Submission of the Ombudsmen on the Corrections Amendment Bill (12 April 2012)

Introduction

1. The Ombudsmen are Officers of Parliament. We are responsible to Parliament and are independent of the Government.

2. Our purpose is to investigate, review and inspect the administrative conduct of state sector agencies and provide advice and guidance in order to ensure people are treated fairly in New Zealand.

3. Our main functions that are relevant to this submission are to:

    - investigate state sector administration and decision making under the Ombudsmen Act; and
    - monitor and inspect places of detention for cruel and inhuman treatment under the Crimes of Torture Act (COTA).

4. We had a limited opportunity to comment on the draft Corrections Amendment Bill (the Bill) and some amendments were made as a consequence of our submissions. However, there remain other matters which concern us. This submission is concerned with the following clauses of the Bill:

    - restraint of prisoners;
    - health centre managers;
    - minimum entitlements;
    - search of prisoners; and
    - testing prisoners for alcohol and drugs.

Restraint of prisoners – use of mechanical restraints for more than 24 hours

5. Clauses 6 and 25 of the Bill remove the power of the Visiting Justice to decide whether a mechanical restraint may be used for more than 24 hours. Under clause 25, section 87(5) of the Corrections Act 2004 (the Act) is amended to allow a prison manager to authorise the use of a mechanical restraint on a prisoner for more than 24 hours if "*in the opinion of a medical officer, continued restraint is necessary to protect the prisoner from self harm*".

6. We do not support removing the requirement for a Visiting Justice to approve the use of mechanical restraints for longer than 24 hours.

7. We understand mechanical restraints are only used for longer than 24 hours in rare and exceptional cases, most often by using tie down beds where it is considered a prisoner would otherwise harm himself or herself. The Department has advised us that since 2001, the highest number of uses of mechanical restraints for longer than 24 hours in a single year was 10 instances (which all related to a single prisoner).

8. Given the relatively rare use of mechanical restraints for more than 24 hours, the seriousness of the situation in which such an action would need to be taken, and the

vulnerability of the prisoner in that situation, we consider that independent oversight should be retained.

9. We consider that the Visiting Justice has an important role to play, in terms of:

    - ensuring a decision to continue to use mechanical restraints is administratively reasonable and complies with the relevant law; and
    - retaining independent oversight of the use of mechanical restraints, in the most critical and sensitive of situations where prisoners are to be restrained for an extended period of time and usually in a very drastic way.

Health centre managers

10. Clause 7 of the Bill inserts a new section 19A in the Act, relating to the appointment of health centre managers. The chief executive must appoint a health centre manager for every prison, who must be either a medical practitioner or a nurse. Health centre managers will be "*responsible for ensuring the provision of health care and treatment to prisoners*".

11. The Ombudsmen's recent report on an Investigation of the Department of Corrections Prisoner Health Services identified a number of issues concerning the prison health service, the role of medical officers, the need for a greater alignment with public health services and the need for a greater degree of clinical support for nursing staff within the prisons.

12. The current requirement under section 20 of the Act for medical officers[1] to have responsibility for the provision of health care and treatment will be removed. In addition, under clauses 15, 23 and 40 of the Bill, health centre managers will also have authority to recommend segregation for medical oversight, prescribe a particular diet and manage health records.

13. In practice, these amendments will mean that many of the health care decisions currently required to be made by medical practitioners will be able to be made by nurses, acting as health centre managers. The proposed amendments do not serve to align prison health services with the wider health system and could create a more insular prison health service with even less support for nursing staff decision making and professional development than exists now.

14. We recognise that under the proposed amendments, health centre managers will be subject to legal requirements to act only within the scope of their practice, and will be required to refer prisoners to a medical officer for any assessments or treatments that may only be provided by a doctor. However, we also consider that a further safeguard needs to be included to allow prisoners to seek a second opinion from a medical officer. Currently, there is no provision for a health centre manager's judgment to be questioned in relation to any assessment or treatment that may be required.

15. We are particularly concerned about this in circumstances where the health centre manager will have authority to recommend segregation for medical oversight, and may decide that daily or twice daily medical visits to a prisoner in segregation are not

[1] Who must be a medical practitioner.

necessary[2]. We consider that such important medical decisions should be made by doctors.

16. We also consider that the medical officer, as well as the health centre manager, should have authority to prescribe a particular diet[3].

17. In addition, we consider that if the health centre manager is to be responsible for maintaining health records and keeping them secure, this responsibility should not also be placed on medical officers[4]. Rather, their responsibility should be limited to making an accurate record of the care they have specifically provided.

Minimum entitlements – physical exercise when removed from prison

18. Clause 22 of the Bill amends section 69(4) of the Act, to allow a prisoner to be denied their minimum entitlement of 1 hours physical exercise per day if:

    - the prisoner has been temporarily released or removed, or removed for judicial purposes; and
    - the prison manager considers it is not practicable to provide the entitlement to physical exercise during the time the prisoner is in prison.

19. We do not support the introduction of this clause as far as it relates to removals for judicial purposes. We understand that prisoners are generally taken to Court very early and taken back to prison very late, for prison convenience reasons only. Sitting in a Court, Court cells, or a prison van all day, is not, in terms of our responsibilities under COTA, 'access to the outdoors'. Denying prisoners going to Court for lengthy trials access to yards, may be considered cruel and inhumane.

20. The Chief Ombudsman, Beverley Wakem, has previously considered a complaint from a prisoner who was denied his minimum entitlement of physical exercise on the days he was required in Court. Ms Wakem found the Department's failure to provide the minimum entitlement in that case was based on the available resources, namely staff availability and the practical difficulty of redeploying staff from one area to another. Ms Wakem noted in that case that if at all practical, the Department should seek the resources it needs to meet prisoners' statutory entitlements, rather than removing them.

21. In addition, under section 69(3) of the Act, where prisoners are held in police jails, the denial of the minimum entitlement to exercise is dependent not simply on the prison manager's opinion that it is "*not practicable*" to provide the entitlement. Regard must also be had to both the facilities and resources available at the jail. We consider that in the case of normal prisons, if a denial of the entitlement is to be permitted at all, it should be based on an objective standard, not merely the opinion of the prison manager, and be dependent on an actual lack of facilities and resources at that time.

[2] Refer clause 15.
[3] Refer clause 23.
[4] Refer clause 40.

Search of prisoners – strip searches

22. Clauses 26 and 27 of the Bill amend sections 90 and 98 of the Act, to allow strip searching to be conducted by an officer in many different situations.

23. We do not support this amendment.

24. Strip searching involves the prisoner squatting to the ground and potentially being subject to an examination of all orifices.

25. Currently, there are two classes of strip searches:

    i. An officer may strip search a prisoner in many situations such as when they are under cell confinement, entering, returning to, leaving or transferring from a prison, and before and after visits.

       Such a strip search may involve removing all clothing and examining mouth, nose and ears and requiring the prisoner to bend his or her knees.

    ii. An officer may strip search a prisoner if the officer has reasonable grounds for believing that the prisoner has an unauthorised item in his or her possession, and has obtained the prison manager's approval.

       Such a strip search may involve removing all clothing and examining mouth, nose, ears, anal and genital areas, and requiring the prisoner to fully squat (bending his or her knees until buttocks are adjacent to heels).

26. The proposed amendments will remove these two classes of strip searches, and will allow *all* strip searches to:

    - be conducted by an officer without any authorisation from the prison manager; and
    - require the prisoner to squat to the ground and examine all orifices.

27. Such strip searches are highly degrading and prone to abuse. We are concerned that they may become a matter of routine, on any occasion when a strip search is conducted following the movement of a prisoner or a visit. At present strip searches may only be conducted when there are reasonable grounds to believe a prisoner has an unauthorised item.

28. In addition, we are very concerned that removing the requirement for a prison manager to approve a strip search makes it much easier for systematic abuse to occur and go undetected.

Testing prisoners for alcohol and drugs – water loading

29. Clause 36 of the Bill amends section 129(c) of the Act, to make it an offence for any prisoner to consume, administer or supply any substance with intent to dilute or contaminate a sample.

30. We understand the new offence is intended to penalise the use of substances to mask drug use. This includes water loading, where prisoners drink large amounts of water before a urine test in order to produce a dilute sample.

31. While we do not disagree with the new offence *per se*, we do not support its introduction in relation to the issue of water loading. This is because we consider enforcing such an offence would be both difficult to prove and potentially in breach of a prisoner's right to access drinking water. Provision for an offence that will not likely be provable in practice would bring the law into disrepute.

32. It would seem very difficult to prove that a prisoner had drunk water "*with intent*" to dilute a sample. We understand that water loading requires 2-4 litres of water to be consumed in the 2-4 hours before a test. In circumstances where water is freely available to prisoners to drink as much as they require for their own personal needs, it could be difficult to prove that the water they did drink was with an intention to dilute a sample. We consider that drinking 2 litres of water in 4 hours is not unheard of. We note the *Ministry of Health Food and Nutrition Guidelines* state that an average man requires approximately 3 litres of water per day and an average woman requires approximately 2.2 litres of water per day, with a recommendation that adults drink 6-8 glasses of water per day[5].

33. In addition, we note that prisoners have a right to access drinking water. Section 72(1) of the Act provides:

> "*Every prisoner must be provided with a sufficient quantity of wholesome food and drink based on the food and nutritional guidelines for the time being issued by the Ministry of Health, and drinking water that complies with any drinking water standards for the time being issued by the Ministry of Health or in force under any enactment*".

34. Any action by the Department that purports to limit a prisoner's access to drinking water, including penalising the drinking of water in certain circumstances, could be in breach of this right. It should also be noted that some prisoners may have a legitimate medical need to drink large amounts of water.

35. Prisoners also have a right to be provided with a reasonable amount of water when they are placed under supervision prior to a drug test. Regulation 138(1) specifically states:

> "*A prisoner who does not provide a urine sample immediately or who accidentally spills his or her sample must be—*
> *a. placed under supervision in an area authorised for the purpose by the manager; and*
> *b. given a reasonable period, not exceeding 3 hours, within which to provide a urine sample; and*
> *(c) provided with approximately 200 mls of water per hour to drink during that period*".

36. We understand that the Department has tried to deal with this problem administratively, in particular, by manipulating the time when tests are conducted, but that this has had

[5] See http://www.health.govt.nz/publication/food-and-nutrition-guidelines-healthy-adults-background-paper

limited success. However, we note that the administrative options which have been trialled in this respect were limited to moving the testing time to earlier in the morning at two prisons (which prisoners quickly adjusted to), and supervision of prisoners before testing (both of which encountered resourcing issues).

37. We consider that more effort could be made to deal with the problem administratively, before considering the introduction of an offence for water loading. In particular, by collecting samples at truly random and varying times during the day, rather than at a set time in the morning. Regulation 131 allows samples to be collected at reasonable times, and at any time if there are reasonable grounds to believe a drug or alcohol offence has been committed. Varying the time during the day when samples are collected would seem to be a much more effective way of reducing water loading than the introduction of an offence which may be very difficult to prove and which potentially conflicts with a prisoner's right to have access to drinking water.

Conclusion

38. In conclusion, as discussed above, we consider:

- the Bill should not remove the requirement for a Visiting Justice to approve the use of mechanical restraints for longer than 24 hours;
- the Bill should provide for a second opinion to be sought from a medical officer in relation to a health centre manager's assessment or treatment of a health need;
- the Bill should not remove minimum entitlements to physical exercise for prisoners removed from prison for judicial purposes;
- the Bill should not amend the Act to allow strip searching by officers without approval by the prison manager and without limits on the circumstances when this is permissible; and
- the Bill should not introduce an offence for water loading.