

**Internal Disciplinary Hearings in New
Zealand Prisons: Undisciplined Administrative
Discretion**

by

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For most people the prison is a place of mystery—set aside from the rest of public and private society. In popular mythology, it has an image of violence. While the potential for such is real, it is not the potential for violence or cruelty from guards, or fellow prisoners that is the greatest evil; neither is it the threat of homosexuality or long hours confined to cells. The greatest potential evil in our prisons is administrative discretion granted to inadequately trained prison staff. It is a discretion that is not open to review independently of the prison system. The nature of this discretion and its use as it applies to the formal disciplinary procedures in New Zealand prisons is examined. Changes that would both support and reform existing disciplinary procedures are proposed and discussed.

I. ADMINISTRATIVE DISCRETION IN PRISON

Administrative discretion in the prison is that power to make decisions that affect the prisoner's status, mental and physical wellbeing, and access to procedures, privileges and information. It can even decide the length of time the prisoner will serve within the upper limit of the court-imposed sentence. It is that power to decide for the prisoners everything that they would have done for themselves.

An increasingly popular view is that the prisoner retains all the rights which citizens in general have, except those which must be limited or forfeited to enable the administration of the penal institu-

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tion.¹ Unfortunately, the rights that the prison administrators see as necessary to be limited or forfeited are nearly all those enjoyed by outside society. This power of control is justified as being essential to the good management of the prison—it is the mechanism by which rewards and punishments are meted out so that the behaviour of the prisoner conforms to the administration's expectations. The use of administrative discretion in prisons is guided by the Penal Institutions Act 1954, the Penal Institutions Regulations 1961, the Penal Manual and such directives as the Justice Department issues.

The superintendent of each prison must ensure that an approved summary of the relevant parts of the Act and the regulations are posted in a conspicuous place in the prison.² He must also see that incoming prisoners understand the various provisions as they relate to the treatment of prisoners, earnings and privileges, making complaints, food, clothing, bedding, other necessities and to disciplinary requirements of the prison.³ While knowing what is in the Act and regulations will be a help in understanding how administrative discretion will be exercised, a proper understanding can only come from a reading of the Penal Manual Volume 1.⁴ There the operational policies of the Penal Division of the Justice Department are set out. The Manual is not available to prisoners for reference. It is in such secrecy that most prison administrators seek to shroud their use of the administrative discretion. It ensures a large measure of protection for their decision-making. A decision can be difficult to attack if the basis on which it is made is unknown and effectively unknowable to the prisoner. Even having the basis on which the decision was made may be of little avail—such is the nature of the discretion. Rules and regulations set out how the discretion is to be exercised but it is doubtful if these confer any enforceable rights on a prisoner so that a breach of those rules by a prison officer would be actionable or enforceable. The courts have historically upheld this “hands-off” doctrine in a variety of decisions.⁵ What is demanded of the prisoner is total obedience to the rules of the prison and the decisions made by the prison officers, even if those decisions are not in accordance with those same rules. Lord Chief Justice Goddard in *Arbon v. Anderson* said:

It seems to me impossible to say that, if he can prove some departure from the

¹ Hawkins, “The Prison—Policy and Practice”, (University of Chicago Press, 1976).

² reg. 13(1).

³ reg. 13(2). The superintendent is under a duty to satisfy himself that this is the case. In practice incoming prisoners are just told where the summary is posted and to make themselves familiar with that summary. Very few ever bother to read the summary and, in the writer's experience, even less understand the rules that regulate the prison.

⁴ The Penal Manual Vol. 1 is issued to prison officers of Third Officer rank or higher but is available to all prison officers for consultation.

⁵ Zellick, “Is Remission Enforceable?”, (1980) Crim. L.R. 695.

prison rules which caused him inconvenience or detriment, he can maintain an action. It would be fatal to all discipline in prisons if governors and warders had to perform their duty always with the fear of an action before their eyes if they in any way deviated from the rules.⁶

Support for this "hands-off" policy is usually given by the use of analogy—the prison superintendent being likened to an army commander in the field. It has been seen as essential that he can make on-the-spot decisions without the worry of having to account for every detail of his actions.⁷ The effect of this is to place the civil rights of the prisoner in limbo. That absolute control and discipline is necessary in prison is a fact taken for granted by those in prison administration and is accepted by the courts. The rationale is that without such control the penal system would collapse and the real goals of punishment and confinement, together with the mythical goal of rehabilitation, would collapse as well.⁸ Thus, the wide administrative discretion of prison administrators is not to be questioned by the courts which, it is postulated, lack the expertise and insight into penal matters which prison officials possess. The consequence of this policy has been to place prison administrators in a position of near invulnerability. There have been many challenges to the "hands-off" doctrine. American prisoners have been able to invoke the guarantees of the Constitution of the United States,—an aid not available to New Zealand prisoners who must rely on the common law. As early as 1956 U.S. courts recognised that certain rights were not lost by the fact of imprisonment.⁹ The "hands-off" doctrine still holds much force in the United States though prisoners have gained recognition for many of those rights which are guaranteed by the constitution.

Two recent cases, *Daemar v. Hall*¹⁰ and *R. v. Hull Visitors, Ex p. St. Germain*¹¹, show a willingness of courts in New Zealand and Britain to intervene in prison administrative decisions—but only in certain areas when the rules of natural justice are violated¹² or the

⁶ [1943] 1 K.B. 252,255. In *Gibson v. Young* (1900) 21 N.S.W.L.R. 7, it was held that because it was public policy to ensure the maintenance of discipline in prisons, a prisoner could not bring an action for injuries suffered as a result of the negligence of prison officials. It is the writer's opinion that the prison priorities of 1983 are little different—only now the language setting them out is couched in the soft rhetoric of the rehabilitative ideal. See the annual "Report of the Department of Justice" at Penal Division—Objectives.

⁷ *R. v. Hull Visitors, Ex p. St. Germain* [1979] 2 W.L.R. 42,54.

⁸ For all the talk of prisoners being sent to prison *as* punishment, not *for* punishment, punishment is the prison reality—prison life cannot be described differently.

⁹ Vogelmann, "Prison Restrictions—Prisoner's Rights" (1968) 59 *Journal of Criminal Law, Criminology and Police Science* 386. Volgeman notes the case of *United States ex rel Marcial v. Fay* 247 F.2d 662 cert. denied, 355 U.S. 915 (2d Cir. 1957), 669 where the court stated: "We must not play fast and loose with basic constitutional rights in the interest of administrative efficiency."

¹⁰ [1978] 2 N.Z.L.R. 594.

¹¹ *Supra*.

¹² In *Daemar v. Hall*, McMullin J. said: "The walls of the prison are no bar to the use of the prerogative writ of certiorari in such a case", *supra*, 603.

courts are not expressly excluded by statute.¹³ Just how far the courts will go to intervene in the administration of prisons is unknown. For, while McMullin J. was prepared to intervene in the decision of a Visiting Justice, he was unprepared to extend it to the decision of a prison administrator. He said:

There must, of course, be many cases in which the power of prison officers to discipline inmates can never be the subject of review. The very nature of a prison institution will require that "on-the-spot" decisions be made by prison officers the effect of which will be to impose some restrictions and possibly punishments on inmates. I do not intend by this judgment to suggest that the power of those officers will be in any way curbed. If it were otherwise the day-to-day running of a prison institution might be jeopardised and the life of prison officers made a nightmare. Interference with that kind of day-to-day activity would be as unthinkable as interference by the civil courts with the actions of a non-commissioned officer on a parade ground.¹⁴

Megaw L. J. and Waller L. J. approved this passage of McMullin J. and thought it undesirable to extend the court's interference to the on-the-spot decisions of the prison governor.¹⁵ Their fellow judge, Shaw L. J., could not distinguish between the two functions saying that they were essentially the same. He saw no reason why the High Court's inherent jurisdiction should be fettered in its scope without express provision to the contrary.¹⁶ The internal disciplinary hearing procedure is the prime example of this on-the-spot decision making in prison and it is these decisions, with the attendant exercise of the administrative discretion, that most often come under judicial scrutiny.

II. THE STATUS OF INTERNAL DISCIPLINARY HEARINGS IN NEW ZEALAND

An understanding of the internal disciplinary hearing (I.D.H.) adhered to by many New Zealand prison officers is that expressed in the deposition of the American deputy-warden, Perry DeLong. DeLong had just taken one hundred days remission from an inmate and sought to explain the process. He said in reply to the Court's questioning:

Q. At the disciplinary hearings, are the inmates entitled to call witnesses in their behalf?

A. No.

Q. Are they entitled to cross-examine guards?

A. They are not.

Q. Are they entitled to representation by anyone?

A. No.

Q. What record is made of the proceedings at a disciplinary hearing?

A. As you see here, on the disciplinary report, the punishment is noted. This disciplinary hearing is not a judicial hearing, it corresponds to, I believe, a *potter*

¹³ In *Ex p. St. Germain*, Shaw L. J. said: "Apart from statute or specific contract there can be no external fetters on the exercise by the court of its jurisdiction to control the proceedings fo bodies or individuals who have the power to deal with the rights of liberties or status of a subject" *supra*, 61.

¹⁴ *Supra*, 603-604.

¹⁵ *Ex p. St. Germain*, *supra* 56 and 71.

¹⁶ *Ibid.*, 63.

familus (sic). I could be wrong on the *potter familus*.

Q. *Potter familus*?

A. It is probably known as the authority figure, as meting out what is family punishment, or family discipline. This is not a judicial thing in the sense of a court of record, and there is no provision for it as a court of record, and this is an internal disciplinary thing, very much as a father and mother in the home who say, "Johnny, you have done so and so, and you are forbidden to do it, and therefore you will stay in your room."¹⁷

The procedure in New Zealand is different with rights to call witnesses and cross-examine given to the prisoner.¹⁸ What is the same is the feeling of the I.D.H. being *paterfamilias*. The prison system is based on reducing the prisoner's status to that of a child, a child incapable of thinking for itself but drilled to follow directions. Hawkins says, after using the DeLong example:

What it illustrates is an attitude towards inmates that pervades every aspect of prison administration and is by no means restricted to prison disciplinary proceedings. What one might call the paterfamilial concept of authority in prisons is as old as the prison system itself. Prisoners are seen as being in a state of pupillage and are expected to accept the dominance-submission pattern of relationships. Their status is inferior and dependent, and their access to rewards—and for that matter necessities—is subject to their total obedience to the rules of the institution.¹⁹

The "hands-off" doctrine dominated New Zealand's penal system until the decision in *Daemar v. Hall*.²⁰ *Daemar* sought review of a visiting justice's I.D.H. decision claiming that regulation 78(3) had not been followed.²¹ He sought a review of the decision because he had been refused the opportunity to call witnesses on his behalf. Of the proceedings before a visiting justice, McMullin J. said:

The Penal Institutions Act and the regulations lay down a procedure similar to that prescribed by the Summary Proceedings Act 1957. A charge of a specified kind is required to be made and made known to the applicant. He is required to plead to the charge. Evidence is required to be called in support of the charge and the prisoner is given the right to give evidence and to call witnesses. Only when the prescribed procedures have been followed can a penalty be imposed by the visiting justice. I have no doubt that the function which the visiting justice exercises is of a judicial character, the procedure laid down by the regulations containing all the trappings of a Court.²²

McMullin J. chose to follow the principle stated by Atkin L. J. in *R. v. Electricity Commissioners*²³ that certiorari will lie if such a body acts in excess of their authority. McMullin J. then went on to state what must be taken as the legal position in New Zealand today. He said:

I am of the view that where a statute or regulation clearly indicates that disciplinary proceedings are to be conducted by a judicial officer following judicial procedures

¹⁷ Deposition of Perry J. DeLong, Jan. 10, 1969, 39-40, *Visconti v. LaVallee* No. 68 Civil 403 (N.D.N.Y., filed Nov. 1968), as cited in Turner, "Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation" (1970-71) 23 *Stanford Law Review* 473, 500 n. 159.

¹⁸ Penal Institutions Regulations 1961, reg. 78(3).

¹⁹ *Supra*, 142-143.

²⁰ *Supra*.

²¹ reg. 78(3) provides that inmates who plead not guilty shall be given the opportunity to present their own case and to call witnesses on their behalf.

²² *Supra*, 602.

²³ [1924] 1 K.B. 171, 205.

closely allied to those which would be followed by a Court sitting outside a prison institution, the Supreme Court has power to review the decision of the visiting justice if he acts outside the powers conferred upon him. The walls of the prison are no bar to the use of the prerogative writ of certiorari in such a case.²⁴

Though unnecessary to decide on the facts before him, McMullin J. expressly excluded the possibility of his decision being used to extend court review to decisions of prison officials, other than the visiting justice, sitting in a similar disciplinary role. He had previously stated that where possible, such a matter as was before him, should be decided on accepted legal principles rather than by analogies. McMullin J. then chose not to apply the same logic to the role of the superintendent, preferring to use the analogy of the superintendent being akin to the military officer.²⁵ Though the point of extending the court's jurisdiction to the prison governor was unnecessary to decide, Megaw L. J. and Waller L. J. stated opinions similar to that of McMullin J.²⁶ The third Law Lord, Shaw L. J. took an opposing view and said:

I do not for my part find it easy, if at all possible, to distinguish between disciplinary proceedings conducted by a board of visitors and those carried out by a prison governor. In each case the subject matter might be the same; the relevant fundamental regulations are common to both forms of proceeding. The powers of the governor as to the award he can make (which really means the punishment he can impose) are more restricted than those of a board of visitors in a corresponding situation; but the essential nature of the proceedings as defined by the Prison Rules is the same. So, in nature if not in degree, are the consequences to the prisoner.²⁷

It remains to be seen whether a future New Zealand court faced with a case of prison injustice would follow the logical observations of Shaw L. J. or rely on decision making by legal analogy. It is to be hoped the former will prevail. Recent decisions in other jurisdictions have likewise been conflicting.²⁸

It is likely that the slow speed at which the courts are moving in deciding how far their powers of review go will not be quick enough for the prisoner. It is the writer's opinion that legislative determination of the role of the courts is an outcome more likely than judicial decision. Though it might be hoped that the legislators would prefer an open review of all decisions affecting such fundamental rights as an independent review of a sentence to time in prison, in the writer's opinion legislation would favour restriction of the court's role in prison matters.²⁹

²⁴ *Supra*, 603.

²⁵ *Ibid.*, 602.

²⁶ *Supra*, 56 and 68.

²⁷ *Ibid.*, 62.

²⁸ The High Court of Australia in *Stratton v. Parn* (1978) 52 A.L.J.R. 330, held that it could review the decision of a visiting magistrate sitting in an I.D.H. The Canadian courts in *Martineau v. Inmate Disciplinary Board, Matsqui Institution (No. 2)* (1978) 40 C.C.C. (2d) 325, decided the other way holding that prison discipline is an administrative matter and not open to review.

²⁹ New Zealand governments are not known for accepting very kindly any "meddling" in matters they (the legislators) see as concerns of their Ministers or departmental officers.

III. REGULATION OF THE INTERNAL DISCIPLINARY HEARING IN NEW ZEALAND

Internal discipline in prisons is governed by, as Megaw L. J. said:

... a special, as it were "private law", code of discipline, related to a particular and limited class of persons, and in respect of which special considerations apply.³⁰

In New Zealand the structure of the I.D.H., the charges and dispositions are set out in sections 32 through to 35 of the Penal Institutions Act 1954 and its amendments.³¹ The manner in which the hearing of charges will be conducted is set out in the Penal Institutions Regulations 1961, regulations 75 through to 78.³² Another section of the Penal Institutions Act 1954 that is used as a disciplinary tool is section 7. It has no procedure for the laying of charges, no hearings and no appeals. Section 7 (1A) states:

... if a Superintendent is satisfied that—

- (a) The safety of an inmate or of any other person, or the security of the institution, would otherwise be endangered; or
- (b) Directions to be given under this subsection are in the interests of an inmate and the inmate consents to or requests the giving of directions; or
- (c) Failure to give directions would be seriously prejudicial to the good order and discipline of the institution,—

he may in the discharge of his responsibility for the general administration of the institution give directions that the opportunity of the inmate to associate with other inmates be restricted or denied for a period.

The superintendent must as soon as practicable make a report on the circumstances to the Secretary for Justice who may revoke any part or all of the superintendent's directions.³³ The directions are limited to a fourteen day period unless their extension is so authorised by the Secretary for Justice.³⁴ The directions are then reviewed every three months.³⁵

IV. INTERNAL DISCIPLINARY HEARINGS AT AUCKLAND MAXIMUM SECURITY PRISON

The I.D.H. at Auckland Prison, as in the other New Zealand

³⁰ *Supra*, 49.

³¹ S.32 sets out disciplinary offences in two parts. The first lists offences which can be heard either before the superintendent or a visiting justice. The second lists ten more serious offences that are to be heard before a visiting justice. Some offences are specific in the acts they refer to, others are phrased as general catch-alls for prisoner actions or inactions that do not fall within the more specific behaviour. Ss.33 and 34 set out the powers of the visiting justice (s.33) and the superintendent (s.34) in relation to the disposition of cases and to passing the case to a higher hearing authority. S.35 gives the prisoner the right of appeal to a visiting justice from the decision of a superintendent. The punishments which can be awarded include: loss of remission, forfeiture or postponement of privileges, forfeiture of earnings, work exclusion or confinement to cells. These may be awarded separately or in combination.

³² The regulations will be discussed in a later section.

³³ s.7 (1B).

³⁴ s.7 (1C).

³⁵ In practice it would be possible for a superintendent simply to impose a new set of directions at the expiry of each fourteen day period and by this procedure circumvent the statutory intention.

prisons, is the method by which the administration demonstrates to the prisoner its power over their every waking and sleeping hour. It is a ritualized show of force carried out with the mock decorum of a court hearing. In this section the procedures adopted here at Auckland Prison will be reviewed and the statistics relating to the years 1971, 1976, and 1981 (set out in Table 1) will be used to show trends in charging and sentencing.

TABLE 1

	1971	1976	1981
Single charges heard before the superintendent	330	332**	207
Multiple charges* heard before the superintendent	95	90	35
Single charges heard before a visiting justice	43 (8)***	9 (2)	6 (4)
Multiple charges* heard before a visiting justice	61 (2)	5 (4)	4 (2)
Totals	529 (10)	436 (6)	252 (6)
Multiple charges as a percentage of total charges	30%	22%	15%

* Multiple laid charges split into the individual charges.

** Includes 13 charges laid under s.32(2)(d) Penal Institutions Act 1954 but which were heard by the superintendent—he discharged with “caution and advise”.

*** All figures in brackets are appeals from a decision of the superintendent to the visiting justice. These figures are not included in the totals of the charge before the visiting justice as they are a second hearing of the same facts and are included in the superintendent's total charges.

The character of the prison is a reflection of the policies of the superintendent and this shows in the statistics. The present superintendent, Mr Jack Hobson, took charge of Auckland Prison in February 1972, replacing an authoritarian superintendent of the traditional mould. The prison at the time was experiencing grave internal disciplinary problems—rioting was a commonplace occurrence and the prison was a public embarrassment to the Justice Department. Two high level official reviews were the result of that situation. Since shortly after Mr Hobson's arrival, Auckland Prison has been quiet with no major displays of disobedience. Mr Hobson's regime can be described as “liberal”, an exception to the normally conservative prison administrations in New Zealand. What can be done to ease the pains of imprisonment will be done within the regulative restrictions imposed by law. The favourable use of discretion is encouraged at all levels of the prison administration. The superintendent is easily accessible to all prisoners and staff—to the extent that often prison officers' restrictive interpretation of rules or practices are overruled when a prisoner approaches the superintendent. While this causes

some disquiet among the ranks of the prison custodial staff, it clearly demonstrates the superintendent's policy that administrative discretion be favourably exercised where possible. The conflict between the traditional custodial staff attitude of "give the bastards nothing" and the policies of Mr Hobson often surface in the workings of Auckland Prison. The term of his administration has seen the development of a unique relationship between most staff and resident prisoners and the breaking down of many traditional barriers so dramatised in prison literature and mythology. How permanent this will be is another matter—perhaps the answer to this question is that the character of prison administration depends strongly on its ranking officer.

It is against this background that the I.D.H.'s at Auckland Prison must be considered. They do not necessarily reflect charging and sentencing practices at other New Zealand prisons, which to the writer's knowledge, tend to be more authoritarian and militaristic in their approach. The fall-off in the number of charges and the severity of awards given at Auckland Prison since 1971, in the writer's opinion, reflect the acceptance by the prisoners of Mr Hobson's regime, and his administration's acceptance that prisoners have legitimate needs and rights to humane confinement.

A. Charging

Most prisoners are made aware that they are "on charge" at the time an incident takes place or else are told at the time of the following lock-up. In most instances, the prisoner "on charge" will remain in the company of his fellow prisoners. If, however, some serious incident involving violence or gross disobedience is alleged the prisoner may be confined to the Pound Block.³⁶ Under the regulations the prisoner must be notified of the charge a sufficient time before the hearing so he can prepare his defence.³⁷ In practice, this is usually a verbal statement that he is "on charge", it being assumed he will know the specific allegations. The charging officer, after consultation with the Chief Officer, will frame the charge in accordance with the Penal Manual. The superintendent may recommend what charge to lay, downgrade the charge, wipe marginal charges and will determine if the charge is to go before a visiting justice or outside court. In general, charges before the superintendent are heard within twenty-four to forty-eight hours.³⁸ Because no written notification is required, many prisoners only learn of the actual charge when it is

³⁶ The punishment book—the "hole" or "well" of prison argot.

³⁷ reg. 76.

³⁸ reg. 75.

read out at the beginning of the I.D.H.³⁹ The casual attitude of most prisoners to the specific charge results from a combination of belief in the fairness of the superintendent in giving a fair hearing and sentence, and belief that the result may be a foregone conclusion. What is important to a prisoner is the penalty—in this matter the fairness of the superintendent ameliorates any concern of unfair charges.

B. The Hearing

The superintendent decides the time and place of the I.D.H.

Most are held in his office, but may be held in "the pound" if the offence was particularly disorderly.⁴⁰ The practice at Auckland Prison and others in New Zealand is for the Chief Officer to conduct the prosecution under the power in regulation 77. The I.D.H. proceedings take on the appearance of a "mini-court". In situations where the prisoner has a cultural or a language problem, he is given the assistance of another prisoner to translate for him and the "court". No other help or legal advice is available.

C. Sentencing

Sentence, in accordance with sections 33 and 34, is passed after a guilty determination and is entered in the "punishment book". The superintendent normally makes detailed notes of the evidence together with reasons for the sentence. These are not available to the prisoner should he appeal to the visiting justice, as that hearing takes the form of a complete rehearing of the case. However, the notes are available to the Ombudsman should he decide to investigate circumstances surrounding the charge and hearing.⁴¹ Awards are often tailored to the circumstances of the charge and the prisoner.⁴² An alternative

³⁹ This is the writer's experience. Out of an interest to see when notification of the charge would be given, the writer did not seek out what he was "on charge" for—but waited to be told by an officer. The first notification of the specific charge was when it was read out at the I.D.H. The writer has observed the practice at Auckland Prison and questioned other prisoners as to when the specifics of a charge are notified to them. Invariably, it is at the I.D.H.

⁴⁰ Mr Hobson relates the occasion when a prisoner in "D" Block refused to come out of his cell for an I.D.H. Rather than bodily haul the prisoner out and probably have more charges result, Mr Hobson put a table and chair in front of the cell grill, and with the prisoner sitting in the corner of his cell, conducted the hearing. Another superintendent may not have been so flexible—preferring to maintain the decorum of the mock court environment.

⁴¹ Prisoners may write to the Ombudsman asking him to look into any matters concerning the prisoner's treatment. The Ombudsman will take up an inquiry if the prisoner has exhausted all other channels of appeal. However, he will not look into the decision of a visiting justice who, as a judicial officer, makes decisions outside the Ombudsman's area of investigation.

⁴² Mr Hobson's awards are not always those contained in s.34(3) of the Penal Institutions Act 1954. While their legal standing is doubtful few prisoners would ever challenge their fairness. Examples include: one week's fatigues, disposing of cake by Monday, giving cigars to Welfare for prizes, having a haircut within one hour, and apologising to prison officers in a manly manner.

informal disposition arising from an I.D.H. can take the form of a recommendation to the head office of the Justice Department that an already approved transfer be suspended for six months or until the next Classification Board the prisoner is to face. The prisoner could also be transferred to another block within the prison as punishment.⁴³

In general prisoner reaction to an I.D.H. is standard—one “cops it”. This response is to be expected as there is no real alternative and the attitude that “they can’t hurt me” is best for the prisoner’s peer group image. Fighting back may give personal satisfaction in the short term but the administration always has a better armoury.

V. MULTIPLE CHARGING AND CUMULATIVE SENTENCING

The maximum penalties which can be awarded under sections 33 and 34 of the Penal Institutions Act 1954 do not in themselves appear formidable when compared with the power of the courts. Indeed, three months loss of remission is moderate when compared to the unlimited loss of remission which can be arranged for grave charges by the prison visitors in the United Kingdom.⁴⁴ However, a disturbing potential exists in the I.D.H. sentencing powers when a prisoner faces a multiple charging situation. Charges arising out of a single incident can be laid under several of the charging provisions of section 32(1) or section 32(2). Consider, for example, the situation where:

A prisoner is told by a prison officer to leave the messroom table. The prisoner tells the prison officer to ----off and throws his cup of drink over the prison officer’s uniform. He is charged with:

- (a) s.32(1)(a) disobeying an order; and
- (b) s.32(1)(c) using obscene words; and
- (c) s.32(1)(i) committing a nuisance (he may have done it before); and
- (d) s.32(2)(b) assaulting a prison officer.

Because the assault charge must be heard before a visiting justice the prisoner is exposed to a maximum loss of remission of one year—the equivalent of an eighteen month prison sentence.⁴⁵ By this method of multiple charging, the legislative maxima can be circumvented if the maximum awards of loss of remission are made or a combination of awards are made. The extent of this practice in New Zealand is difficult to gauge. At Auckland Prison multiple charging is used but the practice is not to award cumulative sentences. The number of multiple charges has decreased in the ten year period analysed (see

⁴³ Prisoners at Auckland Prison can be directed to “D” Block under s. 7 (1)(a) of the Penal Institutions Act 1954. Being a punishment block and segregation unit, it is a prison within a prison. It’s use is an integral part of discipline as there prisoners can be buried out of sight of the rest of the prison, just as all prisoners are buried out of sight of civil society by the fact of their imprisonment.

⁴⁴ The U.K. equivalent of our visiting justice.

⁴⁵ With the usual reduction of one third for good behaviour, a prisoner spending twelve months in prison will have served an eighteen month sentence.

Table 1). In most cases studied by the writer, where the awards if added together would have exceeded the maximum, the "punishment book" entry is noted as being concurrent. Only five entries of multiple charges with sentences that when added together are above the maximum are entered and not noted as being concurrent. The writer is informed by the superintendent that even if the award is not noted as concurrent, the punishment is carried out as if it had been made concurrent, except for awards of loss of remission. Directions to this effect are given in the Penal Manual, G.2.2.(1) to (3). G.2.2.(1) directs that the penalties shall not be accumulated if more than one penalty is imposed, e.g. an award of loss of association is not to begin once the award of confinement to cells ends; time is to run on each from the time of sentence. G.2.2.(2) states there is no power if a prisoner is found guilty on two or more charges to sentence, for example, for twenty-eight days off privileges on each charge and have them served one after the other. Awards cannot be accumulated above the maximum award possible on one charge. G.2.2.(3) states that while loss of past and present earnings can be ordered, this cannot extend to any accumulation of future earnings. The award for loss of remission is treated differently from the above. The Secretary for Justice has advised all superintendents of the interpretation to be followed in the situation described as multiple charging and cumulative sentencing. In a note to all superintendents it is stated:

Loss of remission for more than one offence on the same day (LEG 29-3-1)

There appears to have been some uncertainty as to whether penalties of forfeiture of remission can be cumulative. Our Legal Advisors have considered this matter and advise, inter alia:

"The Penal Division Manual G.2.2.(4) states:

'Forfeiture of remission must relate to remission already earned before the sentence (of forfeiture) and consequently takes effect in full immediately. Therefore if two such forfeitures were ordered for two offences, that would not be accumulation.' "

Since the forfeitures take effect immediately where two or more such penalties are awarded each separate amount of forfeiture is deducted from the remission earned by the inmate and these deductions are not to be regarded as cumulative penalties. The very terms "concurrent" and "cumulative" are inappropriate when forfeitures of remission are considered. Each forfeiture is a "lump sum" penalty e.g. if an inmate is entitled to be recommended for 75 days remission and on the one day first loses 20 days remission and then 15 days for another offence on the same day. The first amount of remission is deducted leaving 55 days, then the second amount of forfeiture is deducted leaving 40 days remission. In practice, of course, the total amount of forfeited remission (in this case 35 days) will be deducted at the one and the same time.

Please ensure that this interpretation is adhered to when remission is ordered to be forfeited for more than one misconduct committed on the same day.⁴⁶

This legal interpretation avoids the central issue of multiple charging for it does not acknowledge that "more than one misconduct on

⁴⁶ This is the text of a directive from the Head Office of the Justice Department sent to all superintendents to inform them of the policy involving accumulation of awards of loss of remission at I.D.H.'s.

the same day" is, in reality, likely to be "more than one misconduct charge being framed from one set of facts". This semantic side-step does not alter the effect of cumulative sentencing. The Justice Department has by-passed the legislative intention which was to impose maximum penalties for prison disciplinary offences, in a situation where there are few, if any, checks on the exercise of a very wide administrative discretion. There is a danger that substantial prison terms may be awarded without a prisoner having the right to review of his sentence by an outside court. It is incongruous that the Justice Department in the Penal Manual goes to great lengths to avoid the cumulative effect of the less severe sentences which can be awarded at I.D.H.'s, but goes to even greater lengths to ensure the cumulative effect of the most severe of the I.D.H. sentencing powers. The haphazard way sentences are entered in the "punishment book" as concurrent or cumulative—especially by visiting justices who appear to be unaware of the cumulative effect of forfeiture of remission, leaves it open to Justice Department officers to interpret all forfeiture of remission sentences in light of LEG 29-3-1, even if the sentence was intended to be concurrent by the I.D.H.⁴⁷ While the Penal Manual directs there shall not be cumulative awards of the other I.D.H. penalties, in the writer's opinion these directives are not binding and, indeed, are not enforceable by a prisoner if not followed.⁴⁸

The fact that there does not, to the writer's knowledge, appear to be widespread use of the power to award cumulative forfeitures of remission so that the maximum is passed, does not justify the situation remaining unaltered and it is submitted it should be abolished. In circumstances where it is possible for several charges to be laid, all related to one set of facts, it is the writer's opinion, that the procedure should be used only for the most serious of the sustainable charges to be laid. In the event of a guilty determination, it is still open to the superintendent or the visiting justice to award more than one form of punishment. This, it is submitted, was the intention of the legislation.

VI. PROPOSALS FOR INTERNAL DISCIPLINARY HEARING REFORM

The main criticism of the I.D.H. procedure and the sentencing

⁴⁷ In two cases in the years analysed at Auckland Prison, a visiting justice made the maximum award of forfeiture of three months remission for each of the charges faced. There was no note as to how the awards were to be considered. Thus it was open to the Justice Department's interpretation as to the cumulative effect or otherwise. In 1976, a prisoner was charged with: (1) s.32(2)(b) holding a prison officer by the throat; and (2) s.32(2)(b) punching a prison officer in the face and s.32 (1)(g) having home brew in his cell. In 1981 a prisoner was charged with: (1) s.32(3) attempting to escape from custody; and (2) s.32(2)(b) striking a prison officer on the face on apprehension. Interpretation under LEG 29-3-1 would mean a total of nine and six months loss of remission respectively, with no right of review.

⁴⁸ In *Becker v. Home Office* [1972] 2 Q.B.407,418, Lord Denning said: "The Prison Rules are regulatory directives only. Even if they are not observed, they do not give rise to a cause of action."

powers available is found when forfeiture of remission is awarded as a punishment for, in effect, it is as if another term of imprisonment has been imposed. Of the other I.D.H. sentencing powers, the award of "confinement to cells" is the most severe as the prisoner is isolated for a period from fellow prisoners. Such punishment gives rise to prison folklore, as there are not witnesses to any incident which may have been alleged to happen. As long as the sentence is of a defined length this punishment is one the prisoner accepts as being part of prison life, doing it, so to speak, "on one's back".

There have been many calls for reform of the procedure for prison disciplinary hearings⁴⁹ from academic and prison reform groups. However suggestions are often inappropriate to the realities of prison life and routine.

In the following discussion, proposed reforms of the I.D.H. are examined and alternatives suggested.

A. Abolition of Forfeiture of Remission as an Award in the I.D.H.

The sentence of "loss of remission" gives the I.D.H. the character of a court more than any other available award. It enables the I.D.H. to deprive a prisoner of his liberty, regardless of the fact that he is already suffering such deprivation. Generally, retention of the award is justified by noting its usefulness for maintaining prison discipline. However, in the writer's observation, it is *not* an essential ingredient for discipline and is seldom used in Auckland Prison (See Table 2.)

TABLE 2
Loss of Remission Used as an Award

	1971	1976	1981
Charges before the superintendent	425	422	242
Charges remission lost	69	16	10
Average remission lost	3 days	3 days	4½ days
Charges before the visiting justice	104	14	10
Charges remission lost	29*	7**	5***
Average remission lost	13½ days	35½ days +	32 days +

* includes 18 charges of assault against a prison officer.

** all charges of assault against a prison officer.

*** includes three charges of assault against a prison officer and one escape charge.

+ average award distorted by the award of a sentence of the maximum award of 90 days (in each case the award is taken as being single and concurrent when in fact it might have been that in these cases, because of the directive on loss of remission awards (LEG 29-3-1), the totals were 270 days in 1976 and 180 days in 1981).

⁴⁹ Zellick, "Prison Discipline and Preventive Confinement" (1981) Crim. L.R. 218. Also Blom-Cooper "The Constitutional Framework of the English Penal System", in Blom-Cooper (ed.) *Progress in Penal Reform* (1974), 32.

In those cases where the superintendent used the award under section 34(3)(a)⁵⁰, the average loss of remission was three days, which hardly indicates the need for such a powerful award.

Where it has been used by a visiting justice under section 33(3)(a)⁵¹ it is primarily for cases of assault against a prison officer.

This trend can be seen in the 1976 and 1981 figures (table 2) where eleven out of twelve awards were for assault, the remaining one being for an attempted escape. Both these types of charge could have been dealt with by outside courts where the normal channels of review are available to the prisoner.

It is submitted that the sentence of "loss of remission" under sections 33(3)(a) and 34(3)(a) should be abolished. Five grounds for this proposition are offered.

1. The award of loss of remission is not applied equally to all prisoners

Those serving indeterminate sentences, such as life imprisonment or preventive detention, do not have this award made against them as the Parole Board determines their release date and such extensions would be pointless. However, the award is made against other prisoners whose release dates are also determined by the Parole Board.⁵² In such cases the award is little more than information of a prisoner's misbehaviour and that information will be on his file without the award of loss of remission (as it is with those serving life imprisonment or preventive detention sentences). Taking away time from an uncertain release date is ridiculous. The fact that the award has little effect against a large group of prisoners is an indication of its non-essential nature.

2. Loss of remission is an arbitrary punishment

The use of this award varies from prison to prison, from superintendent to superintendent, and likewise with visiting justices.⁵³ An offence that one superintendent will award loss of remission for might only rate loss of pay from another. A prisoner's classification and location within the prison system should not be a determining factor when penalties are awarded in an I.D.H. proceeding.

⁵⁰ As amended by s.16(1)(a) of the Penal Institutions Amendment Act 1975.

⁵¹ The term "loss of remission" is used to describe the effect of the expression "postponement for a specified period of any eligibility of the inmate for release" in ss. 15(1)a 16(1)(a) of the Penal Institutions Amendment Act 1975. This amended the original Act's ss.33(3)(a) and 34(3)(a). The prisoner now has a release date set which assumes remission of a quarter of his sentence—s. 31 of the Penal Institutions Act 1954. The punishment award can delay that date, i.e. remission is lost.

⁵² Those prisoners serving over four years.

⁵³ As is shown in the 1971 figures when compared with the 1976 and 1981 figures of the use of the award at Auckland Prison.

3. *Loss of remission is imprisonment without review*

While the decision of the superintendent can be appealed to a visiting justice, the visiting justice cannot be seen as being independent of the prison authorities. For prison justice to be accepted as being independent of prison authorities, the final level of appeal must be outside of the prison environment. Coming in front of a visiting justice who the prisoner knows has in all likelihood just had a cup of tea and a chat with the superintendent hardly gives him confidence in the impartiality of the hearing he faces. There is no appeal, apart from procedural matters, from the decision of the visiting justice.⁵⁴ Without a full review of the I.D.H. decisions by the courts the writer is of the opinion that sections 33(3)(a) and 34(3)(a) should be repealed.

4. *Other sentences are adequate to control prison discipline*

The other penalties in sections 33 and 34 are adequate when used in conjunction with the powers given to the superintendent in section 7 to deal with internal prison discipline.⁵⁵ This is indicated by the use of these other penalties in the majority of charges dealt with by I.D.H. at Auckland Prison. This is especially so when it is considered that Auckland Prison is New Zealand's maximum security prison (supposedly containing the country's most dangerous men) and thus probably in need of the most severe punishments, if punishments are indeed a valuable disciplinary tool.⁵⁶

5. *Serious prison infractions are more properly the concern of the outside judicial system*

The outside court system already deals with prison cases referred to it under section 33(4) or section 34(4)(b). A court can make a term of imprisonment awarded for an offence before it, concurrent or cumulative with the prisoner's present sentence. The hearing is public and appeal procedures are available. The figures in Table 2 indicate that the superintendent at Auckland Prison for the years 1976 and 1981 selected the more serious cases to go to the visiting justice—this is shown in the average loss of remission increasing while the cases referred decreased. The same selectivity would apply if the more serious cases, where it might be anticipated that a loss of remission could be an appropriate punishment in a guilty determination, were to

⁵⁴ *Daemar v. Hall, supra.*

⁵⁵ Forfeiture or postponement of privileges; forfeiture of earnings; and exclusion from work in association; confinement to cells.

⁵⁶ At Auckland Prison the award of "loss of remission" was given in only 12.4% of the cases over the three years investigated, with only 6.3% in 1981. It is interesting to note that in the United Kingdom "loss of remission" was awarded in 27% of I.D.H. sentences in British prisons in 1979; British Prison Statistics (1979 Cmnd., 7978, 1980). This perhaps reflects the more repressive prison regimes in that country.

be removed to an outside court.

The charges involved in prison discipline do not, apart from offences involving drugs, assault or escape, have counterpart charges in the outside criminal code. The dispositions that would remain after the removal of the sentence of loss of remission do not have equivalents either. By removing to the outside courts those serious offences, the remaining prison disciplinary charges and the remaining powers of sentencing (the loss of remission award having been deleted), would together present a prison disciplinary system that was appropriate to the prison environment.

B. Provide Legal Advice to Prisoners

Three methods of providing legal advice for prisoners have been suggested by other writers. These include: outside legal advice and legal aid;⁵⁷ and an administrative office to aid the prisoner;⁵⁸ and a 'McKenzie' type friend.⁵⁹ It is the writer's contention that these three methods are inappropriate to the prison setting. A fourth possibility, more a support of the existing procedure rather than a reform, is proposed.

1. Outside legal advice

This would be a difficult scheme to implement in New Zealand. While most prisons are relatively isolated, discipline requires a quick disposition of charges, thus speedy consultation and representation would present a major problem. However, isolation and difficulties in establishing a workable legal service are not in themselves justification to deny legal advice to prisoners. Most I.D.H. charges are run-of-the-mill disciplinary offences for which legal counsel would be inappropriate. Also such a service could be used by prisoners as a means of delaying and fouling up the prison system, being costly in both time and money. It is doubtful whether many lawyers would want to participate in the resulting prison circus and it would be difficult to draw the line where legal advice would be appropriate.

The situation when it is probably most required is where there is a potential for a "loss of remission" award. As the offence is serious, it may more appropriately be the concern of an outside court where prisoners might qualify for legal aid. Removing the power of an I.D.H. to take away remission would remove the need for any legal services within an I.D.H.

⁵⁷ Misner, "Prison Discipline: The Inherent Conflicts", *Aust. and N.Z. Journal of Criminology* (Mar., 1973): 6,1,21,29; Brant, "Prison Disciplinary Procedures: Creating Rules" (1972) 21 *Cleve. St. L.R.* 83,94.

⁵⁸ Misner, *Ibid.*, 30.

⁵⁹ *McKenzie v. McKenzie* [1970] 3 All E.R. 1034.

2. *An administrative officer to aid the prisoner*

While this has been seriously suggested, it is an inappropriate solution in the prison setting.⁶⁰ It is difficult to envisage a prisoner trusting the advice of a prison official. To ask an officer to assist a prisoner when his fellow prison officers are on the opposing side would cut across group loyalties and place both parties in an invidious position.

3. *The provision of a McKenzie-type friend*

This would provide the prisoner on charge with the independent advice of another prisoner, padre, or welfare officer, who knowing something of the I.D.H. procedure, could aid the prisoner at all stages of the charge. While this solution would suit some prisoners it might lead to pressure being placed on other prisoners who have a special knowledge of the law.⁶¹ The burden would fall on a few and "prison rules" would oblige them to help out. A negative result or the feeling that a prisoner did not get the best advice could mean quick retribution. With the number of hearings in most prisons (an average of 360 hearings a year over the three years surveyed at Auckland Prison) the position of McKenzie friend could take on the appearance of a legal practice. This it is submitted, is too much to ask of other prisoners trying "to do their own lag".

A form of McKenzie friend already exists in New Zealand prisons when the prisoner on charge has a cultural or language problem. Such situations are not common and cannot be used to illustrate the potential for the more extensive use of this scheme.

4. *Printed guides to the I.D.H. procedures*

A more appropriate method to aid the prisoners on charge would be to provide them with written notification of the charge they are facing and the nature of the evidence against them. This would have to be given within a few hours of the charge being laid as the I.D.H.'s are often heard within twenty-four hours of charging. Such a scheme would also overcome the present haphazard implementation of "sufficient notice" under regulation 76(1). Together with written notification, the prisoner could be supplied with a booklet specifically written for prisoners and compiled for the Justice Department by lawyers interested in prison matters. It would detail the I.D.H. procedure the prisoners would be put through and would inform them of their rights and needs at each stage, including appeals. Written in clear language, it would be a valuable aid for prisoners. It is also a relatively inexpensive way of providing help to prisoners, and would assist them to

⁶⁰ Misner, *op. cit.*, 30.

⁶¹ Many prisoners are well-versed in the ways of the law and its procedure. The term "jailhouse-lawyer" is well founded.

assume some responsibility for their own affairs.

C. Grant Appeal Rights from a Decision of a Visiting Justice

The need for court review of I.D.H.'s where remission is lost has already been discussed. An appeal right from a visiting justice's determination may have to go to the High Court as visiting justices are drawn from the District Courts. It is anticipated that most appeals would be for the more serious charges or for instances where the prisoner feels aggrieved by the prison disciplinary system (the appeal would do much to ease internal tension where a prisoner feels trapped in the often Kafkaesque prison trial situation).⁶²

That there be a general right of appeal for review by an outside court has been recommended in two reports by the then Ombudsman, Sir Guy Powles, and Mr L. G. H. Sinclair, S.M.⁶³

The right to appeal to an independent court is particularly important in the context of multiple charging and cumulative sentencing when it is possible for prison administrators to circumvent the intended maximum.

D. Review by the Ombudsman

The Ombudsman's present role, in regard to I.D.H.'s is extremely limited. He does, on occasion, look into the circumstances surrounding the I.D.H. but never reviews the decision of the superintendent or the visiting justice. His power of review is normally exercised when all other avenues of redress have been exhausted. Because there is a right of appeal to the visiting justice from a superintendent's decision such applications to the Ombudsman are usually declined. Suggestions that the Ombudsman's power of review be extended to the area of I.D.H.'s have been made.⁶⁴ For the Ombudsman to review by extending his power would only partly resolve the problem of I.D.H. review. He does not have the authority to direct that remedial steps be taken. His power is one of persuasion; albeit a very strong one. Giving him power to order remedial action would fundamentally alter the nature of the Ombudsman's role. The appellate function would necessarily subject the Ombudsman to rules that go with an appellate role—the rules of judicial procedure. The establishment of an office of Prison Ombudsman whose sole function would be to investigate prison matters,

⁶² That mainly serious charges would be appealed is borne out on an analysis of the charges appealed from the superintendent's decision. Those figures indicate that there would not be a flood of appeals merely because an appeal right exists.

⁶³ These were reports into the conditions of Paremoro Prison (Auckland Maximum Prison). The first was in January 1972. The second March 1973. Both were as a result of severe disciplinary problems in the prison.

⁶⁴ Hawkins, *op.cit.*, 150. Also Bergesen, "California Prisoners: Rights without Remedies" (1972) 25 Stanford Law Review 1, 46.

including an informal review function of I.D.H. decisions, is another possibility.⁶⁵ As the review power would extend to decisions of the visiting justices, the status of the office would need to be on a level with that of a District Court judge. This power of review would be informal and the Ombudsman would not be able to direct that remedial action is taken. This would preserve the nature of the Ombudsman's role and not hinder it with the constraints that go with more formal judicial review. The suggestions made by the present Ombudsman are, in nearly all cases, followed by the New Zealand prison authorities even though there is no requirement for them to do so. It would be no different with the suggestions of a specialised Prison Ombudsman. If the prison authorities were unprepared to implement the recommendations after the Ombudsman had reported on the prisoner's complaint then, at this point, there could be a right of appeal to an outside court. The establishment of a specialised Prison Ombudsman's office would, in the writer's opinion, ameliorate most of the "closed-shop" criticisms of the present I.D.H. procedure.

E. Codify Prison Behaviour and Disciplinary Offences

In 1975, at the request of the Justice Department, the superintendents of Auckland and Mount Eden Prisons, Mr Hobson and Mr Rogers respectively, prepared a report containing proposals for the amendment of the prison disciplinary section of the Penal Institutions Act 1954. The intention was to codify prison behaviour and to specify the offence under which that behaviour would be charged. They intended to eliminate the catch-all type of charge that can be used to encompass almost any behaviour that a prison officer might find objectionable.⁶⁶ In place of the present twenty-two charges in section 32(1) and (2) of the Penal Institutions Act 1954 the superintendents proposed over eighty charges that were more specific in the behaviour they prescribed. Even so, the catch-all type charge could not be eliminated.⁶⁷ It is the very nature of the power held by prison officers that requires that they must have a large element of discretion. Rigid codified rules would restrict prison officer's ability to meet particular circumstances with a flexible approach. Even if the

⁶⁵ A similar office was proposed in California in 1971 and 1972 when Bills implementing this passed the legislative houses on both occasions but were vetoed by, the then Governor of California, Ronald Reagan. Bergesen said of the proposed office: "The ombudsman's primary function would be to investigate actions taken by correctional organisations and individuals to determine whether the actions were illegal, unreasonable, erroneous, arbitrary or inefficient", *ibid.*, 46.

⁶⁶ Two such provisions are s. 32(1)(i) commits any nuisance; and s. 32(1)(1) in any other way, offends against good order and discipline.

⁶⁷ One example of a proposed charge was: "221. Conduct which disrupts or interferes with the security or orderly running of the institution." Report (unpublished) by the superintendents of Auckland Prison and Mt. Eden Prison, to the Secretary for Justice, on proposed amendments to the Penal Institutions Act 1954, (1975).

rules were codified, it is doubtful whether prison authorities would be bound to follow them.⁶⁸ The superintendents' proposals were shelved when the government changed at the end of 1975.

Flexibility in the use of discretion can go two ways—while there is potential for abuse there is also great potential for the creative use of that discretion. It is the characteristics and will of those persons exercising that power of decision that is important. Any code would be outdated by the time of its introduction—alteration of some clause as required is more appropriate.⁶⁹ It is the writer's opinion that the benefits of a flexible discretionary power outweigh any advantages of limiting that power to prevent abuses. With flexibility comes the ability to adjust the operation of the prison to changing social attitudes and indeed makes for a more humane environment for prisoners.

F. Additions to the Dispositions Available

A further disposition, the suspended sentence, would be a valuable tool in I.D.H. sentencing as it would be in keeping with the desire to encourage positive behaviour. The report to the Secretary for Justice by the Auckland and Mount Eden prison superintendents made such a recommendation.⁷⁰ The proposal was that the suspension would be for three months and that the prisoner would come up during that time if called upon because of his behaviour. They said:

We feel it is desirable to include this type of suspended sentence as there are occasions when inmates who have a consistent pattern of good behaviour commit some indiscretion or trivial offence which could mar the opportunity for additional remission and destroy the previous goodwill which had built up. By giving the inmate the opportunity to demonstrate his willingness to conform, the imposition of this clause could be a constructive sentence as against a straight out punishment.⁷¹

Such a sentencing power would greatly aid flexible exercise of administrative discretion at the I.D.H.

VII. CONCLUSION

The procedure, sentences and the use of administrative discretion is a system that has developed and been interpreted in light of changing prison conditions. A reappraisal of that system is required but without substantially altering the essentially workable nature of that system. It is believed that adoption of the above proposals, together with the creative use of administrative discretion, would help achieve a more relevant and just system of I.D.H.'s in New Zealand prisons.

⁶⁸ *Arbon v. Anderson, supra*, 255.

⁶⁹ For example the Ombudsman's proposal to the 1981 Penal Policy Review Committee to amend s. 32(2)(c) of the Penal Institutions Act 1954. The proposal, accepted by the committee, was to rephrase the clause to eliminate the contentious and illdefined "false and malicious" phrase.

⁷⁰ *Supra*.

⁷¹ *Idem*.