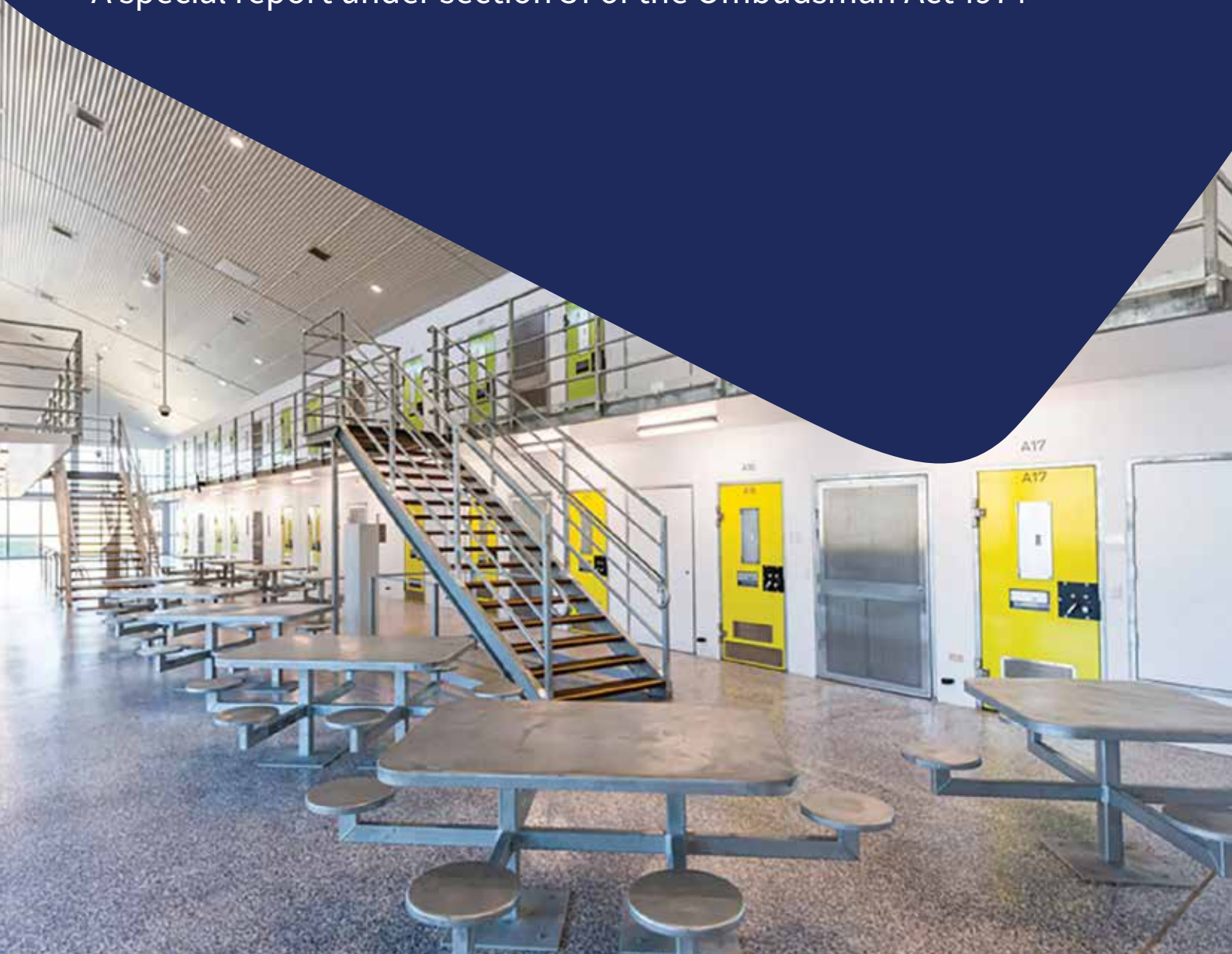


Investigation into actions taken against bystander inmates following an incident at Clarence Correctional Centre

A special report under section 31 of the Ombudsman Act 1974



Pursuing fairness for
the people of NSW.

NSW Ombudsman

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

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

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The Hon Benjamin Franklin MLC
President
Legislative Council
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SYDNEY NSW 2000

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

Dear Mr President and Mr Speaker

Pursuant to section 31 of the *Ombudsman Act 1974*, I am providing you with a report titled *Investigation into actions taken against bystander inmates following an incident at Clarence Correctional Centre*.

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

Yours sincerely

A handwritten signature in black ink that reads 'Paul Miller'. The signature is written in a cursive style with a large, sweeping 'P' and 'M'.

Paul Miller
NSW Ombudsman
21 August 2024



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1. Introduction

1.1 Complaints

On 26 and 27 September 2023 we received 11 complaints from inmates at Clarence Correctional Centre (Clarence), which is managed by Serco Australia Pty Ltd (Serco). The complainants alleged that, after another inmate had assaulted a staff member on 21 September 2023, they and approximately 20 other inmates who had observed the assault were:

- charged with failing to comply with correctional centre routine
- penalised by having access to television withdrawn for 2 weeks, and
- told they must sign an 8-week behaviour management contract (BMC), which restricted their time out of cell to either 2 hours or 4 hours a day.

Generally, inmates told us they considered:

- they had been unfairly charged with correctional centre offences
- that their placement on a BMC, which significantly restricted their time out of cell, was punitive and unreasonable, and
- that fair and proper processes had not been followed when decisions had been made to charge them with offences in custody and place them on BMCs.¹

Over the next 2 months, another 2 inmates raised concerns with us about their management following the incident and some existing complainants raised additional concerns about their treatment arising from the incident.²

1.2 Our investigation

After reviewing the information received in response to our preliminary inquiries, it appeared to us that Serco may have engaged in conduct of a kind referred to in section 26 of the *Ombudsman Act 1974* (Ombudsman Act), including conduct that may have been contrary to law, unreasonable, unjust, or oppressive.

Pursuant to section 246 of the *Crimes (Administration of Sentences) Act 1999* (CAS Act), Serco is a public authority in relation to its management of Clarence for the purposes of the Ombudsman Act.

On 1 December 2023, we commenced an investigation under s 13(1) of the Ombudsman Act and issued a notice of investigation to Serco under s 16 of the Ombudsman Act. The notice described the conduct under investigation to be:

Whether the conduct of Serco and its officers in dealing with inmates who observed an assault on a staff member by a fellow inmate on 21 September 2023 at Clarence Correctional Centre (including the segregation of certain inmates, the inquiries into related correctional centre charges, and the implementation of behaviour management plans and contracts):

¹ When a BMC is implemented, a Behaviour Management Plan (BMP) is also created. We use the term BMC to refer to both as they contain the same provisions.

² We received the 2 additional complaints on 20 October 2023.

- a) *contravened relevant legislative and policy provisions (including but not limited to the Crimes (Administration of Sentences) Act 1999 (CAS Act) and the Corrective Services NSW Custodial Operations Policies and Procedures) (COPP), and/or*
- b) *was unreasonable, unjust and oppressive.*

Following consideration of submissions made by Serco and Corrective Services NSW (CSNSW) in response to a statement of provisional findings and recommendations, and a consultation with the Minister on 8 August as required by the Ombudsman Act, we issued a final report of investigation, in accordance with section 26 of the Ombudsman Act, on 13 August 2024.

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

Of note, the assault on the officer in this case was, as is appropriate, reported to be dealt with as a criminal matter by Police. Our investigation was not concerned with actions taken against the perpetrator, and our focus has only been on the correctional centre's subsequent actions in relation to other inmates. In that regard, we do also acknowledge that a subset of those inmates appeared, after the incident, to behave in ways toward the perpetrator that could be taken as commending his actions. This was likely distressing for correctional staff, who perform a vital and challenging job, and whose safety and security in performing this role is critical.

2. Observations and conclusions

2.1 The incident

On 21 September 2023 a correctional officer was assaulted by an inmate in the officer station (or office) in Neighbourhood 1 at Clarence.³ In this report, we refer to this inmate as 'Karl'.⁴

CCTV footage shows that the officer (who was alone in the office) opened the door to speak to Karl. When the officer stepped back into the office, Karl pushed his way into the office. Karl punched the officer multiple times, knocking him onto the floor and subsequently into a wall. Karl can be seen walking out of the officer station approximately one minute after entering.

CCTV footage shows several inmates in Neighbourhood 1 milling about prior to Karl entering the officer station. When these inmates observed Karl enter the officer station, they looked towards (and generally moved towards) the station and watched what was unfolding through the windows at either end of the station. Other inmates also moved from the adjacent yards to watch what was happening.

It is difficult to discern from the footage exactly how many inmates were watching the incident. However, 8 inmates can be seen stepping onto a table or chair presumably to get a better view and others are watching from an elevated position of a staircase. During the assault, several inmates were walking around outside the office and some can be seen to walk across a red line on the floor. One inmate, Martin, can be seen attempting to turn the handle of the door of the officer station. The door handle did not turn, indicating that the door was locked.

³ Most prisons call the area where inmates live a unit or wing. At Clarence these are called neighbourhoods.

⁴ Pseudonyms are used throughout this report.

When Karl walked out of the officer station several inmates can be seen clapping for a few seconds. Most inmates did not clap. One inmate can be seen shaking Karl's hand, 1 or 2 inmates patted him on the shoulder and another inmate put his arms around Karl's shoulder as they walked off together away from the office.

Approximately 30 seconds after Karl left the officer station, 3 officers can be seen walking through the areas adjacent to the officer station, past the inmates in the neighbourhood and entering the officer station to assist the officer who had been assaulted. It does not appear from the footage (which does not contain sound) that any of these officers spoke to the inmates who observed the assault, and who had recommenced milling around. No inmates can be seen obstructing these officers.

The footage suggests the incident arose suddenly, with Karl's forced entry into the office apparently being in response to something said by the officer. There is nothing in the footage to indicate that any other inmate was aware beforehand that Karl was going to push his way into the officer station. Nor is there any indication that any inmate encouraged him to do so. There is nothing in the footage that suggests inmates observing the assault had incited or encouraged the incident, or that they had, at any stage, sought to become involved in the assault on the officer.

Following the incident Karl was moved to another correctional centre. The incident report states the assault by Karl was reported to police.

Following the incident:

- Neighbourhood 1 was locked down for 5 days
- 3 inmates who observed the assault were placed in segregation
- 34 inmates (including those 3) who observed the assault were charged with correctional centre offences and penalised, and
- 33 of those inmates were placed on BMCs.⁵

2.2 Neighbourhood lockdown

The decision to lock all 175 inmates in Neighbourhood 1 in their cells for a period of 5 days from the afternoon of 21 September to 25 September (and in some instances 26 September) was not warranted for the purposes of maintaining the good order and security of the centre. The decision to do so was made without apparent regard to any identified risk of general disturbance or the individual involvement and circumstances of each inmate.

Clause 244 of the *Crimes (Administration of Sentences) Regulation 2014* (CAS Regulation) provides that, where an inmate is suspected of having committed, or about to commit, an offence, a correctional officer may confine the inmate to his or her cell, or in some other appropriate place of confinement, for no more than 48 hours, pending instructions as to how the inmate should be dealt with.⁶

⁵ One inmate was released from custody before being placed on a BMC.

⁶ Further guidance is contained within Custodial Operations Policy & Procedures, 14.1 Inmate discipline, 7.

We were advised by Serco that no inmates were confined to cell in accordance with this provision.⁷ Serco stated that, instead:

*Neighbourhood 1 was locked down for a total of five (5) days for the good order and security of the centre after the staff assault. This affected all inmates within that Neighbourhood. These lock downs were approved by the Acting General Manager.*⁸

Serco did not provide any detail as to how or why locking down the whole of Neighbourhood 1 — approximately 175 inmates — for 5 days following an assault by a single inmate on one officer was warranted. Nor did Serco identify or describe the risk, whether of further disturbance or some other threat, that the lockdown was intended to prevent.

Our view is that the decision to lock Neighbourhood 1 down for 5 days was unreasonable and oppressive, noting:

- Serco did not identify any risk or threat to the good order and security of the centre that the lockdown was intended to mitigate.
- 4 inmates believed by Serco to have played a more active role in the incident had been moved to a segregation unit. These inmates could not have posed a continuing risk to the good order and security of the Neighbourhood.
- Any other individuals suspected of playing an active role in the incident could have been confined to cell pending instructions as to how they should be dealt with (but only for 48 hours).
- The lockdown extended even to inmates who had not been present and did not witness the assault.

2.3 Segregation

The evidence available at the time of the decisions to segregate three inmates did not show any conduct by those inmates from which a decision-maker could reasonably form the view that they (either generally or in comparison to other inmates) had engaged in conduct that warranted segregation in accordance with section 10 of the *Crimes (Administration of Sentences) Act*.

The Commissioner of Corrective Services may direct an inmate be held in segregated custody if of the opinion that it is necessary to secure the: personal safety of any other person; security of a correctional centre; good order and discipline within a correctional centre.⁹ The Governor of a correctional centre can also exercise this authority with respect to inmates in their particular correctional centre.¹⁰

Four inmates were moved from Neighbourhood 1 after the incident and placed in a segregation unit. One was Karl, the inmate who assaulted the officer. The 3 other inmates placed in segregation to secure the good order and discipline of the centre and the reasons recorded for doing so were:

⁷ Serco statement of information, 3 [7]. While Serco told us no inmates were confined to cell, other records state that Julian was confined to cell before the hearing related to his correctional centre charges was held. He is simultaneously recorded as being placed in segregation.

⁸ Serco statement of information, 3 [8]. CSNSW Daily Synopsis shows that approximately 175 inmates in Neighbourhood 1 were locked down between 22 September and 25 September. At midday on 25 September, the General Manager directed that 83 inmates be let out of their cells. On 26 September, Neighbourhood 1 returned to normal routine.

⁹ *Crimes (Administration of Sentences) Act 1999*, s 10(1).

¹⁰ *Crimes (Administration of Sentences) Act 1999*, s 10(2).

- Jett - in segregation from 22 September to 5 October. This was on the basis that:
'On 21/09/2023 inmate [Jett] was witnessed inciting other[s] in an attempt to create a major disturbance whilst an officer was being seriously physically assaulted by another inmate. [Jett] also made threats to physically assault responding staff.'
- Martin - in segregation from 22 September to 5 October. This was on the basis that:
'On 21/09/2023 inmate [Martin] attempted to breach a secure officer post whilst an officer was inside being seriously physically assaulted by another inmate. [Martin] also then attempted to incite the remainder of the accommodation unit to impede responding officers.'
- Julian - in segregation from 22 September to 28 September, when he was released from custody. This was on the basis that:
'On 21/09/2023 inmate [Julian] was witnessed inciting others in attempt to create a major disturbance whilst an officer was being seriously physically assaulted by another inmate. Inmate [Julian] was non-compliant with officer direction throughout the duration of the incident.'

Our review of the CCTV of the incident shows no conduct by these inmates that indicates or suggests that they were attempting to create a major disturbance, disobeying directions or inciting inmates to impede responding officers. Witness statements from relevant Serco officers (see section 2.4.1 below) also do not support the allegations.

On being required to provide us with the details of the conduct warranting their segregation over other inmates,¹¹ Serco responded: 'Upon review of the incident, it was identified that there was no particular conduct displayed by the three inmates that warranted segregation. Records will be expunged.'¹²

We have formed the view that the decision to segregate these 3 inmates was contrary to law because it was not reasonably open in each case to conclude that the alleged conduct had occurred or that segregation was necessary to secure the personal safety of any other person; security of a correctional centre; good order and discipline within a correctional centre.

2.4 Correctional centre offences

The inquiry process for offences charged following the incident was not conducted in accordance with the *Crimes (Administration of Sentences) Act*: charges were laid, guilt recorded and penalties imposed, despite a lack of reliable evidence that offences had been committed. In addition, specific procedural requirements designed to ensure the fairness of the inquiry process were not followed, correct information was not reliably recorded, and relevant considerations were not considered when penalties were imposed.

Part 2, Division 6 of the CAS Act sets out the procedure for dealing with correctional centre offences. Where an inmate has been charged with a correctional centre offence, the Governor or delegate may conduct an inquiry into the offence charged and impose such penalty as is appropriate.¹³

¹¹ NSW Ombudsman, Section 18 Notice to provide information, 1 December 2023, Schedule A [13].

¹² Serco, Statement of Information, 3.

¹³ *Crimes (Administration of Sentences) Act 1999*, s 52(1).

2.4.1 The inquiry process

The paperwork that is completed when an inmate is alleged to have committed a correctional centre offence is referred to as the 'misconduct package'.

Section 52(2) of the CAS Act sets out the requirements that apply to the conduct of an inquiry. The inquiry must be conducted with as little formality and technicality, and with as much expedition, as fairness to the inmate charged, the requirements of the CAS Act and the regulations, and the proper consideration of the charge permit. The inmate is entitled to be heard and to examine and cross examine witnesses. The inquiring officer must be satisfied of the guilt of an inmate beyond reasonable doubt before imposing a penalty.¹⁴

Particular provisions apply to the inquiry process for inmates with disability (see below at 2.4.1.1), and protections if people are to be confined to cell (eg. the policy provides that young Aboriginal inmates 'should not' be confined to cells alone).¹⁵ There are also legislative provisions governing the issuing of penalties.¹⁶

Following the incident at Clarence, 16 staff prepared witness statements.¹⁷ One officer's statement outlines how she noticed inmates in the yard running towards Unit 2 and called a 'CODE BLACK' (officer needs assistance) when she saw, on the CCTV officer post camera, Karl punching the officer. She directed inmates over the PA system to return to their cells while officers responded to the Code Black call. Other witnesses did not report seeing the incident itself but reported how they responded to the Code Black and assisted the officer, secured inmates in their cells and/or moved Karl to segregation.

The inquiries in respect of the charges against Jett, Julian and Martin were held on 22 September and the inquiries for the charges against the remaining 31 inmates were held on 26 September.

Most inquiries were held after a senior correctional officer completed inmate misconduct reports on 25 September which purport to describe her observations and make allegations of offences following her review of the CCTV of the incident. The inquiries were held by 4 substantive or acting functional managers, delegated to conduct inquiries into correctional centre offences.

Our conclusion is that the inquiries held did not accord inmates the requisite fairness that should have been provided to them under sections 52(2)(a) and 52(2)(c) of the CAS Act. In particular:

- The only substantive evidence considered during the inquiries were the inmate misconduct reports prepared by the senior correctional officer.¹⁸ The misconduct packages, including the inmate misconduct reports, only refer to the CCTV footage (which does not contain sound). There is nothing in the misconduct packages or any other information to indicate that any witness statements were read, that any witnessing officers were called to the inquiries, or what consideration (if any) or weight (if any) was given to those statements. This deprived the inmates of any opportunity to examine official witnesses whose evidence could reasonably have given rise to doubt about the offences charged (for example, none of the officer witness statements

¹⁴ *Crimes (Administration of Sentences) Act 1999*, s 53(1).

¹⁵ CSNSW Custodial Operations Policy & Procedures, 14.1 Inmate discipline, 16. Young adult offenders are those who are under 26 years old. Corrective Services NSW, Policy for Inmate Classification and Placement (1 February 2021), 24.

¹⁶ *Crimes (Administration of Sentences) Act 1999*, s 53; *Crimes (Administration of Sentences) Regulation*, Part 6, Div 5.

¹⁷ There is no information to suggest inmates present were also asked to provide statements.

¹⁸ In the case of inmates, Jett, Julian and Martin, the inquiries in relation to charges were heard on 22 September, which appears to be before the senior correctional officer completed her inmate misconduct reports, all dated 25 September. It is unclear what evidence, then, the inquiry relied upon. The most likely explanation is that the senior correctional officer provided an oral report consistent with her later written report.

reported any officer being obstructed when responding to the incident or reported any inmates who observed the assault acting in an intimidatory manner).

- Inmates were not offered the opportunity to examine or cross-examine witnesses (the section of the misconduct package where officers are expected to report whether or not the inmate wishes to call witnesses was not completed in any of the packages).

2.4.1.1 Assistance for inmates with cognitive impairment or intellectual disability

Section 52(2)(e) of the CAS Act provides that the Governor must allow a person (other than an Australian legal practitioner) to represent or assist an inmate if the Governor is satisfied that the inmate does not sufficiently understand the nature of the inquiry or is otherwise unable to properly represent him or herself during the inquiry.

The COPP provides that, before proceeding to inquiry, the Offender Information Management System (OIMS) 'must be checked [by the Governor or delegated officer] to ascertain whether the inmate has a cognitive impairment or intellectual disability'.¹⁹ It further provides that the Manager of the Statewide Disability Services must be informed that the inmate requires a support person where:

- OIMS indicates an inmate requires a support person for inquiries and interviews, or
- the Governor or delegated officer is satisfied that the inmate cannot sufficiently understand the nature of the inquiry or is unable to properly represent himself or herself because of a possible cognitive impairment or intellectual disability.

An inquiry must not proceed until a support person is provided.²⁰

In response to our requirement to provide information, Serco identified 4 inmates charged following the incident as having a disability or cognitive impairment: Jett, Majid, Theodore and Stanley. OIMS alerts for Jett and Majid state they require a support person if being interviewed as part of a departmental or police investigation. OIMS records Theodore and Stanley as having a disability or cognitive impairment but does not specify that a support person is required during inquiries.

Serco informed us that consideration was given to each of these 4 inmates' recorded disability/cognitive impairments, but that no supports were provided for the inquiry process because it was 'not required'.²¹ The misconduct packages for all 4 inmates did not record this consideration and there is no indication that the Manager of Statewide Disability Services was notified about any of these inmates' charges.

Serco provided no further detail as to why support was said to be 'not required' for Jett or Majid, or why it did not comply with the provisions of the COPP pertaining to support persons. Nor did Serco explain how it was able to be satisfied that Jett or Majid understood the nature of the inquiry and were able to represent themselves in the face of the OIMS alerts and absent any engagement with the Manager of Statewide Disability Services.

In the circumstances, we conclude that Serco failed to ensure inmates with disability/cognitive impairment received appropriate support when charged with correctional centre offences as required by the COPP, compromising the fairness of the inquiry process and in contravention of section 52(2)(a) of the CAS Act.

¹⁹ CSNSW Custodial Operations Policy & Procedures, 14.1 Inmate discipline, 9.

²⁰ CSNSW Custodial Operations Policy & Procedures, 14.1 Inmate discipline, 11.

²¹ Serco, Statement of Information, Appendix 1 provided 12 January 2024.

2.4.2 The charges

34 inmates were charged with one or more of the following correctional centre offences:

- Fail to comply with correctional centre routine - An inmate must comply with the hours of work and general routine for the correctional centre or part of the correctional centre in which the inmate is detained (failure by an inmate to comply with this clause is a correctional centre offence) (CAS Regulation, cl 39).
- Participate or incite riot - An inmate must not participate in a riot or incite any other inmate to participate in a riot (cl 140).
- Obstruct correctional officer - An inmate must not wilfully hinder or obstruct a correctional officer in the performance of the officer's duties (cl 156).
- Intimidation - An inmate must not use insulting, abusive or threatening language to or in the presence of another person. An inmate must not threaten to damage or destroy any property of another person. An inmate must not otherwise behave in a threatening way towards another person (cl 138).

We conclude, based on the information outlined below in 2.4.2.1-2.4.2.4, there was not sufficient or reliable information to support the charges laid against inmates who observed the assault.

2.4.2.1 Fail to comply with correctional centre routine

Clause 37 of the CAS Regulation states:

- (1) The Commissioner is to determine the hours of work and general routine for each correctional centre.*
- (2) The Commissioner may determine different hours of work and different general routines for different parts of a correctional centre.*

Following the assault upon the officer, 34 inmates were charged with failing to comply with correctional centre routine. The misconduct packages submitted refer to:

- the inmate crossing a red line on the floor (21 packages)
- the inmate 'laughing', 'encouraging', 'cheering' (or similar) (34 packages), and
- the inmate standing on a table (2 packages).

Table 1 contains excerpts from a sample of misconduct packages, outlining the reasons the charge of failing to comply with a correctional centre routine was selected. In some cases, misconduct packages referred to more than one reason. From our analysis of available information, the senior correctional officer, who completed the misconduct reports, was not herself present during or immediately after the incident and based her reports solely on a review of CCTV footage.

Table 1: Excerpts from misconduct packages – fail to comply with correctional centre routine

Inmate name	Inmate Misconduct Report
Theodore	<i>Whilst reviewing CCTV for incident on 21.09.2023 in NH1 unit 2 at approximately 1543hrs, inmate now known to me as [Theodore] is seen laughing and cheering encouraging inmate to continue to assault staff member. At no time did I give permission to [Theodore] to encourage staff assault failing to comply with correctional centre routine.</i>
Ryan	<i>Whilst reviewing CCTV for the incident on 21.09.2023 in NH1 Unit 2 at approximately 1543hrs, Inmate now known to me as [Ryan] is seen to cross the red line marked on the floor, cheering and encouraging inmate during staff assault inmate. At no time did I give permission for [Ryan] to cross the red line, failing to comply with Correctional Centre Routine.</i>
Barak	<i>Whilst reviewing CCTV for incident on 21.09.2023 in NH1 unit 2 at approximately 1543hrs, inmate now known to me as [Barak] is seen standing on a table, cheering and encouraging inmate during staff incident. At no time did I give permission for [Barak] to stand on a table, failing to comply with Correctional Centre Routine.</i>

We required Serco to produce the following information:

- details of the ‘correctional centre routine’ for those charges and the particular inmate conduct that breached the routine
- the basis for the routine (eg Commissioner’s directive)
- relevance and/or significance of the ‘red line’ and crossing the red line as referenced in 21 misconduct packages, and
- relevance and/or significance of standing on tables referenced in 2 misconduct packages.²²

On 12 January 2024 Serco stated: ‘The Correctional centre routine is implemented site wide to facilitate the Purposeful Day for inmates. The routine is approved by the General Manager and is a contractual requirement.’²³

On 27 February 2024 Serco provided further advice that there is not, in fact, a ‘formal Correctional Centre routine’ at Clarence. Instead, a half-page excerpt from the inmate handbook details the rules and regulations for the inmates.²⁴ This excerpt includes the statement: ‘You must not enter any area that is “out of bounds” unless instructed by a member of staff’.

²² NSW Ombudsman, Section 18 Notice to provide information, 1 December 2023, Schedule A, [1].

²³ Serco, Statement of Information, 12 January 2024, [1].

²⁴ Email from Serco to NSW Ombudsman, 27 February 2024.

Serco told us: that, ‘inmates are advised when they are received into the accommodation areas that the red line is out of bounds and they are not permitted to cross without Officer permission’.²⁵ Serco did not tell us how inmates are usually informed of this rule, although confirmed this information is not contained in the inmate induction material. Serco did not provide any information to confirm whether the inmates charged following the incident had been informed that crossing a red line on the floor is not permitted. It is therefore not clear if the individuals involved had knowledge that they were prohibited from crossing the red line, and that doing so would be treated as a failure to comply with correctional centre routine.

Only 2 of the misconduct packages refer specifically to inmates standing on tables despite CCTV footage showing at least 8 inmates standing on a table or chair during the incident. Serco has not explained the reasons for this. However, it did state, in relation to the issue of inmates standing on tables:

*Standing on tables [is] not specifically referred to in any centre routine or communication. Whilst the behaviour is not expected from inmates, the offence in custody should not have been raised for the inmates [who] were identified and charged. These charges will be expunged.*²⁶

It is not clear whether Serco has sought to update records relating to the charges of those inmates penalised for failing to follow correctional centre routine who were standing on a chair or table, or only those whose misconduct packages specifically refer to them standing on a table.

Serco did not provide any information about charges for a breach of routine based on conduct other than crossing a red line or standing on a table. No information has been received about the relevance of inmates allegedly ‘laughing’ or ‘cheering’ to a charge of failing to comply with correctional centre routine.

2.4.2.2 Participating in/inciting a riot

Jett, Martin and Julian were charged with participating in or inciting a riot. There was no riot, and no evidence (including CCTV footage) that they attempted to incite the assault, let alone a riot. This has been acknowledged by Serco for 2 of the inmates:

*Upon review of the incident, it was identified that the two inmates [Julian and Martin] conduct did not amount to engaging in a riot and/or inciting a riot. Inmates’ records will be expunged’.*²⁷

We did not ask Serco about Jett’s charge in our notice because we were not aware of this charge at the time. Serco has not provided any information to explain why Jett received this charge or whether his records will also be updated to reflect the findings are not sound.

2.4.2.3 Obstructing a correctional officer

Julian was charged with obstructing officers. The inmate misconduct report states this was because Julian was ‘standing in the way of the officer post door.’²⁸

²⁵ Serco, Statement of Information, 12 January 2024, [1].

²⁶ Serco, Statement of Information, 12 January 2024, [1]. While Serco has used the term ‘expunge’ and we used this term in our statement of provisional findings and recommendations, Corrective Services has received legal advice that charges cannot simply be expunged. In response, we suggest that records relating to charges be updated to reflect that findings were unsound and should be disregarded in future decisions.

²⁷ Serco, Statement of Information, 12 January 2024, [1] and [14].

²⁸ Inmate misconduct report, 25 September 2023.

The footage of the incident does not support this charge. When Karl enters the officer station at 15:42, Julian can be seen watching from behind the red line. He continued to watch from a distance among a group of other inmates until 15:43 and then walked into the outside yard. While Julian was in the yard, CCTV shows the 3 officers who first responded to the incident moving through the unit and then into the officer station. Their progress through the unit and into the officer station does not appear to have been impeded by Julian.

2.4.2.4 Intimidation

Martin and Jett were charged with intimidation.

The basis for the charge against Martin appears to be the senior correctional officer's inmate misconduct report. That report states that Martin 'is seen [on the CCTV footage] to be attempting to access the officer post, intimidating the officer being assaulted'.

The CCTV footage shows Martin holding, and apparently trying to turn the door handle of the officer's station while the assault was taking place. When the handle doesn't turn, he takes a step away from the door and watches with his hands at ease. It is unlikely that the officer being assaulted saw or was aware of Martin touching the door handle, and Martin's actions and demeanour do not appear, from our assessment of the footage, to be intimidatory.

Jett's charge of intimidation appears to relate to an allegation that he had stated 'you're next you little cunt' to an unidentified officer responding to the incident.

The inmate misconduct report states:

Whilst reviewing CCTV of incident, at approximately 1543hrs on the 21st September 2023 inmate now known to me as [Jett] Intimidated responding officers by stating "You're next you little cunt" He also claps, cheers and screams during the assault, inciting others to participate.

The CCTV of the incident does not contain sound and witness statements also do not support this allegation.

2.4.3 The pleas, findings and penalties

Section 53 of the CAS Act outlines the penalties that may be imposed where a Governor, or delegate, is satisfied beyond reasonable doubt that an inmate is guilty of a correctional centre offence. When considering the penalty to be imposed, the COPP outlines a range of matters that should be considered by the Governor or delegate.²⁹ This includes the nature and seriousness of the offence; and an inmate's criminal history, case notes, OIMS alerts, recent behaviour and work history; the plea; and any mitigating circumstances. Further:

whether the inmate has already lost a privilege as a result of the offending conduct and the imposition of a penalty might be construed as an additional penalty (eg. the inmate has been transferred to a higher security accommodation or has incurred a reduction in wages).³⁰

²⁹ CSNSW Custodial Operations Policy & Procedures, 14.1 Inmate discipline, 14.

³⁰ CSNSW Custodial Operations Policy & Procedures, 14.1 Inmate discipline, 14.

Only one penalty may be imposed for each correctional centre offence.³¹ One of the available penalties is 'deprivation, for up to 56 days, of such withdrawable privileges as the Governor may determine'.³² A withdrawable privilege includes 'use of, or access to, television' and the 'ability to purchase goods'.³³

Another available penalty is confinement to cell for up to 7 days, with or without deprivation of withdrawable privileges.³⁴ However, relevant policies provide that young Aboriginal inmates should not be confined to cells alone and require alternative penalties to be considered.³⁵ The COPP also states 'The *Inmate discipline checklist* must be completed before a penalty of confinement to a cell is imposed.'³⁶ This checklist forms part of the misconduct package and covers 'important factors to be considered before a penalty of confinement to cell is imposed (eg. self-harm history).'³⁷

In relation to the correctional centre charges brought following the incident, all inmates charged were found guilty or pleaded guilty to the offences charged.

Records show the following in relation to charges, pleas and penalties imposed.

Fail to follow correctional centre routine (34 inmates charged)

- 25 inmates entered a plea of guilty and 9 not guilty
- 31 received a penalty of 14 days with no access to television
- 1 (Julian, who pleaded guilty) received a penalty of 7 days with no access to television
- 2 (Jett and Martin, who both pleaded guilty) received a penalty of 14 days off buy-ups.

Participate/incite riot (3 inmates charged)

- Martin pleaded not guilty. He was found guilty and a penalty of no access to television for 14 days was imposed.
- Julian pleaded not guilty. He was found guilty and a penalty of 7 days cellular confinement was imposed (21-27 September, noting his hearing was held on 22 September).
- Jett is recorded as pleading guilty. He was found guilty and a penalty of no access to television for 14 days was imposed.

Other charges

- Julian was charged with obstruct correctional officer. He is recorded as pleading guilty. A penalty of 28 days off buy-ups was imposed.
- Jett and Martin were charged with intimidation. Both are recorded as pleading guilty. A penalty of 3 days cellular confinement was imposed.

³¹ *Crimes (Administration of Sentences) Act 1999*, s 53(1); CSNSW Custodial Operations Policy & Procedures, 14.1 Inmate discipline, 14.

³² *Crimes (Administration of Sentences) Act 1999*, s 53(b).

³³ *Crimes (Administration of Sentences) Regulation 2014*, cl 163 (d) and (g).

³⁴ *Crimes (Administration of Sentences) Act*, s 53(1)(c).

³⁵ CSNSW Custodial Operations Policy & Procedures, 14.1 Inmate discipline, 16. CSNSW, Inmate Classification and Placement Policy and Procedure Manual, Overarching Policy for Inmate Classification and Placement, Section 9.9 of the defines young Aboriginal offenders as any inmate housed in a Centre in NSW under the age of 26.

³⁶ CSNSW Custodial Operations Policy & Procedures, 14.1 Inmate discipline, 12.

³⁷ CSNSW Custodial Operations Policy & Procedures, 14.1 Inmate discipline, 13.

2.4.3.1 The pleas of guilty

Several inmates complained to us that they were not given the opportunity to plead not guilty. Further, our review of the misconduct packages showed that guilty pleas were recorded in cases where the inmate made statements contesting the charge or refusing to comment on the charge during the inquiry. Several inmates are recorded as pleading guilty despite the following comments also being recorded:

- 'I was just watching'
- 'Nah'
- 'No comment'
- 'No comment gronk'
- 'I just came to see what's going on'
- 'Nothing to say'
- 'It's a little bit unfair'
- 'No comment but I didn't do anything'.

In other instances (eg. Julian, Martin, Jett) inmates are recorded as pleading guilty but then refused to sign the paperwork confirming the plea. Further, Jett who was charged with 3 offences and recorded as pleading guilty on all counts did not have the benefit of a support person contrary to policy provisions requiring this due to his OIMS disability alert.

We have concluded that the guilty pleas were not based on sufficient or reliable information. In addition, we conclude that all relevant considerations were not taken into account when Serco imposed penalties for the correctional centre charges. In particular:

- Individual circumstances (including plea and recent behaviour) must be taken into account when deciding what penalty to impose. However, the vast majority of inmates (31) received the same penalty (14 days off television) for failing to comply with correctional centre routine. This suggests that little or no consideration was given to individual circumstances.
- 33 inmates who observed the assault were placed on BMCs as well as being charged with correctional centre offences. Given the conditions of the BMCs could in the circumstances be construed as an additional penalty, Serco should have had regard to those BMC conditions when determining the penalties for the charges. Serco informed us that no consideration was given to the imposition of BMCs when determining the outcome of the offences in custody.³⁸
- Decisions to confine inmates as a penalty for a correctional centre offence did not comply with relevant policy and procedural requirements. For example:
 - Julian, Martin and Jett all received a penalty of cellular confinement. However, these inmates' misconduct packages contain only an incomplete inmate discipline checklist, with health information omitted. This is particularly noteworthy in relation to Martin, given he has a recorded history of self-harm.³⁹
 - According to Jett's checklist, his case file was not reviewed before issuing the penalty of cellular confinement, as required under policy.⁴⁰

³⁸ Serco, Statement of Information, 12 January 2024, 2 [6].

³⁹ Recorded in misconduct package and OIMS.

⁴⁰ CSNSW Custodial Operations Policy & Procedures, 14.1 Inmate discipline, 12-13, 16.

- In relation to Julian, it is of particular concern that he, being an 18 year old Aboriginal man, was confined to his cell alone when policy stipulates this should not occur.
- There is no documented consideration of any alternative penalties being considered for Martin or Julian, despite their recorded vulnerabilities.

2.5 The Behaviour Management Contracts

The BMCs were imposed for a purpose for which they were not intended, without consideration of relevant information or procedures; the conditions of the BMCs were not aligned to specific management issues and were unreasonable and oppressive; and there were flaws in processes followed to review, extend and cease the BMCs.

The CAS Act permits the Commissioner to adopt policies to manage the behaviour of inmates and specify the circumstances in which withdrawable privileges may be increased or decreased. The withdrawing of privileges in accordance with the behaviour management policy is authorised whether or not proceedings are underway, or penalties have been imposed in relation to a correctional centre offence or criminal offence.⁴¹

The COPP outlines the processes to be followed to institute individual BMCs where ‘an inmate demonstrates behavioural management issues and is unwilling to comply with standard behavioural requirements’.⁴² This provides that a BMC should be developed in consultation with a multi-disciplinary team, and include an assessment based on an inmate’s risk(s), need(s) and intervention targets to inform immediate to medium term management of security risks.⁴³ A BMC must only be in effect for a maximum period of 8 weeks (56 days) and reviews should be conducted at least every 2 weeks.⁴⁴ Further: ‘These plans must be individualised’.⁴⁵

The COPP also states, a BMC:

*must be implemented for a proper purpose as a result of identified behaviour that poses a risk to the good order and security of a correctional centre (e.g. drug use, violence). Accordingly, any withdrawal of privileges must be aligned to the specific behavioural management issue to be addressed.*⁴⁶

The Behaviour Management Plan form (which is completed when a BMC is commenced) states: ‘This [plan] was developed because of a **pattern of behaviour** identified that poses a risk to the good order and security of the correctional centre. [emphasis added]’⁴⁷

⁴¹ *Crimes (Administration of Sentences) Act*, s 65A.

⁴² CSNSW, Custodial Operations Policy and Procedures, 3.11 Behaviour management, 4.

⁴³ CSNSW, Custodial Operations Policy and Procedures, 3.11 Behaviour management, 5.

⁴⁴ CSNSW, Custodial Operations Policy and Procedures, 3.11 Behaviour management, 7.

⁴⁵ CSNSW, Custodial Operations Policy and Procedures, 3.11 Behaviour management, 6.

⁴⁶ CSNSW, Custodial Operations Policy and Procedures, 3.11 Behaviour management, 5.

⁴⁷ CSNSW Behaviour Management Plan v1.1 – 20 January 2020, 1.

2.5.1 Imposition of BMCs

Following the incident on 26 September, 33 inmates were placed on an 8-week BMC. Based on inmate complaints to our office, these BMCs were imposed in the same meeting where the inquiries and determinations were made in relation to the correctional centre charges. Two further inmates (Jett and Martin) were placed on a BMC on 5 October, when they returned to the Neighbourhood from the segregation unit.

We have identified several issues with the establishment of the BMCs.

- Serco has confirmed that the BMCs were not developed in consultation with a multi-disciplinary team as the policy stipulates should occur.⁴⁸
- Serco stated that the creation of the BMCs ‘was intended to define behaviour expectations for the inmates as a result of what was reported during the incident.’⁴⁹ We understand this to mean that these BMCs were not a response to patterns of behaviour or behavioural issues but rather a specific response to the incident.⁵⁰ Given the inmates were also charged and punished for correctional centre offences arising from the same alleged conduct, it gives rise to a question whether inmates were exposed to double punishment for the same conduct. This is even more marked given the BMCs were imposed as part of and in the course of the disciplinary inquiry and without the required consultation.
- Several of the forms completed to establish the BMCs set out inaccurate information to justify the creation of the BMC. For example, a number refer to the inmate encouraging Karl to assault an officer. As outlined above (see section 2.3 and 2.4.1), the footage of the incident does not show inmates encouraging Karl to assault the officer, and no Serco witnesses state this occurred.

In addition, the goals and conditions of the BMCs were not individualised for the behavioural needs of each inmate. They were almost identical for each of the inmates, with goals for all including to:

- remain drug and alcohol free
- use appropriate communication to resolve issues and avoid violent/threatening/abusive behaviour, and
- remain pro-social and avoid attempts to influence or coerce others to follow an extreme ideology, incite gang activity, membership or violence.

The relevance of these goals to the individual needs of inmates placed on a BMC is not clear.

The BMCs did differ in relation to 2 items:

- 13 BMCs included scheduled cell searches as a condition, and
- 8 of the inmates were restricted out of their cells for 4 hours a day and 25 inmates for 2 hours a day.

The reason for some, but not all, inmates being subject to cell searches is also unclear. We asked Serco for the reasons why some BMCs provided for 4 hours out of cell a day and others 2 hours but did not receive an explanation.⁵¹

⁴⁸ Serco, Statement of Information, 12 January 2024, 2 [9].

⁴⁹ Serco, Statement of Information, 12 January 2024, 2 [9].

⁵⁰ OIMS records reflect that 14 of the inmates placed on a BMC had no previous offences in custody, reinforcing our preliminary conclusion that the BMCs were not established as a response to a pattern of poor behaviour.

⁵¹ NSW Ombudsman, Section 18 Notice to provide information, 1 December 2023, Schedule A, 3 [10].

Our conclusion is that the imposition of BMCs was unreasonable and oppressive. This is because the:

- inmates present during the assault had been penalised through the inmate discipline process
- BMCs were established without the input of a multi-disciplinary team, and
- BMCs were not imposed as a result of a pattern of identified behaviour posing a risk to the good order and security of a correctional centre and were not aligned to specific behavioural issues.

2.5.2 Conditions of the BMCs

It appears that the intention of the BMCs was to improve inmates' behaviour by restricting them to their cells for 20 or 22 hours a day for up to 8 weeks. We do not have information demonstrating how many people were confined to a cell alone during the BMC period. However, we understand some inmates were placed in cells alone and some in pairs; for some inmates this changed over time.

Serco has told us that the inmates were not restricted from any services, visits, employment or phone calls unless they were serving an outcome of an offence in custody at the time they were on the BMC.⁵² However, we are aware of at least one inmate who could not work during the period of his BMC.

Locking inmates in cells for lengthy periods is known to be harmful,⁵³ and prolonged solitary confinement is prohibited under international law.⁵⁴

The CAS Regulation (cl 289) provides that an inmate who is confined to cell for the purposes of punishment, or under a segregated or protective custody direction, must be kept under daily observation by a prescribed health officer and have access to essential medical care. The COPP also recognises the significant psychological and physical risks associated with cellular confinement. This is why an inmate discipline checklist must be completed when a penalty of cellular confinement is issued, prompting officers to check for an inmate's risk factors, and make mandatory reports where an inmate is identified as being at risk of self-harm or suicide.⁵⁵ As outlined at section 2.4.3, CSNSW policies also provide that young Aboriginal inmates should not be confined to cell alone and that alternate penalties be considered.

Such protections are not included in and do not apply to measures under the behaviour management policy. It seems that when relevant BMCs included conditions for minimal time out of cell, Serco did not take steps to identify or appropriately manage those inmates at risk of, or with a history of, self-harm so as to minimise the psychological and physical risks of confinement. For example, Serco advised us that some inmates were made to move cells during the BMC period to facilitate the management of time out of cells. Of the 8 inmates who were moved, 2 inmates — both Aboriginal — were moved from a cell with a cellmate to a cell on their own.⁵⁶ One was 19 years old, the other had a self-harm alert.

⁵² Serco, Statement of Information, 12 January 2024, 2 [9].

⁵³ See for example, New Zealand, Office of the Inspectorate, *Separation and Isolation: Thematic Report – Prisoners who have been kept apart from the prison population* (March 2023).

⁵⁴ *United Nations Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules), Rules 43-45.

⁵⁵ CSNSW, Custodial Operations Policy & Procedures, 14.1 Inmate discipline, 12-13, 16.

⁵⁶ Serco Statement of Information, 12 January 2024, Appendix 4.

There is some evidence that some of the inmates placed on a BMC were not coping. For example:

- On 1 October, one inmate (who was in a cell by himself) attempted 'self-harm through means of lighting a cell on fire and superficial lacerations on forearms.' He was 'moved to segregation unit and managed by Risk Intervention Team' until 4 October.⁵⁷
- OIMS case notes dated 5 October record that another inmate was struggling to comply with the conditions of his BMC.

We conclude that the BMCs, in setting conditions that provided for minimal time out of cell for up to 8 weeks, were unreasonable and oppressive. The impact of these restrictions was likely exacerbated because:

- The inmates placed on BMCs on 26 September had already been locked in their cells for 5 days due to the whole of Neighbourhood lockdown. Further, the BMCs for Jett and Martin commenced on 5 October after they had already spent 14 days in segregation.
- During the period inmates spent on BMCs, there were at times broader lock-ins at the centre. This meant that on some days some inmates (who were spending minimal time out of cell each day) would be locked in for the entire day.⁵⁸

2.5.3 Reviews, extension and cessation of the BMCs

The COPP provides that a review of an inmate's BMC should be conducted by a functional manager or authorised officer at least every 2 weeks, which will include scheduling an interview with the inmate to assess their progress and compliance with their BMC.⁵⁹

The outcomes of reviews conducted for Clarence inmates placed on BMCs were:

- Of the 33 inmates on BMCs, 31 had their time out of cell increased following a review.
- One inmate's hours out of cell never changed.
- Jett (an inmate with a recorded disability) had time out of cell decreased following poor behaviour.
- 25 inmates progressed off their plan before the 8-week end date after a scheduled review.⁶⁰

This indicates the majority of inmates' time out of cell increased during the period they were on a BMC. Notwithstanding, we identified issues with the administration of review procedures. Nineteen inmates had at least one scheduled review delayed meaning that their time out of cell may have been restricted for longer than would have been the case had the reviews been conducted when scheduled. For example, 18 inmates had their time out of cell increased after reviews on 12 October, 2 days behind schedule. Similarly, Martin's scheduled review for 19 October was pushed back to 24 October, creating a 5-day delay to his progression. Jett contacted our office throughout November 2023 to report that officers were missing his review meetings. On 6 December Serco confirmed that there had been no review of Jett's BMC between 3 November and 30 November.⁶¹

⁵⁷ Serco, Statement of Information, 12 January 2024, 3 [12].

⁵⁸ We received a complaint about this issue on 30 October 2023. The lock-in was confirmed in the CSNSW Daily Synopsis on 30 October 2023.

⁵⁹ CSNSW, Custodial Operations Policy & Procedures, 3.11 Behaviour Management, 7.

⁶⁰ Serco, Statement of Information, 12 January 2024, Appendix 5.

⁶¹ Email from Serco to NSW Ombudsman, 6 December 2023.

Serco informed us that delays in reviews were a result of a disturbance in the centre on 17 November.⁶² However, our analysis of information provided by Serco shows there was a delay in 19 reviews scheduled before this date. Reasons for the delays in these cases have not been provided.

While the policy provides that inmates are to be interviewed as part of the BMC review process,⁶³ 2 inmates informed us that they were simply notified of the review outcome and were not interviewed or otherwise involved in the review process. Failing to include inmates in the BMC review process undermines not only the fairness, but also the purpose and utility, of the BMC process.

The COPP states 'A ... BMC developed for an inmate must only be in effect for a maximum period of **8 weeks (56 days)**. [emphasis in original]'⁶⁴ If this should be extended, the BMC must be submitted to the Governor or Manager of Security in charge of the centre for approval.⁶⁵

The BMC for 6 inmates were in effect for over 8 weeks (56 days). Two of these were terminated 70 days after commencement. Information provided by Serco and available in OIMS does not show any extensions being approved by the Centre Manager or Manager of Security.

We conclude that the processes followed to review, extend and cease the BMCs did not comply with relevant policies and procedures resulting in inmates being treated in an unreasonable and oppressive manner.

3. Findings

In light of the facts and conclusions set out above, the NSW Ombudsman found that the conduct of Serco involved conduct of a kind referred to in s 26 of the Ombudsman Act, as follows:

1. The conduct of Serco was contrary to law within the meaning of s 26(1)(a) of the Ombudsman Act. In particular:
 - a. Jett, Martin and Julian were placed in segregation despite the evidence available at the time not showing any conduct from which a decision-maker could reasonably form the view that they had engaged in conduct that warranted segregation in accordance with section 10 of the Crimes (Administration of Sentences) Act.
 - b. The inquiry process for inmates charged with correctional centre offences was not conducted in accordance with Part 2, Division 6 of the Crimes (Administration of Sentences) Act, specifically:
 - i. all relevant and appropriate information was not considered when charges were laid, inquiries held, and guilty pleas recorded, compromising the fairness of the process for inmates (s 52(2)(a))
 - ii. inmates were not provided with the opportunity to examine and cross examine witnesses (as per their entitlement under s 52(2)(c))
 - iii. Jett and Majid were not represented or assisted by a support person during the inquiry process, compromising the fairness of the process (s 52(2)(a)).

⁶² Email from Serco to NSW Ombudsman, 6 December 2023.

⁶³ CSNSW, Custodial Operations Policy & Procedures, 3.11 Behaviour Management, 7.

⁶⁴ CSNSW Custodial Operations Policy & Procedures, 3.11 Behaviour Management, 7.

⁶⁵ CSNSW Custodial Operations Policy & Procedures, 3.11 Behaviour Management, 8.

- c. Inmates were charged, found guilty of, and penalised for correctional centre offences under Part 2, Division 6 of the Crimes (Administration of Sentences) Act when the available evidence for charges fell well short of what might be reasonably sufficient to establish the elements of the offences, let alone prove, the charges.
2. The conduct of Serco was unreasonable and oppressive within the meaning of s 26(1)(b) of the Ombudsman Act. In particular:
 - a. The decision to lock all inmates in Neighbourhood 1 in their cells from the afternoon of 21 September to 25 September (and in some instances 26 September) was not warranted.
 - b. Relevant considerations were not considered when penalties for correctional centre offences were imposed.
 - c. The decisions to confine Julian, Martin and Jett as a penalty for correctional centre offences did not comply with relevant policy and procedural requirements when they should have.
 - d. The behaviour management contracts were imposed for a purpose for which they were not intended and without consideration of relevant information. Conditions restricting inmates' out of cell hours were unreasonable and oppressive.
 - e. The processes to review, extend and cease the behaviour management contracts and plans contravened relevant policies and procedures, resulting in inmates being treated in an unreasonable and oppressive manner.

4. Recommendations

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

1. Corrective Services NSW update records relating to the correctional centre charges against bystander inmates arising out of the incident at Clarence on 21 September 2023, to reflect that findings are unsound and should be disregarded in future decisions.
2. Serco write to each inmate who was in Neighbourhood 1, Clarence, at the time of the incident (not including the inmate who committed the assault) and:
 - a. apologise for the way Serco responded to the incident with specific reference to the impacts on the particular inmate (ie. lockdown; segregation; correctional centre charges and penalties; and/or the establishment of a behaviour management contract)
 - b. inform the inmate that the findings of correctional centre charges arising from the incident are unsound and will be disregarded in future decisions (as per Recommendation 1).
3. Corrective Services NSW review whether the correctional centre routine at Clarence complies with legal and contractual requirements; is adequately documented; and is being effectively communicated, including to inmates.
4. Serco ensure that staff at Clarence (including centre management) receive refresher training on incident management, inmate discipline, the use of segregation and behaviour management contracts, and legislative requirements pertaining to record keeping.
5. Serco determine the factors leading to incomplete and erroneous information being recorded or relied upon in misconduct packages and segregation orders and decide whether further remedial or other action is warranted in response.

We will monitor implementation of these recommendations.

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