

CLAIR CAIRD

**HOLDING CORRECTIONS TO ACCOUNT AND WHAT
HAPPENS WHEN WE FAIL: THE WAIKERIA PRISON
PROTEST**

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Abstract

People in prisons exist in an extremely vulnerable situation. Prison officers wield a considerable amount of power over their lives, and they are secured in facilities which are away from the public eye. Because of this, it is necessary that Aotearoa New Zealand has safeguards which operate to protect the rights of people in prisons. Without adequate protection, human rights abuses are guaranteed. Aotearoa is required by both its own domestic laws and international agreements to protect prisoners and uphold their inherent dignity and mana. Despite these standards, there are numerous examples of prisoners' rights being violated. This raises questions about the adequacy of current mechanisms of protecting prisoners' rights. Internally, people in prisons can raise issues through the PC01 complaint forms. Externally, the Ombudsman conducts inspections of prisons to assess their quality. The Waikeria Prison Protest in 2020-2021 drew attention to the inadequacies of both of those processes in holding the Department of Corrections/Ara Poutama Aotearoa to account. Waikeria Prison has had poor conditions which have seen little improvement despite multiple reports from the Ombudsman and numerous prisoner complaints. Similar issues are found in prisons around Aotearoa. This paper asserts that the Ombudsman and PC01 forms are not effectively working to protect the rights of people in prisons, and that broader reforms are required.

Keywords: 'prison watchdog', 'prisoners' rights', 'prison conditions', 'Ombudsman', 'Waikeria Prison'.

Contents

I	INTRODUCTION.....	4
II	THE NEED FOR PROTECTING PRISONERS' RIGHTS	6
III	KEEPING ARA POUTAMA AOTEAROA IN CHECK.....	10
	A Prisoner Initiated – PC01 Forms	10
	B Non-Prisoner Initiated	13
	1 The Corrections Inspectorate	13
	2 The Ombudsman	14
IV	WAIKERIA	ERROR! BOOKMARK NOT DEFINED.
	A Waikeria Introduction and Conditions	17
	B The Waikeria Protest	19
	C Analysis on the Effectiveness of the Ombudsman	21
	D Analysis on the Effectiveness of the Complaints Process	23
V	ALTERNATIVES	26
VI	CONCLUSION.....	26
VII	BIBLIOGRAPHY	29
VIII	APPENDIX.....	ERROR! BOOKMARK NOT DEFINED.

I Introduction

People in prison are in an incredibly vulnerable position. Prison authorities hold an enormous amount of direct power over those in their care, which shapes the conditions in which prisoners live.¹ Regulating the conditions in prisons through having an effective prisoner complaints process as well as an independent monitoring body is therefore of the utmost importance not only for those in prison, but for their whānau and wider society. Aotearoa New Zealand has seen a range of high profile cases demonstrating human rights abuses in prisons around the country. Some of these violations have resulted in people questioning how effective both the complaints and the external monitoring processes are. Nothing has brought these issues into the spotlight in recent times like the Waikeria Prison protest, which took place at the end of 2020 and into early 2021. This protest drew attention to the deplorable conditions at Waikeria Prison, which have seen little change in recent years.

Before beginning this paper, I will briefly outline my positionality. I am a Pākehā woman who has no personal experience of incarceration. These positions and experiences will have influenced my exploration of this topic. I wanted to explore this topic as I have a passion for social justice, and I was concerned about the frequent media reports concerning the state of our prison conditions. I also write this paper from the perspective that Aotearoa must be decolonised, and power returned to tangata whenua.

Prisons are a western concept, imported into Aotearoa under colonisation, marginalizing Māori ideas of justice. Initially focused on deterrence, around the turn of the 20th century the focus of prisons shifted to reforming.² Many question whether prisons have succeeded in achieving new goal, as 52% of those released from prison are convicted of a new offence and returned to prison within 60 months of being released.³

There are 18 prisons across Aotearoa.⁴ Across these prisons are a total of 8,655 people, as of March 2021. Of those people, 52.7% are Māori.⁵ The overrepresentation of Māori within prisons is the most significant problem with prisons in Aotearoa. Since the 1980s,

¹ Dirk van Zyl “Regulation of Prison Conditions” (2010) 39(1) JCJ 503 at 504.

² Just Speak *Unlocking Prisons: How We Can Improve New Zealand’s Prison System* (2014) at 50.

³ At 55.

⁴ Ara Poutama Aotearoa Department of Corrections “Our locations” <www.corrections.govt.nz/about_us/getting_in_touch/our_locations>.

⁵ Ara Poutama Aotearoa Department of Corrections “Prison facts and statistics – March 2021” <www.corrections.govt.nz/resources/statistics/quarterly_prison_statistics/prison_stats_march_2021>.

Māori have comprised at least 50% of the prison population.⁶ This is despite only making up approximately 16.7% of the population as of 2020.⁷ The gross mistreatment of Māori within the justice system has been a well-known issue since 1987 with the publication of Moana Jackson's *He Whaipanga Hou*, which details the interactions of Māori with the justice system and the cultural bias that occurs at every stage.⁸ Little has changed over the past 34 years since this publication. Those in power have not accepted nor understood the changes necessary.⁹ The justice system in Aotearoa is viewed as a form of structural violence, one that is continuing the project of colonisation.¹⁰ When discussing issues around prison conditions in Aotearoa it is essential to keep in mind that those who are overwhelmingly the victims of these poor conditions and lack of redress are Māori. Despite shifts in the language used within our justice system, such as the Department of Corrections now often using its te reo Māori name *Ara Poutama Aotearoa*, and the introduction of new policies like Hōkai Rangī, Māori are still disproportionately suffering under this system.

This essay will examine why it is important for people in prison to have access to both avenues for them to address their own grievances, and for external monitoring bodies to address issues with prison conditions. It will then detail the main avenues for redress relevant to Waikeria Prison, the PC01 prison complaints forms and the external reviews undertaken by the Ombudsman. I will then investigate the issues with Waikeria Prison and the resulting protest, examining how this could be seen as an example of the complaints system and the Ombudsman being ineffective tools in protecting prisoners' rights.

⁶ Kim Workman "From a search for Rangatiratanga to a struggle for survival - criminal justice, the state and Maori, 1985 to 2015" (2016) 22(1) JNZS 89 at 91.

⁷ Statistics New Zealand "Māori population estimates: at 30 June 2020"

www.stats.govt.nz/tereo/information-releases/maori-population-estimates-at-30-june-2020.

⁸ Moana Jackson *The Māori and the Criminal Justice System: A New Perspective: He Whaipanga Hou* (February 1987).

⁹ Hui Māori *Ināia Tonu Nei: Now is the time, we lead, you follow* (July 2019) at 9.

¹⁰ Juan Tauri "Criminal Justice as a Colonial Project in Contemporary Settler Colonialism" (2014) 8(1) AJCJS 20 at 27.

II The Need for Protecting Prisoners' Rights

People in prison are in a precarious situation. They are deprived of their liberty and are reliant on others to provide for their basic needs. Oftentimes they were already in vulnerable situations prior to incarceration.¹¹ Given this vulnerability, it is imperative that there are processes to ensure that prisoners are not placed in poor conditions and that their voices can be heard. Being incarcerated is incredibly disempowering and many people experience challenges in drawing attention to issues.¹² The most fundamental principles of a prison system which is compliant with human rights are regular independent inspections of the prisons and an effective process for prisoner complaints.¹³ Without a comprehensive system which ensures human rights are upheld, human rights abuses are inevitable.¹⁴

People in prisons are human beings, who have accompanying human rights. This includes a right to dignity which must be recognised, despite their incarceration.¹⁵ Without prisoners' complaints being heard, and without independent bodies checking to see whether prisons are meeting human rights standards, prison conditions may be at a standard which do not enable people in prison to survive with their dignity and humanity intact, which will not aid in their rehabilitation.¹⁶ Diane Medlicott, when researching suicide and self-harm in prisons, interviewed a prisoner, asking him what he would like changed about prison, he answered "you know, just to be treated as human, like."¹⁷ It is imperative that the prison system in Aotearoa operates in such a way that it upholds prisoners' human rights and their inherent dignity, treating them as human.

It is essential to be proactive about protecting prisoners' rights not least because there is an incredible power imbalance between prisoners and prison officers. Officers have the

¹¹ Michael White "The role and scope of OPCAT in protecting those deprived of liberty: a critical analysis of the New Zealand experience" (2019) 25(1) AJHR 44 at 44.

¹² Stephen Livingstone "Prisoners' Rights in the Context of the European Convention on Human Rights" (2000) 2(3) Punishment and Society 309 at 310.

¹³ Sabine Carl "Prisoner welfare, human rights and the North Rhine Westphalian prison ombudsman" (2013) 35(3) JSWFL 365 at 366.

¹⁴ Ivan Zinger "Human Rights Compliance and the Role of External Prison Oversight" (2006) 48(2) CJCCJ 127 at 128.

¹⁵ Zyl, above n 1, at 504.

¹⁶ At 504.

¹⁷ Diana Medlicott "The Unbearable Brutality of Being: Casual Cruelty in Prison and What This Tells Us About Who We Really Are" in Margaret Breen (ed) *Minding Evil: Explorations of Human Iniquity* (Rodopi, Amsterdam, 2005) at 77.

power to use force against those under their control. They also control almost every aspect of a prisoner's life. When prisoners eat, their clothes, access to showers, access to complaint forms and so on are all in the officer's power. This power imbalance means that it can be very difficult for those in prison to assert their rights themselves.¹⁸ It is also necessary for the state to be proactive about protecting prisoner's rights as prisons are places which have high rates of abuse and assault. As the justice system is putting people into these dangerous conditions the onus is on the system to have built in mechanisms to create accountability and uphold prisoner's rights.¹⁹

The very nature of prisons and how they are set up separate from society is another complicating factor. Prisons are closed off from the media and the public. This means it can take a long time, if ever, for people to discover what human rights abuses have been occurring inside.²⁰ General society does not know about or often have an interest in prison conditions.²¹

The way that prisons are structured also poses an obstacle to complaints.²² Prisons have a history of difficult structures for accountability and responsibility.²³ Prison staff and those in charge often become used to the way things are and fail to realise that they are complicit in harmful behaviours. Another related issue is the disparity between what those at the upper levels believe is going on and what people in prison are actually experiencing.²⁴ Without effective monitoring of prisons it is easy for cruelty and mistreatment, even unintentionally, to flourish.

Treating people in prisons with dignity is not merely the right thing to do, it is also required by law. Prisoners are to have all their human rights aside from those necessary for detainment, like freedom of movement. Oftentimes prisoners are also deprived of

¹⁸ Nick Hardwick "Inspecting the Prison" in Yvonne Jewkes, Jamie Bennett and Ben Crewe (eds) *Handbook on Prisons* (2nd ed Routledge, London, 2016) at 646.

¹⁹ Oscar Battell-Wallace "Guarding Identity: An Investigation of New Zealand's Accountability Systems for Unrecognised Rights Claimants in Prisons" (LLB(Hons) Dissertation, Victoria University of Wellington, 2018) at 8.

²⁰ Hardwick, above n 18, at 646.

²¹ Manfred Nowak "Fact-Finding on Torture and Ill-Treatment and Conditions of Detention" (2009) 1(1) *JHRP* 101 at 110.

²² Mary Seneviratne "Ombudsmen and prisoner complaints in the UK" (2012) 34(3) *JSWFL* 339 at 340.

²³ Diana Medlicott "Preventing Torture and Casual Cruelty in Prisons Through Independent Monitoring" in Phil Scraton and Jude McCulloch J (eds) *The Violence of Incarceration* (Routledge, New York, 2009) at 256.

²⁴ Hardwick, above n 18, at 646.

other important rights such as rights to privacy, communication, information, and voting. Then there are rights which on paper available to prisoners, but which in reality are not available, such as having adequate living conditions.²⁵

Both international human rights standards and domestic legislation require Aotearoa to treat prisoners in a certain manner. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) sets out good practices for the treatment of prisoners.²⁶ Rule one stipulates that all prisoners must be treated with respect due to their inherent dignity and value as human beings, and that prisoners shall be protected from cruel or degrading treatment.²⁷ Rule thirteen stipulates that the accommodation for prisoners must meet all requirements of health, particularly lighting, heating and ventilation.²⁸ Rule 56 states that every prisoner must have the opportunity to make complaints to both prison staff and inspectors without censorship of the substance.²⁹ Rule 57 holds that these complaints must be dealt with promptly, and that safeguards must exist to ensure that these complaints can be made in a safe and confidential manner.³⁰

At a domestic level, Aotearoa has a range of legislative and policy directives on the treatment of people in prisons. Under s23(5) of the Bill of Rights Act 1990, every person that is in prison must be treated with humanity and respect in order to uphold the inherent dignity of that person.³¹ Sections 69-82 in the Corrections Act 2004 set out more specific guidelines on requirements such as minimum standards for exercise and bedding.³²

Aotearoa also has policy commitments to maintain adequate prison conditions. *Hōkai Rangi* is the new strategy for Ara Poutama Aotearoa which aims to address the over-representation of Māori in prisons, amongst other things.³³ In establishing the goals of the strategy, under the aim of humanising and healing, the strategy says that Ara Poutama

²⁵ Nowak, above n 21, at 110.

²⁶ United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) GA RES 70/175 (2016) at 7.

²⁷ At 8.

²⁸ At 10.

²⁹ At 19.

³⁰ At 20.

³¹ Bill of Rights Act 1990, s23(5).

³² Corrections Act 2004, s69-82.

³³ Ara Poutama Aotearoa Department of Corrections *Hōkai Rangi Ara Poutama Aotearoa Strategy 2019-2024* (2019) at 1.

Aotearoa will respect the “human dignity and inherent mana of all people in our care”.³⁴ Hōkai Rangi also outlines the need to embed values of manaaki, whānau, wairua, kaitiaki, and rangatira in the day to day operations of Ara Poutama Aotearoa.³⁵ These principles and values of the strategy work in conjunction with the legislative directives and mean that people in prisons must be treated with a certain level of dignity and must be held in adequate conditions.

Treating people in prisons well by maintaining good conditions not only ensures that Aotearoa is upholding the prisoners’ basic human dignity and meeting its national and international legal obligations, it also helps contribute to positive change for people within prisons, enabling them to emerge as more responsible citizens.³⁶

Despite these legislative and policy directives there remain a number of issues with prisoner treatment and prison conditions in Aotearoa. The overuse of seclusion and restraint is one such persistent issue.³⁷ In 2021 there has been a range of high-profile cases demonstrating issues with the quality of prison conditions and treatment of prisoners. One such case is that of Mihi Basset, who attempted suicide in Auckland Women’s Prison after being unlawfully segregated, and shortly after her suicide attempt was threatened with pepper spray. Manakau District Court Judge David McNaughton described this treatment and the treatment of other women in the prison as “inhumane, cruel and degrading”.³⁸ Cases such as that of Mihi Basset demonstrate that notwithstanding the laws and policy which mandate certain levels of care, Ara Poutama Aotearoa is at times falling short of meeting these standards.

One common rationale for the failure to meet these standards is that due to an increase in the prison population, significant pressure is being placed upon prisons, causing issues through the continued use of old facilities and the use of measures such as double-bunking.³⁹ This is not a defensible excuse. Upholding human dignity is a requirement that

³⁴ At 20.

³⁵ At 25.

³⁶ Zinger, above n 14, at 127.

³⁷ White, above n 11, at 58.

³⁸ Guyon Espiner “Prison guards threaten pepper spray moments after suicide attempt” Radio New Zealand (4 March 2021) <www.rnz.co.nz/news/in-depth/437611/prison-guards-threaten-pepper-spray-moments-after-suicide-attempt>.

³⁹ Elizabeth Stanley *Human Rights and Prisons: A review to the Human Rights Commission* (July 2011) at 6.

cannot be balanced out by budgetary constraints. It is an absolute minimum, one that is required at all times.

Many consider the deficiencies of the government in this area to be further evidence of the Crown failing to act as a partner with Māori under Te Tiriti o Waitangi. The way the justice system has been implemented is clearly failing Māori and is not addressing the legacy of colonisation.⁴⁰ The racism and bias against Māori fails to meet the requirements of a just and fair system.

When prisons are falling short of these standards, as they appear to be in Aotearoa today, it is important to have effective mechanisms for drawing attention to these failures and addressing them. The next part of this essay will explore some of the most important methods of keeping Ara Poutama Aotearoa in check with its treatment of people in prisons.

III Keeping Ara Poutama Aotearoa in Check

This section will explore some of the main avenues for keeping Ara Poutama Aotearoa in check. I will explain and analyse the PC01 form process, which is prisoner initiated, before going on to look at the non-prisoner initiated mechanisms which operate as prison watchdogs. I will further explore the effectiveness of these processes in the case study of the issues at Waikeria Prison that are addressed in Part IV of this paper.

A Prisoner Initiated – PC01 Forms

The main avenue for people in prison to assert their rights and make a complaint whilst incarcerated is through the PC01 form process. The Corrections Act 2004 sets out in subpart six the process for complaints. Section 152 sets out the objectives of the corrections complaints system. Subsection(1)(c) states that complaints are to be investigated in a fair, timely, and effective manner. Section 153(3) states that notices must be prominently displayed in each unit that explain the complaints process and how prisoners may obtain the necessary forms. Section 154 describes how assistance must be provided to help make complaints when required.⁴¹ The Prison Operations Manual provides further context, outlining the process of making complaints for prisoners in more detail. In the manual, it states that complaints are to be resolved informally at the

⁴⁰ Hui Māori, above n 9, at 11.

⁴¹ Corrections Act 2004, ss151-160.

lowest level but can be escalated if this is not possible.⁴² It is considered best practice internationally to have these complaints resolved internally for reasons of efficiency and good governance.⁴³ Staff are required to take all reasonable steps to address the issue. If at this point the issue is not resolved, the staff member must advise the prisoner of the internal complaints process and provide them with a PC01 form. Staff are required to assist prisoners who have difficulties in filling out the form, and the prisoner is to be advised that they are allowed a support person to help with the complaint. The staff member must complete the rest of the form, then give the copy to the prisoner as confirmation that the complaint had been received.⁴⁴

An example of a best practice complaints system would be one where prisoners have trust in the system, where avenues to complain are accessible, and one where complaints are heard timely and are resolved to the satisfaction of those involved.⁴⁵ Whilst in theory the Prisoner Operations Manual and Corrections Act present a system which seems compliant with those goals, in reality the experience of many prisoners in Aotearoa is contrary to this. Bruce, who is in prison, wrote a ‘how to’ guide for making a PC01 Complaint, published in the prison newsletter *Take No Prisoners*.⁴⁶ When asking for a PC01 form, Bruce says “the officers will try to persuade you not to make a complaint”,⁴⁷ and said that when a prisoner hands in their form, again the officers will try to convince the prisoner otherwise. The guide goes on to describe how prisoners should insist upon a receipt, and to make sure to take the name of the officer, and other ways to avoid being tricked by the system.⁴⁸ The way Bruce describes navigating the system and the officer’s unwillingness demonstrates that the PC01 system may be ineffective at receiving complaints. Bruce’s experience does not appear to be an isolated example. Surveys of prisoners around Aotearoa indicate that 80% of people in prisons have no faith in the complaints processes, and that 75% feel that complaints are not dealt with promptly or fairly.⁴⁹

⁴² Ara Poutama Aotearoa Department of Corrections “Prison Operations Manual, Prisoner complaints” <www.corrections.govt.nz/resources/policy_and_legislation/Prison-Operations-Manual/Prisoner-complaints>.

⁴³ Cormac Behan and Richard Kirkham “Monitoring, Inspection and Complaints Adjudication in Prison: The Limits of Prison Accountability Frameworks” (2016) 55(4) HJ CJ 432 at 435.

⁴⁴ Ara Poutama Aotearoa Department of Corrections, above n 42.

⁴⁵ Behan and Kirkham, above n 43, at 445.

⁴⁶ People Against Prisons Aotearoa “Take No Prisoners, Issue 6,” (February 2021) at 6.

⁴⁷ At 6.

⁴⁸ At 7.

⁴⁹ At 4-5.

Aside from officer's attempts to dissuade people in prison from making complaints, other identified issues with the complaints process are that there are generally no boxes for prisoners to deposit a complaint in a more confidential manner. Prisoners who wished to complain would have to ask for the form from a staff member and give it to them for further action.⁵⁰ This poses a barrier as staff have full control over whether they think the complaint is worthy, meaning that staff with a bias could abuse this power.

Even when complaints are made, there are further issues with the process. Where complaints were made available to review by the Human Rights Commission the quality and the speed of response to the complaints were extremely variable, likewise with the processes of quality assurance.⁵¹ Some prisoners will not report complaints, as they feel it is a pointless exercise when they may be released before the complaint is addressed.⁵²

Another crucial aspect of best practice for complaints mechanisms is that prisoners must have trust within the system. Trust is an essential ingredient for an effective complaints system, as prisoners must feel that they are able to lodge complaints.⁵³ There appears to be a lack of this trust. Many prisoners are too intimidated and frightened to lodge complaints, due to a fear of repercussions.⁵⁴ This is doubly true for vulnerable groups within prison populations, such as youth prisoners or LGBTQ+ people.⁵⁵ For Māori, a lack of faith in the system is extremely reasonable, given the reports detailing the bias against Māori which runs through the entire justice system.⁵⁶ It is questionable that it is possible to have an effective complaints process where prisoners feel they are unable to lodge complaints.

The effectiveness of this complaints process has been commented on by external bodies. In 2013 the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) identified one major problem with detention in Aotearoa being the adequacy of complaints mechanisms.⁵⁷ In the Monitoring Places of

⁵⁰ Sharon Shalev *Thinking Outside the Box a review of seclusion and restraint practices in New Zealand* (April 2017) at 49.

⁵¹ At 49.

⁵² Behan and Kirkham, above n 43, at 444.

⁵³ Behan and Kirkham, above n 43, at 445.

⁵⁴ Diana Medlicott, above n 23, at 257.

⁵⁵ At 257.

⁵⁶ Te Uepū Hāpai i te Ora *He Waka Roimata (A Vessel of Tears)* (June 2019) at 25.

⁵⁷ White, above n 11, at 55.

Detention Annual report of activities under the Optional Protocol to the Convention Against Torture (OPCAT) 1 July 2017 to 30 June 2018 one of the major repeat areas of concern was the effectiveness of the prisoner complaint process. It was noted that across three prisoner surveys there was a lack of faith and confidence in the complaint system.⁵⁸

Despite the complaints process sounding comprehensive and effective in legislation and policy, it appears that, in reality, prisoners are either not having their complaints heard at all or are not having their complaints heard in a timely or effective manner.⁵⁹ This poses a significant threat to the effectiveness of the processes which keep Ara Poutama Aotearoa in check. If these complaints are not being heard or not being resolved, people in prisons may find their rights violated with limited recourse available.

B Non-Prisoner Initiated

This section will explore non-prisoner initiated avenues for safeguarding prisoners' rights,. This includes the Corrections Inspectorate, which is an internal mechanism, and the Ombudsman, which is an external mechanism.

1 The Corrections Inspectorate

The Corrections Inspectorate is a body established under the Corrections Act 2004 which operates within Ara Poutama Aotearoa. This internal oversight is a dedicated complaints resolution body. These inspectors perform regular visits to facilities and conduct interviews.⁶⁰ Prisoners are able to contact inspectors at any time on a free phone line. Of 2,799 complaints in 2008-2009, only 93 were found to be justified complaints requiring intervention. The Inspectorate has been useful in identifying the discrepancies between the law or policy and the practice of staff members in prisons. However, many prisoners do not trust the inspectorate, due to their lack of independence from Ara Poutama Aotearoa. They also suffer from a high work-load and are less able to undertake prompt investigations.⁶¹

⁵⁸ New Zealand Human Rights Commission *Monitoring places of detention: annual report of activities under the Optional Protocol to the Convention Against Torture (OPCAT)-1 July 2017 to 30 June 2018* (April 2019) at 19.

⁵⁹ Peter Boshier *Final report on an unannounced inspection of Waikeria Prison under the Crimes of Torture Act 1989* (August 2020) at 38.

⁶⁰ Warren Young *Prison policy, prison regime and prisoners' rights in New Zealand* (June 2008) at 507.

⁶¹ Stanley, above n 39, at 104.

2 *The Ombudsman*

The main body in Aotearoa which operates to keep prisons in check is the Office of the Ombudsman. The Ombudsman has this role due to the way Aotearoa has enacted the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). The introduction of the OPCAT has been heralded around the world as a significant instrument in preventing harms to those in detention.⁶² Aotearoa signed the OPCAT in 2003 and ratified it in 2007. It was implemented in law through amendments to the Crimes of Torture Act 1989.⁶³ It establishes both international and domestic bodies for monitoring places of detention. The international body is the Subcommittee on the Prevention of Torture (SPT) which is mandated to make visits to places of detention.⁶⁴ The domestic bodies are called National Preventative Mechanisms (NPMs). These NPMs visit places of detention in the hopes of improving conditions and deterring ill treatment. NPMs inspect and make recommendations for improvements under the OPCAT.⁶⁵ They are responsible for more than prisons, and investigate all places where people are detained.⁶⁶

Section 27 of the Crimes of Torture Act 1989 identifies the functions of the NPMs. These include examining at regular intervals and at other times the conditions of detention and the treatment of detainees and making recommendations to those in charge of detention to improve the conditions of detention. Under this section NPMs must also provide at least one written report each year to either the House of Representatives or the Minister, depending on whether the NPM is an Officer of Parliament or not.⁶⁷ Section 28 provides that NPMs must be allowed access to the treatment of detainees in places of detention and the conditions of detention.⁶⁸

⁶² Natalie Pierce “Implementing human rights in closed environments: the OPCAT framework and the New Zealand experience” (2014) 34 Int J Law Context 154 at 154.

⁶³ At 158.

⁶⁴ Judy McGregor, Sylvia Bell, and Margaret Wilson *Human rights in New Zealand: emerging faultlines* (Bridget Williams Books, Wellington, 2016) at 150.

⁶⁵ Amy Dixon “The Case for Publishing OPCAT Visit Reports in New Zealand” (2013) 11 NZJPIIL 553 at 553-554.

⁶⁶ At 556-557.

⁶⁷ Crimes of Torture Act 1989, s27. The Ombudsman, as an independent Officer of Parliament must provide its report to the House of Representatives.

⁶⁸ Crimes of Torture Act 1989, s28.

The National Preventative Mechanism responsible for prisons is the Ombudsman.⁶⁹ The Ombudsmen are independent Officers of Parliament. Their job is to investigate complaints against the government. In the context of OPCAT, they are also responsible for monitoring court cells, immigration detention facilities, childcare and youth justice residences, and health and disability places of detention.⁷⁰

The purpose of these visits under the OPCAT is to prevent human rights abuses by acting as a deterrent. Visits are focused on prevention over punishment, given how immeasurable and irremediable the impacts of human rights abuses are on victims.⁷¹ The NPMs focus on preventative monitoring is seen to be a significant benefit. These national mechanisms are also able to visit more places of detention regularly than international bodies. The presence of regular independent visits to prisons has been reported as contributing to positive change, through deterring bad behaviour and putting pressure on corrections to improve both transparency and prison conditions.⁷² The NPMs are intended to engage in constructive dialogue with those in charge of detention, to improve conditions and move towards solutions.⁷³ These visits supposedly act as a deterrent as those who are perpetrating torture or ill-treatment will stop, either because of a fear of sanctions or to avoid social disfavour.⁷⁴

International best practice for monitoring systems hold that what is needed is a structure which embraces and accepts the Ombudsman's reports and acts on them to improve practices within prisons on the future.⁷⁵ In line with this, many consider the Ombudsman's investigations to be an effective tool, as there are a range of benefits resulting from their visits and reports on prisons. In the 2012-2013 financial year approximately 87% of the Ombudsman's recommendations had been accepted or partially accepted by those authorities responsible for detainment.⁷⁶ Noted impacts of the OPCAT monitoring process include upgrades to facilities, changes in policy and practice, and both the identification and addressing of problems relating to detention.⁷⁷ Some

⁶⁹ Dixon, above n 65, at 559.

⁷⁰ Judy McGregor "The challenges and limitations of OPCAT national preventive mechanisms: lessons from New Zealand" (2017) 23(3) AJHR 351 at 355.

⁷¹ Pierce, above n 62, at 162.

⁷² McGregor, above n 70, at 356-357.

⁷³ Pierce, above n 62, at 186.

⁷⁴ Dixon, above n 65, at 568.

⁷⁵ Behan and Kirkham, above n 43, at 450.

⁷⁶ Pierce, above n 62, at 193.

⁷⁷ White, above n 11, at 45.

specific examples include prison exercise areas now allowing greater access to the outdoors and better management of seclusion and restraint practices.⁷⁸ This is encouraging, as it indicates that Ara Poutama Aotearoa is willing to work with the Ombudsman and take steps towards protecting the rights of people in prisons.

However, despite these positive gains, there remain some persistent issues which indicate that the Ombudsman is perhaps not operating as effectively as a watchdog as it could. One major issue is the systemic human rights issues relating to people in prisons which are consistently raised by the Ombudsman and which are not adequately addressed by the government or Ara Poutama Aotearoa.⁷⁹ Some of these major issues identified by the SPT during its 2013 inspection such as the over incarceration of Māori are beyond the scope of the Ombudsman, as they require far greater systemic change to adequately be addressed.⁸⁰ Notably, all of the NPMs have expressed concern over the high rates of Māori incarceration, however little change has occurred in this area despite shifts in policy.⁸¹

Another area of concern is the Ombudsman not having the ability to enforce its findings and ensure compliance. This leads to situations where monitoring agencies publicly report on deficiencies and failures, often with no government response until the media becomes involved.⁸²

A further concern is that the Ombudsman, as an independent institution, lacks the direct accountability that comes with government institutions. This raises questions of accountability, with the main method being an annual report tabled in Parliament.⁸³ There are also questions around how fully independent NPMs can be, as in practice this may be compromised by the funding structures and resource constraints. It is important that these processes are reviewed.⁸⁴ Funding has been identified as the biggest barrier to a functional review body.⁸⁵

⁷⁸ At 53.

⁷⁹ McGregor, above n 70, at 362.

⁸⁰ White, above n 11, at 56.

⁸¹ New Zealand Human Rights Commission, above n 58, at 1-2.

⁸² Bronwyn Naylor “Human rights oversight of correctional institutions in Australia” (2021) 18(1) EJC 52 at 66.

⁸³ Dixon, above n 65, at 570.

⁸⁴ White, above n 11, at 56.

⁸⁵ At 63.

Although the Ombudsman has been successful in a range of areas at encouraging Ara Poutama Aotearoa to improve conditions, there remain some gaps. This raises questions about the effectiveness of the review body at protecting the rights of people in prison. The next section will consider the example of Waikeria Prison, and how the PC01 forms and Ombudsman reports operated in that situation.

IV Waikeria

This section will set out the background to issues relating to Waikeria Prison, providing some context for the prison and detailing reviews on the prison conditions. It will then discuss the 2020-2021 protest which took place at Waikeria in response to the conditions, before demonstrating that the situation at Waikeria exemplifies the problems with the current processes for protecting the rights of people in prisons.

A Waikeria Introduction and Conditions

Waikeria prison has been open since 1911 and is located near Te Awamutu in the Waikato region of Aotearoa. The prison can hold 803 people and has a range of security classifications, from minimum to high.⁸⁶ In 2020 the prison had a 67% Māori population.⁸⁷ The prison is said to be facing challenging conditions as many of its facilities are over 100 years old.⁸⁸ In 2012 some of the original prison units were closed as they were not fit for purpose. In 2015 the remaining units were to be closed, but due to an increase in the prison population not all of the closures proceeded, and four of these original units remained in use as high security units.⁸⁹

An October 2019 inspection by the Ombudsman found that the tāne in the high security complex were kept in poor living conditions, with many in double-bunked cells which were originally intended only for one person.⁹⁰ Some people were unable to sit upright on the bottom bunk due to the proximity to the top.⁹¹ The cells were in a poor state and were not adequately ventilated.⁹² A survey of the tāne in Waikeria of the conditions saw many drawing attention to the poor ventilation, with quotes such as “lack of fresh air in our cell”, “can’t breathe”, “not allowed fans in high mediums – why?”, “asthmatic, can’t

⁸⁶ Boshier, above n 59, at 3.

⁸⁷ At 1.

⁸⁸ Office of the Inspectorate Te Tari Tirohia Waikeria Prison *Unannounced Follow-up Inspection August 2019* (May 2020) at 3.

⁸⁹ At 10-11.

⁹⁰ Boshier, above n 59, at 1.

⁹¹ At 21.

⁹² At 21.

breathe at times”, and “ventilation doesn’t work, need to open up windows.”⁹³ This lack of fresh or conditioned air was deemed to be contrary to the Corrections Regulations 2005 and rule 13 of the Mandela Rules.⁹⁴

The issues with the conditions of the prison did not stop there. Another area of major concern was that the cells also lacked storage space and many toilets did not have lids. This posed an issue as tāne ate most meals within the cell, meaning they were forced to eat near uncovered toilets, which was noted as being both unsanitary and culturally inappropriate.⁹⁵ The low security complex was much better maintained, although both complexes had issues with the supply and quality of both clothing and bedding.⁹⁶ Many tāne complained about the quality and quantity of both during the inspection. Whilst 68% of tāne said they usually received clean sheets every week, 52% reported that they were not given access to enough clean and appropriate clothes.⁹⁷

Another major area of concern was the separate confinement units. These separate units were for prisoners undergoing the punishment of being confined in their cells. They were described as not fit for purpose, due to their lack of natural light, poor ventilation, and small size.⁹⁸ All the separate units in the high security complex were found to be in a poor state of repair.⁹⁹ This was not the first time that these units were deemed unsuitable. As early as 2011 and 2014 the Ombudsman reported on poor living conditions in the separate units. The units were described as “deplorable”, and the recommendation was to immediately upgrade them.¹⁰⁰ This did not occur, as the 2016 report on the inspection of Waikeria by the Ombudsman again described the separate units as ‘deplorable’.¹⁰¹ The separate units in the lower security complex were also found to be not fit for purpose.¹⁰² The Office of the Inspectorate described the high security units as “an environment not

⁹³ At 21.

⁹⁴ At 22.

⁹⁵ At 21.

⁹⁶ At 1.

⁹⁷ At 23.

⁹⁸ At 1. For images of the units, look to the appendix.

⁹⁹ At 9.

¹⁰⁰ New Zealand Human Rights Commission *Monitoring places of detention: annual report of activities under the Optional Protocol to the Convention Against Torture (OPCAT)- 1 July 2014 to 30 June 2015* (December 2015) at 30.

¹⁰¹ Boshier, above n 59, at 10.

¹⁰² At 11.

conducive for the humane treatment of prisoners”.¹⁰³ Once again there was no improvement, with the same units identified as not fit for purpose in 2020.¹⁰⁴

A further major area of concern was the significant number of tāne who described to the inspectors issues with the quality of the water, stating it was often dirty and cloudy. The inspectors noted this variation in colour, although the senior managers maintained that the quality was regularly tested.¹⁰⁵ The discoloured water was also noted in the 2020 report by the Officer of the Inspectorate.¹⁰⁶

This 2020 report by the Office of the Inspectorate also noted that there had been no meaningful improvement in the conditions and physical environment of the high security facility since their previous 2017 report.¹⁰⁷ Overall, the findings regarding the conditions of the prison led to the Chief Ombudsman Peter Boshier holding that the high security complex was not fit for purpose and was adversely impacting the treatment of the tāne.¹⁰⁸

Multiple references were made in the Office of the Inspectorates report to the fact that a new facility was under construction to open in 2022, presumably implying that this would solve many of the issues.¹⁰⁹ However, waiting for future buildings is not a valid excuse for keeping current prisoners in poor conditions which are detrimental to their health and wellbeing. The poor prison conditions, which had not changed over many years, were seen as triggers for the 2020-2021 Waikeria Protest.

B The Waikeria Protest

Between December 2020 and January 2021, a protest took place at Waikeria Prison. The tāne were reported as protesting the unacceptable prison conditions, and that their complaints about the issue had been ignored.¹¹⁰ The protesters took control of the top part of the prison and lit fires, causing substantial damage.¹¹¹

¹⁰³ Office of the Inspectorate Te Tari Tirohia, above n 88, at 3.

¹⁰⁴ Boshier, above n 59, at 11.

¹⁰⁵ At 24.

¹⁰⁶ Office of the Inspectorate Te Tari Tirohia, above n 88, at 29.

¹⁰⁷ At 6-7.

¹⁰⁸ Boshier, above n 59, at 1.

¹⁰⁹ Office of the Inspectorate Te Tari Tirohia, above n 88, at 7.

¹¹⁰ Human Rights Commission “Human Rights Commission calls for inquiry into Waikeria protest” (4 January 2021) <www.hrc.co.nz/news/human-rights-commission-calls-inquiry-waikeria-protest/>.

¹¹¹ Radio New Zealand “The legacy of the Waikeria Prison riots” (27 April 2021) <www.rnz.co.nz/programmes/the-detail/story/2018792780/the-legacy-of-the-waikeria-prison-riots>.

Below is the manifesto of the inmates involved in the Waikeria Uprising, passed on to the organisation People Against Prisons Aotearoa by whānau of the protestors.

“We are not rioting. We are protesting. We have showed no violence towards Corrections officers – none whatsoever – yet they show up here in force armed with guns and dogs to intimidate us. We are the ones that are making a stand on this matter for our future people. Showing intimidation to us will only fuel the fire of future violence. We will not tolerate being intimidated any more. Our drinking water in prison is brown. We have used our towels for three straight weeks now. Some of us have not had our bedding changed in five months. We have not received clean uniforms to wear for three months – we wear the same dirty clothes day in and day out. We have to wash our clothes in our dirty shower water and dry them on the concrete floor. We have no toilet seats: we eat our kai out of paper bags right next to our open, shared toilets. These are only very few of the reasons for the uprising. We are tangata whenua of this land. We are Māori people forced into a European system. Prisons do not work! Prisons have not worked for the generations before! Prisons just do not work. They keep doing this to our people, and we have had enough! There is no support in prison, all the system does is put our people in jail with no support, no rehabilitation, nothing. We have had enough. This is for the greater cause.”¹¹²

This manifesto definitively identifies the poor prison conditions as being the cause of the protest. It outlines aspects that were explicitly mentioned in the Ombudsman’s report, such as the drinking water being discoloured,¹¹³ a lack of bedding and clothes,¹¹⁴ and the lack of toilet seats.¹¹⁵

It is also significant to note the protestors drawing attention to their status as tangata whenua. They explicitly mention the fact that they are trapped in a Pākehā system which largely operates by and for Pākehā. Not only are Western standards of human rights being violated, many also consider the prison system to be a breach of Te Tiriti o Waitangi. Consequently, Waitangi Tribunal claims have been filed by 14 of those involved at the Waikeria Protest.¹¹⁶

¹¹² People Against Prisons Aotearoa “Take No Prisoners, Issue 5” (February 2021) at 5.

¹¹³ Boshier, above n 59, at 24.

¹¹⁴ At 1.

¹¹⁵ At 21.

¹¹⁶ Māori Party “Māori Party: Waikeria Protestors To File Civil Rights Cases” (31 March 2021) Scoop <www.scoop.co.nz/stories/PA2103/S00235/maori-party-waikeria-protestors-to-file-civil-rights-cases.htm>.

The protest came to an end after a six day stand-off when the tāne surrendered to authorities after Māori Party co-leader Rawiri Waititi spoke with them.¹¹⁷ Seventeen tāne were charged with arson and disorder related offences resulting from the protest.¹¹⁸ Despite a large media buzz surrounding the 2020 Ombudsman’s report into Waikeria and the protestors’ manifesto being widely distributed, Ara Poutama Aotearoa chief executive Jeremy Lightfoot was not swayed by this evidence, and was quoted as saying there was no excuse for the protestors actions, and that there were “many channels to complain”.¹¹⁹

Ara Poutama Aotearoa is proceeding with two internal reviews to investigate the situation, and the Human Rights Commission has also called for an independent inquiry into the protest by the Ombudsman.¹²⁰ Chief Commissioner Paul Hunt said that poor conditions were a vital part of the context triggering this protest and noted that despite the fact the failings of the prison system are common knowledge, “progress is glacial”.¹²¹

C Analysis on the Effectiveness of the Ombudsman, in context of Waikeria.

The protest draws attention to the idea that the Ombudsman is not operating as an effective check on Ara Poutama Aotearoa. Considering the lack of improvements despite multiple reports drawing attention to the same issues, such as the ‘deplorable’ separate units at Waikeria identified in 2016,¹²² with no changes by late 2019, it seems to many that prisons are not being kept in check. The lack of changes following multiple reports are seen to be the cause of the Waikeria Protest. These reports and the lack of change can be seen as damning evidence of the lack of effectiveness of the Ombudsman as a watchdog for prisons in Aotearoa.

The lack of action on known poor conditions at Waikeria Prison was not a one off situation. In responding to the Waikeria protest, Chief Commissioner Paul Hunt said it was a wrong to see it as an isolated incident.¹²³ This is supported by other examples of the Ombudsman identifying human rights violations and Ara Poutama Aotearoa not taking any steps to resolve the issues. In 2014 the Ombudsman identified that Mount Eden Prison was lacking a Youth Unit, despite a large number of detained young people.

¹¹⁷ Radio New Zealand “Waikeria Prison protesters surrender to authorities” (3 January 2021) <www.rnz.co.nz/news/national/433969/waikeria-prison-protesters-surrender-to-authorities>.

¹¹⁸ Radio New Zealand, above n 111.

¹¹⁹ Radio New Zealand, above n 117.

¹²⁰ Human Rights Commission, above n 110.

¹²¹ Human Rights Commission, above n 110.

¹²² Boshier, above n 59, at 10.

¹²³ Human Rights Commission, above n 110.

These youth were also subject to extended amounts of lockdown during the day and limited access to fresh air. Ara Poutama Aotearoa did not take action to develop a Youth Unit, as it determined that the younger population would decrease. Later Ombudsman visits in 2014 and 2015 found that this was not the case, and that young people were placed in an extremely vulnerable situation. Ara Poutama Aotearoa still dismissed the call for a Youth Unit.¹²⁴

Others have identified the present accountability mechanisms as lacking for certain vulnerable prisoners, such as those from the trans community. It took a period of almost twenty years for change to occur after many complaints and reports around the issue of trans prisoner safety.¹²⁵

Another area where a lack of progress has been demonstrated is that of seclusion and restraint. Issues around the overuse of seclusion and restraint were identified in a 2017 report from the Chief Ombudsman which found that Ara Poutama Aotearoa had breached the Convention Against Torture and the Corrections Act 2004. Despite much media interest and a review into the case, tie-down beds were still deemed by Ara Poutama Aotearoa to be an acceptable method of restraint.¹²⁶

Another example of Ara Poutama Aotearoa not accepting recommendations can be seen with the 2013-2015 OPCAT report. In this report, 15 recommendations made by the Ombudsman were not accepted by Ara Poutama Aotearoa. Some of these recommendations were made pertaining to practices which were described by the Ombudsman as cruel, inhumane and degrading.¹²⁷ It is troubling that recommendations against practices described in such a manner were not implemented.

These examples demonstrate that the Ombudsman is ineffective because of it being a solely recommendatory body. Internationally, the systems for monitoring prisons have also been criticised for their suggestions and efforts to improve conditions being ignored by those in power.¹²⁸ Where the government and Ara Poutama Aotearoa are unwilling to implement the changes and suggestions of the Ombudsman, there will be no changes to conditions. Relying on the goodwill operating between the Ombudsman and Ara Poutama

¹²⁴ McGregor, above n 70, at 362-363.

¹²⁵ Battell-Wallace, above n 19, at 44.

¹²⁶ White, above n 11, at 58-59.

¹²⁷ McGregor, Bell, and Wilson, above n 61, at 152.

¹²⁸ Behan and Kirkham, above n 43, at 444.

Aotearoa works sometimes, but in other situations, like with the separate units at Waikeria, the suggestions remain as mere suggestions and very few improvements are made. This demonstrates that where the Ombudsman is purely a recommendatory body, it is an ineffective mechanism.

Considering these examples of situations where people in prisons are subject to deplorable and inhumane conditions, and Ara Poutama Aotearoa not taking significant steps to address these issues in response to multiple Ombudsman reports, there seems to be a real problem with the Ombudsman's effectiveness as an accountability watchdog.

D Analysis on the Effectiveness of the Complaints Process, in context of Waikeria

*“Ask any screw or manager and they’ll tell you that if you have a problem, just write a complaint. And then you watch as they put that PC01 right in the toilet, under a chair, or in a shredder.”*¹²⁹

The PC01 system was also mentioned in both the Ombudsman's 2020 report and by the whānau of the Waikeria protestors. The Ombudsman's investigation into Waikeria had concerning findings with regards to the PC01 complaints process. The inspection found that the complaints process was not advertised well enough across all wings in the high security complex, and that complaint forms were not readily available. Many tāne informed the inspectors that they felt the complaint forms were difficult to access intentionally to discourage them from complaining.¹³⁰ It was found that 77% of tāne did not have faith in the complaints process and that 78% did not feel complaints were dealt with promptly, with 75% feeling complaints were not dealt with fairly. Additionally, only 67% complaints were found to have been responded to within the mandated three day timeframe.¹³¹ When asked the question “is it easy or difficult to get a complaint form (PC01)” 42% said that it was difficult and 38% of respondents said they did not know. Concerningly, 28% of tāne did not know how to make a complaint.¹³²

It was reported that prior to the 2020-2021 protest, staff had refused prisoners the PC01 forms.¹³³ Those protesting made it clear that they felt they had exhausted all channels. A press release from People Against Prisons Aotearoa, authored by whānau of the Waikeria

¹²⁹ People Against Prisons Aotearoa, above n 112, at 4.

¹³⁰ Boshier, above n 59, at 37.

¹³¹ At 38.

¹³² At 66.

¹³³ Māori Party, above n 116.

protesters, contained the statement that “our loved ones inside also tried many times to make complaints, but were denied access to PC01 complaint forms”.¹³⁴

Once more, these issues do not appear to be isolated to Waikeria Prison. In a 2020 investigation into Paremoremo Prison it was noted that the processes for prisoners to request reviews involving incidents of force were not robust. The inspectors watched CCTV footage showing one such incident which involved a tāne on his knees with his hands behind his back being pepper sprayed.¹³⁵ It was considered to amount to cruel treatment under the OPCAT. The report pertaining to the incident was inaccurate, which was of concern.¹³⁶ It is imperative that prisoners have processes accessible to review incidents such as this, and that the complaints they make are not altered or ignored.

The 2020 Paremoremo inspection also found that many tāne at the prison had difficulties accessing the PC01 complaint forms from staff members. As high as 46% of tāne from one unit said that it was difficult to get a complaint form, and concerningly, there were no corresponding records of complaints from tāne in that unit. This was worrying to the inspectors. Broader responses from across the prison included statements such as “you do NOT ask for PC01 forms in this unit... you will be kicked out if you do!”, “you’re not allowed to ask or receive PC01 form” and “I feel if I make a complaint I will be sent to the maximum security block”.¹³⁷ Similar to Waikeria, it was noted that the complaints process was not well advertised around the prison, and many complaints were not handled in a timely manner.¹³⁸ Likewise, a 2020 inspection of the Auckland Region Women’s Correctional Facility found that whilst the complaints procedure was well understood, it was not timely, effective, or well administrated by staff.¹³⁹

During the Waikeria inspection, several tāne informed the inspectors that they were unable to read or write.¹⁴⁰ In the 2020 inspection of Paremoremo one tāne informed the inspector that “they gave me a whole lot of paper and said all the info is in there but did

¹³⁴ People Against Prisons Aotearoa “Statement From The Waikeria Uprising Whānau” (3 January 2021) Scoop <www.scoop.co.nz/stories/AK2101/S00026/statement-from-the-waikeria-uprising-whanau.htm>.

¹³⁵ Peter Boshier *Final report on an unannounced inspection of Auckland Prison under the Crimes of Torture Act 1989* (December 2020) at 10.

¹³⁶ At 1.

¹³⁷ At 45.

¹³⁸ At 45.

¹³⁹ Office of the Inspectorate Te Tari Tirohia *Auckland Region Women’s Corrections Facility Announced Inspection* (June 2020) at 34.

¹⁴⁰ Boshier, above n 59, at 38.

not explain cause I can't read'.¹⁴¹ This poses a significant barrier to the complaints process, and to filling out the surveys provided by the inspectors for the Ombudsman. It is not fair to those who are not able to read or write to have limited access to justice. Although both the Prison Operations Manual and the Corrections Act stipulate that staff must help those who need assistance, from accounts like the one above, it is not clear that this does in fact take place.

The fact that the complaints process is not timely or effective, and that people in prison feel they cannot use the process is incredibly concerning to hear and does not indicate that there should be confidence in the PC01 system for protecting the rights of people in prisons. This suggests urgent changes are needed to better protect the ability of people in prisons to advocate for themselves without fear of repercussions.

V Alternatives

In response to these issues, there are a range of possible solutions. These are beyond the scope of this paper to discuss effectively. The following are some possible options which require further consideration, but which are important to bear in mind when considering what changes are needed.

One comparatively simple response is the implementation of an independent prison inspectorate. Groups such as the Howard League for Penal Reform are critical of the current framework for addressing prisoner complaints and inspections. They call for an independent prison inspectorate instead.¹⁴² However, even with the strongest monitoring and inspection standards prisoners' rights may still be violated. Enhanced formal accountability for Ara Poutama Aotearoa is not likely to create full and proper protections of the rights of people in prisons.¹⁴³

There is evidence from overseas that although increases in monitoring may reduce physical injuries, prison staff may instead assert their power over people in prisons in other ways.¹⁴⁴ This process is worsened when people in prisons do not feel able to communicate what is happening due to a lack of faith in the system which has caused

¹⁴¹ Boshier, above n 135, at 32.

¹⁴² Stanley, above n 39, at 108.

¹⁴³ Behan and Kirkham, above n 43, at 447.

¹⁴⁴ Stanley, above n 39, at 109.

them so much harm before.¹⁴⁵ Evidence of this lack of trust is clear from the current lack of faith in the complaints system.

The state is required to lead change in this area. Independent monitoring mechanisms are not able to change things alone. The very nature of prisons mean they are a place where cruelty and inhumane treatment are easily able to grow.¹⁴⁶ Monitoring may help, but broader transformation is needed to our prison systems in Aotearoa, perhaps broader than mere reformation. Fundamental changes are required, that will benefit everyone.¹⁴⁷

Institutionalised racism and the violation of human rights cannot be removed from a system which has proved itself quite complicit in these objects for many years. When considering how to more effectively monitor prisons, “it is important that a human rights approach to imprisonment does not become detached from questions of the criminal justice system as a whole.”¹⁴⁸ It is imperative that Aotearoa continues discussing both how to improve rights for people in prison now, and broader transformations of the justice system for the future.

Questions of justice reform are linked to questions of constitutional reform. In order to see real change in our justice system, the rights promised under Te Tiriti o Waitangi should be given their full effect, with Māori having decision making powers equal to the Crown.¹⁴⁹ Power must be returned to Māori, and it is Māori who must lead the reformation of the justice system.¹⁵⁰ The government must adopt the recommendations in *Ināia Tonu Nei, He Waka Roimata* and *Turuki! Turuki!*.¹⁵¹ Only once these things have been achieved is it possible to have a truly just society which protects human rights.

VI Conclusion

Ensuring that Aotearoa has good processes for protecting the rights of people in prisons is essential. The importation of the British prison system significantly altered the justice system in Aotearoa. Māori have felt the brunt of this change and continue to represent the majority of people in prisons. Without substantial processes in place to protect prisoners’

¹⁴⁵ At 109.

¹⁴⁶ Medlicott, above n 23, at 256.

¹⁴⁷ Hui Māori, above n 9, at 12.

¹⁴⁸ Livingstone, above n 12, at 321.

¹⁴⁹ Te Uepū Hāpai i te Ora *Turuki! Turuki! Move together!* (December 2019) at 26.

¹⁵⁰ Hui Māori, above n 9, at 2.

¹⁵¹ Te Uepū Hāpai i te Ora, above n 56., Te Uepū Hāpai i te Ora, above n 149., Hui Māori, above n 9.

rights, human rights abuses are inevitable. This is due to the particularly vulnerable situation people in prison are in, with limited access to the outside world, they are completely at the mercy of prison staff who control nearly every aspect of their lives.

Aotearoa is required by both domestic and international law to ensure people in prisons are kept in a manner which upholds their inherent dignity and mana. Despite these requirements, there are major issues with prisons in Aotearoa, with many having poor conditions which do not meet national and international standards.

PC01 forms are the main option available to people in prisons to raise issues and complaints. Non-prisoner initiated methods of overseeing conditions include the internal Corrections Inspectorate and the OPCAT mandated Ombudsman. The 2020-2021 Waikeria Prison Protest helped demonstrate the flaws with these processes. The poor conditions at Waikeria Prison had been reported on several occasions, with limited change occurring. The protest over these conditions gained much media attention and helped draw further attention to the conditions inside the facility. I argue that the Waikeria protest illustrates the inadequacy of the current systems which act to keep prisons in check. Despite multiple damning reports from the Ombudsman, the Prison Inspectorate, and numerous prisoner complaints, very little improvements occurred. A similar story is apparent at Mt Eden Prison, and with nationwide processes on seclusion and restraint. At Waikeria and other prisons there was also a resounding lack of faith in the PC01 process. It appears that the current systems of keeping Ara Poutama Aotearoa in check are inadequate.

The conditions at Waikeria Prison of overcrowding, lack of ventilation, limited access to clean clothes and bedding, deplorable confinement units, dirty water and more are not unique. Similar conditions are found in prisons around Aotearoa, and when prisoner complaints and Ombudsman reports are not properly acted upon by Ara Poutama Aotearoa, we are allowing a system which encourages violence and harm to continue. Waikeria could be a starting point for change, or it could be the first of many protests as cruel conditions continue in prisons around the country. It is time for a more robust system to be put in place, but more importantly, it is time for a bigger constitutional transformation which returns power to Māori, creating a justice system that is informed by Te Ao Māori, centres on human rights, and is focused on rehabilitation.

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VIII Appendix

I am attaching photographs of the conditions of the cells at Waikeria Prison in 2020 to help illustrate the conditions that the tāne were kept in. All photographs are sourced from the Final report on an unannounced inspection of Waikeria Prison under the Crimes of Torture Act 1989 (August 2020) at pages 8, 10, and 22.



Figure 1: Directed Segregation Cell in the High Security Unit



Figure 2: Directed Segregation Cell in the High Security Unit



Figure 3: Separate Unit's Yard in the High Security Complex



Figure 4: Separate Unit's Cell in the Lower Security Complex



Figure 5: A Double Bunked Cell in the High Security Complex