INQUIRY INTO THE ESCAPE OF PERSONS HELD IN CUSTODY AT THE SUPREME COURT OF WESTERN AUSTRALIA ON 10 JUNE 2004

INQUIRY CONDUCTED BY MR RICHARD HOOKER PURSUANT TO APPOINTMENTS UNDER SECTION 11 OF THE PUBLIC SECTOR MANAGEMENT ACT 1994 AND SECTION 44 OF THE COURT SECURITY AND CUSTODIAL SERVICES ACT 1999

30 July 2004

1 FOREWORD/EXECUTIVE SUMMARY 5

2 STATUTORY FOUNDATION OF INQUIRY AND ASSOCIATED PROCEDURAL MATTERS 7

2.1 Relevant Aspects of Public Sector Management Act 1994 7

2.2 Relevant Aspects of *Court Security and Custodial Services Act 1999* 10

2.3 Investigative Approach And Applicable Components Of Principles Of Procedural Fairness 11

2.4 Approach to Terms of Reference 16

3 NATURE OF THE CSCS CONTRACT, THE CSCS ACT & BUDGET 18

3.1 Background to the CSCS Contract 18

3.2 Court Security And Custodial Services Act 1999 19

3.3 Request for Proposal 20

3.4 AIMS' Response 22

3.5 Details of the CSCS Contract 23

3.6 Service Requirements 24

3.7 Risk Assessment and Management 26

3.8 Performance Measures 27

3.9 Contract Price 27

3.10 Emergency Plans, Critical Incidents and Reporting 28

3.11 State Facilities 29

3.12 Default and Termination by the State 29

Implementation of the Contract: Shadowing 30

3.13 Changes to the Cost of the Contract 30

3.14 Arbitration 31

3.15 Review of the CSCS Contract 31

4 AIMS: CORPORATE STRUCTURE 33

4.1 Vision, Mission And Values Of The Court Security And Custodial Services Division 33

4.2 Executive Management ... 33

4.3 Court Security and Custodial Services in WA ... 34

4.4 Staffing ... 35

4.5 Training ... 35

5 DEPARTMENT OF JUSTICE - RELEVANT STRUCTURAL ASPECTS ... 37

5.1 Prisons ... 37

5.2 Court Services ... 38

5.3 Corporate Services ... 39

5.4 Strategic Planning Group ... 39

5.5 Client Agencies Group ... 39

6 BUILDING ISSUES – ONGOING PLANNING AND BUDGET ACTIONS ... 43

6.1 Supreme Court And General Funding Allocations ... 43

6.2 Custody Centre of the Supreme Court ... 47

6.3 Progress on Improvements to the Custody Area ... 49

7 NARRATIVE OF EVENTS DIRECTLY CONCERNED WITH SUPREME COURT ESCAPE ... 52

7.1 Early Preparations for 10 June 2004 ... 52

7.2 Arrival of Prisoners on 10 June 2004 and Initial Response ... 53

7.3 The Escape Itself ... 55

7.4 Immediate Aftermath of Escape ... 59

7.5 decision of director general to intervene ... 61

7.6 Some General Findings ... 64

7.7 Applicable Procedures And Their “Approval” ... 65

7.8 Unlocking Procedures ... 67

7.9 Management Of Keys ... 69

7.10 Locking Of Doors ... 70

8 MONITORING OF THE CSCS CONTRACT BY THE DEPARTMENT OF JUSTICE 73

8.1 Introductory 73

8.2 Quality Assurance 74

8.3 Monitoring of Court Security and Custodial Services Contract 75

8.4 Development and Approval of the Supreme Court Site Manual 79

9 PARTICULAR TOPICS 81

9.1 Risk Assessment And High Risk Security Prisoners 81

Competing Arguments 83

Inquiry's Approach 86

9.2 Videolinks 89

Legislative Basis for the Use of Videolinks 90

Judicial Discretion/Judicial Practice 91

Basis of Practice at Supreme Court 92

Casuarina Prison 93

Hakea Prison 93

Technology and Other Practical Issues 94

10 ROLE OF THE MINISTER FOR JUSTICE 97

10.1 General Factual Matters 97

10.2 Specific Factual Matters 99

10.3 The Minister's Responsibility 101

10.4 Origin and Traditional Concept of Ministerial Responsibility 102

10.5 Western Australian Government's "*Ministerial Code of Conduct*" and the Prime Minister of Australia's "*Guide on Key Elements of Ministerial Responsibility* 104

10.6 Modern Conceptions of Ministerial Responsibility 106

10.7 Information Essential to Electoral Choice 107

10.8 Breaches of Ministerial Responsibility: Political Judgements that Influence the Ultimate Outcome 107

10.9 Breaches of "Ministerial Responsibilities:" Examples of Resignations 108

Stephen Byers 109

Estelle Morris 110

10.10 Non-resignations of Ministers after Escapes from Prisons 110

10.11 Resulting Observations Regarding Role of the Minister 111

11 INSPECTOR OF CUSTODIAL SERVICES 113

11.1 Inspector of Custodial Services: Statutory Framework 113

11.2 Findings of Report 7 relevant to Recommendation 6(c) 116

Master Plan 118

11.3 Internal Audit 119

Assessing Recommendations from OICS Reports 120

Implementing Recommendations from OICS Reports 122

Monitoring and Reporting on the Progress of OICS Recommendation Implementation 123

11.4 Conclusion 125

CHAPTER 12 - CONCLUDING OBSERVATIONS AND SUMMARY OF MAJOR FINDINGS AND RECOMMENDATIONS 126

Training 126

Use of Force in Custody Centres 126

Use of Restraints in Court Custody Centres and Court Environs 127

Court Lists 127

12.1 MAJOR FINDINGS AND RECOMMENDATIONS 127

A. Processes and Procedures 127

B. Departmental Monitoring and Approval 128

C. Actions Since the Escape 129

D. Risk Assessment 129

E. Video Links 130

F. Role of the Minister 130

G. Implementation of Inspector's Recommendations 130

1 FOREWORD/EXECUTIVE SUMMARY

On 10 June 2004 nine prisoners escaped from the Supreme Court custody centre.

There was considerable public interest and concern in the escape, reinforced by substantial media attention, Parliamentary debate, and other commentary. One can readily understand the tenor of public feeling concerning an incident like this: as everyone knows, the most serious criminals attend the Supreme Court of Western Australia. Citizens are entitled to assume, without giving it a second thought, that prisoners will be kept secure, and escapes will be prevented, whether in prisons or court custody centres.

Public concern was fuelled when it came clearly to light that court custody services are provided at the Supreme Court - as with all metropolitan court custody centres - by AIMS Corporation Limited, a private contractor to the Department of Justice.

Against that background, this Inquiry was initiated by two distinct instruments of appointment, one from the Premier under the *Public Sector Management Act 1994,* the other by the Director General of the Department of Justice under the *Court Security and Custodial Services Act 1999*. Those instruments gave this Inquiry appropriate investigative and coercive powers to find out literally what happened at the time of the escape and what aspects of the Court Security and Custodial Services Contract, its performance and management, might have contributed to such a disastrous occurrence.

The Inquiry has reached a number of conclusions about the practices and procedures of AIMS, the monitoring of contractual performance by the Department, and overall aspects of the contractual relationship between the two parties. No one factor, or even set of factors, can reasonably be said to have "caused" the escape, but there are nevertheless numerous findings that are rightly of concern to those who have instigated this Inquiry, the wider Public Sector, and most importantly, the people of Western Australia. In short, AIMS' security practices were inadequate and the Department ought to have done more, or acted quicker than it did, to identify and remedy those deficiencies.

After the Inquiry had given notice of its provisional adverse findings, AIMS in certain public statements acknowledged that the escape had been "inexcusable" and that it had "badly failed the people of Western Australia". The Inquiry's own conclusions sit entirely consistently with those admissions.

Largely those findings will speak for themselves and will no doubt inform other decision making processes within Government concerning the status of the CSCS Contract. Those broader issues are beyond the Inquiry's terms of reference and will be for others to consider and determine.

The Inquiry was also directed, in its terms of reference, to have regard to the role of the Minister for Justice. A Ministerial member of the Executive Government, being beyond the composition of the Public Sector, cannot lawfully be investigated, in this kind of administrative inquiry, in the same way as the contracting parties. The Inquiry has sought to achieve a reasonable balance by having regard to the actions of the Minister for Justice against a background of relevant principles as to the nature and meaning of contemporary notions of "ministerial responsibility" under the Westminster system of Government.

In concluding this summary, it should not be thought that there are no positives in the relationships between the contracting parties and others involved in the CSCS Contract and related matters. To the contrary, the Inquiry heard much evidence of a vastly improved, co-operative, contractual relationship and the work of a number of able and diligent people. Senior staff of each of the contracting parties impressed with their intelligence and energy. The challenge will be to further strive to convert those strengths into redressing the deficiencies identified, and aiming to restore the confidence of the people of Western Australia.

2 STATUTORY FOUNDATION OF INQUIRY AND ASSOCIATED PROCEDURAL MATTERS

As indicated, the existence, functions and powers of the Inquiry are sourced in two distinct appointments under separate Acts of the Western Australian Parliament. Thus to appreciate the nature of those functions and powers, it is necessary to have some regard to the text, subject matter and statutory purpose of that legislation.

2.1 RELEVANT ASPECTS OF PUBLIC SECTOR MANAGEMENT ACT 1994

The *Public Sector Management Act 1994* ("the PSM Act") is concerned with the administration of the Public Sector of Western Australia and the management of the Public Service and other public sector employment. Whereas its predecessor, the now repealed *Public Service Act 1978* was concerned with the narrower governmental and bureaucratic concept of a Public Service, the contemporary legislative framework recognises the legitimacy, and appropriateness, of a more broadly based regulation of the departments, instrumentalities and agencies of government, generally including all those bodies and offices that are established or continued for a public purpose under a written law.[1]

Enacted in the aftermath of the Royal Commission into Commercial Activities of Government and Other Matters, and in implementation of a number of its specific recommendations, the Act was nonetheless intended to strengthen the workings of government within the context of Westminster principles.[2]

In its regulation of the broader Public Sector, as opposed to merely the Public Service, the PSM Act provides for certain general principles in the areas of public administration and management, human resource management and official conduct. The Act was specifically said not to be designed to legislate for "honesty" in government, but to take available legislative measures to protect integrity, specify the roles and responsibilities of key players in the process and generally to promote ethical conduct.[3]

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[1] The Public Sector is formally defined in section 3 of the PSM Act to comprise all agencies (which means departments and SES organisations), ministerial offices and non-SES organisations. Thus the Public Sector of Western Australia excludes Ministers *per se.*
[2] Second Reading Speech, Public Sector Management Bill, 30 Sept 1993, Hansard, p5023-4.
[3] Supra, n 2.

An Office of Commissioner for Public Sector Standards is created by the PSM Act, consistently with the enactment and application of those general principles. The Commissioner is empowered to establish, and monitor compliance with, a variety of norms of conduct for the administration of the Public Sector, including public sector standards (setting out minimum standards of merit, equity and probity), codes of ethics and codes of conduct.

Entirely separately to the Office of Commissioner and her functions, the Minister for Public Sector Management may, in writing, direct one or more suitably qualified persons to hold a special inquiry into a matter relating to the Public Sector. The formal appointment of this Inquiry by the Premier, in his capacity as Minister for Public Sector Management, is a direction under that power. There may, in some cases, be questions as to the meaning and potential width of the expression "a matter relating to the Public Sector". No difficulties of that kind arose before this Inquiry. There could be no question that the terms of reference contained in the Premier's direction were within the scope of his power to direct the holding of a special inquiry, and of the PSM Act generally.

A special inquirer has a range of powers for the purpose of undertaking his or her special inquiry. Those powers include:

- Entry of the premises of any public sector body;
- Requiring a person to produce to the inquirer, any book, document or writing that is in the possession or under the control of that person and to inspect and take copies of that document; and
- Summonsing of witnesses and documents and examination of such witnesses on oath.[4]

A special inquirer is to act independently in relation to the performance of his or her functions.[5] With respect to matters of procedure generally, a special inquirer is to act on any

[4] Section 12 (2) and Schedule 3, PSM Act. An interesting, and potentially important, question arises as to the ambit of the power to summon witnesses and documents, and hence compel the giving of evidence on oath or affirmation, under Schedule 3, clauses 1 and 3 of the PSM Act. The power is expressed to be in respect of a "person" which, taken literally, has an obvious meaning and therefore a very wide application. It is at least arguable, however, that the meaning of "person" must be interpreted more narrowly in light of the overall purpose and structure of this part of the Act. Such an interpretation may lead to the consequence that the coercive power is confined to members of the public sector or, at least, persons who have, at times relevant to the special inquiry concerned, been members of the public sector, to be summonsed and examined on issues. The conduct of the Inquiry did not render it necessary for me to express a view on those competing interpretations.

[5] Section 13 (2) of the PSM Act.

matter in issue according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms and is not to be bound by the rules of evidence, but may be informed on any such matter in such manner as the special inquirer considers appropriate.[6] This procedure is a common one for a variety of administrative tribunals and inquiries.[7]

It is important to recognise that, in administrative proceedings where rules of evidence do not apply, a tribunal or inquirer is not simply entitled to ignore those rules and the rationales or principles that underpin them. That is because evidentiary rules represent the development and evolution of the common law to identify and utilise methods of inquiry, which are best calculated to prevent error and arrive at truth.[8]

Generally speaking, it is appropriate that administrative tribunals and inquirers seek to base their findings and conclusion on material (ie not necessarily "evidence"[9] in any strict or formal sense) that is logically probative. There is no particular magic or complexity in such a requirement: it simply means that a decision ought be based on material which tends logically to show the existence, or non-existence of facts, or the likelihood or unlikelihood of some future, relevant event. Such common sense notions guide an assessment of what material truly has "probative value" for the purposes of an administrative inquiry.[10] Beyond those observations, and subject to the rules of procedural fairness, an administrative inquiry possesses considerable flexibility in its structure and process. To that extent, the PSM Act recognises and enacts the common law position.

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[6] Section 13 (3) of the PSM Act

[7] Numerous provisions similar to section 13 of the PSM Act can be found in both Commonwealth and State legislation – eg, *Migration Act* 1958 (Cth), *Military Rehabilitation and Compensation Act* 2004 (Cth), *Industrial Relations Act* 1979 (WA), *Environmental Protection Act* 1986 (WA) and the *Workers Compensation and Rehabilitation Act* 1981 (WA). In *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 Gaudron and Kirby JJ noted that section 420 of the *Migration Act,* which provided that the Refugee Review Tribunal is "not bound by technicalities, legal forms or rules of evidence" and that it "must act according to substantial justice and the merits of the case," required that Tribunal to act as an administrative body with flexible procedures and not as a body with technical rules.

[8] *R v War Pensions Entitlement Appeals Tribunal: ex parte Bott* (1933) 50 CLR 228 at 256.

[9] As observed by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 terms such as "evidence" and "balance of probabilities" are borrowed from civil litigation and may not be readily adaptable to an administrative inquiry.

[10] See generally *Minister for Immigration and Ethnic Affairs Pochi* (1981) 31 ALR 666 at 683-90; *Mahon v Air New Zealand* [1984] 1 AC 808; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282.

A special inquirer may, in respect of a matter not dealt with by the PSM Act, give directions concerning the procedure to be followed at or in connection with the special inquiry. A person participating in that special inquiry is to comply with any such direction.[11] In the context of the confidentiality of certain materials obtained and assessed by this Inquiry, a formal direction was given, the details of which appear in Appendix B.

2.2 RELEVANT ASPECTS OF *COURT SECURITY AND CUSTODIAL SERVICES ACT 1999*

The CSCS Act empowers the Director General or "CEO" to, for and on behalf of the State, into a contract with the private sector for the purposes of providing any court security or custodial services.[12] It is unnecessary to detail the framework for the administration of such contracts, and court security and custodial services otherwise. It suffices to note that the CSCS Act makes particular provision for such contracts, including certain minimum matters to be included therein, minimum standards, and related matters of administration. [13]

As part of what may loosely be termed the "accountability provisions" of the CSCS Act, the CEO may, and upon the request of the Minister must, appoint a suitably qualified person to inquire into and report upon any matter, incident or occurrence concerning any service that is a subject of a contract, other than whether or not an offence has been committed[14]. Mr Piper's instrument of appointment of 17 June 2004 constitutes such an appointment.

The Act enables a person so appointed (an "Investigator") to undertake his or her inquiry and report through the obtaining of information and answering of questions of contractors and, where applicable, subcontractors, and their respective employees or agents. A process is enacted whereby it is open to an Investigator to obtain such information and/or answers to questions either through requests or requirements. It is unnecessary to detail the legislative text relevant to the distinction between such requests and requirements. It suffices to say that the Inquiry remained cognisant of those distinctions and, in interviews with AIMS and its staff, provided appropriate explanations of the legislative framework, and its associated obligations, accordingly.

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[11] Section 13(4), PSM Act.
[12] Section 18, CSCS Act.
[13] Sections 38-43, CSCS Act.
[14] Section 44(1), CSCS Act.

As has been explained, the attitude of AIMS to the Inquiry was co-operative overall, albeit that all representatives of the company who were interviewed by the Inquiry elected that questions, and requests for information, be couched in terms of a "requirement".

For all intents and purposes, the two instruments of appointment initiating the Inquiry were pursued concurrently. This Report constitutes a simultaneous discharge of the reporting obligations to each of the instigators of the Inquiry, the Premier (in his capacity as Minister for Public Sector Management) and the Director General of the Department of Justice, accordingly.

2.3 INVESTIGATIVE APPROACH AND APPLICABLE COMPONENTS OF PRINCIPLES OF PROCEDURAL FAIRNESS

Most administrative inquiries are subject to a requirement, implied by the common law of Australia, to comply with the principles of natural justice, or (to use the essentially synonymous term) procedural fairness. That general principle is only capable of being overridden by express and unambiguous statutory prescription to the contrary.[15]

It is well recognised that reputation, be it of a personal, business or commercial nature, constitutes an interest which should not be damaged by an official finding following a statutory inquiry, unless the person whose reputation is likely to be affected has had a full and fair opportunity to show why the finding should not be made. [16]

However, merely to acknowledge, at a general level, the applicability of the rules of procedural fairness of itself says little as to the operative component, or practical requirements, of that obligation. That is largely because procedural fairness is a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of a particular case. The nature of any given administrative inquiry, its subject matter, and any statutory obligations which it must satisfy, are among the factors that will shape the practical content of the principles of procedural fairness.[17]

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[15] *Annetts v McCann* (1990) 170 CLR 596 at 598, 608 – 609; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 578; *Edwardes v Kyle* (1995) 15 WAR 302 at 310-311.
[16] *Annetts v McCann*, supra at 608; *South Australia v O'Shea* (1987) 163 CLR 378 at 389.
[17] *Kioa v West* (1985) 159 CLR 550 at 585; *Mobil Oil Australia Pty Ltd v Commissioner of Taxation* (1962) 113 CLR 475 at 501.

It is open to an administrative inquiry or tribunal to undertake its work in a way that draws, to a greater or lesser degree, on methods of *adversarial* adjudication or, on the other hand, *inquisitorial* or *investigative* procedures. It is open to view the two contrasting models as located at extreme ends of a continuum within which any given mode of determination and its associated set of procedures will fit. The concept of adversarial adjudication involves a contest between opposing parties, whereby the parties conceptualise and seek to establish their own claims, usually through the giving of oral testimony which is regulated by the rules of evidence and tested by cross examination. By contrast, inquisitorial (or the less pejorative term "investigative") procedures draw on the traditions of courts in civil law jurisdictions, the essence of which lies in the active participation of an impartial investigator from the outset of the proceedings. It will be the investigator or inquirer who has primary responsibility for defining the issues and hence the conceptualisation of the form of evidence gathering and the supervision of that process as it unfolds.[18]

Common law courts have acknowledged for many years that it is inappropriate to expect administrative tribunals and inquiries to follow the procedures of courts and all the associated involvement of lawyers[19]. As the leading academic text on Australian administrative law recognises, [20] the contrasting labels of "adversarial" and "inquisitorial" will often provide little more than a starting point in the process of an identification and enunciation of the actual, practical components of an inquiry's processes and procedures. It is therefore necessary to identify some aspects of this Inquiry's subject matter, inherent nature and statutory and other obligations.

First, it is apt to reiterate that the Inquiry is a "special inquiry" under the PSM Act and an inquiry "into a particular incident or occurrence" concerning a service the subject of a contract under the CSCS Act. Hence the terms of reference in the Premier's instrument of appointment recite at the outset that the applicable role is one to "inquire into" certain specified matters involving the Department in respect of the Supreme Court escape. Similarly, the instrument of appointment from the Director General of the Department of Justice is in terms an appointment for the purpose of "investigating and reporting on" the court custody services at the Supreme Court under the CSCS Contract. Thus the very "nature" of the Inquiry can be contrasted with other forms of administrative inquiries or

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[18] *Aronson et al, Judicial Review of Administrative Action* (3rd edition, Law Book Co, 2004, 489 – 490).
[19] *Local Government Board v Arlidge* [1915] AC 120 at 138.

tribunals where a particular application is made, seeking certain relief or orders, on which the decision maker must adjudicate.[21]

Secondly, it is an express term of reference under the Premier's direction that the Inquiry "proceed with expedition". The terms of reference as initially phrased expressed a requirement that the Inquiry report its findings and recommendations to the Minister for Public Sector Management by 16 July 2004. On 28 June 2004 the Inquirer wrote to the Premier seeking an extension of the Inquiry's time to 30 July 2004. That request was based upon a combination of matters, including my initial assessment of the scale, scope and relative complexity of the Inquiry's subject matter, the likely time to be taken in interviewing witnesses and examining relevant documentation, and the practical obligations of complying with the principles of procedural fairness. The request for an extension of time was granted by the Hon Premier by letter to the Inquiry dated 5 July 2004.[22] The requirement to complete the Inquiry by 30 July 2004 has been a realistic, but nonetheless tight, timeframe on the procedures and reporting requirements of the Inquiry.

Thirdly, and related to each of the preceding observations, it was inappropriate and unrealistic to anticipate, let alone expect, that any of the parties under investigation would put forward some kind of "case" or "position" regarding the Inquiry's subject matter and terms of reference. Beyond the text of the terms of reference, there were no pleadings as is the case with civil litigation, nor any other particular parameters or boundaries pursuant to which a case or position could be framed. Rather, an administrative inquiry like this Inquiry will usually be a fluid, dynamic exercise, with new or varied lines of investigation frequently being identified or unearthed.

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[20] A*ronson,* supra n 18, 491.

[21] For example, where an industrial relations commission is called upon to settle an industrial dispute or grant relief for alleged unfair dismissal or denied contractual benefits (see, eg, *Industrial Relations Act* 1979 (Cth) sections 23-29, *Workplace Relations Act* 1988 (Cth), sections 99-104) or where the Refugee Review Tribunal is required to adjudicate on an application by a non-citizen of Australia for a protection visa, or other form of authorisation to remain in the country (see *Migration Act* 1959 (Cth) sections 411-419).

[22] By contrast to the Premier's instrument of appointment, the Director General's instrument of appointment was not expressly subject to any particular limitation of time. However, in light of the overall circumstances of the Supreme Court escape and the near simultaneous issuance of the two instruments of appointment, it was readily apparent that the respective terms of reference ought be addressed concurrently. I drew these matters to the attention of the Director General in correspondence dated 7 July 2004, suggesting that I would meet his instrument of appointment and terms of reference by 30 July 2004, in simultaneous compliance with the Premier's terms of reference, as extended. I suggested that it would be sensible and appropriate to produce a single report which satisfied both statutory obligations. The Director General readily acceded to that suggestion.

Fourthly, the mere fact that a tribunal is authorised to take evidence on oath does not mean that it is bound to acquire all, or any, of its information in that way. Such provisions are merely enabling in character.[23] Similarly the nature and circumstances of the Inquiry meant that there was no obligation upon it to allow legal representation, either generally or in respect of any particular aspect of the Inquiry's work. [24] (As will shortly be explained, however, one of the parties under inquiry sought ongoing representation by its firm of solicitors and the Inquiry acceded to that request.)

These matters strongly pointed towards the conduct of the Inquiry in a way that was, as far as reasonably possible, and with due observance of applicable principles of procedural fairness, investigative (or inquisitorial) rather than adversarial.

The parties and entities under inquiry were co-operative with the Inquiry's investigations, processes and timetabling. The Director General of the Department (who, of course, was in part one of the very instigators of the Inquiry) expressly indicated in written correspondence that he and the staff of his Department would make every effort to facilitate the Inquiry's work, and that co-operation and assistance did duly occur. AIMS through its lawyers, Jackson McDonald, expressed similar sentiments, initially at a preliminary oral hearing on 25 June 2004 and subsequently in associated written correspondence.[25] The recitals to the terms of reference in the Premier's instrument of appointment stated that the Minister for Justice would be "available to (the Inquiry) to assist" with its inquiries and would allow "full access to her and her staff" as the terms of reference were addressed. Again, that availability and assistance did indeed eventuate.

As the work of the Inquiry proceeded, witnesses who were sought to be interviewed attended voluntarily, although in the case of interviews undertaken with employees of AIMS Corporation, the Inquiry obtained information and asked questions by means of a "requirement" rather than merely a "request" pursuant to section 44 of the CSCS Act. Lawyers from Jackson McDonald attended with those witnesses and in some cases

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[23] *TA Miller Ltd v Minister for Housing and Local Government* [1968] 1 WLR 992 at 995; E*x parte Smith; re Russo* [1971] 1 NSWLR 184 at 187-188.
[24] Aronson, supra, n 18, 532-536. *Forbes, Justice in Tribunals* (2nd edition Federation Press 2002) [1120-1128] The orthodox position in Western Australia is probably represented by *Stampalia v WA Trotting Association Inc* [1999] WASC 7 and, on appeal, [2000] WASCA 24.
[25] Clause 2.4 of the CSCS Contract expressly states that the parties will work together cooperatively in relation to the Contract.

undertook limited questioning of them (rather than "cross-examination", a term more apt for adversarial proceedings), in a way that facilitated the Inquiry's processes.

It was determined that the main component of the principles of procedural fairness applicable to the Inquiry was the notification to the parties under inquiry of provisional findings that were adverse, or could reasonably be construed as adverse, to those parties. Those provisional findings were provided to the Department and AIMS under cover of letters dated 20 July 2004, together with the substance of the documentary and other material before the Inquiry that was considered to support, or potentially support, the provisional findings. Those two parties were directed to provide any further material, written submissions, or other responses to the provisional findings, by 26 July 2004. The two parties acquiesced in that procedural timetable and duly complied with the requirement to provide responses by 26 July 2004. The respective written responses were of considerable assistance to the Inquiry.

Shortly after AIMS and the Department were informed of the Inquiry's provisional adverse findings, some important public statements were made by Mr John Cooper, the Managing Director of AIMS. Mr Cooper, in describing the Supreme Court escape and another matter not the subject of this Inquiry as "inexcusable", said that "a breakdown in services had badly failed the people of Western Australia". He detailed certain action to improve security systems, describing implementation of the improvements as a priority to "restore the confidence of Western Australians". On learning of these public statements, the Inquiry wrote to Jackson McDonald, expressing its considerable interest in the acknowledgments and seeking more detail as to the proposed managerial and procedural changes. Although by this time, the Inquiry had obtained practically all of its evidentiary material and was deliberating on its findings, the importance of AIMS' acknowledgments rendered it essential to have regard to them in this report.

Separately, and by letter dated 23 July 2004 to the Inquiry, Jackson McDonald on behalf of AIMS requested an opportunity to supplement its written response to the provisional findings by oral submissions. Although there was no legal obligation to allow any of the parties under inquiry to provide submissions orally[26] (whether in response to provisional adverse findings or otherwise) , the Inquiry granted that request in a way that facilitated both AIMS' delivery of

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26 See generally Aranson, supra n18, 493-4. Forbes, supra n 24, 160 - 162

oral submissions and the satisfaction of the Inquiry's requirement for elaboration on AIMS' acceptance of the "inexcusable" nature of the escape and related acknowledgments. The submissions were delivered on 26 July 2004 by AIMS' counsel, Ms Patricia Cahill, instructed by Mr Basil Georgiou, a partner at Jackson McDonald. The two were accompanied by Mr David Nicholson, who by that time had assumed his new position as General Manager, Court Security and Custodial Services in place of Mr Stephen MacPherson. He provided certain elaboration on Mr Cooper's public acknowledgment, the basis for the managerial change, and other issues pertinent to the closing submissions.

2.4 APPROACH TO TERMS OF REFERENCE

The instrument of appointment from the Director General, received first in time by the Inquiry, was expressed to be for the purpose of inquiring into and reporting upon the escape itself. The appointment also expressed a distinct, yet intimately related, purpose of investigating and reporting on the "court custody services" under the CSCS Contract, insofar as those services relate to the escape itself.

The parameters of the Inquiry as marked by the Director General's appointment were, in effect, subsumed by the somewhat broader framework established by the Terms of Reference under the Premier's appointment. However, and as already noted, a significant source of authority was created by the Director General's appointment insofar as it empowered the Inquiry to investigate aspects of the contractual performance of AIMS Corporation, with associated coercive powers to be exercised if necessary.

With respect to the operative part of the Premier's terms of reference, the requirement to examine and report on the facts of the escape itself and the circumstances under which it took place, were central to the investigations and assessment undertaken by the Inquiry. Hence this report initially outlines, as concisely as possible in light of the relatively complex contractual relationship, several matters of background concerning the structures of AIMS and the Department together with the nature, and important operative provisions, of the CSCS Contract itself. It then proceeds to set out a narrative of the circumstances of the escape itself, and a series of conclusions about factors that, in the Inquiry's view, played a direct role in influencing the escape, or facilitating its risk.

In addressing the second operative paragraph of the Premier's appointment, the central focus is an analysis, and series of conclusions, regarding the way in which the Department monitored and managed the contractual performance. However, associated issues of particular relevance arise, including the complex and somewhat vexed question of the risk assessment pertaining to "high risk" or "high security" prisoners and appropriate responses to those risks. Other important, related issues concern aspects of the overall commercial relationship between the contracting parties and the use, and present limitations on videolinks for criminal appearances.

Regarding the third operative paragraph of the Premier's terms of reference, it is emphasised that the relevant content of Report No 7 of November 2001 issued by Professor Richard Harding provides only the factual foundation for an examination of relevant issues and is not the subject of inquiry in its own right. The statutory office of the Inspector is not a constituent of the Public Sector and, in any event, the meaning of the terms of reference do not admit of any examination of his role or the merit of any of his reports.

Three particular recommendations from Professor Harding's Report 7 are identified as having particular significance for prisoner custody at the Supreme Court of Western Australia. Two of those three recommendations sit within a broader context of risk assessment for prisoners carrying enhanced security requirements, and the overall topic of monitoring. The third topic, concerning the concept of a "Master Plan" for the Supreme Court custody centre, is the subject of discrete treatment.

It will be readily apparent that the major focus of the Inquiry is on aspects of the respective performance, and interrelationship of AIMS and the Department of Justice under the CSCS Contract. Although the Minister does not form part of the Public Sector, the Inquiry proceeded to have regard to her role regarding the escape, and associated matters, as directed in the preamble to the terms of reference. A separate chapter covers those matters.

3 NATURE OF THE CSCS CONTRACT, THE CSCS ACT & BUDGET

3.1 BACKGROUND TO THE CSCS CONTRACT

In 1995 it was first proposed that court security and custodial services be transferred to the then Ministry of Justice[27] to increase the number of Police undertaking operational duties by the transfer of these non-core duties. In particular, it was proposed to transfer courtroom security functions (i.e. existing security, orderly and gallery guard function) to new generic positions of Court Orderly. It was foreshadowed at that time that consideration be given to the engagement of the private sector in the provision of aspects of court security and custodial services.

In 1997, upon endorsement of the Cabinet Sub Committee on Public Sector Management, the joint Police/Justice Core Functions Project[28] proceeded to market test lockup custody management, court security, court custody and prisoner movement services and plan for the implementation of the outsourced delivery of these services.

On 14 September 1998, Cabinet approved the printing of the Custody Management and Court Security Bill 1998 subject to finalising drafting with the Minister for Police.

On 23 September 1998, the Minister for Justice, Hon Peter Foss QC MLC and the Minister for Police, Hon Kevin Prince MLA, by a submission to Cabinet regarding Custody Management and Court Security Services sought "approval to negotiate a contract with Corrections Corporation of Australia[29] for the provision of custody and court security services." The goal was again to increase the "… availability of sworn police officers for front-line duties by separating the functions of policing from the supervision and transport of offenders in custody." It was also stated that:

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[27] The Department was known as the Ministry prior to the Machinery of Government reforms in 2001. Where applicable the Department will be referred to as the Ministry in the course of this Report.
[28] The objectives of the joint Police/Justice Core Functions Project included to substantially replace the current service delivery arrangements with an integrated flexible and innovative service provided from the private sector; improve the quality of the service; improve the cost effectiveness of the delivery of the services and thereby reduce the costs to Government; and enable sworn police officers, prison officers and juvenile justice officers currently performing the services to be returned to core duties.
[29] Now AIMS and referred to as AIMS in this report.

> "Overall outsourcing of these services provides a better service at less cost than could be done by keeping the services within the Ministry of Justice. Additionally the outsourcing option better meets the project objectives of returning [Police] and Ministry of Justice staff to core duties and relieving Police of custodial functions. It also better meets Government policy objectives."

These negotiations occurred during 1998 and in April 1999 Cabinet gave in principle approval for AIMS to be contracted to provide this service subject to the completion of a due diligence process, the maintenance of the agreed price and the upgrade to certain lockups[30] and three other facilities. [31] The provision of custody services in remote areas was specifically excluded. The expected cost of the contract in 1998/99 was $8 million.[32]

It was anticipated that the contract would provide an improved service at a slightly less cost to that which would be incurred by the Ministry of Justice and the Western Australia Police Service ("WAPS") under the current system. It also facilitated the deployment of 201 Police Full Time Equivalents ("FTE") and 40 Ministry of Justice FTE to core duties.

3.2 COURT SECURITY AND CUSTODIAL SERVICES ACT 1999

The *Court Security and Custodial Services Act* 1999 ("CSCS Act") substantially reorganised the arrangement for the provision of services relating to court security, court custody, prisoner movement and lockup management. Such a reallocation allowed the services to be "delivered in a safe, more efficient, better integrated and more accountable way."[33]

The Act provides that the CEO[34] of the Department of Justice is responsible for providing these services and the CEO may, on behalf of the State, enter into a contract with private persons for the provision of the services.[35] Provision is made for the CEO to delegate particular powers to contract workers necessary for the provision of these services.[36] The Act outlines a number of matters that must be addressed in any contracts made under the Act,[37]

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[30] The lockups were at Midland, Fremantle, Joondalup, Armadale, Kalgoorlie and South Hedland.
[31] The facilities to be upgraded were at Canning Vale, Bunbury and Carnarvon.
[32] It was open to Government to request additional services (phase 2 services) within 2 years of 1 July 1999 if those services were required.
[33] Second Reading Speech, Court Security and Custodial Services Bill, 12 November 1998, Hansard, 3372.
[34] The Director General
[35] Section 18, CSCS Act.
[36] Sections 20 and 21 and schedules 1, 2 and 3, CSCS Act.
[37] Section 38, CSCS Act.

these include matters such as compliance with the Act; performance standards; costs; reports; code of ethics and conduct; and investigation procedures and dispute resolution.

A range of accountability provisions is contained in the Act. As already noted the CEO may, and upon the request of the Minister must, appoint an investigator to inquire into any matter, incident or occurrence concerning the provision of services.[38] Moreover the Minister may give directions to the CEO in respect of the performance of the CEO's functions under the Act.[39] The CEO must notify the Minister in the event of particular events, including escapes and deaths in custody.[40] The CEO retains the right to intervene in a contract in the event of an emergency in the service or a failure to effectively provide the service where such intervention is in the public interest.[41] The CEO can also terminate or suspend a contract in a range of situations.[42]

3.3 REQUEST FOR PROPOSAL

The Request for Proposal No 1/1998 ("the Request") was issued 2 April 1998 by the WAPS and Ministry. By and through this document the State of Western Australia sought to contract a company for the delivery of the police custody management services, court custody management services, prisoner movement services and court security services as well as the upgrading of some police lockups. The Request provided detailed information on the services to be provided and general operating requirements, as well as information on the method and conditions for submitting proposals.

One part of the Request was headed "Exclusions"[43] and provided –

> "The following prisoners are excluded from this Contract and will not be managed by the Contractor, albeit that they may be held and guarded in facilities managed by the Contractor:
>
> (a) high security prisoners in the custody of MOJ Emergency Security Group (ESG), or in the custody of WAPS because of operational necessity or risk. In these cases WAPS or ESG may provide all escorts and guards."

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[38] Section 44, CSCS Act.
[39] Section 28, CSCS Act.
[40] Section 29, CSCS Act.
[41] Section 59, CSCS Act.
[42] See Part 3.12 of this Report.
[43] Clause 4.1.3 of Part 4, Request for Proposal.

Significantly, this clause in the Request was expressed in similar, although not identical, terms to the applicable provision eventually agreed upon in the CSCS Contract, clause 3.3.3 Schedule 2.

Elsewhere in the Request under the heading “Custody and Security” –

> “The Contractor will make every effort possible to prevent escapes or attempted escapes. This is a key measure of Performance. Custody and security are prime responsibilities which must be demonstrated in the operational procedures to be developed by the Contractor and approved by the Principal.…Security and supervision arrangements will vary according to the category of prisoner, the physical environment immediately pertaining to the prisoner and the risk of escape. The Client Agencies will develop protocols with the Contractor for the secure and confidential transfer of known security information pertaining to prisoners in the Contractor’s care.”[44]

The Request outlined that all proposals would be evaluated using two groups of criteria. One relating to the provision of the services and the other to the upgrading of lockups. The criteria related to the provision of service were:

1. financial capacity and stability;
2. capacity and capability to provide the required services;
3. innovation applied to services;
4. service quality
5. risk management; and
6. price of services.

Of particular relevance to this Inquiry are criteria 2, 4 and 5. The response to criterion 2 required detail of “proven experience and ability to provide the Contract services or similar services with evidence of prior good performance.” The response to criterion 4 had to demonstrate “evidence of proven previous performance in addressing key performance

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[44] Clause 7.2 of Part 7, Request for Proposal. This is to be contrasted with clause 5.2 of the schedule 2 of the CSCS Contract also entitled “Custody and Security.”

issues in these types of services or similar services, including reduction in rates of escapes, attempted escape…" The response to criterion had to demonstrate an "understanding of the key technical, financial, operational and Contractual risks involved in proving each Contract service" and "evidence of a capacity to develop, implement and monitor a risk management plan to minimise those risks."

3.4 AIMS' RESPONSE

In relation to criterion 2, AIMS' provided details of the court custody and security service it provided in respect of the County and Supreme Courts in Melbourne and Geelong -

> "The Supreme Court operates 16 separate court rooms however does not have a holding capacity in close proximity to the court thereby necessitating escorting of prisoners by CCA staff through public access areas. Since commencement of operations these escorts have been achieved without incident and with a faultless record of safety to the public, judiciary and prisoners."

In response to the proven previous performance aspect of criterion 4, AIMS provided a table breaking down the performance of their Custodial Management Services division of the Victorian Operations. This table indicates no escapes occurred between 1994-1998.

In response to criterion 5, AIMS outlined their Risk Management and Control Technique:

- "Clearly identifies risk areas in all functions of an operational unit;
- Quantifies risk within an easily communicated framework;
- Involves external stakeholders (eg MOJ/WAPS) as partners in identifying risk areas;
- Enables risks to be re-evaluated and recalculated on a regular basis;
- Establishes and reviews risks quickly and effectively following an incident;
- Involves clients in identifying and monitoring ongoing risk and outcomes;
- Provides a strategic planning process to control risk; and
- Risk Management and Control Technique is directly linked to the Quality Assurance Program."

In various arguments presented to the Inquiry, particularly surrounding risk assessment, and response thereto, the Department emphasised AIMS' representations on these issues and the conclusions it maintained it was entitled to reach from those representations.

3.5 DETAILS OF THE CSCS CONTRACT

The contract for the provision of court security and custodial services was made between the State and AIMS to commence on 17 January 2000 for a term of 5 years.

The Contract contains a number of recitals. Notably, for the purposes of the Department's position regarding risk assessment, recital (E) provides –

"The Contractor has represented that it has the skills capacity and resources related to the provision of facilities and services of the type described in the Request for Proposal and has submitted the Proposal in response to the Request for Proposal in which it had offered to provide the Services in a manner which is at all times consistent with the Objectives[45] and Outcomes."[46]

Clause 2 sets out the obligations whereby AIMS agrees to provide particular services to the State in accordance with the Act and the provisions of the contract in return for the contract price.

The State administers the Contract through the Contract Manager who acts on behalf of the State.[47] AIMS administers the contract through the Service Manager who acts on behalf of AIMS.[48] Administration includes management, monitoring and reporting.

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[45] The Objectives of the State in entering in the Contract are outlined in the recitals and include replacing the current services with an integrated, flexible and innovative service; improve the quality and cost effectiveness of the services; enabling police officers and prison officers currently providing the services to return to core duties; and improving the safety of court premises and custodial places for both persons in custody and staff.

[46] The Outcomes to be realised by the Contract are also outlined in the recitals. The Outcomes include an assured, specified level of safety and security for the public, person in custody; judicial officers, staff, court premises and custodial places involved in the provision of services; application of the appropriate duty of care; and improved service efficiency and effectiveness.

[47] Clause 9.

[48] Clause 9.

3.6 SERVICE REQUIREMENTS

Pursuant to the Contract, AIMS is to provide, manage, operate and maintain in accordance with the Contract, Schedule 2 and the CSCS Act.[49]

There are four categories of services to be provided under the Contract and the nature of the services to be provided for each category is outlined in Schedule 2, namely:

- court security services;[50]
- court custodial services;[51]
- prisoner movement services;[52] and
- lockup custody management services .[53]

Part 5 of Schedule 2 outlines the service requirements, expressed as objectives, that must be met in providing all the services.

Court custodial services are defined in the Contract as the admission and custody of prisoners who are scheduled to appear in a court and the transfer and release of those prisoners once the court hearing has concluded.[54]. These requirements focus on the active duties of AIMS and do not detail those events that AIMS must seek to prevent, for example deaths in custody or escapes.

The Contract excludes certain prisoners from AIMS' service and responsibility in certain circumstances.[55] These circumstances include high security prisoners in the charge of the Emergency Security Group or in the charge of the Police because of operational necessity or

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[49] Clause 6.1(a)
[50] Part 2.
[51] Part 3.
[52] Part 4.
[53] Part 6.
[54] Clause 1.1.1. The specific requirements for court custodial services at the Supreme Court are provided at 3.3.1 and include the requirements to accept and process custody of prisoners for appearances before the Court, conduct appropriate risk management, provide for the care, welfare and security of persons in custody and escort prisoners to court and maintain the security of prisoners in the courtroom
[55] Clause 3.3.3

risk and prisoners held in the custody of the police at a location where the contract does not apply. The Contract Manager can also specifically exclude prisoners.[56]

The Contract contains general service requirements that apply to all services provided by AIMS.[57] In particular, AIMS must develop operational procedures to prevent escapes and attempted escapes.[58] These procedures must be approved by the CEO of the Department of Justice.

AIMS must take into account best practice objectives encapsulated in national and international standard guidelines in developing operational procedures.[59]

AIMS must have a staffing plan that includes a training plan.[60] AIMS is responsible for all pre-service and ongoing training of its staff engaged in providing services under the contract and meeting set training outcomes .[61] AIMS is also required to develop a code of ethics and conduct for its staff, for approval by the CEO of the Department of Justice.

Handover procedures will be developed for the transfer of persons in custody, property, goods, documentation and communication between AIMS and the Department of Justice and police.[62]

AIMS is required to develop operational procedures to regulate the use of force. The discretion to use force to control persons in custody is to be exercised with due care and only in circumstances where all alternative forms of control have failed.[63]

AIMS is required to develop an operations manual prior to the commencement of the contract and its staff is to use this manual.[64] The manual must also be available on-line between the State and AIMS. The manual and any subsequent changes to it must be approved by the Contract Manager.

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[56] Clause 3.3.3(e)
[57] Part 5 of Schedule 2.
[58] Clause 5.2 of Schedule 2.
[59] Clause 5.6 of Schedule 2.
[60] Clause 5.7 of Schedule 2.
[61] Clause 5.7.3 of Schedule 2.
[62] Clause 5.9 of Schedule 2.
[63] Clause 5.14 of Schedule 2.
[64] Clause 5.23 of Schedule 2.

AIMS staff are subject to the direction of the nominated representative from the Department of Justice or the police when those directions are reasonably related to the achievement of any Outcome.[65]

Other general service requirements outlined in schedule 2 include –

- compliance with relevant legislation and relevant Government policies;
- the applicable duty of care to the prisoners;
- administrative instructions;
- vehicle and equipment;
- complaints; and
- requirement to produce customer charter.

3.7 RISK ASSESSMENT AND MANAGEMENT

Under the Contract it is AIMS' responsibility to minimise all risks associated with the safe and secure custody and movement of persons in custody in all situations. To the extent the information is available, the Department of Justice or the Police will advise the level of risk of each person in custody transferred to the custody of AIMS.[66] AIMS will also have access to Department's prisoner information systems. AIMS must then adopt all appropriate measures to minimise the identified risk. Where a particular security rating has been assigned to a person in custody, AIMS must supervise and control that person in accordance with agreed procedures appropriate to that rating or higher. [67] In the event of an escape, AIMS must notify the Police and the Contract Manager with the details.[68] There is no further provision for any direct action.

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[65] Clause 5.15 of Schedule 2.
[66] Clause 5.22.1 of Schedule 2.
[67] Clause 5.22.2 of Schedule 2.
[68] Clasue 5.22.5 of Schedule 2.

3.8 PERFORMANCE MEASURES

AIMS is required to monitor its performance of the services against a set of performance measures[69] set out in Schedule 1 of the Contract. AIMS must report on its performance to the CEO of the Department monthly. The performance measures are divided in three categories. The first includes more serious breaches such as deaths in custody; escape; self-harm; assault on a judicial officer; loss of control; unlawful release; and failure to accurately reports contractually required information. The second covers a range of assaults; breach of legislation; breach of service requirements and the third covers assault upon a person in custody by a person in custody; substantiated complaints; etc.

3.9 CONTRACT PRICE

The parties agreed on a lump sum contract price for the first service year. [70] An addendum to the contract was also executed on 17 January 2000 that provided for additional remuneration, at a specified rate, for providing prisoner movement.

After the first service year, the contract price had three components which were the Budget, the Contractor's Margin and the Performance Link Fee ("PLF").

The Budget is the cost to provide the services and is determined each year in accordance with Schedule 3 and agreed to by the parties.[71] The contract price may be increased once it set on account of agreed services increases or cost variations. The Budget is reviewed quarterly and the direct[72] and indirect[73] costs of the Contractor are reported each month and compared with the Budget.

The Contractor's Margin is 1.5% of the Budget, excluding the costs related to long service leave and superannuation.

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[69] Clause 6.2.
[70] Clause 2.
[71] The Budget is determined with reference to previous service volume and estimated future service demands; any changes to services to be delivered and the impact of any cost variations; the Contractor's direct and indirect cost; the Perth Consumer Price Index; and appropriate external comparisons.
[72] A direct cost is a cost direct attributable to the provision of the services.
[73] An indirect cost is a cost of the Contractor relating to the provision of the services in Western Australia.

The PLF is a bonus calculated in accordance with Schedule 1 to the contract and is intended as an incentive to provide the services to a particular standard. The maximum amount of the PLF is 4.5% of the Budget.[74] The PLF is determined according to how many service breaches occur in a year above the contract service standard. Service breaches include serious events such as deaths in custody and escapes, but also include less serious breaches such as breach of service requirement and assault upon a person in custody by a person in custody. Each potential service breach is allocated a percentage of the PLF and, in the event of a breach that exceeds the contract service standard, the PLF is reduced.

Importantly for the focus of this Inquiry, any breach in excess of the contract service standard results in a deduction of $100,000 per death in custody and $25,000 per escape. The amounts deducted for these breaches can exceed the percentage of the PLF allocated to each particular service breach.

3.10 EMERGENCY PLANS, CRITICAL INCIDENTS AND REPORTING

In accordance with the Contract, AIMS had to develop an emergency plan.[75] This plan must be approved by the CEO of the Department of Justice and be reviewed at least once a year. AIMS was also required to develop an operational procedure to manage critical incidents such as death in custody, escape or attempted escape, and riot.[76] AIMS was required to develop an operational procedure to manage reportable incidents such as complaints relating to the provision of services and assaults on persons in custody.[77]

AIMS is required to notify the CEO of the Department of Justice in the event of a number of occurrences including any escape, death or serious emergency or irregularity. Within eight hours of the occurrence of a critical incident, AIMS must provide the CEO with a written report regarding the incident. The Contract Manager must be notified of any reportable incidents.

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[74] Excluding costs associated with long service leave and superannuation.
[75] Clause 16 states - An emergency is classed an event that is beyond the resources of a single agency or which requires the coordination of a number of emergency management activities.
[76] A list of critical incidents is set out in schedule 2 which also provides some guidance as to what the operational procedure should cover.
[77] A list of reportable incidents are outlined in schedule 2 which also provides some guidance as to what the operational procedure should cover.

3.11 STATE FACILITIES

AIMS is granted access to the state facilities outlined in Schedule 4 of the Contract (courts, prisons etc) for the purposes of performing services under the Contract.[78] The state facilities remain in the ownership, control and risk of the State and the State remains responsible for all preventative and breakdown maintenance and minor improvements. AIMS is required to keep the facilities clean but cannot make an alterations or additions to the facilities without the consent of the CEO. The heritage status of some of the facilities is also acknowledged under the Contract.

3.12 DEFAULT AND TERMINATION BY THE STATE

The State can terminate the Contract in the event of a material breach.[79] A material breach will occur if one of the following events occurs in a service year: more than two separate and isolated instances of a death in custody; more than six separate and isolated escapes; AIMS achieves less than 50% of the Performance Link Fee for two or more of the performance measures (excluding death in custody and escapes); or AIMS fails to comply with some other provision of the contract, which the Contract Manager reasonably considers material and failures to remedy the breach within 5 days of notice.

The State can also terminate in the event of a non-material breach that AIMS fails to remedy within the period specified in the notice or in the event of insolvency and change in control, management or ownership. [80] The State can terminate at its convenience. If AIMS commits a breach or default under the contract, the State can resort to another service provider.

The State also has a number of statutory remedies under the CSCS Act. In accordance with section 59 of the Act, the CEO of the Department may intervene in the contract where there has been an emergency in a service under the contract or the contractor has failed to effectively provide a service and it is in the public interest, or necessary to ensure proper provision of the service, to intervene. Section 60 also provides that the CEO may terminate the contract for insolvency; change of ownership, control or management without consent;

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[78] Clause 20.
[79] Clause 24.
[80] Clause 24.

material breach that cannot be rectified; breach that has not been rectified after notice; or after the CEO gives the contractor notice.

In the event that the State defaults, AIMS may give the State notice requiring the default to be rectified within 28 days. [81] The State can then either rectify the default or dispute the default. AIMS cannot terminate the contract prior to the expiration of the term.

Implementation of the Contract: Shadowing

The Request for Proposal outlined that the respondent, as part of its proposal, was to provide a draft transition plan. The Proposal submitted by AIMS indicated that a "phase in period" would commence following the completion of training whereby AIMS staff would "shadow" client agency staff. It was agreed between the parties that the shadowing period last for two weeks. The shadowing period was structured to allow the practical application of knowledge and skills and cover the day to day procedures that needed to be followed. AIMS specifically relied on this aspect of the transition in response to certain provisional findings about deficient processes and procedures.

3.13 CHANGES TO THE COST OF THE CONTRACT

In the 2001/02 budget process it was noted that "the level of contracted services currently delivered is well above that estimated in 1997 and which formed the basis of initial contract cost settings." It was expected that the contract cost would increase by 36% to $17 million, the rise was based upon:

- the relevance of the 1997 survey information to forecast annual demand;
- the increase in the number of prisoners;
- increase in Court trials; and
- higher levels of security and service expansion required by the judiciary.

[81] Clause 24.

3.14 ARBITRATION

Over the period October 2001 to July 2002, AIMS and the State took part in a series of arbitration proceedings with Mr Chris Zelestis QC, a senior barrister at the Perth Independent Bar, as arbitrator. The proceedings related to interpretations of various provisions of, and variations to, the Contract with a particular focus on issues concerning the Budget.

As a result of the arbitration proceedings, the parties were united in the view that the contract, in relation to the second and subsequent service years, was intended to be a "costs-plus" contract, namely a contract in which the claimant was entitled to be paid all of the costs which were actually and reasonably incurred by it in the proper performance of its obligations, together with agreed margins. The parties agreed to a statement of the proper construction of the contract in that regard. Not all matters of dispute between the parties were dealt with in the arbitration and some ongoing issues remain.

3.15 REVIEW OF THE CSCS CONTRACT

The current Government was elected in February 2001 and made a commitment to reconsider the delivery of services by the private sector, particularly in the area of community safety.[82] Recommendation 63 of the Functional Review Taskforce recommended that the court security and custodial function be transferred from the Department to the WAPS.[83] It was proposed that this plan would be implemented when the CSCS Contract expires in July 2005. It was expected that this proposal would deliver significant savings to government. A Steering Committee, including the Commissioner of Police and the Director General of the Department, was formed to review this proposal.

It was suggested the benefits resulting from transferring the court security and custodial function would be that the internal workforce would be more flexible during periods of downtime as well as savings being achieved relating to AIMS head office and the profit margin (approx. $2.7 million as at 2006/07). Also there would be greater co-operation between the agencies involved and whole of government synergies.

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[82] Labor Party Election Policy, *A Commitment to Better Government*.
[83] Cabinet Submission for 4 April 2003 regarding *Decisions at Expenditure Review Committee (ERC) Meetings on 29 March 2003 and 2 April 2003*.

Ultimately Recommendation 63 of the Functional Review Taskforce was not implemented and rather the WAPS and the Department were directed to review court security and custody services provided under the Contract.

> "Following that review and extensive consultation with various stakeholders and detailed analysis of court security and custody services, business cases were presented that resulted in savings ($1.5 million net present value from 2005/06) by reducing overheads with no reduction in service delivery. Since the development of the business cases, AIMS provided a proposal to save $2.0 million subject to an extension of the contract. A strategy has been developed to negotiate with AIMS for one additional three year extension to the contract, based on removing a number of existing services, changing the form of the contract from cost plus to fixed price/schedule of rates and implementing the cost savings… This strategy provides improved cost benefits and a significant reduction in risks associated with the transition of services." [84]
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> It was also noted that "on a comparison of all available options to the existing budget envelope, only the negotiated AIMS Contracted Extension Option can be achieved without resorting to additional funding support."[85]

The Strategy, resultant Proposal, and Evaluation of that Proposal is discussed more broadly under Chapter 5 of this Report. The CSCS Contract extension was to be negotiated within the framework of a Repositioning or Revitalising Program. This has been developed and is also canvassed in Chapter 5 of this Report.

[84] Internal email, Department of Treasury & Finance 28 Jan 2004
[85] Supra, n84

4 AIMS: CORPORATE STRUCTURE

The AIMS Corporation is a proprietary limited company incorporated in Queensland. AIMS is 100% owned by Sodexho Alliance, a publicly listed French-based company, which bought AIMS in 2000.

Sodexho operates in over 22,000 sites in 74 countries providing the services of facilities management and correctional and related services. Sodexho's Asia Pacific offices in Sydney and Melbourne provide corporate services and support to AIMS in Western Australia.

The core business of AIMS is to provide correctional and related services to governments. AIMS has been operating in Australia since 1989 and currently operates services in Victoria and Western Australia. In addition to the CSCS Contract, AIMS also provides the total service and maintenance at Acacia prison.

4.1 VISION, MISSION AND VALUES OF THE COURT SECURITY AND CUSTODIAL SERVICES DIVISION

The CSCS Vision, Mission and Value Statement indicates AIMS' vision, "Our stakeholders recognise AIMS CSCS as the partner for a better future in security, custodial and movement services" and AIMS' mission "to serve the people of Western Australia by providing security, custodial and movement services of the highest quality." AIMS' values are –

- Quality Performance: We consistently strive to exceed our customer's expectations;
- Human Dignity: We treat all people respectfully and ethically; and
- Public Accountability: All our actions are capable of standing up to intense public scrutiny.

4.2 EXECUTIVE MANAGEMENT

The executive management team of AIMS is headed by the Managing Director, John Cooper; and also comprises Director Operational Review; General Manager Business Development and Support; and General Manager Finance and Administration. The Director Operational Review is not an AIMS employee, but a contracted consultant to AIMS and in that capacity oversees each of the contracts held by AIMS.

4.3 COURT SECURITY AND CUSTODIAL SERVICES IN WA

The Court Security and Custodial Services Division of AIMS is responsible for the CSCS Contract. The head office and control centre of this Division is located in West Perth. The General Manager CSCS, until 22 July 2004 was Stephen MacPherson, and is now Dave Nicholson, who heads this Division and is responsible for the delivery of services and profit outcomes; the development of the budget and ensuring the budget program is achieved; and the achievement of performance specifications in the contract. The General Manager CSCS reports to the Managing Director of AIMS.[86]

As has already been noted, AIMS made a series of public announcements on 22 July 2004 which included an announcement of Mr Nicholson's replacement of Mr MacPherson. On investigation by the Inquiry, AIMS confirmed that Mr MacPherson's employment had ceased on 22 July 2004. Mr MacPherson's written fixed term contract expired in April 2004. There had been no signed extensions to that contract, and no further unwritten extensions were to be offered. Mr Nicholson informed the Inquiry that, in his view, this managerial change was influenced by a perception that Mr MacPherson had "lost the confidence" of the Department, whereas the Department retained considerable confidence in Mr Nicholson.

A number of individual managers report to the General Manager CSCS. Of particular relevance to this Inquiry is the role of the Operations Manager, John Hughes. The Operations Manager is responsible for the delivery of operational services in accordance with the contract and the CSCS Act, the budget process, and management plans. The other managers who report to the General Manager CSCS cover the areas of human resources, information technology, finance and accounting, logistics and quality, and investigations which all primarily support the functions performed by the Operations Manager.

CSCS operations exist in 18 locations in Western Australia. Two co-ordinators support and, report to, the Operations Manager in relation to CSCS operations.

There are Coordinators for both the Metropolitan Courts and the Metropolitan Transport/Regional Operations. The former position is concerned with overseeing the

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[86] The General Manager CSCS is nominated under the CSCS Contract as the "Service Manager" which means he is the legal representative for the Sodexho Corporation under the CSCS Contract.

provision of services under the CSCS Contract to the metropolitan sites, including the Supreme Court. Specific responsibilities of the role include planning and coordinating services, managing operational performance and coordinating the work team.

A Supervisor controls each court custody centre and reports to the Co-ordinator, Metropolitan Courts. He or she is responsible for planning daily staffing and tasking in response to the Department's[87] requirements and agreed staffing budget. This must also be in accordance with CSCS policies, procedures, training and directions from the co-ordinator or Operations Manager. The Client Agency may require additional staff at times.

4.4 STAFFING

The Contract provides that AIMS must provide a staffing plan[88] and the plan must be in accordance with the provisions of Schedule 2, Part 5. AIMS submitted that the Staffing Plan reflects agreed staffing levels determined during the budget process. AIMS directed the Inquiry to a number of documents including an additional annexure to AIMS' submissions, namely the original staffing plan for the Supreme Court Custody Centre. The Inquiry inferred from these documents that the Staffing Plan for 2003-2004 was similar to the original staffing plan, contemplating 2 staff for custodial services.

AIMS further submits that for the period, 1 July 2003 to 30 June 2004, the Staffing Plan allocated two members of AIMS' staff to the Supreme Court custody centre and that the Plan was approved by the Department. AIMS submits that since the inception of the CSCS Contract it has always manned the custody centre with two officers. The Supreme Court Site Manual stipulates that the custody centre be manned by 2[89] custodial officers, together with a number of other staff.

4.5 TRAINING

AIMS staff undergo training prior to and during the course of their employment. All training is approved and paid for by the Department.

[87] For the purposes of the Contract a client agency is defined as either the Department of Justice or the Western Australian Police Service, however for practical purposes the Department is the main client agency dealt with by AIMS officers.
[88] Clause 12.1, CSCS Contract.

AIMS is a nationally accredited as a registered training organisation and regular audits are conducted to ensure AIMS' training system conforms with national standards.

Users of the training system have the opportunity to provide feedback on the training. The training content is also submitted to the Department of Justice for approval and there is the opportunity for the Department to comment on the content of the training and the frequency of the training. Supervisors deliver the training and this allows feedback for whether the training suits the needs at a particular site. If an employee desires further training, he or she can communicate this to his or her supervisor, the General Manager CSCS, the safety representative on the site or the Union delegate.

AIMS provided the Inquiry with an outline of the current entry-level training provided to AIMS officers. This included 32 modules and corresponding workbooks categorised into three broad topics covering safety and security, offender management and intervention, and organisation administration and management. Safety security covered such specific modules as batons and handcuffs, escort procedures, emergency procedures and lock, keys and other security devices[90]. Offender management and intervention involved modules on blood borne diseases, special needs management and communication. Organisational administration and management involved modules on the Code of Conduct, reportable and critical incidents and team approach to security.[91]

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[89] The consequences of this requirement in facilitation of the escape is examined in Chapter 7 of this Report.
[90] The Inquiry was cognisant of the inter-relationship between training and the requirement for specific and detailed procedures. It is arguable that more extensive training would lessen the requirement for specific and detailed procedures and vice versa. The Inquiry has not given particular consideration to this proposition.
[91](The Inquiry has not explored the scope of the training currently provided by AIMS, nor did it reasonably expect to given the terms of reference of the Inquiry. The nature and scope of training provided by AIMS is a matter about which the Inquiry has made some final observations at Part 12.1 of this Report.

5 DEPARTMENT OF JUSTICE - RELEVANT STRUCTURAL ASPECTS

The Department is responsible, broadly speaking, for "providing quality, coordinated and accessible justice services which contribute to a safe and orderly community"[92]. The Department has an operating budget of approximately $520 million per annum[93] and employed 4 296 FTEs as at 2002/03[94] of which 23 staff members are of a senior level.[95] The Department consists of 10 separate divisions and offices which cover a broad range of service provision, policy development and management areas. A number of the offices report directly to the Director General, for the purposes of administration, and to the Attorney General, on professional matters. None of the divisions falling within the scope of the Inquiry reports directly to the Attorney General.

The three divisions of the Department of particular significance to the Inquiry are:

- Prisons;
- Court Services; and
- Corporate Services.

These are discussed below.

5.1 PRISONS

The Prisons Division manages adult and juvenile offenders in custody, and in the community, and "aims to reduce re-offending, contribute to the protection of the community and direct offenders toward law-abiding lifestyles".[96]

The Executive Director of the Prisons Division has responsibility for the management of Custodial Contracts, including the CSCS Contract.

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[92] Department of Justice, *Annual Report*, ,2002/03, p15
[93] Supra, n 92, p186.
[94] Supra, n 92, p51.
[95] Supra, n 92, p52. For its purposes the Inquiry has defined 'senior level' as Level 9 and above, which corresponds with the level at which an officer may be appointed to the Senior Executive Service. This figure necessarily excludes officers who sit outside the standard public service classification such as employed members of the quasi-judiciary and certain senior lawyers of the State Solicitor's Office and Office of the Director of Public Prosecutions.
[96] Supra, n 92, p72.

Within the Prisons Division, the Custodial Contracts Directorate has responsibility for the Acacia Prison Contract and the CSCS Contract. This Directorate is broken up into five branches, including Monitoring Services, CSCS and CSCS Repositioning Team. The CSCS Repositioning Team is made up of 11 FTEs and is responsible for planning and renegotiating any extension of the CSCS Contract beyond 2004. It is a project team rather than a branch of the Directorate.

The CSCS Branch consists of a Manager and a number of contracts and support officers totalling 5 FTEs. The Branch is responsible for the day to day management of the CSCS Contract within the Department.

The Monitoring Services Branch undertakes the monitoring of the provision of service under both the Acacia Prison Contract and the CSCS Contract. The Branch comprises a "Monitor" or Manager position and 10 FTEs of which 3 are directly responsible for monitoring the CSCS Contract.

Since the escape of 10 June 2004, officers from within the Division have been involved in various tasks in regard to improving the security at the Supreme Court custody centre specifically, and throughout the Courts generally, reviewing security arrangements at other court custody facilities in the metropolitan area and providing court custodial services at the Supreme Court in the short to medium term.

5.2 COURT SERVICES

The Court Services Division "provides administrative services and support for the management of courts and tribunals. This includes provision of accommodation, technical facilities, non-judicial staff support, registry, security and other administrative support services"[97]. This Division performs a liaison role between the Department and members of the judiciary and, to a certain extent, between members of the judiciary and AIMS officers.

[97] Supra, n92, p62.

5.3 CORPORATE SERVICES

The Corporate Services Division "assists the Department in developing its overall strategic direction and manages the Department's human, financial and physical resources"[98]. The Division is responsible for the management of the physical resources of the Department including the management, maintenance, and upgrading, of the Supreme Court facilities.

The CSCS Contract established two committees to oversee the implementation of the contract:

5.4 STRATEGIC PLANNING GROUP

The Strategic Planning Group was to be established by the Director General, pursuant to the contract, to provide advice on strategic and policy issues affecting service provision[99]. The membership of the Group included a representative of the Chief Justice and the Police Commissioner.

5.5 CLIENT AGENCIES GROUP

The Client Agencies Group was to be coordinated by the Contract Manager to assist him or her to improve the effectiveness and efficiency of the service delivery and to allow communication between the Contract Manager and client agencies.[100] The Group included the Sheriff and a representative of the Police Commissioner.

In addition, the Department established certain *ad hoc* groups to manage the implementation of the contract comprising membership from within the Department and within AIMS. The purpose, nomenclature and membership of these groups can, at best, be described as dynamic. The Contract Management Group seems to have been the body charged with the day-to-day responsibility for the management and monitoring of the CSCS Contract. It has also constituted a forum for discussing issues regarding the delivery of service, and broader issues of management and strategic development under the CSCS Contract.

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[98] Supra, n92, p104.
[99] Clause 9.5, CSCS Contract.
[100] Clause 9.6, CSCS Contract.

In preparation for the renewal of the CSCS Contract, and acknowledging the difficulties experienced during the current term of the CSCS Contract, the Department instigated the CSCS Revitalisation Program which aims to:

> "improve court security and court custody management in all major Western Australian Courts including improved procedures and infrastructure and with an enhanced 'risk management' approach to security, custody and emergency management."[101]

The development and implementation of the CSCS Revitalisation Program is being overseen by the CSCS Steering Committee. The Program includes a number of discrete "Projects" encompassing the following subject matters:

- CSCS Contract Variations;
- CSCS Security Reviews;
- CSCS Management Systems (which relates to information management);
- Secure Fleet Vehicle; and
- Management Framework.

The Department and AIMS had made significant progress towards negotiating an extension to the CSCS Contract prior to the escape on 10 June 2004. The Department had reviewed the provision of services under the contract and developed a strategy for repositioning the services which, in its simplest terms, changed the mix of commercially provided services and Department based services in favour of more Department based service delivery ("the Strategy"). On the basis of the Strategy, AIMS have submitted a proposal to the Department for cost reduction conditional on the renegotiation of the Contract with reduced service delivery requirements in certain areas ("the Proposal")[102]. The Strategy and the Proposal both envisage AIMS continuing to manage court custody centres. The Proposal was reviewed by an Evaluation Panel which made findings and recommendations to the CSCS Steering Committee on appropriate contract variations to be negotiated. This, along with the Proposal and the Strategy, formed the basis for the renegotiation of the CSCS Contract.

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[101] Department of Justice, CSCS Revitalisation Draft Program Plan, undated, p1.
[102] The Inquiry takes the view that no legitimate purpose is served by specifying these areas in light of the provisional nature of the contractual negotiations and other circumstances of uncertainty since the escape.

In light of a range of circumstances including the escape of 10 June 2004, the appointment of this Inquiry and the managerial change within AIMS, this negotiation process seems to have been placed on hold. Indeed, these circumstances also seem to have lead to some uncertainty and changes more generally in the application.

The Evaluation Panel also noted that "the success of a contract extension was contingent upon the Department being able to achieve an improved ongoing business relationship with AIMS"[103]. The Department proposed a new structure for managing the CSCS Contract as part of the CSCS Revitalisation Program. The proposed new structure is made up of a strategic management committee, a client agency forum and a contract management group. It also includes regionally based client agency forums. The proposed new structure defines the relevant responsibilities and objectives of each tier within the structure and provides a clear "escalation" plan for bringing matters through each group for final consideration by the strategic management committee. The structure also acknowledges that collaboration at all levels of service provision is necessary to ensure that relevant information is shared, issues are identified and problems are resolved in a timely fashion.

The Department envisages significant changes to the structure of the Prisons and Courts Divisions which will require the creation of new positions within those Divisions to take responsibility for the service delivery to be transferred from AIMS to the Department as part of the Revitalisation Program.

The CSCS Revitalisation Program includes the CSCS Management Systems Project (Information Management) and the Secure Fleet Vehicle Project. Both projects recognise the need for the Department to have a stronger role in the management of physical resources, both generally and having particular regard to the changing role of the Department under the Revitalisation Program.

A Court Security and Court Custody Project was being planned as part of the Revitalisation Program and has been given increased priority since the escape on 10 June 2004. The Project also seems to have superseded the Security Review / Risk Management Project, planned as a distinct component of the CSCS Revitalisation Program. The Court Security

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[103] Department of Justice, CSCS Revitalisation Draft Program Plan, undated, p2. As to other aspects of the business relationship between the Department and AIMS, see chapters 7.7 – 7.10 and 8 of this Report.

and Court Custody Project involves undertaking security audits of all major Courts, implementing immediate actions, establishing a project team to review and improve relevant processes and systems and integrating the improvements into the Department's operational processes and structures. The review includes the substantive - and highly important- topics of intelligence and risk assessment, the development of new procedural guidelines, operational briefs and video conferencing. The Project Team is made up of officers from a number of divisions within both the Department and AIMS and represents a cross-section of expertise and responsibilities. It will also be responsible for the implementation of any recommendations which arise out of this Inquiry.

The Project Team has been engaged in a process of issue identification and implementing 'quick win' remedial actions, that is immediate procedural changes and simple maintenance or physical improvements which can be achieved quickly, yet provide a significant change to the security at the facility. The Project then envisages a process of stabilization and development of written procedures and processes, which is currently underway, and integration regarding the more permanent allocation of resources within 6 months.

The Inquiry has had the benefit of reviewing the preliminary recommendations and some initial documentation prepared by the Project Team. It demonstrates a clear understanding of the broad security issues faced at the Supreme Court facility and a capacity to address those issues in a strategic fashion. It is also an example of how a simple structure, with a sensible and appropriate membership, a clear set of goals and a genuine impetus, can achieve significant change in Government within a limited period of time.

6 BUILDING ISSUES – ONGOING PLANNING AND BUDGET ACTIONS

6.1 SUPREME COURT AND GENERAL FUNDING ALLOCATIONS

Built in 1903, the Supreme Court building is situated within the Stirling Gardens on Barrack Street, Perth. The present building was added to in 1960 and a new wing was constructed in 1986/87 to accommodate more staff and courtrooms. The Supreme Court itself is "heritage listed"[104]. The Stirling Gardens, owned by the State Government and vested in the City of Perth, are themselves heritage listed and also classified as a "class A reserve"[105]. The fact that the Supreme Court is heritage listed and surrounded by a "class A reserve" does complicate the process for developing and improving the building.

By 1992, if not earlier, it was apparent that the Supreme Court had outgrown its facilities and, to cater for future demand, renovations and extensions would be required. A Cabinet submission identified these issues as well as issues with the current and future accommodation of the District Court and Magistrates' Court in Perth and the metropolitan area. Funding was recommended for the further development of planning proposals to meet projected future needs of the Supreme Court and $200,000 was suggested for inclusion in the 1992/93 budget. This was referred to Cabinet's Expenditure Review Committee for consideration in 1992/93 Budget Process.

In 1996 the Coalition Government committed to "make special provision for all the necessary preparatory work, design and construction of new Supreme Court facilities to meet the State's requirements into the 21st Century". A decision was made to co-locate the Supreme and District Courts. In 1997 Cabinet agreed the current site of the Supreme Court was

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[104] The *Heritage of Western Australia Act 1990* specifies the criteria for places to be included in the Heritage Register (i.e."heritage listed"). Places that are heritage listed are identified to be of cultural heritage significance or possesses special interest related to or associated with the cultural heritage, and is of value for the present community and future generations (s.47). The Act vests authority in the Heritage Council to review and provide advice on all development proposals for heritage listed places to ensure that all developments retain the cultural significance of the place.

[105] The *Land Administration Act 1997* outlines the process for declaring a class A reserve. In general terms, a "class A reserve" is Crown land reserved to the Crown for "one or more purposes in the public interest" (s.41). A Minister can order a reserve to be classed as a class A reserve (s.42(1)). Once designated a class A reserve, alterations to this land must be laid before Parliament and also advertised publicly by the Minister.

unsuitable for the development of this co-located Court on the basis of the following functional and operational deficiencies being identified:

- Custodial, judicial, jury and public access to courtrooms which, in many cases, are inappropriately shared;
- Inappropriate levels of general internal and building security; and
- Inadequate custodial transfer, detention and prisoner management facilities.

The former Director of Public Prosecutions also identified numerous issues with the Supreme Court facilities as a concern back in 1997, noting that "…accommodation and facilities for witnesses, victims and counsel in the Supreme Court remain substandard. Security problems also exist." [106]

While discussions continued as to the preferred location of the co-located Supreme and District Courts and the timeline for starting the works, the 1998/99 budget process for the Ministry sought to allocate $19.6 million funding to "refurbish the existing Supreme Court to allow it to continue its role as a court facility". The then proposed start date for this project was 2004/05. The objectives of this project were stated to include:

- Improved service delivery; and
- Improved functionality of existing building (as it was stated "Dysfunctional facility continues to operate").

This budget process also allocated $400,000 for the schematic design of the co-located Supreme Court, to be expended in that year. $231,000 of work was undertaken "…in respect to the co-located Supreme/District Court however, as a result of the 1998/99 submission the previous allocation was removed pending the finding of a suitable site."[107]

In late 1998 Cabinet agreed that the co-located Supreme and District Courts be located on the corner of Hay and Irwin Streets. This project is known as the CBD Courts Project. Additionally, Cabinet agreed that limited development of the Supreme Court site should occur so it could continue to be used for court business following refurbishment. The associated Cabinet submission noted a number of deficiencies in the current Supreme Court including "insufficient and outdated building services; minimal public amenities, such as

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[106] Office of the Director of Public Prosecution, *Annual Report* 1996/97, p.52
[107] Briefing to the Treasurer from the Acting Under Treasurer, 18 June 2004.

waiting rooms, interview areas, victims facilities and amenity areas; and, inadequate custodial transfer, detention and prisoner management facilities".

Consideration of the planning and funding of the refurbishment of the Supreme Court and the development of the CBD Courts Project were interlinked from this point as

> "… the decisions made for the CBD court complex informed and confirmed the nature of work needed for the future use of the Supreme Court building. When decisions were finalised in December 2003 as to the functions and scope for the CBD courts complex, it was then possible to confirm the scope of works for the Supreme Court, planning for which (including the letting of tenders) had been well progressed prior to the escape incident."[108]

As planning continued it was decided that once the CBD Court Complex was built, the Supreme Court would house the Supreme Court civil matters and the Court of Criminal Appeal, while Supreme Court criminal trials would generally be heard at the CBD Court Complex.

The "roll out" of the Metropolitan Court Security Improvement Program was provided for in the 2000/01 budget process. This program of works aimed to upgrade security at existing courts to "…protect both court staff and users from threats and intimidation as has recently been experienced in courts both locally and in the eastern states and other government facilities such as council offices."[109] Additionally, one of the risks identified in the process was the escape of prisoners. Of the $2.9 million that was to be spent on this program over 7 years, $850,000 was designated for security upgrades to the Supreme Court, Supreme Court Annex and the May Holman Centre.[110]

Although the refurbishment of the Supreme Court continued to be considered as an item for future funding, the Expenditure Review Committee approved the provision of $3.5 million in transitional capital works for the Supreme Court site in April 2003 commencing in 2003/04.

In August 2003 the Department wrote to the Chief Justice asking if the Supreme Court could determine priorities for the works required at the Supreme Court, which included the custody

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[108] Internal Department of Justice briefing, 15 July 2004.
[109] Briefing note to Attorney General from Chairman, Cabinet Budget Standing Committee, 18 December 2000.
[110] This was to be spent in the 2002/03 financial year. However, the following year the start date was revised to start in 2006/07

area's sally port and holding facilities. The response to this request outlines the Supreme Court's priorities for works to be completed. The priorities for the Supreme Court site[111] were:

- Waterproofing of north elevation;
- Sally port and holding facilities;
- Installation of lift (disabled access);
- Essential building services works
- Air-conditioning of indoor areas; and
- Minor reconfiguration of areas.[112]

In October 2003 The Architect Group (TAG) Architects were commissioned as part of a three stage process to:

- "Develop design options to accommodate the recently approved Court of Appeal within the existing Supreme Court buildings in Stirling Gardens;
- Master plan and prioritising works to be accommodated within the $3.5 million approved above; and
- Develop a longer term master plan to accommodate the Supreme Court on the Stirling Garden site through to 2026."[113]

It should be emphasised at this point that the Chief Justice had, for a number of years, emphasised his concerns about the state of the Supreme Court buildings and its associated facilities in his Annual Review of Western Australian Courts. His Honour's predominant concern was the operation of the Supreme Court in two separate locations and the overall efficiency at the work of the court[114].

The 2004/05 budget allocated $2.75 million to the Supreme Court for the upgrade of building services and fitout. The proposal's objectives were said to achieve a number of benefits, including "meet[ing] the need for additional Supreme Court accommodation, first identified in

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[111] As opposed to the Supreme Court annex at 111 St Georges Terrace where some of the Supreme Court staff and functions are accommodated.
[112] Specifically planned works on the custody area are at part 6.2 of this Report.
[113] Briefing note to the Minister for Justice and the Attorney General dated 15 June 2004 from Director General, Department of Justice.

1989”. The proposal also aimed to minimise risks, which included: “Continuation of security risk for all persons attending court; Poor service delivery and continuing the inefficiencies by using multiple locations; and, Continued risk of unscheduled increased maintenance costs”.

6.2 CUSTODY CENTRE OF THE SUPREME COURT

In the 1997/98 financial year, the Department of Justice upgraded cells at key court facilities to the police safe cell standard brief, in response to certain recommendations of the Royal Commission of Aboriginal Deaths in Custody. “This was the first major upgrade to the cells in this area since their construction and has stood the test of time since, in reducing hazards and improving security and well-being within the custody centre.”[115]

Issues with the Supreme Court custody centre were apparent in the planning for the Supreme Court site after the construction of the CBD Court Complex. Video links were discussed as a means of reducing the requirement to upgrade the Supreme Court custody centre when the CBD Court Complex was completed.[116]

From 2001 to 2003, the Department was engaged in planning activities to develop options for a Supreme Court custody facility that complemented the facilities to be provided at the CBD Court Complex to ensure that the two could provide similar levels of safety and security for those in custody.

In June 2002, the Inspector of Custodial Services tabled in Parliament the *Report of an Announced Inspection of Metropolitan Court Custody Centres*. The Inspector’s findings of particular relevance for present purposes were:

> “The facilities at the Supreme Court custody centre caused the Inspector serious concern and resulted in the commissioning of an expert to produce an assessment of the Court’s custodial environment. The three main findings of the report relate to the design of the sally port, public accessibility to custodial activities and the need for master planning for the site.”[117]

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[114]In particular see *Annual Review of Western Australian Courts,* 1998 at p2 and 2003 at p3.
[115] *Annual Review,* supra, n 114.
[116] This would also reduce the requirement for the judges housed at the Supreme Court to “circuit” to the CBD Court Complex.
[117] Office of the Inspector of Custodial Services (2002), *Report of an Announced Inspection of Metropolitan Court Custody Centres,* Finding 2.63.

"Due to the serious nature of cases that it hears, the Supreme Court of Western Australia has the most serious offenders in this State appear before it. Despite this, the area at the Supreme Court where prisoners are first received into court custody from the transport vehicle – the sally port[118] - was the most insecure of the seven centres inspected. The immediate surroundings of the area have dense landscaping, allowing items or people to be easily concealed. The sally port itself is constructed of corrugated metal over galvanised wire mesh, providing minimal security. When a vehicle is not delivering a prisoner to court, it is an open area with unfettered access to anyone who may walk by."[119]

"In addition to the sally port area being easily accessed by the public, the barriers separating the public area from the custody centre of the Supreme Court are also inadequate. Access from the centre to a number of courts requires persons in custody to be escorted through public areas. One court requires movement through a main emergency exit corridor that must be closed to general use during escorts. Finally, the construction of the door to the main entrance to the custody area is not adequately secure. These problems are exacerbated further by the fact the Supreme Court trials involve high security escort prisoners more often than trials in the lower jurisdictions, bringing into consideration the complex issues raised above with regards to security."[120]

"These issues must be remedied immediately. The proposed criminal court complex that will incorporate the Supreme Court will be completed no sooner than 2007/08. **The current complex cannot continue to operate until this time in the current condition.** Any increased security measures will not go to waste as the Court of Criminal Appeal will continue to operate from existing buildings. Accordingly, the need for a secure area will remain."[121] (Emphasis added)

It is repeated that it is not a function of this Inquiry to review the Inspector's role, or to examine or analyse the content of any of his reports. Nor could the role of a special inquiry under the *Public Sector Management Act 1994* with the Inspector's role defined, as it is, to be distinct from, and independent of, the Public Sector. The third operative paragraph of the Premier's instrument of appointment of the Inquiry authorises an examination of aspects of the Department's implementation of certain recommendations of the Inspector that occupy a particular relevance to the escape of 10 June 2004, rather than – it is emphasised - any

[118] The vehicle sally port is the area at the court custody centre where transport vehicles carrying prisoners who are to appear in court enter and are secured before allowing the prisoner out of the vehicle and lodging them in a court custody cell. Police also use the sally port to deliver persons they have arrested to the court custody center.
[119] *Report of an Announced Inspection of Metropolitan Court Custody Centres,* supra n 117, Finding 2.64.
[120] Supra, n 117, Finding 2.66.

issues of the content or merit of the recommendations themselves. Beyond that, particular portions of the Inspector's Report 7 provide important background and context.

In the 2002 *Annual Review of Western Australian Courts*, the Chief Justice indicated, in response to Professor Harding's report on Metropolitan Court Custody Centres, that improvements were necessary to court security generally but particularly in relation to custodial facilities. "Internalising" the sally-port was specifically mentioned as necessary. In the same year, the Chief Justice indicated that the Court itself was undertaking minor works to improve Court security.[122]

It was noted by the Director General of the Department that -

> "the Department of Justice was not in a position to respond immediately to the Inspector of Custodial Service's recommendations [regarding the Supreme Court Custody area] as with many of the other recommendations… these recommendations need to be taken in the context of other planning priorities within the Department. The total impact of the Inspector's many recommendations is estimated to be in excess of $200 million. The Department did however take on board the Inspector's comments to ensure that they were integrated into the medium to longer term planning solutions for the custodial facilities in the Supreme Court."[123]

However, custodial deficiencies highlighted in the Inspector of Custodial Services Report, particularly the significant risk represented by the sally port, were key areas for redevelopment in the upgrade approved by the Expenditure Review Committee in April 2003.

6.3 PROGRESS ON IMPROVEMENTS TO THE CUSTODY AREA

As has been noted, the Department and the Supreme Court have determined the priorities for short term upgrades and refurbishments to the Supreme Court with the allocated funding. The Supreme Court stated in its response to the Department in regards to the custodial facilities that:

> "the work required is firstly the construction of a proper sally port with proper access through into the custody centre, which in turn needs urgent work to address the trenchant criticisms made of the facility by the Inspector of Custodial Services."[124]

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[121] Supra, n 117, Finding 2.67.
[122] *Annual Review of Western Australian Courts*, 2002, supra n 114, p4.
[123] Briefing note to the Minister for Justice and the Attorney General from Director General, Department of Justice, 15 June 2004.
[124] Letter dated 29 August 2003.

Master planning undertaken by TAG for the Supreme Court detailed proposed plans to fulfil the requirements for custodial facilities, within the confines of the heritage restrictions, for its current and future Court of Appeal roles.[125] The upgrade planned is based on the recommendations of the Office of the Inspector of Custodial Services and redevelops the custody centre so it is contained and removes risks of persons in custody using areas also used by jury members, staff of the Supreme Court or the public.

Workshops for the modifications and upgrades to the custody facilities were held with members of AIMS and the Office of the Inspector of Custodial Services. This ensured that operational issues and concerns noted in the Report No 7-were addressed in the proposed upgrade.[126]

Additionally, in early 2004 the Department appointed specialist consultants to assess security and access control for the Supreme Court building generally with a particular focus on the custody centre. A Security Master Plan for the Supreme Court is currently being finalised by the Consultant.

The Department appointed Data Analysis Australia to identify the number of holding cells required in the custody centre. This analysis has been undertaken on the basis that:

- "Pre 2008 …the Supreme Court building will still hold most of the Supreme Court criminal matters (including criminal trials); and
- From 2008 on, … all Supreme Court criminal work (excepting the CCA and possibly status conferences) will move to the new CBD Courts building"[127].

This analysis recommended that 3 holding cells and 1 bail holding facility be provided to 2008 and reduced to 3 holding cells only, after 2008.

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[125] Letter dated 12 December 2003.
[126] Briefing note to the Minister for Justice and the Attorney General from Director General, Department of Justice, 15 June 2004.
[127] Data Analysis Australia, March 2004

By early March 2004, the expenditure of various components of the $3.5 million funding to address critical short-term requirements of the Supreme Court was finalised. Of this funding, approximately $1.4 million was allocated for upgrading to the custody centre and facilities to manage prisoners within the Supreme Court generally[128].

Oversight of the custody centre upgrade was put out to a request for tender which closed on 28 May 2004.[129]

Following the escape at the Supreme Court on 10 June 2004, the Department of Justice responded with a programme of remedial works to the custody centre and the sally port to ensure critical security issues were addressed immediately. Improvements have included:[130]

- upgrades and wider use of monitoring and alarm equipment;
- securing of partitions and doors considered to be a security risk; and
- improved key management and prisoner movement processes.

The question which inevitably falls to be examined is whether those specific means of addressing critical security issues ought to have been implemented earlier than they were. Was the need for measures which were truly in the nature of minor works, but vital to the short term upgrading of the custody centre, overlooked in the pursuit of a bigger picture regarding capital works and a major upgrade? It is appropriate to return to these questions after an examination of the escape itself, and its immediate aftermath.

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[128] Works to the custody centre are regarded as part of the "Stage One" works undertaken for the upgrade to building services and fit out at the Supreme Court.
[129] This tender will oversee the design, documentation, tendering and construction of the custody centre upgrade which was expected to begin in the summer recess, January 2005
[130] The Inquiry takes the view that a general description, rather than any detailed treatment or analysis, of these improvements is appropriate.

7 NARRATIVE OF EVENTS DIRECTLY CONCERNED WITH SUPREME COURT ESCAPE

The Supreme Court custody centre is located in the basement of the Supreme Court and is currently comprised of five cells (including one "female holding cell") and a court security office, linked by corridors with key entry doors and grilles. It is linked to the external sally port by a corridor which runs through the Supreme Court building. The custody centre was designed as part of the original Supreme Court building and, whilst having undergone at least one major upgrade since that time, still retains many of the hallmarks of a facility built a century ago.[131]

Prisoners are transported to the custody centre from various prisons by AIMS transport services, which are provided under distinct contractual obligations. Occasionally, persons who are appearing at the Supreme Court will surrender themselves to the custody centre as bail prisoners.

Pursuant to the Site Manual applicable at the Supreme Court at the time, the staffing complement at the Supreme Court on any given day was to be at least twelve staff.

7.1 EARLY PREPARATIONS FOR 10 JUNE 2004

It was customary for the AIMS Supervisor at the Supreme Court custody centre to receive, at around 2.30 pm on the day preceding each court sitting, a draft "cause list" which showed the likely schedule for the following day. The Supervisor would use this cause list, among other sources of information, to make preliminary preparations for how he would deploy his staff for the next day. In any given situation, it was open to him to ring the section of AIMS known as "AIMS Ops" (short for Operations) to request additional staff should he see the need to do so. If, in any given case, AIMS Ops was unable to provide additional staff, it was open to him to contact his Co-ordinator to make a similar request. As has been explained, the main responsibility of AIMS' Metropolitan Courts Co-ordinator is to oversee the deployment of staff, and general management, of AIMS' contractual obligations at all Metropolitan Court custody centres.

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[131] The nature of the facilities has been discussed at Chapter 6 of this Report.

As far as the cause list for 10 June 2004 was concerned, however, the Supervisor had received a communication as early as the morning of 8 June 2004 from the Associate to Murray J regarding the length of the list, the potential security risks posed by some of the prisoners on that list, and possible options for responding to those risks. The listings before Murray J on 10 June 2004 were to be "status conferences" that is, appearances before a Judge of the Supreme Court to assess a criminal case's readiness for trial and to discuss matters concerning its future programming. The Associate to Murray J informed the Supervisor, in that initial telephone conversation, that she had herself been told by the State Security Unit of the WAPS that that Unit would be unable to provide any officers to provide security services in Murray J's courtroom for his status conference list.[132]

The Associate to Murray J suggested that, in light of the inability of the State Security Unit to assist, the Supervisor might find out what additional staff could be provided by AIMS to help with providing security for Murray J's status conference list. The Supervisor told the Associate that he would make requests for the provision of the extra staff accordingly.[133]

On either the afternoon of 9 June 2004, or early on the morning of 10 June 2004, the Supervisor rang AIMS Ops to ask for more staff to help with the number of prisoners scheduled to come to the Supreme Court custody centre on 10 June, particularly those appearing in Murray J's status conference list.[134] The Supervisor was informed that AIMS Ops had no such staff available.

7.2 ARRIVAL OF PRISONERS ON 10 JUNE 2004 AND INITIAL RESPONSE

Between about 8.35 am and 8.50 am on 10 June 2004, prisoners began arriving at the Supreme Court custody centre in secure vehicles from several different metropolitan prisons including Casuarina, Acacia, Hakea and Bandyup. Of those prisoners, one was a prisoner requiring segregated detention, and was placed alone in cell 2 accordingly. Another person

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[132] The reason given by the State Security Unit for that inability to assist was the fact that all of its available police officers had been previously engaged for another important commitment which required a high level security response. There was no challenge to, let alone any basis to question, the legitimacy of this stated reason.
[133] Before the Inquiry, the Supervisor was unable to recall having any conversation with the Associate to Murray J before 10 June 2004. Nevertheless, and taking into account in particular the impact of the escape itself on the Supervisor and his health, I am satisfied that the earlier communications with the Associate to Murray J did, in fact, take place.
[134] The Supervisor's own recollection, before the Inquiry, of having telephoned AIMS Ops was unclear. Again, I am satisfied on the totality of material before the Inquiry, that such a communication was made.

had come independently to the Supreme Court, pursuant to his bail obligations, to be sentenced, and he was placed alone in cell 3. Three female prisoners were placed together in cell 4. That left 11 prisoners (comprising the nine prisoners who eventually escaped and two others) who were kept together in cell 1.

At about 9.00am the Supervisor was informed by AIMS Ops that one custody officer was unable to come to work at the Supreme Court custody centre that day because he was sick. The Supervisor, aware that he was to be understaffed and that there was a heavy list of prisoners anyway, rang his Co-ordinator shortly after 9.00am. The Supervisor was asked by the Co-ordinator whether he had first spoken to Operations, as that should be his first port of call where more staff are needed. The Supervisor replied, “yes, but they were unable to supply”.

The Co-ordinator initially told the Supervisor that he would see if he could find an extra person. He then himself rang AIMS Ops and some other custody centres where AIMS provides services under the CSCS Contract, including at least the Central Law Courts. He found out that staff at all other metropolitan court custody centres were allocated and had commenced their duties so that it would be difficult to relocate anybody, particularly at short notice. Hence the Co-ordinator rang the Supervisor at the Supreme Court and told him that he was unable to provide extra staff for the Supreme Court and that therefore the Supervisor should think about utilising one of his perimeter security guards to work in the court custody centre, or in a courtroom, during that day. The Inquiry is satisfied that the AIMS Co-ordinator acted diligently and appropriately, in light of the resourcing available to him, in dealing with the request he received from the Supreme Court Supervisor on 10 June 2004.

Having been told by his Co-ordinator that there were no available staff to assist at the Supreme Court, the Supreme Court Supervisor then juggled some of his staff around to try and suit the timing of the various courts. In particular, he directed Officer A, who was normally his desk officer, to be ready to act on duty as a dock guard for court 7 from 11.30 am.

Just after 9.00 am and after he had heard from his Co-ordinator, rejecting his request for more staff, and having made some initial deployment decisions, the Supervisor gave a short verbal briefing to the other five staff members who were present on duty. He alerted them to the fact that there were to be 11 prisoners in cell 1 who would be sitting there for longer than

usual because, as he understood it, Murray J's status conference list was not to commence until 12 noon. He told them to be "extra vigilant" and they should not attempt to unlock cell 1 "with less than two officers present". However - and importantly - he did not give any specific or clear direction as to the staffing of cell unlocks, let alone any detailed or prescriptive method to be employed in conducting an unlock.[135]

On several occasions over the next two hours, it was necessary for different combinations of AIMS staff to take one or more prisoners out of cell 1 to go to the toilet. (There is no toilet in cell 1 itself.)[136] On some of those occasions the cell unlock was performed by two AIMS officers and on other occasions by three AIMS officers. Just as there had been no clarity or specificity to the direction given by the Supervisor to his staff shortly after 9.00 am, there was no operative direction or requirement as to a minimum number of staff required (aside from it being "no less than two"), nor any particular procedure employed in performing the unlock.

7.3 THE ESCAPE ITSELF

At about 10.45 am a lawyer for the prisoner Mr Dodd delivered some papers to the custody office within the custody centre, for Mr Dodd to read. About 15 minutes later, the Supervisor was told by one of his custody officers about the delivery of those papers. He then, appropriately, searched the papers, which were in two A4 envelopes, satisfying himself that they contained no inappropriate object or material. Having finished the search, he discussed with Officer A the best means of arranging for Mr Dodd to be able to read the legal papers in an empty cell so that he would be uninterrupted by other prisoners.

It was decided that the prisoner who had attended the Supreme Court that day on bail, then in cell 3 ("the bail prisoner"), was to be moved into the interview room (situated outside the cell block and secured by a lock, but not a cell as such) so that Mr Dodd could be placed in cell 3 to read his papers. The Supervisor and Officer A between them decided on this procedure because they regarded the bail prisoner as being of relatively low risk, with a

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[135] More than half a dozen different accounts were put to the Inquiry as to precisely what the Supervisor told his staff at this briefing. The Inquiry's findings, as reflected in the main text, take into account witness statements given to the police and to the Inquiry itself, interviews undertaken with Department of Justice internal investigators and with the Inquiry itself, the text of the Supreme Court Site Manual, written and oral submissions put on behalf of AIMS Corporation, and other factual findings about the circumstances of 10 June 2004.

[136] The Inspector of Custodial Services, in his *Report of Announced Inspection of Metropolitan Court Custody Centres*, supra n 117,- commented generally on the varying standards concerning toilet facilities and other amenities in court custody centres at paragraph 2.68ff.

likelihood that his bail would be renewed after his court appearance on that day. The Supervisor and Officer A then jointly asked another AIMS officer, Officer B, to accompany them down to cell 3, to remove the bail prisoner, before proceeding to cell 1 to get Mr Dodd. Importantly, this conversation involved no specific discussion, much less a direction from the Supervisor, as to any particular procedure, let alone a detailed or prescriptive one that was to be employed by the three officers in unlocking cell 1 to get Mr Dodd to move to cell 3.

The three officers went to cell 3, where they together removed the bail prisoner. Officer B then escorted the bail prisoner to the interview room outside the cell block. From cell 3 the Supervisor and Officer A moved towards the entry to cell 1, a distance of about 5 metres. Whilst they were in transit towards the door of cell 1, the prisoner Mr Nicolaides called out to the Supervisor that he wanted to go to the toilet.[137] The Supervisor told Mr Nicolaides that he would deal with him shortly, but first he wanted to see Mr Dodd. The Supervisor then placed the legal papers for Mr Dodd on a bench, which faces directly opposite the door to cell 2, and sits perpendicular to the door to cell 1. The Supervisor then moved towards the door of cell 1, at which time Officer A was standing about a metre behind and to the right hand side of the Supervisor. Officer B was not with the Supervisor and Officer A in the cell block at this time, nor at any time before the nine prisoners escaped from cell 1 and fled the Supreme Court.

The Supervisor then unlocked and commenced opening the door to cell 1, telling Mr Nicolaides that he would attend to him in a minute, but wanted Mr Dodd out of the cell. The Supervisor opened the door approximately one quarter of its full diameter. Momentarily, Mr Nicolaides appeared to stand back so as to let Mr Dodd come through, but then, instantaneously, a flood of prisoners rushed through the door. Mr Nicolaides and Mr Dodd were the first two out, and the seven other escaping prisoners followed very quickly thereafter. The nine escaping prisoners had “planned” the escape only to the limited degree of discussing the potential for it to happen whilst in custody at the Supreme Court that very morning.

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[137] Mr Nicolaides was a difficult and disruptive prisoner whilst in custody at the Supreme Court. Earlier on the morning of 10 June 2004 he had been repeatedly asking AIMS officers to see his solicitor. On one occasion Officer A told Mr Nicolaides that when he saw Mr Nicolaides’ solicitor, he would try and bring him down to the custody centre.

Prior to the prisoners coming out of cell 1, neither the Supervisor nor Officer A looked at the CCTV monitor which gave a view of a portion of cell 1. Nor did they undertake more than a passing glance inside the cell window of cell 1, which gives a view of the remainder of the cell not covered by the CCTV monitor.

In light of the number of prisoners coming out of the cell door, it was not possible for either the Supervisor or Officer A to make more than a token effort to close the cell door on the prisoners, or any number of them. The force of the rushing prisoners pushed the two officers backwards, towards the bench. One or two of the prisoners aggressively asked the Supervisor to hand over his keys. They applied either no force, or at most minimal force, but crowded towards him and continued to demand that he hand the keys over. The Supervisor either literally handed the keys to one of the prisoners or simply acquiesced in them being taken out of his hand. During this time the Supervisor was conscious of the duress button on the wall to the left of the cell door, but well beyond the Supervisor's reach. However with the flood of prisoners emerging from the cell, including those crowding around him, the Supervisor realised that he would not be able to get close enough to the duress button to press it.

Meanwhile, the prisoner Mr Lacco applied force around the head and neck area of Officer A, causing him to remain seated on the bench. The force was enough to leave Officer A with a strained and sore neck, but not to such a degree as to cause any bruising. On filtering out of the door to cell 1, one or two of the prisoners noticed Officer B, who by this time was still outside the cell block (having walked there after depositing the bailed prisoner in the interview room), but within a few metres of its entrance. One of them called out to Officer B to "just relax" and "not get involved" and Officer B stood where he was, making no further ground towards the fleeing prisoners. He either placed his hands on his head, or adopted another stance which indicated to the prisoners that he was not going to enter the cell block.

The prisoner who had obtained the keys from the Supervisor then proceeded past the door to cell 2, in the direction of the door to cell 3, to a locked door at the entrance to the remainder of the secure line. In a matter of seconds he used one of the keys on the Supervisor's key ring to unlock that door and proceed in a westerly direction towards the western wall of the Supreme Court building. The other eight prisoners followed him. The nine fleeing prisoners then went through two doors in their path which were wedged open. Those doors were at all times wedged open, except when prisoners were being delivered to

the custody centre having arrived at the sally port or delivered from the custody centre to the sally port. The nine fleeing prisoners, or at least some of them, then took a right turn towards a door at the exit to the sally port, tried to open that door, and found out that it was locked.

The prisoners then quickly retraced their steps, and all nine followed the path depicted by two lit "EXIT" signs heading again in a westerly direction, towards some fire exit doors on the western wall of the Supreme Court building, just south of the sally port. Those fire exit doors were closed but unlocked. They were pushed open by one or two of the prisoners and all nine fleeing prisoners left the Supreme Court building before heading in a westerly direction towards the traffic proceeding east along The Esplanade. Because there had been no planning of the escape apart from a fairly general discussion of its potential on the morning of 10 June 2004, none of the prisoners had any arrangements in place to assist their flight from the vicinity of the Supreme Court. Hence they immediately looked for vehicles to steal and drive away, and succeeded in doing so.

It was about 25 to 30 seconds after the prisoners had fled the cell area before the Supervisor and Officer A raised any alarm or commenced a pursuit of the escaping prisoners. This delay was due to the shock they experienced. The prisoners had locked behind them the single door which they themselves had unlocked to facilitate their escape. Officer A gave his keys to the Supervisor so the Supervisor could unlock that door. The doors in the prisoners' flight path which were wedged open had had their wedges kicked away, and therefore were closed but unlocked. The two officers then followed the path the prisoners had taken, left the Supreme Court building via the same fire escape doors through which the prisoners had departed, before spending about one to two minutes looking for the escaped prisoners. They did not find any.

Meanwhile Officer B had, at roughly the time that the Supervisor and Officer A had begun to pursue the escaping prisoners, yelled out, "help, help" to another officer who was in the custody office. Also at about the same time, yet another AIMS officer, who was in one of the court rooms as a gallery guard, heard a commotion and a yelling, and ran into the cell area, at which time Officer B emerged and unlocked the gate to the cell area to allow the gallery guard in. The gallery guard, noticing the door to cell 1 being open, pressed the duress alarm button on the left hand side of cell 1, before himself proceeding through the "secure line" towards the sally port. No one had hit a duress alarm button before the gallery guard did so at this time.

The duress alarm system operating at the Supreme Court on 10 June 2004 provided for an alarm to sound in the custody area, although not the cell area, to alert AIMS officers in that area to a critical incident. Individual AIMS officers throughout the building were not alerted through a pager system or the like.[138] At the time the duress alarm button was activated by the Gallery Guard, the relevant officers in the custody area were already aware of the escape.

7.4 IMMEDIATE AFTERMATH OF ESCAPE

The Supervisor, on returning to the custody area, rang the Co-ordinator. He briefly told the Co-ordinator of the fact that nine prisoners had escaped from the Supreme Court custody centre. The Co-ordinator then immediately briefed Mr John Hughes, AIMS's Operations Manager. Mr Hughes in turn briefed AIMS' then General Manager for the CSCS Contract, Mr Stephen MacPherson, by telephoning him at a meeting he was attending. The Co-ordinator and Mr Hughes then travelled from AIMS's office on Murray Street, Perth to the Supreme Court.

Whilst in transit, the Co-ordinator rang the Police Operations Centre to advise the Police Service of the incident. The Police Operations Centre asked the Co-ordinator for details, including the names of the escapees and the prisons where they came from. The Co-ordinator did not have those details, so he was unable to provide them at that stage. However, on arrival at the Supreme Court, the Co-ordinator received from the Supervisor and Officer A a list of the escaped prisoners and identification of the prisons where they were sentenced. The Co-ordinator then rang back the Police Operations Centre and provided it with those details. By this time something of a frenzy of activity had developed.

News of the escape reached the Department when Mr Hughes, AIMS' Operations Manager, telephoned Mr Stephen Fewster who was at that time in a meeting with Mr Stephen MacPherson, the General Manager, CSCS Contract and Mr Mike Adams, Executive Director, Operational Review AIMS. The meeting was, perhaps ironically, one of a succession of meetings for the planning and negotiation between the Department and AIMS of a possible extension, and variation, of the CSCS Contract.

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[138] This apparent deficiency has been remedied as part of the security improvements put in place after the escape, including portable radios equipped with personal duress buttons.

Mr Fewster informed Mr MacPherson and Mr Adams of the circumstances of the escape and the three decided to terminate their meeting. Mr Fewster advised Mr Brian Yearwood, who in turn advised the Director General of the Department of Justice, Mr Alan Piper. The immediate short-term response of Mr Piper was to instruct Mr Yearwood to become the Incident Commander and his location within the Department to become a Co-ordination Centre for a response to the escape.

Senior management of the Department thus became involved in reviewing security and procedures at the Supreme Court. Meanwhile the Police Prisons Unit also commenced an investigation which involved the interviewing of AIMS staff working at the Supreme Court on that day and other witnesses, and more generally the Unit pursued the recapture of the escaped prisoners and charges arising out of the escape. Subsequently, the Internal Investigations Unit of the Department commenced an investigation into the incident which included interviewing AIMS staff at the Supreme Court that day and the recaptured prisoners. That internal investigation was sourced in a series of appointments under section 44 of the CSCS Act.[139]

Independently of the report to the Police Operations Centre by the Co-ordinator, a separate report had informed the Police Service of the fact that two groups of the prisoners had stolen motor vehicles from near the intersection of The Esplanade and Barrack Street. This information enabled the Police Operations Centre to implement a co-ordinated response within approximately five minutes of the escape by despatching the following resources:

- Officers from the Major Incident Group were despatched to the Supreme Court itself;
- A separate group of Major Incident Group officers, together with officers from the Regional Operations Group, were despatched to pursue and locate the two stolen vehicles; and
- A Police helicopter was sent to the general vicinity of the Supreme Court and the surrounding areas.

Initial command of the incident was taken by the Central Metropolitan District, with ongoing management and co-ordination of the Police Response then assumed by the Major Crime

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[139] Those appointments were later withdrawn upon the commencement of work at this Inquiry. The Director General acknowledged the potential for duplication and inefficiency in the pursuit of dual inquiries under s.44 of the CSCS Act.

Division, Prison Unit. Additionally, all Police Officers within the metropolitan area were advised of the identity of the escapees together with details of the stolen vehicles.

Officers from the Major Incident Group located four prisoners in one of the stolen vehicles, a Landrover Freelander, within two hours of the escape in the Yangebup area. After a short pursuit in a northerly direction along the Kwinana Freeway, the stolen vehicle was crashed in Brentwood, where the escapees Pezzino, Fulgrabe, Lacco and Hapke were taken into custody. The Police helicopter assisted during the pursuit with two of the escapees suffering injuries as a result of the crash of the vehicle. One escapee was taken to Royal Perth Hospital and the other to Fremantle Hospital for treatment. All four captured escapees were then taken to the Perth Watch House at approximately 1:30pm that afternoon**.** The second motor vehicle stolen by some of the escapees shortly after the escape, a Holden Commodore, was located in Marangaroo on 11 June 2004.

The Prisons Unit of the WAPS conducted an intensive investigation into the location of the remaining five escaped prisoners. In the evening of Friday 11 June 2004, after a tip off, escapees Nicolaides and Simion were recaptured at a private residence in Lockridge. It is alleged that Mr Nicolaides was in possession of a hand gun at the time of his recapture.

The remaining three prisoners remained at large for over a week. It is alleged that during that time escapees Dodd and Sweeney were responsible for an armed robbery in South Perth. After what police described as a 'breakthrough', escapees Dodd and Sweeney were recaptured on Friday 18 June 2004 in a vehicle near a home in Kensington. The last remaining escapee, Hill, communicated with police through the media to discuss a possible surrender, however this did not eventuate and he was recaptured on 22 June 2004 without incident.

7.5 DECISION OF DIRECTOR GENERAL TO INTERVENE

By the afternoon of 13 June 2004, Mr Piper was in a position to send a memorandum to the Minister for Justice, described as a “Key Issues Briefing” which summarised Mr Piper’s impressions, formed to that time, of the factors which may have influenced the escape and some of the responses he was considering in his capacity as Director General.

By this time, Mr Piper had commenced considering whether he would exercise his power under section 59 of the CSCS Act to intervene in the CSCS Contract. Such "intervention" is a power either to give directions as to the manner in which a service that is a subject of such a contract is to be provided, or to actually provide a service that is the subject of such a contract.[140] From the outset, Mr Piper proceeded on the basis, correctly, that it was entirely his own decision as to whether or not to exercise that power.

In his briefing note to the Minister of 13 June 2004, Mr Piper expresses the provisional view that there appeared to have been "a fundamental AIMS service failure" leading to the escape and that that failure, depending on how it was viewed, "may warrant a range of contractual actions". He noted that, "it would be preferable if AIMS were willing to accept responsibility for their service failures as the basis for changed arrangements between AIMS and the Department." He went on to suggest that, if that could not be achieved, available options for "legislative and contractual arrangements" included intervention under section 59, issuing a default notice for lack of threat assessment, perimeter security, and risk management at the Supreme Court, and reducing performance link fee payments. Importantly, however, Mr Piper did not invite any comment from the Minister or her staff on the subject of his potential intervention under section 59, and nor was any such contribution made by the Minister or her staff.

One of the responses Mr Piper had implemented shortly after the escape was to form a Security Audit Team, authorised to undertake a structured "walk-through" of the Supreme Court custody centre, correcting anything capable of immediate correction and then reporting back to Mr Piper on the state of the Supreme Court. That team, which comprised Mr David Nicholson, then General Manager of Acacia Prison and now General Manager of the CSCS Contract itself, Mr Stephen Fewster, the then Departmental Contract Manager for the CSCS Contract, and Mr Jeff Clegg, Manager Security, Casuarina Prison reported orally to Mr Piper on the night of 11 June 2004 concerning numerous perceived shortcomings in security at the Supreme Court custody centre, a number of which could fairly be said to have directly

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[140] Section 59 of the CSCS Act is in the following terms:

(1) The CEO may intervene in a contract if, in the opinion of the CEO –

a) There are grounds for doing so under subsection (2); and

b) The intervention is in the public interest or is necessary to ensure the proper provision of a service that is the subject of a contract.

(2) The grounds for intervening in a contract are that –

a) There is an emergency in a service that is a subject of the contract; or

influenced the escape. The report of the Security Audit Team, together with the contents of some interviews provided by some of the escapees to Police, gave Mr Piper the strong impression by the weekend of 12 – 13 June 2004 that the escape had been "closer to a walk-out than a break-out" and that certain processes in the custody centre were "soft, suspect and not well-structured".

Mr Piper, in considering whether to exercise his power of intervention under section 59 focused on the question of public safety and sought, in particular, to send a very clear signal to prisoners at the Supreme Court custody centre that the facility could no longer be viewed as a "soft touch" and that the centre was very much under control. He was keen to put in charge of the centre a group of people whom he could regard as being of sufficiently high calibre, both as a beneficial step in its own right and, further, so that he was in a position to critically examine the processes and procedures within the custody centre and construct a new way of doing business there.

Finally, Mr Piper considered material before him to the effect that AIMS staff were under pressure and likely to be distracted from the fallout of the incident and that he wanted to have greater confidence in the capacity of the particular officers manning the custody centre.

Having taken into account all of those matters, Mr Piper, by notice of intervention dated 14 June 2004, formally exercised his powers under section 59 of the CSCS Act on the basis that the contract had failed to effectively provide certain services at the Supreme Court pursuant to the CSCS Contract. Specifically, the notice of intervention asserted that the Contractor, AIMS, had failed to:

- Effectively provide adequate risk management by failing to effectively supervise and control persons in custody, leading to the escape of nine persons on 10 June 2004;
- Effectively provide adequate perimeter security;
- Effectively provide court custody centre security; and
- Effectively provide management of court security.

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b) The Contractor has failed to effectively provide a service that is a subject of the contract.

The nature of the intervention was that Mr Piper, as CEO of the Department, was to undertake court custody and court dock guards in the Supreme Court, until he was satisfied that the Contractor can effectively undertake those services. As at the date of this Report that intervention continues, on an indefinite basis, there being no date specified or foreshadowed for its cessation

Mr Piper's exercise of the power to intervene in the CSCS Contract under section 59 of the CSCS Act 1999 was timely and appropriate, and took into account matters that he was entitled to consider in a valid exercise of his statutory discretion.

7.6 SOME GENERAL FINDINGS

The circumstances of the escape are stark in their simplicity. The reader is entitled to register immediate concern that nine prisoners, temporarily housed in the court which hears the State's most serious criminal charges, could so readily, and with the most minimal and rudimentary planning, secure their own short-term freedom. Certainly a number of the prisoners themselves saw the matter in similar terms. In the words of one prisoner after his recapture:

> "It was like taking candy from a baby … there was just an open hallway for me to walk through".

And in the words of another:

> "For the highest court in Western Australia, it was all a bit of a joke".

Those observations having been made, the Inquiry was nonetheless concerned to reach its conclusions without any preconceptions or assumptions of particular "fault" or "responsibility".

Before turning to examine more closely some of the apparent shortcomings in the processes and procedures employed at the time of the escape, it is appropriate to make some certain findings relevant to the conduct of the individual officers concerned. The AIMS Supreme Court Supervisor acted consistently with applicable procedures contained in the Supreme Court Site Manual and a more generic Operations Manual. Indeed, a dominant characteristic emerging from several of AIMS' submissions was the Company's insistence that its Custody Officers (including Supervisors) have minimal independent discretion and work in as confined a way as possible in compliance with documented procedural requirements.

The Supervisor himself impressed the Inquiry as a genuine, sincere person who did his best to perform the duties of his position, often under constraints and sufferance imposed by physical restrictions in the custody centre and the inherent nature of the job. A number of people, including co-employees within AIMS and others, spoke positively about his commitment and effort to the job. Equally, it was clear that the escape, its aftermath, and surrounding media attention had had a devastating effect on the Supervisor's state of mind and his physical health. Although it was not feasible for the Inquiry to pursue the issue in any depth, the Supervisor spoke of the medical treatment he had been receiving and the gradually positive effect that was having on his state of health. AIMS, to its credit, had funded such medical consultations.

7.7 APPLICABLE PROCEDURES AND THEIR "APPROVAL"

The Supreme Court Site Manual used, and occasionally referred to by AIMS' staff at the Supreme Court custody centre, was a 47 page document detailing general site information, duty statements, and certain procedures regarding the management of persons in custody. Although it was available in the custody office within the court custody centre, employees would not necessarily refer to its contents with any frequency, rather would undertake their duties from day to day based on their own accumulated experience, from time to time consulting with more senior officers and co-workers where an issue needed to be clarified. Nevertheless, the Inquiry is satisfied that as a firm general rule, the Supervisor was very well acquainted with the procedures contained in the Site Manual, would act consistently with them himself and would shape his direction and management of other custody officers accordingly.

Section 1.2 of the Site Manual, headed "Service Requirements" provided that the provision of court security and custodial services were delivered by the positions of one custodial supervisor and one security supervisor, certain perimeter security officers, a dock guard, two custodial officers, a gallery guard and an after hours "security presence". Section 1.2.3 provided that "all persons in AIMS custody at the Supreme Court will be escorted by a minimum of TWO OFFICER'S AT ALL TIMES" (sic).

Section 3.3 of the Site Manual provided that all officers "are to strictly adopt the following procedures when opening any cell door or Sally Port door."

3.3.1 Cell Doors

- Each time a cell door is open, it compromises the security and good order of the custodial environment, and places everyone from Custodial Officers to **PERSON IN CUSTODY** at risk.
- Custody Officers are hereby advised to keep Persons in Custody movements to an absolute minimum. Cell doors must remain secured in the double lock position and are only to be opened for legitimate reasons. The opening of a cell door for general conversation or to ask a Person in Custody how he/she would like their coffee is not a legitimate reason.
- Custody Officers are instructed that when more than one cell is occupied with Persons in Custody, **ONLY ONE CELL DOOR IS TO BE OPENED** at any one time, particularly when the cells are occupied by two different classifications of Person in Custody eg. One cell has Male Person in Custody and the other has Segregated Person in Custody. These two classifications in particular along with Juvenile Persons in Custody are strictly never to come into contact with each other.
- When escorting Persons in Custody down to the toilets, the Officer is to observe the Person in Custody at all times, NO PERSON IN CUSTODY IS TO BE OUT OF AN OFFICER'S SIGHT. ONLY ONE PERSON IN CUSTODY TO BE ESCORTED TO THE TOILETS AT ANY ONE TIME.
- THE ABOVE PROCEDURE IS TO BE STRICTLY ADHERED TO.
- (Bold and Capitals all in original.)

A significant amount of material was put before the Inquiry concerning the method by which the Department "approved" AIMS' procedural documentation. It is unnecessary to recount the entire history of this lengthy and somewhat harrowing process. Suffice to say it commenced approximately four years ago with a succession of correspondence, culminating, most recently in correspondence of 6 January 2004 in which Mr MacPherson, AIMS' then General Manager, CSCS Contract, wrote to Mr Fewster, the Department's then Contract Manager, enclosing copies of Site Manuals for some ten different sites, including the Supreme Court. Mr MacPherson's covering letter said that the manuals had been "developed in consultation with DOJ CMT and are submitted for your approval". (CMT stands for Contract Management Team.) That letter has not been the subject of any formal response by the Department.

Furthermore, in the exchange that had developed between the Department and AIMS regarding the text of the Supreme Court Site Manual, largely during 2004, the Department's comments and suggested changes were confined largely to matters of style, phrasing and typographical errors. It was not apparent to the Inquiry that any substantive review was undertaken of matters which, as events transpired, carried a direct connection to the escape, such as numbers of custody officers on duty and a prescriptive procedure for the opening of cells.

The Department, in its closing submission, pointed to a number of aspects of the history of the "approval" process that were unnecessary for the Inquiry to pursue in elaborate detail. However there is a sufficient foundation to conclude that AIMS was entitled to proceed on the basis that the most recent draft of the Supreme Court Site Manual, sent in January 2004, although potentially to be the subject of a further revision, had a *de facto* approval at the time of the escape. The four year duration of the process was an unacceptably long time to finalise Site Manuals for not only the Supreme Court, but each site, and a relatively important issue like this should have been attended to earlier and with more intensity. This conclusion is reflected in the simple reality that interim, yet comprehensive, new procedures for the Supreme Court custody centre have already been developed, that is, within a matter of weeks after the escape.

7.8 UNLOCKING PROCEDURES

On 10 June 2004, AIMS officers performed unlocks of cell 1 on a number of occasions, and on each of those occasions there was no clear, operative direction or requirement as to the minimum number of officers required, nor any particular procedural requirements as to how the cell unlock was performed. This is of particular significance given the size of cell 1, the 'blind spots' that existed within cell 1, and the number and combination of prisoners in cell 1 on that occasion, and indeed on numerous occasions in light of the physical limitations of the cell block area.

The particular elements absent from the cell unlock procedures employed on 10 June 2004 include:

- No discussion occurred, nor was a specific instruction issued from the Supervisor, as to any particular procedure, (let alone a detailed or prescriptive procedure) to be employed by the officers unlocking cell 1.

- No clear procedure applied as to the placement of officers during the course of the cell unlock to ensure appropriate pressure on the door during the cell unlock, monitoring of the CCTV footage of cell 1, and to ensure that an officer had access to a duress alarm button at all times during the cell unlock procedure.
- There was insufficient management of prisoners in cell 1 during the course of the cell unlock, particularly not enough attention to the placement of prisoners in the cell at the time of the unlock allowing, instantaneously, a flood of prisoners to rush through the door. [141]
- Officers undertook no more than a passing glance inside the cell window of cell number 1, which gives a view of the portion of the cell not covered by the CCTV monitor.
- Despite a recognition of the risk presented by the number and security profile of prisoners in cell 1 and the direction to staff to be "extra vigilant" and "not [to] attempt to unlock cell 1 with less than two officers present", cell unlocks were conducted on cell 1 on 10 June 2004 without at least 3 officers present

There ought to have been a clearer, more prescriptive process for the unlock, involving a step by step approach of how the door would be opened and the position to be taken by the prisoners within the cell whilst the unlock occurred.

In closing submissions to the Inquiry, it was contested on behalf of AIMS that such clearer, more prescriptive, procedures concerning the position to be taken by prisoners whilst a cell unlock is occurring would create significant practical problems, namely that prisoners would be unlikely to immediately and routinely comply with such a direction, it may compromise the efficiency and timeliness of delivery of prisoners to court and court custody management generally and it may be perceived by prisoners as provocative, aggressive or unnecessary. The Inquiry failed to see any merit in this submission. The primary focus for procedures in this area must remain on precision in management of prisoners to avoid a risk of escape.

[141] Counsel on behalf of AIMS submitted to the Inquiry that the evidence of the Supervisor and Officer A that prisoners were 'standing back' meant that, bar one prisoner, no other prisoner was assessed as being close to the door and not back from it. The Inquiry formed that view that having one additional prisoner too close to the door was a risk and that had the prisoners been sufficiently "standing back" it would not have been possible for "instantaneously" a flood of prisoners to rush through the door. Moreover, "standing back" is a somewhat question-begging description. The Inquiry is satisfied that the prisoners apart from Messrs Dodd and Nicolaides were at various points within cell number 1 when the Supervisor commenced to unlock the cell door. All had a readiness to rush through the cell door if a certain signal was given.

Effective and decisive prisoner management ought be able to overcome the suggested "practical problems".

More than two Custody Officers should have attended directly outside cell 1 at the time of the unlock, with at least one of those officers positioned within arm's reach of a duress button. These Custody Officers ought to have had regard to the actual movements of the prisoners in cell number 1, based on viewing through the cell window, and/or by use of the CCTV monitor.

Counsel for AIMS submitted to the Inquiry that activating the duress button would not, in and of itself, prevented the escape. Whilst there is some logic in that proposition, it is also true to say that the timely activation of a duress alarm allows for a timely response to a critical incident, in this case an escape. In addition it has been submitted to the Inquiry, and is accepted, that each and every facet of custodial security acts as a deterrent to potential escapees. Having considered these propositions, the Inquiry has maintained its view about the benefit of the use of duress alarms.

Ultimately, the processes and procedures employed by AIMS to unlock cell 1 were deficient and failed adequately to guard against the possibility of an escape.

7.9 MANAGEMENT OF KEYS

Once one of the prisoners had obtained the keys from the Supervisor, that prisoner was able to use one of the keys on the Supervisor's key ring to unlock the door from the cell area and proceed in a westerly direction towards the western wall of the Supreme Court building. Although the prisoner only needed to use that one key, the key ring that had been obtained actually held all the keys available to the custody centre Supervisor, allowing access to all areas of the Supreme Court.

The management of keys within a custodial environment is a key element of risk minimisation. This is evident in the (draft) Operational Procedures put in place within the Supreme Court custody centre by the Department after the incident. It is supported by the evidence the Inquiry received from Departmental officers with security expertise and from AIMS management itself. The purpose of key management within a custody environment is to ensure that, should a prisoner have access to keys obtained in a cell area, that prisoner

does not have access to any additional keys for the facility and, therefore, be able to breach the secure line surrounding the custody area.

Counsel for AIMS sought to minimise the impact of this security deficiency by emphasising that AIMS' practice for maintaining (joint) custody of keys was initiated by officers of the WA Police Service whom AIMS' staff formally "shadowed" prior to commencing their duties under the CSCS Contract. Undesirable as it is for such a practice to have been, in effect, passed on as part of a handover of tasks, there was plainly an obligation on AIMS to assess, and constantly improve, its own security practices in application of the knowledge and expertise it brought to the provision of service. The fact that such a recognition has occurred since the escape speaks for itself.

The management of keys at the court custody centre was deficient, and contributed to an unacceptable risk of an escape, in storing both cell keys and custody access keys on the same key ring.

7.10 LOCKING OF DOORS

Having unlocked the only locked door in their flight path, the nine prisoners proceeded through two doors in their path which were wedged open. In fact those doors were at all times wedged open, except when prisoners were being delivered to the custody centre having arrived at the sally port or delivered from the custody centre to the sally port.

All AIMS officers held the belief that those two doors were wedged open at the direction of one or more people in authority at the Supreme Court. The Inquiry heard evidence, which it accepts, that the Executive Officer of the Supreme Court gave a direction that certain doors adjacent to the court custody facility not be locked as they were a court thoroughfare. However, these doors were not used during the course of the escape. In AIMS' understanding, this direction extended to two additional doors between the court custody centre and the sally port. It was those "additional" doors which were wedged open and were used by the prisoners during the course of the escape.

There were some rather vague suggestions in all of the materials before the Inquiry that the reason for the requirement about open doors lay in either or both of two reasons: using the path along offices in the westernmost part of the building as a fire escape route, and simply

for the convenience of staff as a more direct route in moving through the building. The former reason at least has a superficial appeal, albeit that it is plainly an insufficient basis to deny the integrity of a “secure line” to and from a custody centre. The latter reason is so obviously an unacceptable reason that no further comment is necessary.

Finally, a door at the perimeter of the court custody centre was wedged open, and also used during the course of the escape. This would seem to be material to the escape of the prisoners and was certainly not referred to by either AIMS officers, nor Departmental representatives, as in any way supporting the confusion about what doors needed to be “wedged open” as described.

Despite the honestly held views of the AIMS officers responsible for the management and control of the Supreme Court custody centre, the “wedging open” of the two doors in such a strategic location within the custody centre presented a major risk to the security of the custody centre at all times. Indeed it seems that the view of AIMS officers was formed by mistake as to the direction, by the time it reached AIMS officers in the custody centre, was not sufficiently clear, nor was clarification sought. No particular blame lies with any individual, or group of employees. It was incumbent on AIMS in a corporate sense - as the manager of that custody centre - to take all reasonable steps to ensure the locking of those two doors as a vital component of the “secure line”. Those steps, if need be, would have included the making of representations to the Department, to staff of any affected members of the judiciary and to any other party they considered might have given, or endorsed, a direction to have those doors unlocked.

The failure of AIMS to take any steps, or any reasonable steps, to secure the locking of two doors, wedged open at the time of the escape in the flight path of the escapees, contributed to an unacceptable risk of an escape.

Equally, there was an absence of any clear understanding as between AIMS and the Department of the basis, or supposed authority, for the two doors in the flight path of the escapees being wedged open at all material times. Of the material before the Inquiry, neither AIMS nor the Department’s on site monitors appear to have brought this risk to attention in order to have it remedied.

Overall, the relationship between AIMS as Contractor, and the Department, with ultimately statutory responsibility under the CSCS Act, despite its various strengths, failed to address, properly or at all, issues relative to the maintenance of a secure custody facility at the Supreme Court. In particular, defects in the overall security of the facility, including proper maintenance of a secure line, key custody, and a sufficiently clear understanding of cell unlock procedures, were addressed insufficiently or not at all. Although the Department had adverted to the means of correcting known deficiencies in the facilities themselves, attention was not given, nor properly considered, to deficiencies in the AIMS operational procedures.

As has been described, the Department formed a Joint Security Audit Team, comprising members from the Department and AIMS, to conduct a Court Services Security/ Risk Review which focussed, initially, on the Supreme Court custody centre. The review conducted at the Supreme Court found that, as at 10 June 2004, the Supreme Court security required action, or immediate action, in almost all areas. In only four areas was the security considered to be adequate by the Joint Security Audit Team, being perimeter CCTV, cell fittings, external walls and staff prisoner relationships. This review provides a preliminary understanding of both the physical and procedural systems failures which allowed an escape to occur.

It is unnecessary to go into great detail about specifics of the review. Suffice to say the majority of the deficiencies identified by this review have now been remedied. The risks previously presented by the custody facility itself have been minimised as far as possible.

Overall, the steps taken by the Department were appropriate. However, had those steps been undertaken earlier they would have significantly reduced the risk of escape.

8 MONITORING OF THE CSCS CONTRACT BY THE DEPARTMENT OF JUSTICE

8.1 INTRODUCTORY

The CSCS Contract is managed within the Department by a Contract Manager who reports, through the Director of Contracts Management to the Executive Director of Prisons Division to the Director General. Specific powers are delegated to the Contract Manager under the CSCS Contract including the power to manage "all aspects of the operation and performance of the contract".[142] The Contract Manager is responsible, in particular, for:

- Negotiating and coordinating changes to the services and any contractual variations;
- Managing the contract and service performance and stakeholder satisfaction;
- Coordinating the Client Agencies Group[143];
- Managing the issues raised by stakeholders; and
- Directing the Service Manager[144] on any aspect of the Service and the requirements of the contract.

The structure established under the contract provides for the Director General to retain responsibility for the strategic management of the CSCS Contract, whilst the Contract Manager has delegated responsibility for the day-to-day implementation and management of the contract.[145]

The CSCS Contract does not expressly provide for the "monitoring" of the contract in the manner in which it is currently undertaken. What is does provide is that the Contract Manager has delegated authority to manage and monitor contract and service performance and stakeholder satisfaction with the services provided.[146]

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[142] Clause 9.4(a), CSCS Contract.
[143] As described in part 3.4 of this Report.
[144] The Service Manager is defined in the Contract as the AIMS officer responsible for the provision of the services by AIMS.
[145] Part 9, CSCS Contract.
[146] Clause 9.4(c), CSCS Contract.

In addition, the Director General has power under the contract to, at any time, provide for an external evaluation of the performance of the contract and the services[147]. This power has been used once, where the evaluation was with regard to reporting regimes used by various centres throughout the State. It did not examine the actual provision of service.

Other clauses in the CSCS Contract guarantee the State the right to enter onto premises to inspect or review equipment, records and operations,[148] and have access to information and records, subject to the giving of reasonable notice.[149]

8.2 QUALITY ASSURANCE

Section 4 of the CSCS Contract requires the contractor to maintain a Quality Management System to a certain standard. Quality Assurance is, in its simplest terms, the assurance that the systems put in place by an organisation to produce its good or service is going to produce a high quality good or service.

Section 4 of the CSCS Contract requires the contractor to be certified to the Quality Assurance standard, AS/NZS ISO9001:2000. The Quality Management System reviews the processes used by the corporation under review and is not, nor is it intended to be, an actual security review. As such it is of little practical relevance to the provision of day to day security services pursuant to the CSCS Contract.

More broadly, a general Quality Assurance, or Total Quality Management approach is intended to be a process of ongoing review of process and procedures – both on an audit and critical incident basis – which generates knowledge and learning within an organisation which can then lead to changes in the systems employed by the organisation and an improvement in how it delivers its service. These general principles of Total Quality Management are applicable in more managerial activities, including the management of the provision of court security and court custodial services.

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[147] Clause 9.11, CSCS Contract.
[148] Clause 21.3, CSCS Contract.
[149] Clause 2.5, CSCS Contract.

8.3 MONITORING OF COURT SECURITY AND CUSTODIAL SERVICES CONTRACT

Under the CSCS Contract, as it was implemented at the time of the incident, the Contract was managed by the Contract Manager, and his relevant superiors within the Department as required. Monitoring of the provision of service pursuant to the contract specifications was also undertaken and, although not expressly required by the contract, was implicitly required by the provisions of the contract relating to the management of the contract and service performance, and by the Director General to fulfil his statutory obligations with regard to the provision of court security and custodial services on behalf of the Government.

On-site monitoring of the delivery of services by the AIMS contractors is undertaken by the Monitoring Branch of the Custodial Contracts Directorate. The Department advised that the Branch was given the task of monitoring the CSCS Contract as a result of the recommendation of the Inspector of Custodial Services in 2001.[150] That recommendation suggested that the monitoring function should include interviews or surveys of prisoners and officers, formal investigation processes[151], and formal grievance processes for persons in custody, as well as compliance checks.

The Branch has been conducting the monitoring in accordance with a Monitoring Plan, most recently revised in March 2003. The previous version of the Monitoring Plan (the inaugural version) was substantially similar to the version promulgated after the review conducted in early 2003. The Monitoring Plan is intended to be a tool by which the Monitoring Branch test, report and review the on-site provision of services by AIMS to the Contract Manager. The Plan acknowledges that the Monitor and his team need to provide timely and regular feedback on the day-to-day provision of services to the Contract Manager to ensure AIMS are meeting their contract requirements. The Monitoring Plan includes "informal" surveying of AIMS officers and, on occasion, prisoners, but no formal surveying process.

The Monitoring Plan includes four processes: planning, testing, reporting and reviewing. The planning element particularly relates to when, and by whom, the reviews will be conducted. The testing, or on-site monitoring, is done according to certain templates included in the Plan itself. Once the reports were completed they were provided to the Director, Custodial

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[150] *Report of Announced Inspection of Metropolitan Court Custody Centres*, supra n 117, recommendation 5.
[151] This function is undertaken by the Internal Investigations Unit of the Department.

Contracts and a review period was commenced which focused on "analysis, planning and implementation of enhancements to the [Monitoring] Plan". [152] The completed monitoring reports were reviewed by the Contract Manager and relevant issues raised with the Director, Custodial Contracts. The Contract Manager has the contractual authority to deal with, and 'escalate' any particular issue arising out the monitoring reports. However it is clear to the Inquiry that the Contract Manager, and the Contract Management Branch, had little or no input in the Monitoring Plan, and the Plan did not reflect perceived risks in various areas. Indeed, although the Monitor's Reports were received by the Contract Manager and were used to gauge performance, the Contract Manager himself acknowledged that he was not "intimately involved" with the conduct of the monitoring. The Monitor received little, if any, feedback from other sources about the conduct of the monitoring tests, save as to the comments of the Inspector of Custodial Services in his Report Number 7 at recommendation 4.

The Inspector of Custodial Services recommended that "the Department should take a more active monitoring role in training received by the Contractor's regional employees to ensure that standards promised in the Contract are adhered to". The Department responded that the monitoring of training, as a factor, would be incorporated into its compliance schedule.[153] This recommendation seems to have had little, if any, impact on the Monitoring Plan.

The Monitoring Plan includes 22 tests, of which three were of particular significance to the Inquiry's terms of reference, namely:

- Test 1 – Supervision and Management of Persons in Custody

  Test 1 addresses the supervision of persons in custody and required the Monitoring Officer to observe practices, discuss procedures with staff, and inspect documents, alarm systems and close circuit television.

- Test 3 – Escapes and Unlawful Release

  Test 3 assesses the response of the contractor to escapes and unlawful releases and requires the Monitoring Officer to ensure that there is an appropriate incident response, confirm appropriate authorities were notified, observe whether relevant legislation and

[152] Monitoring Plan, p4.

policy had been adhered to and staff were conversant with relevant policies and procedures, and determine whether procedures were effective in achieving service standards.

- Test 4 – Incidents – Procedures, Responses and Notifications (including Emergency)

  Test 4 examines a broad range of incidents, and responses. It requires, where possible, the Monitoring Officer to review an actual incident to determine if appropriate procedures were followed. Otherwise the Monitoring Officer would confirm that appropriate procedures were in place to deal with reportable and critical incidents and emergencies.

After the escape of 10 June 2004, an analysis of the outcomes of the relevant tests across all custody centres, including the Supreme Court was conducted. This analysis summarised the outcomes of each of these tests as conducted by the monitors, which had been provided to the Contract Manager by the Monitoring Branch. It is not clear whether any such analysis had been conducted previously; it seems that it was not provided to the Contract Manager in this format in any event. The analysis concluded that the risk associated with failures in the procedures being tested were high and the existing controls over those high risk situations were, generally, inadequate. As such the residual risk of an adverse incident occurring was high.

It is readily apparent that the Monitoring Branch did not analyse the data it obtained during the conduct of the monitoring tests with a view to identifying trends or areas of increased risk or ongoing problems. Rather, the Monitoring Branch focused merely on the frequency and timeliness of tests and reporting.

As has been emphasized, the Joint Security Audit Team Review conducted at the Supreme Court found that, as at 10 June 2004, the Supreme Court security required action, or immediate action in almost all areas. Significantly this review, whilst being conducted by officers of relative seniority, took only a few hours to complete but represents the most significant security review of the facility conducted by either the Department or AIMS during the course of the Contract.

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[153] Office of Inspector of Custodial Services. 2003 *Report of Announced Inspection of Non-Metropolitan Court Custody Centres*, p34.

The Monitor's reports were summarized and provided to the Minister for Justice as part of the monthly reports entitled *Justice Monthly Reports – AIMS/CCC Transport Section* (the Monthly Reports) regarding the CSCS Contract. The Monthly Reports included only a brief summary of the monitor's reports for that month. The Reports, generally, include:

- a summary of major incidents for that month, for example deaths in custody, escapes;
- a statement of any audits conducted;
- overseeing the implementation of the contract; a summary of incidents against the Performance Linked Fee; and
- figures on the demand for services under the CSCS Contract.

Apparently the Monthly Report references to the monitor's role were intentionally brief in order to highlight only areas of real significance for the Director General and the Minister.

It is clear, upon the evidence of witnesses from the Department itself, including its Director General, that the monitoring of the contract was inadequate. It was described as "paper-based" and "clumsy", failing to identify "glaring deficiencies" and the Director General was of the view that "in hindsight… there were lots of detailed service elements that are looked at, the security focus has not been strong enough and will be significantly increased".

It can be readily concluded, from the examination of the escape of 10 June 2004 conducted both by this Inquiry and at the instigation of the Department, through its Security Audit Team and Internal Investigations Unit, that the monitoring conducted by the Department failed to detect, or properly detect, deficiencies in the following areas which directly influenced or facilitated the escape[154]:

a) The overall maintenance of a "secure line", including the ongoing (and highly insecure) practice whereby two doors between the custody centre and the western wall of the Supreme Court building were wedged open;

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[154] The monitoring conducted by the Department also failed to detect, or properly detect, deficiencies in the areas of contingency and emergency planning, weapons storage procedures, evacuation procedures, internal escort procedures, key storage procedures, security audits and the procedures for the use of chemical agent spray and other accompaniments.

b) Key security and custody, particularly insofar as the practice of AIMS permitted cell keys and perimeter access keys to be maintained on the same key ring; and

c) Appropriate unlock procedures, particularly in light of the following shortcomings of the procedures actually adopted for cell number 1 immediately prior to the escape as described in Chapter 7.

The Inquiry finds that the Department's monitoring of AIMS' performance under the CSCS Contract was deficient in that it failed to detect inadequacies that impacted on the maintenance of a secure custody facility.

The Department envisages significant change to the monitoring of the CSCS Contract under the CSCS Revitalisation Program. These changes will move to a more audit based framework with an increased focus on security and better linkages between the monitoring and the management of the contract. The changes will also allow the 'clients' of the service, the Prisons and Court Services Divisions, to have a greater role in managing and monitoring the service.

8.4 DEVELOPMENT AND APPROVAL OF THE SUPREME COURT SITE MANUAL

The CSCS Contract requires AIMS to develop a Site Manual for each site upon which it delivers services. Relevant portions of the content of the Supreme Court Site Manual are extracted in Chapter 7. Of additional interest to the Inquiry is the process by which that Site Manual was prepared by AIMS and the approval process employed by the Department.

The first Site Manual was produced by AIMS in September 2001 and provided to the Department for approval. This was returned to AIMS by the Department as, in the Department's view, requests regarding format and content had not been followed. A further draft of the Site Manual was prepared and submitted by AIMS, amendments were sought and a penultimate draft was provided to the Department in September 2003. It was returned to AIMS with suggested changes confined, almost exclusively, to matters of style, phrasing and typographical errors. AIMS submitted the final draft of the Site Manual on 6 January 2004 and did not receive any advice from the Department with regard to that draft at any material time.

It was agreed in May 2004 that the relevant AIMS officer and Departmental officer (in this case the Monitor) should attend the various sites to consider and agree the content and serviceability of the outstanding Site Manuals. This had not occurred prior the escape of 10 June 2004.

The last relevant correspondence concerning the approval process for the Supreme Court Site Manual, dated 6 January 2004, has not been the subject of any formal response by the Department. In those circumstances AIMS was entitled to proceed on the basis that the most recent draft of the Supreme Court Site Manual at least *de facto* approved by the Department.

The Inquiry having had regard to the particulars of the escape of 10 June 2004 and analysed those particulars with a view to making findings about the performance by both AIMS and the Department formed the view that the Site Manual had significant shortcomings in regard to:

a) The provision of only two custody officers within the Custody Office at any given time;

b) The provision of specific and detailed procedures with regard to the opening of Cell Doors; and

c) The provision of clear and prescriptive procedures for the management of an "escape".

The Department's process of approval of AIMS' procedural documentation was flawed in that it failed to detect the following substantive shortcomings;

a) Supreme Court Site Manual at 1.2 regarding "Two Custody Officers";

b) Supreme Court Site Manual at 3.3.1 providing, in limited detail, for the procedure concerning "Cell Doors"; and

c) Operational Procedures Manual at 8.105.2 regarding an "escape".

9 PARTICULAR TOPICS

9.1 RISK ASSESSMENT AND HIGH RISK SECURITY PRISONERS

Two interrelated topics arose time and time again in the course of the Inquiry's examination of the overall relationship between AIMS and the Department, namely risk assessment and the custody of "high security" or "high risk" prisoners. Historically, the concept of "high security escort" status has been accorded certain prisoners, based on an identified risk of some major breach of security whilst the prisoner is under escort. At present, about 44 prisoners out of about 3,150 are so classified (none of whom were among the nine escapees of 10 June 2004), and together they account for about 350 transport movements per year, out of about 50,000. The types of risks that the classification, and increased security response, are concerned with encompass matters such as:

- Externally assisted escape involving the use of weapons;
- A previous history of escape while under escort;
- A history of dangerously violent behaviour, particularly when under escort;
- Perceived danger that the prisoner will be subject to attack from others; and
- (Rarely) Extreme public notoriety.

The Department emphasises that "high security escort" involves a highly trained, *armed* escort as its essential element, the entire concept being designed to prevent and deter an escape using armed assistance. However AIMS points to the artificiality and practical difficulties of conceptualising the entire framework of the custody of prisoners who carry an enhanced risk in that way. Even accepting, favourably to the Department, its specific concerns about the nature of risks accompanying the *transit* of dangerous prisoners, it can scarcely be doubted that some level of enhanced risk remains after the transit is completed. Additionally to that, a certain synergy applies where particular combinations and associations of prisoners are held in custody simultaneously.

There are many possible starting points in undertaking a more formal analysis of these issues, but perhaps the most natural commencement lies in the text of the applicable provision of the CSCS Contract[155], which relevantly provides:

> "The following prisoners are excluded from the provision of court custodial services under the Contract and will not be managed by the Contractor, albeit that they may be held and guarded in facilities managed by the Contractor:
>
> a) High security prisoners in the charge of MOJ Emergency Security Group (ESG) or in the charge of WAPS because of operational necessity or risk. In these cases WAPS or ESG may provide all escorts and guards."

A distinct provision[156] provides, less controversially, that "Any prisoner designated by the Client Agencies to be a high security prisoner requiring to be moved by high security escort in a manner determined by the Client Agencies" constitutes a prisoner movement service (as opposed to a court custodial service) which is excluded from the Contract.

Professor Harding examined the contract exclusion concerned with prisoners posing a high security risk in his Report of an Announced Inspection of Metropolitan Court Custody Centres. He expressed concern about the delivery of exceptional risk prisoners to court custody centres to the Contractor, which treats them as ordinary persons in custody. He observed that court custody staff will then endeavour to manage these prisoners according to the perceived risk, but as they receive no specific risk assessment information from the Department, the measures are *ad hoc* and incomplete. He expressed further difficulty with the fact that AIMS staff do not have the training or equipment to properly manage prisoners in this category. Professor Harding went on to observe that the situation placed all people concerned in a high risk situation. He questioned how such prisoners can be assessed as "high risk" for the purposes of an escort but not for the purposes of placement at the custody centre or while appearing in court.[157]

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[155] Clause 3.3.3, Schedule 2.
[156] Clause 4.3.3, Schedule 2.
[157] *Report of Announced Inspection of Metropolitan Court Custody Centres*, supra n 117, paras 2.52-2.53.

Thus Professor Harding formally recommended as follows:

> "As a matter of urgency, the Department should cease the practice of placing high security escorts into the custody of Contract staff. Prisoners who have been assessed as posing a high risk should remain in the custody of specialised officers at all times."

Each of the Department[158] and AIMS[159] put on record a formal response to that recommendation. Whilst those responses sit consistently with the breadth and depth of positions maintained by the contracting parties in their ongoing commercial relationship (and as asserted to this Inquiry) it is appropriate to provide some fuller detail to the respective positions.

Competing Arguments

The Department's position can be summarised in the following way:

a) Under the relevant term of the CSCS Contract (cited above), high security prisoners who are in the charge of the ESG Division of the Department, or the WAPS, because of operational necessity or risk are excluded from the provision of services under the Contract and will therefore not be managed by AIMS. However the contractual term expressly contemplates that such prisoners may be held and guarded in facilities managed by AIMS. Moreover, the concept of high security escort ceases, by definition, when the prisoners the subject of that classification are delivered to the custody of AIMS within a particular court custody centre, and hence the contractual exclusion likewise ceases at this point.

b) In the negotiation of the CSCS Contract, AIMS held itself out as having the ability and capacity to deal with whatever combinations of prisoners may be delivered to particular court custody centres. The mere fact that, in any given case, there is merely a heightened risk does not alter AIMS' capacity in that regard.[160]

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[158] The Department's response to the recommendation was in the following terms: "The Department is not aware of any reasons for excluding high security prisoners from the scope of the services. Nevertheless, the Department will undertake a risk assessment of placing high security prisoners in the custody of the Contractor at court custody centres."

[159] AIMS' response to the recommendation was in the following terms: "Agreed. AIMS Corporation has represented its case to exclude high security escorts from the Contract formally to the Department on a number of occasions to no avail."

[160] Moreover, the Department reinforces this step in its argument by pointing to the text of recital E to the CSCS Contract which provides:

> The Contractor has represented that it has the skills capacity and resources related to the provision of facilities and services of the type described in the Request for Proposal and has submitted the Proposal in response to the

c) The rationale behind applying a high security escort classification to a particular prisoner is, in essence, whether it is appropriate that the prisoner be accompanied in transit by armed officers. That is, in part, largely because of particular risks and contingencies that may pose an extreme risk during the transportation process. But after the transportation process has ended, it is highly unlikely that such a "guns or no guns" question needs to be applied to the management of any particular prisoner held in a court custody centre. Where there are particular combinations of prisoners that may pose a heightened risk, the accumulated knowledge and experience of AIMS (reinforced by that material available on the TOMS Information System, including known relationships and associates of prisoners) should be equipped to perceive, and respond to, any such heightened risk.

d) To have staff of the ESG section of the Department remain in a court custody centre to support AIMS officers – in line with the expectation of the contractor, would breach any sensible principle of clear lines of authority which are essential in the management of critical incidents. Whilst this might conceivably be overcome to some extent through the establishment of formal protocols, the more desirable and manageable situation is one where all staff are clearly under a single command.

e) Insofar as the Inspector of Custodial Services dealt with this subject in Report Number 7 of November 2001 (as summarised above), he gave insufficient regard to the Department's position based on the text of the CSCS Contract, and otherwise. The Department's response to the Inspector's fourth recommendation in that report was phrased accordingly.

AIMS' competing position, primarily as encapsulated in a written outline of submissions submitted in response to provisional findings of the Inquiry, is essentially as follows.

(i) The Department's interpretation of the applicable clause of the CSCS Contract is flawed, for that clause quite clearly operates to exclude the management of (among others) "high security prisoners" in the charge of the ESG or the WAPS because of "operational necessity or risk". Indeed the clause is explicit that such prisoners will not be *managed* by AIMS at all, although they may be held and

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Request for Proposal in which it has offered to provide the Services in a manner which is at all times consistent with the Objectives and Outcomes.

guarded *by others* in facilities *otherwise and usually* managed by AIMS. It cannot fairly be said that such "management by others" ought to cease once the "high security" prisoner arrives at a court custody centre.

(ii) The applicable clause contains no definition of "high security". Hence AIMS is entitled to assume from the text of the provision that when prisoners are left in the charge of AIMS, and are not excluded from the contract, they are not determined by the Department to be "high security" and therefore do not require any additional operational resources.

(iii) AIMS does not have the ability and capacity to manage the movement and custody of prisoners who are at increased risk of violence and/or escape, if required to do so. The Western Australian workforce recruited by AIMS to perform its obligations under the contract will require additional training and resources to perform work at this level. If the Department does wish AIMS to perform that kind of work, it must be prepared to commit appropriate funding for that purpose. [161]

(iv) There is no logical basis for suggesting that "high risk" prisoners require a high level of security during transportation, but no increased security once actually inside a court custody centre. This is especially so at the Supreme Court where the physical limitations of the building are well known and acknowledged. Moreover, the responsibility for gathering and analysing intelligence to assess and identify the individual and collective risks of all persons in custody who are received into the Supreme Court custody centre is properly the responsibility of the Department.

Each of the arguments, as summarised, is tenable. Yet the relevant contractual provision is at once uncertain, ambiguous and unworkable. Varying uses of interrelated labels like "high risk", "high security" and "high security escort", have exacerbated the confusion.

One course open to the Inquiry is to provide an interpretation of the provision, perhaps reinforced by related findings and recommendations for the parties to resolve the dispute and facilitate an improved, co-operative contractual relationship on this subject. To do so may

have involved consideration of material extrinsic to the CSCS Contract[162] or the implication of terms to seek to give "business efficacy" to the Contract and its performance[163].

Inquiry's Approach

But such an approach would not necessarily serve to cure the disputation between the parties. A more constructive, positive course is to propose a framework for resolution of the difficulty which is at once forward looking and seeks to break free from a deadlock that may be destructive of the necessary co-operative relationship. The parties must share the responsibility for the current unsatisfactory deadlock concerning the management of prisoners of an enhanced risk of escape being arrived at.

The considerable material put before the Inquiry on this subject[164] reflects, as an overriding theme, repetition of entrenched positions, (accompanied, at most, by slight variations and fine tuning) with limited attempts, until very late in the piece, to break new ground to strike a resolution. To the extent that the Department may present a valid argument on a strict construction of the text of the contract (putting to one side whatever may be revealed by any relevant extrinsic evidence) the reality remains that the Director General is charged by statute with responsibility for the security, control, safety, care and welfare of people who are in court custody centres, and in custody within any other part of court premises.[165] Although the implementation, in a strict sense, of the Department's response to the Inspector's recommendation has been limited, the Department emphasises that it is not obliged to implement any particular recommendation and that it has strongly held views on this important subject.

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[161] A similar point was made by Professor Harding, in his Report 7, supra n 117, para 2.26.
[162] Evidence of surrounding circumstances is admissible to assist in the interpretation of a contract where its language is ambiguous. Such "surrounding circumstances" may include contractual negotiations, such extrinsic material being legitimate to construe the contract to the extent that it establishes objective background facts and the subject matter of the contract. Prior negotiations will not be admissible, however, to the extent that they reflect subjective intentions and expectations of the contracting parties. Ultimately the task is to look to the objective framework of facts within which the contract came into existence, and to the parties', presumed intention within that setting: *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289.
[163] For the implication of terms, (in fact, as opposed to "in law"), into a formal written contract, the cumulative criteria are rigorous. The term "proposed to be implied" must be: reasonable and equitable, necessary to give business efficacy to the contract, so obvious that it "goes without saying", capable of clear expression, and not such as to contradict any express terms of the contract: *Codelfa Construction*, supra n 162.
[164] The Inquiry created, in its short existence, a file of papers several inches thick solely on the subject of the parties' competing arguments and positions about roles and responsibilities for high risk prisoners.
[165] Section 10, CSCS Contract.

Equally, the responsibility of AIMS to assess the level of risk presented by the particular combinations of prisoners in a court custody centre cannot be understated. It is no answer to say, as AIMS vigorously asserted, that a more sophisticated, integrated system of intelligence gathering needs to be designed, and that the Department is the proper repository of that role. There is a shared responsibility, borne of the respective obligations of AIMS and the Department sourced in contract and statute respectively, for the assessment of risk, and response thereto, as effectively as possible with the bodies of information presently available. On any given day at a court custody centre (and to an appreciable degree preceding that day) AIMS can, and ought, take account of the intelligence disclosed on the TOMS system to which it has access, matters regarding individuals or groups of prisoners drawn to its employees' attention by others working at the courts (such as Judges' Associates), and issues disclosed by early releases of court (or "cause") lists.

It has already been concluded that the relationship between AIMS and the Department, whilst positive and co-operative in certain respects, failed to address, or properly address, different aspects of security at the Supreme Court Custody facility. In the specific context of this subject, the contracting parties between them had no discernible process for assessing the risks posed by particular combinations of prisoners in custody at the Supreme Court and for, in turn, responding to any heightened risk, through appropriate deployment of resources, variation of procedures or otherwise.

Promising steps have been taken, very recently, to establishing such a discernible process for assessment of, and response to, such heightened risks at, particularly, the Supreme Court custody centre. The numerous strengths within "the contracting parties" co-operative relationship should ensure that this process is swiftly and efficiently finalised.

A joint working party, comprising representatives from AIMS and the Department, is to thoroughly examine requirements from "intelligence services" (seemingly encompassing assessment, analysis and response) for court custody centres. When a full review of these matters is completed, a "draft charter" for the Intelligence Analysis Section of the Department will be prepared. In the interim, a trained analyst, employed by the Department, is accessing daily intelligence generated by existing data, associations maps, cohort groups and court listings, and communicating with the Manager of the court custody centre accordingly.

Simultaneously a review of related procedures in NSW and Queensland is taking place. The fruits of that review are intended to be reflected in a “final charter” and operational policy, to be “fully implemented” within 2 or 3 months.

Amongst the materials provided to the Inquiry in its final week, and as a component of the parties’ final submissions, was a potential model, (for the sake of convenience, “The New Enhanced Security Model”), the essential features of which are summarised in Confidential Appendix I.

It has been foreshadowed that this model may be refined in the very near future so as to include bases for risk assessment and the development of detailed procedures. There can be no doubt, in all of the circumstances as described, that such refinement should occur as a priority.

The Inquiry also sought, and received, the views of the Commissioner Police about the Police performing some duties within a custodial setting where high risk prisoners were being held in custody. The Commissioner was of the view that the role of guarding high risk prisoners was properly the role of the Department, and the involvement of WAPS in those duties would not bring any material benefit. Although these views must be accepted, the Inquiry would urge flexibility within senior echelons of the Public Sector where it can be affirmatively shown that structural change can bring about overall material benefit.

That these various ideas and suggestions have been advanced is encouraging. But, as with other steps taken since the escape of 10 June 2004, the Inquiry is left with the distinct impression that, absent the escape or a similarly serious event, such rapid movement may have been a lot longer coming, if in fact it came at all.

Accordingly, it is recommended that:

a) Finalisation of the New Enhanced Security Model be expedited within the framework summarised in this report, with a view to endorsement by the respective Contract Managers, no later than 13 August 2004. The model ought expressly take account of the risk assessment, and respond to such risk as assessed, of combinations of prisoners. Particular attention ought be given to clear and consistent use of definitions.

b) Clause 3.3.3 of Schedule 2, Part 3 of the CSCS Contract be in any event urgently revised and varied, such variation to include, at least:

(i) Clear provision as to respective contractual responsibilities;

(ii) Express adoption of the New Enhanced Security Model as finalised pursuant to (a) above and;

(iii) An express incorporation of agreed protocols regarding risk assessment.

c) The final draft of the Department's own "HSE Policy" be analysed and implemented only in light of, and consistently with, the test of the New Model.

d) The review of intelligence services should focus on a clear and concise agreement and joint strategy between the Department and AIMS for the collection, analysis and sharing of intelligence information. It is envisaged, if properly conducted, the review and resulting strategy will render unnecessary the foreshadowed "draft charter" for the Intelligence Analysis Branch.

9.2 VIDEOLINKS

All nine prisoners who escaped from the Supreme Court on 10 June 2004 were being held in the custody centre awaiting status conferences. Proceedings may be adjourned to a status conference if an accused person enters a plea other than a not guilty plea or a new trial is ordered (either at trial or as a result of an appeal).[166] Although status conferences deal with some pre-trial issues, the main focus is to determine whether a pre-trial hearing is required and whether or not the case is ready to proceed to trial.[167]

There are obvious security advantages in prisoners remaining in prisons for appearances concerning matters of a merely procedural or programming nature. In addition, the Inquiry has heard anecdotal evidence that prisoners generally prefer the convenience of video-linked appearances for proceedings of the nature of status conference as it allows them to continue their daily activities without having to attend at a court custody facility for the day. It is in that

[166] Rule 40, *Criminal Procedure Rules* 2000.
[167] Rule 40, *Criminal Procedure Rules* 2000.

context that the feasibility of an increased use of videolink facilities in criminal proceedings arises for more detailed consideration.

Legislative Basis for the Use of Videolinks

In 1998, the *Acts Amendment (Video and Audio Links) Act 1998* amended a number of statutes so as to "empower any court or tribunal in Western Australia to hear virtually any matter by videolink."[168] These amendments were expressed to be in response to the recognised benefits of using videolink technology in respect of security (alleged offenders considered inappropriate to release on bail can remain in the prison environment, which minimises the risk of escapes and subsequent threat to the community);[169] efficiency, and for the taking of evidence from witnesses.

The following specific provisions were either inserted or amended to their current form as a result of that initial amending legislation.

The *Evidence Act* 1906 makes provision for the use of videolink in taking evidence,[170] either at the direction of the court or as a result of an application[171] although the court can only make such a direction if it is satisfied that videolink is available and the direction is "in the interests of justice".[172]

Section 647(1) of the *Criminal Code* permits the court to order, on its own initiative or on an application, a person in custody who has been committed to trial or sentence to appear before the court by videolink.[173] The expressed intention behind this provision was to "enable the court…to use video and audio links for indictable matters before the superior courts."[174]

Rule 9(1) of the *Criminal Procedure Rules* provides that a court may direct that an accused, offender or other person appear before the court by means of an audio link or a videolink.

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[168] Second Reading Speech, *Acts Amendment (Video and Audio Links) Act 1998*, 27 October 1998 Hansard 2675.
[169] Supra n 168, 2674.
[170] Sections120 –132.
[171] Section 121(1).
[172] Section 121(2).
[173] Section 647(2).
[174] Supra n 2, 2675.

This rule is in addition to section 647 of the *Criminal Code*, sections 14 or 14A of the *Sentencing Act 1995,* or sections 120 to 132 of the *Evidence Act 1906.*[175]

Section 86A of the *Justices Act* makes it automatic for prisoners being dealt with under that legislation on remand, and a videolink facility actually exists, to appear before the court by that videolink, but the court retains a discretion to order a defendant be brought in personally either on their own initiative or on an application of a party to a proceeding.

The *Sentencing Act* 1995 provides that a court is not to sentence an offender unless the offender is personally present in court or appears before the court by videolink.[176] The court can direct an offender to appear by videolink by its own initiative or on application by the prosecutor or the offender[177] but can only make such a direction if it is satisfied that videolink is available and the direction is in the interests of justice".[178] The court retains a discretion to require an offender to appear personally to be sentenced.[179]

It will be appreciated that these provisions empower and facilitate the use of videolink for a wide range of criminal proceedings. More general provisions in both the *Criminal Code* and the *Criminal Procedure Rules* could be interpreted to permit the use of videolink for additional proceedings[180], although section 635 of the *Code* may operate to limit the scope for the use of videolink.[181]

Judicial Discretion/Judicial Practice

The provisions outlined above have extended the scope of, and potential for, videolink usage quite significantly, although in practice it would appear videolink is not so widely used. This is, in part, a consequence of the judicial discretion enacted in each provision, and retained by the presiding Judge or Magistrate, to decide whether and when to proceed via videolink.

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[175] Rule 9(4)
[176] Section 14(1), *Sentencing Act*.
[177] Supra, n 176, s14A(1).
[178] Supra, n 176, s14A(2).
[179] Supra, n 176, s14(4).
[180] Section 647 of the *Code* and rule 9 of the *Criminal Procedure Rules*.
[181] Section 635 states that proceedings must take place before an accused person except where permitted to be taken by video link under the *Evidence Act* and the *Sentencing Act*. The definition of "proceeding" for the purposes of this section would indicate an accused person should appear in person for bail applications; a number of preliminary matters concerning questions of law, procedure and fact; and the trial itself.

In recent years, the practice of the Supreme Court has developed such that remands, pleas of not guilty and general interlocutory matters can be dealt with by videolink but pleas of guilty, any subsequent proceedings for sentencing purposes and situations where the accused or prisoner might be disabled by the videolink from giving instructions to his or her lawyer are not so heard and determined. In addition, should an accused person wish to be brought before the Court personally on a remand or adjournment that request can be, and generally is, met and a personal appearance arranged.

Basis of Practice at Supreme Court

It would appear that a number of factors have contributed to the present practice of the Supreme Court justices with regard to the use of videolinks.

There is only one videolink facility at the Supreme Court, located in court 7. Although there are three ISDN lines that feed into the court from prisons, limitations are imposed by the processor, known as CODEC, which receives signals and manages the messaging between the court and the prison. This processing equipment can handle only one conference at a time.

This sole videolink facility is in high demand. It is typically used for remote witnesses in criminal trials, bail applications and status conferences or appeal hearings where the accused/appellants and counsel are in the country.

Videolink facilities are rarely used for status conferences. The Supreme Court judiciary has indicated a number of concerns arising from the prisoner, or accused person, not being physically present in court. Issues arising in status conferences often require conferral between the accused and counsel. Such conferral is perceived to be impeded, if not wholly prevented, by the nature and set-up of the videolink facilities at each of the major WA prisons. Difficulties also arise in arranging for documents relevant to the status conference being transmitted, generally by facsimile, between the prison and the court. A third problem arises from an understandable reluctance by counsel to travel to the prisons merely for a single status conference.

Even more fundamentally, there are obvious problems that arise when an accused person pleads guilty at a status conference. It is plainly essential to the integrity of the sentencing

process, and the administration of criminal justice generally, that a sentencing Judge or Magistrate have a prisoner physically present. Similar problems to those faced at status conferences can also arise in using videolinks for pleas days, as an accused person will often plead guilty without prior notification, or change his or her notified plea.

Videolink facilities are rarely used for CCA motions. The Supreme Court generally discourages represented appellants from attending court on these days but maintains that it is desirable for unrepresented appellants to attend in person as such persons often use the opportunity to file amended grounds of appeal or documents and, in some cases, discontinue. A Legal Aid representative is also available to assist on these days.

The Inquiry inspected video conferencing facilities at Casuarina Prison and Hakea Prison and makes the following observations:

Casuarina Prison

The “video conferencing facility” at Casuarina Prison, is in fact a set of equipment mounted on a trolley located in the Prison’s internal disciplinary tribunal room. The equipment is portable, and thus can be removed when the room is required for other purposes. The number of prisoners using the facilities is fairly low, as Casuarina is not a remand facility, and most of the inmates are actually sentenced prisoners. On average, less than 10 prisoner used the facility on any given Court sitting day.

The equipment itself seems to be relatively new, however the lack of a purpose-built facility is clearly undesirable. There are no positions in the Casuarina Prison employment structure specifically responsible for the management of the video conferencing process; rather the role is undertaken by the Prison Prosecutor. There is no duty lawyer from Legal Aid present at the site.

Hakea Prison

Hakea Prison is an amalgamation of the former Canning Vale Prison and the neighbouring Remand Centre. As such the Prison houses a significant number of remand prisoners. Hakea does have a ‘purpose built’ video conferencing facility built from existing resources with prison labour in 1998. The facility consists of two hearing rooms, holding cells, a small

custody centre, a telephone bank for prisoner's use, an interview cubicle for the use of visiting solicitors, and an office. The prison has a single officer responsible for the facility and a number of other staff also work in the area during peak use periods.

The facility is used approximately 50- 70 times a week, predominantly for bail hearings and mentions. A duty solicitor from Legal Aid is present at the facility and attends in the video conferencing room during the course of all appearances, and can be called to assist as necessary.

The equipment at Hakea Prison is antiquated; indeed during the Inquiry's inspection one of the machines was not working and the prison management does not anticipate being able to obtain replacement parts for the machines. A master plan exists for the expansion of the facility however, due to a drop in usage caused by changes to the remand cycle and budgetary issues, this has not been pursued.

Whilst the mere existence of the facilities places Hakea Prison at an advantage to Casuarina Prison, there is nonetheless considerable scope for their improvement.

Technology and Other Practical Issues

The Superintendents of both prisons visited by the Inquiry noted that it would be beneficial if more bandwidth was available for the video conferencing facilities, but acknowledged that this was a broader issue of bandwidth available in the prison generally. Whilst the bandwidth used by the video conferencing equipment could be upgraded, that would be at the expense of other systems in the prison, which already have issues with speed and constancy.

The Department has accepted that technical and practical limitations impact on the use of videolink for remands, status conferences and mention at the Supreme Court. Provision has been made for the installation of an additional CODEC and conferencing equipment in court 9 of the Supreme Court this year. However this facility is intended primarily for the use of the Master and Registrars for status conferences and remote witnesses in the civil jurisdiction. A number of additional changes are required to increase the capacity of the court to hear evidence and take appearances via videolink.

Whilst it is noted that the current video conferencing facilities at prisons are not utilized to their capacity, it is necessary for the prisons containing prisoners appearing at the Supreme Court to be modernised and physically equipped to accommodate document exchange, and the provision of instructions and advice between lawyers and their clients in order to enable more extensive use of the video conferencing facility.

In addition to the security and efficiency advantages identified by the Inquiry, the Superintendents of both Hakea Prison and Casuarina Prison see practical advantages for the management of the prisoners in the use of video conferencing facilities. For example, it is possible for prison officers who attend the video conferencing to explain the outcomes of the proceedings to prisoners, which may mitigate frustration and the risk of violent or self-harming behaviour. Videolink is also used for other purposes such as appearances by witnesses, therapeutic services and family reunification. It would appear that the practical impediments to effective video conferencing often occur where there are programming or planning issues which are not resolved ahead of time between court and prison staff.

There is an entirely understandable reluctance on the part of Supreme Court judges to use videolink for proceedings where there is potential for an accused person to plead guilty without prior notice to the Court, or where there is an apprehension that the prisoner may be disadvantaged by such proceedings. While there has been some focus on the fact that there is only one videolink facility at the Supreme Court, it would seem, in light of the strong views of the Judges, that an additional line may only increase efficiency for those proceedings that would have been held by videolink anyway. An additional line, on its own, is unlikely to lead to an increase in the use of videolink for status conferences. In any event, the presence of only one video line into the Supreme Court is unacceptably limiting.

Technical and practical limitations upon the use of videolinks for remands, status conferences and mention at the Supreme Court ought to be addressed and minimised as a priority.

As part of the Court Security and Court Custody Project commenced after the escape, the Department has commissioned a project to review and improve processes to enhance the use of videolink. According to its draft terms of reference, the review will:

- Consider the observations of the judiciary, the Solicitor General, the court and the prison administrators;

- Make recommendations on changes to process, particularly in relation to broadening the use of video-conferencing; and
- Audit current infrastructure and facilities –

  Identify modern equipment that can be introduced to enhance services including provision for document exchange and the provision of instructions and advice between lawyers and their clients.

  Identify potential for increased facilities at all metropolitan and regional prisons and at all metropolitan and major regional courts.

  Submit a proposed implementation plan and a proposed capital works program.

The project will also consider the option of staffing remands, status conferences and mentions from a prison or custody centre with court officers, and/or suitably trained prison officers. In light of the difficulties identified by the Inquiry, this option warrants close examination.

It is imperative that this recently initiated project examining videolinks swiftly address some of the technological, procedural and philosophical issues that have been outlined. In this way, the legitimate concerns of the judiciary ought be minimised. It is recommended accordingly, and further, that a senior Government lawyer such as the Solicitor General undertake appropriate liaison between the judiciary and the Department's nominated senior representative to ensure the swift completion of this project and implementation of its conclusions.

10 ROLE OF THE MINISTER FOR JUSTICE

In the aftermath of the escape there were repeated calls, from both the Opposition and the media, for the resignation of the Minister for Justice on various related grounds that centred around the proposition that the Minister should "take responsibility" for an event that put the Western Australian community at considerable risk. Accordingly, and in light of the recitals to the Premier's instrument of appointment, it is appropriate that the Inquiry consider the concept of ministerial responsibility in light of relevant facts as found.

10.1 GENERAL FACTUAL MATTERS

The Minister for Justice, Ms Michelle Roberts, was elected to the Parliament of Western Australia on 19 March 1994. Immediately prior to standing for election, she was employed in the Public Service of Western Australia as a Senior Policy and Research Officer at the then Department of Occupational Health and Safety.

Ms Roberts was appointed to the Cabinet of the Gallop Government as Minister for Police, Emergency Services and Local Government. Shortly thereafter she received the additional portfolio responsibility of Minister Assisting the Minister for Planning and Infrastructure. Later in 2001 she was relieved of the Local Government portfolio but retained the other described portfolios.

In July 2002 Ms Roberts relinquished the responsibility of Minister Assisting the Minister for Planning and Infrastructure and added the responsibility of Road Safety to those of Police and Emergency Services. From July 2003 she assumed responsibility for the Justice and Community Safety portfolios.

In addition to her position as a Member of the Legislative Assembly and her roles within Executive Government, Ms Roberts is President of the Western Australian Branch of the Australian Labor Party. That is largely a titular role responsible for the chairing of executive meetings[182]. Ms Roberts' role as President of the Western Australian Branch occupies

[182] The principal managerial role for the Australian Labor Party in Western Australia is that of the State Secretary, assisted by other paid members and certain office staff.

minimal time, both in an absolute sense and relative to the demands on her as a parliamentarian and member of the Executive.

Ms Roberts' ministerial office staffing arrangements are conventional by current standards. The Chief of Staff is responsible for providing strategic advice, information and co-ordination to the Minister on all portfolio matters including Government policies and the legislative program. He is also responsible for the leadership and administration of the office and in maintaining relationships with relevant principal office holders and stakeholders

Beneath the Chief of Staff is a tier of Principal Policy Officers who provide advice, information and policy analysis to the Minister on matters within her portfolios.

Both the Chief of Staff and the Principal Policy Officer (Justice) accompany the Minister to meetings with the Director General and other senior executives of the Department on a fortnightly basis. Those meetings involve the discussion of issues of particular importance concerning policy, the operation of current legislation or potential enactment of proposed legislation and topical items of particular relevance to the portfolio. More frequent updates are provided to the Minister from time to time on particular issues, and moreover, advice will often be sought from senior executives within the Department on the progression of legislation, policy or specific topical issues. Specifically regarding the CSCS Contract, regular monthly reports are provided to the Minister by the Department highlighting the "performance" of AIMS in delivering the contracted service

The Minister, together with her Chief of Staff and Principal Policy Officer (Justice), also meet on a regular basis with the Inspector of Custodial Services, albeit less frequently than with the Department itself. At those meetings the Inspector will, typically, raise issues regarding his ongoing inspection program, the conditions of WA Prisons and custody centres, relationships between his Office and the Department, and any other matters considered by him to be of particular importance. Beyond those regular meetings, draft reports are provided to the Minister of the Inspector's reports to be tabled by him in Parliament.[183] The Principal Policy Officer (Justice) will examine those draft reports and, on occasion, seek clarification or elaboration from the Inspector and/or the Department as he deems necessary or appropriate.

It is open to the Minister, on receipt of information from the Inspector either pursuant to the regular process of meeting and provision of draft reports, or in response to *ad hoc* issues to request, through the Department certain immediate action[184].

Separately to each of those two processes, the Inspector will from time to time highlight issues which his office regards as urgent or in need of immediate attention. One such example during the duration of Ms Roberts holding the Justice Portfolio was involving perceived drug problems at Wooroloo and Karnet Prisons, the change management program at Hakea Prison, and particular management issues concerning work at the head office of the Department.[185]

10.2 SPECIFIC FACTUAL MATTERS

The Minister was alerted to the escape on the morning of 10 June 2004 whilst she (together with her Chief of Staff and Principal Policy Officer (Justice)) were in a regular, fortnightly meeting with the Director General and other senior executives of the Department. There then followed a convergence of activity by which senior Departmental staff, the Minister's own Chief of Staff and senior Police made various communications to ascertain the full circumstances of the escape and develop an initial response.[186]

One issue the subject of some attention in Parliament and in the media was the attendance by the Minister of a dental appointment on the afternoon of 10 June 2004. The appointment had been organised by the Minister's appointments secretary around one month prior to the day of escape. At the time she attended her dentist's surgery, the Minister had been advised that the Police Service had in the vicinity of one hundred officers engaged in the pursuit of the prisoners through various means.[187] The Minister had, primarily through her Chief of Staff, arranged a visit to the Supreme Court and to conduct a media conference at the Supreme Court at 3pm that afternoon. She attended her dental appointment of about a

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[183] Pursuant to the statutory obligation in section 35 of the *Inspector of Custodial Services' Act*.
[184] A recent example of this was the identification by the Inspector of concerns regarding section 94 of the *Prisons Act 1981* and minimum security issues within prisons during the early part of 2004. In response, the Minister requested that immediate investigation be undertaken and the Department report back on its findings. That occurred, giving rise to an overhaul of certain practices in that area of prisons management.
[185] All of these issues, obviously, are beyond the scope of this Inquiry's terms of reference. They are merely cited to provide a flavour for the relationship between the Inspector and the Minister and her staff.
[186] See more fully Chapter 7 of this Report.
[187] See more fully Chapter 7 of this Report.

15 minute duration and duly appeared for her scheduled Supreme Court visit by about 2.45 pm. Whilst in the Dentist's surgery her mobile phone was on and she remained contactable, as is her usual practice. The Inquiry observes that this is a minor, even trivial, event in the overall scheme of the escape and its aftermath. No further treatment of the subject is necessary or warranted.

On 12 June 2004 the Minister gave a press conference, directly outside the sally port on the western side of the Supreme Court building, on aspects of the escape and its aftermath. Among the statements she made was an assertion that "from time to time the Department of Justice proposes security measures to the Chief Justice and, on a number of occasions, those requests have been rejected". In informal communications with the Inquiry, the Chief Justice emphatically denied that claim.

Before the Inquiry, the Minister and her staff confined the reference to "security measures" in her press conference to certain specific matters, such as perceived possibilities of increased use of restraints in the court area, increased use of armed guards and (albeit not strictly a security measure) increased use of video facilities.[188] The statutory discretions reposed in the Chief Justice concerning the Supreme Court generally, and in individual judges presiding over particular courtrooms, to issue directions about court security and custodial services, are paramount.[189] The assertion of the Minister, taken at its ordinary meaning, may have carried to the listener an inference of a much wider claim than, as qualified, the claim was explained to this Inquiry. Furthermore without the important acknowledgment of the statutory discretion reposed in the Chief Justice and other members of the Supreme Court, a most inaccurate impression may well have been generated. The matter ought now be laid to rest, but the potential for confusion was regrettable.

The Minister was alerted by the Director General of the Department to his consideration of a potential intervention under section 59 of the CSCS Act by receipt of a briefing note on her fax machine at home on 13 June 2004.[190] The Inquiry has already concluded that Mr Piper

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[188] The subject of video facilities is dealt with in some detail in Part 9.2 of this Report, and the issue of shackles or restraints is touched on in some concluding comments in Chapter 12 of this Report.
[189] Section 40(2) of the CSCS Act.
[190] See further, in the context of Mr Piper's own decision making process under section 59 of the CSCS Act, Part 7.5.

made his decision to intervene in the CSCS Contract at the Supreme Court custody centre entirely of his volition.[191]

The Minister received numerous briefing notes in the week subsequent to the escape, most of which covered the nature of the escape, investigations into its circumstances and updates on the recapture of prisoners. The Minister also sought, and received, briefing notes on the progress of proposed structural changes to the Supreme Court, progress of the CBD Courts Project, the management of the CSCS Contract and the implementation of (all) Office of Inspector of Custodial Services Reports, particularly Report Number 7. Following the statutory intervention, she sought, and received, regular updates on the progress of remedial security works being conducted at the Supreme Court custody centre.

10.3 THE MINISTER'S RESPONSIBILITY

The steps taken by the Department, pursuant to the intervention and otherwise in response to the escape, were appropriate, as was noted in the Inquiry's earlier examination of relevant events. However, had those steps been undertaken earlier, they would have significantly reduced the risk of escape. In light of the relatively minor nature of the structural alterations, managerial changes and procedural methods involved in that immediate action, it is plain that those were actions of operational detail that one would not reasonably expect would be drawn to a Minister's attention. In other words, it cannot reasonably be argued that a Minister, or even her staff, need be concerned with matters of detail such as which keys are on which key rings, which doors are locked or unlocked, and how custody officers go about undertaking a cell unlock.

Nonetheless does the Minister bear responsibility for the deficiencies of the Department and its contractor that the Inquiry has identified? What practical content does "responsibility" carry in this context?

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[191] The Inquiry notes that the Minister conveyed her support for Mr Piper's decision when he expressed his intention to take this action.

The High Court of Australia has recognised the primary components of what ministerial responsibility means, namely:

(i) the individual responsibility of Ministers to Parliament for the administration of their departments; and

(ii) the collective responsibility of Cabinet to Parliament (and the public) for the whole conduct of the administration.[192]

These general propositions merely represent a convenient starting point, however. In particular, what does it mean, in a political sense, to be "responsible to Parliament"? What aspects of the *administration* of a department trigger those responsibilities? To examine these questions, it is necessary to consider some of the contemporary learning on the theory and practice of government.

10.4 ORIGIN AND TRADITIONAL CONCEPT OF MINISTERIAL RESPONSIBILITY

Ministerial responsibility is a convention that has no express basis in the written constitutional law of either the Commonwealth or the Western Australian State governments[193]. It is sourced in the "Westminster model", which connotes a system of government that comprises the main features of the British system of government, including the separation of the head of state from the head of government, the existence of a cabinet presided over by a Prime Minister and the executive branch of Government being members of the legislature. As such, ministers are collectively and individually responsible to a freely elected and representative legislature. [194]

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[192] *FAI Insurance Ltd v Winneke* (1982) 151 CLR 342 at 364, per Mason J. Sir Anthony Mason relied in particular on an article of the well known Australian political scientist, Professor Hugh Emy, "The Public Service and Political Control" in the *Appendix to the report of the Royal Commission on Australian Government Administration (1976) Vol 1*, p.16.

[193] Commission on Government Report No. 5, August 1996, p.54. And see also, in similar terms, Constitutional Commission, Final Report, AGPS, Canberra, 1988, para 2.185

[194] Reid, G.S (1984) "The Westminster Model and Ministerial Responsibility" in *Current Affairs Bulletin* v.61, no.1 June 1984, p.7

Dr Gordon Reid cites the work of Professor R.S. Parker of the Australian National University in assessing the significance of 'Westminster' in Australian Government[195]:

> "In lieu of 'model' [Professor Parker] refers to the existence of a 'Westminster syndrome' in Australia which is comprised of:
>
> - the doctrine of ministerial responsibility;
> - the need for an officialdom quite distinct from the political set of ministers and other parliamentarians;
> - that the elected minister should have the last word, and the appointed official must bow to that; and
> - that the lines of accountability of the whole administration run from the lowliest official up through his minister to the cabinet, the Parliament and ultimately – and only by that circuitous route – to the elector." [196]

It is implied in the concept of a single chain of accountability passing through the hierarchy of the public sector to applicable Minister, the Parliament and finally the people that each public official in the chain is accountable only to the level immediately above it.[197] On this view of the principle of ministerial responsibility, the Minister is obliged to account only to Parliament.

This State's own Commission on Government Report Number 1 noted, consistently with the High Court authority already cited, that Ministers are responsible to Parliament for the proper administration of their departments and the government is accountable collectively for its performance. However, this description does not cover the entire scope of the traditional concept of ministerial responsibility and invites examination of the *type* of conduct for which a Minister may be called upon to account.

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[195] Parker, R.S. (1978), 'Public Service Enquiries and Responsible Government' in Smith R. and Weller P. (eds.), *Public Service Enquiries in Australia,* University of Queensland Press, St. Lucia, 1978, pp352-4

[196] Although Australian systems of government have inherited Westminster traditions, there also exist certain elements that are not part of the Westminster system, most importantly the written Commonwealth and respective State Constitutions which enact the basic law governing the legal foundations, and structures of government at Federal and State level.

[197] Commission on Government Report No. 2 of 1995 – Part 2, p. 207.

Weller takes the analysis further by offering a list of areas that ministerial responsibility is generally considered to encompass. These roles are:

a) Personal Behaviour: Ministers are to behave ethically and sensibly in their personal life, in their relationships and their political activity. They are to obey any applicable set of ministerial guidelines provided.[198]

b) Collective Behaviour: Ministers, as part of Cabinet, are collectively responsible for the decisions made in Cabinet regarding policy and development of strategic political decisions.[199]

c) Administrative Behaviour: Ministers are the superiors in Departmental affairs. Traditionally "[t]hey have legislative and political authority to oversee the actions of the officials. This is the [area] in which the concept of ministerial responsibility was initially developed. Ministers have delegated authority and may be held accountable for its use…" by parliament, parliamentary committees, application of administrative law or the media.[200]

10.5 WESTERN AUSTRALIAN GOVERNMENT'S "*MINISTERIAL CODE OF CONDUCT*" AND THE PRIME MINISTER OF AUSTRALIA'S "*GUIDE ON KEY ELEMENTS OF MINISTERIAL RESPONSIBILITY*

The Western Australian *Ministerial Code of Conduct* (the Code) acknowledges that the Code was developed as a response to "widespread public concern about the conduct and accountability of public officials"[201]. The purpose of the document is expressly identified in the following terms:

> "Ministers have significant discretionary power and make decisions that can greatly affect individuals and the community. Consequently, it is necessary to set higher standards of conduct for them than for other categories of elected office holders.

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[198] In Western Australia, this is the "Ministerial Code of Conduct" (undated) available at http://www.premier.wa.gov.au/Accountability/MinisterialCodeofConduct.pdf

[199] While a Minister may be responsible for submitting a proposal to Cabinet, "it is for Cabinet to decide whether policies are well considered and properly planned, or whether a new direction is part of, or breaches, the government's core commitments." In Weller, (1999) infra **(n)**

[200] Weller, 1999 "Disentangling concepts of ministerial responsibility [Edited version of a paper presented to the Accountability in Australian Government Symposium (1998)]" in *Australian Journal of Public Administration,* v.58, no.1, March 1999 p.63.

[201] Supra, n 198, p.1.

> Being a Minister of the Crown demands the highest standards of probity, accountability, honesty, integrity and diligence in the exercise of their public duties and functions. They must ensure that their conduct does not bring discredit upon the Government or the State.
>
> …the primary intention of this Code is to provide some direction to Ministers about the conduct the public expects of them and to which they should aspire."

Ministerial responsibilities are described in the context of Cabinet members acting as a "…trustee of the public interest [and that role] should always be paramount in the performance of their functions". It is fair to describe the Code as providing a general overview of *how* a Minister should act, both in the context of the individual and collective responsibilities of a Minister in the State Government. The Code does not itself specify the extent of any consequences of its contravention, or means of its enforcement.[202]

The Code makes specific reference to section 74 of the PSM Act, but does not provide additional guidance with respect to the administration of Departments within a Minister's portfolio.[203]

The Prime Minister's "*A Guide on Key Elements of Ministerial Responsibility"* (the Guide) provides a detailed overview of the types of roles and responsibilities of Ministers of the Commonwealth. Ministerial accountability with respect to their supervisory role over portfolio departments and the role of the Departmental Secretary is clearly outlined.[204]

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[202] The Code provides Ministers with standards to aspire to in regards to their declaration of personal and financial conflicts of interest. These conflicts of interest include pecuniary and other interests of themselves personally and their family members, use of confidential information; Ministerial expenses and use of public resources; declaration of gifts; and, establishing proper relations with the Public Service. The Code also advises Ministers that they should divest themselves of conflicting positions to ensure that there is no conflict with their portfolio responsibilities, and appropriately declare to the Premier in Cabinet any actual or potential of conflict of interest.

[203] Section 74 of the PSM Act makes provision for the establishment of arrangements, in writing, in relation to each department or organisation for which the Minister of the Crown is responsible setting out the manner in which, and the circumstances in which, dealings are to be had, and communications are to be made, between ministerial officers assisting the Minister of the Crown and the employees in that organisation. The section provides that ministerial officer shall not, otherwise than with the agreement of the employing authority of the department or organisation concerned, direct an employee of that organisation in relation to the manner in which that employee is to perform the functions of his or her office.

[204] Section 6 of the Prime Minister's "A Guide to Key Elements of Ministerial Responsibility", part entitled "Ministers' Relations with Departments", in particular states:

> "The secretary of a department is, pursuant to the Public Service Act, responsible "under the minister" for the general working of the department and for advising the minister in all matters relating to the department.
>
> This does not mean that ministers bear individual liability for all actions of their departments. Where they neither knew, nor should have known about matters of departmental administration which come under

10.6 MODERN CONCEPTIONS OF MINISTERIAL RESPONSIBILITY

The concept of Ministerial responsibility has evolved over time as a result of the increasing complexity and size of government. It is impractical to expect that Ministers could have a detailed knowledge of, and control over, all the actions of their departments.[205]

Mulgan (2002) states "It may be improper to think of Ministerial Responsibility for errors as "vicarious[206]" – the responsibility remains direct , provided 'the leaders may be said to have contributed to the outcome, for instance through setting a general policy direction or allocating a level of resources that made such mistakes more likely to occur"[207].

This draws a distinction between the responsibility for "policy", and "administration" or "operational" responsibilities. The Australian and United Kingdom's contemporary understanding of ministerial responsibility tends to include the "policy" aspect, while the Public Service head of a Department is considered to be responsible for "administration" or "operations" of the Department[208].

The contemporary Australian understanding of ministerial responsibility falls short of recognising administrative errors as within the scope of its definition. Professor Diana Woodhouse, an expert in politics and affairs of government at the Oxford Brookes University, argues that the distinctions between policy and operations and accountability and responsibility, is "flawed because of the difficulty, in many cases, in making a clear split between the two and the assumption that ministers are necessarily removed from operational matters".[209]

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scrutiny it is not unreasonable to expect that the secretary or some other senior officer will take the responsibility.

Ministers do, however, have overall responsibility for the administration of their portfolios and for carriage in the Parliament of their accountability obligations arising from that responsibility. They would properly be held to account for matters for which they were personally responsible, or where they were aware of problems but had not acted to rectify them."

[205] Page, B (1988) "Ministerial responsibility: myth or reality?" in *Current Affairs Bulletin* v.64, no.11 Apr 1988, pp.30-31.

[206] The traditional convention of ministerial responsibility carried "…with it the notion of vicarious responsibility, that is, the acceptance by ministers of responsibility for any deeds or misdeeds of their civil servants, regardless of their distance from the Minister" Woodhouse, D (2004) "UK Ministerial Responsibility in 2002: The Tale of Two Resignations" in *Public Administration, v82, n1, 2004*, pp8.

[207] Mulgan (2002) quoted in Beale, R. (2002) "Ministerial Responsibility for administrative actions: some observations of a public service practitioner" in *Agenda: a journal of policy analysis and reform* v.9, no.4, 2002, p. 293.

[208] Barker, A (1998) "Political Responsibility for UK Prison Security – Ministers Escape Again" in *Public Administration V.76 Spring 1998* pp.1-23.

[209] Woodhouse, D (2004) "UK Ministerial Responsibility in 2002: The Tale of Two Resignations" in *Public Administration V.82 No. 1, 2004,* pp.8.

10.7 INFORMATION ESSENTIAL TO ELECTORAL CHOICE

The concept of a body of information concerning the performance of elected representatives is of real practical importance to the operation of our systems of government. The High Court has repeatedly acknowledged that freedom of communication on matters of government and politics is an indispensable incident of the system of representative government created by the Commonwealth Constitution and the respective State Constitutions. [210] The content of that freedom of communication comprises all matters intended or likely to affect voting in an election, including discussion of public affairs, political and economic matters, and opinions about the performance of Parliamentarians and Members of the Executive.[211]

Hence a law of a State or the Federal Parliament may be held to be invalid where it infringes the implied freedom of communication on matters of Government politics, as elaborated in that fashion.[212] In less legalistic terms, the significance of the freedom of political communication, as recognised by the High Court, gives further meaning and content to the principles of ministerial responsibility. The actions of Ministers, the extent to which they know about the performance of Departments within their portfolios, and their public justifications therefore, all fall for legitimate discussion and commentary as a component of our system of representative democracy. Openness concerning the affairs and performance of government, through the workings of the Houses of Parliament, and the facilitation and informing of public opinion, is an indispensable element of our society accordingly.

10.8 BREACHES OF MINISTERIAL RESPONSIBILITY: POLITICAL JUDGEMENTS THAT INFLUENCE THE ULTIMATE OUTCOME

The concept of ministerial responsibility is commonly couched in the somewhat absolute terms of whether a breach of ministerial responsibility will result in the resignation or sacking

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[210] See, most recently, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[211] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

[212] More specifically, a law will be invalid where:

1. That law effectively burdens freedom of communication about government or political matters either in its terms, operation or effect; and
2. The law is not reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of a constitutionally prescribed system or representative and responsible government (*Lange v Australian Broadcasting Corporation* (2001) 208 CLR 199.

of the “responsible” Minister. However, once what Professor Woodhouse describes as “the constitutional requirement of fault” [perhaps, more accurately, a substantial breach of accepted notions of ministerial responsibility] is satisfied, the fate of a minister depends on judgements about its seriousness and whether there may be political circumstances which militate against resignation.[213]

Professor S.E. Finer, a renowned English twentieth century political scientist, colourfully expressed the view that resignations only occur “if the minister is yielding, his Prime Minister is unbending or the party is out for blood”[214].

A distinct dimension on the of resignations of ministers as a result of breaching ministerial responsibilities is that reshuffles may also be a mechanism that reveals the value placed on the minister’s day-to-day performance[215]. Blick states “[r]eshuffles generally occur at convenient points such as after elections or following the departure of ministers through resignation, retirement or other causes, and their significance as a commentary on ministerial performance tends to be overlooked or underestimated….”[216].

10.9 BREACHES OF “MINISTERIAL RESPONSIBILITIES:” EXAMPLES OF RESIGNATIONS

Regarding Australia, Thompson and Tillotsen note the narrowness of distinction between departmental actions and ministerial resignation.[217] They note the following circumstances when ministerial resignations have customarily occurred:

1. “when a minister cannot support government policy: ie cannot stand by cabinet solidarity;

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[213] Woodhouse, D (2004) “UK Ministerial Responsibility in 2002: The Tale of Two Resignations” in *Public Administration V.82 No. 1, 2004,* p.12.
214 Finer, S (1956) “The Individual Responsibility of Ministers” in *Public Administration*, V.34, pp.383. Plehwe provides further insight into this point of political judgement on the outcome of a breach of ministerial responsibility. He states “…[T]he process of “accountability” is unpredictable, with no consistent relationship between transgressions and their consequences. The Senate Select Committee states outright that “whether a minister who had erred is to be asked to resign or dismissed is a political issue and is one for the leader (of the government) to resolve”; Plehwe R (1994) “Shifting the blame: what has become of ministerial responsibility?” in *IPA Review (Institute of Public Affairs (Australia))* v.46, no.4 p.18.
[215] Blick, B (1999) “Ministerial responsibility in practice: a commentary [Edited version of a paper presented to the Accountability in Australian Government Symposium (1998)]” in *Australian Journal of Public Administration,* v.58, no.1, March 1999 pp. 58-61
[216] Blick, B , supra, p 59.
[217] Thompson, E and Tillotsen, G (1999) “Caught in the act: the smoking gun view of ministerial responsibility [Edited version of a paper presented to the Accountability in Australian Government Symposium (1998)]” in *Australian Journal of Public Administration,* v.58, no.1, March 1999 p.50

2. … when a minister is caught out having done something unethical either personally or financially;
3. …when a minister is demonstrably directly responsible for a major error, is found out and misleads parliament. Even here prime ministers and ministers attempt to tough it out and sometimes succeed”[218]

Recent examples of reasons for ministerial resignations in Australian federal politics include loss of factional backing, dissatisfaction with cabinet and policy decisions, failed (or successful) leadership challenges, lying to parliament, failure to declare a financial interest, public position to gain special favours, inadequate administration, and personal and political propriety. [219] The introduction of the Prime Minister's Guide in 1996 led to a significant short term increase in the number of resignations due to a failure to declare financial interests as Ministers developed an understanding of the new, more stringent, guidelines on the declaration of financial interests.

Woodhouse provides two recent examples of Ministers in the UK resigning as a result of errors within the departmental context rather than from misjudgements made by the ministers independently or from indiscretions in their private lives:

Stephen Byers

Stephen Byers resigned as Secretary of State for Transport, Local Government and the Regions on 28 May 2002. Over an 8 month period:

- Mr Byers attempted to ”spin” the release of information, including in relation to the death of a member of the Royal family;
- A member of Mr Byers' staff had allegedly sent an email from the Department to the press (suggesting he was not in control of his press office);
- Wholesale resignations in his office, and a public airing of the breakdown of those relationships; and
- Mr Byers was criticised in parliament and the media for misleading the House.
- Mr Byers tendered his resignation 28 May 2002.

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[218] Thompson, E and Tillotsen, G , supra n 217*,* 51.

Estelle Morris

Estelle Morris resigned as Secretary of State for Education and Skills on 23 October 2002. It is noted by Woodhouse that Morris' resignation had no single cause but was the result of a number of incidents following each other closely. None was particularly serious in isolation, but together they had a powerful cumulative effect. [220]

10.10 NON-RESIGNATIONS OF MINISTERS AFTER ESCAPES FROM PRISONS[221]

In 1983 James Prior, Secretary of State for Northern Ireland stated he would resign only if the inquiry into the breakout from the Maze Prison found government policy or a failure of implementation, for which he was responsible, was to blame for the escape. The Maze breakout resulted in the loss of 38 IRA prisoners and involved violence, guns, and murderous threats. The implication of Prior's statement was that he had no responsibility for administrative errors, regardless of their nature, their closeness to himself or the need for Ministerial oversight.[222]

The Whitemoor[223] and Packhurst[224] escapes led the then Home Secretary, Michael Howard to call for a national review of maximum security prisons. Mr Howard faced questioning in

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[219] Thompson, E and Tillotsen, G , supra n 217*,* 50.

[220] These matters included reversal of a policy by Departmental officials which allowed teachers to be employed without a full criminal check in the wake of the Soham murders; inconsistencies in examination and coursework marks for A level results; terms of reference to an Inquiry into A level result inconsistencies extending beyond the lawful role of the relevant authority; on the eve of the release of its report, the Chair of the Inquiry accusing Morris of improperly interfering with the inquiry; Morris sacking the Chair two days after the report was delivered; contrary to the ruling of a tribunal, Morris calling for two boys who had threatened the life of a teacher not to be allowed back to school; and, an overall failure to meet key education targets.

[221] Barker, A (1998) "Political Responsibility for UK Prison Security – Ministers Escape Again" in *Public Administration V.76 Spring 1998* pp.1-23.

[222] Similarly, Home Secretary Kenneth Baker, used the same reasoning in 1991 following the escape of two IRA prisoners from Brixton Prison. His view of what constituted "Administration" was so broad that it confined his role to overall strategy. This effectively removed the possibility of a causal link unless the incident was a direct result of government policy, under which the Minister would be subject to conventional notions of collective responsibility. Of particular note was the fact that the Chief Inspector of Prisons, who was responsible for investigating this incident, had previously recommended Brixton should not be used for the highest-risk prisoners - Baker, supra n 221.

[223] This breach resulted in the near loss of six category A (highest escape risk) prisoners (five IRA and a convicted armed robber) and the shooting of a prison officer. The Home Secretary stated that the official inquiry (the Woodcock Inquiry) that was conducted as a result had revealed such "dreadful state of affairs" at this maximum security prison that a national review was needed – Baker, supra n 221.

[224] The Packhurst escape involved the temporary loss of three category A prisoners and the use of fake guns to fire blanks. The Whitemoor and Packhurst prison escape attempts in 1994-5 prompted the Home Secretary, Michael Howard, to claim culpability lay with the Prison Service head, Derek Lewis (a contracted businessman) who was dismissed and who successfully sued for full compensation and costs. This sacking and law suit were unprecedented events which highlighted familiar tensions about "policy" and "administrative" ("operational")

Parliament over his role and refuted any suggestion of a causal responsibility, despite his alleged involvement in operational matters and the effect of his policies on agency efficiency.

On 8 April 2004, Reliance Custodial Services ("Reliance") the private security firm responsible for Prisoner Escort Services in Scotland, mistakenly released a convicted housebreaker and 17 year-old murderer from custody in a Scottish court. The prisoner was released from custody as a result of convincing the guards that he was another prisoner by switching bail papers. This event occurred on the first day of Reliance overtaking operational duties for prisoner escort and custodial services from Police in Scotland. [225]

10.11 RESULTING OBSERVATIONS REGARDING ROLE OF THE MINISTER

It may be said that the contemporary examples cited are merely illustrative of the nature of political debate that has occurred elsewhere in response to events similar to the escape of 10 June 2004, or where substandard performance at departmental level is asserted. It can fairly be concluded, however, that no general rule exists regarding necessary expectations or requirements of a Minister in these circumstances. The content and limits of the concept of "ministerial responsibility" remain elusive where no personal wrongdoing is at stake. However the essence of the concept concerns the observance of the supervisory role of Parliament and the free flow of political communication with the electorate.

The attention to the circumstances of the escape and the perceived role, or expected role, of the Minister were, for approximately a fortnight after the incident, both extensive and

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distinction connecting theories about individual ministerial responsibility to Parliament. Howard distanced himself from operation failures of the Prison Service, arguing that while he was accountable to Parliament for what happened he was not responsible – Baker, supra n 221 and Woodhouse, n 213.

[225] Media and Opposition pressure called for a public inquiry into the release. Although no public inquiry was announced by the Minister for Justice, Cathy Jamieson, the Scottish Parliament Justice 2 Committee ("Justice 2 Committee") agreed to conduct some interviews with representatives from the Scottish Prison Service and Reliance to "consider some remaining issues". These issues related to the period prior to Reliance taking over the Prison Escort and Custody Services contract, particularly the negotiation of the contract and the awarding of the contract. Other areas of focus for the inquiry were "What controls were exercised and what involvement was there on the part of the Scottish Executive officials and ministers or Scottish Prison Service officials?". The Justice 2 Committee invited representatives from the Scottish Prison Service (SPS) and Reliance Secure Task Management Ltd to appear before the Committee to discuss the contract. The Minister herself, was also invited to appear before the Committee. It is noted that "[n]o formal remit or terms of reference were set for the inquiry, nor was it the [Justice 2] Committee's role to examine the circumstances surrounding specific incidents". The Parliamentary Inquiry remains ongoing.

intensive, within the Parliament[226] and the media alike.[227] The Minister did “account” to Parliament for the extent of her own involvement and the actions of her Department. The Parliamentary debate, the media coverage of that debate, and other aspects of the escape and its aftermath will contribute towards a body of material on which the people of Western Australia will base their electoral choice at the next Parliamentary election. Beyond those observations, any decisions of the Minister herself, the Cabinet, or the Executive Government of Western Australia otherwise, are matters for those entities in light of the circumstances as they are now understood.

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[226] **“**Escape from Supreme Court: Statement by the Minister for Justice”, Hansard, 15 June 2004 p. 3653; “Escape from Supreme Court: Questions Without Notice”, Hansard, 15 June 2004 p. 3654 – 3661; “Minister for Justice, Motion of No Confidence: Matter of Public Interest Matter of Public Importance”, Hansard, 16 June 2004 p. 3663’; “Community Development and Justice Standing Committee, Inquiry into Escapes from the Supreme Court: Standing Orders Suspension”, Hansard, 16 June 2004 p. 3764; “Supreme Court Security, Documents: Statement by the Premier”, Hansard, 16 June 2004 p. 3767; “Escape from Supreme Court: Independent Inquiry: Statement by the Minister for Justice”, Hansard, 16 June 2004 p. 3764; “Prison Escapees, Status: Questions Without Notice: 335”, Hansard, 16 June 2004 p. 3781; “AIMS Contract: Questions Without Notice: 337”, Hansard, 16 June 2004 p. 3783; “Supreme Court Custody Centre: Questions Without Notice: 340”, Hansard, 16 June 2004 p. 3784 –85; “High Security Prisoners, Classification: Questions Without Notice: 344”, Hansard, 16 June 2004 p. 3785; “Escape from Supreme Court, Police Resources: Questions Without Notice: 346”, Hansard, 16 June 2004 p. 3787; “Minister for Police and Emergency Services; Justice; and Community Safety: Motion”, Hansard, 16 June 2004 p. 3799 – 3824; “Escape from Supreme Court, Assembly to Oversee Terms of Reference for the Independent Inquiry: Standing Orders Suspension”, Hansard, 17 June 2004 p. 3907; “Hooker Inquiry, Details of Drafting Process for Terms of Reference: Standing Orders Suspension – Motion”, Hansard, 17 June 2004 p. 3914; “Hooker Inquiry, Tabling Terms of Reference Papers: Standing Orders Suspension”, Hansard, 17 June 2004 p. 3917; “Escape from Supreme Court, Independent Inquiry: Questions Without Notice: ”, Hansard, 17 June 2004 p. 3900, 3904; “Supreme Court, Refurbishment of Offices and Library: Question Without Notice: 353”, Hansard, 17 June 2004 p. 3903; “Hooker Inquiry, Terms of Reference: Questions Without Notice: 357”, Hansard, 17 June 2004 p. 3904-6; “Supreme Court Security: Statement by the Premier”, Hansard, 22 June 2004 p. 4020; “Escape from the Supreme Court, Hooker Inquiry Terms of Reference: Statement by Minister for Justice”, Hansard, 22 June 2004 p.4020; and “Supreme Court Security Matters, Tabling of Cabinet Documents,” Hansard, 30 June 2004 p. 4627.

[227] ”The great escape” West Australian 11 June 2004, p. 1; “Ringleaders run down after suburban chase” West Australian 11 June 2004, p. 1; “AIMS Under pressure” West Australian (Country ed) 11 June 2004, p. 4; “The escapee’s dream is over” West Australian 11 June 2004, p. 5; “Prisoners to get armed guards” West Australian (Country ed.) 11 June 2004, p. 5; “Don’t blame us” West Australian 12 June 2004, p.1; “Recaptured ‘monster’ blames justice system for mass escape”, The Australian (Weekend) 12 June 2004, p.10; “Rule No.1: blame someone else” West Australian 12 June 2004, p.1; “Justice failures are Roberts’ responsibility” West Australian 12 June 2004, p.18;”Gallop ‘ignored early warnings’” Sunday Times, 13 June 2004, p.4; “Mrs Roberts must take the blame” Sunday Times, 13 June 2004, p.57; “Delay on $1m court security” West Australian 14 June 2004, p.3; “Judges tell of disquiet after escape” The Australian, 14 June 2004, p.4; “Minister blames escapes on judiciary” Kalgoorlie Miner, 14 June 2004, p.20; “Breakout costs firm contract” The Australian, 15 June 2004, p.5; “Court escape as security check ended” West Australian, 15 June 2004, p.4; “Ignorance no excuse for ministers” West Australian, 15 June 2004, p.16; “Roberts clings on” West Australian, 16 June 2004, p.1; “Gallop backs Minister” West Australian, 16 June 2004, p.6; “AIMS attack is lies: union” West Australian, 16 June 2004, p.7; “Guards threaten strike over blame for escape” The Australian 16 June 2004, p.4; “AIMS attack is lies: union” West Australian, 16 June 2004, p.7; “Gallop bows to calls for probe” West Australian, 17 June 2004, p.7; “DOJ contract a security concern” Business News, 17 June 2004, p 12; “Roberts rides out the storm” 18 June 2004, p.9; “Now, Opposition’s on run over great escape” 18 June 2004, p.22; “Escape inquiry under fire” 18 June 2004, p.9; “Farce after breakout was easily avoidable”, West Australian 23 June 2004, p. 18; “Last escapee back in custody” The Australian 23 June 2004, p.4; “Part of escapee files secret” West Australian 23 June 2004, p.6; “Yes, Minister probe is a foregone conclusion” West Australian 25 June 2004, p.18.

11 INSPECTOR OF CUSTODIAL SERVICES

11.1 INSPECTOR OF CUSTODIAL SERVICES: STATUTORY FRAMEWORK

The Inspector of Custodial Services occupies a statutory office created by the *Inspector of Custodial Services Act 2003*[228] and he reports directly to Parliament.

The *Public Sector Management Act 1994* does not apply to, or in relation to, the appointment of the Inspector and the Inspector is not subject to that Act.[229] Comment has already been made on the limited extent to which the terms of reference empower this Inquiry to investigate aspects of the functions and work of the Inspector.[230] Although not himself a constituent of the Public Sector of Western Australia, staff who are "public service officers" are to be appointed as necessary for the performance of the Inspector's functions.[231] Furthermore it is open to appoint or engage people for the purpose of giving expert advice or other assistance in relation to the performance of the Inspector's functions.[232] A further alternative is for the Inspector to, by arrangement with departments, agencies or instrumentalities within the public sector, make use of the services of any officer or employee.[233]

The Inspector is not subject to direction by the Minister for Justice, or any other person, in the performance of the his or her functions, subject only to certain limited exceptions as expressly provided. Those exceptions involve the capacity of the Minister for Justice to, in writing, direct the Inspector to:

a) inspect a prison, detention centre, court custody centre or lockup; or

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[228] Section 5 of the *Inspector of Custodial Services Act2003* continues the office that was initially created by an amendment to the *Prisons Act 1981*. The Act repealed Part X A of the *Prisons Act*, which comprised sections 109A -109V. The entirety of the structure, functions, powers and reporting requirements of the Inspector of Custodial Services are now contained in the *Inspector of Custodial Services Act.*
[229] Section 6(2) *Inspector of Custodial Services Act*.
[230] SeePart 2.4 of this Report.
[231] Section 16(1*) Inspector of Custodial Services Act*
[232] Section 16 (2) *Inspector of Custodial Services Act*
[233] Section 16 (3*) Inspector of Custodial Services Act*

b) to review a custodial service in relation to a prison or detention centre or a custodial service under the *Court Custodial and Services Act,* or an aspect of that service,

and report on a specified matter of significance.

Moreover, the Minister for Justice, after consultation with the Inspector, may issue to the Inspector written directions as to the performance of any of the Inspector's functions, but such a direction cannot be issued in respect of a particular case. [234]

There is a mandatory obligation upon the Inspector to, at least once every three years, inspect each prison, detention centre, court custody centre and lockup.[235] Each of those places is defined in the Act. Relevantly for the purposes of the Inquiry, a "court custody centre" has the meaning given to that term in section 3 of the CSCS Act. The Inspector is required to prepare an inspection report on his or her findings in relation to each inspection that he undertakes of that kind. Such an inspection report may contain such advice or recommendations as the Inspector considers appropriate in relation to the findings he makes.[236]

Aside from the mandatory functions of the Inspector concerning inspection and reporting, he also is empowered to inspect the places within the ambit of his legislation at any other time and on any number of occasions. He may also, at any time, review any aspect of a custodial service as defined in the CSCS Act*,* or a custodial service in relation to a prison or a detention centre. Similar powers to provide reports, give advice, and make recommendations apply in respect of those occasional inspections and reviews.[237]

For the purpose of performing his statutory functions, the Inspector, or any person authorised by him, has free and unfettered access to the relevant places, vehicles and documents that

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[234] Section 17- (1) (3) *Inspector of Custodial Services Act 2003.* To date, the Minister has not exercise the provisions of this Act, however, it has been considered on two occasions. Using similar provisions under *Prisons Act*, the then Minister for Justice, the Attorney General, Hon. Jim McGinty MLA directed the Inspector to investigate issues following the death of two prisoners at Hakea Prison in 2003,.
[235] Section 19 *Inspector of Custodial Services Act*
[236] Section 20 *Inspector of Custodial Services Act*
[237] Section 23 *Inspector of Custodial Services Act*

enable him to do his work.[238] He has, likewise, access to applicable court custody centres, detention centres and lockups.[239]

An express requirement in the governing legislation imposes on the Inspector certain obligations of giving the department, a contractor under the CSCS Act, and other applicable people an opportunity to be heard before the Inspector discloses information or makes a statement setting out an opinion that is, either expressly or impliedly, critical of those people. The Inspector is obliged to afford those people, if in peril of such critical findings, the opportunity to make submissions, either orally or in writing.[240]

On 8 October 2001, the Inspector announced his intention to conduct an inspection of nominated metropolitan court custody centres, incorporating the facilities and provision of services at the following court custody centres including, materially, the Supreme Court of Western Australia and the Central Law Courts.

The principal focus of the inspection was to report on the treatment and conditions of persons in custody, the performance of the Contractor in meeting the service requirements as stipulated in the contract and the interaction of the Department, the Contractor and the Western Australian Police Service in the delivery of services. The inspection was specifically limited in scope to court custody centre services, rather than the whole scope of the contract, which includes the provision of things like prisoner transport services, court orderly work and the guarding of prisoners when not within the prison (for example, during hospital stays).

The Inspector created an inspection team for the purposes of the formal inspection at each court custody centre. Members of the inspection team spent a number of hours at each centre observing the operations of the custody centre, and interviews were conducted with staff and persons in custody. Meetings were also held with heads of the various court jurisdictions (that is, the Chief Justice of the Supreme Court, the Chief Judge of the District

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[238] Section 28 *Inspector of Custodial Services Act*
[239] Sections 29-30 *Inspector of Custodial Services Act*
[240] Section 37 *Inspector of Custodial Services Act 2003*. It is a moot point as to whether this express statutory requirement goes any further than applicable components of the common law principles of natural justice, or procedural fairness.

Court and the Chief Stipendiary Magistrate), judicial support officers at each court complex, clerks of court, registrars and some police personnel.[241]

This formal, announced inspection culminated in certain findings and recommendations concerning the state of the Supreme Court custody centre and the delivery of service under the CSCS Contract. Three specific recommendations from Report Number 7, and their implementation by the Department, have particular relevance to the Supreme Court custody centre.

Recommendation 4, regarding practices for "high security" and "high risk" prisoners, has been examined in the context of a fuller analysis of risk assessment in Chapter 9. Recommendation 5, regarding "field-based" monitoring of service delivery under the Contract, has been noted within a broader treatment of the Department's monitoring process generally in Chapter 8.

It remains to address Recommendation 6(c), which is in the following terms:

> The Department should assess the suitability of the physical facilities of all metropolitan court custody centres for the safe delivery of service to persons in custody, and make provision for capital and minor works appropriations. As a matter of priority, the Department must take steps to remedy the facilities with regard to:
>
> …(c) The development of a master plan for the management of people in custody and vehicles at the Supreme Court complex, including secure arrangements for the vehicle sally port.

11.2 FINDINGS OF REPORT 7 RELEVANT TO RECOMMENDATION 6(C)

Certain specific findings of the Inspector regarding the exact physical facilities of the Supreme Court that require improvements to ensure "… the safe delivery of persons in

[241] *Report of an Announced Inspection of Metropolitan Court Custodial Centres*, supra n 117, 1.6-1.9.

custody" have already been cited[242]. The concluding paragraph 2.78 regarding "Facilities" provides particular context to the ultimate recommendation:

> "Serious safety concerns raised in this section need to be addressed as a matter of priority. This is particularly the case with the Supreme Court, and a **comprehensive master plan** should be prepared to address the movement of people and vehicles onto and off the site. As owner of the facilities and the party with the ultimate responsibility for the safety, security, care and well being of persons in custody and persons who enter into court complexes, the Department must initiate change. This is especially the case where the safety of the public is at risk." (Emphasis added)

Earlier in the report, paragraph 2.55 spoke of the ownership role of the Department of Justice in managing court security and custodial services at the Supreme Court and noted that:

> The terms of the Contract require the Contractor to provide clean and hygienic court custody centres[243]. Beyond this, there are no other references to the physical court custody buildings and facilities, so the Department (as the owner and party ultimately responsible for persons in custody) retains responsibility for the appropriateness of the cells for their purpose, the adequacy of facilities for the volume of prisoners, and maintenance."

The Inquiry noted that in order for the Department to ensure the adequacy of facilities for the volume of prisoners, and maintenance, it relied upon AIMS to provide it with the necessary notification and information to ascertain that adequacy and to respond to maintenance requirements in a timely fashion.

Notably the CSCS Contract provides, regarding "Use of State Facilities[244] by Contractor":

(b) "The State Facilities will remain in the ownership and control and risk of the State."

And regarding "Maintenance of State Facilities"[245]:

(a) The State will be responsible for all Preventative Maintenance and Breakdown Maintenance and Minor Improvement Works in the State Facilities.
(b) The Contractor shall clean and keep clean those parts of the State Facilities that are used by the Contractor in connection with the provision of the Services.

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[242] See Chapter 6 of this Report.
[243] Clause 3.3.2(v), Schedule 2, CSCS Contract.
[244] Clause 20.1, Schedule 4, CSCS Contract.

(c) The contractor must not make any alterations or additions to the State Facilities without the prior consent of the CEO in writing."

Paragraph 2.63 outlines the key findings of the independent report commissioned by the Inspector (appendix 2) to Report Number 7. The independent report made particular reference to the need for "master planning". Thus paragraph 2.63 said:

> "The facilities at the Supreme Court custody centre caused the Inspector serious concern and resulted in the commissioning of an expert to produce an assessment of the Court's custodial environment[246]. The three main findings of the report relate to the design of the sally port, public accessibility to custodial activities and the need for master planning for the site."[247]

Paragraph 2.67 concluded:

> "These issues must be remedied immediately. The proposed criminal court complex that will incorporate the Supreme Court will be completed no sooner than 2007/08. **The current complex cannot continue to operate until this time in the current condition.** Any increased security measures will not go to waste as the Court of Criminal Appeal will continue to operate from existing buildings. Accordingly, the need for a secure area will remain." (Emphasis added)

Master Plan

An issue arose for the Inquiry about the true meaning of "master plan" used in recommendation 6(c). On one view, those matters were of wider import than the definition of "master plan" used by the supporting paragraphs within Report Number 7. The definition of "master planning" used in both the independent report[248] and the supporting paragraphs 2.63, 2.64 and 2.66 of Report Number 7 specifically relate to the "facilities" of the Supreme Court.

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[245] Clause 20.2, Schedule 4, CSCS Contract.

[246] The commissioned report is attached as Appendix 2.

[247] Specific findings were also made about the design of the sally port and the barriers separating the public area from the custody centre (the communal use of a main emergency exit corridor and the main entrance door to the custody area) *Report of Announced Inspection Metropolitan Court Custody Centres* supra n 17, Paragraphs 2.64 and 2.66.

[248] "Safety and security impacting on the custodial service from people entering and using general public and courtroom spaces is not dealt with in this document, other than issues impacting on the immediate surroundings to the accused dock in the courtrooms… This report attempts to document **what** should be done to bring the custodial facilities up to an acceptable standard..." *Report of Announced Inspection Metropolitan Court Custody Centres* supra n 17, p.39.

In correspondence towards the end of the Inquiry, the Department described the approach that it had taken in responding to Recommendation 6 (c). In short, the Department's response had "… look[ed] at the structural and physical needs of the building rather than any wider issues. The response was constructed in the context in which the recommendation is made in the report. It was taken that the references in the text of the report were to do with poor facilities, not poor processes."

The Department also pointed to the fact that "master planning" is a common term used in a building and architectural context and has specific meaning in that context. Given that Recommendation 6(c) arose out of the work of the consultant architect who worked with the Inspector on this report, it was reasonable to respond to this issue as a "facilities issue", so the Department maintained.

There is little advantage in now embarking on an analysis of precisely what was meant, or what meaning should have been taken, by "master plan" in Recommendation 6(c). To the extent that there may have been work left to be done by the Department, at least on an interpretation of Recommendation 6 (c) that drew on the full context of Report 7, that hiatus has been subsumed within the escape, and the various aspects of the Department's response. There is indeed now a "master plan"[249], even on the broadest, most purposive view of the term's meaning.

The more enduring concern is that the Department could have allowed the relationship between it and the Inspector to linger on an important issue like this. To ensure that there is common understanding of definitions used in the Inspector's reports, there is a need to establish lines of communication for the Department of Justice to clarify definitions or intentions of the Inspector prior to reports being released. This will assist in facilitating appropriate responses by the Department to recommendations by the Inspector.

11.3 INTERNAL AUDIT

No doubt influenced at least partly by its awareness of this aspect of the Inquiry's work, the Director General of the Department initiated an internal audit into the current processes employed by the Prisons Division (Custodial Inspections and Custodial Contracts Branch)

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[249] See Chapter 6 above; and Confidential Appendix I of this Report.17

and Court Services (particularly the Sheriff's Office) of the Department in managing the Office of the Inspector of Custodial Services (OICS) Reports.[250]

More specifically the review examined the Department's processes for:

- Assessing recommendations from OICS Reports;[251]
- Implementing recommendations from OICS Reports;
- Monitoring progress; and
- Reporting progress to management

Assessing Recommendations from OICS Reports

At the time of the audit, a Project Manager in the Custodial Inspections Branch of the Prisons Division coordinated the Department's process for commenting on draft reports from the OICS and assessing recommendations from OICS reports. The Project Manager is responsible for issuing OICS draft reports to managers and/or personnel of impacted business areas (internal stakeholders). Meetings of "internal stakeholders" are coordinated by the Project Manager to check the factual accuracy of the report and to provide comment on each recommendation. The Project Manager then compiled these factual changes, comments and management responses.

[250] The express objective for the internal audit was to review and report on the Department's process for managing the Office of the Inspector of Custodial Services (OICS) Reports including the identification of improvement opportunities where appropriate.
[251] This assessment was limited to categorising the recommendations as "agreed to", "partially agreed to" and "disagree".

The audit found:

a) The issue of clear accountability, communication and reporting protocols was particularly relevant for OICS recommendations relating to the CSCS Contract and court security issues, as responsibilities were unclear and spanned across business areas and divisions.

b) Management responses to OICS reports were inconsistently presented and did not always clearly indicate the Department's position on recommendations or provide associated action/s. There were also inconsistencies in the coordination of the Department and AIMS responses in matters relating to Hakea or CSCS, which, not only represented a concern with regard to responding to the reports, but also again demonstrated the lack of collaboration between the two organisations.

c) No formal process was in place to manage and assess priorities arising from recommendations agreed by the Department. Significance rating were not applied to OICS recommendations. It was noted by the audit that the significance criteria should be risk based.

d) Although the OICS reports tend to highlight a number of "issues", these issues are not necessarily directly linked to the report's recommendations. The audit found the Department does not have a formal process in place to assess and address these 'issues'.

e) At internal stakeholder meetings, attendance was not restricted to key personnel, reducing the effectiveness of meetings, particularly when the meeting aimed to determine a common management response for cross business area recommendations (thematic reviews).

f) Previously comments and factual errors identified by attendees at the meetings were collected by the Project Manager after the meeting.

The audit recommended the following changes the current process:

1. Clear accountability, communication and reporting protocols be established for addressing OICS recommendations that are cross-divisional.

2. A consistent approach be applied to all management responses provided by the Department of OICS Reports. Guidelines should be agreed and established as a standard when responding to OICS recommendations.

3. Management to develop a significance criteria rating to assist in preparation of management responses, prioritisation of actions and allocation of resources. Significance criteria should be risk based.

4. Management consider preparing a joint response to OICS recommendations for reviews relating to AIMS contracts.

5. Develop and agree on a process for assessing and addressing 'issues' identified in OICS reports.

6. Consider restricting attendees to the meeting for impacted business areas to key management.

7. Mechanisms to improve the effectiveness of the impacted business area meetings.

This revised process should include a recognised procedure between the Department of Justice and the OICS for seeking clarification on elements of the report that require further clarification to ensure a common understanding between the Department and OICS.

Implementing Recommendations from OICS Reports

After the Executive Director, Prisons Division (and where relevant other Executive Directors) and the Director General have reviewed and endorsed the Department's management response it is forwarded to the OICS. A copy of the recommendation and associated management response was stored by the Custodial Inspections, Prisons Divisions. The status reports on progress are prepared by the Project Manager on an *ad hoc* basis. The audit found the status reports were insufficient, there was no formal framework for strategically linking accepted OICS recommendations with the Department's planning

processes; and risk mitigation strategies were not developed for matters arising out of the OICS Reports although breach of Court Security was rated as an extreme risk.[252]

The audit recommended the following "significant" changes to the process of implementation:

8. An Action Plan be developed and endorsed for each OICS report which records.[253]

It is also recommended that the Action Plan should:

(i) include some analysis of the recommendation (i.e. definition of key issues);

(ii) suggest alternatives where the recommendation is partially agreed or not agreed with;

(iii) identify whether agreed actions are short, medium or long term solutions; and

(iv) identify a timeline for reviewing the implementation of the recommendation.

Monitoring and Reporting on the Progress of OICS Recommendation Implementation

The audit found the "Department does not have a formal and structured process for monitoring and reporting on the progress of the implementation of OICS recommendations", rather it was an *ad hoc* process conducted by the Project Manager. The frequency and ability of the Project Manager to follow up on actions in the published management responses was reduced by a reduction in staff assisting the Custodial Services Inspections Project Branch.

- In cases where the Department's progress on OICS recommendations was followed up, there was no requirement for regular reporting to management. In April 2004, the Executive Director, Prisons Divisions requested a report on the status of all

[252] Impact was considered major and likelihood was rated as likely.
253 The Action Plan should record issues, significance rating, OICS recommendation, management comment, agreed action, rationale for disagreed or partially agreed recommendations, position responsible for action; and action date.

outstanding OICS recommendations,[254] but prior to that, lists and summaries of all outstanding OICS recommendations had not been prepared.

- The Custodial Services Inspections Project Branch does not have an automated process to assist in the monitoring and reporting on the progress of recommendation implementation. Recommendations are managed and monitored via paper based and electronic word documentation.
- Although OICS recommendations impact on the Prisons Division, Court Services and Community and Juvenile Justice Division, the Project Manager position reports only to the Executive Director, Prisons Division.

In this regard, the audit recommended that:

1. Management agree and implement a regular follow up process for outstanding OICS recommendations.
2. Formal reporting protocols and mechanisms be developed to report outstanding OICS recommendations and progress reports for Court Services (CSCS Contract), Prisons Division and Community and Juvenile Justice Custodial Services) to management.
3. Management review the current reporting structure as OICS recommendations impact across Divisions within the Department.
4. Implement an automated tracking and monitoring system for OICS issues and recommendations. Review existing systems within the Internal Audit Branch and the Internal Investigations Unit. The system should record the fields listed under recommendation 8.
5. To improve the Department's ministerial reporting consideration should be given to providing the Minister with progress reports on outstanding OICS recommendations to coincide with the annual business planning and budgeting cycle.

254 This report provided the status of announced inspections only. OICS recommendations for thematic and court custody reports were not included in this report.

6. Management should consider implementing compliance and self-assessment systems within the Prisons Division and for the Court Security and Custodial Services (CSCS) Contract.

11.4 CONCLUSION

Following the escape of 10 June 2004, the Department undertook its internal audit in order to develop comprehensive and consistent practices in managing the reports of the Office of the Inspector of Custodial Services. This is a laudable objective but, as with other steps taken following the escape, it would have been preferable for action, with this degree of organisation and energy, to have been take considerably earlier. The audit's recommendations, if implemented, ought to improve the Department's practices for managing these. Some other changes recommended by the Inquiry ought assist this process, as well as ensuring the Minister is kept apprised of the Department's position.

CHAPTER 12 - CONCLUDING OBSERVATIONS AND SUMMARY OF MAJOR FINDINGS AND RECOMMENDATIONS

At various points in the text, reference is made to significant matters of importance not feasible to be pursued by the Inquiry. In an administrative inquiry of finite time traversing a wide subject matter and complex commercial relationship, decisions will inevitably need to be made as to the limits of the investigation and analysis. That was the case here, and the following issues are highlighted as being of potential importance to court custodial services in Western Australia and which may warrant further examination and pursuit as the Premier and Director General see fit.

Training

Some views were expressed by representatives of the Department, and others in informal contact with the Inquiry, that aspects of the training of AIMS' employees were deficient, either generally, or in certain specific areas. Other anecdotal evidence suggested that some employees, themselves, would air grievances about their perceived deficiencies in training. This was a substantial factual area that would have necessitated a round of hearings in its own right for the Inquiry to be equipped to reach conclusions.

Use of Force in Custody Centres

A variety of views and perspectives was aired before the Inquiry concerning the extent to which custody officers (and for that matter prisons officers) ought to apply force, at varying levels of aggression or robustness, in dealing with prisoners, particularly during cell unlocks. The Inquiry was only able to form preliminary impressions, and was unable to explore the rather subtle philosophical and practical issues in any detail. To proceed to any conclusions, however tentative, without the opportunity for full reflection would be both inappropriate and unfair to the parties under inquiry. It is suggested, however, that in the interests of the strongest possible understanding between the contracting parties (or at the very least, the avoidance of palpable misunderstanding) the parties confer in an attempt to agree, at least, some broad parameters or protocols concerning the use of force in court custody centres.

Use of Restraints in Court Custody Centres and Court Environs

Certain material informally presented to the Inquiry clearly evidenced a strongly held views of the judiciary against allowing visible use of restraints in criminal courts. Some persons, however, queried whether for appearances where there is no jury present, the accepted practice needs to be so entrenched. Moreover, the Inquiry heard of the existence of an apparently modern design whereby a prisoner wears a single leg band which is concealed under the clothing, displaying no outward impression of restraint. Provisional impressions about the desirability of using such restraints were very positive. The Inquiry is of the view that any design which can, simultaneously, accommodate the concerns of the judiciary and provide practical assistance in the custody of prisoners who carry a heightened security risk ought be carefully considered.

Court Lists

As observed, court or "course" lists are generally issued at around 2.30 pm on the day preceding that list. With the relevant information presumably available to Registry Staff ahead – if not well ahead – of that time, it is open to question whether more flexibility may be introduced into this seemingly long-standing procedure. Discussions between senior officers of the Department with a view to improving the early and accurate flow of information about combinations of prisoners, for the benefit of custody officers, is to be encouraged.

12.1 MAJOR FINDINGS AND RECOMMENDATIONS

A. Processes and Procedures

- The processes and procedures employed by AIMS to unlock cell number 1 were deficient and failed adequately to guard against the possibility of an escape.

- The management of keys at the court custody centre was deficient, and contributed to an unacceptable risk of an escape, in storing both cell keys and custody centre keys on the same key ring.

- The relationship between AIMS as Contractor, and the Department of Justice, with ultimate statutory responsibility under the CSCS Act, failed to address, properly or at

all, issues relevant to the maintenance of a secure custody facility at the Supreme Court. In particular, defects in the overall security of the facility, including proper maintenance of a secure line, key custody, and a sufficiently clear understanding of cell unlock procedures, were addressed insufficiently or not at all. Although the Department had adverted to the means of correcting known deficiencies in the facilities themselves, attention was not given, nor properly considered, to deficiencies in the AIMS operational procedures.

- The failure of AIMS to take any steps, or any reasonable steps, to secure the locking of two doors, wedged open at the time of the escape in the flight path of the escapees, contributed to an unacceptable risk of an escape.

- There was an absence of any clear understanding as between AIMS and the Department of the basis, or supposed authority, for the two doors in the flight path of the escapees being wedged open at all material times. Neither AIMS nor the Department's on site monitors appear to have brought this risk to attention in order to have it remedied.

B. Departmental Monitoring and Approval

- The Department's monitoring of AIMS' performance under the CSCS Contract was deficient in that it failed to detect inadequacies that impacted on the maintenance of a secure custody facility.

- The Department's process of approval of AIMS' procedural documentation was flawed in that it failed to detect the following substantive shortcomings;

  a) Supreme Court Site Manual at 1.2 regarding "Two Custody Officers";

  b) Supreme Court Site Manual at 3.3.1 providing, in limited detail, for the procedure concerning "Cell Doors"; and

  c) Operational Procedures Manual at 8.105.2 regarding an "escape".

C. Actions Since the Escape

- The work to date of the Project Team demonstrates a clear understanding of the broad security issues faced at the Supreme Court facility and a capacity to address those issues in a strategic fashion. It is also an example of how a simple structure, with a sensible and appropriate membership, a clear set of goals and a genuine impetus, can achieve significant change in government within a limited period of time.

- More broadly, the steps taken by the Department in responding to the escape were appropriate. Yet had those steps been undertaken earlier they would have significantly reduced the risk of escape.

D. Risk Assessment

- The contracting parties had no discernible processes for assessing the risks posed by particular combinations of prisoners in custody at the Supreme Court and for, in turn, responding to any heightened risk through appropriate deployment of resources, variation of procedures, or otherwise.

- It is recommended that:

  (a) Finalisation of the New Enhanced Security Model be expedited within the framework summarised in this report, with a view to endorsement by the respective Contract Managers, no later than 13 August 2004. The model ought expressly take account of the risk assessment, and respond to such risk as assessed, of combinations of prisoners. Particular attention ought be given to clear and consistent use of definitions.

  (b) Clause 3.3.3 of Schedule 2, Part 3 of the CSCS Contract be in any event urgently revised and varied, such variation to include, at least:

    (i) Clear provision as to respective contractual responsibilities;

    (ii) Express adoption of the New Enhanced Security Model as finalised pursuant to (a) above and;

    (iii) An express incorporation of agreed protocols regarding risk assessment.

(c) The final draft of the Department's own "HSE Policy" be analysed and implemented only in light of, and consistently with, the text of the New Model.

(d) The review of intelligence services should focus on clear and concise agreement and a joint strategy between the Department and AIMS for the collection, analysis and sharing of intelligence information. It is envisaged, if properly conducted, the review and resulting strategy will render unnecessary the foreshadowed "draft charter" for the Intelligence Analysis Branch.

E. Video Links

- The recently initiated Project examining video links ought swiftly address all relevant technological, procedural and philosophical issues. Further, a senior Government lawyer such as the Solicitor General ought undertake appropriate liaison between the judiciary and the Department's nominated senior representative to ensure the swift completion of this Project and implementation of its conclusions.

F. Role of the Minister

- The Minister did "account" to Parliament for the extent of her own involvement and the actions of her Department. The Parliamentary debate, the media coverage of it and other aspects of the escape and its aftermath will contribute towards a body of material on which the people of Western Australia will base their electoral choice at the next Parliamentary election. Beyond those observations, any decisions of the Minister herself, the Cabinet, or the executive Government of Western Australia otherwise, are matters for those entities in light of the circumstances as they are now understood.

G. Implementation of Inspector's Recommendations

- There is a need to establish lines of communication for the Department of Justice to clarify definitions or intentions of the Inspector prior to reports being released. This will assist in facilitating appropriate responses by the Department to recommendations by the Inspector.

- There should be developed a recognised procedure between the Department of Justice and the Inspector for seeking clarification on elements of the Inspector's

Report that require further clarification. This will ensure that there is common understanding between the Department and Inspector and will assist in facilitating appropriate responses by the Department to Inspector's recommendations.

APPENDIX A

INQUIRY INTO THE ESCAPE OF PERSONS HELD IN CUSTODY AT THE SUPREME COURT OF WESTERN AUSTRALIA ON 10 JUNE 2004

I, DR GEOFFREY IAN GALLOP, Premier; Minister for Public Sector Management, pursuant to section 11 of the *Public Sector Management Act 1994* direct and appoint Mr Richard Lancelot Hooker, Barrister, to inquire into the role, duties, functions, and operations of the Department of Justice in respect of the escape on 10 June 2004 of nine persons held in custody at the Supreme Court of Western Australia **(Incident)** and the management by the Department of Justice of the contract entitled "Contract for the Provision of Court Security and Custodial Services" dated 17 January 2000 **(Contract)** and entered into between the State of Western Australia and Australian Integration Management Services Pty Ltd (then named Corrections Corporation of Australia Pty Ltd) **(Contractor)** in accordance with the Terms of Reference set out below.

The Terms of Reference below are to be addressed concurrently with your appointment by Mr Alan Piper, Director General, Department of Justice, pursuant to section 44 of the *Court Security and Custodial Services Act 1999*, of today's date, and having regard to the role of the Minister for Justice who will be available to you to assist you with your inquiries and will allow you full access to her and her staff as you address your Terms of Reference as set out below.

Terms of Reference

1. To examine and report on the facts of the Incident and the circumstances under which the Incident took place.
2. To examine and report on the role and performance of the Department of Justice in monitoring and managing the performance of the Contractor under the Contract, with particular reference to, but not limited to the Incident.
3. To examine and report on the steps taken and processes and procedures initiated by the Department of Justice to implement the recommendations contained in a report issued by Professor Richard Harding entitled "Report No. 7; Report on Announced Inspection of Metropolitan Court Custody Centres, November 2001" so far as they relate to prisoner custody at the Supreme Court of Western Australia.
4. To proceed with expedition.

The Inquiry is required to report its findings and recommendations to the Minister for Public Sector Management by 16 July 2004.

Dear Mr Hooker

APPOINTMENT AS INVESTIGATOR PURSUANT OT SECTION 44, COURT SECUIRTY AND CUSTODIAL SERVICES ACT, 1999

I have been requested by the Minister for Justice, the Honourable Michelle Roberts, to appoint you as investigator pursuant to section 44 of the Court Security and Custodial Service Act 1999 ("the Act") for the purpose of inquiring into and reporting upon the escape incident that occurred at the Supreme Court on 10 June 2004.

Accordingly, I hereby appoint you as investigator pursuant to section 44 of the Act for the purpose of investigating and reporting on the court custody services at the Supreme Court provided under the Court Security and Custodial Services Contract by the AIMS Corporation in relation to that incident.

This authorisation is valid from this date below until formally withdrawn by notification in writing.

In respect of your inquiry into the management and monitoring of the Court Security and Custodial Services Contract at the Supreme Court by the Department of Justice, I will ensure that the Department is fully co-operative with your investigation.

Yours sincerely,

Alan Piper
DIRECTOR GENERAL

17 June 2004

APPENDIX B

Government of Western Australia

Inquiry into the Supreme Court Escape of 10 June 2004

A special inquirer may, in respect of a matter not dealt with by the *Public Sector Management Act 1994* ("PSM Act"), give directions concerning the procedure to be followed at or in connection with the special inquiry. Section 13(4) specifically provides that:

> A special inquirer may, in respect of matters not dealt with by this Act, give directions concerning the procedure to be followed at or in connection with the special inquiry concerned, and a person participating in that special inquiry shall comply with any such direction.

During the course of the Inquiry, particularly during the giving of oral evidence, I have not been invited to give any direction. This may have been, at least in part, due to the clear understanding, by all parties involved, of the nature of the matters under consideration which, for the most part, involved detailed information regarding the security arrangements for several custodial facilities within Western Australia. Inquiry highly sensitive information and needed to be treated with a high level of confidentiality.

The Inquiry has also received certain written submissions regarding the confidentiality of some material provided to the Inquiry and the use of that material in the Inquiry's Report. In partial deference to those submissions, material that is, on the Inquiry's assessment, genuinely sensitive security information has been included in confidential annexures to the Report.

I also perceive that the susceptibility of the Inquiry's materials to the statutory regimes under the *Freedom of Information Act 1992* and the *State Records Act 2000* may give rise to delicate issues in light of that sensitivity.

Of course, there may be various bases upon which documentation may be exempt from disclosure under the *Freedom of Information Act* 1992, irrespective of the existence or content of any direction. Nevertheless I am satisfied that it is appropriate for me in exercise

of the power under section 13(4) of the Act, to give a direction concerning a procedure to be followed “in connection with” this special inquiry.

I accordingly direct that all constituents of the Public Sector of Western Australia must be cognisant of the nature of the material examined by the special inquiry in its final report, particularly its content with regard to the security of custodial facilities in Western Australia. Accordingly, all constituents of the Public Sector, whether acting pursuant to the *Freedom of Information Act 1992*, the *State Records Act 2000*, or otherwise, must strive to observe, so far as possible, the sensitive character of that material and accordingly to restrict its release beyond the Public Sector in any circumstances, or within the Public Sector only for bona fide professional cause.

I appreciate that there are competing views as to the ambit of a direction under s.13(4) of the *Public Sector Management Act*. It is my intention, however, for all documentation considered, created by, or used in connection with, this special inquiry to be restricted from release to the fullest extent that the legislation and executive power of the Government of Western Australia allows. My intention, and the content of my direction in the preceding paragraph, ought be taken into account in the classification of any documentation as “records” for the purposes of a record keeping plan pursuant to the *State Records Act 2000.*

RICHARD HOOKER
SPECIAL INQUIRER

APPENDIX C: WITNESS LIST

The following people appeared before the Inquiry -

1. Mr Mike Adams, Australian Integrated Management Services Corporation (AIMS) (with counsel) – 25 June 2004, 1 July 2004
2. Mr Alan Piper, Department of Justice – 25 June 2004, 19 July 2004
3. Mr Stephen Fewster, Department of Justice - 28 June 2004
4. Mr Stephen MacPherson, AIMS (with counsel) – 25 June 2004, 29 June 2004, 16 July 2004
5. Mr Craig Castle, Department of Justice – 1 July 2004
6. Mr Brian Yearwood, Department of Justice – 2 July 2004
7. Mr Terry Simpson, Department of Justice – 2 July 2004
8. Mr David Ewart, Department of Justice – 2 July 2004
9. Mr Geoff Zimmer, Department of Justice – 13 July 2004
10. Ms Fay Roberts, Associate to Justice Murray – 13 July 2004
11. Mr Timothy Fraser, Office of the Minister for Police and Emergency Services; Justice; and Community Safety – 9 July 2004
12. Mr Emiliano Barzotto, Office of the Minister for Police and Emergency Services; Justice; and Community Safety - 9 July 2004
13. Superintendent. Alan McCagh, Western Australian Police Service – 13 July 2004
14. Brad Newhill, AIMS (with counsel) – 14 July 2004
15. Graham Kelly, AIMS (with counsel) – 14 July 2004

16. Mr Ralph McCloy, AIMS (with counsel) – 14 July 2004

17. Hon Michelle H Roberts, Minister for Police and Emergency Services; Justice; and Community Safety – 16 July 2004

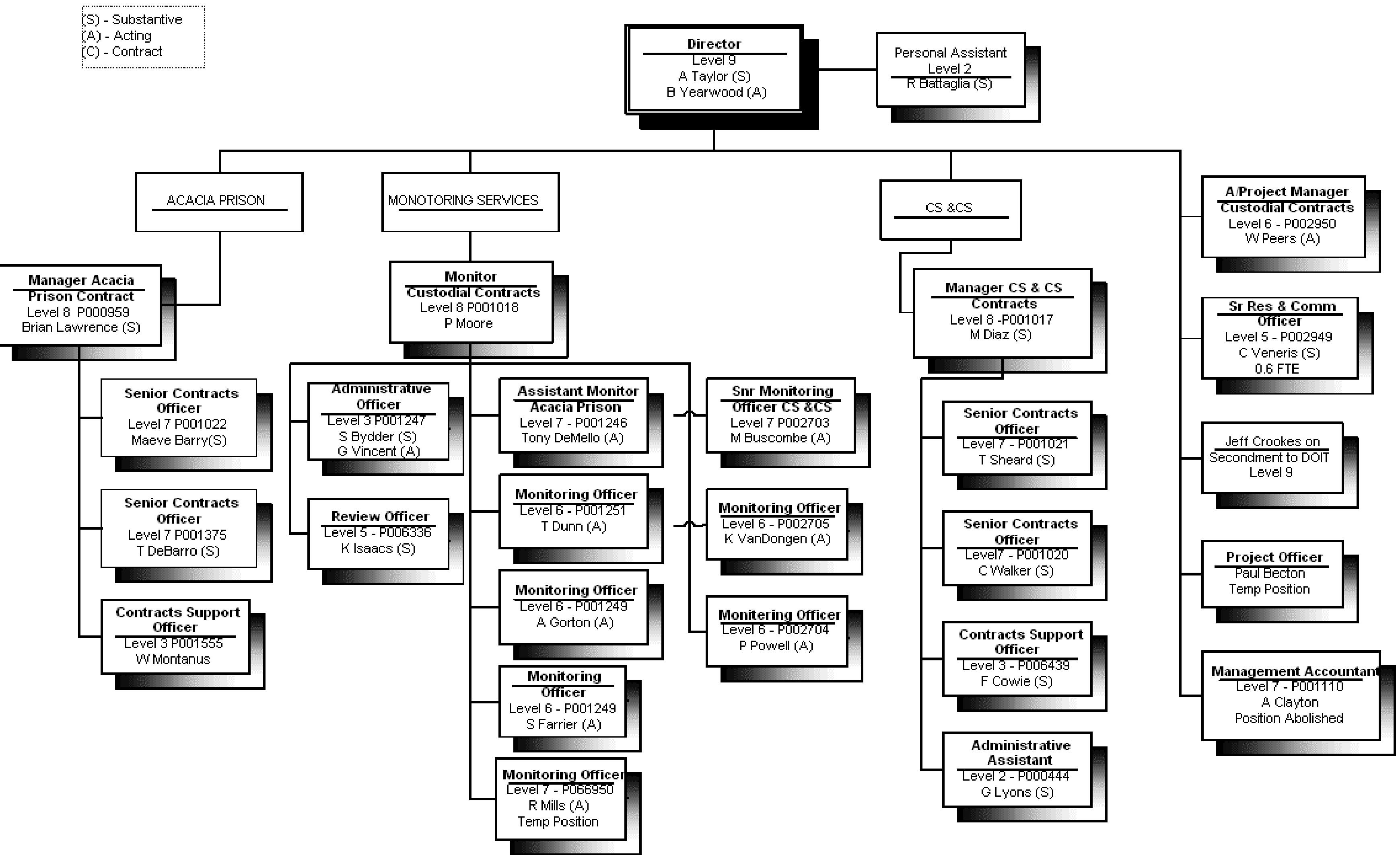
18. Mr Dave Nicholson, AIMS (with counsel) – 26 July 2004.

APPENDIX D: SUBMISSIONS AND INFORMATION

Submission and information was received by the Inquiry from the following persons and organisations –

1. Department of Justice, Western Australia
2. AIMS
3. Hon Michelle H Roberts, Minister for Police and Emergency Services; Justice; and Community Safety
4. Western Australian Police Service
5. The Chief Justice of the Supreme Court of Western Australia, David Malcolm
6. The Chief Judge of the District Court of Western Australia, Antoinette Kennedy
7. Chief Stipendiary Magistrate and Deputy Chief Magistrate
8. The Inspector of Custodial Services, Professor Richard Harding
9. The Department of the Premier and Cabinet
10. Transport Workers Union, Western Australian Branch
11. WA Prison Officer's Union

APPENDIX E



APPENDIX F: BIBLIOGRAPHY

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