i) where the offender is detained in custody at the time the sentence is imposed—the day the sentence is imposed ; or

(ii) where the offender is at large at the time the sentence is imposed—the day the offender is apprehended in pursuance of a warrant of commitment issued in respect of that sentence.

(2) Whenever an offender sentenced to a term of imprisonment either with or without hard labour or any other punishment by a court judge or justice or other person having jurisdiction to award the sentence is allowed to be or to go at large either on bail or otherwise pending an appeal or the consideration of any question of law reserved or a case stated under the provisions of any law in force in Victoria, the period intervening between the day on which the offender was allowed to go or be at large and the day when he renders himself or is taken into custody to undergo the sentence by reason of his having abandoned or failed to prosecute or proceed with such appeal question of law reserved or case stated or of it being dismissed or decided adversely to the offender shall not count in calculating the term to be served by him under the sentence and the service of the sentence shall during the said period be suspended.

(3) Notwithstanding anything in this Act or any rule of law or practice to the contrary every sentence referred to in sub-section (2) shall be calculated exclusive of the time during which the service of the sentence was suspended by reason of the appeal question of law reserved or case stated.

(4) If an offender is imprisoned under process in respect of an offence or offences other than the offence to which the appeal question of law reserved or case stated relates at the time when it is finally determined the sentence shall (unless otherwise directed by the court judge or justice awarding the sentence or the court or judge determining the appeal question of law reserved or case stated) take effect at the expiration of any sentence or sentences he is then undergoing.

(5) If a person lawfully imprisoned under a sentence escapes from a prison or from the custody of a member of the police force governor prison officer or person in whose custody he is the period intervening between the day on which he so escapes and the day when he surrenders himself or is apprehended shall not be reckoned as part of the term to be served by him under the sentence and the service of the sentence shall during the said period be suspended.

(6) Notwithstanding anything in any Act or any rule of law or practice to the contrary every such sentence shall be calculated exclusive of the time during which the service of the sentence is so suspended.

(7) If a person is imprisoned during any period referred to in this section under process in respect of an offence or offences other than that for which he received a sentence as aforesaid he shall commence to serve the uncompleted portion of the sentence at the expiration of any sentence or sentences he is then undergoing under such process.

(8) If the period during which an offender's sentence is suspended either under sub-section (2) or sub-section (5) includes any time when the offender ought to be whipped or kept in solitary confinement the whipping or solitary confinement shall not lapse but shall be inflicted or imposed at a time to be determined by the Governor in Council.

123. (1) Every sentence of imprisonment with or without hard labour or any other punishment imposed on an offender by a court judge or justice shall, notwithstanding anything to the contrary in any Act, unless otherwise directed by the court judge or justice at the time of pronouncing the sentence be cumulative upon any uncompleted sentence previously imposed upon such offender by a court judge or justice.

(2) Every term of imprisonment imposed upon an offender in default of payment of a fine or sum of money shall, notwithstanding anything to the contrary in any Act, be cumulative upon any uncompleted sentence of imprisonment or term of imprisonment in default of payment of a fine or sum of money previously imposed upon the offender by a court judge or justice.

(3) Where an offender is serving a sentence or sentences of imprisonment and there is delivered to the keeper of the prison in which he is imprisoned a warrant for the committal of the offender to prison in default of payment of a fine or sum of money the offender shall not commence to serve the term of imprisonment specified in the warrant until the completion of any sentence or sentences of imprisonment he is then serving or becomes liable to serve before being entitled to be discharged or otherwise released.

(4) Where two or more warrants of commitment for the imprisonment of an offender in default of payment of fines or sums of money are delivered to the keeper of a prison whilst the offender is imprisoned therein the terms of imprisonment specified in the warrants shall, subject to sub-section (3), be served as far as practicable in the sequence in which the fines were imposed or the sums of money became due and payable.

124. (1) The Governor of Victoria may order the discharge from prison of any person who is imprisoned—

(*a*) in default of finding sureties to keep the peace or to be of good behaviour ; or

(*b*) for non-payment of any sum of money within the meaning of this section payment of which or so much thereof as remains unpaid has been remitted by the Governor or in respect of which or so much thereof as remains unpaid such person has entered into a recognizance as hereafter in this section provided.

(2) For the purposes of this section " sum of money " means any sum of money that is imposed as a penalty or forfeiture under any Act or law or is expressly recoverable under any Act as if it were a fine imposed by a court upon a conviction in the exercise of its ordinary criminal jurisdiction.

(3) The provisions of paragraph (*b*) of sub-section (1) shall apply whether the payment of the amount concerned may be remitted by the Governor or not but where the Governor has not power to remit payment of an amount for the non-payment of which a person is imprisoned the liability of that person to pay the moneys shall not be discharged or reduced by virtue of any imprisonment suffered by him with respect to that amount and the amount shall until paid be recoverable as a civil debt.

(4) Every recognizance for the purposes of this section—

(*a*) shall be entered into before a justice ;

(*b*) shall be in such amount and with such sureties (if any) as the Governor directs ; and

(*c*) shall be conditioned that the person to be discharged shall pay the moneys in respect of which he is imprisoned or is liable to be imprisoned or so much thereof as is then due and unpaid in such manner, by instalments or otherwise, to such person or persons, and within such time or times as the Governor directs having regard to the circumstances of the case.

(5) Where a recognizance is entered into the person imprisoned shall be released from custody but shall be liable to be committed to prison again if he fails in any of the conditions thereof.

(6) Where it appears to a justice by information on oath that a person released on recognizance under this section has failed to observe any of the conditions of his recognizance the justice may issue a summons under his hand requiring the person to attend before a magistrates' court to be dealt with according to law or may issue a warrant under his hand to apprehend the person and bring him before a magistrates' court to be dealt with according to law.

(7) The provisions of section 23 of the *Justices Act* 1958 shall apply to every summons under sub-section (6).

(8) The magistrates' court before which the said person is so summoned or brought may upon being satisfied by evidence that he has failed to observe any of the conditions of his recognizance adjudge him to be guilty of a breach thereof for which the recognizance shall be forfeited and may direct that he be committed to prison for the unexpired portion of the term for which he was originally committed to prison unless he pays the whole of the sum then remaining due and unpaid.

(9) Any justice sitting in the court or the clerk thereof may sign any warrant necessary for such committal and the period of imprisonment of the said person after such new committal shall begin to run as from the day of such new committal if he is then before the court, and if not, then from the date of his subsequent arrest.

125. (1) The Director-General may by warrant under his hand cause the removal of a prisoner from a prison or police gaol to any other prison or police gaol in Victoria.

(2) Upon a removal the prisoner shall, subject to the provisions of section 115 as to police gaols, be subject to be kept at such prison or police gaol for the unexpired portion of his sentence or until removed by lawful authority.

(3) Whilst being removed from or to a prison or police gaol a prisoner shall be deemed to be in the legal custody of the member of the police force or prison officer having the custody of the prisoner and acting under the warrant.

(4) The Director-General may order the removal of a prisoner from a prison to a hospital or institution for the purpose of his receiving medical treatment and the prisoner whilst in the hospital institution or place and in going thereto and returning therefrom shall be deemed to be in the legal custody of the Director-General and the hospital institution or place shall be deemed to be a prison.

(5) When the Director-General so directs the prisoner shall after treatment be taken in custody to the prison whence he was removed or such other prison as the Director-General directs.

126. The Director-General may order any persons sentenced to imprisonment or committed to prison in default of payment of a fine or sum of money to be set to some labour.

127. In all cases in which a person is under sentence of imprisonment on summary conviction or under section 135 or section 136 it shall be lawful for the governor or other officer or person having the custody or charge of the offender to do for the safe keeping of the offender and preventing his escape all such acts as it would be lawful for the governor officer or person to do for the like purpose if the offender were then under sentence of imprisonment or detention for an indictable offence.

128. The Director-General may order the release from custody of a prisoner at any time within the seven days immediately before the date upon which the prisoner would have been entitled to be released under the regulations applicable to the detention of the prisoner or on parole pursuant to the provisions of Division 2 of Part IV. of the *Crimes Act* 1958.

129. When a prisoner is detained in a prison or lock-up under or awaiting sentence or awaiting trial or on remand or for any other lawful cause and the prisoner is charged with an offence he may upon an order in the form or to the effect of the form in Schedule Three made by a judge of the court or by the justices or by one of the justices before whom the charge may be tried or heard be brought up to answer the charge without a writ of *habeas corpus* and every prisoner brought up under any such order shall be deemed to be in the legal custody of the member of the police force governor or prison officer having the temporary custody of the prisoner and acting under such order and he shall in due course return the prisoner into the custody from which he was brought.

130. The Director-General may make inquiry and take evidence on oath or otherwise as to the conduct of any prison officer and as to the treatment and conduct of the prisoners and as to any alleged abuse within the prison or in connexion therewith.

DIVISION 4.—OFFENCES.

131. (1) The governor of a prison may hear and determine all charges against a prisoner for any minor breach of the rules or regulations as by the rules or regulations made by the Governor in Council under this Act are directed to be submitted to the decision of the governor of the prison, and may punish such prisoner by solitary confinement for a term of not more than two days or by close confinement in a cell on half rations for a term of not more than four days, such punishment to be concurrent with any sentence the prisoner is then undergoing or by stopping any gratuity which would otherwise be accruing to the prisoner for any period not exceeding one month or by postponing the discharge of the prisoner under the regulations or the release of the prisoner on parole for any period not exceeding seven days.

(2) A record of all such punishments shall be kept by the governor and forwarded every month by him to the Director-General and no prisoner shall be punishable upon a second charge for the same offence before a visiting justice.

132. Every person lawfully imprisoned for an offence by the sentence of a court of competent jurisdiction who escapes, attempts to escape, or without lawful authority is absent from a prison or from the custody of a member of the police force in whose custody he is shall be guilty of an indictable offence and being lawfully convicted thereof shall be liable to imprisonment for a term of not more than five years.

133. (1) Every person who conveys or causes to be conveyed or who delivers or causes to be delivered to any person for the purpose of being conveyed into a prison or who secretes or leaves upon or about any road public work prison or other place where prisoners are usually employed or confined for the purpose of being found or received by a prisoner any article of disguise instrument arms weapon or any poisonous or deleterious drug or any other article or thing likely to be used for the purpose of escape shall be deemed and taken to have delivered the same to aid and assist the escape of a prisoner from the prison or place even though no escape has been attempted.

(2) Every such person and every person who in any other manner aids abets or assists or attempts to aid abet or assist a prisoner to escape from a prison or other place of detention may be apprehended by any member of the police force or other person without warrant and be by him detained and kept in safe custody until the offender can be brought before a magistrates' court which may hear and determine the alleged offence.

(3) Such offender shall upon conviction thereof or of any of such offences be liable to a penalty of not more than $2,000 and in default of payment or in the discretion of the justices without any default to imprisonment with or without hard labour for a term of not more than two years.

134. (1) Every person who harbors in or about his house lands or otherwise or in any manner employs any person under sentence of imprisonment and illegally at large shall be liable to a penalty of not more than $1,000.

(2) Upon any proceedings for an offence against sub-section (1) it shall be a defence to the charge if the defendant proves to the satisfaction of the court that he used due and proper diligence in ascertaining whether the person so illegally at large was free or not and that such first-mentioned person had reasonable ground for believing that the person so illegally at large was free.

135. Every person who—

(*a*) contrary to the provisions of any Act or regulation relating to prisons holds or attempts to hold communications with any prisoner ;

(*b*) without the approval of the Director-General delivers or in any manner whatsoever endeavours or attempts to deliver or causes to be delivered to a prisoner or introduces or attempts or endeavours to introduce or causes to be introduced into a prison any money letter tobacco article of clothing alcoholic liquor or any other article or thing whatsoever ;

(*c*) lurks or loiters about a prison or other place in which prisoners are confined or employed for any of the purposes aforesaid ;

(*d*) without the approval of the Director-General delivers or causes to be delivered to any other person any money letter tobacco article of clothing alcoholic liquor article or thing for the purpose of being conveyed or introduced as aforesaid or who secretes or leaves upon or about any place where prisoners are usually employed any money letter tobacco article of clothing alcoholic liquor article or thing for the purpose of being found or received by a prisoner ;

(*e*) without the approval of the Director-General in any other manner conveys or causes to be conveyed to a prisoner any money letter tobacco article of clothing alcoholic liquor article or thing ;

(*f*) without the approval of the Director-General takes or receives or in any manner attempts to take or receive from a prisoner any money letter article or thing whatsoever ;

(*g*) without the approval of the Director-General permits requires or causes any person to take or receive from a prisoner any money letter article or thing whatsoever—

may be apprehended by any member of the police force prison officer or other officer or by any person in whose custody any such prisoner then is without warrant and may by such member prison officer or other person be detained and kept in safe custody until he can be brought before a magistrates' court which may hear and determine the offence.

Penalty : Imprisonment for two years.

136. If any person loiters about a prison or other place in which prisoners are confined and refuses or neglects to depart therefrom upon being warned so to do by a member of the police force prison officer or authorized person or if any person (not being a prisoner or a governor prison officer or other officer or person duly authorized) is found within the boundaries of a prison, such person shall, unless he proves to the contrary, be deemed to be lurking or loitering about the prison or place for the purposes aforesaid.

137. (1) A visiting justice may inquire in a summary way into any charge of escaping insubordination assault upon or attempt to do any bodily injury to any officer or prisoner or any riot or tumult in a prison or other place where prisoners are in custody or any wilful and malicious destruction or injury of or attempt at the wilful and malicious destruction or injury of any such prison or any furniture thereof or of any public works or of any implements used thereon brought against any prisoner.

(2) The justice may upon convicting a prisoner sentence him to be kept to hard labour for a term of not more than two years and may order the prisoner to be kept in solitary confinement for any portion of that term of not more than three months in period none of which shall exceed one month and which shall be at intervals of at least one month.

138. (1) A visiting justice may inquire in a summary way into any charge of attempting to escape idleness insolence refusal to work disobedience of orders use of indecent abusive or improper language or breach of any rule or regulation or any other misconduct brought against a prisoner.

(2) The visiting justice may sentence a prisoner upon conviction to be imprisoned for a term of not more than six months for a first offence, and of not more than eighteen months for a second or subsequent offence or to be kept in solitary confinement either continuously or at such intervals as the visiting justice thinks fit for a period of not more then twenty-one days for a first offence and of not more than thirty days for a second or subsequent offence.

139. Every sentence of punishment by a visiting justice shall unless otherwise directed by the justice at the time of pronouncing the sentence be cumulative upon the substantive sentence or sentences under which the prisoner is detained but shall be concurrent with or cumulative upon any previous uncompleted sentence of punishment by a visiting justice as is in each case determined by a justice imposing a second or subsequent sentence.

140. (1) A sentence of punishment by a visiting justice upon a prisoner shall, whether concurrent with or cumulative upon the substantive sentence of the prisoner or any uncompleted sentence of punishment by a visiting justice previously imposed upon him, take effect immediately unless the justice imposing the sentence orders that it shall take effect upon the completion of such substantive sentence or of any such uncompleted sentence of punishment previously imposed or at some other time before the final discharge of the prisoner.

(2) If a sentence of punishment by a visiting justice is cumulative upon a previous uncompleted sentence and the first-mentioned sentence takes effect before the completion of a previous uncompleted sentence it shall have the effect of suspending every previous sentence uncompleted at the time it takes effect and every such suspended sentence shall at the expiration of the suspending sentence of punishment become again in force so that the period of the suspending sentence shall not be reckoned as a portion of the time served under the suspended sentence.

141. (1) A conviction under section 137 or section 138 on any charge need not be drawn up in a formal manner but a book to be called the " Conviction Book " in accordance with or to the effect of the form in Schedule Four shall be kept in every prison and the visiting justice or justices shall cause to be entered in the book the particulars of each charge and of the adjudication thereon, and the visiting justice or justices then adjudicating shall sign his or their name or names opposite the entry and the entry so signed shall, if the prisoner is convicted of the charge, be deemed to be a conviction for all purposes whatsoever.

(2) A Conviction Book having an entry so signed of a conviction or a document purporting to be a copy of a particular entry of any conviction therein and purporting to be certified under the hand of the officer of the prison having the custody of the book to be a true copy of an entry in the book shall be sufficient evidence of such conviction and be received as such in any court or before any person having by law or by consent of parties authority to hear receive and examine evidence.

142. The term of any imprisonment hard labour or solitary confinement imposed under any of the provisions of this Act shall not be deemed or taken as a portion of any term of imprisonment or hard labour to which the prisoner was sentenced.

DIVISION 5.—MISCELLANEOUS.

143. A person arrested under the process of a court or for an offence may be taken to the prison or lock-up which by reason of its nearness or accessibility to the place of arrest is in the opinion of the person making the arrest the most accessible or convenient and may be there detained until discharged or otherwise dealt with in due course of law.

144. Nothing in this Act shall affect the jurisdiction or responsibility of the sheriff in respect of a prisoner under sentence of death or his jurisdiction or control over the prison where the prisoner is confined and the officers thereof so far as is necessary for the purpose of carrying into effect the sentence of death or for any purpose relating thereto.

145. All proceedings under this Act other than proceedings in respect of indictable offences shall be had and taken in a summary way and no such proceeding shall be removed by *certiorari* into the Supreme Court.

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PART VIII.—GENERAL.

178. (1) The Director-General may at any time order that any ward of the Department or other person lawfully in his custody be examined to determine his medical physical or mental condition.

(2) The Minister the Director-General or any person authorized by the Minister in that behalf and notwithstanding the objection of any parent may consent to any surgical or other operation upon any ward of the Department or upon any other person under the age of twenty-one years lawfully in the custody of the Director-General which he is advised by a legally qualified medical practitioner is necessary in the interest of the health or welfare of any such person.

(3) Arrangements may be made between the Minister and the Minister of Health whereby any necessary medical dental psychiatric and pharmaceutical services may be provided for any persons whatsoever in the custody care or control of the Director-General or the Department or such voluntary organizations persons or classes of persons as are prescribed.

179. (1) The Director-General may by writing under his hand permit any person in his legal custody to temporarily leave, with or without escort or supervision, the place where he is imprisoned detained or held in custody.

(2) A permit under this section may be subject to such conditions limitations and restrictions as the Director-General thinks fit to impose.

(3) A person permitted temporary leave in accordance with the provisions of this section shall during such temporary leave be deemed to continue to be in legal custody.

(4) Any person who fails to return to the place of custody from which he was so released or is guilty of a contravention of or failure to comply with any other condition limitation or restriction to which the permit is subject shall be deemed to have escaped from legal custody.

180. Every person who obstructs or hinders the Director-General or any officer of the Department in the execution of his duties under this Act shall be guilty of an offence.

Penalty : $250 or imprisonment for three months.

181. Every person who contravenes or fails to comply with any of the provisions of this Act or the regulations shall for every such contravention or failure be guilty of an offence against this Act.

(2) Every person guilty of an offence against this Act for which no penalty is expressly provided shall be liable to a penalty of not more than $100.

182. The Governor in Council may make regulations for or with respect to—

. . . . . .

(*j*) reports for the purposes of this Act ;

(*k*) all matters necessary or expedient for the good order discipline safe custody and health of prisoners ;

(*l*) the mitigation or remission conditional or otherwise of any sentence of imprisonment or of imprisonment or detention with hard labour for any indictable offence or offence punishable on summary conviction as an incentive to or reward either for good conduct or for special industry in the performance of any work or labour allotted to an offender whilst he is

imprisoned or detained under such sentence and may mitigate or remit the term of punishment accordingly ;

(*m*) the treatment programme for prisons ;

(*n*) all matters necessary or expedient for carrying out the provisions of section 131 ;

(*o*) scales of prisoners' earnings ;

(*p*) prescribing courses of instruction and training necessary to qualify for certificates of qualification issued by the Training Council ;

(*q*) prescribing fees to be paid—

(i) by persons attending lectures classes courses schools and other activities conducted by the Department ;

(ii) by candidates at examinations conducted by the Training Council and for the issue of diplomas and certificates of competency ;

. . . . . .

(*v*) prescribing standards to be observed for the care and welfare of inmates of institutions under the control or supervision of the Department and in performing any function, supplying any service, or otherwise in carrying out the objects of this Act ;

(*w*) the conduct management and supervision of children's reception centres children's homes youth training centres remand centres youth hostels youth welfare services prisons and police gaols and such other homes and institutions as are established under and pursuant to this Act or under the control of the Department ;

. . . . . .

(*ac*) prescribing forms of applications agreements complaints books certificates rolls licences orders warrants and bonds under this Act and such other forms as are necessary or expedient for the administration of this Act and all such forms or forms to the like effect shall be sufficient in law ;

(*ad*) prescribing penalties for offences against the regulations; and

(*ae*) generally any matter or thing authorized or required to be prescribed for carrying this Act into effect.

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SCHEDULE FOUR.

CONVICTION BOOK.

Prison, (*Day of Week*) the day of , 19 .

Name and number of Prisoner.	Charge.	Date of offence.	Plea.	Decision.	Signature of Visiting Justice and Date.

PARTS OF THE SOCIAL WELFARE REGULATIONS 1962.

(Amendments have been incorporated, but in the interpretation of these Regulations effect must also be given to the statutory transfer of the administration of the penal system from the Chief Secretary's Department to the Social Welfare Department. Although they have not been reproduced in this Appendix, sections in Part I of the *Social Welfare Act* 1970 are relevant to the interpretation of these Regulations.)

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5. These Regulations are divided into divisions as follows :—

Division I.—Family Welfare Division.
Division II.—Youth Welfare Division.
Division III.—Prisons Division.
Division IV.—Research and Statistics Division.
Division V.—Training Division.
Division VI.—Probation and Parole Division.
Division VII.—Miscellaneous Division.

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DIVISION III.—PRISONS DIVISION.

PARTS.

1. This Division is divided into Parts as follow :—

I. Interpretation and Application.
II. Prison Standing Orders.
III. Routine.
IV. Discipline : Offences by Prisoners.
V. Dietary Scales.
VI. Health of Prisoners.
VII. Clothing and Property.
VIII. Prisoners' Correspondence.
IX. Visits to Prisoners :
(*a*) by relatives and friends
(*b*) by qualified legal advisers
(*c*) at Court
(*d*) by Police.
X. Religious Observance and Pastoral Care.
XI. Bails and Fines.
XII. Petitions.
XIII. Remissions.
XIV. Classification of Prisoners.
XV. Treatment Programme.
XVI. Employment of Prisoners.
XVII. Prisoners' Earnings.
XVIII. Regulations Applicable only to Prisoners under Sentence of Death.
XIX. Regulations Applicable only to Prisoners Awaiting Trial or not Convicted of a Crime.
XX. Discharge and Release Procedures.
XXI. Visits to Prisons.
XXII. Searching of Officers or Persons within Prisons.
XXIII. Officers—(*a*) General
(*b*) Offences
(*c*) Uniforms
(*d*) Awards to Officers.
XXIV. Visiting Justices.
XXV. Chaplains.
XXVI. Medical Officers.
XXVII. Prisoners' Aid Society and Women's Prison Council.

PART I.—INTERPRETATION AND APPLICATION.

2. In this Division :—

" Director of Prisons " means the person appointed to administer the Prisons Division subject to the control and direction of the Director-General.

" Prison " means any gaol under the *Gaols Act* 1958.

" Governor " means governor, keeper, gaoler, officer or other person for the time being in charge of the prison.

" Medical Officer " means medical officer of the prison.

" Officer " includes any person other than a prisoner, employed in a prison.

" Overseer " means any person specifically employed to supervise the labour of prisoners.

" Prisoner " means any person in custody in any prison irrespective of the cause of such detention.

" Classification Committee " means any committee appointed as such by the Director-General.

3. These Regulations shall apply to all persons employed in the Prisons Division of the Social Welfare Branch and to all prisoners in any prison under the control of the Prisons Division.

PART II.—PRISONS STANDING ORDERS.

4. The Governor of each prison shall prepare a complete set of standing orders relating to any matters concerning the administration of his prison not specifically covered by these Regulations.

5. Prison standing orders are to be approved by the Director-General and any amendments are subject to such approval.

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PART III.—ROUTINE.

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21. Any complaint made by a prisoner shall be investigated by the Governor of the prison who shall if the complaint is serious refer the matter to the Director-General.

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PART IV.—DISCIPLINE : OFFENCES BY PRISONERS.

25. Any prisoner who—

(*a*) threatens to assault or do any bodily injury to any officer or prisoner ;

(*b*) wilfully injures himself ;

(*c*) makes alters or removes any tattoo mark or other mark (whether natural or otherwise) upon the body of himself or another prisoner ;

(*d*) except with the permission of an officer, sets alight any article or thing ; or

(*e*) attempts to do any of the foregoing things—

shall be guilty of a breach of these Regulations.

26. Any prisoner who—

(*a*) engages in gambling ;

(*b*) except with the permission of an officer, smokes tobacco ;

(*c*) except where he is permitted to do so by or under these Regulations, writes any letter ;

(*d*) except with the permission of the Director-General, has in his possession any article or thing which has not been issued to him by any officer ;

(*e*) engages in trafficking in any articles or things ;

(*f*) quarrels with any other prisoner ;

(*g*) except by the direction or with the permission of an officer, leaves his place of work or recreation ;

(*h*) makes unnecessary noise ;

(*i*) enters another prisoner's cell without permission or direction from an officer ;

(*j*) fails to obey a lawful order given by an officer ; or

(*k*) attempts to do any of the foregoing things—

shall be guilty of a breach of these Regulations.

26A. Any charge brought against a prisoner for any breach of these Regulations referred to in Regulation 26 may be submitted to the Governor for his decision."

PART V.—DIETARY SCALES.

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29. A prisoner undergoing solitary confinement shall receive 16 oz. of bread per day for the first two days and thereafter one-half of the daily ration scale.

30. The Director-General may alter the foregoing dietary scales from time to time.

PART VIII.—PRISONERS' CORRESPONDENCE.

63. Officers are directed to encourage prisoners to write letters to maintain family ties, and to permit letters to assist their rehabilitation and employment on discharge.

64. A prisoner may write and receive one letter fortnightly but the Governor may permit additional letters to be written and received.

65. Each letter written to or by a prisoner shall be examined by the Governor or an officer detailed for that purpose. Any letter either to or from the prisoner may be withheld by the Governor and submitted to the Director-General whose decision shall be final.

66. Each letter received by the prisoner shall be returned to the Governor within seven (7) days to be retained until the prisoner's discharge or, if the prisoner wishes, destroyed.

67. Letters shall be written only on paper supplied and a record kept of the letters posted for the prisoner and the cost of postage shall be deducted from his earnings.

68. A prisoner shall not be permitted to write to another prisoner without permission from the Director-General.

69. A prisoner shall not be permitted to sign for, deliver to or receive from a relative, friend, or legal adviser, any document without the sanction of the Director-General.

PART IX.—VISITS TO PRISONERS.

(*a*) *By Relatives or Friends.*

. . . . . .

(*b*) *By Qualified Legal Advisers.*

82. On application at the prison, a duly qualified legal adviser of a prisoner may see the prisoner in private—

(*a*) to prepare his defence when on remand awaiting trial or remanded for sentence ;

(*b*) to advise the prisoner concerning an appeal, if within the statutory time allowed for an appeal ;

(*c*) to prepare his appeal if the prisoner has duly lodged an appeal against conviction and/or sentence.

83. Applications to visit a prisoner under sentence or for any purpose not defined in the foregoing Regulation shall be made to the Director-General and such visits will be in the presence of an officer.

84. The hours of attendance for such professional visits are :—

Monday to Friday—9 a.m. to 11.30 a.m.
2 p.m. to 3.30 p.m.

except that a prisoner may receive a professional visit at the prison between 8 a.m. and 9 a.m. on any day he is appearing at Court.

(*c*) *Visits at Court.*

85. Where a prisoner is in custody at a Court awaiting trial, the escorting officer may permit visits by legal advisers conducting his defence where facilities at the Court enable this to be done. Such visits shall be at the convenience of the escorting officer having regard to his duties to the Court and his responsibility for safe custody of the prisoner or other prisoners.

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PART XIV.—CLASSIFICATION AND SEPARATION OF PRISONERS.

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104. A prisoner shall be provided with a separate bed, and shall be housed in a separate cell unless directed otherwise.

104A. Any prisoner who has been charged with any offence committed within a prison may be directed by the Governor to be kept apart from other prisoners pending the hearing of the charge.

105. A prisoner undergoing punishment for any prison offence or whose removal may be considered necessary may be kept apart from other prisoners by the Governor subject to the approval of the Director-General.

106. A prisoner being kept apart from other prisoners or undergoing solitary confinement shall receive exercise in the open air at least two hours daily.

107. Prisoners shall be classified and separated by the Classification Committee subject to the approval of the Director-General.

108. In determining classification the Committee shall have regard to age, social history, criminal record, aptitude and suitability for training and employment, nature of current offence, length of sentence and need for security.

109. The Classification Committee shall review classifications and may alter these when appropriate to do so.

110. Classification files and personal case histories of prisoners shall be prepared and regularly maintained and entries made as directed by the Director-General.

111. Classification files and personal case histories of prisoners are confidential and shall not be disclosed to any person without the authority of the Director-General.

112. The Governor is responsible for conveying to every officer directly concerned in the treatment and training of a prisoner, any entry on the classification file which may affect the prisoner's treatment programme.

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PART XVI.—EMPLOYMENT OF PRISONERS.

122. A prisoner shall be employed at work within his capacity at such hours as laid down in standing orders of the station.

123. An unconvicted prisoner may be permitted to work and to receive earnings if he elects to do so and the routine of the prison and facilities enable this to be done.

PART XVII.—PRISONERS' EARNINGS.

124. A prisoner may earn credits of money (hereinafter referred to as earnings) for work performed in accordance with scales determined from time to time by the Director-General not exceeding a rate of fifty cents per day.

125. A prisoner employed otherwise than at an industry may be eligible for earnings if the nature of the work performed by him is considered by the Director-General to merit payment.

126. The earnings of a prisoner shall, in the discretion of the Director-General, be applied :—

(*a*) towards supplying personal needs of the prisoner ;

(*b*) towards payment of fees for education and training ;

(*c*) towards the maintenance, during the detention of the prisoner, of his wife and family (if any) ;

(*d*) in repayment to the Social Welfare Branch of any amount expended for the maintenance and support of his children during his detention ;

(*e*) in satisfaction of expenses and costs involved in re-arrest and trial after escape or attempted escape ;

(*f*) in satisfaction of costs to the Crown on any appeal or question of law raised by the prisoner.

127. Earnings shall be forfeited for absconding ; attempting to abscond ; or for any indictable offence.

128. A deduction as directed by the Director-General may be made from earnings for the value of property damaged, destroyed or lost, or for repeated acts of misconduct.

129. (i) An account of the earnings of each prisoner and of all disbursements and deductions made under the provisions of these Regulations shall be kept in the prison in which he is detained and the balance standing to his credit shall be paid to him upon his release from prison otherwise than on parole.

(ii) When a prisoner is released on parole the Chief Parole Officer shall, subject to any direction by the Parole Board, determine the amounts and times of payments to that prisoner of the said balances standing to his credit but so that the whole amount of that balance shall, unless forfeited under the next succeeding sub-clause, be paid before the expiration of his parole.

(iii) Where the prisoner's parole is cancelled the Parole Board shall determine the disposal of any amount of the said balance not paid to the prisoner before the date of cancellation of the parole.

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PART XXIII.—OFFICERS.

(*a*) *General.*

. . . . . .

169. In enforcing obedience by prisoners an officer shall be firm but temperate, carefully avoiding the use of harsh or irritating language or gestures, and shall resort to force only when absolutely necessary.

. . . . . .

174. An officer shall inform the Governor when any prisoner desires to see the Governor or a visiting justice, or the medical officer, or to make a request or make a complaint to superior authority.

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179. The Governor shall be the medium of communication between superior authority or persons outside the prison and officers and prisoners within, and shall forward without delay to the Director-General any report or complaint he may receive addressed to superior authority, with such remarks or explanation thereon as he thinks fit.

180. The Governor shall hear at least daily all reports that may be made to him, and shall take care that every prisoner having a complaint to make or a request to prefer shall have ample facilities for so doing ; he shall redress any grievance or take such other steps as may be necessary in each case.

181. The Governor shall personally keep a journal in which he shall note daily any occurrence of importance which may take place in the prison ; such journal shall be laid before the Director-General and the Director of Prisons on their visits.

182. The Governor shall, unless prevented by some extraordinary cause (which he shall record in his journal), personally visit and inspect every ward and cell in the prison, and see each prisoner as often as may be convenient. He shall attend at least one muster daily, and shall visit the prison during the night not less than once every week, and shall record each such visit in a book kept for the purpose.

183. The Governor shall take the best means at his disposal to make prisoners acquainted with the Regulations for prisoners.

184. The Governor shall not allow any person to view the prison contrary to these Regulations, and shall be careful that no visitor holds communication with a prisoner unless duly authorized to do so.

185. On each visit of the Director-General, the Director of Prisons, or a visiting Justice, the Governor shall report to him all irregularities which have occurred in the prison since his last visit. The Governor shall immediately report to the Director-General in writing, or if urgent by telephone, any serious irregularity, accident, or other extraordinary event which may occur.

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PART XXIV.—VISITING JUSTICES.

218. The Visiting Justice of each prison shall see all prisoners confined therein at least once in every month, at such times as least interferes with labour and discipline, and shall ascertain if such prisoners have any complaints, or if anyone is improperly or unnecessarily detained. In either case the Visiting Justice shall make such inquiry as he may deem desirable, and, if it appears to him to be necessary, shall bring the matter under the notice of the Director-General or Chief Secretary.

219. The Visiting Justice shall hear all complaints against prisoners which may be brought before him, and deal with such complaints according to law. He shall inspect the record of punishments inflicted by the Governor, but shall not be at liberty to alter any such punishment.

220. The Visiting Justice shall not directly interfere in, or give instructions with regard to, the management or discipline of the prison, or deal with any case affecting the conduct of the officers, but may report to the Director-General or Chief Secretary from time to time on these or other subjects as he may think necessary.

221. On or before the sixth day of each month the Visiting Justice shall report, in writing, to the Chief Secretary on the state of the prison to which he is appointed. In his report he shall include any matter that requires attention, and shall attach a return showing all punishments inflicted by his orders or by order of the Governor during the preceding month.

APPENDIX B.

BOARD OF INQUIRY INTO MATTERS CONCERNING HER MAJESTY'S PRISON —PENTRIDGE—AND INTO OTHER MATTERS.

TERM OF REFERENCE (*b*).

Submission by Director of Prisons (E. V. Shade) and Deputy-Director of Prisons (B. D. Bodna) on behalf of Social Welfare Department.

1. *Term of Reference* (*b*) :

Whether the provisions of Part IV. of the *Social Welfare Act* 1970 relating to—

(i) the maintenance of discipline in prisons ;

(ii) the formulation, hearing and determination of charges against prisoners ;

(iii) the punishment of prisoners for offences committed in prisons ;

should be amended in any and what respect and whether provision should be made for the representation of prisoners and prison officers at the hearing of charges.

2. *The Maintenance of Discipline in Prisons :*

2.1. The Oxford Dictionary suggests several relevant emphases when defining " discipline " :

(*a*) a system of moral and mental training ;

(*b*) the practice maintaining this system ;

(*c*) the process of correction and penalty used to maintain this practice ;

and the proper examination of this term of the inquiry requires the examination of Part IV. of the *Social Welfare Act* 1970 further to each of these several meanings.

2.2. *A System of Moral and Mental Training :*

2.2.1. Although section 112, Part IV., *Social Welfare Act* 1970 indicates that the functions of the Prisons Division shall be—

" (*a*) to control and supervise all persons imprisoned or detained in prisons;

(*b*) to assist in the rehabilitation of all prisoners and all persons released from a prison or police gaol;

(*c*) to provide welfare services to prisoners and their families ; and

(*d*) to assist and promote co-operation between private organizations and Government departments concerned with the welfare and after-care of prisoners; "

the detail of these functions which enable a varied programme of training and other gaols for the Prisons Division are contained in Division III. of the Social Welfare Regulations subsequent to section 182, Part VIII. of the *Social Welfare Act.*

2.2.2. Section 182 of the *Social Welfare Act* indicates that the Governor in Council may make regulations *inter alia* for the following:—

" (*k*) all matters necessary or expedient for the good order discipline safe custody and health of prisoners ;

(*l*) the mitigation or remission conditional or otherwise of any sentence of imprisonment or of imprisonment or detention with hard labour for any indictable offence or offence punishable on summary conviction as an incentive to or reward either for good conduct or for special industry in the performance of any work or labour allotted to an offender whilst he is imprisoned or detained under such sentence and may mitigate or remit the term of punishment accordingly ;

(*m*) the treatment programme for prisons ;

(*n*) all matters necessary or expedient for carrying out the provisions of section 131 ;

(*o*) scales of prisoners' earnings ;

. . . . . .

(*w*) the conduct management and supervision of children's reception centres children's homes youth training centres remand centres youth hostels youth welfare services prisons and police gaols and such other homes and institutions as are established under and pursuant to this Act or under the control of the Department ;

. . . . . .

(*ad*) prescribing penalties for offences against the regulations ; "

and the regulations make general provision for the varied programme of treatment and training within prisons.

2.2.3. It can therefore be maintained that Part IV. of the *Social Welfare Act* does not refer to the above meaning of " discipline " and that therefore this area is not within the ambit of the Inquiry.

It could be argued that section 126 of the *Social Welfare Act* which provides that " the Director-General may order any persons sentenced to imprisonment or committed to prison in default of payment of a fine or sum of money to be set to some labour " refers to an aspect of training, but it is more likely that it is purely enabling legislation without reference to labour as a mode of training.

2.3. *The Practice Maintaining this System :*

2.3.1. It would again appear that this aspect of discipline is essentially described in the regulations pursuant to section 182, Part VIII. of the *Social Welfare Act* 1970 and does not stem from Part IV. of this Act.

However, section 127 may appear to have some relevance to this aspect of discipline—

> " 127. In all cases in which a person is under sentence of imprisonment on summary conviction or under section 135 or section 136 it shall be lawful for the governor or other officer or person having the custody or charge of the offender to do for the safe keeping of the offender and preventing his escape all such acts as it would be lawful for the governor officer or person to do for the like purpose if the offender were then under sentence of imprisonment or detention for an indictable offence."

2.3.2. Although the Prisons Division has a special obligation for the safe keeping of all imprisoned offenders, special precautions and facilities are provided for the prisoners considered high security risks in H Division, H. M. Prison, Pentridge. However, this Division is also used for disciplinary purposes and prisoners may be removed to H Division with the approval of the Classification Committee of the Prisons Division. The Classification Committee receives this authority from Regulations 107–9 of the Regulations subsequent to section 182 (1), Part VIII., *Social Welfare Act* 1970—

> " 107. Prisoners shall be classified and separated by the Classification Committee subject to the approval of the Director-General.
>
> 108. In determining classification the Committee shall have regard to age, social history, criminal record, aptitude and suitability for training and employment, nature of current offence, length of sentence and need for security.
>
> 109. The Classification Committee shall review classifications and may alter these when appropriate to do so."

2.3.3. In these circumstances it would appear that section 127 does not have relevance to this second aspect of " discipline ".

2.4. *The Process of Correction and Penalty used to Maintain this practice :*

The matters which relate to this aspect of discipline and entail details of the formulation and hearing of charges, and the penalties for offences are contained in the other items of section (*b*) of the Inquiry.

3. *The Formulation, Hearing and Determination of Charges against Prisoners :*

3.1. *The formulation of charges and appropriate jurisdiction :*

3.1.1. The earlier portions of sections 131 (1), 137 (1) and 138 (1) of Part IV., *Social Welfare Act* 1970 refers to the variety of offences which might be committed by a prisoner whilst in prison and differentiates between tribunals, hearing and determining charges—

> " 131. (1) The governor of a prison may hear and determine all charges against a prisoner for any minor breach of the rules or regulations as by the rules or regulations made by the Governor in Council under this Act are directed to be submitted to the decision of the governor of the prison. . .
>
> 137. (1) A visiting justice may inquire in a summary way into any charge of escaping insubordination assault upon or attempt to do any bodily injury to any officer or prisoner or any riot or tumult in a prison or other place where prisoners are in custody or any wilful and malicious destruction or injury of or attempt at the wilful and malicious destruction or injury of any such prison or any furniture thereof or of any public works or of any implements used thereon brought against any prisoner.
>
> 138. (1) A visiting justice may inquire in a summary way into any charge of attempting to escape idleness insolence refusal to work disobedience of orders use of indecent abusive or improper language or breach of any rule or regulation or any other misconduct brought against a prisoner."

The offences which might be committed by a prisoner are therefore described in the statute as in sections 137 and 138 or are described in regulations further to the *Social Welfare Act*. There are several matters which deserve attention in this area.

3.1.2. The offences for which the governor has jurisdiction must be described in the regulations whereas the offences for which the visiting justice has jurisdiction are essentially described in the statute although this jurisdiction may extend to offences mentioned in the regulations.

3.1.3. The offences mentioned in section 137 which relate to the jurisdiction of the visiting justice are essentially general offences against the law even outside the prison with the notable exceptions of " insubordination " and " riot or tumult " in a prison. The latter is obviously seen as a particular form of riot and both appear to relate to the special nature of a prison.

3.1.4. The offences described in the regulations are generally acts which do not otherwise constitute a breach of law. These offences are actions which are prejudicial to the security and proper order of a prison and the safety of prisoners.

3.1.5. Section 138 describes further offences which relate to the jurisdiction of the visiting justice. These offences, with the possible exception of indecent and improper language, are not offences outside the prison. They are essentially actions which undermine the security and good order of the prison and this section, in addition to naming particular actions of this nature which do not occur in the regulations, also extend to the jurisdiction of the visiting justice to offences which are described in the regulations. Jurisdiction of the visiting justice may therefore be described as both judicial and quasi-administrative.

3.1.6. Section 137 indicates that the governor's jurisdiction extends only to minor breaches of the regulations and the visiting justice's jurisdiction relative to breaches of the regulations would therefore appear to relate only to offences which more seriously breach regulations.

3.1.7. The formulation of charges against prisoners if they are to remain valid must of necessity be prepared with the guidance of the statute and regulations. The statute also indicates proper jurisdiction for hearing charges although some discretion is allowed for breaches against regulations. This discretion is generally exercised by the governor of a prison who must decide whether such breaches are minor or otherwise. It would appear from examination of returns submitted by visiting justices that governors rarely pass breaches of regulations to the jurisdiction of visiting justices and therefore appear to prefer handling such breaches within their own jurisdiction.

3.1.8. It would appear that where breaches of regulations are passed to the jurisdiction of visiting justices, or subsequent to section 138 the visiting justice hears offences which are essentially breaches of good order in the prison, the penalties imposed for these offences are generally considerably less than the maximum penalties allowed by section 138 for these offences.

3.1.9. Accordingly, it would appear desirable to differentiate between actions which constitute an offence even outside the prison and were therefore generally breaches of law, and actions which are prejudicial to the security and good order of a prison and are presently described both in section 138 and the regulations. This could be generally achieved by incorporating the offences presently described in section 138 in the regulations. However, it would be necessary further to this principle to include the offence of indecent and abusive language, which is generally an offence, and possibly attempting to escape, in section 137. In these circumstances the visiting justice would only have jurisdiction over prison offences which are also general offences at law, whilst the governor would have jurisdiction over actions which breach the good order of the prison. It would appear that present practice closely approximates to this principle.

3.1.10. However, it is felt that because of the special nature of a prison, that the offence of " insubordination " and " riot or tumult " should be retained in section 137. The latter offence could possibly be abbreviated to " riot " and in this way would not differ from that offence outside the prison.

3.2. *The Hearing and Determination of Charges against Prisoners : Tribunals.*

3.2.1. The Social Welfare Act, as indicated above, provides two tribunals for hearing charges against prisoners in prison. Section 131 indicates that the governor of a prison may hear and determine particular charges against a prisoner, whilst sections 137 and 138 indicate that a visiting justice may inquire in a summary way into similar and other charges against the prisoner. It is necessary to determine the nature of these tribunals so that the proper mode of hearing and determining charges against prisoners can be clarified and more closely defined.

3.2.2. It is perhaps appropriate to quote from J. C. Maddison, Minister for Justice in New South Wales, (*Justice in Correction, the Dilemma* Aust. and N.Z. Journal of Criminology, Vol. V. No. 1. March, 1972, p. 11) at this point. Maddison clearly defines the increasing problem with regard to prison tribunals and it is this problem which underlines the need for greater clarity and definition at this stage—

> " The need for a body of rules and regulations directed to the preservation of discipline and good order within the prison situation is an essential feature of custodial security. The prisoner who is alleged to have breached any rule or regulation may be required to appear before the prison disciplinary tribunal to answer the charge preferred against him.
>
> In recent years a great deal of attention has been paid to the absence of meaningful procedural safeguards for the prisoner when he appears before the tribunal. The rights of the prisoner before the tribunal are constantly being compared to the rights of the accused during trial and pre-trial stages:—
>
> The failure of the prisoner to receive advance notice of the charges preferred against him, the denial of the right to representation by counsel, the tendering of the misconduct report as the only evidence against the prisoner, the inability of the prisoner to cross-examine the officer who prepared the report, the absence of rules of evidence and the denial of the right to call or summon witnesses to give evidence on his behalf are the alleged shortcomings of most of the prison systems of the United States of America. There is no doubt that prisoners in most jurisdictions are also denied some or all of these suggested rights."

3.2.3. Although the hearing of charges by the governor of a prison is known familiarly as " governor's court " it would appear that this hearing does not have statutory judicial status. The Social Welfare Act in section 131 enables a governor to hear offences, but restricts these offences to breaches of the regulations subsequent to the Act and limits penalties which pertain to actions breaching the security, good order and the safety of prisoners, essentially to denial of privileges and reward to the prisoner within the prison.

3.2.4. It could perhaps be argued with regard to this latter that the penalty of solitary or close confinement, with reduced rations for a defined term, approximates to a further sentence for the prisoner, especially because of the nature of this penalty and also because the visiting justice, who appears to have judicial functions, may also impose this penalty further to sections 137 and 138 of the Social Welfare Act. It should be noted in this regard however, that solitary confinement when awarded by a visiting justice is considered to be a mode of confinement during a period of additional sentence.

3.2.5. It should be noted that section 131 does not even prescribe quasi-judicial procedures for the tribunal of the governor. It would therefore seem that the hearing of charges against prisoners by the governor of a prison has the status of a special administrative tribunal.

3.2.6. de Smith (*Judicial Review of Administative Action.* London 1968 p. 64–66) endeavours to differentiate between the features of judicial and administrative tribunals essentially by identifying the characteristic features of a judicial tribunal. However, de Smith also recognizes that this type of exercise is riddled with ambiguities and that many features relative to judicial tribunals also relate to administrative tribunals. He identifies the following features of judicial tribunals:—

(*a*) The performance of the function terminates in an order that has a conclusive effect and has no need for confirmation or adoption by another authority. However, this is not considered a decisive factor.

It is perhaps relevant here that a governor pursuant to section 131 (2) of the *Social Welfare Act* is obligated to make a monthly return of all punishments imposed by the governor during the month and it is necessary in Victorian prisons for the visiting justice to the prison to inspect and sign records relating to the hearing of charges by the governor;

(*b*) They determine matters in cases initiated by parties;

(*c*) They must normally sit in public;

(*d*) They are empowered to control the attendance of witnesses who may be examined on oath;

(*e*) They are required to follow the rules of evidence;

(*f*) They are empowered to impose sanctions by way of imprisonment, fines, damages, etc., and to enforce obedience to their commands.

3.2.7. However, many of these features, because of the essentially administrative or quasi-judicial role of a hearing and the special nature of a prison, do not appear relevant and appropriate to the gevornor's tribunal. de Smith emphasizes that the most characteristic feature of an administrative tribunal is the obligation to observe the rules and precepts of natural justice.

3.2.8. de Smith (op. cit., page 135) indicates that English law recognizes two principles of natural justice ; that an adjudicator be disinterested and unbiased and that the parties be given adequate notice and opportunity to be heard. de Smith also, when discussing tribunals which implement the rules of natural justice, indicates that these underline the required impartiality and indicates that such tribunals have failed in their function if the deciding authority acts in bad faith, capriciously in furtherance of unauthorized purpose without regard to relevant considerations or on the basis of irrelevant considerations, or if the tribunal fails to exercise an independant discretion in a particular case.

3.2.9. Osborne (" *Concise Law Dictionary* ", London 1964, p. 217) neatly defines other principles and features of natural justice—

> " The chief rules are to act fairly, in good faith, without bias, and in a judicial temper ; to give each party the opportunity of adequately stating his case, and correcting or contradicting any relevant statement prejudicial to his case, and not to hear one side behind the back of another. A man must not be judge in his own case. . . . A man must have notice of what he is accused. Relevant documents which are looked at by the tribunal should be disclosed to the parties interested.
>
> In short, not only should justice be done, but it should be seen to be done."

3.2.10. de Smith (p. 68) indicates that it is not possible to appeal against a decision of an administrative tribunal unless this is specifically prescribed in the statutory discretion, enabling the tribunal.

3.2.11. Investigation of procedures followed by governors at the various prisons when hearing charges against prisoners indicates that these procedures generally approximate to the prescriptions of natural justice. However, practices do vary from one prison to another and in some instances particular requirements may be overlooked. There is at prssent, no general set of instructions available to governors advising these officers of procedures to be followed when hearing charges against prisoners.

3.2.12. It is felt that a comprehensive set of procedures based on the rules and general practices demanded by the principles of natural justice, should be prepared for the guidance of governors when hearing charges against prisoners. These procedures could be included in the regulations subsequent to the Social Welfare Act. However, it will be appreciated that this matter is essentially ancillary to section 182 of the Act.

3.2.13. The Social Welfare Act, Division IV., sections 137 and 138 provides a visiting justice may inquire in a summary way into various charges against prisoners. However, it is perhaps essential before proceeding to a discussion of the status of such inquiries to examine the status and role of the visiting justice. These are defined by section 120 of the Social Welfare Act.

" 120. (1) The Governor in Council may appoint any number of fit and proper persons being justices to be visiting justices of a prison and may remove any visiting justice.

(2) Every visiting justice shall unless prevented by illness or other sufficient cause—

(*a*) visit the prison, in rotation with other visiting justices, not more than once in every week ;

(*b*) make such reports as are from time to time required by Order of the Governor in Council ; and

(*c*) shall have and may exercise all the powers and authority of a visiting justice appointed under this Act.

(3) Every stipendiary magistrate shall by virtue of his office and without further appointment or authority than this Act be a visiting justice of every prison and shall have and may exercise at or in relation to a prison all the powers and authority of a visiting justice."

3.2.14. The visiting justice to a prison therefore, in addition to the judicial role imposed by sections 137 and 138 of the Social Welfare Act, also fulfills an inspectoral role and does in fact, in his monthly report, from time to time comment upon matters relevant to the administration of the particular prison or indicates complaints by prisoners about the administration of the prison.

3.2.15. It is provided by Regulation 218 that prisoners be given the opportunity of approaching the visiting justice during his periodic visits to a prison and in this way a visiting justice often acts as an informal legal advisor to prisoners.

3.2.16. It is noteworthy that despite the option allowed by the statute, the status of incumbents of the visiting justice's position has altered during the past decade. Although ten years ago it was still the practice for Justices of the Peace to be recommended to the Governor in Council by the Crown Law Department with the approval of the Social Welfare Department as visiting justices to particular prisons, it has become without exception, usual for visiting justices to be stipendiary magistrates appointed to particular prisons by the Senior Stipendiary Magistrate.

3.2.17. The previous and possible exceptional nature of the tribunal of the visiting justice in a prison is perhaps indicated by the contrast between the authority of the individual justice of the Peace acting in a judicial capacity as visiting justice even with regard to offences which are general offences and the prescription of section 661 of the *Justices Act* 1958 that except where otherwise expressly enacted, at least two justices shall comprise a magistrates' court. However, this exceptional nature of a visiting justice's court has been eroded by only appointing stipendiary magistrates to the role of visiting justice.

3.2.18. Section 137 and 138 indicate that visiting justices may inquire in a summary way into offences by prisoners but does not define the mode of procedure to be followed beyond this. Paul's ' *Justices of the Peace* ' (2nd ed. 1965 p. 171–2) when commenting on Part IV. of the *Justices Act* 1958 which relates to procedures to be followed in a magistrates' court notes that that Act refers to the summary jurisdiction of that court but does not define summary jurisdiction, nor kindred expressions. It is noted that the expression ' summary jurisdiction ' would seem wide enough to include—

(1) the jurisdiction of a Court of Petty Sessions and also

(2) the summary jurisdiction conferred by various acts on a justice or justices not sitting as a Court of Petty Sessions."

3.2.19. This volume argues that since section 112 of the Justices Act specifically indicates that certain sections of that Act relate to the general jurisdiction of justices then the other sections of the Act, including those that relate to procedure in a magistrates' court, do not extend to the general jurisdiction of justices. If this conclusion is valid then considerable ambiguity and doubt must exist about the correct procedures to be followed by a visiting justice when hearing charges against prisoners. It would appear that these procedures may depend only on the experience, training, and discretion of the individual visiting justice.

3.2.20. The uncertainty about the status of these proceedings is possibly increased by the ability of a prisoner convicted by a visiting justice's tribunal to appeal against that conviction.

Section 142 of the *Justices Act* 1958 indicates that—

" the expression magistrates' court shall include a justice or justices not sitting as a magistrates' court in every case whereby the last preceding section an appeal is given from the conviction or order of such justice or justices . . . . . ".

The Victorian Crown Solicitor in 1948 in an opinion on the right of a prisoner to appeal against sentence imposed by a visiting justice, indicated that although the *Gaols Act* 1928 (the precursor of those sections of the Social Welfare Act relating to prisons) made no provision for appeal, but section 136 to the *Justices Act* 1928 (now section 142 of the *Justices Act* 1958) allowed appeal to summary conviction and that sections 41 and 43 of the *Gaols Act* 1928 (now mainly equivalent to sections 137 and 138 of the Social Welfare Act) enable visiting justices to convict after inquiry in a summary way. He concluded that such convictions were summary convictions and that appeals were therefore justified. Subsequent to this opinion appeals by prisoners against convictions by visiting justices have been allowed to proceed without the proper authority contesting this right.

It would therefore appear that in practice the end product of the visiting justice's jurisdiction is not different from the decision of a magistrates' court even though the nature of the proceedings before each might be different.

3.2.21. It is felt that the continuing presence of stipendiary magistrates as visiting justices, the uncertainty about correct procedures to be followed by a visiting justice's tribunal, and the acceptance of the principle that sentences imposed by the visiting justice are of the same order as those imposed by magistrates' courts, altogether suggest that there is little purpose in continuing the special nature of the visiting justice's summary inquiry into particular charges against prisoners. It is suggested that present anomalies would be eliminated if the hearing of such charges were given the full status of a magistrates' court hearing and was subject to all statutes, rules and procedures common to that court. The only requisite which would appear difficult to achieve in procedures outlined in the Justices Act for that court is the prescription in section 91 (1) that sessions be public. However, this clause also qualifies the provision about public admittance to court with " so far as the same can conveniently contain them ". It will be appreciated that it has been previously suggested that the charges to be heard before the visiting justice would be essentially those that also constitute offences outside the prison.

3.2.22. It is perhaps relevant here to indicate the proposed change in the nature of the visiting justice's hearing would probably remove the present practice of visiting justices recording penalties on prisoners after conviction in a Conviction Book subsequent to section 141 of the Social Welfare Act and would probably require further warrants of commitment for prisoners convicted for offences whilst in prison.

4. *The Punishment of Prisoners for Offences Committed in Prisons :*

4.1.1. The statutory provisions relating to penalties for offences committed in prison are contained in sections 131, 137 and 138 of the *Social Welfare Act* 1970, whilst sections 139, 140 and 142 make provisions about the relationship of these penalties to sentences already being served by prisoners, and section 142 directs that a Conviction Book should be maintained as sufficient record of penalties imposed by a visiting justice. This matter was discussed earlier in this submission.

The relevant portions of sections 131, 137 and 138 relating to penalties are as follows :—

> " 131. (1) . . . . and may punish such prisoner by solitary confinement for a term of not more than two days or by close confinement in a cell on half rations for a term of not more than four days, such punishment to be concurrent with any sentence the prisoner is then undergoing or by stopping any gratuity which would otherwise be accruing to the prisoner for any period not exceeding one month or by postponing the discharge of the prisoner under the regulations or the release of the prisoner on parole for any period not exceeding seven days.
>
> (2) A record of all such punishments shall be kept by the governor and forwarded every month by him to the Director-General and no prisoner shall be punishable upon a second charge for the same offence before a visiting justice.
>
> 137. (2) The justice may upon convicting a prisoner sentence him to be kept to hard labour for a term of not more than two years and may order the prisoner to be kept in solitary confinement for any portion of that term of not more than three months in period none of which shall exceed one month and which shall be at intervals of at least one month.
>
> 138. (2) The visiting justice may sentence a prisoner upon conviction to be imprisoned for a term of not more than six months for a first offence, and of not more than eighteen months for a second or subsequent offence or to be kept in solitary confinement either continuously or at such intervals as the visiting justice thinks fit for a period of not more than twenty-one days for a first offence and of not more than thirty days for a second or subsequent offence."

4.1.2. The penalties which are contained in the above sections are—

(*a*) Solitary confinement and close confinement;

(*b*) Forfeiture of gratuities;

(*c*) Postponing the discharge of the prisoner;

(*d*) Further imprisonment with or without hard labour.

4.2. *Solitary Confinement or Close Confinement :*

4.2.1. In addition to the mention of those in the Statute, the Social Welfare Department Regulations also contain references to solitary confinement and these are contained in Division III.—Prisons Division ; Regulation 29—

> " 29. A prisoner undergoing solitary confinement shall receive 16 oz. of bread per day for the first two days and thereafter one-half of the daily ration scale."

and Regulation 105—

> " 105. A prisoner undergoing punishment for any prison offence or whose removal may be considered necessary may be kept apart from other prisoners by the Governor subject to the approval of the Director-General."

Regulation 106—

> " 106. A prisoner being kept apart from other prisoners or undergoing solitary confinement shall receive exercise in the open air at least two hours daily."

4.2.2. The Statute and Regulations therefore differentiate between solitary confinement and close confinement. The features of solitary confinement appear to be prescribed by—

1. *Authority to Penalize :*

Statute differentiates between use of this penalty by a governor and the visiting justice and the penalty may be imposed by either for breaches which relate to the different jurisdictions of each authority.

2. *The Period of Penalty :*

The governor may use this penalty for only a period of two days whilst the visiting justice may, depending on the offence of the prisoner, variously impose this penalty for a period not in excess of three months provided that one period of confinement does not exceed one month and shall be at intervals of at least one month and provided it coincides with a further sentence the visiting magistrate has imposed for the same offence, or for a continuous period of 21 days for a first offence and not more than 30 days for a second or subsequent offence.

3. *Mode of Confinement :*

It is implicit that the prisoner will be kept apart from other prisoners during a period of solitary confinement. It would appear, however, that various members of the prison staff may have access to the prisoner.

4. *Food :*

The prisoner undergoing solitary confinement is to receive 16 ounces of bread each day for the first two days of confinement and thereafter one half of the daily ration scale. It should perhaps be noticed here that Regulation 30 allows the Director-General to alter dietary scales from time to time.

5. *Exercise :*

The prisoner in solitary confinement must receive exercise in the open air for at least two hours daily.

4.2.3. *Close Confinement :*

The features of this penalty prescribed by the Statute and Regulations appear to be :

1. *Authority to Impose Penalty :*

This penalty may be imposed only by the governor of a prison.

2. *Period of Penalty :*

The period for the penalty should not exceed four days and is concurrent with any sentence the prisoner is undergoing.

3. *Mode of Confinement :*

It appears implicit that the prisoner should be kept apart from other prisoners in a cell but that members of the prison staff may have access to him.

4. *Food :*

The prisoner in close confinement is allowed half rations for the period of his confinement.

5. *Exercise :*

There is no mention of daily exercise for prisoners in close confinement.

Record must be maintained of all prisoners sentenced to close confinement or solitary confinement by either the visiting justice or the governor of the prison and a return made to the Director of such penalties.

4.2.4. The power of the visiting magistrate to confine a man for extended periods indicates the definite intention of a punitive quality of these practices and the fact that solitary confinement is rarely imposed by a visiting magistrate indicates that there may be an opinion that this penalty is now outmoded.

4.2.5. It is suggested however, that seperate confinement at the discretion of a governor for restricted periods may be a necessary deterrent penalty especially for prisoners who demonstrate violent anti-social attitudes or consistently endeavour to undermine the authority of a prison administration. The penalty of seperate confinement would remove the distinction between close confinement and solitary confinement. Its features would be separation from other prisoners for a period up to four days and the governor would be allowed the discretion of limiting rations by half during this period. The present provisions for exercise in the open air for two hours daily would remain.

4.2.6. However, it should be remembered further to this suggestion that both the *Justices Act* 1958 and the *Crimes Act* 1958 refer to solitary confinement in relation to penalties for offences outside the prison and these references would probably require examination if these penalties were deleted for offences within the prison. It would appear that the penalty of solitary confinement is rarely used although allowed by the Justices Act and Crimes Act.

4.3. *Forfeiture of Gratuities :*

4.3.1. The use of the term " gratuity " in section 131 (1) may appear to be an anachronism. The regulations subsequent to the *Gaols Act* 1928 differentiate between earnings which were " credits of money for work performed in accordance with scales determined from time to time by the Inspector General " and an allowance subsequent to Regulations 70–72 of the same Act that was made available to prisoners not in receipt of earnings.

" Regulation 70 : A prisoner, not in receipt of earnings in accordance with these Regulations, may receive a gratuity at the discretion of the Inspector-General, or the gaoler, who shall inquire into the merits of each case, but on no account shall the maximum amount of the following scale be exceeded by the gaoler :—

Period of Sentence	First Conviction	Second Conviction	Subsequent Conviction
	£ s. d.	£ s. d.	£ s. d.
One month and not exceeding three months	0 5 0	0 4 0	0 3 0
Over three months and not exceeding six months	0 10 0	0 7 0	0 5 0
Over six months and not exceeding twelve months	1 0 0	0 15 0	0 10 0
Over twelve months and not exceeding 24 months	1 10 0	1 0 0	0 15 0
Over 24 months	2 0 0	1 10 0	1 0 0

In very special circumstances the Inspector-General may exceed the scale to the extent of 50 per cent.

71. A prisoner who has funds at his disposal or friends to assist him shall not be granted a gratuity.

72. Good conduct and industry in gaol shall be indispensable conditions for the granting of a gratuity."

This differentiation was necessary because a prisoner who did not work or otherwise qualify after consideration by the Inspector-General was not eligible for earnings.

4.3.2. However, the regulations promulgated subsequent to the Social Welfare Act removed the differentiation between earnings and gratuity. The award of earnings are now contained in Regulations 124 and 125—

" 124. A prisoner may earn credits of money (hereinafter referred to as earnings) for work performed in accordance with scales determined from time to time by the Director-General not exceeding a rate of five shillings per day.

125. A prisoner employed otherwise than at an industry may be eligible for earnings if the nature of the work performed by him is considered by the Director-General to merit payment."

4.3.3. It will be noticed that earnings are not considered a right even for prisoners at work and the nominal discretion of the Director-General is still operative for prisoners otherwise employed. However, it has been the practice to allow all prisoners at least a portion of the amount stipulated as the maximum daily allowance. It should be remembered too that prisoners are obliged to work and that they do not offer their labour on a contractual basis. These factors, together with the doubtful right to a wage, suggest that earnings must still be regarded as a gratuity despite the nomenclature.

But these gratuities at present are earned on a daily credit basis and deductions are made from accumulated credit for canteen and other needs subsequent to Regulation 126—

" 126. The earnings of a prisoner shall, in the discretion of the Director-General, be applied—

(*a*) towards supplying personal needs of the prisoner ;

(*b*) towards payment of fees for education and training ;

(*c*) towards the maintenance, during the detention of the prisoner, of his wife and family (if any) ;

(*d*) in repayment to the Social Welfare Branch of any amount expended for the maintenance and support of his children during his detention ;

(*e*) in satisfaction of expenses and costs involved in re-arrest and trial after escape or attempted escape ;

(*f*) in satisfaction of costs to the Crown on any appeal or question of law raised by the prisoner."

4.3.4. In these circumstances some doubt must exist about the status of the penalty of forfeiture of earnings. There is some argument for interpreting this penalty as a denial of the privilege and further argument for seeing the penalty as a fine.

However, even if the penalty is interpreted as a fine it is probably not beyond the competence of the governor's tribunal to impose this type of penalty. It is considered desirable that this authority should persist for some offences, especially those involving wilful damage are often best penalized by deduction from earnings.

4.4. *Postponing the discharge of the prisoner :*

4.4.1. Part XIII., Division III. of the Social Welfare Regulations provide—

" 97. In respect of any sentence or sentences for which a minimum term has not been fixed, and subject to good conduct and industry and response to the treatment programme the Director-General may grant remission not exceeding one quarter of the total sentence.

Provided that in any case of special merit in the performance of a prisoner the Director-General may grant in addition to the foregoing, a further remission not exceeding three days per month.

98. Where any person is sentenced to a term of imprisonment and a minimum term is fixed in relation thereto, pursuant to the provisions of sub-section (1) of section 534 of the *Crimes Act* 1958, the Director-General of Social Welfare may—

(*a*) grant a maximum reduction of three days from the minimum term so fixed for each calendar month actually served if he is satisfied that the prisoner's conduct and and industry and response to the treatment programme throughout the term merit such reduction ;

(*b*) grant a maximum reduction of three days from the sentence for each calendar month actually served if parole is denied and he is satisfied that the prisoner's conduct and industry and response to the treatment programme throughout the sentence merit such reduction.

Provided that in any case of special merit in the performance of a prisoner the Director-General may grant in addition to the foregoing a further reduction not exceeding three days per month.

99. A prisoner unable to work may receive remission under the foregoing Regulations.

100. Where any sentence of death is commuted to ' life with the benefit of Regulations relating to remission ' the sentence shall be deemed to be twenty years.

101. Where any sentence of death is commuted to ' life without the benefit of Regulations relating to remission ' the sentence shall be deemed to be for life."

These provisions relating to remission are the subject of Reference (*c*) of the Inquiry.

4.4.2. The penalty " discharge postponed " relates to the governor of a prison limiting the remission granted to a prisoner and thereby extending the prisoner's period in detention.

4.4.3. The present penalty allows postponement of discharge for a period to seven days for each conviction by the governor. It is suggested that the proposed extension of a governor's jurisdiction by including many offences presently described in section 138 (2) merits the extension of the possible period for postponing discharge to ten days.

4.5. *Further imprisonment with or without hard labour :*

4.5.1. These penalties in present circumstances may be imposed to the extent of two years imprisonment with hard labour upon conviction for offences subsequent to section 137 of the Social Welfare Act and to a period of not more than six months imprisonment for a first offence, and of not more than eighteen months imprisonment for other offences subsequent to section 138 (2) of that Act. These latter penalties are essentially for offences which breach the good order of the prison whilst the former penalty is mainly for offences which generally resemble offences outside the prison. The earlier recommendation of this submission, when discussing section (*b*) (ii) of the Inquiry, was that the offences presently described in section 138 be included in the regulations and therefore solely within the governor's jurisdiction, but with the exception of the offences of " attempting to escape " and " use of indecent or improper language " which would be included among the offences in section 137 of the Act. The further suggestion was that charges contained in the amended section 137 would be heard in the same manner as prescribed by the *Justices Act* 1958 for offences heard before a magistrates' court. The implementation of these suggestions by removing section 138 (1) of the Act would also delete section 138 (2) which refers to sentences of imprisonment for maximum periods of six or eighteen months.

4.5.2. However, it is further suggested that section 137 (2) also be deleted and that the sentences subsequent to conviction for offences contained in section 137 (1) be the same as those which prevail for the same offences outside the prison. These penalties vary from the present maximum penalty of two years imprisonment with hard labour but all cases are still sufficient to act as a deterrent. This would be possible for all offences mentioned in the amended section 137 with the only exception being the offence of " insubordination " which does not exist in other circumstances. It is possible however, that penalties for this offence are enabled by section 322 (2) of the Crimes Act.

4.5.3. In addition to the above suggestions it is recommended that the penalties available to the governor's tribunal be increased to include " reprimand " and " denial of privileges ". At present section 131 does not allow the option of " reprimand " even though this might be a suitable penalty in some circumstances, and the " denial of privileges " would be a mild penalty relating to participation in activities, access to canteen etc. These latter would still be used as informal penalties within the prison but the addition of this item to section 131 would make this an alternative formal penalty also.

5. *Legal Representation :*

5.1.1. The question of legal representation before the governor's tribunal is closely related, subsequent to discussion earlier in this submission, to views which are otherwise held about legal representation before other tribunals where processes are guided by principles of natural justice.

de Smith (op. cit. p. 199) indicates that there is some authority for the proposition that an individual who is entitled to appear in person before a tribunal, is also entitled to be represented by a lawyer in the absence of expressed provision to the contrary. He further indicates that legal representation is highly desirable where the social standing or financial return of an individual is likely to be gravely prejudiced. He notices that legal representation is becoming more common at disciplinary procedures in universities. However, it is felt that these considerations are not seriously relevant in prisons.

de Smith also mentions arguments for excluding legal representation from tribunals—the practice introduces too much formality into proceedings, the witnesses and inexpert members of the tribunal are thereby often confused by " technical " points made by legal representatives, and that the presence of legal representatives increases the likelihood of subsequent proceedings in courts to impugn the tribunals' decision. It would therefore appear that there is no clear view on the general desirability of legal representation before a non-judicial tribunal and although there is a tendency to representation, much would depend on the nature of the particular tribunal.

5.1.2. It is suggested that the relatively limited penalties available to the governor's tribunal and the difficulty of providing legal representation for both parties with the large number of charges for minor offences that appear before governor's tribunals, make representation at the tribunals impracticable.

5.2.1. The right to both defendant and informant to legal representation before a magistrates' court is clearly stated in section 91 (1) of the *Justices Act* 1958—

> " . . . . and the party against whom such information is laid or such complaint is made shall be admitted either by himself his counsel or solicitor to make his full answer and defence thereto and to examine and cross-examine the witnesses ; and every informant or complainant in any such case shall be at liberty either by himself his counsel or solicitor to conduct such information or complaint respectively and to examine and cross-examine the witnesses ; "

5.2.2. If the earlier suggestion of this submission that the hearing of the visiting justice into offences by prisoners in prison should for all charges be considered a magistrates' court and be conducted according to all relevant statutes, rules and procedures of that court, then the right of the prisoner and the informant to legal representation necessarily follows.

5.2.3. It could be argued that the introduction of legal representation might encourage litigiousness on the part of some prisoners and will sometimes introduce an onerous, inconvenient and expensive procedure into a prison's administration. However, the necessity of ensuring a fair and adequate hearing for prisoners accused of offences which carry relatively heavy penalties undoubtedly outweighs these former considerations.

5.2.4. The extent of proceedings for which prisoners would be eligible for counsel is indicated in the following table. The table covers the periods January to June, 1971 and January to June, 1972 and in some aspects is intended as an approximate representation since it is difficult in present circumstances to subsequently accurately assess the quality of offences—

	January–June, 1971.	January–June, 1972.
1. No. of charges heard and finalized by visiting justice in all prisons	43	118
2. No. of charges heard by visiting justice that could otherwise be heard by governor in all prisons ..	17	39
3. No. of charges heard by visiting justice if regulations were altered in accord with above proposals in all prisons	26	89
4. No. of charges heard by visiting justice in country excluding Geelong	11	12
5. No. of charges heard by visiting justice in country that could otherwise be heard by governor ..	9	8
6. No. of charges heard by visiting justice in country if regulations were altered in accord with above proposals	2	4

The latter period considered was one of considerable unrest and the figure indicated might be unduly high when compared with a more normal period. However, the compensatory feature in considering this total figure of cases heard by the visiting justice in January to June, 1972 was that a significant proportion of offences contained in this figure related to multiple offences committed by a limited number of prisoners. It is therefore considered that the number of cases appearing before a visiting justice's court would not be inordinately high and individual hearings may not necessarily be protracted because of the introduction of legal representatives for parties.

It should also be noticed that the number of cases heard by visiting justices in country areas is relatively insignificant. This fact would undoubtedly be influenced by the practice of sending less troublesome prisoners to country prisons.

5.2.5. It is felt that the problem of providing legal representatives for prisoners desiring these may, in some circumstances, be especially difficult. However, the normal private and public channels for this purpose would undoubtedly be available to prisoners. It is likely though that the Prisons Division would require the additional establishment of a qualified lawyer to assist with proceedings.

6. *Recommendations :*

1. That section 131, Pt. IV. of the Social Welfare Act be altered to read—

> " 131. (1) The governor of a prison may hear and determine all charges against a prisoner for any breach of the rules or regulations as by the rules or regulations made by the Governor in Council under this Act are directed to be submitted to the decision of the governor of the prison, and may punish such prisoner by reprimand denial of privileges or by stopping any gratuity or earnings which would otherwise be accruing to the prisoner for any period not exceeding one month or by seperate confinement for any period not exceeding four days or by postponing the discharge of the prisoner under the regulations or the release of the prisoner on parole for any period not exceeding ten days."

2. That section 137, Pt. IV. of the Social Welfare Act be altered to read—

" 137. The visiting justice or justices may inquire in the same manner as a magistrates' court into any offence of escaping attempting to escape insubordination assault upon or attempt to do any bodily injury to any officer or prisoner riot or any wilful or malicious destruction or injury of or attempt at the wilful and malicious destruction or injury of any such prison or any furniture or fittings thereof or of any public works or of any implements machinery or equipment used thereon or indecent or abusive language by the prisoner and upon convicting the prisoner sentence him in the manner prescribed by the Acts relating to such offence."

3. That section 138, Pt. IV. of the Social Welfare Act be deleted.

4. That section 141, Pt. IV. of the Social Welfare Act be deleted.

5. That section 142, Pt. IV. of the Social Welfare Act be altered to read—

" 142. The term of any imprisonment or hard labour imposed under any of the provisions of this Act shall not be deemed or taken as a portion of any term of imprisonment or hard labour to which the prisoner was sentenced."

APPENDIX C.

BOARD OF INQUIRY INTO MATTERS CONCERNING HER MAJESTY'S PRISON—PENTRIDGE—AND INTO OTHER MATTERS.

TERM OF REFERENCE(*c*).

Submission by Director-General of Social Welfare (A. G. Booth) on behalf of Social Welfare Department.

1. *Term of Reference (c) :*

1.1. Term of Reference (*c*) requires the Board of Inquiry to inquire into and report upon—

> " Whether a further or different provision should be made for the remission, as an incentive to or reward for good conduct or industry, of sentences in respect of which a minimum term has been fixed."

2. *Remission of Sentences and the Administration of Prisons :*

2.1. Remission provides a most effective means whereby discipline and good conduct may be maintained in a prison by the Administration. It should be granted only as a privilege and not as a right, and should constitute the most important privilege available to a prisoner—early release to freedom. The procedure whereby remission is granted should be just and equitable and simple to understand and administer, otherwise it will give rise to unrest and dissatisfaction, and create serious administrative problems.

3. *Statutory Provisions relating to Remission :*

3.1. Section 49 of the *Gaols Act* 1958 made provision for the Governor-in-Council to make rules and regulations for or with respect to—

> " (*c*) the mitigation or remission conditional or otherwise of any sentence of imprisonment or of imprisonment or detention with hard labour for any indictable offence or offence punishable on summary conviction as an incentive to or reward either for good conduct or for special industry in the performance of any work or labour allotted to an offender whilst he is imprisoned or detained under such sentence and may mitigate or remit the term of punishment accordingly :
>
> Provided that any rules or regulations made pursuant to this paragraph shall not apply to sentences of imprisonment in respect of which minimum terms are fixed pursuant to Division two of Part IV. of the *Crimes Act* 1958. "

The Gaols Act was repealed by the *Social Welfare Act* 1970, but section 182 (*l*) of the latter Act contains an identical provision, except that the proviso has been omitted.

3.2. Section 536 of the *Crimes Act* 1958 (Division 2, Part IV.), in its original form, provided—

> " (1) The provisions of any rules and regulations under the *Gaols Act* 1958 relating to the remission of sentences of imprisonment as an incentive to or reward for good conduct or industry shall not apply to or with respect to any sentence of a term of imprisonment in respect of which a minimum term is fixed under this Part.
>
> (2) Regulations may be made under this Part providing for the reduction of minimum terms fixed as aforesaid as an incentive to or reward for good conduct or industry."

3.3. Sub-section (2) of section 536 was repealed by section 4 of the *Crimes* (*Parole*) *Act* 1965—No. 7269—and a new sub-section (2) substituted. The sub-section now reads—

> " (2) Regulations may be made under this Part providing for the reduction, as an incentive to or reward for good conduct or industry—
>
> (*a*) of the term of a sentence of imprisonment in respect of which a minimum term is fixed ; or
>
> (*b*) of a minimum term fixed in respect of a sentence of imprisonment."

3.4. Section 542 (1) of the Crimes Act provides—

> " (1) The Governor in Council may make regulations for or with respect to prescribing any matter or thing by this Part authorized or directed to be prescribed or necessary or expedient to be prescribed for the purposes of this Part. "

4. *Social Welfare Regulations :*

4.1. The Social Welfare Regulations 1962, which came into operation on 1st August, 1962, were made partly pursuant to the powers conferred by the sections in the Gaols Act and the Crimes Act referred to above, and partly pursuant to powers conferred by section 54 of the *Social Welfare Act* 1960, and section 77 of the *Children's Welfare Act* 1958. Although the *Social Welfare Act* 1960, the *Children's Welfare Act* 1958, and the *Gaols Act* 1958 have all since been repealed by the *Social Welfare Act* 1970, the regulations remain in force subject to any amendments that have since been made. Their continuity is preserved by section 2 (2) (*b*) of the *Social Welfare Act* 1970.

4.2. The provisions in the Social Welfare Regulations 1962 relevant to this Term of Reference are as follows:—

" DIVISION III.—PRISONS DIVISION.

PART XIII.—TERMINATION AND REVISION OF SENTENCE.

97. In respect of any sentence or sentences for which a minimum term has not been fixed, and subject to good conduct and industry and response to the treatment programme the Director-General may grant remission not exceeding one quarter of the total sentence.

Provided that in any case of special merit in the performance of a prisoner the Director-General may grant in addition to the foregoing, a further remission not exceeding three days per month.

98. Pursuant to section 536 (2) *Crimes Act* 1958, where a minimum term is fixed, a maximum of three days reduction from the term so fixed for each calendar month actually served may be granted by the Director-General if he is satisfied that the prisoner's good conduct and industry and response to the treatment programme throughout the term served merit such reduction.

Provided that in any case of special merit in the performance of a prisoner the Director-General may grant in addition to the foregoing a further reduction not exceeding three days per month.

99. A prisoner unable to work may receive remission under the foregoing Regulations.

100. Where any sentence of death is commuted to ' life with the benefit of Regulations relating to remission ' the sentence shall be deemed to be twenty years.

101. Where any sentence of death is commuted to ' life without the benefit of Regulations relating to remission ' the sentence shall be deemed to be for life."

. . . . . .

" DIVISION VI.—PROBATION AND PAROLE DIVISION.

B. PAROLE.

(*d*) *Good Conduct Remissions.*

48. Pursuant to section 536 (2) of the *Crimes Act* 1958, where a minimum term is fixed, a maximum of three days' reduction from the term so fixed for each calendar month actually served may be granted by the Director-General if he is satisfied that the prisoner's good conduct and industry and response to the treatment programme throughout the term served merit such reduction.

Provided that in any case of special merit in the performance of a prisoner the Director-General may grant in addition to the foregoing a further reduction not exceeding three days per month.

(*e*) *Notifications.*

49. The Governor of the Gaol shall notify the Chief Parole Officer in writing of the date upon which it is expected that a prisoner, who has been sentenced to a term of imprisonment in respect of which a minimum term has been fixed, will be eligible to be released on parole (which date is hereinafter called ' the expected eligibility date '), and such notification shall be given not less than six weeks before the expected eligibility date.

50. In assessing the expected eligibility date the governor shall deduct the amount of good conduct remission granted or expected to be granted under section 536 (2) *Crimes Act* 1958, as set out in Regulation 47 (should read 48), and shall add the period of any sentence referred to in section 535, *Crimes Act* 1958, or of any postponement of discharge under section 37, *Gaols Act* 1958.

51. The Chief Parole Officer shall submit each parole case to the Parole Board not less than fourteen days prior to the expected eligibility date."

4.3. It will be seen that Regulation 98, in its original form, provided only for the granting of a remission which had the effect of reducing the minimum term of the sentence and not the full sentence fixed by the Court. Thus, if a prisoner were denied parole, he was required to serve in total the full term of sentence imposed.

4.4. The 1965 amendment to section 536 (2) of the Crimes Act was passed to correct this anomaly. Regulation 98 was then repealed and a new regulation substituted by Statutory Rule No. 164 of 1965 as follows:—

> " 98. Where any person is sentenced to a term of imprisonment and a minimum term is fixed in relation thereto, pursuant to the provisions of sub-section (1) of section 534 of the *Crimes Act* 1958, the Director-General of Social Welfare may—
>
> (*a*) grant a maximum reduction of three days from the minimum term so fixed for each calendar month actually served if he is satisfied that the prisoner's conduct and industry and response to the treatment programme throughout the term merit such reduction ;
>
> (*b*) grant a maximum reduction of three days from the sentence for each calendar month actually served if parole is denied and he is satisfied that the prisoner's conduct and industry and response to the treatment programme throughout the sentence merit such reduction.
>
> Provided that in any case of special merit in the performance of a prisoner the Director-General may grant in addition to the foregoing a further reduction not exceeding three days per month."

At the same time, the heading to Part XIII. was changed to—" Termination and Remission of Sentence ".

4.5. Thus, power now exists to enable a prisoner, who is denied parole, to get the benefit of remission. The scale is at the rate of a maximum of three days for each calendar month actually served and, in addition, the prisoner is able to gain the benefits of a further reduction (special merit remission) not exceeding three days per month. The scale is the same whether or not the prisoner is denied parole.

4.6. Accordingly, the present position is that a prisoner serving a sentence in respect of which a minimum term is fixed may have the minimum term reduced to enable him to be released prior to the minimum date, and should such a prisoner be denied parole the full term of the sentence may be reduced in a like manner. The prisoner gains the complete benefit of remission only, in fact, when he is denied parole. When a prisoner is paroled, the parole period includes the period of remission that enabled him to be released at an earlier date than the minimum date.

5. *Early Release by Director-General of Social Welfare :*

5.1. A further statutory provision of relevance is section 128 of the *Social Welfare Act* 1970 which provides—

> " 128. The Director-General may order the release from custody of a prisoner at any time within the seven days immediately before the date upon which the prisoner would have been entitled to be released under the regulations applicable to the detention of the prisoner or on parole pursuant to the provisions of Division 2 of Part IV. of the *Crimes Act* 1958."

This provision is not used very frequently, but an example of its use is to enable a prisoner in a country prison to be released a few days before his release date if departmental transport happens to be available to transport him to Melbourne or other place of destination. This avoids the need to arrange transport on the actual release day.

6. *Release on Parole :*

6.1. The Parole Board was established under section 17 of the *Penal Reform Act* 1956—No. 5961—and commenced operating on 2nd July, 1957. The constitution of the Board is provided for in section 521 (2) of the *Crimes Act* 1958.

6.2. Section 538 (1) of the Crimes Act provides—

> " 538. (1) The Board may in its discretion by order in writing (hereinafter called a ' parole order ') direct that a prisoner undergoing a sentence of imprisonment in respect of which a minimum term was fixed be released from gaol on parole at the time specified in the order (not being before the expiration of the minimum term) and he shall be released accordingly :
>
> Provided that the Board may revoke amend or vary any parole order before the prisoner has been released thereunder, and any order so amended or varied shall apply accordingly."

Thus, the Parole Board has a discretion as to when or whether it may order the release of a prisoner on parole.

6.3. In practice, parole is almost invariably granted on or soon after the eligibility date in the case of a prisoner undergoing, for the first time, a sentence in which a minimum term is fixed. However, if a prisoner has had one or more prior paroles, the Board usually either defers his release for a period or, in some cases, decides that parole is not appropriate or should be denied.

6.4. Under the existing regulations relating to remission, a prisoner who receives a sentence in respect of which a minimum term is fixed, and who is denied parole, remains in prison longer than he would have remained if the Court had given him a definite sentence of the same total duration.

7. *Statistics relating to Paroles and Denials of Parole :*

7.1. The following tables give details of releases on parole, deferments and denials of parole, during the years ended 30th June, 1969, 1970, and 1971 :—

RELEASES BY PAROLE BOARD.

Year.	Releases within 1 month eligibility date.	Releases after deferment.	Releases after transfer from from Youth Training Centre.	Re-paroles.	TOTAL releases on parole.
1968–69	376	* 121	*	119	616
1969–70	411	86	81	110	688
1970–71	427	55	72	107	661

RELEASES ANALYSED ACCORDING TO NUMBER OF TIMES PAROLEES PAROLED OR REPAROLED.

Year.	1st Time.	2nd Time.	3rd Time.	4th Time.	TOTAL.
1968–69	481	114	19	2	616
1969–70	524	148	16	..	688
1970–71	507	127	27	..	661

ANALYSIS OF PAROLES AND REPAROLES DENIED.

Year.	No Previous Parole.	1 Previous.	2 Previous.	3 Previous.	TOTAL.
1968–69	16	42	43	6	107
1969–70	26	60	43	6	135
1970–71	27	32	27	8	94

8. *Comparison between existing Forms of Remission :*

8.1. The substantial differences in the forms of remission applicable to a prisoner undergoing a definite sentence and one undergoing a sentence in respect of which a minimum term is fixed are as follows:—

(1) The prisoner undergoing a definite sentence may be granted ordinary remission not exceeding one-quarter of the total sentence, whereas the maximum reduction for ordinary remission for a prisoner with a sentence in respect of which a minimum term is fixed is three days for each calendar month actually served—less than one-tenth of the total sentence. In each of the two categories, the maximum remission is granted in full almost automatically.

(2) The remission earned by a prisoner undergoing a definite sentence cannot be lost after release. In the case of a prisoner released on parole, the remission is deducted only from the portion of the sentence actually served and not from the full sentence. Thus, should he breach parole after release, he becomes liable to serve the difference between the time actually served and the full sentence. This unexpired portion of the sentence includes all the remissions granted—both ordinary and special merit.

8.2. Special merit remission—whether or not the prisoner is undergoing a definite sentence or one in respect of which a minimum term is fixed—is not granted as a right, but is recommended by the Governor and granted by the Director-General of Social Welfare following assessments made by the Chief Prison Officer and Overseer or other appropriate officers. The maximum special merit remission is three days a month.

9. *Recommendations :*

Recommendations made on behalf of the Social Welfare Department are as follows:—

(1) That rules and regulations relating to the remission of sentences of imprisonment should be as nearly as possible the same whether or not the sentence is one in respect of which a minimum term is fixed. Further, a prisoner serving a sentence in lieu of the payment of fines should also be eligible for the same remission.

(2) That remission should not be granted as of right, but should be a privilege that is fully earned. Once earned, it should be retained except where discharge is postponed or in exceptional circumstances.

(3) That a prisoner should be informed periodically of the remission he has earned.

(4) That both ordinary and special merit remissions should be combined into the one form of remission.

(5) That, in respect of a sentence wherein a minimum term of three months or less is fixed, the Director-General of Social Welfare should be empowered to grant remission not exceeding one-third of the minimum term fixed in respect of the sentence, such remission to be deducted also from the term of the sentence.

(6) That, in respect of a sentence wherein a minimum term of more than three months is fixed, whether that sentence is a single sentence or comprises two or more sentences, the Director-General of Social Welfare should be empowered to grant remission not exceeding fifteen days for each complete calendar month *actually served* (i.e., approximately one-third) with *pro rata* remission for portion of a calendar month, such remission to apply to the term of the sentence in respect of which the minimum term is fixed, and also to the minimum term.

(7) That, for the purpose of assessing the actual number of days' remission granted under Recommendation (6), regard should be had to a prisoner's good conduct, industry and diligence, his response to the treatment programme and special merit in his performance and application. The assessment should be made initially by the Chief Prison Officer and Overseer or other appropriate officers in charge of the prisoner, and should be subject to the recommendation of the Governor to the Director-General.

(8) That the necessary amendments be made to the Crimes Act and the Social Welfare Regulations.

A. Booth,
Director-General of Social Welfare.

20th October, 1972.

APPENDIX D.

PRISON DISCIPLINE INQUIRY.

Submission by Counsel assisting the Inquiry upon the matters raised by term of reference (c).

Apart from the opinion evidence heard in conference with Mrs. Frost and Messrs. Johnston, Misner and Hundley a number of prisoners gave evidence relevant to term of reference (*c*). The statements made to me and those instructing me by other prisoners concerning remissions and parole were also tendered to the Board. The intelligence of the prisoners varied greatly. Their insight of the authorities' purpose in implementing systems of remissions and parole similarly varied. Nevertheless, the evidentiary material thus gathered shows a failure by the community to impress upon most prisoners the purposes intended to be served by remissions and by parole. The prisoner is confused as to the desires of the community and exasperated by the apparent inconsistencies of the treatment he receives. In particular, no clear definition of the different purposes served by the system of remissions and the system of parole is, in the case of many prisoners, discernible in their approach to the problems of serving a sentence of imprisonment, of behaviour in prison and of rehabilitation.

The present system of legislation, which requires a judge or magistrate to fix a minimum term of imprisonment before eligibility for parole, is believed by many prisoners to be abused consciously or unconsciously by the sentencing tribunal. There is a strong feeling amongst prisoners that the tribunal uses the " maximum " in terrorem of the community (thereby satisfying one of the deterrent aspects of judicial sentencing for crime) and the minimum as a true indication of the tribunals' belief of the seriousness of the offence. To this extent, whilst in general prisoners are cynically sympathetic to what they believe are the judicial motives, they recognize an abrogation of the imprisoning power by the judge and a usurpation of that power by the Parole Board whose decisions are seen to determine both the actual time spent in prison and the time which the community " really believes " should be so spent.

The pronouncement of a sentence in terms referring to the fact that remissions are available to the prisoner similarly leads to speculation by the prisoner as to judicial, in contradistinction to prison administrative, motives.

These obstacles to communication between the forces of authority in the community and the prisoner become insuperable in some cases where the prisoner has received a number of different sentences from different tribunals and, in particular, where the complexities of combining those sentences receive the addition of problems created by the prisoner's breach of parole of some earlier sentence. In such cases the ascertainment, even by the prison authorities, of a probable date of release is rendered very difficult. Its explanation to the prisoner is more difficult. Having regard to the secret and generally unexplained manner of making decisions employed by the Parole Board, any such date of release must, in the case of a man subject to decision by the Parole Board, be expressed conditionally or tentatively. It is not surprising that prisoners beseech the sentencing tribunal to give them " a straight sentence " ; that is one thought by the judge to be appropriate to the offence and uncomplicated either by what are suspected to be phony judicial motives or by the uncertainty of the workings of the Parole Board.

Moreover, in the absence of communication of society's intentions towards the prisoner, his first and persistent question of those in authority over him is : When are you going to let me out ? The answer to that question is seen by him as a statement of his right to be released. Failure to answer the question is seen as an admission that the system has failed ; and, in the mind of the prisoner, the failure is readily attributed to over-complexity of the system, malice of the prison authorities, unsympathetic incompetence of the Parole Board or the general purposelessness of society when confronted by one who does not conform to its rules and patterns. If answered, the question precludes acceptance of rehabilitative help in or out of gaol because any deferment of the acknowledged right to be released is seen by the prisoner as unjust. If not certainly answered, the failure is seen as illegal, stupid and unjust. In either event the purposes both of regulating behaviour during imprisonment and of assisting the prisoner to understand and conform to the community's standards of behaviour are rendered more difficult to achieve. In so far as these problems affect the acceptance by the prisoner of the interest which the community has in his welfare it is likely that the failure to answer them leads to a greater number of failures of rehabilitation than most other causes. It is submitted that the acceptance of certain cardinal principles is necessary if the provision of a system of remissions is to play a part in the maintenance of prison discipline, and the provision of parole to be effective in restoring the prisoner to society in any way the better for his interdiction by the system of justice. These principles are as follows :—

1. The prisoner must be given clearly to understand that remissions for good conduct are intended by the prison authorities to induce him to be of good conduct whilst in prison, that is to avoid conduct of which the prison authorities are known to disapprove however sensibly or foolishly from their point of view or his.

2. The prisoner must be given clearly to understand that parole represents an attempt by the community to permit him to undergo the interdiction of the courts whilst able, notwithstanding, to live and work amongst its free citizens. Implicit in this concept is that he is not whilst on parole a wholly " free " man, but is not in prison because it is believed that the special circumstances of his present life make it convenient for the community to allow him to serve the period of interdiction in some way other than by imprisonment. Implicit also in the concept is that society's purpose in its interdiction, whether it results in imprisonment or parole at any particular time or times, is to persuade him to stop committing criminal offences.

3. The prisoner must be given clearly to understand that the task of the sentencing tribunal is solely that of providing a maximum period of interdiction appropriate to the circumstances of his crime bearing in mind the need to assuage public hurt, to deter him, to deter others, to give him the opportunity of reform and, if necessary, to prevent by physical incarceration his further injury of others. Implicit in this concept is that the court fixes

a punishment for past conduct and is concerned at the time of sentencing only with future conduct as a capacity of the prisoner, whereas the Parole Board is engaged in a continuing process of assessment and re-assessment in an effort to predict his future conduct.

Insofar as the prisoner's understanding of these basic principles is impaired so far are the purposes of parole and rehabilitation made harder to achieve, and more likely is the prisoner to be undisciplined in prison.

I concede immediately two existing obstacles to the acceptance by many prisoners of the truth of these cardinal principles. The first is that a breach of parole results in a liability to serve the unexpired term of sentence, and to that extent the time successfully spent on parole is not regarded as part of the sentence of imprisonment. Second, and to some extent concomitant with the first, the Parole Service is seen by some prisoners as inadequate because of problems of obtaining qualified personnel in sufficient numbers. In short the prisoner is apt to say : Parole is not really part of the sentence because I have to serve the same part over again in gaol if I break my parole ; and the community doesn't really believe in it or me because it doesn't provide enough parole officers.

Having conceded the existence of these obstacles I decline to permit them to influence my submission. On the contrary their existence reinforces it. Both obstacles should in my submission be removed, the one by regarding, for all purposes, expiration of time spent on parole without conviction as in the same position as time spent in prison, and the other by expenditure of public money on the parole system.

Consideration of the effectiveness of the parole system as at present constituted, and of ways in which it might be made better effective, are outside the scope of the Inquiry. However, I seek to strengthen my submission by saying that the probable trend to " weekend imprisonment " and to " halfway houses " must necessitate a general reconsideration of the functions of the Parole Board, of its means of gaining information about the prisoner, of its qualifications to assess that information in appropriate terms and of the extent of support it can give through its officers. When that reconsideration is made it is my submission that the two obstacles, the presence of which I concede now to exist, will be removed in the search for a consistent programme of rehabilitation of each prisoner.

The suggestion that the prison authorities should have in their grant remissions which enable the Parole Board to release a prisoner who receives them earlier than the normal time of such release upon parole is antithetical to each of the cardinal principles. It is clearly inconsistent with the maintenance of the clear distinction between parole and remissions and especially between their separate purposes. It further destroys the already blurred demarcation of the powers and purposes of the courts and those of the Parole Board. A prisoner subject to such a system would be entitled by logic to say that neither the courts, nor the prison authorities nor the Parole Board really mean what they say about their purposes or about the criteria upon which they purport to act.

I say that it further destroys the demarcation of judicial and administrative functions because I am conscious that a partial destruction has already occured by reason of the legislative provisions of S.534 of the Crimes Act, which, in general, requires the sentencing tribunal to fix a minimum term of imprisonment before eligibility for parole. The apparent purpose of this provision is to reinforce the judicial function of appearing to represent the community when signifying publicly the seriousness of the offence and the extent of retribution which it ought to attract. If so, it fails. In fact the maximum sentence ordinarily receives public acceptance as this signal ; and the prisoner promptly assumes that the tribunal intended his release at the expiration of the minimum term. To him this represents a judicial direction to the Parole Board to so release him. This " accrued right " syndrome leads to the evils I have already discussed. To supplement it by placing the Parole Board further at the " direction " of the prison authorities is, in my submission, to compound an error of fundamental psychology which ought to be corrected. The courts should pass sentence. The question whether that sentence is to be served wholly or partly in prison or wholly or partly on parole should be determined by the Parole Board. Having regard to the serious nature of the determination it may well be thought proper that the Parole Board's means of reaching it and of communicating it to the prisoner should be the subject of other submissions and other inquiry ; they are outside the scope of this one.

It follows from what I have said that I submit that the present provisions of S.534 should be repealed and that the present system of granting up to six days a month as remissions from minimum sentences should be abolished. A fortiore the Board should, in my submission, recommend that no further such remissions be made available.

I am aware that the strongest argument against the submission I make is that the Prisons Division of the Social Welfare Department have expressed a belief that such remissions would assist in the maintenance of discipline in persons. Whilst not purporting to express an expert view myself, I submit that the evidentiary material to which I have already referred indicates that the belief of the Department is probably fallacious. The fact is that such remissions could not constitute any direction to the Parole Board unless it is envisaged that the whole concept of parole be altered. In fact, whether the prisoner gets remissions for good conduct in gaol or not, the Parole Board must still independently determine the time of his release. " Parole deferred " and " parole denied " will still constitute the effective decisions whatever remissions are gained.

In these circumstances the suggested remissions are illusory, and will be seen to be so by the same prisoners who have vigorously complained of the illusory nature of all remissions when gained by a man subject to the determination of the Parole Board. In my submission, so far from serving the ends of good discipline and rehabilitation, the reliance upon illusions of this nature creates confusion of mind, frustration and indiscipline in the prisoner, and leads to the adoption by him of attitudes and beliefs detrimental to his rehabilitation.

W. M. R. Kelly.

Owen Dixon Chambers,
27th March, 1973.

C. H. Rixon, Government Printer, Melbourne.