I Introduction

Twenty years ago, the National Report of the Royal Commission into Aboriginal Deaths in Custody1 (‘RCIADIC’) was released. The RCIADIC investigated the excessively high numbers of deaths of Aboriginal people in custody. The conclusion was that, although per capita Aboriginal people in custody were not dying at a significantly higher rate than non-Aboriginal people, the rate of death in custody was excessively high and the incarceration rate of Aboriginal people was much higher than for non-Aboriginal people. The National Report spanned five volumes and included 339 recommendations to state, federal and territory governments. The purpose of the recommendations was to reduce both the rate of incarceration and the number of deaths in custody. This paper examines the duty and standard of care owed to prisoners, an important aspect of the National Report.

One of the important aspects of the RCIADIC report was to remind prison authorities of their duty of care to prisoners. In the National Report, the Commissioners stated that ‘[o]n general principles, the duty of care would appear to extend to protection against risks which are reasonably foreseeable and the standard of care to be that which the reasonable person would regard as reasonable in all the circumstances of the particular case.’2 The Commissioners’ fundamental position on duty of care was laid down in RCIADIC recommendation 122:

That Governments ensure that:

a. Police Services, Corrective Services, and authorities in charge of juvenile centres recognise that they owe a legal duty of care to persons in their custody;

b. That the standing instructions to the officers of these authorities specify that each officer involved in the arrest, incarceration or supervision of a person in custody has a legal duty of care to that person, and may be held legally responsible for the death or injury of the person caused or contributed to by a breach of that duty; and

c. That these authorities ensure that such officers are aware of their responsibilities and trained appropriately to meet them, both on recruitment and during their service.3

In practical terms, the Commissioners were particularly concerned with the duty of care manifesting in emergency response training, including giving immediate first aid assistance and resuscitation to injured prisoners.4 Also, the National Report and recommendations were directed to ensuring that prison officers were made aware that Aboriginal prisoners are vulnerable to harm whilst in custody in specific ways and for specific reasons. Training is vital to ensure that officers understand the reasons Aboriginal prisoners are vulnerable, the nature of that vulnerability and the means to address it.5 Another of the impulses flowing from the release of the RCIADIC National Report was the provision of cultural awareness training for prison officers. Training in all these fields was found to be defective for both police and correctional officers.

RCIADIC recommendations 155 and 158–66 were specifically directed to improving officer’s training, emergency responses, resuscitation and the training of prison officers in understanding the unique health problems faced by Aboriginal peoples and in risk assessment on that basis. Elaborating on the need for such improvements, the Commissioners stated that deficiencies were noted in emergency response procedures generally resulting in
delays in the provision of medical assistance once it was determined that such was necessary.\(^6\)

The above recommendations were thus directed to prison officers achieving and maintaining an enhanced standard of care not only to Aboriginal prisoners, but prisoners generally.

In relation to individual deaths in custody, the reports highlighted the faults within custody systems and their effects on Aboriginal prisoners. The Commissioners also made practical recommendations on ways to improve prison health services and safety systems.\(^7\)

Additionally, a series of recommendations dealt with the duty to provide adequate health services to prisoners. These recommendations are highlighted below.

Recommendation 150 states that the standard of healthcare is to be equivalent to that in the general community. Recommendation 151 deals with the improvement of psychiatric care, while recommendation 152 deals with the provision of health services to Aboriginal prisoners. Recommendation 154 discusses training of prison health service staff on issues relevant to Aboriginal prisoner’s health, and recommendations 156 and 157 deal with improved initial medical assessments of prisoners, including gaining access to medical notes from other sources. These were all general recommendations directed to improving the standard of medical care of prisoners. Whether individual prisons or police watch houses implemented the recommendations will be a relevant factor under consideration when a court decides whether a standard of care has been met.

Two other focuses of the RCIADIC recommendations were the improvement of prison conditions and the improvement of the lives of prisoners generally, and particularly Aboriginal prisoners. These focuses are reflected in volume three of the RCIADIC National Report, and specifically recommendations 168–87 which are directed at improving the prison experience generally. For example, recommendations 168–70 urge the placement of prisoners in prisons close to their families, granting families financial assistance to visit relatives in prison, and the provision of improved visitation facilities. Similarly, recommendation 172 recommends periodic visits from Aboriginal organisations and recommendation 173, a more humane living environment in prison, with shared accommodation for community living.

Recommendations 174, 177, and 178 deal with the need for employment of Aboriginal welfare officers, the screening out of racist correctional officers and enhanced employment opportunities for Aboriginal people in corrections generally. Finally, recommendations 176 and 179, cover improved and enhanced requests and complaints procedures for prisoners.

There are limited court decisions which deal directly with the consequences of a failure to comply with RCIADIC recommendations. However in the criminal case of Robinett v Police,\(^8\) the court held that a failure to comply with RCIADIC recommendations in providing medical assistance to an intoxicated prisoner in distress gave rise to a discretion to exclude certain police evidence. In his judgment, Bleby J said:

So much is clear from a brief perusal of the Report of the Royal Commission Into Aboriginal Deaths in Custody (1991). Whilst the recommendations of the Royal Commission cannot be binding on this Court as prescribing essential standards of police conduct towards Aboriginal people, recommendations 122–167 of the Report provide a wide range of recommendations concerning desirable measures to be implemented in respect of the health and safety of persons in police custody. Whilst they are obviously not prescriptive, they are indicative of changing community standards and expectations of conduct to be exhibited by police custodians, in particular in respect of Aboriginal people.

In my opinion, it was inappropriate in the present state of community understanding of and insight into the effect of neglect of possible medical needs and requirements of persons in custody to ignore requests of the type that were made in this case, and in the circumstances in which they were made. I am reinforced in that view by the fact that an ordinary common law duty of care is owed by police to persons in their custody in such circumstances. Breach of such a duty, if it results in loss or damage, will render the authority liable in damages to the person injured.\(^9\)

II The Duty of Care to Prisoners

The Department for Correctional Services has a responsibility for prisoners’ welfare. In South Australia, a duty of care arises from the fact that the Chief Executive Officer (‘CEO’) has accepted lawful custody of the prisoner and has assumed control of their person.\(^10\)
Section 24(1) of the Correctional Services Act 1982 (SA) (‘Correctional Services Act’) states that ‘[t]he Chief Executive Officer has the custody of a prisoner, whether the prisoner is within, or outside, the precincts of the place in which he or she is being detained, or is to be detained.’ Other sections which cover the responsibility for a prisoner’s welfare include: section 23, their assessment for rehabilitation and health programs; section 24, their subjection to regimes of privileges and discipline; section 25, transfer between prisons; and section 37A, their release on home detention.

The special relationship of gaoler to prisoner that gives rise to a duty of care also extends to providing a safe prison environment. In New South Wales v Bujdoso (‘Bujdoso’) the High Court said:

It is true that a prison authority, as with any other authority, is under no greater duty than to take reasonable care. But the content of the duty in relation to a prison and its inmates is obviously different from what it is in the general law-abiding community. A prison may immediately be contrasted with, for example, a shopping centre to which people lawfully resort, and at which they generally lawfully conduct themselves. In a prison, the prison authority is charged with the custody and care of persons involuntarily held there. Violence is, to a lesser or a greater degree, often on the cards. No one except the authority can protect a target from the violence of other inmates. Many of the people in prisons are there precisely because they present a danger, often a physical danger, to the community.

It would seem from the case law on the subject that the duty of prison authorities has been subsumed into the general category of non-delegable duties, arising from the prisoner’s relationship of dependency upon the CEO, who has custody of all prisoners within that jurisdiction. In Burnie Port Authority v General Jones Pty Ltd the High Court summarised recent authorities on non-delegable duties:

It has long been recognised that there are certain categories of case in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor. In those categories of case, the nature of the relationship of proximity gives rise to a duty of care of a special and ‘more stringent’ kind, namely a ‘duty to ensure that reasonable care is taken’. Put differently, the requirement of reasonable care in those categories of case extends to seeing that care is taken. Mason J identified some of the principal categories of case in which the duty to take reasonable care under the ordinary law of negligence is non-delegable in that sense: adjoining owners of land in relation to work threatening support or common walls; master and servant in relation to a safe system of work; hospital and patient; school authority and pupil; and (arguably), occupier and invitee. In most, though conceivably not all, of such categories of case, the common ‘element in the relationship between the parties which generates [the] special responsibility or duty to see that care is taken’ is that ‘the person on whom [the duty] is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised’. It will be convenient to refer to that common element as ‘the central element of control’. Viewed from the perspective of the person to whom the duty is owed, the relationship of proximity giving rise to the non-delegable duty of care in such cases is marked by special dependence or vulnerability on the part of that person.

The CEO’s duty of care to a prisoner is a non-delegable one in the sense that it is a duty that cannot be passed down to individual officers, to whom the CEO generally makes delegations under section 7 of the Correctional Services Act 1982 (SA). Rather, the CEO is responsible for ensuring that his officers observe the duty of care and that appropriate decisions are made with regards to that duty. It can be argued that, having regard to the potential danger presented by other inmates, the duty of care to a prisoner includes a duty to provide properly trained officers, which must necessarily incorporate relevant RCIADIC recommendations as to enhanced training, referred to above.

Under existing law, the Department for Correctional Services owes a duty of care to ensure that a prisoner is adequately fed, clothed, and sheltered and that health care is provided. The duty extends to protecting particular classes of prisoners from dangers to which imprisonment renders them uniquely vulnerable. Any statutory powers and discretions must be exercised in such a way that the duty is adhered to. It extends to protecting a prisoner from another prisoner where it ought to have been known that the second prisoner was prone to violence.
III  Prisoners at Work

Aspects of work done by, and training for prisoners had been the subject of RCIADIC recommendations, but they did not cover the requisite duty or standard of care. The law in relation to duty and standard of care for prisoners at work, and the circumstances where a prisoner can or cannot sue for negligence is complex and developing. Apart from the general common law duty of care, section 29 of the Correctional Services Act regulates the duty of care imposed upon Prison Managers in relation to systems of work for prisoners:

(1) A prisoner (other than a remand prisoner) is, while in a correctional institution, required to perform such work, whether within or outside the precincts of the correctional institution, as the manager directs.

... 

(4) A manager must, in directing a prisoner to perform any particular work, have regard to the age and the physical and mental health of the prisoner, and any skills or work experience of the prisoner.

This section was considered in detail by the Full Court of the Supreme Court in the recent decision of Haseldine. The Full Court concluded that although prisoners have rights which can be enforced in court, those rights are less than those of ordinary citizen, specifically those of an employee. The Full Court considered that the Department’s duty of care to a prisoner had not been breached when a prisoner on a mobile work gang injured his back whilst helping to dig a hole with a crow bar and shovel. Justice Gray noted that South Australia asserted and the plaintiff conceded that their relationship was that of prisoner and State and not employer and employee. That meant that the duty of care owed was less than applies between employer and employee, on that point however, Justice Gray said that ‘[t]he State accepted that it could not avoid liability in the following circumstances: where the State knowingly exposed a prisoner to a risk of injury through an unsafe system of work directed to be undertaken when the risk that eventuated was reasonably foreseeable.’

Justice White considered the Department’s general duty of care against the statutory regime of prisoners work in section 29(4) of the Correctional Services Act, and decided that because the officers had made due inquiry as to the prisoner’s suitability and fitness to attend the work camp and based on his answers had concluded he was fit to do the work, there had been no breach of the section 29(4) duty of care.

III  Duty of Care and the Use of Reasonable Force

In addition to immunity for actions taken in good faith, the Department for Correctional Services and individual officers are allowed and indeed required on occasions to use ‘reasonable force’ against prisoners. This is confirmed by section 86 of the Correctional Services Act:

Subject to this Act, an officer or employee of the Department or a member of the police force employed in a correctional institution may, for the purposes of exercising powers or discharging duties under this Act, use such force against any person as is reasonably necessary in the circumstances of the particular case.

The use of reasonable force in carrying out a lawful duty will be regarded as an action in good faith, whereas gratuitous, unprovoked and unauthorised violence against a prisoner, who was not disobeying a lawful order, will not be so regarded and may give rise to personal liability of the officer, and potentially liability of the state for failure to properly train the officers who abuse their powers.

This is the approach taken by the Canadian courts in Peeters v Canada (‘Peeters’):

A staff member shall use as much force as he believes, in good-faith and on reasonable and probable grounds, is necessary to carry out his legal duties. He shall use force in good judgment, considering the protection of inmates, and refrain from personal abuse, corporal punishment and personal injury. Inmates will be protected from injury, harassment and damage to personal property. If the force used is excessive, he is criminally responsible for such excess, and he may also be liable for civil action where the use of excessive force is claimed.

The theory was excellent, but the CSC members clearly had not been trained to the point where reasonable restraint was second nature to them, as they should have been, as employees expected to use force. Instead, at the first temptation they succumbed to what the Trial Judge rightly called ‘goon-squad machismo’.
Peeters is also authority for the proposition that punitive damages can be awarded against the state if the decision making giving rise to the improper conduct by the officers concerned involved inappropriate deployment of the officers and a lack of proper training of the officers concerned. It was that inappropriate deployment and improper of training which gave rise to a liability for punitive damages against the state.

This approach to damages has received support from the High Court of Australia in *New South Wales v Ibbett* (‘Ibbett’) in the context of New South Wales police legislation. Whether the *Ibbett* approach to liability of the State to prisoners, when officers have abused their powers and have not received adequate training, will be adopted in relation to the *Correctional Services Act* remains to be seen. Certainly RCIADIC recommendations 162, 163, 177 and 182 provide a strong proposal for recognition of an enhanced duty and standard of care in relation to the use of force, particularly lethal force by correctional officers. The following dicta from the High Court in *Ibbett* may be equally relevant to the changed constitutional position of correctional officers, as to that of police. The High Court said:

The approach taken in cases such as *Adams* and *Peeters* should be accepted. It is supported by the observations of Lord Devlin and Lord Hutton to which reference has been made earlier in these reasons. The submissions by counsel for the State should be rejected.

First, the course of development over the last two and a half centuries of the law respecting Crown liability in tort does not support attention to the financial means of the miscreant public officers as a significant and limiting determinant of the quantum of liability. Reference has been made earlier in these reasons to what was said on the subject in *The Commonwealth v Mewett*.

Secondly, the New South Wales legislative reforms do not require, in obedience to a “master’s tort” theory, determination solely of what would be an appropriate award of exemplary damages against the police officers to the exclusion of considerations affecting the state itself.

The doctrine, associated in Australia with *Enever v The King*, which excepted the exercise of independent discretions from the legislative changes otherwise providing for the vicarious tort liability of the Crown, would have denied any award of exemplary or other damages against the State in the present case. There is little established case law on what constitutes reasonable force being used by prison officers with the exception of forced that may be used in body searches, and to prevent escapes. Additionally, the use of force will be regarded as an action in good faith, in circumstances such as the suppression of violence or property damage by prisoners, in which cases the use of reasonable force is the duty of the officers. This begs the question – what is reasonable force? The dicta from *Peeters* quoted above provides some guidance, but the general test relates to the proportionality of the actual force used against an objective test of what a reasonable officer in the actual situation of the officer in question, would have done, having regard to the prisoner’s conduct.

IV Conclusion

Apart from the common law duty of care to prisoners, there are few legal duties imposed on correctional authorities, as to their behaviour towards prisoners or objective standards against which the treatment of prisoners can be judged. Thus, although the common law duty of care to a prisoner is quite extensive, the prisoner still has few rights in relation to officers whose tasks it is to supervise and control their day to day lives and to exercise the numerous statutory discretions delegated to them under the *Correctional Services Act*. To summarise the position, the author Professor Richard Harding, comments:

Prisoners do not in the common law jurisprudential model possess rights in relation to their conditions and treatment. Rather the imprisoning authority possesses non-enforceable obligations. These may seem to be reasonably comprehensive, as for example in relation to the … Standard Guidelines for Corrections in Australia - but they are not legally binding in the sense of giving prisoners a right of action against prison authorities in a court of law.

It may be observed that sections 29 and 86 of the *Correctional Services Act* are important exceptions to the general position outlined by Harding and that the enactment of those sections is at least a partial acknowledgement of the criticisms of the *Correctional Services Act* made by Commissioner Gresley Clarkson in his 1981 Royal Commission and by Commissioner Johnston QC in the Semmens case. In the RCIADIC report, Commissioner Johnston QC said:
The Clarkson Commission was a very important catalyst for important changes in the law relating to penal institutions in South Australia. The recommendation by Commissioner Clarkson that the Act or the Regulations there under should establish and set out the responsibilities of prison officers in relation to care of prisoners has not been but should be put into effect.  

* General Counsel, Aboriginal Legal Rights Movement.

2 Ibid vol 1, 78–9 [3.3.7].
3 Ibid vol 5, 95 rec 122.
5 Ibid vol 5, 104–5 rec 155. The recruit and in-service training of prison officers should include information as to the general health status of Aboriginal people and be designed to alert such officers to the foreseeable risk of Aboriginal people in their care suffering from those illnesses and conditions endemic to the Aboriginal population. Officers should also be trained to better enable them to identify persons in distress or at risk of death or harm through illness, injury or self-harm. Such training should also include training in the specific action to be taken in relation to the matters which are to be the subject of protocols referred to in rec 152(g): at 103–4.
6 Ibid vol 1, 96 [3.3.81].
9 Ibid 507.
10 Howard v Jarvis (1958) 98 CLR 177, concerned the duty of care to a prisoner in police custody after arrest. The High Court stated that:

Howard was subject at common law to a duty to exercise reasonable care for the safety of Jarvis during his detention in custody. He had deprived Jarvis of his personal liberty, and assumed control of his person. In arresting and detaining Jarvis he was no doubt acting lawfully and properly and in the due execution of his duty, but he was depriving Jarvis of his liberty, and he was assuming control for the time being of his person, and it necessarily followed, in our opinion, that he came under a duty to exercise reasonable care for the safety of his person during the detention: at 183.

13 (1994) 179 CLR 520.
15 Peeters v Canada (1993) 108 DLR (4th) 471 (Federal Court of Appeal) (‘Peeters’).
17 See Bujdoso (2005) 227 CLR 1, 13–14, 16–17, where the plaintiff had not simply relied upon the fact that prisoners convicted of sexual offences against minors are at greater risk than other offenders: he proved that the Appellant knew that he had been threatened and taunted by other prisoners. There was more than a mere foreseeable risk. There was a risk that had been expressly threaten. Such a risk, once known, called for the adoption of measures to prevent it.
18 Haseldine v South Australia (2007) 96 SASR 530, 553 (White J) (‘Haseldine’).
20 RCIADIC, above n 1, vol 5, 110 recs 184–6.
21 Correctional Services Act 1982 (SA).
22 Haseldine (2007) 96 SASR 530, 537 (Gray J).
23 Ibid 541–2 (Gray J).
24 Ibid 553 (White J).
29 Correctional Services Act s 37(2) (reasonable force can lawfully be used by an officer in carrying out an arrest of an escaping prisoner under s 52).
33 RCIADIC, Semmens, above n 7, 45 (Commissioner Elliott Johnston).