

**Investigation into good practice when conducting prison
disciplinary hearings**

July 2021

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The Victorian Ombudsman pays respect to First Nations custodians of Country throughout Victoria. This respect is extended to their Elders past, present and emerging. We acknowledge their sovereignty was never ceded.

Letter to the Legislative Council and the Legislative Assembly

To

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973* (Vic), I present to Parliament my *Investigation into good practice when conducting prison disciplinary hearings*.

A handwritten signature in black ink, appearing to read 'Deborah Glass', with a stylized flourish at the end.

Deborah Glass OBE
Ombudsman

7 July 2021

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Foreword

Quis custodiet ipsos custodes? *Who will guard the guards themselves?*

From the Latin, Satires of Juvenal

For the vast majority of Victorians, people in prison are out of sight, out of mind. Yet as Nelson Mandela said: A nation should not be judged by how it treats its highest citizens, but its lowest ones. The same could be said of fairness – how fairly do we treat prisoners who are alleged to misbehave while they are behind bars? Does the process respect a prisoner's right to humane treatment when deprived of liberty, as required by Victoria's Charter of Human Rights?

The prison disciplinary process deals with prisoners who break prison rules, such as threatening or disruptive behaviour. It results in some 10,000 hearings a year across Victoria's 14 prisons. The consequences for a prisoner can be serious, can impact on parole and include the loss of 'privileges' – such as telephone calls or out of cell time – and can even result in contact visits with family or children being withdrawn.

Significantly, should a prisoner wish to challenge the outcome of a hearing, their only option is to seek judicial review by the Supreme Court. In what other system is someone directed to the Supreme Court when their alleged transgression has been judged by their keeper?

My predecessor reported on this issue in 2011, with most recommendations being accepted. But complaints to my office have continued. I began this investigation in late 2019 where it was both delayed and disrupted by the COVID-19 pandemic, which created challenges for access to files and opportunities for interview. But while we were unable to observe hearings in person, the files we were eventually able to access, the many people we were able to speak to, and the complaints we analysed, painted a telling picture.

A suicidal prisoner with a recorded mental health condition resists a strip-search while being moved to a 'safe' cell, struggling with the prison officers who try to take his clothes off. Despite the prisoner saying he was sorry about the incident the following day, he was still charged with a prison disciplinary offence. While the charge was eventually dismissed, in whose interests could it possibly have been for this matter to have proceeded to a hearing at all?

Ultimately, while we found improvements in some areas since 2011, disciplinary hearings in Victorian prisons are still carried out 'in the dark' with insufficient scrutiny, oversight or transparency. And while we observed some good practices and decisions, the potential for unfairness is still rife.

Undocumented pre-hearing discussions appear to be widespread – although as nothing is recorded, our evidence remains anecdotal. But the outcomes in these off-the-record meetings can have major ramifications for prisoners. In one case, a prisoner said he was told he would not be taken off the methadone program if he pleaded guilty – a decision he came to regret after the hearing officer denied making such a deal and he was removed from the program. But these, together with the conduct of hearings by officers from the same prison, and often the same unit, as the charged prisoner, lead to perceptions of bias.

We found limited access to information and support, especially for prisoners with cognitive impairment. Although Victoria's Public Advocate provides support to prisoners with a recognised intellectual disability, the take-up is often sparse, bearing no relationship to the high proportion of prisoners who may be unable to understand the proceedings.

And while proceedings involve voluminous hard-copy paperwork, there is no requirement for written reasons for decisions. Our investigation was hampered by poor or inaccurate record-keeping, even including incomplete checklists.

“ Fairness for prisoners may not be a popular subject, but the lack of it damages our reputation as a civilised society. ”

Written reasons, good records and internal reviews are the keys to good administrative decision-making. Sensible use of discretion in handling minor offences would also see many fewer matters proceed to a formal disciplinary process, reducing the burden on the prison, the prison officer and prisoner alike.

The recommendations I make in this report would not only increase fairness and transparency in a notoriously opaque process, they support good decision-making. Corrections Victoria has nothing to fear from adopting them, and I urge them to do so, before the next Ombudsman turns their attention to what should not be a perennial issue. Fairness for prisoners may not be a popular subject, but the lack of it damages our reputation as a civilised society.

Deborah Glass

Ombudsman

Glossary

Charter of Rights Act	<i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic) – legislation providing for the protection of fundamental human rights in Victoria; commonly referred to as ‘the Charter’
CISO	Corrections Independent Support Officer – volunteers engaged by OPA to assist and support prisoners with a diagnosed intellectual disability at disciplinary hearings in Victoria
Commissioner’s Requirements	High-level operational requirements applying to all prisons in Victoria
Commissioner’s Requirement 2.3.3	<i>Commissioner’s Requirement 2.3.3: Disciplinary Process and Prisoner Privileges</i> – Commissioner’s Requirement relating to the prison disciplinary process
Corrections Act	<i>Corrections Act 1986</i> (Vic) – legislation providing for the establishment and management of prisons in Victoria; sets out the broad framework for the prison disciplinary process
Corrections Regulations	<i>Corrections Regulations 2019</i> (Vic) – regulations made under the Corrections Act; includes forms and procedures relating to the prison disciplinary process
Corrections Victoria	Business unit of the Department responsible for administering public prisons in Victoria
Department	Department of Justice and Community Safety – Victorian Government department incorporating Corrections Victoria
Deputy Commissioner’s Instructions	Operational requirements applying to public prisons in Victoria
Disciplinary Officer	Prison officer nominated by the Secretary to the Department of Justice and Community Safety responsible for investigating and charging prison offences
General Manager	Person employed under the Corrections Act to manage a prison and ensure the safe custody and welfare of prisoners
Hearing Officer	Delegate of the General Manager responsible for conducting prison disciplinary hearings under the Corrections Act
Mandela Rules	Standard Minimum Rules for the Treatment of Prisoners, adopted in 2015 by the United Nations General Assembly

OPA	Office of the Public Advocate – authority responsible for promoting the rights, interests and dignity of people with a disability living in Victoria
Operating Instructions	Operational requirements applying to private prisons in Victoria
PIMS	Prisoner Information Management System – database administered by Corrections Victoria
Prison Disciplinary Handbook	Prisoner Disciplinary Process Handbook v 1.1 dated 24 May 2017 – document providing advice to Disciplinary Officers and Hearing Officers engaged in the prison disciplinary process during the period relevant to the investigation
Prison offence	Conduct of a prisoner that contravenes Part 7 of the Corrections Act or the Corrections Regulations – for example, disobeying a lawful order, direction or instruction of a prison officer
Procedural fairness	Legal principle developed by courts that aims to ensure public officers and authorities act fairly when making decisions likely to affect people's rights and interests

Introduction

... the operation of the discipline system in prisons has its own potential for disorder, growing out of inmates' perception that the rules they are charged with breaking are highly arbitrary and the procedures employed to convict them significantly unfair.

Tim Owen and Alison Macdonald, *Livingstone, Owen and Macdonald on Prison Law* (Oxford University Press, 5th ed, 2015) 395.

Why we investigated

1. The Ombudsman regularly receives complaints from prisoners about the prison disciplinary process. Although varied, these often raise concerns about the degree to which procedural fairness is afforded to prisoners participating in the process.

'It doesn't seem fair to me. I've been pinning my hopes on getting parole.'

– Prisoner, complaint to the Ombudsman

2. The prison disciplinary process deals with prisoners who break prison rules; for example, through assaults or threats, possession of contraband or disruptive behaviour.
3. The process has three stages:
 - investigation of the alleged offence by a prison Disciplinary Officer, who decides whether to charge the prisoner
 - a hearing before a prison Hearing Officer
 - if the prisoner pleads or is found guilty, determination of a penalty.
4. When approaching the Ombudsman, prisoners often raise specific concerns corresponding with each of these stages; for example:
 - processes leading up to disciplinary hearings, such as decisions to charge in lieu of other possible outcomes
 - the way in which hearings are conducted, including the opportunity to call witnesses
 - inconsistent or purportedly unfair outcomes resulting from the process.
5. While the Ombudsman's office is often able to assist prisoners to resolve their complaints directly with prison management, a 2017 investigation by the Ombudsman raised particular concerns about the fairness of Victoria's prison disciplinary process.
6. The details of the 2017 complaint and investigation are summarised below.



Protected disclosure complaint from a prisoner

In February 2017, the Independent Broad-based Anti-corruption Commission ('IBAC') referred a protected disclosure complaint to the Ombudsman (now referred to as a 'public interest complaint') concerning the treatment of Lee, a prisoner.

Among other things, the protected disclosure complaint alleged:

- prison staff had abused Lee during a routine interaction
- when Lee complained about his treatment, prison staff retaliated by issuing a disciplinary charge against him for 'verbally abusive' behaviour
- during the disciplinary hearing, Lee was refused the opportunity to call witnesses in his defence
- although Lee continued to deny the charge, he was found guilty and received an automatic loss of privileges and a fine of \$100.

The Ombudsman investigated the complaint but was ultimately unable to substantiate the allegation that Lee had been abused by prison staff during the initial interaction.

However, the investigation identified several concerns about the way in which the disciplinary process had been conducted. The investigation concluded:

- prison staff chose a disciplinary hearing to deal with Lee's alleged behaviour, when other, less severe, options were reasonably available

- in conducting the hearing, prison staff failed to follow the documented disciplinary process
- the Hearing Officer failed to give proper consideration to the evidence
- the outcome of the disciplinary hearing was disproportionate to the alleged conduct and was likely to unfairly influence Lee's future parole applications.

The investigation was particularly critical of the decision by the Hearing Officer to deny Lee's request to call witnesses before the hearing.

Section 53(2) of the *Corrections Act 1986* (Vic) provides that prisoners must be given 'a reasonable opportunity to call witnesses' during a disciplinary hearing. Despite this requirement, the Hearing Officer told the investigation they decided to refuse Lee's request to call witnesses in his defence, because, among other reasons, 'it would have ended up being one person's word against another'.

The investigation made several recommendations to the then-Department of Justice and Regulation, including that it undertake a review of the decision made by the Hearing Officer to find Lee guilty of the charged offence.

The Department accepted the recommendations made by the Ombudsman.

7. The 2017 investigation followed a previous ‘own motion’ investigation into prison disciplinary hearings in Victoria conducted by the Ombudsman in 2011.



Previous Ombudsman investigation into prison disciplinary hearings

Between 2010 and 2011, the Ombudsman investigated the disciplinary process at four prisons – Barwon Prison, Port Phillip Prison, Ararat Prison (now known as the Hopkins Correctional Centre) and the Dame Phyllis Frost Centre.

As part of the investigation, the Ombudsman interviewed witnesses, reviewed 237 hearing files and attended and observed a number of hearings at each prison.

The investigation identified several issues with the existing disciplinary process, including:

- unreasonable duplication of charges
- insufficient accessibility and transparency around the process for calling witnesses

- the impacts of prison transfers on procedural fairness
- lack of independent support for many prisoners with special needs
- significant delays arising from unnecessary referrals to Victoria Police
- poor record keeping by prison officers involved in the process.

The investigation made eleven recommendations to Corrections Victoria, of which ten were accepted (see Appendix A). These included that better guidance and training be provided to Hearing Officers and extended supports be made available for prisoners with a disability.

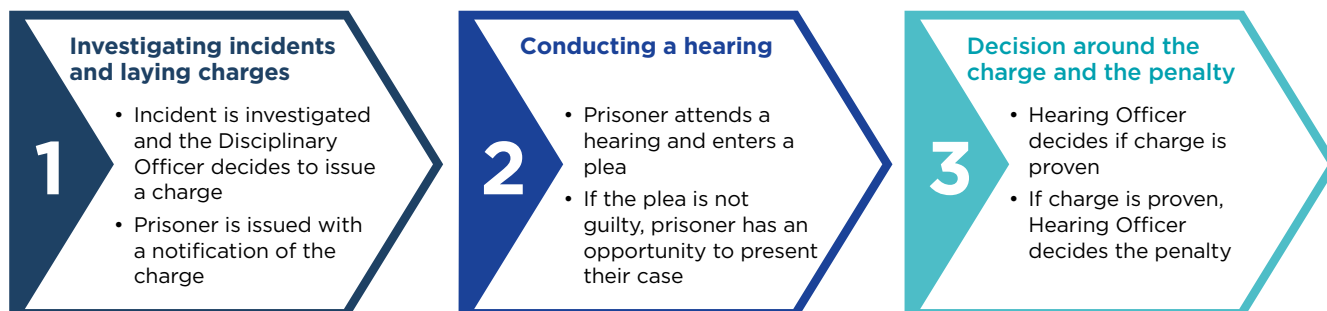
8. Between April 2019 and April 2020, there were 9,870 hearings conducted at 14 Victorian prisons. Despite the previous investigations, the Ombudsman continues to receive approximately 60 complaints per year relating to the prison disciplinary process.
9. While this number represents only a fraction of the hearings conducted each year, there remains limited oversight of the process and relatively few opportunities for independent advice or support for prisoners. If a prisoner wishes to challenge the outcome of a disciplinary hearing, their only option is to seek judicial review by the Supreme Court of Victoria.

'[Following the hearing] I've been denied access to special [purchases] and paint brushes and stuff that, you know, is kind of necessary for my mental health. They said I can't appeal it.'

– Prisoner, complaint to the Ombudsman

10. In light of the conclusions of the 2017 investigation, the limited oversight of disciplinary hearings and continuing complaints, the Ombudsman decided to investigate the fairness of the current process.

Figure 1: Stages in the prison disciplinary process



Source: Victorian Ombudsman

Jurisdiction

11. Public prisons in Victoria are administered by Corrections Victoria, a business unit of the Department of Justice and Community Safety ('the Department').
12. Private prisons in Victoria are administered by contractors in accordance with specific agreements entered into under the *Corrections Act 1986* (Vic).
13. Section 16A of the *Ombudsman Act 1973* (Vic) provides that the Ombudsman may conduct an 'own motion' investigation into any administrative action taken by or in an 'authority'.
14. The definition of 'authority' in the Ombudsman Act includes a Victorian department.
15. The definition of 'authority' also includes a 'specified entity'. Contractors and sub-contractors engaged to manage prisons and police gaols under the Corrections Act are 'specified entities' under items 23 and 24 of Schedule 1 to the Ombudsman Act.
17. The investigation looked at:
 - processes leading up to disciplinary hearings, such as:
 - o investigation of the incident
 - o the decision to issue a disciplinary charge
 - o processes for notifying prisoners of disciplinary charges
 - how disciplinary hearings are conducted
 - outcomes of disciplinary hearings, including determination of penalties.
18. The investigation also looked at the consequences for prisoners where charges are proven and the options for challenging outcomes of the disciplinary process.

Methodology

Terms of reference

16. The terms of reference for the investigation sought to identify whether prisons were engaging in good practice when conducting prison disciplinary hearings, with particular regard to:
 - how public and private prisons ensure disciplinary hearings are conducted fairly in the circumstances
 - whether and how disciplinary hearings observe good decision-making principles and practices, including:
 - o legislative obligations under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter of Rights Act'), the *Corrections Act* and the *Corrections Regulations 2019* (Vic)
 - o local and departmental instructions and policies.
19. On 13 December 2019, the Ombudsman notified the Secretary to the Department, the Commissioner of Corrections Victoria and the Minister for Corrections of her intention to investigate the prison disciplinary hearing process in Victoria.
20. The investigation did not set out to conduct an audit of prison disciplinary hearings, but instead sought to look into the recurring themes identified in complaints to the Ombudsman.
21. The investigation:
 - obtained and reviewed prison files relating to 148 disciplinary hearings conducted between 29 April 2019 and 30 April 2020 ('the sample period')
 - reviewed relevant legislation, including the:
 - o Corrections Act
 - o Corrections Regulations and the previous *Corrections Regulations 2009* (Vic)
 - o Charter of Rights Act

- reviewed complaints made to the Ombudsman about disciplinary hearings since January 2017
- analysed data from the Prisoner Information Management System administered by Corrections Victoria ('PIMS')
- reviewed relevant Commissioner's Requirements, Deputy Commissioner's Instructions and Operating Instructions, which set policy and operational requirements for prisons in Victoria
- obtained and reviewed documents from Corrections Victoria relating to the disciplinary hearing process, including:
 - o instruments of delegation for Disciplinary Officers and Hearing Officers
 - o the Prisoner Disciplinary Process Handbook v 1.1, as in effect during the sample period ('the Prison Disciplinary Handbook')
 - o training materials for Disciplinary Officers and Hearing Officers
- considered a submission from the Victorian Office of the Public Advocate ('OPA'), which operates the Corrections Independent Support Officer ('CISO') program supporting prisoners with an intellectual disability at disciplinary hearings
- reviewed records and other information provided by OPA including:
 - o statistics from hearings attended by CISO volunteers in 2019
 - o emails between OPA and Ravenhall Correctional Centre, the Dame Phyllis Frost Centre, Barwon Prison and Port Phillip Prison regarding the engagement of CISO volunteers during the sample period
- interviewed the following parties:
 - o five prison officers involved in administering the disciplinary process
 - o one CISO volunteer
- conducted a round table discussion with other CISO volunteers and OPA staff to obtain background information about the CISO program
- obtained information from legal aid and community legal services about their experiences assisting prisoners participating in the prison disciplinary process, including:
 - o information about services provided by Victoria Legal Aid
 - o a submission from the Law and Advocacy Centre for Women
 - o case examples and a draft legal self-help kit for prisoners facing disciplinary hearings provided by Fitzroy Legal Service
- held background discussions and consulted with:
 - o the Community Legal Sector Prison Working Group
 - o Flat Out Incorporated, a service working with women with experiences of the prison system
 - o Justice Health
 - o CISO volunteers and administrative staff at Port Phillip Prison and Ravenhall Correctional Centre
- provided a draft version of this report to the Department, Corrections Victoria and OPA for comment.

Limitations of the methodology

22. Public health restrictions imposed in response to the COVID-19 pandemic presented significant logistical challenges to the investigation, and the investigation's methodology was accordingly adapted to the circumstances.
23. In particular, the investigation found it necessary to abandon plans to observe a selection of disciplinary hearings and conduct in-person interviews with prisoners about their experiences with the disciplinary process.
24. The number of hearing files requested from Corrections Victoria was also reduced in light of the administrative and operational burdens affecting prisons during the COVID-19 pandemic.
25. The hearing files reviewed by the investigation did not represent a 'blind' sample of disciplinary hearings. Having regard to the terms of reference, the investigation determined to focus on disciplinary hearings where:
 - the prisoner contested the charge
 - the prisoner had a registered intellectual disability or psychiatric condition
 - the Hearing Officer ordered significant restitution
 - the prisoner had participated in multiple disciplinary hearings during the sample period.
26. As the Department observed in its response to the Ombudsman's draft report, the hearing files reviewed by the investigation represented a very small sample of the overall number of disciplinary hearings conducted during the sample period.
27. Similarly, the hearing files selected by the investigation predominantly related to Port Philip Prison, Ravenhall Correctional Centre and the Dame Phyllis Frost Centre; and the interviews with prison officers accordingly focused on these prisons. A small number of files relating to Marngoneet Correctional Centre, the Metropolitan Remand Centre and Melbourne Assessment Prison were also reviewed where relevant to disciplinary offences occurring at the above prisons. The investigation acknowledges that prison profiles, practices and populations will necessarily vary across the 14 prisons in Victoria that are implementing the disciplinary process.
28. The investigation further acknowledges that uncontested hearings relating to drug testing make up a significant proportion of all disciplinary hearings conducted in prisons in Victoria. But, owing to the selection criteria developed by the investigation, these were not represented to a similar degree in the files reviewed by the investigation.
29. While Aboriginal and Torres Strait Islander people are significantly over-represented in the Victorian prison population, just three of the hearing files analysed by the investigation related to Aboriginal or Torres Strait Islander prisoners. Regrettably, this limited the investigation's ability to comment on the particular experiences of these prisoners in the disciplinary process. In each case reviewed by the investigation, an Aboriginal Liaison Officer was provided to support the prisoner through the process. Evidence from Hearing Officers indicated this was routine practice.

Procedural fairness and privacy

30. This report contains adverse comments about the disciplinary process used in Victorian prisons. In accordance with section 25A(2) of the Ombudsman Act, the investigation provided the Department with a reasonable opportunity to respond to the material in the draft report. This final report fairly sets out its response.
31. In responding to the Ombudsman's draft report, the Department also provided feedback from General Managers at several Victorian prisons. This feedback was considered by the investigation and, where appropriate, has also been incorporated into the final report.
32. In accordance with section 25A(3) of the Ombudsman Act, any other persons who are or may be identifiable from the information in this report are not the subject of any adverse comment or opinion. They are named or identified in the report as the Ombudsman is satisfied that:
 - it is necessary or desirable to do so in the public interest, and
 - identifying those persons will not cause unreasonable damage to those persons' reputation, safety or wellbeing.
33. This report includes case studies describing individual prisoners' experiences with the prison disciplinary process. Names have been changed and other details have been removed to protect the privacy of the individuals concerned.

Legal and governance framework

34. Prison disciplinary processes exist to ensure that good order is maintained within prisons. However, it has rightly been observed that ‘prisoners should not leave their rights at the prison gate’.¹ The balancing act between maintaining good order and preserving humane conditions, fairness and the right to due process can, at times, be a challenging one.
35. In Victoria, the legal and governance framework for disciplinary hearings tries to strike this balance. Among other things, it has been developed with regard to the following considerations:
- the need to provide procedural fairness to prisoners
 - fair decision-making principles
 - the human rights obligations of public authorities under the Charter of Rights Act
 - other legislative requirements identified in the Corrections Act, Corrections Regulations and relevant instructions and policies.

Key concepts for decision-makers to observe

36. In the Victorian public sector, good decision-making should be guided by the public sector values identified in the *Public Administration Act 2004* (Vic), including:
- responsiveness
 - integrity
 - impartiality
 - accountability
 - respect for human rights.

37. The key argument in support of fair and transparent hearings is that better decision-making processes lead to better quality decisions. This can in turn give prisoners greater understanding of the processes and, ultimately, promote good order in prisons.
38. Public authorities are expected to observe the principles of procedural fairness when making administrative decisions, as well as other principles of administrative law.

Procedural fairness

39. Procedural fairness is a legal principle developed by courts over many years. It aims to ensure public officers and authorities act fairly when making decisions likely to affect people's rights and interests.
40. In a leading case relating to procedural fairness, *Kioa v West*, former High Court judge, the Hon Justice Mason, observed:

It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.²

41. Procedural fairness encompasses the following concepts:
- the **fair hearing rule**, which requires a decision-maker to give a person an opportunity to be heard before making a decision affecting the person's rights, liberty or interests
 - the **bias rule**, which requires that a decision-maker be free from actual and perceived bias and not to have pre-judged a decision

¹ Tim Prenzler, *Ethics and Accountability in Criminal Justice: Towards a Universal Standard* (Australian Academic Press 2009) 163.

² *Kioa v West* (1985) 159 CLR 550, 582.

- the **notice rule**, which requires that a person likely to be affected by a decision be provided notice of the issues to be heard in enough detail to be able to meaningfully respond
- the **evidence rule**, which requires that a decision be based on logically probative evidence.³

42. Procedural fairness requires a decision-maker to objectively consider all matters that are relevant to the issue being determined – including the evidence given by the subject of the decision – and then base the decision on those matters, instead of unrelated or irrelevant considerations.
43. Leading cases on procedural fairness often highlight the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.⁴
44. In practice, this may involve allowing the subject of a decision-making process additional support to ensure they understand the process and the evidence.
45. For example, a person with a cognitive impairment may require a support person to assist them. Similarly, where a material witness is not available to attend a hearing scheduled for a certain time, the decision-maker should consider whether reasonable arrangements can be made to reschedule to a time when the witness can attend.
46. While procedural fairness is essential for fair decision-making, other administrative law principles also promote fairer outcomes. These are set out below.

Fair decision-making principles

47. Fair decision-making in an administrative law context is the process by which a decision-maker:
 - gathers and considers all relevant facts and information
 - correctly identifies, interprets and applies the law
 - reasonably exercises their discretion.
48. In practice, this means decision-makers must:
 - confirm they are properly delegated the power to make the decision
 - have enough skills and experience to effectively conduct the process and be sufficiently independent and impartial
 - base their decisions on sound evidence that is both credible and reliable
 - consider relevant policies, procedures and guidelines, as well as how the decision may impact human rights.
49. In addition to promoting fairer outcomes, observing fair decision-making principles ensures decisions are consistent with internal policies and give proper consideration to the human rights of people likely to be affected.

³ Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters Australia, 2013) 398-99; *Kioa v West* (1985) 159 CLR 550, 587 and 609 (Mason J); NSW Ombudsman, *Good Conduct in Administrative Practice* (March 2017) 3rd Edition, 67.

⁴ *Kioa v West* (1985) 159 CLR 550, 585; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, [37].

Openness and transparency

50. Openness and transparency are also fundamental elements of accountability in administrative decision-making. The maxim is that the 'cathartic glare of publicity' will reduce the risk of arbitrary decisions and push decision-makers to carry out processes fairly.⁵
51. In the context of prison disciplinary hearings, this generally means decision-makers should:
- keep good records of the hearing process
 - clearly explain decisions in a manner capable of being understood by the prisoner, including any options for review or reconsideration.
52. Details that should be recorded include:
- the name of the decision-maker
 - the reasons for the decision and an accurate description of the evidence relied upon when reaching it
 - the outcome.
53. Prison disciplinary hearings are not open to the public in the same way as most court and tribunal proceedings, but can still be made more transparent by taking the above steps.

Human rights relating to the prison disciplinary process

The Charter of Rights Act

54. Victoria is one of only three jurisdictions in Australia with dedicated human rights legislation.
55. The Charter of Rights Act identifies the fundamental human rights, freedoms and responsibilities of people in Victoria.
56. Under the Charter of Rights Act, it is generally unlawful for public authorities, including operators of private prisons, to:
- act in a way that is incompatible with a human right
 - fail to give proper consideration to a human right when making a decision.
57. Public authorities must comply with both of these requirements for a decision to be lawful.
58. In Victoria, the Prison Disciplinary Handbook relevantly provides:
- A prisoner's human rights, in accordance with the Charter of Human Rights and Responsibilities Act 2006, must be considered during all aspects of the disciplinary process.

⁵ *David Syme & Co Ltd v General Motors - Holden Ltd* [1984] 2 NSWLR 294.

59. The following human rights identified in the Charter of Rights Act may be engaged by the prison disciplinary process:
- the right to humane treatment when deprived of liberty, which provides that 'all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person' (section 22(1))
 - the right to a fair hearing, which recognises that people charged with criminal offences or who are party to civil proceedings have the 'right to have the charge or proceeding determined by a competent, independent and impartial court or tribunal after a fair and public hearing' (section 24(1)).
60. Other human rights may also be engaged by the prison disciplinary process; for example, a decision to restrict a prisoner's visit privileges may engage rights relating to the protection of families and children identified in section 17 of the Charter of Rights Act.
61. The Charter of Rights Act recognises that human rights are not absolute and may be limited in certain circumstances. However, section 7(2) provides that for a limitation to be reasonable (and therefore lawful) it must be 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.
62. Under section 7(2), decisions to limit human rights must take into account 'all relevant factors', including the nature of the human right, the importance and purpose of the limitation and whether there is 'any less restrictive means reasonably available to achieve the purpose' in the circumstances.

The Mandela Rules

63. The United Nations *Standard Minimum Rules for the Treatment of Prisoners*, referred to as the 'Mandela Rules', also set minimum international standards for the treatment of prisoners. The principle behind these rules is best summarised in Nelson Mandela's words:

It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.⁶

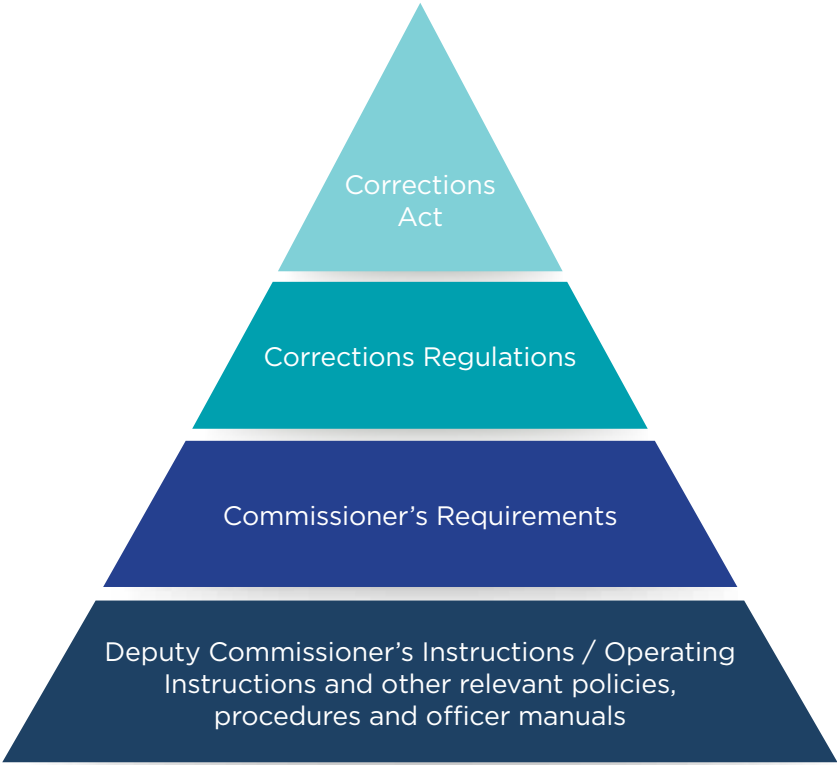
64. Among other things, the Mandela Rules provide that prisons must:
- grant prisoners the right to defend themselves in person or through legal assistance where required by the interests of justice, particularly in cases involving serious disciplinary charges
 - take into account the individual needs of prisoners, in particular those in the most vulnerable categories
 - protect and promote the rights of prisoners with special needs and ensure that prisoners with physical, mental or other disabilities have full and effective access to prison life on an equitable basis
 - encourage prison administrations to use, to the extent possible, conflict prevention, mediation or other alternative dispute resolution mechanisms to prevent or resolve conflicts.

⁶ Nelson Mandela, *Nelson Mandela International Day*, (September 2015) United Nations website <https://www.un.org/en/events/mandeladay/mandela_rules.shtml>.

Corrections law and policy

65. Victoria's corrections laws and policies establish the legislative and operational requirements for the prison disciplinary process.
66. They consist of:
- the Corrections Act, which provides for the establishment and management of prisons in Victoria and sets out the broad framework for the disciplinary process
 - the Corrections Regulations, which expand on the requirements of the Corrections Act, including various forms and procedures relating to the prison disciplinary process
 - Commissioner's Requirements, which set out high-level policy requirements for all prisons in Victoria
 - Deputy Commissioner's Instructions and Operating Instructions, which include more detailed policy requirements. While public prisons observe Deputy Commissioner's Instructions and private prisons follow Operating Instructions, the policy requirements relating to the disciplinary process are largely the same
 - other policy documents, for example, the Prison Disciplinary Handbook, which provides detailed guidance for Disciplinary Officers and Hearing Officers about how to conduct disciplinary hearings.
67. This governance structure can be thought of as a pyramid with the Corrections Act and Corrections Regulations at the peak (see Figure 2).
68. The legislative and policy framework emphasises that prison disciplinary hearings are not required to be conducted to the same standards as court proceedings.
69. For example, the Corrections Regulations state that the Governor (or General Manager) of a prison:
- must ensure disciplinary hearings are conducted with 'as little formality and technicality' and as 'expeditiously' as possible, subject to the requirements of the Corrections Act, Corrections Regulations and the need to give 'proper consideration' to the matters before the hearing (regulation 67(a))
 - is not bound by the rules of evidence and can inform themselves on any matter 'in such manner as [they think] appropriate' (regulation 67(b)).
70. However, disciplinary hearings must still meet basic principles of fairness. For example, *Commissioner's Requirement 2.3.3: Disciplinary Process and Prisoner Privileges* ('Commissioner's Requirement 2.3.3'), states:
- Disciplinary Hearings are not intended to resemble Court proceedings, as the rules of evidence do not apply, although the broader principles of procedural fairness are to be upheld.

Figure 2: Legislative and policy framework applying to prison disciplinary hearings in Victoria



Source: Victorian Ombudsman

The disciplinary investigation and decision to charge

The current process

71. The prison disciplinary process begins with an incident and a report.
72. Where a prison officer suspects a prisoner has committed a prison offence, section 50(1) of the Corrections Act requires them to promptly report it to a prison Disciplinary Officer.
73. Section 50(2) of the Corrections Act provides that Disciplinary Officers must:
 - undertake a 'proper investigation' of the alleged offence
 - provide the prisoner with an opportunity of 'making an explanation'.
74. The Prison Disciplinary Handbook also requires the Disciplinary Officer to:
 - review any report made by another officer
 - interview relevant staff
 - seek additional evidence, if necessary
 - interview the prisoner about the incident and record the prisoner's response
 - check any relevant registers maintained by the prison
 - consider whether the prisoner has any special needs or circumstances.
75. After investigating the alleged offence, the Disciplinary Officer can decide to:
 - take no further action if they are satisfied no offence was committed or if the matter is assessed as trivial (sections 50(3) and (4))
 - deal with the matter by reprimanding the prisoner or withdrawing one of the prisoner's privileges for less than 14 days (sections 50(5)(a) and (b)). Prison officers interviewed by the investigation referred to this option as a 'minor offence'⁷
 - charge the prisoner with a prison offence (section 50(d)).
76. If the Disciplinary Officer decides to charge the prisoner, they must give the prisoner a written notice setting out the charge (section 50(6)).
77. Under section 53(1) of the Corrections Act, the General Manager or their delegate must also give the prisoner notice of the time, date and place of the hearing. This notice must generally be provided at least three days before the hearing, to give the prisoner enough time to prepare and gather relevant information.
78. Under Commissioner's Requirement 2.3.3, Disciplinary Officers are expected to record the details of any witnesses the prisoner wishes to present on the day of the hearing, as well as any representative nominated by the prisoner.
79. In practice, Disciplinary Officers use a checklist set out in Commissioner's Requirement 2.3.3 to record they have taken all the required steps and considered all relevant matters.
80. Some prison offences, such as assaults, are also criminal offences. Section 50(5A) of the Corrections Act provides that prisons may refer serious incidents to Victoria Police to be dealt with under the criminal law. In these circumstances, Commissioner's Requirement 2.2.3 provides that the matter should generally not proceed to a disciplinary hearing 'unless police advise that there will be no further action'.

⁷ Relevant privileges include access to telephone calls, in-cell electrical appliances, extended out-of-cell activities and the ability to purchase some special items from the prison canteen.

Figure 3: Checklist for disciplinary officers

CHECKLIST FOR DISCIPLINARY OFFICERS		
DISCIPLINARY OFFICER / PRISONER DETAILS		
CRN:	PRISONER'S GIVEN NAME & SURNAME:	PRISON & UNIT:
PRINT DISCIPLINARY OFFICER'S FULL NAME:		DATE:
INITIAL ACTIONS REQUIRED		
Obtain and review all reports; footage or other evidence.	Yes ☐ No ☐	COMMENT
Entered into PIMS Incident module	Yes ☐ No ☐	
Interview relevant staff and record details	Yes ☐ No ☐	
Gather additional evidence & seek additional reports where necessary	Yes ☐ No ☐	
Interview prisoner, put details of alleged offence to them and make record of response – ensure to properly consider human rights.	Yes ☐ No ☐	
Details entered in the Use of Force Register	Yes ☐ N/A ☐	
Details entered in the Seizure Register and transferred to Charge Sheet	Yes ☐ N/A ☐	If applicable
SPECIAL NEEDS CONSIDERATIONS		
At the time of the offence, did the prisoner have a P Rating? If yes, list ____ If the prisoner had a P1 or P2 rating, refer to health / psychiatric professionals, to assist in determining: ▪ If this could be a factor which contributed to the offence. ▪ Whether the prisoner was responsible for his or her actions. ▪ Whether an alternative to the disciplinary procedure is more appropriate (case management response).		Yes ☐ No ☐
Does the prisoner have an intellectual disability? If proceeding to a hearing, has an advocate for the prisoner been arranged? Note – a CISO is requested with the prisoner's consent. If this could be a factor in the offence, has specialist advice** been sought as to - ▪ whether the prisoner was responsible for his or her actions? ▪ whether an alternative to the disciplinary procedure is more appropriate (case management response). ▪ Consider ABI, mental health and cognitive impairment.		Yes ☐ No ☐
Was the prisoner under 18 years of age at the time of the offence? If yes, consider: • whether the prisoner's maturity was a factor in the commission of the offence? • whether the prisoner was influenced by other prisoners? • any other information relevant to the young person.		Yes ☐ No ☐
Other (list eg witness name and details):		Yes ☐ No ☐

** Depending on location and individual circumstances, specialist advice may include one or more of the following: nominated representative, senior psychologist at the location, DHHS caseworker (if IDS registered), prison caseworker, AWO, Yilam etc.

Source: Corrections Victoria

Issues identified by the investigation

81. Fairness and good decision-making in the context of prison disciplinary investigations and charges will ordinarily involve:
- use of impartial officers to investigate alleged offences
 - sensible use of discretion, so that prisoners only face disciplinary charges and hearings in appropriate cases
 - clear and detailed charges, so prisoners know exactly what they are accused of doing and can prepare their response
 - access to appropriate advice and support, so prisoners know their rights and can prepare their case.
82. Having regard to the hearing files analysed and other available evidence, the investigation identified the following issues with the current process under which prison offences are investigated and charged:
- perceptions of bias arising from involvement of unit supervisors in investigating the alleged offence
 - instances of poor use of discretion in the decision to charge
 - inconsistent approaches to registering minor offences
 - insufficient information provided to prisoners about the charge
 - use of undocumented pre-hearing discussions
 - limited availability of independent legal advice and support.
83. These issues are described in the passages that follow.

Perceptions of bias

84. Prisoners who complain to the Ombudsman about the disciplinary process often express concerns that prison officers involved in investigating offences are not impartial. A CISO volunteer told the investigation that prisoners also often report this concern to their service.
85. Prison offences are ordinarily investigated by the Supervisor of the unit in which the alleged incident took place. In some cases, this means the Disciplinary Officer may have been involved in the incident that led to the charge.
86. In other cases, the Disciplinary Officer may have ordered the separation of the prisoner following the incident, resulting in the prisoner being taken to a management unit or cell, where they are held in more restrictive conditions until the investigation is completed or they are no longer deemed a risk to the security, good order and management of the prison.
87. In these circumstances, prisoners may have cause to question the impartiality of the Disciplinary Officer investigating the offence.
88. The investigation identified one example of a charge being dismissed because the Disciplinary Officer was directly involved in the incident that led to the charge.

Use of discretion when deciding to charge

89. Disciplinary hearing files reviewed by the investigation indicated some Disciplinary Officers tended to lay multiple charges in circumstances where matters would have been better dealt with as minor offences.
90. This appears to have resulted in many charges either being dismissed by Hearing Officers or ending with a simple reprimand.

'The [Hearing Officer] said, "Listen, we'll give you a reprimand because I think they've made a mistake".'

– Prisoner, complaint to the Ombudsman

'I'll often, if it's a minor type of offence, push it back to the Disciplinary [Officer], and say, "Okay, handle this at your level".'

– Hearing Officer

'I had a [disciplinary hearing] with the manager. He said "reprimand", I said, "What's that?" ... I put my wrist out and he literally slapped me on the wrist and said, "That's for the altercation".'

– Prisoner, complaint to the Ombudsman

91. Of the hearing files analysed by the investigation, about one-quarter resulted in the charged prisoner being reprimanded and receiving no further penalty. While it was not possible to determine how many of these matters should reasonably have proceeded to a hearing, the investigation was concerned that such a significant proportion resulted in this outcome.

92. The following case study is one example where a Disciplinary Officer could have exercised their discretion to deal with an incident differently.



Decision to charge a prisoner with a psychiatric condition

Adil, a prisoner, has a recognised psychiatric condition and learning disability. Due to a previous incident, Adil was placed in a management unit. One evening, Adil expressed suicidal thoughts to staff through his cell intercom, saying, 'I deserve to die' and 'I want to kill myself'.

Staff at the prison decided to move Adil to an observation cell. Prison procedures required the prison officers to strip search Adil before placing him in this cell. According to the hearing file, Adil reacted angrily to this proposal, saying he would 'not cooperate' and threatening to fight any member of staff who attempted to search him. An ensuing struggle resulted in an officer and Adil both being pushed to the floor. Prison staff ultimately managed to subdue Adil in the cell and remove his clothes for the search.

The matter was reported to a Disciplinary Officer and investigated the next day. When interviewed by the Disciplinary Officer, Adil said he was 'really sorry' for his behaviour. Regardless, the Disciplinary Officer decided to charge Adil with 'disobey[ing] a lawful order, direction or instruction'.

The matter proceeded to a disciplinary hearing; however, the Hearing Officer ultimately determined to dismiss the charge based on Adil's recognised psychiatric condition and learning disability. In doing so, the Hearing Officer recorded that Adil would be provided with ongoing support to improve his behaviour, including 'structured rules and consistent messaging.'

While Adil's behaviour may have warranted investigation and the hearing outcome appeared compassionate and reasonable, the decision to charge Adil and proceed to a hearing was arguably unnecessary, given his conduct appeared related to a recognised psychiatric condition, his cognitive impairment and his demonstrated remorse.

General Managers invited by the Department to respond to the Ombudsman's draft report observed that 'staff have the right to charge a prisoner if they deem the incident to be of sufficient seriousness'. These officers nevertheless acknowledged that dismissal of the charge was 'appropriate in the example provided.'

Figure 4: Comments recorded by the Hearing Officer in Adil's case

Hearing Officer's Comments / notes

Charge dismissed based on prisoners PZ status & autism diagnosis. Staff have implemented behavioural change strategies to assist prisoner with ongoing compliance to unit rules.

Source: Corrections Victoria

93. Commissioner's Requirement 2.3.3 provides the following guidance to Disciplinary Officers about which matters should be dealt with as minor offences:

Items under \$30 and where the prisoner admits damage or loss, can be managed through a minor offence, without proceeding to a General Manager's Disciplinary Hearing.

94. Hearing Officers interviewed by the investigation all said they saw matters that could be better dealt with as minor offences. One Hearing Officer observed:

The time that's wasted by myself, by [the Disciplinary Hearings Coordinator] for instance, drawing up the charges, all that sort of thing, could've been circumvented with a minor offence.

95. The investigation heard there are practical advantages to dealing with matters as minor offences because the process is quicker and less resource-intensive than a disciplinary charge and hearing.
96. Those involved in the disciplinary hearing process gave evidence that, by the time a matter reaches the disciplinary hearing stage, the prisoner often struggles to clearly recall the events surrounding the incident.
97. Some Hearing Officers also observed that prisoners separated after an incident who have already admitted fault and demonstrated remorse sometimes perceive the outcome of the disciplinary hearing as a second punishment.
98. In contrast, Hearing Officers were positive about the minor offence process – particularly for prisoners with a good disciplinary record, who are new to the prison or have a disability or mental illness.

99. While the investigation identified scope for greater use of the minor offence process, it is encouraging to observe that Hearing Officers feel comfortable exercising their discretion to dismiss charges with a simple reprimand, where appropriate.

Inconsistent approaches to registering minor offences

100. The investigation identified inconsistencies in the way Disciplinary Officers at different prisons record decisions to treat matters as minor offences.

101. Commissioner's Requirement 2.3.3 provides that General Managers must 'develop and implement procedures for recording and dealing with minor infringements'.

102. The investigation sought data relating to minor offences from Corrections Victoria but was advised there are no separate registers or reports produced for these matters.

103. Corrections Victoria acknowledged there is an issue with the fact that minor offences are not always recorded on PIMS. While data produced from PIMS contained some records of incidents that did not proceed to a hearing, overall it appears PIMS is not widely used to record minor offences.

104. One Hearing Officer from Port Phillip Prison informed the investigation they ordinarily record minor offences in a separate report:

At this location, if a Prisoner receives a minor offence ... the officer who has determined that [will] simply do it as a minor offence [and] needs to write a report as well.

105. In contrast, a Hearing Officer at Ravenhall Correctional Centre said their prison keeps a separate register for these matters:

Minor offences don't always go on PIMS, but they're recorded in our Minor Offence Register. The only time minor offences would go on PIMS would be if there have been items that have been confiscated that needed to go into evidence.

106. General Managers consulted by the Department about the Ombudsman's draft report stated they were in favour of better use of the minor offence register with clearer guidelines and training.

Insufficient information about the charge

107. The investigation found that a majority of the files analysed which resulted in disciplinary charges provided only a broad description of the charged offence.

108. This practice may deny prisoners procedural fairness because it limits their ability to identify the behaviour giving rise to the charge and respond to the case against them.

109. Commissioner's Requirement 2.3.3 and related Deputy Commissioner's Instructions require Disciplinary Officers to use a prescribed form called a 'Notification of Charge'. The form requires the Disciplinary Officer to set out the charged offence and, where relevant, identify items of contraband seized. However, it does not require the Disciplinary Officer to describe the conduct to which the charge relates.

SCHEDULE 1.16(2) NOTIFICATION OF CHARGE OF PRISON OFFENCE SECTION 48-53, CORRECTIONS ACT REGULATIONS 50 - 59, CORRECTIONS REGULATIONS 2009	
I, (Name of designated Disciplinary Officer) of (Prison) charge (Given name & surname of prisoner) on the information of (Name of Informant)(Name of Prison) with the following offence(s), including the specific behaviour which has led to the charge and where relevant, the individual items of contraband seized: allegedly committed on (Date of alleged offence) at (Place of alleged offence) and that this is an offence under Regulation 50 of the Corrections Regulations 2009. Proceedings relating to this matter will take place at a hearing to be held on (Time and date of hearing) before (Name of Presiding General Manager or Delegate) at (Place of Hearing) Signed Dated (Disciplinary Officer)	INSTRUCTIONS: One copy is to be given to the prisoner One copy is to be forwarded to the General Manager One copy is to be filed in the Register of Prisoner Charges One copy is to be retained by the Charging Officer * See below - Delete if inapplicable
Date of Hearing..... Officer Presiding..... Plea (Ea Count)..... Decision..... Penalty Imposed.....	"I agree to waive the 72 hours notice for my hearing "I agree to alter the DATE /TIME /PLACE of my hearing to Date.....Time.....Place..... Signed.....
Prisoner's Signature Issuing Officer's Name Issuing Officer's Signature Witness's Name..... Witness's Signature Page No. Date/Time Issued athrs	I have read and understand my rights and the procedure in regard to Disciplinary Hearings. Prisoner Signature.....

Under section 53(3A) of the Corrections Act, the charge may be heard in your absence should you refuse or fail to attend the hearing. If you refuse or fail to attend a plea of not guilty will be entered on your behalf, and the Hearing Officer will determine whether you are guilty or not guilty after hearing all the evidence presented. The Hearing Officer will inform you of the determination and, where applicable, the penalty imposed.

110. For example, the following excerpt from a Notification of Charge form reviewed by the investigation identifies the prison offence as 'disruptive behaviour' (citing the relevant provision of the Corrections Regulations) but does not provide specific details of the conduct alleged:

111. General Managers consulted about the Ombudsman's draft report gave feedback that they believed 'prisoners should receive an explanation from the issuing officer if required as well as the Hearing Officer'.

Figure 6: Excerpt from a Notification of Charge form issued to a prisoner

(Name of Informant)	(Prison)
With the Following Offence (s) To Wit: Disruptive behaviour	
 65(1)(b) Act in a disruptive, abusive, offensive, racist, discriminatory or indecent manner, whether by language or conduct; or	

Source: Corrections Victoria



Confusion about multiple charges

Deng, a prisoner, contacted the Ombudsman's office to complain that he was facing two disciplinary hearings for the same incident.

Deng said he had recently been transferred to a new prison. Prior to his transfer, Deng pleaded guilty to an offence of damaging property and received a reprimand. Deng said shortly after he arrived at the new prison he received a Notification of Charge form indicating he would face an additional charge of assault. Deng said he believed this was unfair because the matter had already been resolved at the previous prison.

The Ombudsman made enquiries into Deng's situation and confirmed that the charge of assault related to a separate, unrelated incident at the previous prison. Representatives of the new prison agreed to speak with Deng to explain the distinction between the two disciplinary hearings.

Undocumented pre-hearing discussions

112. Many prisoners who complain to the Ombudsman allege that prison officers discuss the likely outcome of the disciplinary hearing with them before the hearing takes place. For example, some prisoners have complained prison officers told them the likely penalty for pleading guilty, or that certain actions would or would not follow a plea.
113. At interview, prison officers acknowledged that staff speak with prisoners when issuing the Notification of Charge form, but said these discussions are confined to administrative matters.
114. For example, the investigation was informed that officers will ask prisoners how they intend to plead in order to identify whether witnesses to the conduct are required at the hearing. Commissioner's Requirement 2.3.3 provides that it may not be necessary for the informant to attend the hearing if the prisoner pleads guilty to the charge.
115. The investigation was informed that staff may also ask prisoners with cognitive impairments if they would like for a CISO volunteer to be present at the hearing, and Aboriginal and Torres Strait Islander prisoners if they would like for an Aboriginal Liaison Officer to be present.
116. Prison officers interviewed by the investigation denied discussing matters of evidence with prisoners when issuing the Notification of Charge form.

117. It was not possible for the investigation to independently verify what happens during pre-hearing interactions because there is currently no requirement for prison officers to document these discussions. The fact there is a period where discussions about the hearing process and possible outcomes are carried out 'in the dark' increases the risk of prisoners not receiving a fair hearing.

'They basically said, "If you plead not guilty, we'll get the other person's statement again and we'll just find you guilty." ... They basically just said either way they were going to find me guilty of this.'

– Prisoner, complaint to the Ombudsman

'One of the senior officers ... came to see me. Questions were fired at me with no explanation as to any process or what was happening. I feel I was deceived.'

– Prisoner, complaint to the Ombudsman

118. This is because:

- the fair hearing rule requires that prisoners be able to understand the evidence against them and make an informed response to the Hearing Officer
- the evidence rule requires decision-makers to impartially consider the relevant evidence, including the prisoner's evidence, before reaching a decision.

119. If prisoners are party to discussions that pre-empt the outcome of the hearing, they may feel influenced to make a particular plea. At its most serious, this may lead to prisoners deciding not to provide information in their defence because they believe the likely penalty is not significant enough to defend the charge (in some contexts, this is referred to as a 'convenience plea').

120. This increases the risk of the hearing resulting in the wrong outcome, and may cause the prisoner to feel an injustice has occurred if the actual penalty differs from what was indicated.

121. These concerns are more significant where the Hearing Officer is also the person responsible for issuing the Notification of Charge to the prisoner. This occurred in five cases at Port Phillip Prison identified by the investigation – representing almost one-third of all cases reviewed by the investigation that were reported, charged and heard at this location.

122. General Managers consulted about the Ombudsman's draft report acknowledged this was a procedural error and said that requirements have since been reinforced with staff.



Undocumented prehearing discussion with a prisoner

Connor, a prisoner, complained to the Ombudsman that he had been misled into pleading guilty at a disciplinary hearing.

Connor said he had been charged with possessing a prohibited drug without a prescription. Prior to the hearing he was approached by the Hearing Officer to discuss his plea. According to Connor, the Hearing Officer told him that if he pleaded guilty to the charge, he would save everybody's time and would avoid being taken off the methadone program.

Prisoners participating in the methadone program are required to sign a contract acknowledging they will be taken off the program if they are found misusing their medication or other drugs. Connor said he nevertheless decided to plead guilty at his disciplinary hearing, based on the Hearing Officer's advice.

Connor was subsequently removed from the methadone program. Connor said when challenged about this outcome, the Hearing Officer denied ever making the undertaking.

Connor said, 'Rather than going with my instincts, I chose to plead guilty, a decision I now regret.'

The Ombudsman was unable to confirm Connor's version of events because no record was made of the alleged pre-hearing discussion. The prison informed the Ombudsman that the hearing outcome was reviewed by the prison in light of Connor's concerns, but was ultimately upheld.

Limited availability of independent advice and support

123. There is a distinct lack of information, independent specialist legal advice and assistance for prisoners facing the disciplinary process in Victoria.
124. While the Notification of Charge form issued to prisoners contains some formal statements about the hearing process, this information uses language that may be difficult to understand without legal training.

'As an Aboriginal inmate, I was not offered a support person on the day. ... It's pretty hard for me because I can't read or write.'

– Prisoner, complaint to the Ombudsman

125. Victoria Legal Aid provides assistance to prisoners but grants of legal aid are not available for the prison disciplinary process. This means it is generally not possible for most prisoners to engage a lawyer to represent them at a disciplinary hearing.
126. Staff who operate Victoria Legal Aid's free Legal Help telephone line can nevertheless provide information and advice to prisoners who call about disciplinary hearings based on specific training about the process. This line is currently available to prisoners at the Dame Phyllis Frost Centre, Metropolitan Remand Centre, Loddon Prison Precinct and Port Phillip Prison.

127. Fitzroy Legal Service also operates a telephone 'Prison Law Advice Line' for prisoners, their families and advocates on Fridays between 10am and 4pm. This service is staffed by lawyers and paralegal volunteers and can provide legal information and advice concerning disciplinary hearings. However, prisoners seeking to access the service must first ask the prison to put the phone number on their list of approved telephone contacts.
128. Other community services and community legal services may provide general assistance to prisoners, but do not have a particular focus on disciplinary hearings.
129. The Law and Advocacy Centre for Women told the investigation that while the fact that prison disciplinary hearings occur 'behind closed doors' means that matters can be resolved relatively quickly, 'there is always a question of procedural fairness and access to advice'.
130. It is noted the Corrections Act does not expressly permit a prisoner to be represented by a lawyer at a disciplinary hearing. General Managers consulted on the Ombudsman's draft report observed that advice is generally provided to prisoners by Disciplinary Officers and Hearing Officers. Further, one General Manager observed that they did not believe a disciplinary proceeding was a 'legal process'.

Figure 7: Information provided to prisoners with Notification of Charge form

SCHEDULE 1.16(2)

NOTIFICATION OF CHARGE OF PRISON OFFENCE (Continued)

The procedure for dealing with the offence with which you are charged is set down in the Corrections Act 1986 and the Corrections Regulations 2009.

Under section 52(1) of the Corrections Act you may ask the General Manager or his or her delegate to refer the matter to another Hearing Officer for hearing. This should be done in writing to the General Manager as soon as possible upon receiving this notification.

Under section 53(2) of the Corrections Act, you may call relevant witnesses. The General Manager or his or her delegate should be advised in writing as soon as possible of witnesses to be called to enable appropriate arrangements to be made. The Hearing Officer may disallow calling witnesses where he or she considers an abuse of process would occur, the witnesses' evidence is irrelevant or would repeat other witnesses' evidence.

Under section 53(3) of the Corrections Act, you may, with the General Manager's permission, be represented by another prisoner. The request to be represented by another prisoner should be made in writing to the General Manager as soon as possible after receiving this notification.

The Disciplinary Hearing will be conducted according to the following procedures:

- the Hearing Officer will read the charge, the name of the informant, the place at which the alleged offence occurred, and details of the section of the Act or the Regulation allegedly breached;
- you will be asked whether you plead guilty or not guilty to the charge;
- if you plead not guilty the informant will present evidence to support the charge and call witnesses;
- you will be given the opportunity to cross examine the informant and informant's witnesses;
- you will be given the opportunity to present your case and call relevant witnesses;
- the informant will be given the opportunity to cross examine you and your witnesses;
- the Hearing Officer will determine whether you are guilty or not guilty after hearing all the evidence presented;
- if the Hearing Officer, finds you guilty, the Hearing Officer will determine the penalty;
- if you plead guilty, the Hearing Officer will review the circumstances of the case, consider mitigating factors and will then determine the penalty after inviting you to make a plea concerning the penalty;
- the Hearing Officer will inform you of the determination and the penalty imposed.

Under section 53(3A) of the Corrections Act, the charge may be heard in your absence should you refuse or fail to attend the hearing. If you refuse or fail to attend a plea of not guilty will be entered on your behalf, and the Hearing Officer will determine whether you are guilty or not guilty after hearing all the evidence presented. The Hearing Officer will inform you of the determination and, where applicable, the penalty imposed.

Source: Corrections Victoria

The hearing and the penalty

The current process

131. During a prison disciplinary hearing, the Hearing Officer must generally allow the prisoner a reasonable opportunity to put their case (Corrections Act, section 53(2); Correction Regulations, regulation 71(c)).
132. At the beginning of the hearing:
- the Hearing Officer informs the prisoner of the hearing procedure (regulation 69(1)(a))
 - the charge is read to the prisoner (regulation 69(1)(b))
 - the Hearing Officer gives the prisoner the opportunity to state their plea (i.e. guilty or not guilty; regulation 69(1)(c)).
133. The Prison Disciplinary Handbook clarifies that the standard of proof required in a disciplinary hearing is 'reasonable satisfaction'. This refers to the degree of confidence reached by the Hearing Officer on considering the evidence. In other words, in order to find the prisoner guilty of the offence, the Hearing Officer must be reasonably satisfied the charge has been proven, having regard to the facts and evidence.
134. The Corrections Regulations provide for different processes depending on whether a prisoner pleads guilty or not guilty during a hearing.
135. If the prisoner pleads not guilty, the person conducting the case against the prisoner must:
- present evidence to support the charge
 - be given a reasonable opportunity to call relevant witnesses
 - be given a reasonable opportunity to cross-examine the prisoner and their witnesses (regulation 70).
136. In such cases, section 53(2) of the Corrections Act provides that the prisoner must also be allowed a reasonable opportunity to call and cross-examine witnesses and informants.
137. If the prisoner pleads guilty, the Hearing Officer must:
- review the circumstances of the charge
 - consider any mitigating factors
 - invite the prisoner to make a plea concerning the penalty (regulation 71).
138. If the prisoner does not attend the hearing, section 53(3A) of the Corrections Act permits the Hearing Officer to determine the charge in their absence. In such cases, the Hearing Officer will read the charge and record a plea of not guilty before proceeding to hear the evidence (regulation 72).



Support for prisoners who have trouble understanding the process

Prisons are required to ensure appropriate support is provided to prisoners who may have trouble understanding the disciplinary hearing process.

Commissioner's Requirement 2.3.3 provides that Disciplinary Officers must ensure the prisoner has a 'reasonable comprehension' of the English language.

In circumstances where the Disciplinary Officer has any concerns about the prisoner's ability to understand the process, they must:

- take steps to identify and provide an interpreter
- notify the Hearing Officer before the hearing begins.

Commissioner's Requirement 2.3.3 also contains specific protections for prisoners with an intellectual disability or psychiatric condition, which are discussed later in this report.

139. At the end of the hearing, the Hearing Officer must dismiss the charge if they consider there is not enough evidence to prove the offence (regulation 73(1)).

140. If the prisoner is found guilty or pleads guilty to the offence, the Hearing Officer can issue any of the following penalties:

- a reprimand
- a fine of no more than one penalty unit (currently equivalent to \$181.74; by way of context, employed prisoners may earn between \$3.95 and \$8.95 per day)
- withdrawal of one or more of the prisoner's privileges for up to 14 days per offence (to a maximum of 30 days).

'I was charged a \$30 fine and [another] \$40 fine and [received] four weeks no visitation, locked in my room for four hours. I just think the charges are a bit rough ... I only have \$22. I can't afford to pay \$70.'

- Prisoner, complaint to the Ombudsman

141. Like Disciplinary Officers, Hearing Officers have a checklist they use to check they have taken required steps before and during a hearing (see Figure 8).

Figure 8: Checklist for Hearing Officers

CHECKLIST FOR HEARING OFFICERS		
HEARING OFFICER / DISCIPLINARY OFFICER / PRISONER DETAILS		
CRN:	PRISONER'S GIVEN NAME & SURNAME:	PRISON & UNIT:
PRINT DISCIPLINARY OFFICER'S FULL NAME:	HEARING OFFICER:	HEARING OFFICER #2 (if referred to another Hearing Officer by initial Hearing Officer [s51(b)] or prisoner [s52(1)] of the Act:
TIMELINESS OF HEARING – Target within 14 Days		
DATE OF CHARGE: / / 20.....	If hearing not achieved within 14 days, list reason:	
DATE OF HEARING: / / 20.....	☐ Unavailability of informant	☐ Unacceptable delays
Achieved within 14 days Yes ☐ No ☐	☐ Unavailability of witnesses	☐ Prisoner unfit to plead
	☐ Unavailability of defendant	☐ Other
PRE-HEARING PREPARATION		
Has at least 72 hours notice of the hearing been given to the prisoner, unless ▪ Shorter period agreed [s53(1)(b)] ▪ Imminent discharge or necessitated by good order [s53(1)(c)]	Yes ☐ No ☐	
Does the charge emanate from another prison?	Yes ☐ No ☐	If so, where? Has consideration been given to using video-conferencing so that the prison where the incident occurred can hear the matter?
Has the prisoner requested hearing to be conducted by other hearing officer? [s52(1)]	Yes ☐ No ☐	If not approved, why not? Note who refused by Secretary/Commissioner/Deputy Commissioner, Custodial Operations and note date given to GM.
Has a witness list been provided by the prisoner? [s53(2)]	Yes ☐ No ☐	List witnesses (full name and CRN where relevant) This list needs to include any witnesses that were nominated by the prisoner and disallowed by the Hearing Officer. In circumstances where this occurs, the reason for excluding the witness should also be clearly documented.
Have the reports been reviewed and deemed acceptable? ▪ Charge not trivial ▪ Appropriate charge cited ▪ Sufficient level of detail ▪ Adequate evidence to be presented	Yes ☐ No ☐ Yes ☐ No ☐ Yes ☐ No ☐ Yes ☐ No ☐	
Has prisoner requested prisoner representation? [s53(3)]	Yes ☐ No ☐	If not approved, why not?

Source: Corrections Victoria



Alternative hearing models

Other Australian jurisdictions and the United Kingdom use different hearing processes depending on the severity of the charge.

In these jurisdictions, major charges that can result in significant penalties for the prisoner have strict procedural requirements, many of which are similar to those applicable to criminal trials. These hearings are presided over by independent officers such as visiting magistrates or judges. Minor offences, by comparison, have fewer procedural requirements and, as in Victoria, are heard by senior prison staff.

Victoria's prison disciplinary process does not differentiate between major and minor offences in this way. In Victoria, there is only one system for laying charges, conducting hearings and applying penalties – although minor offences may not always result in a disciplinary hearing.

In Victoria, all hearings are conducted by a delegate of the General Manager of the prison – in other words, a prison officer. If a prisoner is unhappy with the outcome of the hearing, their only option is to seek judicial review in the Supreme Court of Victoria.

Issues identified by the investigation

142. Fairness and good decision-making in the context of hearings would generally involve:

- a properly appointed and impartial Hearing Officer
- access to appropriate advice and support for prisoners seeking to understand their rights
- the ability to call and cross-examine witnesses
- proper consideration of all relevant evidence
- consistent and appropriate penalties
- an accessible right of review when the prisoner wants to challenge the outcome.

143. Having regard to the evidence, the investigation identified the following issues with the current hearing process:

- management of perceptions of bias during the hearing
- limitations on the right to call witnesses
- impacts of prisoner transfers
- lack of written reasons for hearing outcomes
- application of inconsistent penalties
- problems with the approach taken for more serious prison offences
- a tendency to focus on procedure rather than substantive fairness
- limited rights of review.

Management of perceptions of bias during the hearing

144. Earlier in this report, it was noted that prisoners who complain to the Ombudsman often express concern that prison officers involved in the disciplinary process are biased. This concern extends to Hearing Officers.

145. The following case study provides an example of this type of complaint.



Complaint about bias in the disciplinary hearing process

Yusuf was charged with interfering with his in-cell computer.

Before the hearing, Yusuf submitted a written request to have another Hearing Officer determine the matter, as he believed the allocated Hearing Officer was biased due to previous conflict.

Yusuf's request was considered by the allocated Hearing Officer and relevant Operations Manager, who determined the hearing would proceed without a change of Hearing Officer. Yusuf was informed of this decision verbally, and the hearing proceeded.

Records maintained by the prison do not disclose why staff refused Yusuf's request, nor why they considered there was no actual or perceived bias on the part of the allocated Hearing Officer. In the checklist, the Hearing Officer simply recorded that the request had been 'overruled'.

Yusuf contested the charge at the hearing but was ultimately found guilty by the Hearing Officer. The Hearing Officer imposed a fine of \$80 and revoked Yusuf's access to a computer for the remainder of his sentence.

Yusuf complained to the Ombudsman that, among other things, the Hearing Officer conducted his hearing unfairly.

While the officers involved said they did not think there was an apprehension of bias associated with the hearing, this view was clearly not shared by Yusuf.

146. This report has already described the perceptions of bias that can arise when the officer who authorises a prisoner's separation following an incident is also involved in investigating the offence.

'He [the Hearing Officer] has significant issues with me and I have a significant issue with him hearing my [case].'

– Prisoner, complaint to the Ombudsman

147. Hearing Officers interviewed for the investigation confirmed that officers responsible for authorising separation sometimes also take on the role of Hearing Officer in relation to the same incident.
148. On the information available to the investigation, it was not possible to determine how widespread this practice is.
149. General Managers consulted on the Ombudsman's draft report observed that 'just because a prisoner believes a Hearing Officer is biased ... does not necessarily make it true'. These officers observed that identifying independent Hearing Officers was sometimes challenging at smaller prisons, and prisoners can always make local complaints about unfairness in the hearing process.
150. However, as the previous case study illustrates, it is important for openness and transparency that prison staff record the reasons for refusing a request to allocate a different Hearing Officer.

Requests for witnesses

151. The 2017 investigation by the Ombudsman (described on page 9) expressed concerns that a prisoner had been unfairly denied the opportunity to call witnesses to a disciplinary hearing.
152. The right of an accused person to present evidence by calling, examining or cross-examining witnesses is particularly important to providing procedural fairness.

'I've just been told "no" that I can't [call a witness]. I just think it's unfair and biased for them not to let me call a witness when they're calling witnesses.'

– Prisoner, complaint to the Ombudsman

'They didn't want to [call a witness] because he would have just given the same evidence I did.'

– Prisoner, complaint to the Ombudsman

153. The Supreme Court of Victoria has observed that as a general principle, Hearing Officers should grant requests to call witnesses where there is a likelihood the evidence could contribute to the prisoner's defence. In such cases, it is enough that the witness's evidence may support the possibility of a successful outcome, even if that possibility is not very strong.⁸

8 *Henderson v Beltracchi and Ors* [1999] VSC 135.

154. The 2011 investigation by the Ombudsman into prison disciplinary hearings also warned that unreasonable denial of a prisoner's request to call witnesses could amount to a breach of the Charter of Rights Act:

Prisons should therefore be ensuring that hearing officers are meeting their requirements to accurately record details of the disciplinary hearings, including whether witnesses/informants were requested, and where relevant the rationale for declining such requests.

155. Prison officers interviewed by the investigation all said it was rare for prisoners to request witnesses during disciplinary hearings.

156. The investigation did not identify any cases in its review of disciplinary hearing files that indicated a request to call witnesses was refused. This review identified only one file where a request to call witnesses had been noted by the Hearing Officer, although the outcome of this request was not similarly recorded.

157. The review identified three other files where Disciplinary Officers had listed witnesses identified by the prisoner, however there was no indication these parties were called at the relevant hearing.

158. The investigation nevertheless identified two concerns with the current process for calling witnesses at disciplinary hearings.

159. First, there is a tension between, on the one hand, the broad right to call witnesses in section 53(2) of the Corrections Act, and, on the other, the grounds on which requests to call witnesses may be refused under the Prison Disciplinary Handbook or due to logistical challenges.

160. While the Corrections Act provides that a Hearing Officer 'must allow the prisoner reasonable opportunity to call relevant witnesses', the Prison Disciplinary Handbook provides for refusal of witnesses in some circumstances, including where 'there would be an impact on the security or good order of a prison'.

161. The courts have recognised that Hearing Officers need to balance the need to allow a prisoner to fully defend a disciplinary charge 'with the need to ensure that the ability to call witnesses is not misused'.⁹

162. At interview, prison officers gave evidence that they take care to ensure prisoners do not use the opportunity to call or cross-examine witnesses during hearings as a way of abusing or unreasonably arguing with specific prison officers. One officer interviewed by the investigation said they also disallow requests to call prisoners as witnesses if the witness should not be mixing with the charged prisoner (for example, if they are in a different unit or under a management regime).

163. Prison officers also said there are sometimes logistical problems with securing the attendance of prisoners or prison officers as witnesses. For example, several officers observed it is 'almost impossible' to arrange the attendance of prisoners who have since been transferred to another location.

⁹ Matthew Groves, 'Proceedings for Prison Disciplinary Offences: The Conduct of Hearings and Principles of Review' (1998) 24(2) *Monash University Law Review* 338, 377; citing *R v Hull Prison Board of Visitors, ex parte St Germain and Others* (No 2) [1979] 3 All ER 545.

164. The Ombudsman's 2011 investigation suggested prisons use video conferencing technology to conduct some disciplinary hearings. The present investigation was unable to identify any hearing files where this option was used. At interview, prison officers said they generally considered this option; however, it is not without its own logistical issues, particularly during the COVID-19 pandemic where the technology is in high demand for court hearings.
165. Second, the investigation identified procedural inconsistencies in the way different prisons and officers approach requests to call witnesses.
166. The Prison Disciplinary Handbook provides that requests to call witnesses must be made 'in writing' to the Hearing Officer; and, notwithstanding section 53(2) of the Corrections Act, the investigation was informed of cases where requests from prisoners were rejected due to non-compliance with this requirement.
167. Further, it appears that different prisons have different approaches to when the list of witnesses needs to be submitted.

'I [told] the officer when I received my charge sheet and they said, "When you go to [the hearing] tell the [Hearing Officer] and they'll call [the witness] up."

...

[Later], when I asked why the witness was refused the [Hearing Officer] said "I need earlier notice than this" ...

What should I do? Because I don't feel I'm having a fair [disciplinary] hearing.'

- Prisoner, complaint to the Ombudsman

168. Some locations, including Port Phillip Prison, require the witness list to be provided at least 72 hours before the hearing. By comparison, the investigation received differing accounts of the process at Ravenhall Correctional Centre. One officer gave evidence that prisoners are expected to nominate witnesses to the Disciplinary Officer when issued with the Notification of Charge form, whereas another said the list needs to be in writing but does not need to be submitted more than 72 hours before the hearing.



Prisoner informed of the need to request witnesses in writing

Indra, a prisoner, complained to the Ombudsman about an upcoming disciplinary hearing.

Indra said his hearing was scheduled for the following day. Despite this, he had already been informed that his request to call a witness had been denied.

The Ombudsman made enquiries into the matter, noting section 53(2) of the Corrections Act required the prison to provide Indra with a 'reasonable opportunity to call relevant witnesses'.

In response, the prison clarified that Indra was told the request would be denied because it had not been made in writing. The prison agreed to send a member of staff to Indra's cell to assist him to nominate the witnesses for the hearing.

Impact of prisoner transfers

169. The investigation identified particular procedural fairness concerns arising from situations where prisoners facing disciplinary offences are transferred to another prison before the hearing.
170. In these cases, the disciplinary hearing ordinarily takes place at the prisoner's new prison, presenting significant difficulties in arranging the attendance of witnesses and relevant officers. Further, significant time can pass between the incident and the hearing.
171. The Ombudsman's 2011 investigation found that transferring prisoners with pending disciplinary charges 'can have a significant impact on the effectiveness of the prison disciplinary process', both due to consequences for procedural fairness and the increased likelihood of charges not being substantiated or being withdrawn for lack of evidence. The Ombudsman recommended a 'more concerted effort to ensure matters are heard prior to a prisoner transferring' or, where this is not possible, that prisons consider the use of teleconference and video conference technologies.

172. The investigation identified 18 hearings during the sample period that involved charges relating to events at another prison – equating to approximately 12 per cent of files reviewed. Video conferencing technology was not used in any of these cases. It is acknowledged that the COVID-19 pandemic may have limited the availability of video conferencing systems during part of the sample period.
173. The investigation found that hearings taking place after transfer of the charged prisoner are more likely to result in dismissal or imposition of a reprimand.
174. Some prison officers gave evidence that Hearing Officers are more likely to consider recently transferred prisoners to be deserving of a 'clean slate'. Another suggested the decision to dismiss charges was partly borne of laziness, saying officers at times 'can't be bothered' organising the attendance of the informant from the previous prison. This officer observed that although 'it can be quite hard to organise between prisons, ... it can be done.'



Difficulties gathering evidence following prison transfer

Nathan, a prisoner, contacted the Ombudsman to complain about the outcome of his disciplinary hearing.

Nathan said he had been charged with damaging property at his previous prison. Nathan said he was subsequently transferred to another prison, where the hearing took place.

Nathan said he pleaded not guilty at the hearing and asked prison staff to obtain and review CCTV footage from the previous prison that he believed would demonstrate his innocence. According to Nathan, this request was denied because the Hearing Officer was unsure how to get the footage from the other prison. Nathan said he was ultimately found guilty of the offence and fined over \$250 – an amount exceeding the maximum fine allowed under the Corrections Regulations.

The Ombudsman made enquiries and reviewed relevant records, which ultimately clarified that the CCTV footage would not have assisted Nathan's case. The Ombudsman also confirmed the amount identified by Nathan was actually restitution for the cost of replacing the damaged property, and not a fine.

Lack of written reasons

175. Good administrative decision-making requires proper record-keeping and a willingness to provide written reasons for decisions.
176. In the case of prison disciplinary hearings, both regulation 74 of the Corrections Regulations and the Prison Disciplinary Handbook require the Hearing Officer to record information about the prisoner's plea, the hearing outcome and other specific matters. However, there is no requirement to record reasons for the Hearing Officer's decision.
177. In practice, Hearing Officers record information about the hearing in a standardised checklist. This document includes a field for the Hearing Officer's comments and notes, and in some cases, Hearing Officers choose to record written reasons in this space. Two examples from hearing files are set out below.

Figure 9: Excerpt from Checklist for Hearing Officers including Hearing Officer's comments

Hearing Officer's Comments / notes

[REDACTED] was given ample opportunity to cross examine informant, but he chose to argue the details around whether he was given a verbal direct order. Regardless, [REDACTED] knew he was required to return to his cell and intentionally refused. Clearly disobeying direction.

Source: Corrections Victoria

Figure 10: Excerpt from a Checklist for Hearing Officers including Hearing Officer's comments

Subsequent Actions
☐ Prisoner not in attendance. Schedule 1.16(4) completed for prisoner.
☒ Fine imposed. Payment to be authorised by GM and withdrawal recorded.
☐ Full Loss of Privileges imposed. Separation order prepared and authorisation received.
☐ Checklist attached to file documentation.
☐ PIMS / E*Justice Incident Module updated with decision.
Comments:
Prisoner is to be relocated. Has been separated for a period of time. Padded Cuckoo

Source: Corrections Victoria

178. Currently, prisoners in Victoria seeking written reasons for a decision made at a disciplinary hearing are expected to make a request to the prison under section 8 of the *Administrative Law Act 1978* (Vic). Such requests must generally be made within 30 days of notification of the decision and the written statement of reasons must then be provided to the prisoner ‘within a reasonable time’.

179. By way of comparison, regulations in South Australia require reasons for decisions at disciplinary hearings to be recorded in writing and routinely provided to prisoners.¹⁰

180. At interview, one Hearing Officer said they believed the administrative burden associated with disciplinary hearings was already too substantial in Victoria:

It’s amazing how relatively minor incidents can end up being about 10 pages worth of paper, especially I suppose in this day and age. ... People fill in the incident reports, then it’s put on PIMS as well, then you’re doing this coversheet, doing the disciplinary sheet, the hearing sheet, you go back to fill in the rest of the incident on PIMS ... I’m sure there must be an easier process.

181. The investigation notes that reasons can be provided in a way that still allows hearings to proceed expeditiously and with as little formality and technicality as possible. In Australia, courts have held that when discharging a duty to give adequate reasons, ‘it is not necessary for a decision maker ... to address, specifically and in detail, each and every issue raised by the applicant’.¹¹

182. Written reasons promote good decision-making, insofar as they encourage decision-makers to identify how their decisions have had regard to the evidence. Further, it is prudent for accurate records of the decision to be available in the event of a complaint or application for judicial review in the Supreme Court of Victoria – which is currently the only formal avenue of review available to prisoners.

‘I didn’t plead guilty. I said, “Listen, I think you’ve made a mistake.” ...

The [Hearing Officer] said, “You have to plead guilty to something to get out of the slot”.’

– Prisoner, complaint to the Ombudsman

183. At interview, one Hearing Officer acknowledged that current practices could create difficulties for the prison in the event of a judicial review:

People are just ticking [the boxes] ... because guys have spent time in management or ... they have had good behaviour prior to that incident ... and they’ve taken that into account. I think those boxes can be important, but I understand ... if you’re in Court saying ‘[what is] your reasoning behind this stuff?’, I don’t think that’s going to be enough.

184. Routinely providing written reasons would also assist prisoners to seek independent advice about the decision and any opportunities for review. This reduces the potential for misunderstanding when only verbal reasons are provided – particularly for prisoners with cognitive impairments or other disabilities.

¹⁰ *Correctional Services Regulations 2016* (SA), regulations 22(4) and 23(3).

¹¹ *Mentink v Albiez* [1999] QSC 9, [18].

Inconsistent penalties

185. The investigation found penalties imposed by Hearing Officers vary significantly depending on the prison conducting the hearing, the identity of the prisoner and the particular officers involved. While there are few clear trends, one officer stated they have a standard approach to 'dirty urine test charges' because they believe prisoners need to clearly understand the consequences of drug-taking.
186. The investigation's analysis of hearing files showed that prisoners tend to receive lighter penalties if they plead guilty or have spent time in the prison's management unit following the incident.
187. However, this approach was not consistent across all files reviewed by the investigation.
188. All prison officers interviewed by the investigation agreed that putting prisoners in the management unit had an impact on prisoners. Two officers gave evidence that in most cases, separation in a management unit is itself a form of punishment.
189. One officer at Ravenhall Correctional Centre noted that prisoners subject to separation orders automatically lose all privileges. This officer said they are reluctant to order a further loss of privileges in such cases, for fear of exceeding the 14-day maximum identified in section 53(4)(c) of the Corrections Act.
190. Another officer observed that prisoners with a cognitive impairments and living in specialist disability units are particularly affected when separated to a management unit. This officer was concerned that the separation order, the fact of the hearing, and the subsequent penalty could all feel like forms of punishment for these prisoners.

191. General Managers consulted about the Ombudsman's draft report emphasised that Hearing Officers will always consider a prisoner's time in management when handing out a penalty.



Consideration of time spent in management unit

Jasmin was identified pouring liquid, believed to be her urine, into a washing machine containing the clothing of another prisoner.

Officers investigating the incident placed Jasmin in separation in a management unit and charged her with 'acting in a way that is contrary to the security or good order of the prison or the safety of another prisoner'.

At the hearing, Jasmin agreed to an abridged hearing process and pleaded guilty to the charge. Jasmin was given a fine of \$60 and was notified she would be ineligible to receive contact visits for a period of two weeks.

Records reviewed by the investigation confirm the Hearing Officer considered Jasmin's time in management when determining the penalty.

Approach to serious offences

192. The investigation identified two issues with the approach taken for more serious prison offences.
193. First, there is no formal guidance issued to prison officers as to what constitutes a 'serious' offence that should be referred to Victoria Police in accordance with Commissioner's Requirement 2.3.3. Neither the Deputy Commissioner's Instructions / Operating Instructions, nor the Prison Disciplinary Handbook clarify what factors should be considered when conducting this assessment.
194. By comparison, other jurisdictions such as New South Wales, South Australia and Western Australia have a clear division in their regulations regarding major and minor offences and identify a series of considerations that need to be considered when classifying a particular offence.¹²
195. Second, Victoria Police routinely refer these matters back to prisons after determining not to proceed with a criminal prosecution. Of the hearing files reviewed by the investigation, almost one-quarter involved incidents that had been referred back to the prison.
196. In such cases, the Hearing Officer can only apply the penalties available under the Corrections Act – being a reprimand, fine or removal of the prisoner's privileges. These penalties may not be adequate for particularly serious prison offences.

197. For example, one Hearing Officer gave evidence that the maximum penalties available at a disciplinary hearing are not sufficient for breaches of Family Violence Intervention Orders:

We have had a number of charges against prisoners who have breached [family violence orders] by making phone calls. It's been automatically forwarded on to the Police and the Police send it back saying, 'No further Police action. Deal with it yourselves,' effectively.

You know, if somebody breaches a family violence order on the outside, they're looking at jail time.

198. Other jurisdictions use independent external adjudicators or visiting magistrates to deal with more serious prison offences, where the penalties are also more significant than those available in Victoria. These systems also benefit from the scrutiny of bringing external decision-makers into the disciplinary process.

Focus on procedure rather than substantive fairness

199. Evidence available to the investigation indicates that Hearing Officers tend to focus on carrying out rote procedure, without reflecting on the actual purpose of the disciplinary process.

'[They] said, "Tell [him] he's taken too long and I've found him guilty in his absence". I can't go to [the hearing] unless the officers give me a ticket' ...

'I wasn't given a ticket to go up and plead my case. I didn't choose not to go there.'

– Prisoner, complaint to the Ombudsman

¹² See *Crimes (Administration of Sentences) Act 1999* (NSW), section 54; *Correctional Services Regulations 1985* (SA), Division 2; *Prisons Act 1981* (WA) sections 69-71.

200. Among other things, the disciplinary process is intended to foster an environment that encourages prisoners to engage in activities that promote their rehabilitation. Fulfilling this purpose requires consideration of why prisoners commit offences in prison and what can be done to promote behaviour change.

201. Law professor Matthew Groves has observed:

Empirical research has shown that prisoners will more easily accept their confinement and the conditions of their treatment if correctional rules are explained and applied to them in an impartial and fair way which includes making exceptions to those rules in appropriate instances.¹³

202. At interview, one Hearing Officer from Dame Phyllis Frost Centre demonstrated they understood the importance of acknowledging the prisoner's circumstances and talking with them about their behaviour:

To me it's about giving the opportunity for the person to be heard. ... I think it's very important for them to know, understand why the punishment's there, but they're contributing, they're acknowledging what they ... lose, you know, what I take from them. I find it works really well, but as I said, every person operates differently.

203. Similarly, a Coordinator working in a specialist unit for prisoners with an intellectual disability at Port Phillip Prison said there was potential to use the disciplinary process to promote behaviour change:

If a disabled prisoner in the unit is involved in an incident, we sit down with them and work through why it happened and teach them new ways to manage the anxiety or the stress that comes up that explodes into an incident. It is not just about punishment [but also a way] to try and solve a problem.

204. However, when asked about the purpose of disciplinary hearings, other officers interviewed by the investigation tended to focus on the procedural aspects of the process, as well as the need to maintain prison order.

205. The following case summary was informed by the evidence of a CISO volunteer who observed a missed opportunity to promote behaviour change during a disciplinary hearing.

¹³ Matthew Groves, 'Ombudsmen in Prisons: Reviewing and Reforming' in Marc Hertogh and Richard Kirkham (eds) *Research Handbook on the Ombudsman* (Edward Elgar Publishing 2018), 321.



Missed opportunity to promote behaviour change

Angelo, a prisoner, was assessed as being at risk of suicide. Prison staff determined to transfer Angelo to a monitoring cell. Under *Commissioner's Requirement 1.2.3: Strip Searches in Prisons*, staff were first required to strip search Angelo to identify and remove any implements with which he could harm himself.

During the attempted search, Angelo became upset when a prison officer commented on his existing self-harm scars. Angelo told prison staff he was unwilling to be searched, using threatening language in the process. Angelo ultimately received three charges relating to the incident – the first time he had been charged with a prison offence.

Before the hearing, a CISO volunteer provided by OPA spoke with Angelo about the alleged offences. Angelo revealed that earlier on the day of the incident he had been told that his sibling had passed away. According to the volunteer, Angelo was 'extremely distressed' by this news.

Angelo ultimately pleaded guilty to all charges. According to the volunteer, there was no discussion of Angelo's bereavement during the disciplinary hearing. Instead, the Hearing Officer addressed Angelo in the following manner, 'These were the rules, you understand that there is a penalty to pay, isn't that right?'.

At the conclusion of the hearing, Angelo received two reprimands and a fine of \$40 – a relatively modest penalty in the circumstances.

The CISO volunteer nevertheless told the investigation they believed the disciplinary hearing missed an opportunity to look into the reasons for Angelo's behaviour. The volunteer said Angelo felt humiliated by the prison officer involved in the initial incident, and that the hearing would have done nothing to help Angelo behave differently in the future.

Limited rights of review

206. Prisoners seeking to challenge the outcome of a disciplinary hearing are required to seek judicial review in the Supreme Court of Victoria.
207. Legal proceedings in the Supreme Court can be very complicated, expensive and relatively inaccessible. Applications for judicial review of disciplinary hearing outcomes are extremely rare – just two prisoners have taken up this option in the past five years.
208. Judicial reviews focus on the lawfulness of the decision-making process, rather than whether decisions are correct. At interview, one Hearing Officer observed:
- It's only a judicial review – all you're reviewing is my process ... Did I follow the correct set procedure?
209. Further, while the Victorian Ombudsman can receive and investigate complaints about disciplinary decisions in prisons, find wrong-doing and make remedial recommendations, the Ombudsman is not an appellate body and does not have the power to set aside hearing outcomes.
210. In contrast, Queensland's prison disciplinary process includes a statutory right of internal review. This review must be conducted by a more senior prison officer, who rehears the matter based on the materials presented to the original hearing together with any further evidence they choose to consider. The review must be carried out as soon as practicable after it is requested by the prisoner.¹⁴



Assistance provided to prisoner to make internal complaint

Jackson, an Aboriginal prisoner, contacted the Ombudsman's office to complain about the outcome of his prison disciplinary hearing.

Jackson said he had been found guilty of using a prohibited substance but hadn't used any drugs while at prison. Jackson said he was issued a fine and had all his visits over the Christmas period suspended. He explained this was particularly upsetting for him because his mother had been diagnosed with a terminal illness.

Jackson told the Ombudsman's office he had a mental health issue but didn't receive independent support during the hearing process. He said he wanted to make a complaint about the disciplinary hearing to the General Manager of the prison, but needed help with completing the paperwork.

After enquiries from the Ombudsman, the prison confirmed it had arranged for an Aboriginal Liaison Officer to sit down with Jackson and help him prepare his complaint to the General Manager.

¹⁴ *Corrective Services Act 2006* (Qld), sections 118-119.

Prisoners with a cognitive disability or mental illness

211. Procedural fairness generally requires that prisons take extra steps to ensure prisoners with particular disabilities receive a fair hearing.
212. In Victoria, a significant proportion of prisoners have an intellectual disability or mental illness. Corrections Victoria data shows that as at April 2020:
- approximately four per cent of Victoria's 7,808 prisoners had a registered intellectual disability
 - over 54 per cent of prisoners were considered at risk of suicide or self-harm
 - 42 per cent of prisoners had a psychiatric rating – corresponding with a suspected or diagnosed psychiatric condition.
213. One study commissioned by Corrections Victoria in 2011 found that 42 per cent of men and 33 per cent of women in a sample prison population had an acquired brain injury.¹⁵
214. In a February 2021 report, OPA observed that the rate of acquired brain injury in Victorian prisons was 'extraordinarily high' and recommended all persons entering the prison system be screened for cognitive disabilities.¹⁶

The current process

215. Corrections laws and policies already set out extra protections for prisoners with an intellectual disability or mental illness, but these differ depending on the nature of the condition.
216. Generally speaking, Commissioner's Requirement 2.3.3 requires staff involved in disciplinary hearings to give 'due consideration' to the rights of prisoners with cognitive, psychiatric or mental impairments.

Investigation and decision to charge

217. Regulation 66 of the Corrections Regulations requires Disciplinary Officers to consider whether prisoners have 'any special needs or special circumstances'.
218. Under Commissioner's Requirement 2.3.3, Disciplinary Officers are also expected to consider the prisoner's psychiatric rating at the time the alleged offence was committed. Where appropriate, Disciplinary Officers must seek advice from a health or psychiatric professional to assist in determining the degree to which the prisoner's condition may have contributed to their behaviour.
219. Further, Disciplinary Officers are expected to identify whether the prisoner has an intellectual disability and, if so, seek specialist advice about:
- whether the prisoner was responsible for their actions
 - whether an alternative to the disciplinary process is more appropriate – for example, a case management response.

¹⁵ Martin Jackson et al, *Acquired Brain Injury in the Victorian Prison System* (Corrections Victoria Research Paper Series Paper No. 04, April 2011). See also Centre for Innovative Justice and Jesuit Social Services, *Recognition Respect and Support: Enabling Justice for People with Acquired Brain Injuries* (2017) 14.

¹⁶ Office of the Public Advocate, *Decision Time: Activating the Rights of Adults with Cognitive Disability* (2021) 7-12.

220. If the Disciplinary Officer decides to charge a prisoner, Commissioner's Requirement 2.3.3 requires them to draw any concerns about the prisoner's capacity to understand the process to the attention of the Hearing Officer.

Hearing stage

221. Commissioner's Requirement 2.3.3 requires Hearing Officers to consider the prisoner's psychiatric rating and, where appropriate, seek professional advice about whether it is appropriate to proceed with a disciplinary hearing.

222. As in the case of Disciplinary Officers, Hearing Officers are also expected to identify whether the prisoner has an intellectual disability and, if so, seek specialist advice about:

- whether the prisoner was responsible for their actions
- the prisoner's capacity to understand and cope with any penalties arising from the process.

223. Depending on the location, circumstances and particular cognitive impairment of the prisoner, specialist advice may be provided by a nominated representative, senior psychologist, officer of the Department of Health, prison caseworker or Aboriginal Welfare Officer.

224. OPA's CISO program offers independent support to prisoners facing disciplinary hearings, but generally only for those with a registered intellectual disability.

225. Commissioner's Requirement 2.3.3 requires prisons to invite CISO volunteers to attend disciplinary hearings relating to prisoners with an intellectual disability, subject to the prisoner's consent.

226. If the prisoner consents to a CISO volunteer attending the hearing, they may then assist the prisoner by:

- explaining the process
- assessing whether the prisoner understands and can exercise their rights
- facilitating communication and supporting the prisoner at the hearing.

227. Prisoners with an intellectual disability are not required to speak with a CISO volunteer and can advise the Disciplinary Officer if they do not wish to be supported at the hearing.

228. Where a prisoner is found guilty, Commissioner's Requirement 2.3.3 requires the Hearing Officer to consider the prisoner's psychiatric condition or intellectual disability when determining an appropriate penalty.

Issues identified by the investigation

229. Good decision-making relating to prisoners with a cognitive disability or mental illness involves extra steps. These include:

- considering the prisoner's condition before deciding whether to charge the prisoner
- providing help for prisoners to understand the process and their rights, including support to participate in the hearing
- considering the prisoner's condition when deciding a penalty.

230. Having regard to the evidence, the investigation identified the following issues with the treatment of prisoners with a cognitive impairment or mental illness during the disciplinary process:

- relative over-representation of these prisoners in the process
- failure to identify and consider the condition of some prisoners
- inconsistent consultation with relevant professionals
- limited independent support for many prisoners with a disability
- inconsistent use of CISO volunteers for prisoners with an intellectual disability
- lack of transparency where prisoners decline assistance from the CISO program.

Relative over-representation of vulnerable prisoners in the process

231. The investigation sought to establish whether prisoners with a cognitive impairment or psychiatric condition were any more or less likely to face disciplinary hearings.

232. Data supplied by Corrections Victoria indicates prisoners with an intellectual disability are currently overrepresented in the disciplinary hearing process. As at April 2020, 3.8 per cent of prisoners in Victoria had a registered intellectual disability, whereas between April 2019 and April 2020 just under six per cent of all disciplinary hearings involved such prisoners.

233. On the other hand, the data does not suggest prisoners with a recognised psychiatric condition are significantly more likely to face disciplinary hearings. As at April 2020, 42 per cent of prisoners in Victoria had a psychiatric rating. Between April 2019 and April 2020, the proportion of disciplinary hearings involving such prisoners was also 42 per cent.

234. Both figures are nevertheless concerning. If anything, the procedural requirements relating to prisoners with an intellectual disability or psychiatric condition – including the requirement to consider alternatives to disciplinary hearings – could reasonably be expected to lead to under-representation of prisoners with special needs.

235. Overall, the data suggests the circumstances of prisoners with a cognitive impairment or mental illness are not receiving sufficient consideration during the investigation and charging process.

236. This report has already observed that Disciplinary Officers could make greater use of the minor offence process instead of proceeding with some disciplinary hearings.

237. Some witnesses told the investigation this would be particularly appropriate for incidents involving prisoners with a cognitive disability, because the minor offence process offers a more immediate and effective way to address challenging behaviour.

238. One officer working with prisoners with an intellectual disability told the investigation the lack of immediacy of consequences associated with disciplinary hearings means that prisoners with a cognitive impairment often struggle to draw a connection between their conduct and the hearing outcome.

239. Other officers observed that a quick process was more successful for prisoners with an intellectual disability. These officers observed that acknowledging and understanding challenging behaviour is a key factor in the effective rehabilitation of prisoners with an intellectual disability and also assists to maintain good order in the prison.

'It has to be right away, and it has to be seen to be effective for these guys [prisoners with an intellectual disability].'

- Hearing Officer

240. Hearing Officers also gave evidence that they sometimes exercise their discretion to dismiss charges against prisoners with a significant mental health issue. One observed:

There's no point ... They're just so mentally unwell, ... you can't really [charge] someone when they have no idea what [they're doing].

241. Despite this observation, and as noted above, the files reviewed by the investigation did not suggest prisoners with a recognised intellectual disability or psychiatric rating were any less likely to face disciplinary charges.

242. It is noted that the Prison Disciplinary Handbook does not provide any guidance to prison officers as to what specific processes should be observed in cases involving such prisoners, beyond consideration of the prisoner's condition.

243. In response to the Ombudsman's draft report, the Department noted it recently introduced 'Disability Support Officers' to prisons:

The intent is to consider alternative actions if appropriate and to address the behaviour and not escalate to a disciplinary officer in the first instance – examples, discussing the behaviour with the prisoner, use of a behavioural plan, minor offence registers.

Failure to identify and consider some conditions

244. Prisons need a transparent and consistent way to identify prisoners with a cognitive disability or mental illness to ensure they receive a fair hearing.

245. In a majority of cases reviewed by the investigation, hearing records did not accurately record these conditions.

246. Prison officers are able to check Corrections Victoria's PIMS database to identify whether a prisoner involved in an incident has a registered intellectual disability or psychiatric rating. This information is then expected to be recorded on the hearing file.

247. In cases reviewed by the investigation, prison officers did not always note a prisoner's cognitive impairment or psychiatric rating. In some cases, Disciplinary Officers and Hearing Officers recorded inconsistent or contradictory information.

248. Hearing Officers told the investigation they routinely check information in PIMS and hardcopy documents from the Disciplinary Officer to determine if a prisoner has a disability needing consideration at a hearing. However, failure to consistently record this information on the hearing file means there is often no record of this important consideration.



Decision of a prison to set aside a hearing outcome

Scott, a prisoner with an intellectual disability, telephoned the Ombudsman to complain about the outcome of a disciplinary hearing.

Scott said he was charged with offences relating to prison contraband. According to Scott, when he pleaded not guilty at his disciplinary hearing, the Hearing Officer responded, 'No, I find you guilty.' Scott said he was then immediately issued a fine.

Scott complained that he wasn't given the opportunity to call witnesses in his defence or present his case. Scott told the Ombudsman's office he had an intellectual disability and believed he should have been offered an independent support person at the hearing.

After the Ombudsman made enquiries into the matter, the prison indicated it would set aside the hearing outcome and refund Scott's fine.

Inconsistent consultation with relevant professionals

249. The investigation also identified evidence that Disciplinary Officers and Hearing Officers do not always consult with relevant professionals about prisoners with a psychiatric rating or intellectual disability, as generally required by Commissioner's Requirement 2.3.3.
250. In particular, in a majority of cases reviewed by the investigation involving prisoners with psychiatric ratings there was no record of officers seeking this specialist advice.
251. At interview, Hearing Officers said they consult with professionals in cases where prisoners have a 'significant' psychiatric rating. Psychiatric ratings used in Victorian prisons have several levels (see Table 1).

Table 1: Psychiatric ratings used in Victorian prisons

Rating	Definition
P1	Serious psychiatric condition requiring intensive and/or immediate care
P2	Significant psychiatric condition requiring psychiatric treatment
P3	Stable psychiatric condition requiring continuing treatment or monitoring
P4	Suspected psychiatric condition requiring assessment

Source: Corrections Victoria

252. However, consultation with professionals is somewhat ad hoc and is not consistently recorded by officers involved in the disciplinary hearing process. There is also no specific place in hearing documents to record details of any advice provided – officers are only required to ‘tick a box’ when consultation occurs.

253. There are also inconsistent approaches across prisons about precisely when and with whom prison officers should consult.

254. There are currently four prison health services in Victoria that officers can approach:

- Forensicare (the Victorian Institute of Forensic Mental Health), which delivers mental health services at Ravenhall Correctional Centre and all public prisons
- Correct Care Australasia, which provides primary health services at Ravenhall Correctional Centre and all public prisons
- St Vincent’s Correctional Health Service, which provides primary health and mental health services at Port Phillip Prison
- GEO Group Australia, which provides primary health and mental health services at Fulham Correctional Centre.

255. One Hearing Officer gave evidence that officers at their prison would often consult with ‘a combination of a St Vincent’s [psychiatric] nurse and ... sometimes Forensicare’, depending on the prisoner’s unit.

256. Another Hearing Officer observed:

If [the prisoner’s conduct] is around some form of psychosis or some mental health breakdown, definitely ... [the prison officer] will talk to Forensicare, if they’re an outpatient in Forensicare.

257. However, in some cases reviewed by the investigation, prison officers appeared only to have consulted with prison staff such as caseworkers, unit supervisors or prison disability coordinators, rather than independent professionals.

258. In two cases reviewed by the investigation, prison officers appeared to have exercised their own judgement about whether to consult with a health or psychiatric professional.

259. In the case study below, the Hearing Officer appeared to determine that consultation with a professional was 'not required', notwithstanding a prisoner's complex needs.



Decision by a Hearing Officer not to consult with a professional

Marc, a prisoner with a recognised intellectual disability, was placed on a 'handcuff regime', meaning that he was required to be handcuffed at all times when in the presence of staff.

One morning, Marc became verbally abusive towards prison officers after exiting his cell. Marc was escorted back to his cell and subsequently charged with making threats toward staff. At the time, Marc had been assigned a 'P3' psychiatric rating – corresponding with a stable psychiatric condition requiring treatment or monitoring.

Under Commissioner's Requirement 2.3.3, both the Disciplinary Officer and Hearing Officer should have considered Marc's intellectual disability and psychiatric rating and, if appropriate, consulted with a relevant professional. As a prisoner with a recognised intellectual disability, Marc should also have been offered the support of a CISO volunteer.

The Hearing Officer conducting Marc's disciplinary hearing noted that Marc had a psychiatric rating but nevertheless recorded that consultation with a health or psychiatric professional was 'not required'.

The hearing file does not suggest Marc received the support of a CISO volunteer during his hearing. This may have been because the Hearing Officer incorrectly recorded that Marc did not have an intellectual disability.

260. Currently, Commissioner's Requirement 2.3.3 provides prison officers with some discretion as to whether to consult with health or psychiatric professionals. While this document states that consultation 'must' occur where a prisoner has a psychiatric rating, this requirement is qualified by the phrase, 'if appropriate'.

261. The obligation to consult with a professional appears further narrowed by documents used by officers involved in the disciplinary process, which suggest that consultation is only required in cases where a prisoner has a 'P1' or 'P2' psychiatric rating.

262. In addition to the ambiguity about when to consult, Commissioner's Requirement 2.3.3 does not provide any advice about which particular professionals should be consulted in connection with the disciplinary hearing process.

263. In these circumstances, there is a risk that officers may not always seek or receive the most appropriate advice. As one Hearing Officer observed:

[The] capacity to know what [the prisoner was] ... doing at the time with their mental health issues – I don't think the clinicians could really make a decision on that. I think you would rely on the psychiatric advice for that.

Limited independent support

264. While the CISO program provides support to prisoners with a registered intellectual disability, there is currently no similar program available to prisoners with a psychiatric condition or other cognitive impairment.

265. Overall, there appears to be a lack of independent support available to these prisoners to assist them to understand the process and advocate for their rights.

'I've got an acquired brain injury. Am I allowed to be taken to a [disciplinary] hearing by myself or do I have representatives?'

- Prisoner, complaint to the Ombudsman

'I was asking for an independent third person to come in to deal with me because I've got serious complex mental health issues. ...'

'There was no assistance to give me any help. ... I haven't got a chance to put my case forward or even defend myself.'

- Prisoner, complaint to the Ombudsman

266. The Ombudsman's 2011 investigation into the prison disciplinary process suggested widening the scope of the CISO program to 'include prisoners with other types of disabilities ... such as mental health issues dementia and acquired brain injuries'.

267. However, the Memorandum of Understanding between OPA, Corrections Victoria and Justice Health regarding the CISO program still limits the program to prisoners with a registered intellectual disability.

268. Despite this, the investigation was informed that prison officers at Port Phillip Prison sometimes request the attendance of CISO volunteers at disciplinary hearings involving prisoners with other cognitive impairments, where they believe the prisoner would nevertheless benefit from this support.

269. OPA has consistently advocated for expansion of the CISO program eligibility criteria. In a submission to the investigation, OPA observed:

The CISO Program should include prisoners with any cognitive impairment, other than those with a primary diagnosis of mental illness, so this would include:

- registered intellectual disabilities,
- undiagnosed intellectual disabilities
- Acquired Brain Injuries
- Autism Spectrum
- dementia.

270. OPA explained that mental illness is only excluded from the above criteria 'because of the number prisoners likely to be involved and the fact it would expand the Program beyond OPA's current capacity to manage'.

271. OPA also submitted that CISO volunteers should be made available earlier in the disciplinary process, rather than only at the hearing stage.

272. In this regard, OPA observed that it would be preferable if the CISO program was automatically notified of charges involving eligible prisoners, with CISO volunteers thereafter involved in explaining the charges and the supports available during the hearing. OPA submitted 'this could occur via phone or video through pre-arranged meetings with prison staff.'

273. OPA nevertheless noted these changes would require allocation of additional funding to the CISO program, the levels of which it said already required 'urgent review' to meet current operating costs:

Should the expansion of the CISO Program be recommended as discussed here, then the additional costs would need to be funded such as attendance at a greater number of hearings, staff information sessions and prisoner Easy Read promotional material.

274. In response to the Ombudsman's draft report, the Department similarly observed that expansion of the CISO program would have significant resource implications.

Inconsistent use of CISO volunteers

275. Although Commissioner's Requirement 2.3.3 generally requires prisons to invite CISO volunteers to disciplinary hearings involving prisoners with a registered intellectual disability, evidence suggests not all prisons make full use of the CISO program.

'I'm diagnosed with having an intellectual disability. Should I bring it up to them that I should have had someone [with me]? Because every other [disciplinary] hearing I've had in gaol I've always had a third party in the room.'

– Prisoner, complaint to the Ombudsman

276. Data analysed by OPA relating to the 2018/19 financial year indicates a significant lack of interaction with the CISO program at several Victorian prisons (see Table 2).

Table 2: Hearings attended by CISO volunteers per Victorian prison (2018-19)

Prison	Hearing attended
Dame Phyllis Frost Centre	1
Hopkins Correctional	1
Kareenga Correctional Centre	1
Loddon Prison	1
Ravenhall Correctional Centre	1
Ararat Prison	2
Barwon Prison	5
Melbourne Assessment Prison	12
Metropolitan Remand Centre	119
Port Phillip Prison	156
Total	299

Source: Victorian Ombudsman; data supplied by OPA

277. This data shows disciplinary hearings at Port Phillip Prison accounted for 52 per cent of all hearings attended by CISO volunteers across all Victorian prisons during the relevant period. Port Phillip Prison also includes a specialist unit for male prisoners with an intellectual disability.

278. In contrast, prisons such as Ravenhall Correctional Centre demonstrated very little engagement with the CISO program. While not all prisons have the same profile or same number of prisoners with an intellectual disability, the fact that so many prisons engaged fewer than five CISO volunteers per year is of significant concern.

'I don't understand a lot of what happens. ... There was no one else in the room today.'

– Prisoner, complaint to the Ombudsman

279. OPA has observed this relative lack of engagement with the CISO program is particularly concerning for female prisoners with a disability. According to OPA, the CISO program 'averages only one or two hearings annually' at the Dame Phyllis Frost Centre – the primary women's prison in Victoria.

280. In its response to the Ombudsman's draft report, OPA observed:

OPA worries that vulnerable female prisoners have little or no awareness of, or engagement with, the CISO Program, and that there is virtually no independent oversight of disciplinary hearings conducted [at Dame Phyllis Frost Centre].

281. Data provided by OPA suggests CISO volunteers are invited to attend just over half of all prison disciplinary hearings involving prisoners with a registered intellectual disability. OPA observed that this is particularly concerning because prisons are closed environments and prisoners with an intellectual disability 'are some of the most vulnerable individuals in Victoria'.

282. OPA submitted that more can be done to identify prisoners who are eligible to receive support from a CISO volunteer and promote awareness and understanding of the program within prisons.

283. In this regard, OPA recommended that:

- a screening tool be implemented at prison admission to identify prisoners eligible to receive support under the CISO program
- hearing files in each case identify the steps taken to assist eligible prisoners to access the CISO program
- eligible prisoners be provided with an Easy Read CISO guide at admission and thereafter annually or following transfer to a new prison
- similar posters be displayed at all prisons
- information sessions about the CISO program be conducted at least annually for all staff
- clear protocols be developed in the case of eligible prisoners who are transferred to another prison prior to their hearing.

284. The following case summary is one example of where involvement of a CISO volunteer could have assisted the disciplinary hearing process.



Failure to consider a prisoner's intellectual disability

Jiahao has a registered intellectual disability and English is his second language.

While at prison, Jiahao provided a urine sample which tested positive for a prohibited substance. The Disciplinary Officer who investigated the matter charged Jiahao with using a prohibited drug without a prescription.

The Disciplinary Officer's notes indicate they tried to explain the process in a way that was considerate of Jiahao's knowledge of English and intellectual disability (see below).

However, as Jiahao had a registered intellectual disability he was eligible to receive support from the CISO program during his disciplinary hearing. Despite this, there are no records on the hearing file to suggest a CISO volunteer was offered. Jiahao ultimately pleaded guilty at the hearing and received a modest fine of \$10.

According to the hearing file, the Hearing Officer took into account Jiahao's limited funds and good disciplinary record. However, there is no indication the Hearing Officer considered the consequences of Jiahao's intellectual disability on his behaviour or the suitability of the hearing. In fact, documents completed by the Hearing Officer incorrectly stated Jiahao did not have an intellectual disability.

Given the Disciplinary Officer clearly held concerns about Jiahao's capacity to understand the charge and disciplinary process, a CISO volunteer should have been offered to support Jiahao at the hearing.

Figure 11: Excerpt from Incident Report describing steps taken by Disciplinary Officer when interviewing Jiahao

ADDITIONAL INFORMATION & INVESTIGATION BY DISCIPLINARY OFFICER:

I spoke with [REDACTED] in relation to the positive urine. [REDACTED] claimed he had not taken any drugs and this was a surprise to him. I spent some time going through this with [REDACTED] keeping in mind a possible language barrier (although [REDACTED] speaks very good English) and his intellectual disability. I explained the process of how he can have the second sample sent out for further testing and if it returned the same he would be required to pay \$39.05 or the matter would be referred straight to a GMDH. [REDACTED] stated he understood and he did not request the second sample to be sent out for further testing. I informed [REDACTED] that Operations Manager [REDACTED] would hear the charge and he would explain anything he might not understand as the process proceeded. I also discussed that [REDACTED] has faced other GMDH's in the past. (confirmed on PIMS) [REDACTED] remained calm and respectful during the interview.

Source: Corrections Victoria

285. The following case study illustrates the outcomes that can be achieved when a CISO volunteer supports and advocates for a prisoner with an intellectual disability.



Charges dismissed after CISO intervention

Stefan has a significant intellectual disability and was charged with a prison offence after he was accused of destroying property during a hospital visit. At the time, Stefan had a 'P2' psychiatric rating – indicating a significant psychiatric condition requiring treatment.

The prison arranged for Stefan to receive support from a CISO volunteer. This individual spoke with the Hearing Officer prior to the disciplinary hearing, who indicated they would be prepared to issue Stefan a fine of \$25 if he pleaded guilty to the offence. The Hearing Officer said that if Stefan decided to plead not guilty, the prison would need to arrange for staff at the hospital to attend the hearing remotely. The Hearing Officer disclosed that the technology required for this was not currently available.

The CISO volunteer spoke with Stefan, who indicated he was willing to plead guilty and was very apologetic about his behaviour at the hospital. Despite this, the CISO volunteer formed the view that Stefan did not recall the incident or understand why he was facing a disciplinary hearing. Stefan also seemed to believe the CISO volunteer was a representative of the hospital where the incident took place.

The CISO volunteer raised their concerns with the Hearing Officer. The CISO volunteer explained that Stefan's lack of comprehension and memory of the incident was concerning, and that Stefan only appeared willing to plead guilty because he wanted to please prison staff and 'get the matter over with'.

When the disciplinary hearing began, the Hearing Officer asked Stefan whether he could recall the incident. Stefan said he couldn't, and the CISO volunteer then successfully argued that the charges should be dismissed.

The CISO volunteer spoke with Stefan again after the hearing. During the conversation, Stefan revealed that he didn't understand the meaning of the term 'dismissed'. Stefan apologised for needing assistance, again believing the CISO volunteer represented the hospital.

In a written report completed after the hearing, the CISO volunteer observed that 'things definitely would have gone in another direction' if not for their intervention.

286. The investigation heard that some prisons use prison employees to support prisoners with an intellectual disability at disciplinary hearings, instead of independent CISO volunteers.

287. At interview, one Hearing Officer at Ravenhall Correctional Centre said they understand CISO volunteers are not used at the prison. Instead, this officer said the prison engages a disability worker from within the prison to perform a similar function.

At Port Phillip you used to get ... [an] independent person. ... [At Ravenhall] our advocate for [prisoners with an intellectual disability] is one of our Reintegration Seniors. Once I get to that point and they're going to the hearing, I make a time with [this person] to make sure that she can attend.

288. Another Hearing Officer at Ravenhall Correctional Centre expressed general unfamiliarity with the CISO program:

I think at other locations, [someone] might come in from the – I don't know what you call them – the Public Advocate's Office. But here we have a lady that just does them.

289. In its submission to the investigation, OPA stated that CISO volunteers are more effective than prison support workers because they have specialist training and are independent.

290. OPA further noted that involvement of CISO volunteers adds transparency and integrity to the process:

Prisons are closed environments, so independent oversight and participation within hearings is an essential and vital safeguard for already vulnerable prisoners.

A disability support worker employed within the prison system is not independent of the process ... This arrangement has the potential to create a conflict of interest as the disability support worker is simultaneously serving both as a prison employee and supposedly as an independent advocate/support for the prisoner.

291. In response to the Ombudsman's draft report, the Department observed that Disability Support Officers are intended to assist prisoners to address challenging behaviours and, where appropriate, avoid matters reaching the disciplinary hearing stage at all.

292. While a welcome initiative, the investigation notes that the use of Disability Support Officers at disciplinary hearings may lead to questions about their independence, as highlighted by OPA.

Lack of transparency where prisoners decline support from the CISO program

293. Commissioner's Requirement 2.3.3 provides that prisons 'must arrange for the CISO to be available at the hearing, prior to confirming the hearing date'. Where the prisoner does not wish to be supported by a CISO volunteer, prisons are expected to record this information and notify OPA.

294. The investigation reviewed correspondence between OPA and four prisons relating to the CISO program. These records indicate a total of 225 requests were made under the CISO program from the relevant prisons between May 2019 and March 2020. Of these, 28 requests were subsequently cancelled, usually on the basis that the prisoner had changed their mind.

295. In its submission, OPA said it holds 'ongoing concerns' about prisoners withdrawing requests for assistance from the CISO program prior to the opportunity to speak with a CISO volunteer.

296. The investigation analysed requests submitted to OPA under the CISO program against hearing data obtained from Corrections Victoria. This analysis identified 345 relevant hearings where OPA was not notified that a CISO volunteer may have been required. While this does not necessarily mean that a CISO volunteer was not offered to the prisoner, it demonstrates the correct process is often not being followed.



Failure to notify OPA of a disciplinary hearing

Aimee, a prisoner with an intellectual disability, was charged with a prison offence after she tested positive for a prohibited substance. At the time, Aimee had a 'P3' psychiatric rating – indicating a stable psychiatric condition requiring treatment or monitoring.

According to the hearing file, Aimee immediately admitted to the offence when interviewed by the Disciplinary Officer. The Disciplinary Officer noted Aimee's psychiatric condition and intellectual disability and recorded that a CISO volunteer was 'offered but declined'. Records reviewed by the investigation indicate OPA was not informed of Aimee's hearing or that she had declined the assistance of a CISO volunteer. Under Commissioner's Requirement 2.3.3, OPA should have been notified of Aimee's decision.

Aimee pleaded guilty at the disciplinary hearing and ultimately received a fine of \$75. Documents completed by the Hearing Officer incorrectly recorded that Aimee did not have a psychiatric condition or intellectual disability – suggesting this information was not considered at the hearing.

297. At interview, one CISO volunteer said prisons generally provide inadequate notice where prisoners withdraw requests for assistance under the program:

A lot of the issue was the fact they hadn't actually called me when they were due [for a hearing] and had only called me after the hearing had taken place.

298. This individual also observed:

For us at OPA ... one of the biggest issues is that kind of gatekeeping and the question marks around that. How do they offer a CISO? ... How do people choose or choose not to have a CISO? What does that conversation actually look like? Are they giving informed refusals or informed consent?

299. Concerningly, the investigation identified cases where Hearing Officers determined to proceed with disciplinary hearings involving prisoners with an intellectual disability where attendance of a CISO volunteer was requested but unable to be arranged.

300. The following case study provides an example.



Disciplinary hearings proceed without a CISO volunteer

The investigation was informed that on 6 March 2020, 13 disciplinary hearings were scheduled at Port Phillip Prison involving prisoners with an intellectual disability who had requested assistance from the CISO program.

A CISO volunteer attended the prison about 30 minutes before the hearings were due to start but, for reasons unknown, was not allowed through prison reception. The CISO volunteer notified OPA they were unable to attend the hearings and returned home. Despite this, six of the hearings proceeded in the CISO volunteer's absence.

Port Phillip Prison later issued an apology to OPA for not allowing the CISO volunteer to attend and provided an undertaking that it would not happen again.

While it is possible the relevant prisoners chose to withdraw their requests for assistance, this information was not reported to OPA.

301. OPA observed to the investigation that prisons should be required to report annually on eligibility and participation in the CISO program, including:

- the number of eligible prisoners who face disciplinary hearings
- the number of requests for assistance made under the program
- the outcomes of hearings involving eligible prisoners
- the number of cases where support is provided by other parties.

302. OPA submitted that this data would ensure greater integrity and transparency in the disciplinary hearing process and allow it and Corrections Victoria to review and improve services available to prisoners with an intellectual disability.

Comment about poor record keeping

303. When reviewing prison records to check whether processes were fair, the investigation came across a consistent problem – poor record keeping by prison officers involved in the process.

304. As this report has already observed, Disciplinary Officers and Hearing Officers are expected to demonstrate they have taken required steps and considered appropriate information by completing standardised checklists for each disciplinary hearing.

305. While the checklist process provides a quick way for prison staff to demonstrate they have carried out their functions correctly, information recorded by Disciplinary Officers and Hearing Officers often made it difficult for the investigation to independently verify whether processes were fair.

306. Just under three-quarters of all hearing files reviewed by the investigation contained checklists that were either incomplete or included information that was inconsistent with data recorded on the PIMS database.

307. This included situations where prison staff:

- failed to note whether relevant prison registers had been completed following the incident or failed to include extracts from these registers in the hearing file
- recorded that hearings had been conducted within 14 days of the incident (a key performance indicator), when in fact they hadn't
- incorrectly recorded basic information, such as the date of the incident
- failed to check any of the 'tick boxes' or otherwise identify information considered when deciding the penalty

- incorrectly recorded details of the prisoner's psychiatric rating or intellectual disability
- did not describe consultation with health or psychiatric professionals, where this was required
- failed to document whether a CISO volunteer was offered to the prisoner, or failed to provide details of other discussions with the prisoner relating to the CISO program.

308. These issues are significant because, among other things, in the vast majority of cases reviewed by the investigation there was no complete or accurate record of what happened during the disciplinary process. This significantly limits accountability and makes it more difficult for a person or body to review the process, whether internally or externally.

309. In many cases, these types of records will not be enough to show that the process was fair or that it complied with relevant legislative and policy requirements.

310. The case study on the following page provides one example.

311. The investigation also encountered difficulties in arranging timely access to hearing files maintained by prisons.

312. Prisons currently produce and maintain hardcopy records relating to:

- incidents leading to disciplinary hearings
- the investigation and decision to charge
- the disciplinary hearing
- other related actions, such as separation orders, seizure of contraband and notification of the charge.



Failure to document consideration of a prisoner's medical condition

Liam, a prisoner, was charged with failing to provide a urine sample when requested.

Liam told the Ombudsman he has multiple health issues – including a mental health condition – that can impact his ability to produce a urine sample. Liam said he produced a medical certificate on the day of the incident which noted his conditions and recommended he be provided additional privacy.

Liam pleaded guilty at the disciplinary hearing and received a fine of \$50. Liam subsequently made a complaint to the Ombudsman because he didn't think the prison fully considered his medical condition.

In response to enquiries from the Ombudsman, the prison confirmed the Hearing Officer had been made aware of Liam's medical condition and had accordingly issued a lower fine than would normally be given for the offence. However, this consideration was not recorded on Liam's disciplinary hearing file.

313. These documents are generally stored at the prison where the incident took place.
314. Additionally, disciplinary hearing outcomes and other details are entered into the PIMS database. Different prisons have different procedures for entering information into PIMS.
315. Prison officers interviewed by the investigation said they often found the paperwork burden associated with the hearing process to be considerable.
316. It is noted that unnecessary duplication of information and the significant volume of paperwork required to be completed in connection with disciplinary hearings risks encouraging staff involved in the process to focus on rote procedure at the expense of providing substantive fairness to prisoners.
317. Further, the volume of paperwork associated with the process appears to contribute to the risk of files being completed in a haphazard or incomplete manner.
318. As the Department submitted in response to the Ombudsman's draft report, it is acknowledged there is a clear need to balance, on the one hand, the requirement to keep complete and accurate records of disciplinary hearings and, on the other, the need to ensure staff are not overburdened by unnecessary administrative responsibilities.
319. Corrections Victoria advised the investigation that it intends to move to a paperless system in the future. With robust workflows and consistent case management, this has the potential to streamline and improve record keeping practices.

Figure 12: Excerpts from Checklist for Disciplinary Officers

INITIAL ACTIONS REQUIRED		COMMENT
Obtain and review all reports	Yes ☒ No ☐	
Entered into PIMS Incident module	Yes ☒ No ☐	# 327659
Interview relevant staff and record details	Yes ☒ No ☐	
Gather additional evidence & seek additional reports where necessary	Yes ☒ No ☐	
Interview prisoner, put details of alleged offence to him/her and make record of response.	Yes ☒ No ☐	"interviewed prisoner on, he/she said that...." PRISONER ADVISED OF CHARGE PRISONER SAID "what for BISS, I didn't do anything, it's just smoke" Asked if he was involved, Prisoner said "maybe"
Details entered in the Use of Force Register	Yes ☐ N/A ☒	If applicable
Details entered in the Seizure Register and transferred to Charge Sheet	Yes ☐ N/A ☒	If applicable

DECISION OF THE DISCIPLINARY OFFICER		
Has the disciplinary officer determined that an offence has occurred?	Yes ☒ No ☐	If no - no further action required.
Could the offence be considered trivial or of an inconsequential nature?	Yes ☐ No ☒	If yes – no further action required. Prisoner may be cautioned. Comment:
Has the disciplinary officer determined that an offence has been committed and recorded the matter in the 'Register of Offences'?	Yes ☒ No ☐	Resulting action: ☐ Reprimand the prisoner, or ☐ Withdrawal of a privilege for less than 14 days, or ☒ Charge the prisoner with a prison offence, or ☐ Take steps to have the matter dealt with under the Criminal Law ☐ Complete Incident Report 1.19. Comment:

Source: Corrections Victoria

Figure 13: Excerpts from Checklist for Disciplinary Officers

CONDUCT OF HEARING		
Does the prisoner seek or agree to an abridged hearing process (for guilty pleas only)?	Yes ☐ No ☒	If so, prisoner to sign here:
Process explained to prisoner? ▪ Charge(s) read and explained ▪ Name of informant ▪ Details of alleged offence - location, time, specific acts or omissions etc ▪ Regulation(s) allegedly breached	Yes ☒ No ☐	
▪ Hearing process explained, including prisoner's ability to cross examine informant and witnesses		
Plea(s) entered		Charge 1: Guilty ☒ Not Guilty ☐ Charge 2: Guilty ☐ Not Guilty ☐
In response to a Plea of Guilty – have the requirements of Regulation 49 (see right) been satisfied by the Hearing Officer	Yes ☒ No ☐	Review circumstances of the case ☒ Consider mitigating factors ☒ Invite prisoner to make a plea regarding penalty ☒
Has the prisoner been given opportunity to cross examine informant and witnesses? [s52(2)]	Yes ☒ No ☐	

HEARING OUTCOME – CHARGE 1
☐ Charge dismissed ☒ Charge proven Where proven, factors taken into account in determining penalty: ☐ Previous findings of guilt at GDH ☒ General deterrent ☐ Prior record of good behaviour ☐ Time served in a management unit pending hearing ☐ Potential for actions to incite breaches of discipline by other prisoners ☐ Special needs ☐ Other
Penalty – Note: One only in accordance with Section 53(4), Corrections Act 1986 ☒ Reprimand ☐ Withdrawal of privileges – Privileges withdrawn for days ☐ Fine - \$..... Comments: + \$400 Restitution

Source: Corrections Victoria

Conclusions

320. Many of the disciplinary hearings reviewed by the investigation included examples of good practice – whether through adherence to appropriate procedures, meaningful efforts to assist prisoners to understand the process or the reasonable use of discretion.
321. The investigation also found that Corrections Victoria has made inroads on many of the issues identified by the Ombudsman's 2011 investigation into prison disciplinary hearings. It was particularly encouraging to observe that prisons appear to have ceased practices leading to unreasonable duplication of charges and taken greater care to minimise delays arising from referrals to Victoria Police.
322. Yet some of the issues identified by the previous investigation remain. In particular, it is evident that prisons continue to struggle to ensure prisoners with a disability receive appropriate independent support through the hearing process. The 2011 investigation recommended Corrections Victoria consider expanding the eligibility criteria for the CISO program to include most forms of mental illness and cognitive impairment, and while this appears to be occurring informally at Port Phillip Prison, it is clear the program continues to be relatively under-utilised.
323. Other issues, such as those surrounding the process for calling witnesses and overall poor record keeping associated with the disciplinary process appear to continue relatively unabated. In response to the Ombudsman's draft report, Corrections Victoria accepted current practices for recording requests for witnesses fall short of expectations and that there is 'room for improvement' in how key decisions are documented by staff involved in the hearing process.
324. The issues identified by the present investigation encompass the entire disciplinary process – from the initial investigation and decision to charge, where greater discretion could be used to divert some prisoners from the hearing process entirely; through to the hearing outcome, where lack of written reasons and limited rights of review may increase the risk of unfair decisions being made.
325. Many of the issues identified by the investigation appeared substantially exacerbated by the fact that prison disciplinary hearings continue to be conducted 'in the dark', in the absence of routine independent scrutiny, oversight and transparency. It is noted this characterisation was disputed by the General Managers consulted on the Ombudsman's draft report.
326. This lack of openness and transparency is partly attributable to the legislative regime in Victoria which, unlike other Australian jurisdictions, does not include the use of external adjudicators. Disciplinary proceedings in Victorian prisons are ordinarily conducted by officers from the same prison, and often the same unit, as the charged prisoner – increasing risks of apprehended bias and limiting opportunities for practices to be shaped by external expertise.
327. The investigation also found staff involved in disciplinary hearings do not always reflect on the purpose of the disciplinary process. In some cases, a focus on inflexibly observing rote procedure – for example, by denying prisoners the opportunity to call relevant witnesses for lack of prior written notice – may materially increase the risk of unfair outcomes.

328. Further, a tendency to emphasise considerations of 'good order' at the expense of other factors may miss opportunities to address the root causes of offending or meaningfully promote behaviour change.

329. Encouragingly, some Hearing Officers interviewed by the investigation appeared to recognise the benefits of exploring the reasons for challenging behaviour and promoting effective rehabilitation.

Opportunities to promote fairness and improve decision-making in the pre-hearing process

330. The investigation found that Disciplinary Officers generally complied with legislative and policy requirements, increasing fairness associated with the decision to charge.

331. Yet the investigation identified several issues with this stage of the disciplinary process that may undermine procedural fairness or otherwise lead to poor outcomes.

332. It is clear that Disciplinary Officers could be making greater use of the minor offence process. About one-quarter of all files reviewed by the investigation resulted in a simple reprimand, suggesting charges that could have been resolved through less formal means. This view was shared by Hearing Officers, who gave evidence that the minor offence process is quicker, less resource-intensive and results in outcomes that are more readily understood by prisoners – particularly those with a cognitive impairment.

333. There is also no consistent procedure across prisons for handling minor offences. Minor offence registers are not used in all public prisons and different prisons have different procedures for entering this information in the PIMS database. Implementing a more consistent approach to recording minor offences would assist Disciplinary Officers to obtain complete information about the prisoner's disciplinary history and, where relevant, encourage fairer outcomes at the hearing stage.

334. The investigation also identified concerns about information provided to prisoners facing disciplinary hearings.

335. First, information currently provided to prisoners in the Notification of Charge form often includes only a broad description of the offence – for example, 'disruptive behaviour'. This practice risks denying prisoners procedural fairness because it limits their ability to identify the specific conduct giving rise to the charge and respond to the case against them.

336. Second, written information provided to prisoners about the disciplinary hearing process uses language that may be difficult for most prisoners to understand. This issue is compounded by the fact that most prisoners have access to only limited independent advice about the process.

337. Finally, the investigation noted that undocumented pre-hearing discussions with prisoners may increase the risk of real or perceived unfairness arising in the process. Prisons need to take care to ensure that any discussions pre-empting the hearing outcome are carefully documented to minimise the risk of misunderstandings or apprehended bias.

Opportunities to promote fairness and improve decision-making during and after the hearing

338. Overall, the investigation was impressed by the level of discretion exercised by Hearing Officers during disciplinary hearings. Generally speaking, hearing outcomes appeared to have appropriate regard to prisoners' personal circumstances and other relevant factors, such as time spent on the management regime following an incident.
339. However, this observation is subject to the caveat that poor record keeping makes it difficult to identify the full range of considerations informing many hearing outcomes.
340. The investigation identified other opportunities to promote procedural fairness and improve decision-making at the hearing stage.
341. Prisons sometimes struggle to identify and appoint suitably independent Hearing Officers. In some cases, the officer responsible for issuing a separation order may subsequently act as Hearing Officer for the same incident – increasing the risk of bias. Requests to allocate a different Hearing Officer may simply be 'overruled', with no further information recorded on the hearing file.
342. The Corrections Act requires prisoners be given a reasonable opportunity to call witnesses in their defence. However, the investigation was informed of cases where requests to call witnesses were refused on procedural or logistical grounds. This appears to be a particular risk where prisoners are transferred to other prisons prior to disciplinary hearings. It is acknowledged that the COVID-19 pandemic has placed considerable demand on prison video conferencing technologies.
343. Requiring written requests for witnesses may also make it unnecessarily difficult for some prisoners to present their defence – particularly those with cognitive impairments or literacy issues.
344. Written reasons promote good decision-making, yet there is currently no requirement for Hearing Officers to routinely record reasons for hearing outcomes. This contrasts with other jurisdictions such as South Australia, where written reasons must be provided to prisoners. Written reasons would assist prisoners to understand hearing outcomes and seek independent advice, where necessary.
345. Finally, there is no easily accessible review mechanism for prisoners facing disciplinary hearings in Victoria. Prisoners seeking to challenge hearing outcomes are currently required to seek judicial review by the Supreme Court of Victoria. Unsurprisingly, exceedingly few prisoners take up this opportunity.
346. Other jurisdictions with otherwise similar disciplinary processes such as Queensland provide prisoners with the opportunity to seek internal review of disciplinary outcomes.
347. The closed nature of the prison disciplinary process in Victoria means decisions and processes are not subject to routine independent scrutiny. Providing prisoners with an appropriate internal review process would promote greater fairness in the hearing process and go some way towards mitigating other risks identified in this report.

Promoting fairness for prisoners with a cognitive impairment or mental illness

348. The investigation identified particular room for improvement in how prisons cater for vulnerable prisoners.
349. Corrections Victoria encourages staff to seek professional advice and consider practical alternatives to the disciplinary process where a prisoner's cognitive impairment or psychiatric condition may have contributed to their behaviour or could otherwise impact their ability to understand the hearing outcome.
350. Yet the investigation identified that such prisoners were no less likely – and, in the case of prisoners with cognitive impairments, somewhat more likely – to face disciplinary charges.
351. In response to the Ombudsman's draft report, the Department indicated it recently introduced 'Disability Support Officers' to assist prisoners to address challenging behaviour and avoid minor matters escalating to the disciplinary hearing process. The investigation welcomes this initiative.
352. For those cases that do proceed to a disciplinary hearing, the investigation considered more could be done to consider and record the impacts of a prisoner's cognitive impairment or mental illness, including through more consistent consultation with health and psychiatric professionals.
353. Prisoners with a cognitive impairment may find it more difficult to understand the disciplinary process and their associated rights. In this regard, the investigation endorses OPA's suggestion that CISO volunteers be made available to these prisoners during the pre-hearing process. Earlier engagement with the CISO program may also assist prisoners to make an informed choice about whether to seek support during the hearing.
354. Finally, there is insufficient independent support available to prisoners with other cognitive impairments or psychiatric conditions. The eligibility criteria for the CISO program should be expanded, as was recommended by the Ombudsman's 2011 investigation into the disciplinary hearing process.

Recommendations

To the Department of Justice and Community Safety:

Recommendation 1

Recognising that robust merits review of decisions is likely to substantially mitigate the risk of unfair outcomes, develop and implement an internal review mechanism for disciplinary hearings, including, if necessary, through amendment to the *Corrections Act 1986* (Vic).

The Department's response:

This recommendation will be considered as part of the Government's recently announced independent review into the culture of Victoria's prison system..

Recommendation 2

Establish and invest in a dedicated team within the Department to be responsible for conducting prison disciplinary hearings and related internal reviews, including staff with relevant operational and administrative decision-making expertise.

The Department's response:

This recommendation will be considered as part of the Government's recently announced independent review into the culture of Victoria's prison system.

Recommendation 3

Recognising the benefits in prisons conducting fewer and better quality disciplinary hearings, develop and implement a strategy to reduce the number of minor offences that proceed to the hearing stage, including through a formalised and consistent minor offence process, behaviour management plans and other alternatives to disciplinary hearings.

The Department's response:

This recommendation will be considered as part of the Government's recently announced independent review into the culture of Victoria's prison system.

Recommendation 4

Amend Commissioner's Requirement 2.3.3 and related materials to require that Hearing Officers record brief written reasons for disciplinary hearing outcomes and penalties and make these available to prisoners upon request.

The Department's response:

This recommendation is supported in principle subject to budget deliberations.

Recommendation 5

In consultation with the Office of the Public Advocate, develop and implement measures to improve prisoner understanding and experiences of the disciplinary hearing process and available supports, including through:

- a. development of plain English materials explaining the disciplinary hearing process and available supports
- b. expansion of the CISO program to provide assistance to prisoners with other forms of cognitive impairment
- c. improved integration of the CISO program into pre-hearing processes, including during the notification of charge
- d. identification of further opportunities to promote the CISO program within prisons and relevant specialist units.

The Department's response:

This recommendation is supported in principle subject to budget deliberations.

Recommendation 6

Recognising the significant record-keeping issues identified in this report, investigate opportunities to integrate disciplinary hearing processes and files into a centralised electronic records system.

The Department's response:

This recommendation is supported in principle subject to budget deliberations.

Appendix A

Recommendations from Ombudsman's 2011 investigation into prison disciplinary hearings, including contemporaneous response from Corrections Victoria

	Recommendation	Response from Corrections Victoria (2011)
1	That CV cease the practice of issuing a second penalty of a loss of access to a program such as contact visits on top of the penalties prescribed in the <i>Corrections Act 1986</i> (Vic).	Not accepted Consistent with the Supreme Court decision in October 2001 of <i>Kaufman v Smith and Armytage</i>, the removal of contact visits as a result of a prison offence, and in accordance with the Victorian Prison Drug Strategy, should not be '<i>... characterised as being punishment for the past prison offences, but, rather, as being inducements for prospective behaviour</i>'. ... Nevertheless, CV acknowledges there are a small component of offences outside the Victorian Prison Drug Strategy which can result in a sanction imposed and the removal of participation in the contact visit program. For this reason, CV will review procedures to improve consistency in how the removal of contact visits is applied across prisons.
2	That CV revise Director's Instruction No. 3.4(1.3) in relation to visits and Director's Instruction 1.16(6), in relation to disciplinary hearings to ensure that they are clear and consistent.	Accepted CV will review Deputy Commissioner's Instruction 3.4 – Visits and Deputy Commissioner's Instruction 1.16 – Disciplinary Process, to identify and amend the sections which could be articulated more clearly.
3	That CV ensure that prison staff involved in the disciplinary process are provided clear guidelines and advice regarding: - the maximum penalties they are able to impose according to legislation - the appropriate charges for various offences - situations in which issuing multiple charges would be warranted.	Accepted It is agreed that some additional guidelines and advice would be helpful, and this will be included in the amendments to Deputy Commissioner's Instruction 1.16 – Disciplinary Process and Deputy Commissioner's Instruction 3.4 – Visits. CV agrees with the principle that multiple charges should either not be brought out of the one offence, or (if they are) that a prisoner should not be found guilty of more than one charge arising out of that one offence. CV's view is that if an assault on a staff member were seen to be breaches of both Regulation 50(1) (a) and (u) – the latter in the event that the assault may have incited others to disruptive behaviour – then the penalty should reflect that seriousness.
4	That CV ensure that where practical a charge should be dealt with at the prison in which the incident allegedly occurred. If a prison is required to hear a charge laid by another prison, that they consider utilising teleconference facilities such as telephone or video link up, to co-ordinate the informant to the charge and witnesses.	Accepted The intent of this recommendation reflects the principle under which CV currently operates. Unfortunately, competing pressures (e.g. vacancy management, with bed utilisation rates at above 94 per cent) mean that more often than CV would like, prisoners are transferred to another prison before the charges can be heard. Sometimes this is to keep police cell numbers low. Sometimes this is because the matter has been referred to police and CV does not know when a response will be obtained. CV will impress upon prisons to use videoconferencing technology where possible in GDHs where the prisoner has moved to another prison.

5	That CV review and amend its documentation and guidelines with regards to the disciplinary hearing process to ensure consistency with one-another, and compliance with the Corrections Act.	Accepted CV will review the documentation and guidelines to ensure consistency. It is acknowledged that there is no mention in either the Corrections Act or Regulations of a prisoner being able to have an independent person attend and support them at a hearing. CV believes that having an independent person attend the hearing should remain as an option available to Hearing Officers, if they believe that it is warranted, due to the particular circumstances of the case. CV agrees with the principle that in some cases (particularly where there are complex questions of procedural fairness or the prisoner has a cognitive disability), it represents good practice to request that an independent person attend the hearing.
6	That Corrections Victoria ensure that prison officers record the reasons for disallowing a prisoner's witness(es) on the disciplinary hearing documentation.	Accepted The reason(s) for not allowing a prisoner's witness(es) at the hearing will be included in the amendments to the checklist in Deputy Commissioner's Instruction 1.16 – Disciplinary Process.
7	That Corrections Victoria investigate extending the CISO program to include prisoners with disabilities other than those registered with the Department of Human Services.	Accepted CV will investigate extending the program for use of prisoners with a disability, where the prison is aware of the disability.
8	That Corrections Victoria amend prison guidelines to emphasise the need for the production of an accurate record of the hearing, including specific outcomes and the decisions with regards to prisoner requests for witnesses / informants and support persons to attend a hearing.	Accepted CV will amend prison guidelines to emphasise the need for the production of an accurate record of the hearing. CV will impress upon prisons to ensure that the checklist is accurately and thoroughly completed as adherence to the checklist gives the Hearing Officer the capacity to record these reasons. The Commissioner's newly established Professional Standards Unit will conduct random audits.
9	That Corrections Victoria introduce mandatory training for disciplinary and hearing officers. This should include: • a formal training program and assessment process • a probation period and regular peer oversight • regular refresher training.	Accepted CV accepts that formalised training is desirable, and that persons with no training (including the self-paced training) should not hear charges. Building on the mandatory self-paced training (and utilisation of the checklist tool), CV has included disciplinary hearings training into the Supervisors course and will include this as part of the current development of the Operations Manager training. The Commissioner's newly established Professional Standards Unit will support peer oversight. Further consideration will be given as to the need for a probationary period.

Recommendations from Ombudsman's 2011 investigation into prison disciplinary hearings, including contemporaneous response from Corrections Victoria

	Recommendation	Response from Corrections Victoria (2011)
10	That Corrections Victoria conduct an audit of disciplinary matters referred to Victoria Police and seek outcomes so that the matters can be finalised.	Accepted CV will continue to work with Victoria Police to monitor outstanding referrals to Police. Prisons are already required to send a register of all matters referred to Victoria Police on a monthly basis to the System Performance Branch. These registers are audited quarterly and if required, more frequently on a case-by-case basis. While it is desirable to finalise disciplinary hearings at the earliest opportunity, CV cannot interfere with a criminal investigation.
11	That Corrections Victoria develop an introductory statement that each hearing officer is required to read to the prisoner at the commencement of each hearing.	Accepted CV agrees that it may be of benefit to have a statement that can be read to prisoners (particularly those facing a GDH for the first time). This will be considered during the review of Deputy Commissioner's Instruction 1.16 – Disciplinary Process.

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