

# **The Law Handbook**

**YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES**

**15th EDITION**



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# Prisoners

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**[33.10]** Corrective Services NSW controls 39 correctional centres throughout NSW, from maximum security gaols to open prison farms and forestry camps.

Anyone held in a NSW gaol is in the custody of the governor (or general manager) of that gaol. The governor and other prison officers are employed by Corrective Services NSW, and the responsible Minister is the Minister for Corrections.

Since February 1991, the Commissioner of Corrective Services has had authority to engage private corporations to operate and manage prisons. To date, only two gaols are privately run, Junee Correctional Centre (1993) and Parklea Correctional Centre (2009).

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### Legislation

The main legislation dealing with prisoners and prisons in NSW is the:

- *Crimes (Administration of Sentences) Act 1999* (NSW);
- *Crimes (Administration of Sentences) Regulation 2014* (NSW).

The *Crimes (Administration of Sentences) Act* empowers state officials to run prisons, sets out special offences that can be committed by prisoners and establishes disciplinary procedures to punish prisoners who break the rules. It also deals with parole and other matters relating to prisoners and carrying out sentences. The Regulation sets out the rules for various matters discussed in this chapter, such as classification, visits and prison discipline. Together, these two pieces of legislation also establish principles to ensure the safety of people in custody, including the staff looking after them, and to help rehabilitate offenders with a view to their reintegration into the general community.

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## NSW prison population

**[33.20]** Just before the *Sentencing Act 1989* (NSW) (which introduced so-called “truth in sentencing”) began operation in September 1989, the full-time prison population in NSW was about 4,800 (excluding prisoners serving sentences by periodic detention).

Between 2012 and 2018, the prison population in NSW grew by around 40% from 9,602 to 13,630 inmates. In the same period, the number of women in prison increased by around 50% from 697 to 1,067. There has been a slight decrease in the prison population recently, and as of March 2019, there were 13,466 prisoners in NSW prisoner, 996 of those were women.

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### Indigenous prisoners

Aboriginal people, both men and women, are over-represented in NSW prisons. They are 16%–17% more likely to be in gaol than non-Indigenous people. (For more information, see Chapter 2, Aboriginal People and the Law.)

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### [33.30] People on remand

A person who is arrested and not given police bail (see Chapter 14, Criminal Law) is held in

police cells until brought before a magistrate. If bail is not granted, or the person cannot meet bail conditions (such as payment of a cash deposit called a surety), the person is taken to gaol. Prisoners in this situation are called *remand* prisoners. Note, there is often a delay of a week in police cells before a bed becomes available in gaol.

Men arrested and taken before a magistrate in or near Sydney and remanded in custody are taken to the Metropolitan Remand and Reception Centre (MRRC) at Silverwater. Women are taken to Silverwater Women’s Correctional Centre.

If bail is refused in the Local Court, the prisoner can only make another application for bail in the Local Court if there are grounds for a further application (*Bail Act 2013* (NSW), s 74). Prisoners can also apply to the Supreme Court for bail. The process for applying for bail in the Supreme Court changed substantially in June 2019 with the introduction of Practice Note 11. An application for Supreme Court Bail must now only be lodged, and will only be allocated a hearing date, if the matter is ready to proceed. Application forms should be available at all prisons but prisoners should speak with their lawyers about making a

Supreme Court Bail Application where possible. The *Bail Act 2013* (NSW) was substantially amended from 20 May 2014 and an application for bail by an inmate is now called a release application.

Unsentenced prisoners are called remand prisoners. They should be held separately from sentenced prisoners.

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### **Remand prisoners who need psychiatric help**

A medical officer interviews remand prisoners when they come into gaol. If a male prisoner appears to need psychiatric assistance, Corrective Services may send them to the Long Bay Prison Hospital or the Mental Health Screening Unit at the MRRC for further assessment. Female prisoners may be placed in the Mental Health Screening Unit at Silverwater Women's Correctional Centre. In practice, many people on remand do not receive timely psychiatric care due to a lack of mental health services and the limited availability of beds or cells for mental health screening.

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### **[33.40] Women prisoners**

In March 2019, the full-time prison population in NSW was 13,466, of whom 996 were women. There are four female only prisons in NSW, Silverwater Women's Correctional Centre, Emu Plains Correctional Centre, Dillwynia Correctional Centre at Windsor and Mary Wade Correctional Centre at Lidcombe. There are also women-only units in some country gaols.

#### **Facilities for women with children**

There are limited facilities at Jacaranda Cottages at Emu Plains, and at Parramatta Transitional Centre, for women prisoners to keep their children up to school age with them in gaol. They can also apply under s 26 of the *Crimes (Administration of Sentences) Act* to serve their sentence with their children in an appropriate environment pursuant to a local leave permit.

### **[33.50] Child offenders**

Generally, offenders aged under 18 years are not held in correctional centres. They are held in detention centres under the *Children (Criminal Proceedings) Act 1987* (NSW) and the *Children (Detention Centres) Act 1987* (NSW). Under limited circumstances, a young person may be transferred from a detention centre to an

adult prison (*Children (Detention Centres) Act*, ss 28, 28A, 28B, 28BA); and a young person who has committed a serious offence may be sentenced to imprisonment rather than detention in a detention centre. Also, if they are over 21 years when the sentence is imposed, they must serve their sentence in prison rather than detention unless the sentence or non-parole period of the sentence will expire within six months of the person's 21st birthday (*Children (Criminal Proceedings) Act 1987*, s 33(1)(g)(ii)).

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Juvenile offenders are discussed in Chapter 7, Children and Young People.

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### **[33.60] Prisoners who are forensic patients or correctional patients**

Due to a mental illness or condition, some prisoners are found by a court to be unfit to stand trial, or not guilty because they are mentally ill, or sentenced to a limiting term. These prisoners are known as forensic patients. After being sentenced or while on remand, some prisoners are transferred to a mental health facility. They are known as correctional patients.

The rules for dealing with forensic and correctional patients are in the:

- *Mental Health (Forensic Provisions) Act 1990* (NSW);
- *Mental Health Act 2007* (NSW);
- *Mental Health (Forensic Provisions) Regulation 2017* (NSW); and
- *Mental Health Regulation 2013* (NSW).

These rules mean that these patients may be held in prisons, hospitals and other places (subject to compliance with correct procedures and a court order).

#### **Forensic patients**

Under s 46 of the *Mental Health (Forensic Provisions) Act*, the Mental Health Review Tribunal must review forensic patients every six months. The Tribunal may make orders about their continued detention, care or treatment; or, their release into the community conditionally or unconditionally (s 47). They can be released on a community treatment order (s 67).

Those serving a limiting term, set by the court, cease to be a forensic patient at the end of the term and must be released from prison or hospital. They may also be released earlier.

### Correctional patients

A prisoner may be transferred from a prison to a mental health facility while on remand or while serving a sentence (s 55). The Mental Health Review Tribunal must review the prisoner who is transferred as soon as possible (s 59); and, if they remain a correctional patient, every six months (s 61).

A correctional patient's sentence keeps running, and they are still eligible for release on parole (s 60(3)). Parole is often granted together with a community treatment order. If the Tribunal classifies the person as an involuntary patient (s 65), they cannot obtain parole.

A correctional patient ceases to be such if: they are transferred back to prison; they are released on parole; their sentence expires (s 64); or the tribunal makes them an involuntary patient (s 65).

The Mental Health Advocacy Service (part of Legal Aid NSW) provides legal representation for forensic and correctional patients appearing before the Mental Health Review Tribunal.

## In gaol

### [33.70] Arrival

On arrival at the reception prison (generally, the Metropolitan Remand and Reception Centre for men and Silverwater Women's Correctional Centre or Mary Wade Correctional Centre for women), prisoners are first taken into a reception room by Correctional Officers.

They are stripped of all their personal possessions, including civilian clothes, which are recorded and put in storage (they are usually allowed to keep wedding rings and watches), and searched. They are strip-searched and scanned with a hand-held metal detector. With the exception of an emergency, officers must not search prisoners of the opposite sex.

A physical description is taken. The prisoner is weighed and measured, and marks and blemishes are noted. The prisoner is issued with prison clothing and given a six-figure prison identification number (known as a MIN) unless they already have one from previously being in gaol.

The prisoner is assessed by a medical officer, a Services and Programmes Officer and a primary health nurse to assess any special needs, including mental health issues, and meets with a prison committee which explains gaol procedures. Justice Health staff will be notified if there are concerns about health, drug and alcohol issues, self-harm, if the inmate has been detained under the Mental Health Act or if a specific request for psychiatric or medical attention has been made.

### Offender Integrated Management System (OIMS)

The Offender Integrated Management System (OIMS) governs the management and case management of prisoners in NSW. It records all admissions, releases, movements, classifications, property, legal orders, visits, inmate trusts and offences in custody.

### Aboriginal prisoners

Prisoners are to be given the opportunity to disclose if they are Aboriginal or Torres Strait Islander during reception, and this is to be recorded on OIMS. If an Aboriginal prisoner is received into custody on the weekend, the Aboriginal Inmate Delegate (AID) may be notified.

### [33.80] Classification

Prisoners are assigned a security rating or classification at various points during their incarceration. A prisoner will be classified as soon as they enter into custody and at least once every 12 months after that.

A prisoners classification will affect their day-to-day life in custody. It will dictate which correctional centre they get transferred to and it will affect their eligibility for and access to programs. This is because some programs are held in minimum security areas which means that a prisoner with a certain classification may be prevented from attending.

There is a different classification system for male and female prisoners. Male prisoners are classified

from AA as maximum to C3 as minimum (cl 12) and females are Category 5 as maximum and Category 1 as minimum (cl 13). A prisoner who has committed or has attempted to commit an escape offence in the past will have an E classification and will either be in medium or maximum security. Classification of male and female prisoners:

	<i>Male</i>	<i>Female</i>
Maximum	AA, A1, A2 and E1	Cat 5, 4, 3 and E1
Medium	B, E2	E2
Minimum	C1, C2 and C3	Cat 2, 1

Once sentenced, prisoners are assessed under the *Crimes (Administration of Sentences) Regulation* and a case plan is prepared (cll 24, 25).

### **Levels of gaol security**

Correctional Centres in NSW are divided into three types of security classification: maximum security, medium security and minimum security.

### **High risk categories / maximum security**

Categories AA, A1 and A2 for males and categories 5 and 4 for females are prisoners considered to present a special risk to good order and security, and are confined by a secure physical barrier with towers. Classifications AA and Category 5 are for inmates who are regarded as representing a special risk to national security.

The Commissioner may also designate a prisoner as *high security, extreme high security, extreme high risk* or national security interest depending on the perceived level of danger to other people, threat to good order and security, and, threat to the peace, order or good government of the State (cl 15).

### **Medium risk categories / medium security**

Category B for males and category 3 for females are prisoners to be confined by a secure physical barrier.

### **Low risk categories / minimum security**

Categories C1, C2 and C3 for males and categories 1 and 2 for females are prisoners who need not be confined by a physical barrier and who need not be supervised.

### **Conviction of escape or attempted escape**

Category E1 and E2 prisoners (there is no category D) are those who have been convicted of escaping or attempting to escape (cl 14). They cannot:

- be moved to minimum security institutions;
- enter work release programs or go on day or weekend leave;
- progress through the classification system except on special recommendation from the Review Council that they be reclassified.

### **Review of classification**

Except for serious offenders (see below), a prisoner's classification is reviewed at least once every 12 months (cl 24) by a *case management team of at least two correctional centre staff* and which usually consists of a senior correctional officer and an Offender Services and Programs Officer. The prisoner who is having his classification, placement and case plan reviewed must be at the meeting unless there are exceptional circumstances. A prisoner may request a review of classification or case plan at any time if he or she can present information which was not previously available or can demonstrate that they were denied procedural fairness when the decision was made (cl 32).

### **Public interest inmates**

A prisoner will be classified as a public interest inmate if convicted of a certain offence. A public interest inmate is one who is described by or has been convicted of one or more of the following:

- of wide public interest;
- solicit or conspiracy to murder;
- manslaughter;
- illegal use and/or sale of a firearm(s) or dangerous substance;
- driving offences – if an offender has been convicted of driving causing death or aggravated bodily harm (sentence of three years or more);
- domestic violence – if an offender is the perpetrator of serious domestic violence of relevance to a current conviction to which they have received a custodial sentence of 12 months or more;
- sex offences – if an offender has been convicted of a sex offence against a person 16 years of age or under (sentence of three years or more);

- employee of a criminal justice/customs agency – if an offender has been convicted of an offence while an employee of a Criminal Justice/Customs Agency (sentence of three years or more);
- bringing non-citizens illegally into Australia (people smuggling and related offences) (sentence of five years or more);
- unlawful non-citizens – convicted of an offence while not an Australian citizen (includes offenders who have had a permanent residency visa cancelled).

The Commissioner and the Director (Offender, Classification, Case Management and External Leave Programs) can also confer this status on an offender serving a custodial sentence.

Prisoners regarded by the Commissioner of Corrective Services as *public interest* inmates must be considered by a special committee if they are seeking a C3 (males) or category 1 (females) classification (ie, minimum security which involves unescorted leave).

### **Serious offenders**

A serious offender is defined by the *Crimes (Administration of Sentences) Act* to be an offender who is serving a sentence for life, an offender who is serving a term of imprisonment of at least 12 years, is serving a sentence for murder, an offender who is a Commonwealth post sentence terrorism inmate, a NSW post sentence inmate or an offender prescribed by the regulations to be a serious offender.

Serious offenders are assessed by the Serious Offenders Review Council (SORC) which makes a recommendation to the Commissioner in relation to classification and placement. If a serious offender is being considered for C3 (males) or category 1 (females) classification (ie, minimum security which involves unescorted leave), notice must be given to any victim of the offender recorded in the Victims Register (*Crimes (Administration of Sentences) Act*, s 67).

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### **Prison subculture**

Many prisoners may find it difficult to adjust to life in prison.

Prisoners who feel that they are in danger can ask to go on protection where they are separated from mainstream prisoners, but work and education opportunities are not as good, and there may be a stigma for being on protection.

It is advisable for prisoners not to discuss their legal matters with anyone other than their lawyer. Information that is disclosed to anyone else in prison may be passed on to the authorities and is not covered by privilege.

## **[33.90] Segregation, separation and protective custody**

Corrective Services NSW is responsible for the safety of all prisoners in custody. In some circumstances, it might be necessary to place a prisoner in segregated or protective custody. The decision to place a prisoner in segregated or protective custody will remain until it is revoked.

### **Applying for review**

A prisoner whose period in segregation or protective custody exceeds 14 days may apply to the Serious Offenders Review Council for a

review hearing (s 19). The prisoner is entitled to be legally represented at the hearing. Legal Aid NSW's Prisoners Legal Service provides solicitors (free of charge) to appear. At the hearing, the Review Council may revoke, confirm or amend the direction (s 22).

### **Segregation**

The process of segregation is outlined in the *Crimes (Administration of Sentences) Act*. A prisoner can be placed in segregation if it is either for the personal safety of another, the security of the correctional centre or the good order and discipline within a correctional centre.



## Aboriginal prisoners in segregated custody

If an Aboriginal inmate is to be placed in segregated custody, the Regional Aboriginal Programs Officer (RAPO) will be informed and the prisoner will have access to a member of the Aboriginal Inmate Committee or other appropriate delegate. This is to reduce the possibility of problems which may lead to physical or mental harm.

## Mentally ill prisoners in segregated custody

A prisoner with a mental illness in segregated custody must be managed in collaboration with Justice Health & FMHN. Justice Health will assess and manage the prisoner according to their policies.

A prisoner in segregated custody is not to be deprived of any rights or privileges and while in segregated custody will be visited daily by the Functional Manager (FM) to establish wellbeing, and a prescribed health officer to ensure access to essential medical care. A segregated custody direction by the governor is only relevant to that particular centre and cannot be transferred to any other correctional centre.

## Protective custody

A prisoner may be placed in protective custody at their request or at the direction of the Commissioner. A prisoner may be placed in protective custody where it is determined that the inmate may be at risk and that risk cannot be managed. The most common reasons for protective custody include the nature of the prisoners offence or the previous employment of the inmate (eg, police officer or correctional staff).

Once in protection, the prisoner will be in isolation from other prisoners and will only be able to associate with other like inmates determined by the Commissioner or governor.

A protective custody direction by the governor is only relevant to that particular centre and cannot be transferred to any other correctional centre.

## Special Management Area Placement

Under s 33(3)(b) of the *Crimes (Administration of Sentences) Regulation*, the Commissioner may direct that a prisoner or prisoners be separated from other prisoners. This may be if a prisoner is deemed to be vulnerable or at risk from other prisoners.

During the reception process or as a result of a written application from a prisoner, a decision may be made to place a prisoner in the Special

Management Area. Prisoners held in this area are free to associate with each other and have access to similar programs and services as are available in mainstream.

Under s 78A, an inmate may also be separated from other inmates as part of the general care, control and management of inmates. A segregated custody direction is not required to authorise separation.

## [33.100] Placement and transfers

Clause 20 of the *Crimes (Administration of Sentences) Regulation* lists the factors the Commissioner is to take into consideration when determining the correctional centre placement for a prisoner. Relevant considerations include the prisoners classification, the provision of health care services to the prisoner, the availability of resources and programs and the proximity of the correctional centre to the prisoners family members.

Apart from when a prisoner is first received into a correctional centre, a prisoner may request a review of their placement at any time. Notwithstanding this, a review into the prisoners placement is to be carried out at least once every 12 months (cl 20(3)).

The authority to transfer prisoners from one prison to another is contained in s 23 of the *Crimes (Administration of Sentences) Act*. There must be an order from the Commissioner of Corrective Services before a prisoner can be transferred.

## Reasons for transfer

The reason for removal must be that:

- the prison is to be shut down or requires structural changes; or
- there is an outbreak or danger of contagious or infectious disease; or
- the prison is overcrowded; or
- it is necessary to separate different categories of prisoners; or
- for any other reason specified in the Commissioner's order.

## Problems with transfers

Transfers often cause problems for prisoners. Transfers from Sydney to country gaols and from country to metropolitan gaols effectively prevent prisoners from seeing and talking with friends, relatives and lawyers and maintaining

connection with culture. Moves are often made at short notice, giving prisoners little chance to notify people in advance or opportunity to put submissions against the transfer. In some cases, moves may disrupt a prisoner's education or training program, legal appointments and access to medical treatment.

### [33.110] Health care

Corrective Services NSW and Justice Health & Forensic Mental Health Network (Justice Health) share responsibility for delivering health services in custody. Justice Health is part of the broader health system and reports to the NSW Minister for Health.

Prison health care is not covered by Medicare or the Pharmaceutical Benefits Scheme (with some limited exceptions).

#### Medical services

Broadly speaking, the NSW government has a duty of care to prisoners under its control. Prisoners have a right to medical attendance, treatment and medicine necessary for their health (*Crimes (Administration of Sentences) Act*, s 72A) and must be examined as soon as practicable after being received into a gaol (*Crimes (Administration of Sentences) Regulation*, cl 284). Medical treatment is generally provided by nurses at gaol clinics, and medical practitioners who visit gaols. These are either employed by Justice Health or paid to attend as visiting medical officers.

#### Hospital treatment

Prisoners who need hospital treatment may be taken to the Long Bay Hospital, or to a public hospital close to the gaol. No surgery is carried out at the prison hospital.

In practice, prisoners may find that their access to specialist and allied health services is contingent on various factors including centre lock-downs, the availability of medical escorts to hospital and long public waiting lists.

#### Dental, optical and other treatment

Justice Health can determine the level of access prisoners have to both dental and optical treatment, hearing aids and other artificial medical appliances (cl 54). In theory, a prisoner can speak to Corrective Services NSW about seeing a private doctor at their own expense. In practice, however, it can be very difficult to make those arrangements due to the rules and limitations placed on telephone calls and visitors.

#### Disability Support

Prisoners with disabilities can access help through the Specific Needs team in the Statewide Disability Service (SDS) which forms part of Corrective Services NSW. The SDS is a multidisciplinary team which can provide inmates with assessments, support and access to assistive devices.

#### Enforced treatment

Prisoners can be made to have treatment if the Director of Justice Health is of the opinion that it is necessary to save the prisoner's life or prevent serious damage to health (*Crimes (Administration of Sentences) Act*, s 73).

The Supreme Court has held that a prisoner on a hunger strike can be force-fed if their condition becomes critical.

#### Psychiatric and psychological services

Psychiatric services are provided by Justice Health staff and visiting medical officers, including psychiatrists, who visit the gaols. Nurses at some gaols have specific mental health training. Some prisoners with serious psychiatric illnesses are held in special wards at the Long Bay Hospital or the MRRC, but bed placements are limited compared with the number of inmates requiring treatment.

Psychology services are delivered by Corrective Services NSW as part of Offender Services and Programs.

There is limited access to both psychological and psychiatric services, and prisoners may experience delays in accessing treatment and counselling.

#### Women's Health

Women have the right to access safe maternity care as well as quality gynaecological, antenatal and postnatal services while in custody. However, female prisoners may encounter the same barriers to access as those affecting the general population. The limited availability of counselling services in custody may also impact on women who require specific postnatal care.

#### Complaints about health services

In addition to other avenues of complaint (see [33.270]), prisoners can complain about health services by speaking to the Nursing Unit Manager (NUM) at their gaol or completing a "Self-Referral" Form. As far as practicable, prisoners should keep a written record of any conversations they have with health staff about their health complaint.

If the complaint does not resolve, or the prisoner is not satisfied with the response, they can write a complaint to Justice Health or lodge a written complaint with the NSW Health Care Complaints Commission (HCCC). The HCCC performs a role similar to an independent medical ombudsman. Its functions and powers are governed by the *Health Care Complaints Act 1993* (NSW).

Procedures for addressing health problems in custody are set out in the JH&FMHN policy 2.015 *Patient Complaints Handling*. Lawyers representing prisoners can also opt to send a complaint to the Justice Health Client Liaison Officer.

Complaints about food, dietary requirements, hygiene, cell placement, disability supports, psychology services or access to programs must go to either Corrective Services NSW or the NSW Ombudsman. In cases where a prisoner mistakenly sends their health complaint to the wrong complaint body, the agency will generally forward the complaint to the correct person.

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### DNA testing of prisoners

The *Crimes (Forensic Procedures) Act 2000* (NSW) commenced on 1 January 2001. The Act authorises the taking of DNA samples from all prisoners serving a sentence for a serious indictable offence (ss 61–75). That is, an indictable offence punishable by life imprisonment or a maximum of five or more years' imprisonment (s 3).

The definition does not depend on the actual sentence imposed but on the maximum that could be imposed. The definition is therefore very wide and catches most prisoners.

#### *The procedure*

The sample can be taken by buccal (mouth) swab; hair sample (other than pubic hair); hand, finger, foot or toe print; or blood sample (see s 61). A hair sample or self-administered mouth swab is the usual methods.

Prisoners to be tested are asked by police if they consent to a sample being taken by mouth swab.

#### *If consent is not given*

If consent is not given, a senior police officer can issue an order on the spot (s 70) for the taking of a sample. If a prisoner refuses to comply, "reasonable force" may be used to obtain the sample (s 47).

Police cannot issue an order for the sample to be taken by a blood test: this can only be done by a court (ss 63, 73).

Arguably, there is more legal protection if consent is not given. A prisoner is entitled to say "I do not consent but I will comply if an order is produced". When police make an order, they must record the date, time and reasons, and make a copy available to the prisoner (s 73).

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### Prisoners with HIV/AIDS or hepatitis

Government policy is that prisoners with HIV/AIDS or hepatitis are integrated into the prison population, and under privacy laws their health status must remain confidential. An infected prisoner whose condition becomes known may be at risk of harm and should ask to go on protection.

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## [33.120] Education

While approximately 70% of prisoners have no formal educational qualifications, there are limited opportunities in custody for prisoners to participate in education programmes. Many prisoners are illiterate, and others cannot speak fluent English. The Commissioner may provide services and programs, including educational and vocational programmes (*Crimes (Administration of Sentences) Regulation*, cl 60).

### Courses provided in gaols

Some courses are provided to teach elementary skills and provide job training. Funding cutbacks from time to time have led to problems in meeting even these basic needs.

### Courses run by other institutions

Prisoners may enrol in correspondence courses with TAFE, BSI Learning and universities, and some may be granted leave to attend classes outside the gaol (*Crimes (Administration of Sentences) Act*, s 26). While it is positive that these learning opportunities are available to some inmates, it can be difficult for prisoners to complete educational courses in this way. This is because there is no internet access for prisoners in custody and they often have difficulty accessing computers to complete assignments.

### Prisoners with intellectual disabilities

Facilities for prisoners with intellectual disabilities are limited. These prisoners have special learning needs, and may be particularly vulnerable in the prison system.

There are development units for prisoners with intellectual disabilities at certain prisons. These units have formal education and work programs. The Statewide Disability Services unit co-ordinates programs for intellectually disabled offenders.

### [33.130] Prisoners who are parents

There are no special rights for prisoners who are parents. In relation to care proceedings by Department of Communities and Justice (DCJ), Prisoners Legal Service at the Legal Aid NSW may be able to provide legal advice and assistance.

Female prisoners can have young children live with them at some facilities (see [33.40]).

Shine for Kids is a charity which supports children with a parent in prison. They provide a Prison Visits Programme, run Child/Parent Activity Days and can assist with transport for children to visit a parent in prison if they have no other transport options.

If the prisoner is serving a sentence for a sexual offence, the Commissioner may bar visits by persons under the age of 18 years (*Crimes (Administration of Sentences) Regulation*, cl 108). This can happen even if the child is not the victim of the offence the prisoner has been convicted of.

### [33.140] Employment

The governor of a correctional centre may make an order directing a convicted inmate to carry out work or community service work (*Crimes (Administration of Sentences) Act*, s 6). A prisoner is not required to carry out the work if they are not capable of doing so.

#### Corrective Services Industries (CSI)

All eligible sentenced prisoners in NSW are expected to participate in Corrective Services Industries (CSI) work programs. Prisoners on remand are not required to work but are encouraged to do so.

CSI operates a number of factories within the prisons which manufacture products for the public and private sector. Prisoners are paid a weekly wage which is to provide an incentive and reward for participation. This wage can be used for buy-ups, to assist family members, to contribute to victim's compensation and to accumulate for release.

Although prisoners are paid, the pay is well below award rates and is generally \$70.02 per week based on a five-day 30-hour week. Prisoners who work seven days per week may accrue more. Prisoners who want to work but can't because of lack of availability will receive \$15.51 per week.

### Work release

Section 26 of the *Crimes (Administration of Sentences) Act* provides that the Commissioner may issue a leave permit allowing an inmate to be absent from a correctional centre for a number of reasons including work, education and training. Work release and Education/Vocational Training Programs allow selected inmates to go into the community each day. An inmate must be classified as minimum security C3 (male) or Category 1 (female) to be able to get a case plan which allows unescorted leave.

An inmate participating in the Work Release Program must pay any Victim's Compensation Levy (VCL) from their wages. They must also pay for their travel fares and a contribution to the administration of the Program which can be 15% of their weekly salary.

Not all inmates with a C3 or Category 1 classification will be eligible for work release and a number of factors are taken into consideration including their offences and remaining period of incarceration. The opportunities available will vary depending on the individual correctional centre and location and unescorted external leave programs are only available to inmates at centres which house minimum security inmates.

### Craftwork

Prisoners are encouraged to develop their creative skills through art and craft programs. If a prisoner engages through an education program, Corrective Services will cover the supply of the materials. Prisoners can exhibit their art and craft by display in the centre's visiting area, in local town display facilities or through any other arrangements approved by the governor.

Corrective Services will keep a percentage of the sale of artworks (between 15% and 30%) and the remaining amount will be deposited into the prisoners gaol account.

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#### *If a prisoner is injured at work*

The payment of a prisoner for work done does not mean that the prisoner is a worker for the purposes of the *Workers Compensation Act 1987* (NSW) (*Crimes (Administration of Sentences) Act*, s 7). Prisoners do not have any recourse in general employment law for injury or otherwise but a prisoner injured at work may use common law remedies (see Chapter 3, Accidents and Compensation).

Workplace safety in NSW is mainly regulated by the *Work Health and Safety Act 2011* (NSW) and *Work Health and Safety Regulation 2011* (NSW) (see Chapter 22, Employment). Corrective Services, as the occupier, should be bound by these laws to protect working prisoners, but the law is not clear on this point. There is a duty of care that exists between Corrective Services and a prisoner but it is not that of an employer and employee.

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## [33.150] Voting rights

### Federal elections

Under the *Commonwealth Electoral Act 1918* (Cth), anyone serving a prison sentence of three years or longer, or found to be of unsound mind, is ineligible to vote in federal elections (s 93). A prisoner can remain on the electoral roll but will not be able to vote until release.

### State elections

Under the *Electoral Act 2017* (NSW), a person is not entitled to be enrolled to vote if they are serving a sentence of imprisonment of 12 months or more (s 30).

Corrective Services NSW will provide prisoners with the opportunity to vote if eligible however election materials are not permitted to be distributed.

## [33.160] Property

On being received into gaol, a prisoner must surrender all property that is in their possession and a record is kept (*Crimes (Administration of Sentences) Regulation*, cl 7, 10). The record will contain details about the property collected and details of any property disposed of.

The governor will decide what property may be returned to the prisoner to use while in custody, what property may be retained by the governor for return to the prisoner upon release from custody and what property needs to be collected. If the surrendered property is not collected within 30 days, the governor can either dispose or sell the property. The proceeds from any sale are to be held for the prisoner (*Crimes (Administration of Sentences) Regulation*, cl 9).

All prisoner private property and all property transactions are to be recorded on the OIMS. Prisoners can acquire property while in custody and can receive property delivered by visitors. Prisoners can receive items in relation to their legal matters, unframed photos, socks and underwear. Any private property issued to a prisoner cannot be valued at more than \$50.

All property purchased through buy-ups is included in the prisoner property volume and quantity limits. Prisoners are allowed to have a range of personal items including reading material, personal toiletries, art and craft/education material and electrical equipment.

# Communication with prisoners

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## [33.170] Letters

Prisoners are able to send and receive letters and parcels. The regulations provide that letters and parcels sent to and by a prisoner must not be censored (cl 110). However, the general manager of a gaol has the authority to open, inspect, read and confiscate a parcel or letter if it contains threatening, offensive, indecent, obscene or abusive matter (cl 112). There are restrictions on correspondence with Category AA, Category 5 and extreme high-risk prisoners (see cl 115, 116, 117).

If a prisoner is unable to read or write, they should be provided with assistance from a Corrective Services staff member.

With the exception of letters between prisoners which is covered by Corrective Services NSW, prisoners must meet the cost of personal correspondence and can purchase pre-stamped envelopes from buy-up. If a prisoner does not have any money, Corrective Services will cover the cost of two letters per week.

Certain correspondence is considered privileged and must not be opened, inspected or read prior to it being sent or received by an inmate.

### Privileged correspondence

Some letters can be opened only by the prisoner (cl 113). These are letters to and from exempt bodies which includes:

- the Ombudsman, ICAC, Privacy Commissioner and Legal Aid NSW;
- a member of parliament, a lawyer or a police officer.

The letter must be contained in an envelope addressed to the prisoner but sent within another envelope addressed to the governor together with a letter requesting that the enclosed envelope be delivered to the prisoner without being opened, inspected or read.

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### *The effect of claiming privilege*

Where privilege is claimed, only the prisoner can open the letter. However, the general manager can require the prisoner to open it in their presence. If there is anything in the letter that the prisoner is not entitled to have, the general manager may take the letter and its contents.

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### *The Ombudsman*

All letters addressed to the Ombudsman or coming from the Ombudsman's Office to a particular prisoner should pass through the prison department unopened, although the department will become aware of the complaint when it is followed up by the Ombudsman.

### *Confidential letters from lawyers*

Letters from lawyers are privileged (cl 113) (to assert this privilege see the information on privileged correspondence above).

There is no limit on the number or length of letters that may pass between a prisoner and their lawyer.

### *Correspondence between prisoners*

A prisoner is allowed to correspond with another prisoner at another correctional centre and Corrective Services NSW will provide an envelope and cover the cost.

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### *Privacy in cells*

It is difficult to ensure that prisoners' letters kept in cells will not be read by officers or other prisoners. This is why it is important that material is not sent to a prisoner that could jeopardise their safety. For example, material indicating the prisoner has been charged with a sexual offence or an offence where a child has been injured could result in the prisoner being assaulted if other prisoners read the material.

## [33.180] Telephone calls

Prisoners are provided with access to the Offender Telephone System (OTS) which allows them to make phone calls to friends, family and legal representatives. Corrective Services will cover the costs of one personal local phone call per week for a convicted inmate, three personal local phone calls and all legal phone calls per week for an inmate on remand and all phone calls to those numbers on the Common Auto Dial List (CADL).

Prisoners have a "phone card" on which approved phone numbers are entered. Prisoners may have up to 10 personal numbers and three local contact numbers programmed on their card. With the exception of legal phone calls, all calls are recorded. The calls are limited to six minutes for personal local and interstate calls and 10 minutes for international or legal calls. Prisoners are not able to make consecutive calls and once a telephone call has been completed, the system will not allow the prisoner to make another call for 10 minutes.

Corrective Services supplies free automated calls to 22 agencies via what is called the CADL phone system. The agencies include Law Access, the Ombudsman, Legal Aid NSW, the Aboriginal Legal Service, Revenue NSW, Child Support Agency, DCJ and Housing NSW. A list of the codes for each agency is displayed at the phone (eg, Legal Aid is 11#). These calls are free but are limited to 10 minutes.

Legal Aid NSW's, Prisoners Legal Service (PLS), can be contacted on the CADL phone by calling Legal Aid (11#) or Law Access (02#) and asking to be transferred to PLS.<sup>1</sup>

### *Inter-centre telephone calls*

The governor may approve a prisoner making and receiving a telephone call with a prisoner at another correctional centre. The prisoner will need to complete an application and the governor of both centres must approve this contact. Inter-centre telephone calls are at the discretion of the governor and correctional centre numbers cannot be programmed onto an prisoner's calling card.

### *Access to non-Offender Telephone System (OTS) telephones*

Prisoners can request to use a telephone that is not connected to the OTS for compassionate telephone calls in the case of family illness/accident, a death or birth in the family.

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<sup>1</sup> There may be changes to the way prisoners can access Legal Aid NSW in 2020.

## [33.190] Communication through Services and Programs Officer (SAPO)

Services and Programs Officers (SAPOs) can assist prisoners with personal or family problems and can be the link to families in the event of illness or crisis. Prisoners can apply for a leave permit (*Crimes (Administration of Sentences) Act*, s 26) on compassionate grounds such as visiting ill family members, attending a funeral or burial service or to attend an event of family or cultural significance.

## [33.200] Going to court

Prisoners are frequently taken from gaols to appear in court or appear via audio-visual link (AVL). An order must be made under s 77 of the *Crimes (Administration of Sentences) Act* directing that the prisoner appear. When a case is adjourned or the prisoner is refused bail, the court automatically makes the order for their next attendance at court. If a prisoner thinks that a s 77 order has not been made, they should check with Records at the gaol. If there is no order, the prisoner or their solicitor should contact the court where the prisoner is due to appear and ask that a s 77 order be issued. If there is no order, the prisoner will not be taken to court and could be noted as “failed to appear”.

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### *Prisoners Legal Service*

The Prisoners Legal Service (PLS), run by Legal Aid NSW, represents prisoners in:

- hearings before the State Parole Authority (and related Supreme Court proceedings);
- life sentence redetermination applications in the Supreme Court;
- appeals against segregated or protective custody directions; and
- Visiting Magistrate hearings.

PLS also regularly visits most NSW gaols to offer general advice and minor assistance on legal matters. A prisoner who wants to consult the service can ask

at the gaol for their name to be put in the “Legal Aid book”; or, use the CADL phone system to phone Law Access (02#) or Legal Aid NSW (11#) and ask to be transferred to PLS. PLS currently has solicitors who can provide advice in relation to criminal law, family law and civil law matters.

PLS has its own staff for gaol visits in Sydney. Outside the Sydney metropolitan area, legal services are provided by local solicitors or local legal aid lawyers on behalf of the service.

The service is generally free to prisoners, however some services are subject to means and merit tests.

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## [33.210] Visits to gaols

### **Lawyers**

Prisoners may be visited by a lawyer or barrister (*Crimes (Administration of Sentences) Regulation*, cl 82). Under cl 85, the lawyer must make an appointment with the prison’s general manager for a legal visit. This requirement is insisted on only at some gaols.

Confidential communication with a lawyer is an entitlement. In most gaols, prisoners can see their lawyers in special rooms with a table and chairs and no screen between them. Lawyers can take legal materials into a prison to use during the conference with their client. An officer can inspect but not read any document or recorded material taken into a legal visit (cl 103). Most gaols now have

audio-visual link (AVL) for court appearances, and these facilities are also used for legal visits if the lawyer has access to AVL. Lawyers can also book a telephone call with a prisoner.

### **Family and friends**

#### ***Remand prisoners***

Remand prisoners are usually allowed two visits (not connected with legal matters) per week (cl 76). There can generally be up to four visitors at each visit.

#### ***Other prisoners***

Other prisoners are normally allowed one visit per week. In the case of convicted prisoners, the governor of the gaol can permit more visits, for extreme high risk restricted inmates only the

Commissioner can approve additional visits. Civil prisoners are permitted to have visits on a daily basis.

In some circumstances visits may be approved for longer periods than normal, more regularly, or with more visitors able to attend at the same time. This often happens when a prisoner is critically ill or dying.

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### **Women with children**

Women with children can apply for approval to have special all-day visits with their children.

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### **In maximum and medium security gaols**

In maximum and medium security gaols, visits are usually held in areas that contain facilities for *box visits* and *contact visits*.

Prisoners restricted to box visits are separated from their visitors by a wire screen, or a glass panel with a grille through which they can talk.

In contact visits, prisoners and visitors are allowed to sit together around a table.

Where communication is through glass, holding up written cards is not a breach of any regulation (*R v Fraser* (unreported, District Court of NSW, 9 March 1978)).

### **In minimum security institutions**

In minimum security institutions, arrangements for visits are usually less formal and more flexible, especially in length, and they may take place in a garden area.

### **Supervision of visits**

A visit must be held in the sight and hearing of prison officers (cl 102).

### **Refusal or termination of visits**

Under the regulations, a visit can be refused (cl 106) or terminated (cl 104). This can happen, for example, if:

- the visitor fails to produce adequate evidence of identity and residence or refuses to remove face covering (cl 93);
- the visitor passes anything to the prisoner without permission (cl 99);
- the visitor is under the influence of alcohol or a drug (cl 107);
- the visit may adversely affect the security, discipline and good order of the gaol (cl 106).

### **Arranging visits**

Prisoners do not have to speak to visitors (cl 79). A prisoner expecting a visit from a spouse, for example, may well refuse to see other visitors. Friends and relatives who are not in close contact but are interested in visiting should write to the prisoner, therefore, to find out if they would be welcome and when they should visit.

Most gaols require an appointment to be made in advance of a family or friend visit. All visitors should call the gaol to check visiting times and whether an appointment is necessary, as this varies between prisons. On the proposed visiting day, visitors should also ring the gaol to confirm the visit will still go ahead. This is because visits may be cancelled without notice (eg, prison officers may be unavailable due to illness or industrial action) or the prisoner may have been transferred to another gaol.

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### **Assistance with travel costs**

Regular family visits to prisoners in distant gaols are time-consuming and expensive. Financial assistance from Corrective Services NSW for travel costs is available where certain criteria are satisfied.

Family members should speak to the SAPO at the gaol to find out if they are eligible, and how to apply. Also, the Community Restorative Centre provides a subsidised bus service to some country gaols.

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### **Who can visit?**

In general, any member of the public can visit a person in a correctional centre. However, the governor of a gaol may refuse to allow a person to visit if of the opinion that the visit would prejudice the good order and security of the centre (cl 106) or if the person is under the influence of alcohol or drugs (cl 107). The Commissioner may bar a person from visiting or direct that a person under the age of 18 years be prevented from visiting (cl 108).

### **Withholding visits as a punishment**

Contact visits are a “withdrawable privilege” (*Crimes (Administration of Sentences) Act*, cl 165). Breaches of prison discipline may result in a prisoner losing rights to all but legal visits (see *Crimes (Administration of Sentences) Act*, s 53; *Crimes (Administration of Sentences) Regulation*, cl 163). It may also result in the prisoner being banned from



contact visits for a period of time. This means they can still have visits but they will be box visits.

## Police

Police can only enter gaols to interview prisoners with the general manager's permission.

### *Police powers inside gaols*

When they do enter, police have the same powers inside the gaol as they have outside. The prisoner's right to refuse visitors does not include visits from police or other officials (cl 79). However, a prisoner has the same right as anyone else to decline to participate in a police interview.

### *Police interviews outside the gaol*

Police need a written order from the Commissioner of Corrective Services to take prisoners outside the gaol for questioning (*Crimes (Administration of Sentences) Act*, s 25). The prisoner should be allowed to contact a lawyer as soon as possible if this happens. They do not have to participate in a police interview.

### *Notification to the prisoner's lawyer*

It is Corrective Services policy that departmental officers must notify the legal representative of a prisoner required for interview by police, if the prisoner requests it.

### *If the prisoner wants legal advice*

A prisoner who wants a lawyer present at the interview but cannot nominate one must be given the opportunity to seek telephone advice from Prisoners Legal Service at Legal Aid NSW.

## Parole officers and psychiatrists

Parole officers, psychologists and psychiatrists who are preparing reports for a court or tribunal may visit prisoners. A prisoner does not need to answer any particular questions. If a prisoner does choose to answer questions, he or she should

remember that police may obtain and use any admission or confession they make. Prisoners should also be mindful that choosing not to cooperate during such an interview will be reported back to the Court or Tribunal and may adversely affect their position or delay proceedings.

Sometimes prisoners are placed in the hospital psychiatric facility until they are interviewed by a psychiatrist. Based on that interview, the psychiatrist may later give evidence for the Crown and against the prisoner. The prisoner (who is often confused and intimidated by the surroundings) is entitled to know the status of the interviewing doctor. Refusal to see this Crown psychiatrist may result in the prisoner staying in the psychiatric facility until after the trial.

## The Ombudsman

The Ombudsman's office may inspect facilities and interview prisoners and often does so.

## Consular representatives

A migrant who is a national of a foreign country may be visited by a consular representative (cl 83).

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### *Inmate financials*

Money is no longer able to be left at the prison gate or deposited directly into an inmates account. All personal and professional contacts wishing to deposit money into an inmate account must be registered and recorded on OIMS before a deposit can be accepted. To make a deposit, family and friends will need a Visitor Identification Number (VIN) and a Depositor Reference Report which will contain a personalised Customer Reference Number (CRN).

Friends and family can deposit money using BPAY or by making a deposit at any post office. There is a \$100 individual transactional limit and an inmate can receive up to \$600 per month.

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# Prison discipline

[33.220] Prisoners are subject to the general criminal law. For example, if a prisoner lights a fire in a gaol building, they can be charged with arson and tried in the criminal courts.

## [33.230] Prison offences

There are also special rules creating prison offences (see *Crimes (Administration of Sentences)*

*Act*, ss 51–65; *Crimes (Administration of Sentences) Regulation*, cl 127–162).

If it is alleged that a prisoner has committed a prison offence, they are charged by the governor of the prison. The offence may be dealt with by the governor (s 52), or they may refer it to a visiting magistrate if it is serious (s 54).

## [33.240] Visiting magistrates courts

If a matter is referred to a visiting magistrate, a court is set up in the gaol to hear the case. Visiting magistrate's hearings are not held very often but when they are the prisoner is entitled to be legally represented.

### Procedure

Procedures during a visiting magistrate's hearing are the same as those in an ordinary magistrate's court (s 55), except that it is less formal, and it is not an open hearing – no one except the parties, their solicitors and witnesses are allowed to attend.

If the visiting magistrate is of the opinion that the matter constitutes a criminal offence, they may refer it to a Local Court (s 58).

### Legal representation

Representation is available in most gaols through Prisoners Legal Service.

Prisoners who do not want to be represented must conduct their own case. The prisoner is allowed to cross-examine witnesses for the prosecution, give evidence, call and examine witnesses, and address the magistrate.

### If the offence is proved

If the visiting magistrate finds the offence proved beyond reasonable doubt, they can order that the prisoner:

- be reprimanded and cautioned;
- be confined to their cell for up to 28 days;
- suffer up to 90 days' loss of privileges;
- not receive payment for work completed for up to 14 days;
- be imprisoned for a period not exceeding six months; or
- pay compensation for damage to property (ss 56, 59).

If the visiting magistrate feels that no penalty is warranted even though the offence has been

proved, they also have the power to dismiss the charge.

### Appeals

There is a right of appeal from a visiting magistrate's decision to the District Court, but only if the visiting magistrate imposes imprisonment (s 62).

### Time limits

The appeal must be lodged within 28 days or, with leave of the court, within three months.

### Legal aid for appeals

Legal aid is available from Legal Aid NSW for such appeals, subject to a means and merit test.

## [33.250] Offences dealt with by the governor

### Advantages

The advantages for the prisoner of having the governor deal with a prison offence are that:

- it is quicker; and
- the maximum penalties are less.

### Disadvantages

The disadvantages are that:

- there is no general right of appeal;
- there is no right to be represented; and
- the rules of evidence do not apply.

### If the offence is proved

The governor must be satisfied beyond reasonable doubt that the allegation has been proved. If an allegation has been proved, the governor may impose one of the following penalties:

- reprimand or caution;
- up to seven days' confinement to a cell;
- up to 56 days' loss of amenities or privileges;
- loss of income from work for up to 14 days;
- compensation for damage to property (ss 53, 59).

The governor also has the power to dismiss a prison offence if they find that no penalty should be imposed.

### Mobile phones and drugs

The governor may order loss of privileges for up to six months:

- for possession of a mobile phone or parts (s 56A); or
- if drugs are detected in a prisoner's urine, or if the prisoner refuses or fails to give a urine sample (s 57).

### [33.260] Escape

Escaping lawful custody is a criminal offence (*Crimes Act 1900* (NSW), s 310D) and is dealt with in the Local or District Courts.

#### Was the person in prison?

Only someone in lawful custody can escape. The prosecution must show that the escapee was held

in a place proclaimed as a prison. A prisoner is still considered to be in prison if they are temporarily absent with the approval of the Commissioner – to play sport, attend university, work, or for one of a number of other reasons (see *Crimes (Administration of Sentences) Act*, s 38).

#### Penalty

Any prisoner who escapes or, who having been temporarily released, fails to return, is liable to 10 years' imprisonment (*Crimes Act 1900*, s 310D). The sentence imposed must be served in addition to the non-parole period of the original sentence the prisoner was serving (*Crimes (Sentencing Procedure) Act*, s 57).

## Complaints by prisoners

### [33.270] Complaints

A prisoner who has a grievance may be able to have it resolved without going to a court.

The people and organisations who can receive prisoners' complaints are:

- the general manager or governor of the prison;
- visiting magistrates;
- the Minister for Justice and/or Minister for Corrective Services;
- the Corrective Services Commissioner;
- Justice Health staff or the Client Liaison Officer;
- official visitors and the Inspector of Custodial Services;
- the Ombudsman – ring 08# on CADL phone system;
- the Health Care Complaints Commission – ring 17# on CADL phone system;
- the Corrective Services Support Line – ring 01# on CADL phone system;
- the Professional Standards Branch of Corrective Services in relation to behaviour of correctional officers.

#### The governor or general manager

A prisoner may make an oral or written request to a prison officer to speak to the governor or general manager of the prison.

The governor or general manager should respond on the day the request is received or as soon as practicable afterwards. They must tell the prisoner whether or not they propose to take

any action (*Crimes (Administration of Sentences) Regulation*, cl 168).

#### **Requests to speak to the Minister or the Commissioner**

Prisoners may ask to speak to the Minister or the Commissioner about a specific matter.

The request must be given to the governor, who may deal with the matter personally and must make a record of action taken. If the governor cannot deal with the matter, the person to whom the request is made must be told about it during their next visit (cl 169).

#### The Commissioner or Minister

Any prisoner can write a letter to the Commissioner of Corrective Services or the Minister for Justice without making a formal application (cl 170).

#### Official visitors

Official visitors for each prison are appointed by the Minister and must visit the prison at least once a month (*Crimes (Administration of Sentences) Act*, s 228). Their main role is to receive and deal with complaints made to them by prisoners and prison officers.

Category AA male inmates and category 5 female inmates, extreme high risk restricted inmates and national security interest inmates are not allowed to speak to the official visitor.

### **What the official visitor may do**

An official visitor can bring a complaint to the general manager's attention and try to have it resolved at that level. Otherwise, they can advise the prisoner making the complaint about what else they can do or, with the prisoner's permission, can refer the complaint to an appropriate person (*Crimes (Administration of Sentences) Regulation*, cl 166).

### **Reporting requirements for official visitors**

Each official visitor must make a written report to the Minister at least once every six months.

## **The Ombudsman**

### **What complaints can be made**

The *Ombudsman Act 1974* (NSW) specifically allows complaints to the Ombudsman by prisoners about Corrective Services NSW or its officers.

### **How to complain**

Complaints are made to the Ombudsman on a form available at the gaol, or by setting out the substance of the complaint in a letter.

This letter may be sealed by the prisoner and should be delivered unopened to the Ombudsman by the prison authorities (*Ombudsman Act 1974*, s 12). The Ombudsman's reply should also be passed to the prisoner unopened (*Crimes (Administration of Sentences) Regulation*, cl 113). A free call is available to the Ombudsman on the CADL phone system (08#).

### **What the Ombudsman can do**

The Ombudsman's powers are limited to making recommendations and making a report to the Minister and parliament. It is unusual for a recommendation by the Ombudsman to be ignored however the Ombudsman cannot force an agency to comply with the recommendations.

## **The Health Care Complaints Commission**

A prisoner who wants to complain about health treatment or services in prison (medical,

psychiatric, dental and optical) can make a written complaint to the NSW Health Care Complaints Commission (see Chapter 10, Consumers). Complaints may be about the quality of the service, lack of access to medication or delays in getting medical attention or treatment. A free call is available to Health Care Complaints on the CADL phone system (05#).

### **What the Commission can do**

The Commission may decide to investigate the complaint, and if it considers that the health provider's practice falls below a reasonable standard of care, it can initiate action such as disciplinary proceedings and make recommendations for policy change in Justice Health.

In most cases, the Commission refers the complaint back to Justice Health for local resolution. If the issue fails to resolve, it can facilitate an Assisted Resolution meeting between local staff and the prisoner, which functions like a conciliation. The process is non-binding and complainants are not entitled to ask for compensation.

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### **False or misleading complaints**

It is a Correctional Centre offence for a prisoner to make a complaint against the general manager or a prison officer which the prisoner knows is false or misleading (*Crimes (Administration of Sentences) Regulation*, cl 171).

It is an offence to deliberately make a false complaint to the Ombudsman (*Ombudsman Act 1974*, s 37(1)).

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### **The Corrective Services Support Line**

This commenced operation in 2003 and can be called if other avenues of complaint have been exhausted. Phone 01# on the CADL phone system.

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# **Appeals and legal actions by prisoners**

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## **[33.280] Appeals**

### **Appeals to the District Court**

Anyone who has been convicted by a magistrate in the Local Court has the right to appeal their

conviction or sentence to a Judge in the District Court (*Crimes (Appeal and Review) Act 2001* (NSW), s 11). There is no right to appeal from the District Court following an appeal hearing.

Appeal forms are available at gaols and must be lodged within 28 days of the date of sentence. The Court may grant leave to file an appeal up to three months after the day of sentence if it is not lodged within the initial 28 days. All forms should be sent to the clerk of the Local Court where the person was convicted. The Local Court will make a bail determination and then send the papers to the District Court. If bail is refused, the person can apply to the Supreme Court for bail.

A filing fee of approximately \$117 is payable when a District Court appeal is lodged for one offence. This fee may be higher for multiple offences. The Registrar has the power to waive this fee in some circumstances. Advice should be sought from a lawyer if a prisoner has difficulty filing their appeal – assistance can be provided to apply for a fee waiver.

### Appeals to the Court of Criminal Appeal

A person convicted in the District or Supreme Court can appeal their conviction or sentence (or both) to the Court of Criminal Appeal. This process is initiated by lodging a notice of intention to appeal form with the Registry of the Court of Criminal Appeal. The appellant then has six months within which to lodge their appeal. The necessary forms should be available at the gaol but legal advice should be obtained before filing an appeal. There is no filing fee for an appeal to the Court of Criminal Appeal.

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Advice about appeals and applying for legal aid is available from Prisoners Legal Service, which visits most gaols.

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## [33.290] Legal actions

### Bringing criminal proceedings for assault

A prisoner who alleges assault by a prison officer can personally (not through NSW Police) *lay an information* before a Local Court but this is difficult to arrange.

#### Procedure

The prisoner should ask the general manager to arrange a visit by a chamber magistrate, who must act on the information (unless it appears to be frivolous or an abuse of process, see *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27).

### Problems with proving the charge

The prisoner, as the informant, must satisfy the magistrate who hears the case beyond reasonable doubt that the officer assaulted them. In a case where it is a prisoner's word against a prison officer's, the prisoner will probably lose, unless they can produce witnesses and medical evidence of injuries.

### Legal aid

Generally, there is no legal aid to criminally prosecute an assault and prisoners must pay a lawyer or represent themselves. Legal aid might be available in some circumstances for any civil action arising from an assault by a prison officer.

### Costs

If the charge is dismissed, the magistrate may order the prisoner to pay the defendant's costs.

### Victim's compensation for an assault in gaol

The Victim Support Scheme is designed to assist those who have been a victim of crime and is coordinated by Victims Services.

By s 25 of the *Victims Rights and Support Act 2013* (NSW), a person is not eligible to receive victim's compensation for an assault which occurred while the person was imprisoned as a convicted inmate unless they can show special circumstances to justify an exception being made (eg, being seriously and permanently injured). If the prisoner was on remand or in custody only because of failure to pay a pecuniary penalty, they can make a claim. A claim must be made within two years of the incident.

### Bringing civil proceedings

It might be possible to take proceedings for damages arising from an assault in custody or for injuries sustained in an accident. However, the procedure is complex and requires specialist legal advice. Importantly, there are time limits whereby a prescribed notice must be given within six months of the incident under s 26BA of the *Civil Liability Act 2002* (NSW). Proceedings normally need to be commenced within six years but in some cases the claim must be filed within three.

There are some exceptions to the time limits for giving notice and commencing proceedings. If a prisoner can prove that they were "under a disability", the limitation period can be suspended (*Limitation Act 1969* (NSW), s11(3), s 50F, s 52).

**Felons (Civil Proceedings) Act**

By s 4 of the *Felons (Civil Proceedings) Act 1981* (NSW), a person convicted of a serious indictable

offence may not institute any civil proceedings in any court except by the leave of that court (asking the court for permission).

## Sentences and parole

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### [33.300] Non-parole periods

When a court sentences an offender to a term of imprisonment that is more than six months, they must first set a non-parole period. The court then sets the full term of the sentence by adding an amount not exceeding one-third of the non-parole period, unless it decides there are special circumstances (*Crimes (Sentencing Procedure) Act 1999* (NSW), s 44).

Standard non-parole periods are prescribed for certain serious offences (see Pt 4, Div 1A, s 54A).

The court may decline to set a non-parole period in some circumstances (s 45) and cannot set a non-parole period for a sentence of six months or less (s 46).

### What the court must specify

A court imposing a term of imprisonment must specify:

- the day on which the term commences; and
- the day on which the prisoner will be:
  - entitled to be released (at the end of the term); or
  - eligible to be released on parole (at the end of the non-parole period) (s 48).

### [33.310] Parole

Parole for sentences imposed under state legislation is overseen by the NSW State Parole Authority. Parole for Commonwealth offences is governed by the *Crimes Act 1914* (Cth) and decisions regarding release to parole for Commonwealth offenders is determined by the Commonwealth Parole Office in the Attorney-General's Department. What follows is an analysis primarily in relation to state parole orders.

### If no non-parole period was set

If the sentence has no non-parole period, the prisoner is not eligible to be released on parole and must serve the whole of the term in prison.

### Where there is a non-parole period

Prisoners are eligible to be released on parole if their sentence includes a non-parole period and they have served that term. The procedure for release differs depending on whether the total sentence is more or less than three years, but a prisoner may not be released to parole other than in accordance with an order directing their release (*Crimes (Administration of Sentences) Act*, s 127).

### Three years or less

A prisoner subject to a sentence of three years or less, with a non-parole period, is subject to a "statutory parole order" (s 158). They should be released from prison at the end of their non-parole period unless they are subject to other orders preventing their release. The State Parole Authority has limited powers to revoke parole before release (s 130).

### More than three years

Prisoners sentenced to more than three years with a non-parole period can only be released on parole if the Parole Authority makes a parole order (*Crimes (Administration of Sentences) Act*, s 134).

### What the Parole Authority must take into account

Initially, the Parole Authority considers an application for parole in a private meeting. That meeting must be held at least 60 days before the prisoner becomes eligible for release on parole (s 137).

The Parole Authority must consider a number of factors in making a parole order (s 135) and must determine that the release of the prisoner is in the interests of the safety of the community. The matters that the Parole Authority must consider can be found in s 135(3). They include:

- the nature of the offence and any comments made by the court when sentencing the prisoner;
- prison and criminal records and custodial reports;
- the likely effect on victims of the crime.

If the prisoner is a “serious offender”, the Parole Authority must not make an order for parole unless the Serious Offenders Review Council (SORC) has provided a report indicating that in its view release to parole is appropriate (s 135(5)). If SORC are not of the view release to parole is appropriate exceptional circumstances must be established before the Parole Authority can make a parole order. Exceptional circumstances are not defined in the *Crimes (Administration of Sentences) Act*, and it is extremely rare that the Parole Authority finds special circumstances.

### ***If parole is granted***

If the Parole Authority decides to grant parole, it makes an order directing release on parole, and specifying conditions. The order comes into effect on the day the prisoner is eligible for release, or if that day has passed, within 35 days of making the order (s 138).

### ***If parole is not granted***

If the Parole Authority decides not to make a parole order, it will advise the prisoner and either fix a review hearing or request reasons why a hearing should be given. The Parole Authority can decide that a hearing is not warranted (s 139).

If there is a review hearing, the prisoner appears by audio-visual link (AVL) and can be legally represented. Legal Aid NSW’s Prisoners Legal Service provides solicitors (free of charge) to appear at parole hearings.

## **The parole hearing**

### ***Notifying the prisoner***

The Parole Authority notifies the prisoner in writing of the date their parole is to be reconsidered (s 139). It must give the prisoner copies of reports and other documents that it intends to use when making the decision, except where doing so could:

- endanger the prisoner or someone else; or
- adversely affect the security, discipline or good order of a prison (s 194);
- jeopardise the conduct of a lawful investigation;
- prejudice the public interest;
- adversely affect the supervision of an offender which has been released to parole;
- disclose the contents of any offenders medical, psychiatric or psychological report.

On receiving the notice and reports, the prisoner must complete a notice which is returned to the Parole Authority and advises if the prisoner wants

to appear (by AVL) and be legally represented. The prisoner can nominate to be represented by a private lawyer or Legal Aid NSW’s Prisoners Legal Service. (The Aboriginal Legal Service (ALS) no-longer provides representation for Aboriginal people in parole hearings.) The Parole Authority will then send a copy of the papers to the lawyer nominated.

### ***If parole is refused***

If parole is refused, the prisoner is not eligible for parole again until they have served another 12 months in custody.

If parole is refused, there is no right of appeal. A prisoner who alleges there was an error of law or that the Authority’s decision was based on false, misleading or irrelevant information may apply to the Supreme Court asking it for a direction to be given to the Authority (s 155). This is not very effective. Such allegations are hard to prove, and even if they are proved, all the Supreme Court can do is direct the Authority to reconsider the case and make a decision according to law.

### ***Expiry of parole orders***

Unless it is revoked, a parole order expires when the full term of the sentence expires.

### ***Parole in exceptional circumstances***

The Authority may release a prisoner on parole who is not otherwise eligible if the prisoner is dying, or the authority is satisfied that there are exceptional extenuating circumstances (s 160). Assistance is available from Prisoners Legal Service to make an application under s 160 – a merit test applies.

### ***Reintegration home detention***

In the last six months of the non-parole period of a sentence, some offenders may be able to be released to reintegration home detention (RHD) rather than remaining in prison (see s 124B). A prisoner cannot “apply” to be assessed for reintegration home detention, they will be identified by Corrective Services staff as someone who may be suitable and then an assessment will be done as to suitability and a recommendation will be made to the Parole Authority (s 124C). For prisoners who are serving a term of imprisonment of more than three years, the Parole Authority can only make a RHD order if they also make a decision to grant parole (effective from the parole eligibility date).

## [33.320] Revocation of orders

The Parole Authority may revoke a parole order if the person on parole (the parolee) breaches any of the conditions of the order (s 170A(e)).

The Parole Authority also has jurisdiction to revoke intensive correction orders (s 164(2)(e)) and reintegration home detention orders (s 168D).

### Issue of a warrant for arrest

When the Authority revokes a parole order, intensive correction order or reintegration home detention order it issues a warrant authorising police to arrest the offender and take them to prison (s 181). The warrant is usually issued without a hearing and without the offender being given any notice.

### Notice to the offender

The Authority can send a notice requesting the offender to appear before it, for an inquiry into whether the order should be revoked, but it rarely does this.

### When the revocation becomes effective

The Parole Authority has the discretion to backdate the revocation of an order to the day the breach occurred. This means that the period in the community up to the date of the breach counts towards the completion of the person's sentence, but the period between the date of the breach and the date that the offender returns to prison does not.

### Hearing to reconsider the revocation

Once the offender returns to prison, the Authority must hold a hearing to review the decision to revoke the order (s 173). The prisoner may attend the hearing and be legally represented. There is usually a waiting period of about six weeks

between the date the person is apprehended on the warrant and the date of the review hearing for a parole matter and four weeks for an intensive corrections order.

### Notice and information that must be given

The Authority must serve a notice on the prisoner setting a date for the hearing. It must provide copies of reports and other documents used in making the decision to revoke the order.

### The Authority's decision

At the hearing, the Authority must decide whether or not it should rescind (ie, cancel) the revocation (s 175). If the revocation is rescinded, the order for parole or intensive correction order is revived and the prisoner is released.

If the revocation is not rescinded, the revocation is confirmed. In relation to revocation of parole, this means that the offender cannot apply for parole again until they have served 12 months in prison. A prisoner can seek reinstatement of an intensive correction order after serving one month in prison.

### Release to Parole so as to avoid Manifest Injustice

The Parole Authority may consider an application for parole at any time after the non-parole period of a sentence has expired if doing so would avoid a manifest injustice (ss 137B, 143B). The Regulations set out the circumstances that constitute manifest injustice (cl 223). In 2017, the Regulation was amended to permit a manifest injustice application where a prisoner had been sentenced to a new term of imprisonment and they were eligible to be released from prison on that new sentence. Prior to this the prisoner would still have had to remain in prison until the balance of parole had expired or they had served 12 months in custody (which ever was the shorter period).

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## Life sentences

### Applications for a fixed term

Someone sentenced to life under the law applying after 12 January 1990 will remain in gaol for their lifetime. In relation to life imposed under the law applying before then, the offender was able to apply for release on licence.

The *Sentencing Act* abolished release on licence, and provided that prisoners serving a life sentence

pursuant to the law before 12 January 1990 could apply to the Supreme Court to determine a fixed term. An application cannot be made until eight years have been served, or 30 years if the original sentencing judge recommended that the person never be released. See Sch 1 of the *Crimes (Sentencing Procedure) Act 1999*.



Legal aid is available for this purpose through Prisoners Legal Service.

#### *When a term has been set*

People whose life sentences have been determined are eligible for release on parole at the end of the non-parole period.

Release to parole is decided by the Parole Authority.

#### *Supervision of life sentence prisoners*

The Serious Offenders Review Council ("SORC") manages prisoners serving a life sentence in custody. SORC is responsible for preparing case plans, recommendations for classification and gaol placement, reports to the Supreme Court about each application for sentence redetermination, and reports to the Parole Authority when parole is being considered.

#### *Prisoners previously released on licence*

There are prisoners serving life sentences who were released on licence under the old system. Those licences remain in existence for the term of the person's life. The Parole Authority has jurisdiction over these licences and can revoke or vary the licences. If the licence is revoked, the person is returned to gaol. They must then apply to the Supreme Court to determine a term and fix a non-parole period.

#### *Sentences that have been determined*

There were approximately 240 people in NSW gaols serving a life sentence at 12 January 1990. Most of these have now had their sentences considered by the Supreme Court, and most have been successful in obtaining a non-parole period in the range of 12–18 years. A few have been refused.

## Release

### [33.330] Preparation for release

Release from custody can be scheduled or unscheduled depending on the prisoners' status. Scheduled releases are prepared by State Sentence Administration (SSA) in advance.

Prisoners who obtain minimum security classification (C3 for males and Category 1 for females) can be allowed out of gaol on work release and day and weekend leave to help prepare them for their return to the community.

This transition is especially important for long-term prisoners, who often face severe psychological problems adjusting to the changes, freedom and responsibilities of the outside world, having been confined to an institution where everything – accommodation, food, work – is provided.

The needs of sentenced prisoners will be addressed by Corrective Services in pre-release planning and will help prisoners get ready for release. Practical needs such as ID, housing and medication will be discussed.

### [33.340] On release

Inmates who have been in custody for more than 48 hours will be issued with a Release Certificate upon release. The certificate will include the inmate's personal details, the dates of their incarceration and the centre of release.

Inmates will need to return all Corrective Services property including clothing and any library material.

### Restoration of property

Once the prisoner is released, property taken on their arrival and stored in a departmental facility is returned, with letters, newspapers, books and any other items that were sent to the gaol but that prison officers decided should not be allowed in.

### Gate money

Inmates imprisoned before 1 March 1997 who have served a sentence of more than six months are given a gratuity (gate money) on release. The gratuity is calculated at 30 cents per week of the sentence served, to a maximum of \$100 for a sentence up to seven years and \$150 for more than seven years.

If a prisoner does not have the finances or any other way to get transportation to their residence within NSW, Corrective Services will provide financial assistance. Prisoners may also be eligible to apply for a special gratuity of up to \$200 in cases of hardship. The governor has discretion in determining these applications.

### [33.350] Social security

#### Preparation for release

Centrelink Prison Liaison Officers visit some correctional centres to arrange Crisis Payments for eligible inmates.

### [33.360] Finding work

Work opportunities are limited because of the prejudice of many employers, including the state and federal governments, against people with criminal records. The gaols hold details of some employers willing to offer work to ex-prisoners.

#### Complaining about discrimination

Prisoners may complain about discrimination by employers based on their criminal record to the Australian Human Rights Commission (AHRC). Discrimination is defined to include distinction, exclusion or preference made on the ground of "criminal records" (*Australian Human Rights Commission Regulations 1989* (Cth), cl 4).

The AHRC has the power to investigate any act or practice that may be discriminatory and try to resolve the complaint by conciliation (*Australian Human Rights Commission Act 1986* (Cth), s 31). However, unlike complaints about other protected attributes like sex, age, race and disability, if the complaint about criminal records discrimination does not resolve at conciliation, the complainant cannot take their case to the Federal Court. Even in cases where the AHRC finds the act or practice constitutes discrimination, its powers are limited to preparing a report with recommendations to the Attorney-General. It does not have the power to force respondents to a complaint to comply with any recommendations it may make.

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#### *Assistance for ex-prisoners*

The Community Restorative Centre (CRC) may offer some help in obtaining accommodation and employment upon release through its transitional post-release programs. They generally begin working with prisoners three months before release, and their website contains useful resources which can be downloaded.

Depending on what prison someone is held in, the Prisoners Aid Association of NSW may be able to assist prisoners with storing property on release through its Inmate Property Service. Prisoners should contact the Services and Programs Officer at their gaol to see if they are eligible.

Housing options for prisoners outside of public and social housing are fairly limited. There are half-way houses in Sydney both for men and for women with children. The houses charge residents full board. There is also limited temporary housing for community-based offenders operated by Corrective Services NSW called COSP Centres (Community Offender Support Program). This is a form of supervised residential accommodation for up to six months which also offers programs and support services. In June 2019, there were only two COSPS operating in Sydney.

Further advice and guidance about post-release support is also available from Justice Action, an organisation which advocates for prisoners' and ex-prisoners' rights.

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# Contact points

**[33.370]** If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see [www.communications.gov.au](http://www.communications.gov.au).

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online, see [www.tisnational.gov.au](http://www.tisnational.gov.au).

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See [www.service.nsw.gov.au](http://www.service.nsw.gov.au) for further details.

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## Australasian Legal Information Institute (AustLII)

[www.austlii.edu.au](http://www.austlii.edu.au)

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## Community Restorative Centre (CRC)

[www.crcnsw.org.au](http://www.crcnsw.org.au)

ph: 9288 8700

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## Correctional Centres

For a list of correctional centres, see [www.correctiveservices.justice.nsw.gov.au](http://www.correctiveservices.justice.nsw.gov.au)

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## Corrective Services NSW (CSNSW)

[www.correctiveservices.justice.nsw.gov.au](http://www.correctiveservices.justice.nsw.gov.au)

ph: 8346 1333

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## Council for Civil Liberties NSW

[www.nswccl.org.au](http://www.nswccl.org.au)

ph: 8090 2952

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## Health Care Complaints Commission (HCCC)

[www.hccc.nsw.gov.au](http://www.hccc.nsw.gov.au)

ph: 1800 043 159 or 9219 7444

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## Justice Action

[www.justiceaction.org.au](http://www.justiceaction.org.au)

ph: 9283 0123

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## LawAccess NSW

[www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au)

ph: 1300 888 529

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## Legal Aid NSW

[www.legalaid.nsw.gov.au](http://www.legalaid.nsw.gov.au)

ph: 1300 888 529

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## Ombudsman, NSW

[www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

ph: 1800 451 524 or 9286 1000

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## Prisoners Aid Association of NSW

[www.prisonersaidnsw.org](http://www.prisonersaidnsw.org)

ph: 0412 430 214

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## Prisoners Legal Service

[www.legalaid.nsw.gov.au/what-we-do/criminal-law/prisoners-legal-service](http://www.legalaid.nsw.gov.au/what-we-do/criminal-law/prisoners-legal-service)

email: [pls@legalaid.nsw.gov.au](mailto:pls@legalaid.nsw.gov.au)

ph: 8688 3888

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## SHINE for Kids

[www.shineforkids.org.au](http://www.shineforkids.org.au)

ph: 9714 3000

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## Relevant reading

A Grunseit, S Forell and E McCarron, *Taking Justice into Custody: the Legal Needs of Prisoners* (Law and Justice Foundation of NSW, Sydney, 2008).

[www.lawfoundation.net.au/report/prisoners](http://www.lawfoundation.net.au/report/prisoners)

Australian Institute of Health and Welfare 2019. The health of Australia's prisoners 2018. Cat no. PHE 246. Canberra: AIHW.

