# REPORT TO THE MINISTER FOR CORRECTIVE SERVICES ON MR MARLON NOBLE


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7 June 2011

**IN CONFIDENCE**

**REPORT TO THE MINISTER FOR CORRECTIVE SERVICES ON MR MARLON NOBLE**

## EXECUTIVE SUMMARY

Marlon James Noble is a 29 year old Indigenous man who was born in Carnarvon. During very early childhood he suffered meningitis which left him with developmental delays and some hearing loss. His intellectual and adaptive functioning has consistently been assessed as in the intellectually impaired range and he has been identified as being well below average intelligence.

In 2001 when Mr Noble was 19 years of age, he was charged with two counts of Sexual Penetration of a Child Under 13 Years and three counts of Indecent Dealings with a Child 13 to 16 years, pursuant to the *Criminal Code 1913* (WA). Mr Noble was subsequently found "unfit to stand trial" in relation to these charges, due to his mental impairment and was subject to an indefinite custody order made in 2003 pursuant to the then *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA).

Mr Noble has been detained at Greenough Regional Prison for the majority of the duration of the custody order. He was placed on a five stage graduated plan by the Mentally Impaired Prisoners Review Board (the "Board") in 2006 and has been permitted overnight stays outside the prison with full time supervision since 2009.

Upon his return from an approved Leave of Absence on 3 September 2010, he was asked to provide a urine sample. The initial screening test dated 8 September 2010 stated that amphetamine was detected. The day after the screening test result was provided, PathWest issued an Analyst Certificate which contained the results of the Gas Chromatography Mass Spectrometry (GCMS) test carried out on Mr Noble's urine sample. It certified that no illicit drugs were detected. That should have been the end of the matter. Instead, he was on 7 October 2010 charged with the aggravated prison offence of using an illicit drug, pursuant to section 70(d) of the *Prisons Act 1981* (WA). His home leave was suspended.

Mr Noble was questioned by prison officers and the Superintendent of Greenough Regional Prison, about the results of his urinalysis screening test. He told them that he had not taken any illicit drugs and that he didn't take drugs. Due to this denial of the allegation, the Superintendent was required to refer the charge to a Visiting Justice who chose to hear the charge against Mr Noble as a minor prison offence. Mr Noble, still unable to get anyone to accept his denials, decided to make up a simple story about getting a pill from a passerby in a white car. Mr Noble appeared alone before a Visiting Justice who promised to be lenient,

and following his admission, convicted Mr Noble of the offence under section 70(d) and gave him a verbal reprimand.

At no point during the proceedings was there any reference to the Analyst's Certificate. The Analyst's Certificate is prescribed in Form 1 to the Schedule and given evidential value by the Prisons Regulations 1982. The Regulations require that it must be served on the prisoner to whom it relates. Mr Noble was charged by a prison prosecutor under section 70(d) of the Prisons Act, based on the screening test results. This was a flawed approach. The screening test does not establish the presence of illicit drugs, it does no more than suggest the desirability of a more sophisticated analysis. This was not understood by those involved in proceeding with the charge. All these events led the Board to cancel Mr Noble's home leave entitlements until this year, when the Department advised the Registrar of the Board verbally on 21 March 2011 that Mr Noble's conviction under section 70(d) of the Prisons Act was "unsound". The Board has properly responded to this advice and approved Mr Noble for home leave.

For 6 months Mr Noble lost the opportunity to work towards eventual release under his graduated plan, Fortunately, his home leave has now been reinstated and, in consideration of the adverse effect of the errors, recently upgraded to allow two 48 hour overnight stays per week. This report elaborates on these events and explains the reasons for my views as outlined above.

**REPORT TO THE MINISTER FOR CORRECTIVE SERVICES ON MR MARLON NOBLE**

**TERMS OF REFERENCE**

To inquire into and prepare a report on:

(1) The circumstances resulting in the charging of Marlon Noble with a prison offence under the *Prisons Act 1981* (WA) regarding his alleged use of illicit drugs whilst on day leave in 2010;

(2) The conduct of proceedings relating to that prison offence, including but not limited to the consideration by officers of the Department of Corrective Services and the Visiting Justice of all evidence which was known to officers of the Department of Corrective Services and relevant to that charge;

(3) The capacity of Marlon Noble to represent himself and plead to the prison offence heard by the Visiting Justice;

(4) The appropriateness of the arrangements maintained by the Department of Corrective Services for the receipt and handling of all evidential material relevant to prisons offences; and

(5) The appropriateness of the arrangements currently maintained by the Department of Corrective Services for the training of prosecution officers, and the appointment and training of Visiting Justices, when dealing with mentally impaired offenders accused of prison offences.

## ACKNOWLEDGEMENTS

I acknowledge the support and willing assistance provided by the staff of the Department of Corrective Services, particularly Terry Buckingham, Kerry Bond and Christine Anderton. I also record my appreciation for the considerable efforts made by Rebecca Andrich, Mr Noble's advocate, and Ida Curtois, to whom he refers as "grandma", to make themselves available to be interviewed, and their generosity with their time. I also acknowledge the contributions made by Mr Matthew Holgate, Mr Noble's lawyer. Finally I express my gratitude to Tarryn Ammon, my research assistant, for her research and for providing executive support.

*Robert Cock, Perth, 7 June 2011*

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## REPORT TO THE MINISTER FOR CORRECTIVE SERVICES ON MR MARLON NOBLE

### 1. BACKGROUND

This inquiry has been undertaken in my capacity as Special Counsel to the Premier, at the request of the Honourable Terry Redman MLA, Minister for Corrective Services. The inquiry was called following considerable media attention regarding the plight of Mr Marlon James Noble (Mr Noble), an intellectually disabled prisoner at Greenough Regional Prison. It was revealed via the media in March 2011 that Mr Noble has spent 10 years in prison, without having been convicted of an offence, and last year his Home Leave Order was cancelled following a conviction on a prison offence under the *Prisons Act 1981* (the 'Prisons Act'). At that time, the process by which he was convicted of the prison offence appeared unusual and questions arose regarding why he had been in prison for almost all of his adult life despite never having been convicted of an offence.

The Department of Corrective Services (the 'Department') initiated, at the request of the Corrective Services Commissioner, Mr Ian Johnson (the 'Commissioner'), its own Review of the prison offence charge and its circumstances. The Minister for Corrective Services then announced in State Parliament on 23 March this year that I was to undertake an independent investigation into certain aspects of the matter as set out in the Terms of Reference (TOR).

#### 1.1. Methodology

This inquiry was undertaken in parallel with an internal review undertaken by the Department. On the request of the Commissioner I commenced discussions with the Assistant Commissioner, Professional Standards, Mr Terry Buckingham (the 'Assistant Commissioner'). It was decided that the Corrective Services Inquiry and my review would be most effectively achieved if undertaken concurrently. I learned that the Custodial Standards and Review team had already commenced the information collection and collation phase of their review, and that they intended to travel to Greenough Regional Prison as part of a routine review of operational compliance at the prison. Team members therefore intended to incorporate aspects of this particular review regarding Mr Noble, whilst at Greenough.

This report, focussed on the TOR, is an independent inquiry into events concerning Mr Noble and his prosecution over alleged illicit drug use following a "non-negative" finding of a screened urinalysis sample, taken upon re-entering Greenough after day release on 3 September 2010. I analysed the issues from a legal perspective this report provides

my assessment regarding the extent to which the Department carried out its statutory obligations.

I first met with the Assistant Commissioner to discuss the proposed review on 25 March 2011. I then met with him and Kerry Bond, Director, Standards and Review, to further discuss the background of the review on 20 April 2011. A subsequent meeting then occurred with Ms Bond on 23 May 2011, in the presence of my Research Assistant, to discuss the Department's first draft report outlining their internal review, findings and recommendations on 23 May 2011. To further clarify issues pertaining to the understanding of the drug testing process, procedure and the two analyst reports which are generated, I then met with Christine Anderton, Manager of Drug Strategy within the Offender Management and Professional Development Branch of the Department, with my Research Assistant, on 24 May 2011.

Having regard to the comprehensive nature of the Department's draft report and the information contained therein regarding the roles of the various employees in the urinalysis of Mr Noble, the decision to charge him with a Prisons Act offence and the prosecution of that offence, I did not find it necessary for me to undertake any examination of those matters from any employee of the Department. Nor did I find it necessary to question the Visiting Justice, Mr Ashley Taylor who presided over the hearing in which Mr Noble pleaded guilty to the charge of using prohibited drugs.

On 23 May 2011 I conducted my first interview with one of Mr Noble's supporters and met with Rebecca Andrich, Mr Noble's Advocate, in company with my Research Assistant to discuss the review and her work with Mr Noble. She kindly provided copies of correspondence between herself and the Department and the Mentally Impaired Accused Review Board. That meeting was subsequently followed by a trip to Geraldton with my Research Assistant to meet Ida Curtois, another of Mr Noble's Advocates, at her house on 27 May 2011. At that meeting I also interviewed Mr Noble personally at the home of Ms Curtois, an environment familiar to Mr Noble, whilst he was on day release from Greenough. Mr Noble's lawyer, Mr Matthew Holgate has also been contacted and has provided information to assist this review and assisted by providing copies of relevant correspondence between his office and the Department and the Board, and he also provided responses to specific requests for information.

Following these meetings, with the assistance of my Research Assistant, I have developed a draft report which I submitted to the Department for comment on 3 June 2011. The final report was then provided to the Minister for Corrective Services on 7 June 2011.

## 2. MARLON NOBLE

This Chapter sets out the circumstances surrounding Mr Noble's alleged aggravated prison offence charged pursuant to section 70(d) of the Prisons Act.

### 2.1. Background

Mr Marlon James Noble is an Indigenous man who was born in Carnarvon on 11 February 1982. He is now 29 years of age. During very early childhood, probably at the age of 4 months, he suffered meningitis and spent 8 months in hospital afterwards. He apparently suffered developmental delays and some hearing loss, and as a consequence was subsequently left intellectually impaired. His intellectual and adaptive functioning has consistently been assessed as in the intellectually impaired range although always with a caveat that the scores he has attained during testing may produce an underestimate of actual functioning. He has been identified as being well below average intelligence with cognitive difficulties and this mental impairment is irreversible. An assessment in 1995 identified that he had problems with literacy and numeracy but, despite this however, that he had some capacity for learning new verbal material when presented to him repeatedly although he is likely to become confused if given complex instructions. He was also noted to have problems expressing himself verbally. His mother sought the assistance of Disability Services and the Department of Community Protection because she was having difficulties managing him.

In 2001, when Mr Noble was 19 years of age, he was charged with two counts of Sexual Penetration of a Child Under 13 Years and three counts of Indecent Dealings with a Child 13 to 16 Years pursuant to the *Criminal Code 1913* (the "Criminal Code"). Mr Noble first appeared in the Court of Petty Sessions, as it then was (now Perth Magistrates Court), early in 2002 and he was thereafter remanded in custody for assessment.

At a very early stage it was identified by the Court that he had a mental impairment and subsequent assessments ensued. On 11 March 2003 he was eventually found by the court "unfit to stand trial", pursuant to Part 3 of the *Criminal Law (Mentally Impaired Defendants) Act 1996* (the "Mentally Impaired Defendants Act") as the *Criminal Law (Mentally Impaired Accused) Act 1996* was then known. Mr Noble was deemed unfit following assessments by three psychiatrists.

Pursuant to section 16 of the Mentally Impaired Defendants Act, following a determination of mental unfitness to stand trial, the court then had to determine whether to release Mr Noble unconditionally or make a custody order. A custody order was made pursuant to section 19(5) of that Act and Mr Noble's case was then transferred to the Mentally Impaired Accused Review Board (the "Board"). It should be noted that even though a custody order was made by the court, as Mr Noble was found mentally

unfit to stand trial, there was no finding of guilt with respect to the allegations under the Criminal Code.

Mr Noble's defence lawyer, Mr Matthew Holgate, recently asserted on ABC radio that Mr Noble "*would plead not guilty to these charges if he was given the opportunity*".[1] Based on a psychological report of Mary-Anne Martin, a forensic psychologist dated 20 June 2010, which concluded that with assistance Mr Noble now has the capacity to plead and stand trial, this would seem to be a reasonable statement. Mr Noble will not however have that opportunity, as in late 2010 the Director of Public Prosecutions filed a notice of discontinuance in the District Court advising that he no longer intends to continue with those charges. The court was advised that the decision to discontinue was taken in light of the substantial time Mr Noble has already spent in custody, which period far exceeds any term of imprisonment reasonably open to a court upon sentencing Mr Noble should he be convicted of all charges.

As a detainee under that Act his management and release considerations are overseen by the Board which is a section of the Prisoners Review Board within the Department of the Attorney General ("DotAG"). Pursuant to Part 5 of the Mentally Impaired Defendants Act the Board decided that Mr Noble was to be held at Greenough Regional Prison. In a case such as Mr Noble's where the mental impairment is not treatable and hospitalization is not appropriate, the alleged offender is required to be kept in a prison[2].

I have been made aware from correspondence provided by the Department that a five stage graduated plan for Mr Noble's safe release into the community was endorsed by the Board in 2006. The plan, in summary, was as follows:

- Escorted home leave to a suitable home leave supervisor (Mrs Ida Curtois).
- Home leave without directly being escorted by a custodial officer.
- Home leave with external carers.
- Progression to overnight stays.
- Progression to full time residency in the community with 24 hour supervised care.

It is noted that Mr Noble has been in prison for nearly 10 years. In 2008, he was granted day release for one day only, without overnight stays. During 2010, his day release was increased and he was granted two consecutive days a week within the community with the support of the Disability Services Commission ("DSC"). It has been noted that he has spent a considerable amount of time within the community, without

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[1] ABC Radio Interview with Damien Carrick (22 March 2011) http://www.abc.net.au/rn/lawreport/stories/2011/3169426.htm.

[2] See s 24(1) of the *Criminal Law (Mentally Impaired Accused) Act 1996.*

incident and has therefore reached stage five of the Board's graduated plan but that stage five has not been implemented to date.

Mr Noble has also been supported by a number of agencies which formed a working party to enable engagement in this plan since its endorsement. The working party, in line with the five stage plan, continues to meet on a regular basis to facilitate Mr Noble's progression towards eventual release.

### 2.2. The Allegations of Illicit Drug Use

During Mr Noble's 48 hour Leave of Absence ("LOA") on 2 September 2010, Ms Chantelle Slawinski, the Disability Support Worker who was supervising Mr Noble, offered him a Sudafed tablet as she believed that he was experiencing cold and flu symptoms whilst undertaking gardening jobs around her home. During my discussions with Mr Noble on 27 May, he told me that he had asked Ms Slawinski to give him a Panadol as he "had the flu bad". She told him that she did not have any so she gave him a Sudafed tablet instead, which he took. Ms Slawinski has since admitted this mistake as an accident and her explanation of events is supported by an affidavit dated 28 October 2010.

Mr Noble's 48 hours LOA is approved by the Board pursuant to section 27 of the Mentally Impaired Accused Act. Upon return to Greenough Mr Noble provided a supervised urine sample to the prison officer as required, as a condition of his day release. As noted in the Department's own internal report[3], some of the conditions of Mr Noble's LOA are anomalous. Normal Department practice is that when a LOA permit is granted to a prisoner, the submitting of a supervised urine sample upon return is not usually an imposed condition. Prisoners who are released on Reintegration Leave (*Policy Directive 66* refers) however, are required to provide this sample upon return.

On 8 September 2010 Greenough Prison received from PathWest a *Prison Drugs of Abuse Screen*[4] with regard to Mr Noble's urine sample of 3 September 2010. This PathWest laboratory report was returned with a "presumptive positive" result for amphetamines above the AS/NZS 4308:2008 cut-off levels of 300µg/L[5].

On 9 September 2010, PathWest sent Greenough the Analyst's Certificate[6] which contained the results of the Gas Chromatography Mass Spectrometry (GCMS) test carried out on Mr Noble's urine sample. The PathWest Analyst's Certificate stated that

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[3] See DCS Draft Report, at page 12 of 20.
[4] "Immunoassay Screening"
[5] Micrograms per Litre.
[6] See Form 1 of the Schedule to the *Prisons Regulations 1982*.

amphetamines were "not detected". No other drugs were detected in the sample. Accordingly the certificate established that analysis of the urine sample taken on 3 September 2010 from Mr Noble did not reveal any indication of illicit drug use.

I have discovered during my review that Mr Noble was charged on 7 October 2010 by a prison prosecutor with an aggravated prison offence pursuant to section 70(d) of the Prisons Act, based on the screening test results and an admission by Mr Noble. This is a flawed approach. The screening test does not establish the presence of illicit drugs, it does no more than suggest the desirability of a more sophisticated analysis. The issue consequence was that the conditions that were imposed on Mr Noble by the Superintendent of Greenough and thereafter the Board itself, were imposed in response to the "presumptive positive" initial screening test and not based upon the "not detected" Analyst's Certificate. The Analyst's Certificate was not taken into consideration at any stage of the initial disciplinary process prior to the determination of a conviction, despite what is required by Departmental policy and procedure.

Consequently, Mr Noble was then dealt with consistently with Departmental policy[7] which states that any prisoner convicted of a drug/alcohol offence in prison shall have their LOA program cancelled and is not to be considered for a further permit for leave for six months from the date of the offence. Subsequently, the Registrar of the Board was formally advised of the outcome of the charge and the increased security classification by the Superintendent of Greenough Regional Prison on 13 October 2010 and the Board subsequently determined on 15 October 2010 that Mr Noble no longer had approval for Home Leave in the community.

On 10 March 2011, Sentence Management Directorate of the Department was informed that the prosecution of Mr Noble in October 2010 was based only on the screening test result of 8 September 2010 and that the subsequent Analyst's Certificate from PathWest indicated that the sample was considered negative to amphetamines. Although it is clear that the Analyst's Certificate was received by the prison, there appears to have been a substantial lack of understanding of the implications of it and its contents. In particular, it appears to not have been understood that the screening test had no evidential value in terms of establishing the presence of any illicit drug, and that the only analysis which was capable of evidencing the presence of illicit drugs, the Analyst's Certificate, was negative. Worse, there is no record that the Analyst's Certificate was provided to the prisoner or his advisors or representatives. This constituted a failure to com0ply with Regulation 27(2) of the Prisons Regulations 1982. To fail to provide the Analyst's Certificate to Mr Noble, and for its presence and contents to have not been considered in the decision to prosecute is a serious departure from the process mandated by the Prisons Regulations. Moreover, it was not provided to, nor its

[7] See Department of Corrective Services *Policy Directive 66: Re-Integration Leave (RIL).*

presence and contents mentioned, to the Visiting Justice. This constitutes to my mind a fundamental flaw in the prosecution process which inevitably led to the decision of the Visiting Justice to accept Mr Noble's plea of guilty and convict Mr Noble.

The Department advised the Registrar of the Board verbally on 21 March 2011 that Mr Noble's conviction under section 70(d) of the Prisons Act was "unsound" and as a consequence he would be reviewed in line with Adult Custodial Rule 18[8] as a matter of urgency. The Department formally communicated (by letter) to the Board on 23 March 2011 that Mr Noble had been reviewed, setting aside the unsound conviction, and he was now classified as a minimum security prisoner thereby removing the primary barrier to the re-instatement of the home leave component of the program.

In a briefing note to the Corrective Services Minister from the Department's Deputy Commissioner for Offender Management and Professional Development, Ms Jackie Tang, she stated:

> [The Board] *had subsequently reviewed Mr Noble on two previous occasions (10 December 2010 and 14 January 2011) where there have been representations that Mr Noble's urine result from September 2010 was as a consequence of the provision of an over-the-counter medication supplied by a supervising disability carer during his LOA. [emphasis added]*
>
> *The* [Board] *had sought further information to clarify this possibility. Upon being advised by the Department of the unsound conviction the Board determined to re-instate the home leave provision of the five stage plan previously approved.*
>
> *The LOA Order signed on 22 March 2011 now allows for Home Leave to be in the company of at least one of the following people;*
>
> - *Ms Ida Curtois - Advocate;*
> - *Ms Rebecca Andrich - Advocate; and*
> - *All persons as approved by Mid West Regional Home Care Services (MWRHC).*

In regard to the "representations" referred to by Ms Tang in her correspondence to the Minister, I am only able to infer that the Board were in receipt of a letter from Mr Noble's Advocate, Ms Rebecca Andrich headed "RE: MARLON JAMES NOBLE – HEARING 10/12/2010" which was forwarded to Christine Kannis (who was Acting Registrar of the Board during the period in question) prior to Mr Noble's hearing on Friday 10 December 2010, in order for it to be tabled at that meeting. The letter states:

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[8] See *Adult Custodial Rule 18: Assessment and Sentence Management of Prisoners* at <http://www.correctiveservices.wa.gov.au/_files/prisons/adult-custodial-rules/ac-rules/ac-rule-18.pdf>.

*"As Mr Nobles Individual Disability Advocate I wish to provide some information for you to consider during his hearing.*

*I have been working with Mr Noble in excess of 5 years. It was extremely unfortunate that a recent urine sample was positive as Mr Noble, in my opinion, would NOT have deliberately or knowingly engaged in any recreational drugs as he is fully aware of the repercussions. During a visit to a support workers property, along with his allocated support worker for the day he was complaining of a "stuffy head" and could he have a panadol. Ms Slawinski gave him cold and flu tablets as believed it would help him more than a panadol. The Assistant Superintendent of the prison has stated he is unable to provide me with any further information on the testing of urine outcomes to substantiate for you the scenario of cold and flu tablets. I am hoping that the board has received all available information and the statutory declaration from the person responsible for administering the cold and flu tablets."*

Sharon-Lee Holland, Registrar of the Board, on behalf of the Chairperson of the Board, offered the following response to Ms Andrich in a letter dated 19 January 2011:

*"I write to you on behalf of the Chairperson of the Mentally Impaired Accused Review Board, the Honourable Justice Johnson. The Board reviewed Mr Noble's matters on 14 January 2011.*

*I view of Mr Noble's plea of guilty to a charge of using a drug (amphetamine) whilst on home leave, the Board would like to express its concern in relation to the baseless and unjustified view in your correspondence, dated 9 December 2010, that Mr Noble "would not have deliberately or knowingly engaged in recreational drugs as he is fully aware of the repercussions". The Board is further concerned of the impact such views may have on the quality of supervision provided to Mr Noble whilst on home leave.*

*The Board is not prepared to re-instate Mr Noble's home leaves until he manages to maintain a six month period with no positive urinalysis results. Mr Noble's matters will be reviewed again on 8 April 2011, as required by statute."*

In light of the information provided to the Board by the Department on 23 March 2011 the Board reviewed Mr Noble's LOA approval. Mr Noble has been granted two 48 hour LOA periods per week, each with overnight stays. The conviction of the prison offence has also been administratively set aside.

### 2.2.1. Mr Noble's recollection of the illicit drug use

I arrived in Geraldton in the presence of my Research Assistant, at the home of Ms Curtois on Friday 27 May 2011 to meet with her and Mr Noble. When we arrived at the house, Mr Noble was in the kitchen assisting Ms Curtois make scones and both welcomed us warmly. He was neatly dressed in casual clothes which were clean and well fitted. He was well built, although not overweight, and except for complaining that he had recently strained a muscle in his stomach whilst doing weights in the prison gym, seemed healthy. We were offered a hot beverage, and Mr Noble boiled the water and obtained three cups and made, without apparent difficulty, two cups of coffee and a cup of tea. He was initially quite shy, but demonstrated some social skills by maintaining eye contact whilst speaking and was courteous in allowing all people present the opportunity to converse. We spoke in further detail sitting down at the rear of the home. Mr Noble explained to me that he had commenced a lawn mowing and gardening round, and had purchased a cheap lawn mower and petrol driven "whipper snipper". He showed us leaflets which had recently been prepared, which he distributes to letterboxes. He explained that he also distributes fertilizer to local gardens and spreads it for the home owner. He explained the merit of using seaweed as a garden fertilizer. I found Mr Noble to be very open to answering questions, very energetic and he talked freely to me, while eating and smoking. At first instance I was impressed at his level of competency and politeness.

After approximately an hour, Ms Curtois went inside and left Mr Noble to talk freely with me, with my Research Assistant present, about the circumstances of the drug charge. I asked Mr Noble to recall the events as he remembered them, from the time he was on day leave when taking the Sudafed tablet, which occurred on 2 September 2010 whilst on day leave, to when he re-entered Greenough Prison on 3 September 2010 and he was asked to provide a urine sample. He was vehement that he has not taken any illicit drugs since a time several years in the past when he was caught smoking a cannabis cigarette in the prison. He explained the circumstances of that, but they are not relevant to the present inquiry. He told me he had the flu "bad" whilst at the home of Chantelle Slawinski, where he was doing some gardening. He asked her for a Panadol, but she had none so she gave him what he later learnt was a Sudafed tablet instead. He did not then know what a Sudafed tablet was.

Mr Noble then related his recollection of the events which followed and led to him losing, for a period, the opportunity to regularly leave the prison on supervised absences, which it was apparent impacted very heavily on his confidence of ever realising his hope of one day leaving the prison system forever.

He recalled that some time after he gave the urine sample following his visit to Chantelle, he was told by the prison Superintendent, who he referred to as Mr Gillieland, that "it was dirty". Mr Noble told me he replied "I don't take it, people know that". He said he kept saying "no, no, no".

I observed that he found it difficult to stay on topic and often went off on tangents and I had to lead him back to the question, which he occasionally left unanswered. The conversation itself seemed to take a lot of energy from him and he announced when we had concluded, which would have been about 30 minutes later, that he was tired. My opinion was that the stress of talking about the incident, rather than the interview with me itself, was a little overwhelming. However, I found him open, apparently honest, easy to talk to and I was impressed by his maturity, which I found to be beyond what I had originally expected.

### 2.2.2. The conduct of proceedings

Mr. Noble explained to me that he represented himself before the Visiting Justice, Mr Ashley Taylor. Mr. Noble told me that it felt that he was in the office with the Visiting Justice for 3 or 4 hours, there were 4 guards and the prosecuting officer. He asked if the guards could leave, to which request apparently Mr Taylor agreed. Then according to Mr. Noble, he asked if the prosecutor could leave, which he did leaving only the Justice and Mr Noble. He knew Mr. Taylor and remembered being told by him how lucky he was to not have someone else, "you lucky person, you can go back on home leave, never do that again". I questioned Mr. Noble about what he told the Justice, and he replied that he maintained the story which he said he had recently invented, about getting a pill from a person in a white car which drove by. He explained again that when he had denied any drug use to the Superintendent, he was thereafter continually told that "you have to", presumably being a reference to having used a drug on the particular day. He told me that there was a white car in the prison car park, so "I had a story in my head". He reiterated that the Visiting Justice, who told him "I was a lucky bloke, those screws could take you down the hole for 14 days, luckily I had him, he gave me a warning".

I later spoke with Mrs. Ida Curtois, who has had a keen interest in Mr Noble's welfare for many years, having known him and members of his family over the years. Apparently at a time prior to Mr Noble's mother's murder, Ms Curtois had promised Mrs Noble that if she was ever not able to look after Mr Noble, she would do so. Upon Mrs Noble's death, Ms Curtois has stepped in and assumed a parental role. Mr Noble refers to her as "grandma".

Before Mr Noble appeared before the Visiting Justice on 12 October 2010, he telephoned Ms Curtois and shortly thereafter, Ms Andrich, his other advocate. Both

those telephone conversations, which were initiated from within the prison, were recorded and transcripts of them were made available to me. I set out hereunder the passages of those calls in which Mr Noble discussed the discussions he had within the prison regarding the alleged drug usage. This material was available to, and apparently considered by, the prosecuting officer, but discounted because of Mr Noble's intellectual capacity. As can be seen, what he told both Ms Curtois and Ms Andrich is entirely consistent with what he told me at Geraldton on 27 May 2011.

Beginning of phone call 1

**IDA CURTOIS (ADVOCATE):** So what did you tell the unit manager yesterday?

**MR NOBLE:** He said, "Well, a car come around," or something. He said a car come around. I don't know them, but (indistinct) car come around to my house. I don't know them. He said that. I don't know them.

**IDA CURTOIS (ADVOCATE):** You told him a car came to your house?

**MR NOBLE:** Yeah.

**IDA CURTOIS (ADVOCATE):** You did?

**MR NOBLE:** Yeah. Some (indistinct) brand-new one that's come around there, but no-one'd come around home.

**IDA CURTOIS (ADVOCATE):** All right. So you told them that a car had come to your house, or someone told you?

**MR NOBLE:** —and – for that, and, "I heard one of your school mates come round to your house, I heard." No—

**IDA CURTOIS (ADVOCATE):** Who said that?

**MR NOBLE:** I said that to him.

**IDA CURTOIS (ADVOCATE):** You said one of your school mates came around?

**MR NOBLE:** Yeah.

...

**IDA CURTOIS (ADVOCATE):** Why did you say that?

**MR NOBLE:** I had to say it.

**IDA CURTOIS (ADVOCATE):** Why?

**MR NOBLE:** I don't know.

...

**IDA CURTOIS (ADVOCATE):** So they gave you something. So you actually took something?

**MR NOBLE:** I had to do it. There's a mistake. I told him there's a mistake, there's a problem. There's a mistake.

**IDA CURTOIS (ADVOCATE):** You took something?

**MR NOBLE:** No. It's come up.

**IDA CURTOIS (ADVOCATE):** What did they give you?

**MR NOBLE:** Nothing. Nothing.

**IDA CURTOIS (ADVOCATE):** Well —

**MR NOBLE:** I'm telling you the truth, nothing.

**IDA CURTOIS (ADVOCATE):** I think the whole lot's frigging lies, because—

**MR NOBLE:** I'm not lying, I'm not lying.

...

**MR NOBLE:** No-one came around.

**IDA CURTOIS (ADVOCATE):** Well, what are you talking about then?

**MR NOBLE:** I'm trying to get out of my trouble; I just tried to get it out of there.

**IDA CURTOIS (ADVOCATE):** Well, you won't get out of trouble by telling lies.

**MR NOBLE:** I have to.

**IDA CURTOIS (ADVOCATE):** Why do you have to tell them that someone came around when it's a bloody lie?

**MR NOBLE:** Yeah.

**IDA CURTOIS (ADVOCATE):** Eh?

**MR NOBLE:** Yeah.

**IDA CURTOIS (ADVOCATE):** Marlon!

**MR NOBLE:** No, tell him – you ring up tomorrow to him (indistinct) I'm lying and I'm sorry – you ring up to him.

**IDA CURTOIS (ADVOCATE):** Ring up who?

**MR NOBLE:** Mr Gilliland.

**IDA CURTOIS (ADVOCATE):** Well, you're in deep shit for bloody lying.

**MR NOBLE:** All the officers pushing me.

**IDA CURTOIS (ADVOCATE):** To make you say something?

**MR NOBLE:** Yeah. And push me and push until (indistinct) over the edge.

**IDA CURTOIS (ADVOCATE):** And so you had to say something.

**MR NOBLE:** Yeah, pushing and pushing me.

**IDA CURTOIS (ADVOCATE):** Jesus! Okay.

**MR NOBLE:** I had a yarn with Mr Barton. I came in.

**IDA CURTOIS (ADVOCATE):** When, today?

**MR NOBLE:** No, on Wednesday.

**IDA CURTOIS (ADVOCATE):** Yeah, yeah, I know. Yeah.

**MR NOBLE:** And, yeah, he's telling me – telling me, "I'll have a yarn" – he said he'll have a yarn with Mr Gilliland for me.

**IDA CURTOIS (ADVOCATE):** Yeah.

**MR NOBLE:** And he's trying to (indistinct) never work.

**IDA CURTOIS (ADVOCATE):** Yeah, but when you spoke to Mr Barton, was that the truth?

**MR NOBLE:** Yep. That's the truth. I told him that.

**IDA CURTOIS (ADVOCATE):** So why did you tell him someone came around to your house?

**MR NOBLE:** I'm telling the truth (indistinct) pushing me where I make – I'll make them say it, but – he make me say it.

**IDA CURTOIS (ADVOCATE):** Well, I'll get in touch with Michelle, because she'll know if someone came around.

**MR NOBLE:** Tell her (indistinct) that care come around – nothing.

**IDA CURTOIS (ADVOCATE):** No, I'll ask her. I won't tell her anything. But I just can't understand why you've finished up getting pushed into telling the bloody prison that someone had come around because you just felt you had to give them an answer – didn't you?

**MR NOBLE:** Yeah.

End of phone call 1

Beginning of phone call 2

**REBECCA ANDRICH (ADVOCATE):** Have you spoken to grandma?

**MR NOBLE:** Yeah, grandma (indistinct) that happy. I rang her just then, back 10 minutes ago.

**REBECCA ANDRICH (ADVOCATE):** Okay. So who were you talking to yesterday in the interview?

**MR NOBLE:** The super and a couple of officers.

**REBECCA ANDRICH (ADVOCATE):** Yeah?

**MR NOBLE:** (indistinct)

**REBECCA ANDRICH (ADVOCATE):** Did you tell grandma what you said?

**MR NOBLE:** Yeah.

**REBECCA ANDRICH (ADVOCATE):** Yeah? What'd you say?

**MR NOBLE:** (indistinct) ring up tomorrow.

**REBECCA ANDRICH (ADVOCATE):** Okay, because apparently, yeah, whatever you said in the interview was, yeah, sort of contradicting what we'd said.

**MR NOBLE:** (indistinct) I don't take it.

**REBECCA ANDRICH (ADVOCATE):** No, I know, mate, but that's why we were trying to —

**MR NOBLE:** (indistinct)

**REBECCA ANDRICH (ADVOCATE):** Well, it's not that. We're just trying to get to the bottom of the truth and what had happened. So I just wondering what you'd said to the inspector.

**MR NOBLE:** Yeah (indistinct) setting me up.

**REBECCA ANDRICH (ADVOCATE):** Is that what you think? What makes you think that?

**MR NOBLE:** I told him that somebody is setting up.

**REBECCA ANDRICH (ADVOCATE):** Mm.

**MR NOBLE:** (indistinct) tables on Wednesday night – on the Wednesday (indistinct) Wednesday night. I don't take nothing – no drugs on a Wednesday.

**REBECCA ANDRICH (ADVOCATE):** Mm.

**MR NOBLE:** (indistinct) results come back.

**REBECCA ANDRICH (ADVOCATE):** Yeah, all right. You'll just have to wait for them and —

**MR NOBLE:** Yeah, wait for the DNA to come back.

**REBECCA ANDRICH (ADVOCATE):** Mm.

**MR NOBLE:** Yeah. They're saying (indistinct) take it for 10 days.

**REBECCA ANDRICH (ADVOCATE):** Yeah.

**MR NOBLE:** I said (indistinct) now for three days.

**REBECCA ANDRICH (ADVOCATE):** Mm.

**MR NOBLE:** (indistinct) ring up Mr Gilliland and tell him, you know, but (indistinct) gone home.

**REBECCA ANDRICH (ADVOCATE):** Yeah. Well, wait till next – you'll have to wait till next week now, mate, if they haven't got the results from that second one.

**MR NOBLE:** (indistinct)

**REBECCA ANDRICH (ADVOCATE):** And you'll just have to think, you know, if there was a time where someone did give you headache tablets, because like Chantelle said, she gave you a cold and flu tablet. You were whingeing about your cold when you were gardening around there.

**MR NOBLE:** Yeah. I should have – and I should have clicked on probably. In my head, Chantelle gave me something. I don't know.

**REBECCA ANDRICH (ADVOCATE):** Yeah, maybe not, you know. I mean, I wouldn't have thought that that would have even showed up, but —

**MR NOBLE:** Yeah.

**REBECCA ANDRICH (ADVOCATE):** — who knows? I don't know. Don't know.

**MR NOBLE:** I don't know myself. I've been down here now – three days down this stupid place.

**REBECCA ANDRICH (ADVOCATE):** Yeah. Yep.

**MR NOBLE:** (indistinct) yeah.

**REBECCA ANDRICH (ADVOCATE):** Yep. Well, if you think – yeah, just keep thinking and – you know. So what sort of things did you say to this superintendent?

**MR NOBLE:** I (indistinct) I have to tell a lie.

**REBECCA ANDRICH (ADVOCATE):** Why did you have to?

**MR NOBLE:** I have to (indistinct) I took it. I had to take it. I had to (indistinct)

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**REBECCA ANDRICH (ADVOCATE):** Why did you say that if you didn't?

**MR NOBLE:** No, I'm not – he's pushing me, pushing me and pushing me, pushing me.

**REBECCA ANDRICH (ADVOCATE):** Oh, so you didn't, but he was pushing you to say you took something and —

**MR NOBLE:** Yeah.

**REBECCA ANDRICH (ADVOCATE):** Oh, okay.

**MR NOBLE:** Pushing me.

**REBECCA ANDRICH (ADVOCATE):** No. Well, you just have to tell the truth. You don't ever lie about anything, no matter what the consequences. You never, ever, ever lie.

**MR NOBLE:** I'm not.

**REBECCA ANDRICH (ADVOCATE):** No, that's good.

**MR NOBLE:** Well, 50 per cent – 100 per cent I'm lying.

**REBECCA ANDRICH (ADVOCATE):** Mm.

**MR NOBLE:** (indistinct) that, yeah. Yeah.

**REBECCA ANDRICH (ADVOCATE):** Yeah. Well, just – I mean, I don't know the rules and that out at the prison, but if you're feeling you're being pressured, then maybe say, "Can I have someone with me to continue this" – yeah. "Can I have my advocate with me?" or something.

**MR NOBLE:** Yeah.

**REBECCA ANDRICH (ADVOCATE):** But I don't know, mate. I don't know if they allow that. But, yeah, you – don't be pressured into saying any lies, no matter who, even if it was grandma or me or anyone. You never, ever agree to tell a lie, because it always comes back and bites you in the bum.

**MR NOBLE:** Yeah, yeah.

**REBECCA ANDRICH (ADVOCATE):** Yeah, so tell the truth.

**MR NOBLE:** Yeah.

**REBECCA ANDRICH (ADVOCATE):** You know, there's no excuse – and we all have said, don't ever, ever lie. And if you didn't, you didn't and there's – yeah. If you did, you did tell – you just, you know —

**MR NOBLE:** (indistinct) about three or four officers in that – in the room with me —

**REBECCA ANDRICH (ADVOCATE):** Mm.

**MR NOBLE:** — and that.

**REBECCA ANDRICH (ADVOCATE):** Because they're – you know, they've got a job to do and they've got to get to the bottom of it. You just need to see if there was any – think if there was anyone inside or outside that maybe, you know, has given you a headache tablet and what have you and, like Chantelle said, "Well, he had a cold. I gave him a Sudafed." But, you know, if she just gave you one or two, I wouldn't have thought it would have showed up in your tests. I don't know.

**MR NOBLE:** Yeah.

**REBECCA ANDRICH (ADVOCATE):** We'll have to wait, but – you know, it doesn't matter who it is, you never, ever, no matter what, agree to tell a lie. You know —

**MR NOBLE:** Yeah. Yeah. I told – I told the officer one of the medics gave me something after the – when I asked one of the medics officers.

**REBECCA ANDRICH (ADVOCATE):** Mm.

**MR NOBLE:** (indistinct) given Mr Noble drugs or – any Panadol or morphine or anything like that.

**REBECCA ANDRICH (ADVOCATE):** Yeah, but any medic that approves them will have that all documented, so that will be okay.

**MR NOBLE:** Yeah, you —

**REBECCA ANDRICH (ADVOCATE):** But they have to write it down —

**MR NOBLE:** Yeah.

**REBECCA ANDRICH (ADVOCATE):** — you know. Yeah, if they've given something and you haven't remember or, you know, getting your weeks confused —

**MR NOBLE:** Yeah, I know (indistinct)

End of phone call 2

Having regard to the Analyst's Certificate dated 9 September showing no illicit drugs detected, the consistency between what he told me at Geraldton on 27 May 2011 about being pressured to come up with an explanation for the "dirty" urine sample, and the "story" about a driver in a white car, and how he explained the matter to both Mrs. Curtois and Mrs. Andrich in September 2010, I conclude that Mr. Noble fabricated the story that he was given a tablet by a driver in a white car whilst gardening at Ms Slawinski's home whilst on home leave, and that he therefore wrongly pleaded guilty to the prison offence.

### 2.2.3. The capacity of Mr Noble to represent himself

According to the psychological report of Mary-Anne Martin, a forensic psychologist dated 20 June 2010, which concluded that with assistance, Mr Noble now has the capacity to plead and stand trial on the criminal charges he was then facing, it would seem likely that he was also capable, in September 2010, of pleading to a charge alleging a prison offence. Notably however, in her report, Ms Martin refers to the cognitive impairment from which he suffers which affects his expressive language and verbal comprehension for complex information. She also notes his developing problem solving capacity and ability to deal assertively with life's problems. She reiterated however, his need for support and guidance.

When he was faced with the predicament in September 2010 after being told that the test had shown his urine sample to be dirty, that he had to come up with an explanation and that he was lucky that the Visiting Justice would merely issue a warning and not adversely affect his home leave, it seems to me that he was ill equipped intellectually to maintain his earlier denials. The failure of the Superintendent to comply with Regulation 27(2) and provide him with the Analyst's Certificate which established the absence of any illicit drugs in his urine sample, merely added to the disadvantage he already suffered.

In some respects it is artificial to review his capacity to represent himself on the prison charge, when the fact that the critical piece of evidence, the Analyst's Certificate which said that there were no drugs detected, was not disclosed to him and he had actually been advised that the evidence was to the contrary. Whilst section 76 of the Prisons Act prohibits a prisoner being represented by a legal practitioner at the hearing of a prisons offence, the Superintendent or Visiting Justice may appoint a person nominated or agreed to by the prisoner or in the absence of such nomination or agreement, some other person to assist the prisoner and to represent him in the proceeding. It seems to me to be apparent that every person

suffering cognitive impairment to the extent of Mr. Noble would invariably require the appointment of a person to assist during any proceeding for a prison offence.

## 2.3. Legal Issues

This Chapter deals with the rules of natural justice and their applicability to administrative hearings. It then moves on to dealing specifically with the rules of natural justice in the context of the right to representation, with specific regard to Mr Noble.

The admissibility and relevance of the evidence in Mr Noble's case is also examined within the legal context.

### 2.3.1. The Rules of Natural Justice and "representation"

Offences under the Prisons Act are deemed by the Department to be administrative in nature for the purpose of instilling compliance with the rules and regulations that benefit the good order and management of a prison. Breaches of the Prisons Act fall into the category of Criminal Law if they are an "aggravated prison offence" pursuant to section 70 of the Prisons Act. However, section 73(1)(b) allows a Visiting Justice to hear a charge under section 70 as a "minor offence":

> **73. Visiting justice and aggravated prison offences**
>
> *(1) Where a charge of an aggravated prison offence alleged to have been committed by a prisoner is referred to a visiting justice, the visiting justice may, as he thinks appropriate and having regard to the nature and particulars of the alleged prison offence and the extent of his powers under section 78 —*
>
> *(b) inquire into and determine the charge as a minor prison offence.*

The Visiting Justice shall call upon the prisoner to admit or deny the charge and shall endorse the charge with a note of whether the prison admits or denies that charge. By the Visiting Justice '*having regard to the nature and particulars of the alleged prison offence*' and the extent of his powers as a Visiting Justice, he may use his own discretion to decide which course of action is more appropriate. If the charge is dealt with as a minor prison offence, as it was in Mr Noble's situation, the Visiting Justice is bound simply by the procedures contained in the Prisons Act and Prisons Regulations. This means, inter alia, that there is no right to legal representation, that the normal rules of evidence do not apply and that there is no appeal system.

As the High Court held in *Stratton v Parn*[9], it is clear that the case is thereby removed from '*the domestic area of prison administration*'. This means that the normal rules of

[9] (1978) 138 CLR 182.

evidence and proof apply, the prisoner is entitled to legal representation and there is a clear appeal system, with respect to both conviction and sentence.

The Supreme Court of Western Australia has stressed that the decision under section 73 is one for the Visiting Justice and is not a question of the prisoner's preferences. In *Roser v Fisher*[10], the prisoner was charged with '*using a drug not lawfully issued*' contrary to section 70(d). He requested that the matter be dealt with as an aggravated offence before a magistrate or two Justices, but he Visiting Justice chose to deal with the charge as a minor prison offence. The Supreme Court declined to interfere with this decision on the grounds that it was a matter for the Visiting Justice. As *Kucynski*[11] also shows, the decision of the Visiting Justice is only open to challenge if there has been a breach of natural justice or other procedural requirements. It cannot be reviewed on its merits.

The rules of "natural justice" constitute a set of obligations imposed on decision-makers to ensure that parties have a fair opportunity to prepare and present their case and that the decision is free from bias on the part of the decision-maker. The rules of natural justice are best understood as procedural standards and as Mason J stated in *Kioa v West*[12]:

> *"...there is a Common Law duty to act fairly, in the making of administrative decisions which affect rights, interests or legitimate expectations, subject only to the clear manifestation of a contrary statutory intention...What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting."*

Mason J's threshold question which analyses whether natural justice applies or not in the circumstances of a case, is applied by the decision-maker when inquiring into whether there is a "clear contrary statutory intention" to expressly prohibit the rules of natural justice from applying.

It can be seen that in some other provisions of the Prisons Act[13] the rules of natural justice have been expressly excluded by the words, "*[t]he rules known as the rules of natural justice (including any duty of procedural fairness) do not apply to or in relation to...*". Because the Prisons Act expressly excludes natural justice in surrounding provisions, but does not do so in Part VII, the strong implication is that Part VII

[10] (1996) 86 A Crim R 149.
[11] (1994) 72 A Crim R 568.
[12] (1985) 159 CLR 550 at 584-585.
[13] See in particular – sections 15S(2); 15U(3); and 66(9) of the ***Prisons Act 1981*** where it states "*The rules known as the rules of natural justice (including any duty of procedural fairness) do not apply to or in relation to...*".

relating specifically to prison offences must be read as subject to the rules of natural justice. If Parliament had intended the rules of natural justice not to apply to prison offences and hearings, they would have expressly excluded them.

In the case of Prisons Act offences, the Department has stated in their prosecutor training manual[14], that the rules of natural justice are governed by legislation, including the Prisons Act[15]; Prisons Regulations[16]; and the Department's internal Operational Instruction No 2.[17] The fact that the Department has devoted modules within their prosecutor training manuals to natural justice also evidences that the rules of natural justice apply to the prosecution of prison offences.

Representation

There are two limbs to assessing the content question with regard to natural justice, which will only apply once the threshold test has been met and the rules of natural justice have been found to be applicable:

1. *"the hearing rule"* – the right of a person to be heard; and
2. *"the rule against bias"* – the duty of a decision-maker to make a decision free from bias.

The right to representation subsists within the "hearing rule" and that notion of a right to a fair hearing. At Common Law, the rule regarding legal representation is that *"a person entitled to an oral hearing is also entitled, subject to statute, to be legally represented"*[18]. In section 76 of the Prisons Act, that entitlement is expressly denied. Section 76 of the Prisons Act states:

> ***76. Prisoner not to be legally represented***
> *(1) A prisoner shall not be represented by a legal practitioner in proceedings under this Part before a superintendent or visiting justice.*
> *(2) If the superintendent or a visiting justice is satisfied after making appropriate inquiries that a prisoner who is charged with a prison offence does not for any reason comprehend sufficiently the nature or circumstances of the alleged offence or the nature of the proceedings, the superintendent or visiting justice, as the case may be, may appoint a person nominated or agreed to by the prisoner, or in the absence of such nomination or agreement, some other person to assist the prisoner and represent him in the proceedings.*

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[14] *Conducting Prison Prosecutions* (Training Module 2: Natural Justice).
[15] See ss 74-75.
[16] See r 66-67.
[17] Re "Prison Charges".
[18] *R v Board of Appeal, Ex parte Kay* (1916) 22 CLR 183.

Subsection (1) confirms that a prisoner cannot have legal representation during proceedings for a Prisons Act offence. However, subsection (2) provides a discretionary power for the Superintendent or Visiting Justice to appoint a person to represent the prisoner charged with the offence. The Department's training manual *Conducting Prison Prosecutions* states the following in relation to subsection (2):

> *Section 76(2) gives further discretion to the hearing authority to allow another person to represent the prisoner charged;* ***providing****, the prisoner does not comprehend sufficiently the nature of the circumstances of the alleged offence or the nature of the proceedings. This sub-section is designed to facilitate for prisoners who, eg. by reason of their culture, mental capacity or their non-comprehension of the English language, can be assisted in presenting their version of events. This is where a skilful prosecutor will be of great assistance to the hearing authority in ensuring the prisoner leaves the Hearing having been given every opportunity to state his case. Interviewing the prisoner charged prior to the Hearing will give you a better understanding of his comprehension of the proceedings. By exercising flexibility and empathy towards prisoners in this situation you will quickly gain a reputation for fair play and in turn gain respect.*
>
> *This subsection is not designed for prisoners who fully understand the nature of the circumstances of the alleged offence or are conversant with the nature of the proceedings. It is not for prisoners to get another person to represent them because that person may have some expertise or familiarity with the protocol of a Hearing.*

In Australia, the leading authority on the right to representation is *Cains v Jenkins*[19]. That case arose out of a dispute between the applicant and his trade union. At a committee meeting called to hear charges against him, he asked that he be allowed to be accompanied by an articled clerk whose function would be to observe proceedings and advise him. This request was refused. The Full Federal Court (Sweeney, St John and Keely JJ) held that, in denying him the right to have the assistance of the clerk, the committee had not denied him natural justice. In so finding, the court took account of the applicant's capacity to present this case without reliance on legal representation. It suggested that the position might have been different if the applicant had been a deaf mute or a migrant with no English. The position would also vary according to the seriousness of the matter and the complexity of the legal and factual issues involved.

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[19] (1979) 28 ALR 219.

*Cains v Jenkins* was discussed and applied by the Federal Court in *Krstic v Australian Telecommunications Commission*[20]. *Krstic* involved an application for judicial review of a decision of a review tribunal considering the termination of the employment of an officer who was on probation. Woodward J held that while in the exercise of its discretion the tribunal might permit legal representation the applicant had not been denied natural justice when the tribunal ruled that she was not entitled to be represented. This was because the applicant was capable of conducting her case without representation and was allowed to consult a union official during adjournments.

Woodward J stated[21]:

> *The question whether a person in the applicant's position should be allowed assistance or representation by a person other than a lawyer is more difficult. In my view it depends upon the ability of the person concerned to conduct his or her own case.*
>
> *A person with a tertiary qualification and a normal amount of self-confidence should require no representation or assistance. But even that person might ask to have a friend present, for reassurance and, perhaps, consultation at times. A tribunal such as that in the present case would, in my view, be well advised to grant such a request, unless there was good reason for rejecting it.*
>
> *At the other end of the scale, a person having a low standard of education, and perhaps some difficulty with the English language, who is lacking in self-confidence, may be quite incapable of adequate representation, and only able to put a case through a friend or union representative – or, if these are not available, a lawyer. Such an application should clearly be granted.*

When oral evidence or argument is received by a tribunal, there is no general right to legal or lay representation as a matter of natural justice. However, that is not to say that in all cases a tribunal can refuse it with impunity. Whether representation is necessary to secure a fair hearing depends on all the circumstances of the particular case. The same flexibility applies to domestic tribunals whose discretion regarding whether representation will be allowed is one with which courts have shown a particular reluctance to interfere.

The seriousness of the matter and the complexity of the issues, factual or legal, may be such that refusal to allow representation would offend the principles of natural justice. The ability of the person to present his or her own case is a central consideration. There are some who, for reasons of background, temperament or intellect, have difficulty in presenting a case, especially where the issues and the

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[20] (1988) 20 FCR 486.
[21] at 491.

proceedings are complex. It has been observed that whether a "deaf mute or migrant with no English should have representation is a question that could have a different answer to the same question about a Queen's Counsel"[22]. The Full Federal Court endorsed *Krstic* in *WABZ v Minister for Immigration and Multicultural and Indigenous Affairs*[23]. French and Lee JJ identified four factors as relevant in relation to a hearing before an administrative tribunal:

> (1) *The applicant's capacity to understand the nature of the proceedings and the issues for determination.*
> (2) *The applicant's ability to understand and communicate effectively in the language used by the Tribunal.*
> (3) *The legal and factual complexity of the case.*
> (4) *The importance of the decision to the applicant's liberty or welfare.*

The assessment must necessarily take into account the character of the tribunal, and fairness between the parties. Regard must be had to the gravity of the matter. There is no right to representation by reason only that a person is facing disciplinary charges, or that livelihood is at stake. However, even in promotion appeals, the determination of allegations of serious misconduct might make the circumstances sufficiently exceptional to require cross-examination by counsel. A tribunal could readily take the view that legal representation is desirable where a young employee be appointed permanently after a period of probation is not, of its nature, one which requires lawyers to assist in the decision. It is not procedurally unfair to refuse legal representation in an informal disciplinary inquiry from which there is a full right of appeal at which the appellant is entitled to appear personally and be represented by counsel, a solicitor or agent.

The rules of natural justice do not extend to a requirement that legal representation be provided to persons appearing before administrative tribunals. Nor can natural justice dictate that a hearing may not proceed unless a person, who is entitled to be legally represented, is provided with legal representation at public expense. The "Dietrich principle"[24], which provides that proceedings may be permanently stayed until an indigent person is provided with legal representation, or resources for such representation, applies to criminal proceedings where the person is charged with a serious offence. It is based on, and derives from, the accused's right to a fair trial. The decision whether to grant a stay is thus to be exercised "by asking whether the trial is likely to be unfair if the accused is forced on unrepresented". The principle does not apply to the protection of a witness at an inquiry, the interests of whom are

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[22] See *Cains v Jenkins*, per Sweeney and St John JJ, at 198.
[23] (2004) 134 FCR 271.
[24] *Dietrich v The Queen* (1992) 177 CLR 292.

different from those of an accused person in a criminal trial. The fact that publicly funded legal assistance is provided to applicants for refugee status does not of itself expand the content of natural justice so as to require legal assistance to be provided at the early stages of an investigation into a claim for refugee status. Nor, as a general rule, does a statutory requirement to afford, on request, all reasonable facilities for obtaining legal advice, impose a positive obligation to ensure that such advice is provided at public expense. However, procedural fairness may require proceedings to be adjourned, or the time for making submissions extended, pending an application for legal aid, at least where the issues are complex and the matter is of severe consequence.

In the absence of representation, even a reasonably competent person may wish a friend (commonly known as a "McKenzie friend"[25]) to be present at a hearing for consultation and assistance in taking notes. A tribunal may be well-advised to permit and facilitate this procedure. To place artificial restrictions on a party's ability to communicate with a friend may be unnecessary and unhelpful, but involves no procedural unfairness, at least where the party is otherwise competent and has the opportunity to receive advice and assistance during adjournments. In prison disciplinary proceedings where no one has the right to attend without the permission of visiting justices, the assistance of a friend is at the discretion of the justices.

It is also important to note that intellectually impaired prisoners are often at a disadvantage in contrast to other non-intellectually impaired prisoners when it comes to understanding and representing themselves well before hearings and tribunals. An Australian study conducted by the University of South Australia[26] aimed to establish whether prisoners with significant intellectual impairments (IQ < 70)[27] have an accurate understanding of the court system. The authors, Parton, Davy and White stated, in summing up the literature, at page 97:

> *"People with an intellectual disability are more likely to be detained for questioning and/or arrested (Cockram, 1998; Hodgins, 1992, Lyall, Holland, & Collins, 1995) and fail to understand their legal rights (Attorney-General's Department, 1995; Cockram, Jackson & Underwood, 1998; Howard & Tyrer, 1998; Ierace, 1989; Jackson, Cockram, & Underwood, 1994). They are also more likely to confess to a crime they did not commit due to their acquiescence and desire to please authority figures (Bull, 1995; Cockram et al, 1998; Howard & Tyrer, 1998, Turk, 1989) and are more suggestible (Prosser & Bromley, 1998; Turk, 1989)."*

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[25] *McKenzie v McKenzie* [1970] 3 All ER 1034 (CA).
[26] Felicity Parton, Andrew Davy and Jack White: An Empirical Study on the Relationship Between Intellectual Ability and an Understanding of the Legal Process in Male Remand Prisoners, (2004), Volume 1, *Psychiatry, Psychology and Law*, 96 – 109.
[27] Note: Marlon Noble's IQ has been reported at <70.

Parton, Davy and White concluded at 104:

> *"The findings of this study demonstrate that individuals whose IQ falls in the intellectual disability range have a lot of difficulty in understanding court procedures. They are also likely to possess characteristics which seriously disadvantage them in the criminal justice system, including difficulties in their expressive and receptive skills, concrete thinking patterns, memory problems, short attention span, a desire to please others (particularly authority figures), suggestibility, inability to understand their rights, impaired judgment, pretending to understand what is being said to them and attempting to conceal their disability..."*

The findings of this study are reasonably appropriate to demonstrate the disadvantages faced by intellectually impaired individuals not only in a court setting but in an administrative tribunal setting such as a prison offence hearing before a Visiting Justice. The results conclude that intellectually disabled prisoners, such as Mr Noble, if not given an opportunity to be represented by an advocate or support person, may be unable to provide sufficient evidence to a Visiting Justice and may be led or intimidated by authority figures. Therefore they may also be unable to provide an accurate recollection of events or argument in their favour which in turn supports the view that prisoners, such as Mr Noble, should be represented by a support person in these settings and to deny Mr Noble of this right may therefore equate to a breach of the rules of natural justice.

### 2.3.2. The Evidence

<u>The Analyst's Certificate</u>

Pursuant to the Department's Service Agreement with PathWest for the provision of offender drug analysis, special conditions apply to urine samples received from all prison locations. The Service Agreement states:

> *Urine samples received from ALL prison locations must be screened and all presumptive positive indications MUST be confirmed for prosecution purposes. An Analysis Certificate must be made available as soon as is practicable.*
>
> ...
>
> *Adult Custodial require confirmation testing by either GCMS or LCMS be performed to confirm ALL classes of drugs that show up DETECTED over the AS4308 2008 cut-off level during the screen test. An Analysis Certificate is required for ALL confirmations.*

Pursuant to section 205 of the Department's Standing Order B9 *Procedure for Testing Alcohol and Drug Offences*, no charges in relation to urine testing are to be formulated until receipt of the Form 1, Analysts Certificate *[emphasis added]*. This is even though the following words are included on the initial PathWest screening report:

> *"Note: This is a preliminary screening test result. CONFIRMATION of 'DETECTED' results by Gas Chromatography Mass Spectrometry will follow."*

On 9 September 2010, PathWest sent Greenough the Analyst's Certificate[28] which contained the results of the Gas Chromatography Mass Spectrometry (GCMS) test carried out on Mr Noble's urine sample. PathWest's Analyst's Certificate confirmed that amphetamines were "not detected". The following wording appeared on the Analyst's Certificate:

> *I certify that I have analysed the said sample and the result of such analysis is as follows:*
>
> *Amphetamine, methylamphetamine and MDMA not detected by GCMS above the AS/NZS 4308:2008 cut off threshold of 150µg/L.*
> *Pseudoephedrine and phentermine not detected by GCMS above the AS/NZS 4308:2008 cut off threshold of 500µg/L.*
>
> *Laboratory confirmation has been carried out in accordance with Section 5 of AS/NZS 4308:2008.*

Regulation 27 of the Prisons Regulations requires that an Analyst, who receives a sample pursuant to Part IIIA of the Regulations, provides an Analyst's Certificate with respect to that sample, in the form prescribed by Form 1 of the Schedule to the Regulations. The Superintendent must cause a copy of that Certificate to be served on the Prisoner from whom the sample was taken, once it has been received.

> ***27. Analyst to give certificate***
> *(1) Upon completion of an analysis by the relevant approved analysis agent the analyst shall make a certificate in the form of Form 1 of the Schedule and shall forward that certificate to the superintendent of the prison in which the prisoner is in custody.*
> *(2) The superintendent shall cause a copy of the certificate referred to in subregulation (1) to be served upon the prisoner from whom the sample was taken or obtained.*
> *(3) For the purposes of these regulations, an analyst is a person appointed as an analyst under the Health Act 1911 and employed by an approved analysis agent.*

[28] See Form 1 of the Schedule to the *Prisons Regulations 1982*.

I am satisfied that Regulation 27(1) has been complied with and PathWest provided the Certificate in the correct form to the Superintendent of Greenough. This Certificate was dated 9 September, six days after the sample was taken. Following this however, I have not received any evidence to suggest that Mr Noble was ever given a copy of this Certificate, before or after the prosecution for the offence pursuant to section 70(d) of the Prisons Act and the Superintendent therefore appears to have failed to comply with Regulation 27(2).

As mentioned previously when looking at the rules of natural justice, I understand after meeting with Mr Noble and his Advocates that he is unable to read. Despite this, Regulation 27(2) still needs to be complied with. Mr Noble's reading inability reinforces the necessity for him to be offered a support person during any hearing, and does not obviate the necessity that a copy of the Certificate be provided to him, so he may pass it to an appropriate person, such as his lawyer or advocate.

Regulation 28 allows the Analyst's Certificate to be admitted into evidence against a prisoner charged with a prison offence. It is held to be "prima facie" evidence of the matters contained and certified within the certificate itself, including a "non-negative" or "negative" confirmation of the presence of drugs, above the prescribed threshold.[29] Regulation 28 provides:

> ***28. Admissibility of analyst's certificate***
> *The certificate referred to in regulation 27 shall be admissible in evidence against a prisoner charged with a prison offence and shall be prima facie evidence of the matters certified in the certificate.*

Importantly, the Analysts' screening test report, unlike the Analyst's Certificate, is *not* deemed to be prima facie evidence of the matters asserted therein.

The Record of Proceedings

Regulation 66 of the Prisons Regulations outlines the required conduct to be adhered to by a Superintendent or Visiting Justice when determining a charge with respect to a prison offence, subject to section 76 of the Prisons Act. Regulation 66 provides:

> ***66. Determination of prison offences***

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[29] Pursuant to a Department wide service agreement for the provision of offender drug analysis by PathWest to the Department of Corrective Services, Australian and New Zealand Standard Procedures (AS/NZS 4308:2008) apply in relation to Specimen Collection and the detection and quantification of drugs of abuse in urine.

*Where a prison offence is dealt with before the superintendent or a visiting justice and the prisoner charged denies the truth of the charge, the procedure subject to section 76 of the Act shall be as follows —*

*(a) the prosecuting prison officer shall state the case against the prisoner and call any witnesses in support of the charge;*

*(b) the superintendent or visiting justice may take evidence on oath, affirmation or otherwise at his discretion;*

*(c) the prosecuting prison officer shall conduct the examination in chief of each witness and the prisoner may cross-examine each witness;*

*(d) the prosecuting prison officer shall be permitted to re-examine each witness on matters arising out of cross-examination;*

*(e) the prosecuting prison officer shall then close his case; and*

*(f) the prisoner shall then give evidence on his own behalf or call his witnesses and paragraphs (c), (d) and (e) shall apply subject to necessary modification.*

Regulation 67 then prescribes the conduct of proceedings and provides:

***67. Conduct of proceedings***

*(1) The superintendent or the visiting justice —*

*(a) shall conduct proceedings expeditiously and without undue adjournment or delay;*

*(b) shall keep or cause to be kept an adequate record of proceedings;*

*(c) may question a witness called; and*

*(d) may direct that a particular witness be called or call and question a witness.*

*(2) The prosecuting prison officer and the prisoner charged shall be permitted to question any witness called and questioned under subregulation (1)(d).*

Subsection (1)(b) requires an adequate record of proceedings to be kept for all proceedings.

## 3. REVIEW OF THE PROSECUTION BY THE DEPARTMENT OF CORRECTIVE SERVICES

### 3.1. Background

On Monday 21 March 2011 the Commissioner of the Department directed the Adult Custodial Standards and Review branch to conduct a focused review in relation to Mr

Noble's urinalysis of 3 September 2010, for the purposes of drug testing and the associated disciplinary process in the event of detected drug use.

The Review Team held a planning meeting Monday 28 March 2011 gathering available background information. Previously, a scheduled operational review of Greenough Prison was planned during the period 12-15 April 2011. In order to maximize the effective use of time and resources it was decided that the focused review into the circumstances surrounding Mr Noble would be incorporated into staff interviews and further information gathered while on site during the operational review. Following the completion of the site visit and interviews, the Review Team consolidated the information gathered and commenced the review report. I received the first draft of this Report Friday 20 May 2011, and a revised draft on 3 June 2011.

### 3.2. Findings by the Department

**3.2.1.** The Department provided me with a final draft of the internal inquiry on 3 June 2011. I accept the factual conclusions set out therein.

### 3.3. For the receipt and handling of all evidential material

The Department provided a number of comments regarding the receipt and handling of all evidential material, which I endorse.



IN CONFIDENCE

## 4. THE ARRANGEMENTS CURRENTLY MAINTAINED BY THE DEPARTMENT WHEN DEALING WITH MENTALLY IMPAIRED OFFENDERS ACCUSED OF PRISON OFFENCES

The *Disability Services Act 1993* (WA) requires the Department to develop and implement disability service plans to ensure that prisoners with disabilities can access services provided by the Prison Services Division. *Operational Instruction 10: Prisoners with Disabilities* outlines two main areas of disabilities within prisons – intellectual and physical. The Operational Instruction sets out guidelines to assist staff with the management and development of these prisoners.

As Mr Noble is considered to be "mentally impaired" the guidelines in section 2 of the Operational Instruction apply. There is an emphasis within the guidelines for prison staff to contact the Disability Services Unit if they come into contact with an intellectually disabled prisoner. I would consider this to have been a viable option when the issue of the prison offence was first considered to be prosecuted. Had the Disability Services Unit been contacted they may have assisted the prison officers in communicating more effectively with Mr Noble and could have provided the necessary support person so the rules of natural justice were given full effect. However, all this might have been avoided, and should have been avoided if the prison officers were provided adequate training with regard to the proper interpretation of the PathWest screening test results.

### 4.1. For the training of prosecution officers

One of the issues that has arisen throughout Mr Noble's prosecution has been the lack of understanding by Prison Prosecutors with regards to the reading and understanding of the initial screening and the Analyst's Certificate. The lack of understanding of the implications of the initial screening test on the part of the Superintendent was also alarming. It is clear that prison officers need further training in this area.

Since Mr Noble's flawed prosecution and subsequent wrongful conviction, I have been advised by Ms Anderton that the Department's intranet training portal has included informative training presentations to assist in increasing the skills of prosecuting officers. I have been assured that this information if accessible by all Department personnel. The following slides are a snapshot of the information that is now readily available.

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## Laboratory Testing – Two Steps

- Initial Testing or 'Screening'
  - Purpose is to eliminate negative samples quickly and at relatively low cost
  - Gives a 'NOT DETECTED' result for negative samples.
  - Non negative samples need further testing
- Secondary Testing - Confirmation
  - Purpose is to investigate or definitely identify illicit drugs or legal medications in samples that are not negative
  - [illegible] tography Mass [illegible] uid Chromatog [illegible] MSMS)

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## Prescription or over the counter medications

These include common cough and cold preparations and some analgesics

- amphetamine-type (pseudoephedrine)
- opiates (codeine eg. Panadol forte)
- benzodiazepines (valium, serapax, mogadon)



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## Amphetamines - interpretation

- The amphetamine-type initial screen test has many drugs or even food-stuffs that "cross-react"
- This means that it is not unusual for an amphetamine-type family screen test result to require further investigation but the mass spectrometry confirmation test does not find any illegal drugs and therefore reports NOT DETECTED for illicit drugs

## QUESTION 1

- An initial screen test reports arrives at the prison indicating that all classes of drugs are NOT DETECTED. This means:
  - (a) Further testing should be performed until some illegal drugs are found
  - (b) There is evidence of drug use
  - (c) There is no evidence of drug use.
  - (d) The test is inconclusive.



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QUESTION 2

- An initial screen test report arrives at the prison indicating that the urine sample is not negative. This means:
  - (a) The prisoner has definitely used illicit drugs
  - (b) The prisoner has definitely used either illicit drugs or legal medication
  - (c) There is no evidence of illicit drug use.
  - (d) Confirmation analysis is required before

The correct response to this question is of course (d), confirmation analysis is required before taking action. It is regrettable that this simple message was not appreciated after receiving the screening test regarding Mr Noble.

**4.2. For the appointment and training of Visiting Justices**

I am satisfied that the failure to produce the Analyst certificate left the Visiting Justice with very little capacity to appreciate the problems which were inherent in this proceeding, and am also satisfied that the Visiting Justice managed the hearing as well as could have been expected.

## 5. CONCLUSION

This report outlines the events which led to the wrongful conviction of Mr Noble under section 70(d) of the Prisons Act.

Having regard to the Analyst's Certificate dated 9 September showing no illicit drugs detected, the consistency between what Mr Noble told me when I interviewed him at Geraldton on 27 May 2011 about being pressured to come up with an explanation for the "dirty" urine sample, and the "story" about a driver in a white car, and how he explained the matter to both Mrs. Curtois and Mrs. Andrich in September 2010, his intellectual disability which made him more likely to confess to an offence he did not commit due to his acquiescence and desire to please authority figures, I therefore conclude that Mr. Noble fabricated the story that he was given a tablet by a driver in a white car whilst gardening at Ms Slawinski's home whilst on home leave, and that he therefore wrongly pleaded guilty to the prison offence.

For 6 months Mr Noble lost the opportunity to work towards eventual release under his graduated plan due to the loss of his home leave entitlements. Fortunately his home leave has now been reinstated and, in consideration of the adverse effect of the errors, recently upgraded to allow two 48 hour overnight stays per week.

I have been advised that the Department are intending to develop their training programs in relation to prison offence prosecutions and I am satisfied that their actions so far in that regard, as outlined in Chapter 4, are a positive step forward. I acknowledge that the Department has recognised the substantial errors made and are focusing their efforts to prevent future occurrences. I would encourage those working on the Bill which is currently being drafted to replace the Prisons Act consider providing further clarity to assist prison personnel when dealing with mentally impaired prisoners held pursuant to a custody order under the Mentally Impaired Accused Act, who are also subject to the Prisons Act disciplinary processes.