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**RECOGNISING PRISONER'S RIGHTS:
THE PHYSICAL TREATMENT OF PRISONERS
IN NEW ZEALAND**

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ABSTRACT

The object of this essay is to address the issue of prisoner's rights that relate to the protection of appropriate physical treatment of prisoners in New Zealand. This paper will emphasise that it is essential that prisoner's rights are recognised as important and are upheld as such.

This paper will suggest a framework of moral and natural rights that are of importance to prisoners to ensure they receive appropriate physical treatment. The framework is based on the two rights believed to be of primary importance, the right to equality and the right to be treated with respect. The paper will then analyse the extent to which the moral rights proposed under the framework exist as positive rights under New Zealand law. It will be suggested that despite legislative provisions for prisoner's rights, in practice prisoner's rights to equality and respect for the person are not upheld.

This paper will suggest that unacceptable violations of prisoner's rights are occurring in New Zealand and change to management practices and actions of prison officers in prisons are necessary to ensure the necessary protection of prisoner's rights in the future.

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I INTRODUCTION

It is a commonly held belief that when a person goes to prison they lose the human rights they had possessed as an ordinary citizen. From this view it would follow that while in prison, any treatment that violates prisoner's rights and would not be acceptable to other citizens may be imposed. This view, however, directly conflicts with the arguments that can be made from a natural or moral rights perspective that human rights apply to all people,¹ and in particular, apply to prisoners. The extent to which these natural and moral rights are reflected as positive rights (under New Zealand law) will be addressed in this essay.

When examining the positive rights under New Zealand law, it must be recognised that the nature of a prisoner's confinement in a penal institution will mean that some rights will be limited as a necessity. However, the confinement of a prisoner in a penal institution also means that it is of great importance to ensure that prisoner's rights are not violated. This is because of the considerable potential for human rights violations in prisons due to the secluded nature of prisons and the power imbalance between prison officers and prisoners.

The potential human rights violations that may occur to prisoners are numerous. Because of the enormity of the issue of prisoner's rights, this essay cannot address all aspects of the issue of human rights for prisoners. Instead, this essay will concentrate on the physical treatment of New Zealand prisoners and the rights that may be breached as a consequence of these types of treatment.

The essay will begin by giving an overview of the types of physical treatment that commonly occur in New Zealand. In this section solitary confinement, prison conditions, assaults by prison officers and searches of inmates will be discussed. The essay will then propose a framework that can

¹ Lawrence M Hinman *Ethics: A Pluralistic Approach to Moral Theory* (2ed, Harcourt Brace, Fort Worth, 1997) <<http://ethics.acusd.edu/ed2/>>(last accessed 26 August 2001).

be used to indicate whether prisoners receive appropriate physical treatment. Finally, the essay will evaluate the human rights legislation in New Zealand that might be relevant to the physical treatment of prisoners and then examine the extent to which prisoner's rights are being respected in practice.

II *PHYSICAL TREATMENT OF PRISONERS IN NEW ZEALAND*

This section will outline the main types of physical treatment that may occur to an inmate while in prison. Firstly, the section will discuss the fact of solitary confinement, and the conditions associated with being in solitary confinement. Secondly, the general conditions of prisons will be looked at. Thirdly, the issue of prisoners being subjected to assault by prison officers will be outlined. Finally, the section will discuss the searching of inmates by prison officials.

A *Solitary Confinement*

Solitary Confinement is one example of a form of physical treatment that may occur to inmates in New Zealand prisons. This section will discuss solitary confinement under two separate issues, the fact of solitary confinement and the conditions associated with solitary confinement.

1 *The fact of solitary confinement*

The fact of solitary confinement refers merely to the fact that an inmate is placed in a solitary confinement cell for any number of reasons and for a certain length of time.

a) Solitary confinement defined

Solitary confinement occurs when a prisoner is confined to an individual cell, in a separate block of the institution, away from contact with

the rest of the prison population.² An inmate in solitary confinement will usually spend most of the day locked in the confinement cell, with a limited time outside of the cell for exercise.³

b) Types of solitary confinement

An inmate may be placed in solitary confinement for one of a number of reasons. These reasons are set out in regulation 147 of the Penal Institutions Regulations 2000. Firstly, the inmate may be punished for a disciplinary offence. Similarly, if the inmate is believed to have concealed an unauthorised item, they may be placed in solitary confinement. Secondly, an inmate may be placed in solitary confinement for his or her protection, or the protection of others (due to the physical or mental health of the inmate, or if the inmate is assessed as being at risk of self-harm). An inmate may also choose to be isolated. Thirdly, the superintendent may deem it necessary to isolate a prisoner, for the good order and security of the institution, or under a direction under section 7(1A) of the Penal Institutions Act 1954. Finally, an inmate may be placed in an isolation cell if there is inappropriate accommodation elsewhere in the institution.

c) Duration of solitary confinement

The length of time spent by an inmate in solitary confinement will vary depending on the reason why the inmate is confined. When an inmate is placed in solitary confinement under the penalty ground, the length of time in solitary confinement will depend on the sentence determined at the disciplinary hearing. Under section 34 of the Penal Institutions Act 1954, if the hearing is before the superintendent, the time in solitary confinement awarded may be up to seven days. However, if the hearing is before the visiting justice (under section 33 of the Penal Institutions Act 1954), the inmate may be placed in solitary confinement for up to 15 days.

² Ministerial Inquiry into the Prisons System *Prison Review Te Ara Hou: The New Way* (Government Printer, Wellington, 1989) 207.

d) Effects of solitary confinement

Solitary confinement has been shown to severely impact on the physical and mental health of inmates.⁴ The effect of solitary confinement on a particular inmate may depend on the conditions associated with the confinement as well as the fact of solitary confinement.

An indication of the effects solitary confinement can have on inmates is illustrated by the Canadian case of *McCann v The Queen*⁵ which concerned the issue of solitary confinement. In *McCann v The Queen*, one inmate described the effect that solitary confinement had on him by saying that "You get twisted about. Your frustration turns to hate towards the guards and all the people who keep you there." The inmate further described the effect of solitary confinement on being returned to the general population of the prison. He said that he was unable to converse with the other inmates and said that "... you don't laugh at the things they laugh at...(but)...your hate helps you to cope...".⁶

An expert witness in the case (approved by the court) also described the effect of solitary confinement to be life long. He stated that solitary confinement was like a place where "time stops and then it begins to crush you and you have that suffocation, you have the tiny place, the relative inaction and that crushing experience and the mind begins to play its tricks to save itself."⁷ Another expert witness also agreed that solitary confinement could have damaging effects on inmates, He said of solitary confinement that "a person comes to have no dignity, no self-respect, no identity...".⁸

³ Patricia Webb *History of Custodial and Related Penalties in New Zealand* (Government Printer, Wellington, 1982) 119.

⁴ See generally Bayard Marin *Inside Justice – A Comparative Analysis of Practices and Procedures for the Determination of Offences against Discipline in Prisons of Britain and the United States* (Fairleigh Dickson University Press, New Jersey, 1983) 103.

⁵ *McCann v The Queen* [1976] 1 FC 570 Heald J.

⁶ *McCann v The Queen* [1976] 1 FC 570, 588 Heald J.

⁷ *McCann v The Queen* [1976] 1 FC 570, 592 Heald J.

⁸ *McCann v The Queen* [1976] 1 FC 570, 595 Heald J.

In New Zealand, the 1989 Ministerial Inquiry into prisons also recognised the negative effects that solitary confinement could have on prisoners.⁹ The report said that "...There is little evidence that it will deter further offending and it may have extremely harmful effects on individual inmates."¹⁰ A submission from the department also agreed with this view and stated that "Overseas research indicates that it may sometimes result in aggressive behaviour, self-mutilation, anxiety, disorientation, and mental dysfunction."¹¹

2 *Conditions in Solitary Confinement*

As well as being locked in an isolation cell, an inmate in solitary confinement may further be subject to specific conditions associated with being in solitary confinement.

a) *Conditions*

When a prisoner is placed in solitary confinement, in most cases their "living" conditions will differ from the rest of the prison population.¹² The reason for the differing conditions will be due to being in a different part of the institution (perhaps an older block of the prison, or a block with less windows and ventilation). Additionally, the conditions faced by inmates in solitary confinement may be due to loss of privileges, or conditions stipulated by the reason for the inmate being in solitary confinement. For example, some changes to the contents of the cell may be necessary to safely accommodate a particular inmate.¹³

Conditions in solitary confinement will vary between institutions and will also depend on the grounds for solitary confinement. However,

⁹ Ministerial Inquiry into the Prisons System *Prison Review Te Ara Hau: The New Way* (Government Printer, Wellington, 1989).

¹⁰ Ministerial Inquiry into the Prisons System *Prison Review Te Ara Hau: The New Way* (Government Printer, Wellington, 1989) 221.

¹¹ Ministerial Inquiry into the Prisons System *Prison Review Te Ara Hau: The New Way* (Government Printer, Wellington, 1989) 221.

¹² Penal Institutions Regulations 2000, regs 147-157.

some specific descriptions of solitary confinement may still be useful in illustrating possible scenarios of solitary confinement conditions. One description of solitary confinement stated that:¹⁴

The cells measured 11 feet by 6 1/2 feet and consisted of three solid concrete walls and a solid door with a five-inch-square window which could only be opened from inside the cell. Inside the cell there was no proper bed. The prisoner slept on a cement slab four inches off the floor; the slab was covered by a sheet of plywood upon which was laid a four-inch-thick foam pad. Prisoners were provided with blankets, sheets and a foam-rubber pillow. About two feet away from the end of the sleeping platform against the back wall was a combination toilet and wash-basin.

For a further, more extreme example of solitary confinement, the case of *McCann v The Queen*¹⁵ may again be referred to. In *McCann*, one inmate described how he saw the conditions of solitary confinement:¹⁶

He is issued with 2 blankets, 2 sheets, a pillowcase and a foam rubber pillow. The room contains a combination toilet and washbasin. In the wall there is an air vent and a radio outlet. There are 3 grey cement walls...The cell is lit by a light in the ceiling in the centre of the cell. The light is on 24 hours a day but is dimmed somewhat at night...he was only allowed to shave twice a week, usually with cold water;...the average exercise per day out of the cell was only 40 minutes and was confined to walking up and down the corridor...there was no fresh air exercise. He complained also about lack of proper medical attention; lack of hobbies; movies and television; the radio being restricted to 2 channels; the limited choice of available books and the limited canteen privileges...

In *McCann*, other plaintiffs provided similar descriptions. In particular noting the constant light and the attitude of the guards towards the

¹³ Penal Institutions Regulations 2000, regs 152-153.

¹⁴ Michael Jackson *Prisoners of Isolation – Solitary Confinement in Canada* (University of Toronto Press, Vancouver, 1983) 48.

¹⁵ *McCann v The Queen* [1976] 1 FC 570 Heald J.

¹⁶ *McCann v The Queen* [1976] 1 FC 570, 581 Heald J.

prisoners.¹⁷ The plaintiffs also described guards putting tear gas into cells, pointing gun at the inmates and performing a “skin frisk” procedure.¹⁸

b) Regulation of solitary confinement conditions in New Zealand

The conditions required for inmates confined in solitary confinement are set out in regulation 155 of the Penal Institutions Regulations 2000. This regulation provides that primarily, an inmate confined retains the minimum treatment as required for other inmates in the rest of the prison. However, some differences between conditions in solitary confinement and in the rest of the prison are stated. In the case of inmates confined for protection of self-harm, entitlements as in regulation 42 may be limited to reduce the risk of the inmate to inflict harm on his or her self. Further limitations are that inmates do not necessarily have the same entitlements to visitors or phone calls. However, regulation 155 does make it clear that inmates confined on physical health, accommodation ground, section 7(1A) direction ground, or the request ground “must be confined so far as is practicable in the circumstances and if it is not inconsistent with the ground for confinement, under the same conditions as if he or she were in his or her usual accommodation.”

However, inmates confined on a punishment ground, on the self-harm, or mental health ground may be subject to quite different conditions to the rest of the prison population. The cell facilities for the self-harm, mental health, and penalty ground are set out in the schedule 6 of the Penal Institutions Regulations. The facilities of a penalty cell are of particular interest to this essay and will therefore be set out below.

¹⁷ *McCann v The Queen* [1976] 1 FC 570, 582-584 Heald J.

¹⁸ *McCann v The Queen* [1976] 1 FC 570, 582-584 Heald J.

In isolation cells used as a penalty the mandatory items and features are:¹⁹

A window that allows a complete view of the inside of the isolation cell from a vantage point outside the door.

Artificial lighting that is controlled only from the outside of the isolation cell

Furniture and fittings within the cell that are free from features that could facilitate self-harm (in particular hanging and garrotting).

Heating as appropriate for climatic conditions

Natural lighting (window)

No modesty screen or any other barrier that prevents a full view of the isolation cell from the door window.

Raised sleeping platform.

Ventilation or air conditioning.

Other items and features in isolation cells used as penalty are running water, intercom, alarm, or call button, and toilet.²⁰

B Physical Living Conditions

Another example of physical treatment that prisoners may be subject to in New Zealand prisons is associated with the physical living conditions of the institutions in which they are serving their sentence. The conditions of an institution will impact on the treatment of prisoners in a number of ways such as the hygiene levels, the food available to prisoners, and the available medical facilities.

1 The general condition of prisons

The conditions of prisons will vary from institution to institution. Some prisons will have reasonable conditions while other prisons will have conditions significantly below a reasonable standard.

¹⁹ Penal Institutions Regulations 2000, schedule 6.

²⁰ Penal Institutions Regulations 2000, schedule 6.

One example of where prison conditions will be below a reasonable standard is where there are unhygienic conditions. For an example, it was recently reported that staff at Paparua Men's prison allegedly refused to work in an area because it was infested with pigeon mites.²¹ In the same prison, it was reported that prisoners were cooking their own porridge in a kitchen that had not been used for months.²² A further hygiene problem was noted by a member of the Howard League on a visit to Paparua was that there was an open drain outside the kitchen with sewage in it.²³ The Invercargill prison may be used as a further example of hygiene problems in prisons. At Invercargill prison, toilets have only replaced slop buckets early this year.²⁴

a) The regulation of prison conditions

The Penal Institutions Regulations 2000 provide for some minimum entitlement with regard to the conditions of prisons. The Regulations generally provide that "the superintendent of an institution must take all reasonable steps to ensure that it provides an environment in which the standard of inmates may be maintained to a satisfactory standard."²⁵ The Regulations further state that "Inmate accommodation must provide for the safe, secure, and humane containment of inmates."²⁶

The Regulations further provide more specific requirements for various aspects of the condition of prisons. For example, section 51 specifies a preference for individual cells, section 53 sets out minimum requirements for bedding and section 55 requires institutions to enable inmates to ensure general cleanliness.

²¹ Sean Scanlon "Canterbury Jail Cells 'Disgusting'" (5 January 2001) *The Press* Canterbury 3.

²² Sean Scanlon "Canterbury Jail Cells 'Disgusting'" (5 January 2001) *The Press* Canterbury 3.

²³ Sean Scanlon "Canterbury Jail Cells 'Disgusting'" (5 January 2001) *The Press* Canterbury 3.

²⁴ Tom McKinlay "No Escape from Historic Prison" (18 January 2001) *The Southland Times* Southland 24.

²⁵ Penal Institutions Regulations 2000, reg 48.

²⁶ Penal Institutions Regulations 2000, reg 50.

2 Nutrition

A further indication of the treatment of prisoners can be determined by the food received by prisoners.

One example of a prison diet, at Paparua prison, was described as being cereal and toast (with honey or jam) for breakfast, filled rolls for lunch, and roast beef, beef stew, or roast hogget (with vegetables from the prison garden) for dinner.²⁷ Contrasting to this, at other prisons, there are complaints of innutritious food, and cold food that has led to stomach bugs.²⁸ The level of food received by prisoners can perhaps be indicated by the fact that an average of \$3.41 is spent per prisoner each day.²⁹

The standard of nutrition required in prisons is regulated by the Penal Institutions Regulations 2000. Regulation 56 provides that "Inmates must be provided with a sufficient quantity of wholesome food and drink that conforms to the food and nutritional guidelines and any drinking water standards for the time being issued by the Ministry of Health." The regulations also state that some concession will be made for special dietary needs. The regulations state that "As far as practicable in the circumstances, in providing food and drink to inmates, allowance must be made for the various religious, spiritual, and cultural needs of the inmates."³⁰ The regulations also state that "A medical officer may prescribe a particular diet for a particular inmate."³¹

²⁷ Brenda Webb, "Prison part three: A Day at Paparua" (13 September 2000) *The Southland Times* Southland 24.

²⁸ Debra Alaalatoa "Crims' Grim Tales of Jail Draw Blank" (22 March 1996) *Truth* New Zealand 4. Victoria Clausen "Jail's Cold Food Causes Stomach Bug Inmate" (19 January 2000) *The Press* Canterbury 3.

²⁹ "Prisoners' Fare gets Chef's Thumbs Down" (24 December 1999) *The Dominion* Wellington 6.

³⁰ Penal Institutions Regulations 2000, reg 56.

³¹ Penal Institutions Regulations 2000, reg 56.

3 *Medical treatment*

A further aspect of the treatment of prisoners that is related to the general condition of the prison is the medical treatment facilities and treatment available.

An example of inadequate medical treatment that occurred recently in New Zealand was where prisoners were being given moisturisers and anti-dandruff shampoos from prison health budgets while syringes were being kept in unlocked cupboards.³² Another example of inadequate medical treatment is where medical cells are considered unacceptable for newborns (who were being breastfed in those cells).³³

Medical treatment in prisons is also regulated by the Penal Institutions Regulations 2000. The Regulations give considerable guidance as to the level of medical care required. Section 58 provides that "The standard of health care that is available to inmates in an institution must be reasonably equivalent to the standard of health care available to the public." Sections 59 to 68 elaborate on the standard of health care provided further. Of primary importance, section 59 requires every institution to have a health centre and section 60 sets out the duties of the medical officer.

Dental Services are also governed by the Regulations with section 69 specifying that these services must be primarily concerned with the relief of pain and the maintenance of a reasonable standard of dental care.

4 *Effects of substandard prison conditions*

Where a prisoner spends time in a prison with substandard prison conditions the prisoner will be likely to be negatively affected by the experience. Commentators have suggested that one consequence of

³² Nicholas Maling "Prisoners get Moisturiser but no Hygienic Medical Rooms" (18 March 2001) *Sunday Star Times* New Zealand 4.

substandard prison conditions affecting prisoners is an increase in suicides by prisoners.

Following the two deaths within two weeks at Mt Eden in 1995, Peter Williams expressed concern with prison conditions for remand prisoners.³⁴ He said that "We really are not caring sufficiently for them as human beings. We are just cooping them up and locking them up in these dreadful cells. The place is so overwhelmingly depressive that it's a conducive factor towards suicides."³⁵

C Assaults by Prison Officers

A further example of physical treatment of prisoners that may occur in prisons is where prison officers assault prisoners. An assault on an inmate by a prison officer may occur in a number of situations. In some circumstances, the assault will be justifiable due to achieving some legitimate purpose. Whether or not assault is justified is likely to depend on what is reasonable in the particular circumstances. Examples of justified assault might be where some form of restraint is used to protect a prisoner from himself or herself, or to protect other people from that prisoner.

However, as well as situations of justified assault occurring, there will also be situations where it is clear that a prison officer goes beyond his or her authority and assaults an inmate without justification. For example, a group of prison guards may repeatedly beat prisoners over a number of days.³⁶

In further situations, assault may occur where the action at issue is authorised by prison rules, but officers use excessive force in executing that

³³ Nicholas Maling "Prisoners get Moisturiser but no Hygienic Medical Rooms" (18 March 2001) *Sunday Star Times* New Zealand 4.

³⁴ Phil Taylor "Prison Suicide Freshens Debate" (4 March 1995) *The Dominion* Wellington 1.

³⁵ Phil Taylor "Prison Suicide Freshens Debate" (4 March 1995) *The Dominion* Wellington 1.

action. For an example of this sort of situation, the case of *R v Berrie*³⁷ may be looked at. In *R v Berrie*, an inmate, who refused to shave, was forcibly restrained and shaved by seven or more prison officers.³⁸ Due to the officers forcing this action, the inmate was injured, receiving deep lacerations.³⁹ The prison officers were forced to stop shaving due to the amount of blood caused by the cuts.⁴⁰ In this case the officers were found guilty of common assault despite prison rules saying that inmates should obey the orders of officers with regard to shaving.⁴¹ The court said that there was no situation of urgency or necessity for the inmate to shave and therefore the use of force was not reasonable to enforce the prison rule at issue.⁴²

D Searches of Inmates

A further example of physical treatment of prisoners that commonly occurs in prisons is physical searches of inmates. The searching of inmates in prisons is essential for a number of reasons. The most obvious reasons being to control drug smuggling in prisons, and prisoners having concealed weapons. Despite authorisation of searches of inmates, certain standards, as required by statute, are not necessarily followed.

An example of an unsatisfactory search of a prisoner would occur when a member of the opposite sex is involved in a strip search. For example, earlier this year at the Christchurch prison where a female inmate was strip-searched by the "control and restraint" team that contained at least one male officer.⁴³

A further example of unsatisfactory searching will occur when excessive force is used during the search of an inmate, or an inmate's cell.

³⁶ Basil Logan *Ministerial Inquiry into Management Practices at Mangaroa Prison – Arising from Alleged Incidents of Staff Misconduct* (Wellington, 1993) 6.

³⁷ *R v Berrie* (1975) 24 CCC(2d) 66 Goven Prov Ct J.

³⁸ *R v Berrie* (1975) 24 CCC(2d) 66, 68 Goven Prov Ct J.

³⁹ *R v Berrie* (1975) 24 CCC(2d) 66, 68 Goven Prov Ct J.

⁴⁰ *R v Berrie* (1975) 24 CCC(2d) 66, 68 Goven Prov Ct J.

⁴¹ *R v Berrie* (1975) 24 CCC(2d) 66, 74 Goven Prov Ct J.

⁴² *R v Berrie* (1975) 24 CCC(2d) 66, 74 Goven Prov Ct J.

⁴³ "Prison Investigates Strip Search Claim" (21 February 2001) *The Press* Canterbury 4.

An example of this sort of situation is the case of the 16-member emergency response unit that was set up in 1999.⁴⁴ This team had to be abandoned after complaints of excessive force and intimidatory tactics.⁴⁵ A number of inmates were considering taking legal action against the corrections department over activities of the emergency response unit, Some allegations were of instances of beatings.⁴⁶

The Penal Institutions Act 1954 authorises searches of inmates. Section 21K gives prison officer's power to search inmates "for the purpose of detecting any unauthorised item." This section authorises "rub-down searches (of a clothed prisoner) and strip-searches. This section specifies the necessary grounds for these searches to occur. Sections 21D to section 21J provide further direction on searches of prisoners.

E Summary

This section has sought to illustrate the types of physical treatment that might occur to prisoners in New Zealand. While the types of physical treatment described above commonly occur in New Zealand prisons, it must be emphasised that the incidence of occurrence of unsatisfactory treatment of prisoners will vary considerably between penal institutions. Some penal institutions may have entirely satisfactory conditions, and procedures to deal with physical treatment of prisoners. However, the reverse is also true, and some prisons have unhygienic conditions, and questionable management practices.

The paper will consider in the following sections what human rights are important to prisoners in ensuring that they receive appropriate physical treatment of the kinds discussed in this section. The paper will then evaluate how the human rights law in New Zealand protects prisoner's rights to ensure they receive appropriate physical treatment.

⁴⁴ Yvonne Martin "Inmate Paid Compensation (6 March 2001) *The Press* Canterbury 8.

⁴⁵ Yvonne Martin "Inmate Paid Compensation (6 March 2001) *The Press* Canterbury 8.

⁴⁶ Yvonne Martin "Inmate Paid Compensation (6 March 2001) *The Press* Canterbury 8.

III WHAT RIGHTS SHOULD PRISONERS HAVE?

This section will suggest that prisoners do retain their human rights while in prison and that it is important that a number of specific human rights are upheld to ensure that appropriate treatment of prisoners occurs in New Zealand prisons. The section of the paper will suggest that prisoners have a number of moral rights. (The positive rights of prisoners will be discussed in the following sections of the essay). It must, however, be recognised that prisoner's rights must be limited in some way to necessitate the running of a penal institution.

Before discussing what natural or moral rights a prisoner might have, it is necessary to briefly address the debate over whether prisoners should have human rights at all.

A *Should Prisoners have Rights?*

There has been ongoing debate over whether prisoners should retain their human rights when serving their sentences in prison. Arguments can be made from a natural or moral rights perspective that prisoners, as human beings do retain their rights while in prison. However, contrary arguments suggest that the rights of prisoners can be taken away as a consequence of the prisoner committing a criminal act.

This essay will emphasise that, in accordance with the view of natural rights theorists, human rights continue to apply to prisoners, as they are human beings.⁴⁷ A difficulty with the argument that prisoners retain all rights while in prison has been recognised.⁴⁸ It has been recognised that, by punishing someone you will necessarily breach some rights. However, it has been suggested that this difficulty may be overcome by taking the sort of

⁴⁷ Lawrence M Hinman *Ethics: A Pluralistic Approach to Moral Theory* (2 ed, Harcourt Brace, Fort Worth, 1997) <<http://ethics.acusd.edu/ed2/>>(last accessed 26 August 2001).

view held by Lord Kilbrandon who said that the sentence of imprisonment was "no more than the deprivation of liberty." Therefore it would follow that prisoners retain all rights while in prison except for the right to liberty.⁴⁹

A contrary argument, suggesting that prisoners do not retain their human rights while in prison proposes that rights may be lost as a consequence of a prisoner's criminal act.⁵⁰ This argument suggests that while rights do exist for all people, they are not inalienable and may be lost if a person acts in a certain way. Therefore, following this argument, a prisoner could lose his or her rights by committing a crime

B Rights in the Context of Prisons

The rights that apply to prisoners must be viewed in the context of penal institutions. Viewing prisoner's rights in the context of prisons ensures that the appropriate distinction is made between prisons and the general society of New Zealand.

An ordinary citizen lives in the New Zealand society, and must obey the law of New Zealand. Contrasting to this, a prisoner lives within an institution and as well as answering to the general law of New Zealand, must also obey specific institution rules and regulations and answer to those with authority within the institution. Inmates in a prison may, therefore, have some limits on their human rights as are necessary to comply with the rules of the institution that ensure the effective operation of prisons. For example, a dangerous prisoner may need to spend considerable time in a solitary confinement cell to protect other prisoners and prison staff. Furthermore, regard must be had for the fact that a prisoner is in a penal institution due to committing a crime.

⁴⁸ A J Fowles *Prisoners' Rights in England and the United States* (Athenaem Press Limited, London, 1989) 5.

⁴⁹ A J Fowles *Prisoners' Rights in England and the United States* (Athenaem Press Limited, London, 1989) 5.

However, an argument could also be made that the nature of prisons means that prisoner's rights become even more important. This is because of the secluded nature of prisons and, therefore, higher potential for abuse of rights. This issue was mentioned in the recent Court of Appeal case of *Drew v Attorney General*⁵¹ which will be discussed in more detail below. In *Drew v Attorney General*, the Court approved a passage from the case of *R v Secretary of State for the Home Department, Ex Parte Daly*.⁵² Important parts from the passage referred to read:⁵³

The (custodial) order does not wholly deprive the person confined of all rights enjoyed by other citizens. Some rights, perhaps in an attenuated or qualified form, survive the making of such order. And it may well be that the importance of the surviving rights is enhanced by the loss or partial loss of other rights. Among the rights which, in part at least, survive are three important rights, closely related but free-standing, each of them calling for appropriate legal protection: the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege. Such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment.

By approving this passage the Court is agreeing with the proposition that rights of prisoners might be of more importance because they are in an institution. The reason why prisoner's rights are of more importance because they are in a prison is illustrated by the factual scenario of *Drew v Attorney General*⁵⁴ (discussed below) which concerns a prisoner involved in a disciplinary hearing. A prisoner's right (in this case, to receive a fair trial) can be argued to be of greater importance because the prisoner will have

⁵⁰ A J Fowles *Prisoner's Rights in England and the United States* (Athenaem Press Limited, London, 1989) 5.

⁵¹ *Drew v Attorney-General* (12 July 2001) Court of Appeal, CA 189/00 Blanchard J for the Court.

⁵² *R v Secretary of State for the Home Department, Ex Parte Daly* [2001] UKHL, 26.

⁵³ *Drew v Attorney-General* (12 July 2001) Court of Appeal, CA 189/00 Blanchard J for the Court.

⁵⁴ *Drew v Attorney-General* (12 July 2001) Court of Appeal, CA 189/00 Blanchard J for the Court.

limited access to support in preparing his or her case. (Contrasting to an ordinary citizen who may have constant contact with a lawyer, or community law centre). Furthermore, there is the possibility that prison officials may make it difficult for the prisoner to prepare a case in his or her favour. (For example, by limiting the prisoner's access to research materials).

C What Rights are Important for Prisoners to ensure Appropriate Physical Treatment?

This paper will suggest a framework of moral rights for prisoners. The framework will be based on the rights believed to be of primary importance, the right to equality and the right to respect. It is recognised that these rights overlap and will form the basis of numerous other human rights. Under the proposed framework, the paper will discuss, as extensions to the right to equality and the right to respect for the person, a number of subsidiary rights that are of considerable importance to prisoners concerning the protection of their appropriate physical treatment.

As an extension of the right to equality of the person, this essay will discuss the right to a fair trial before being subjected to physical treatment as a punishment. The right to protection from abuse of power by prison officers will also be discussed. Further, as a part of the right to respect for the person, this essay will discuss the right to protection from cruel or unusual punishment and again mention the right to protection from abuse of power by prison officers.

As discussed above, human rights may be argued to exist from a natural rights or moral rights perspective. This essay will suggest that a number of moral rights approaches can be used to both justify and understand the importance of the right to equality and the right to respect of the person.

1 Equal treatment by the State

This essay emphasises the importance of prisoners being treated as equals with other citizens. The right to equality means that all people are treated as equal before the law. This means that, generally, the State should treat all people the same regardless of their circumstances. The Federal Constitutional Court of Germany has explained the right to equality as requiring “that all human beings are treated equally before the law.” The Court further explained that the right would be violated if “one group to which norms are addressed is treated differently from another group even though there are no differences of such a nature and weight between the two groups that could justify the unequal treatment.”⁵⁵

Applying the equality principle to prisoners, therefore, means that prisoners must be treated equally with ordinary citizens unless the unequal treatment can be justified. The right to equality would, therefore, recognise that substandard living conditions (that are sometimes prevalent in prisons) are not respecting a prisoner’s right to equality. This is because the same living standards would not be accepted as reasonable for other citizens in society and it is doubtful whether there is reasonable justification for depriving prisoners of a reasonable standard of living.

The importance of the right to equality may be justified by referring to the philosophies of Rawls and Dworkin.

Under the “Veil of Ignorance” test, Rawls suggests that human rights should be determined depending on what people would choose if they were in a position of ignorance as to their place in a new society.⁵⁶ This involves asking the question of what a rational person would negotiate, wanting to

⁵⁵ BVerfGE (1980) 55, 88, Sabine Michalowski and Lorna Woods *German Constitution Law – The Protection of Civil Liberties* (Dartmouth Publishing Company Limited, England, 1999) 163-164.

⁵⁶ Peter Bailey *Human Rights in an International Context* (Butterworths, Australia, 1990) 3.

ensure the best possible situation for themselves.⁵⁷ A person who is unsure of his or her place in society will not know if they will have considerable wealth, or if they will be poor. They will also be unable to know for certain that they will not end up in prison. Because of this uncertainty, it seems reasonable that a person in a position of ignorance would want to ensure that he or she was treated equally with other members of society, regardless of his or her position in society. In particular, a person would want to ensure that, whatever his or her future position would be, minimum standards would be preserved, such as a minimum standard of living.

Bearing in mind the necessary limitations on the right to equality, Dworkin's theory of rights may also be used to support the idea of prisoners having the right to receive the same treatment as other citizens. The central part of Dworkin's theory of rights is that individuals have the right to equal concern and respect.⁵⁸ Therefore following Dworkin's theory, prisoners and ordinary citizens alike have equal rights and therefore should be treated, in the first instance at least, in the same manner.

It follows from the existence of the right to equality that prisoners should be ensured the right to a fair trial. This right is linked to the right to equality by the state since other citizens have the right to a fair trial and the Criminal Procedure has provisions protecting this right. The right to a fair trial for prisoners will ensure that when a prisoner is being disciplined for an alleged offence against prison rules, they will have certain entitlements that make them able to present his or her case to a reasonable level. The right to a fair trial would also mean that the prisoner has the same opportunities as the prosecution, to represent his or her side of the case. This right would encompass the right to be heard, the right to fair representation (if necessary) and the right to appeal decisions.

⁵⁷ Peter Bailey *Human Rights in an International Context* (Butterworths, Australia, 1990) 3.

⁵⁸ Andrew Haplin *Rights and Law – Analysis and Theory* (Hart Publishing, Oxford, 1997) 233.

A further extension from the right to equality is that prisoners should be protected from abuses of power by prison officials. The right to protection from abuse of power or authority would ensure that prison officials and prison management act within their power. The right to protection from abuse of power or authority is of particular importance for prisoners because prison officers have considerable power over prisoners.

The right to protection from abuses of power or authority would also protect prisoners against prison officers or management making arbitrary decisions regarding physical treatment. This right is of great importance in the context of prisons because of the secluded nature of prisons and therefore the lack of scrutiny of prison affairs.

The discussion in the section above of assaults by prison officer's occurring illustrates why the right to protection from abuse of power or authority is important for prisoners. The right to protection from abuse of power or authority would recognise that prison officers using any excessive force on prisoners is inappropriate physical treatment.

Furthermore, the discussion above of searches of inmates illustrates why the right to protection from abuses of power or authority is important for prisoners. This right would recognise that officers should not search one inmate under suspicion, but not another inmate under the same circumstances.

2 *Treated with respect for the person*

This essay also emphasises the importance of prisoners being treated with respect. The right for prisoners to be treated as equals with other citizens is linked to the right to be treated with respect for the person. Respect for the person is often referred to as part of the right to inherent dignity of the person. This right recognises respecting the intrinsic value of

each person⁵⁹ and can be looked at to see what the idea of respect might cover. Respecting a person has been held to cover not treating them in a degrading or humiliating way. An example of disrespecting a prisoner might be forcing the prisoner to eat off a dirty floor. Since eating off a floor is not usual conduct of people, and would not be forced upon a citizen, it would not be treating the prisoner as a person worthy of respect. This sort of conduct would illustrate that the prisoner is not worthy of the same respect as an ordinary citizen.

The discussion above of the substandard living conditions that are sometimes prevalent in prisons can again be used to illustrate the importance of the right to respect for prisoners. The right to respect for the person would recognise that substandard living conditions in prisons, such as unhygienic cells, are unacceptable since they are not respecting prisoners as people are not acclimatised to live in such conditions.

Support for the proposition of prisoners having the right to be treated with respect can be found using the “veil of ignorance” test proposed by Rawls.⁶⁰ Since no person could be sure that they would not end up spending some time in a prison at some point in the “new society,” it seems reasonable to suggest that each person would negotiate to ensure minimum reasonable treatment in case they did end up in prison. This minimum treatment would include being treated with respect.

Further support for the right to respect is apparent when relying on the utilitarian approach suggested by Bentham.⁶¹ This approach proposes the maximisation of happiness.⁶² Bentham argued that what was important was

⁵⁹ Sabine Michalowski and Lorna Woods *German Constitution Law – The Protection of Civil Liberties* (Dartmouth Publishing Company Limited, England, 1999) 99.

⁶⁰ Peter Bailey *Human Rights in an International Context* (Butterworths, Australia, 1990) 3.

⁶¹ Fritz Berolzheimer *The World's Legal Philosophies* (The Boston Book Company, Boston, 1912) 138.

⁶² Fritz Berolzheimer *The World's Legal Philosophies* (The Boston Book Company, Boston, 1912) 138.

achieving the greatest happiness of the greatest number of people.⁶³ This approach requires each action to be analysed in terms of advantages and disadvantages.⁶⁴ Utilitarianism has been defined as comprising two principles:⁶⁵

- 1) The consequentialist Principle – that the rightness or wrongness, of an action is determined by the goodness, or badness, of the results that flow from it and
- 2) The hedonist Principle – that the only thing that is good in itself is pleasure and the only thing bad in itself is pain.

Therefore, following the utilitarian approach, the advantages and disadvantages of prisoners being treated with disrespect need to be weighed. It can be argued that while the disadvantages to prisoners from disrespect are apparent, (see for example discussion on effects of solitary confinement in the section above), any advantages from this sort of treatment are not easily recognisable. Therefore, from a utilitarian perspective, disrespect to prisoners should not occur.

As an extension of the right to respect for the person, prisoners should have the right to be protected from any cruel or unusual punishment. The right to protection from cruel or unusual punishment will help ensure that no person is caused unnecessary harm. Unnecessary harm may be defined as any harm caused that has no purpose or overriding benefit. This right will recognise that imposing harm on a prisoner will be likely to have negative effects of a physical or emotional kind. Given the suffering that would be imposed on a prisoner it will therefore be “cruel” to cause this suffering unless there is an excellent reason to do so.

The discussion above of solitary confinement illustrates why the right to protection from unnecessary harm is important for prisoners. The right to

⁶³ Fritz Berolzheimer *The World's Legal Philosophies* (The Boston Book Company, Boston, 1912) 138.

⁶⁴ Fritz Berolzheimer *The World's Legal Philosophies* (The Boston Book Company, Boston, 1912) 138.

⁶⁵ Anthony Quinton *Utilitarian Ethics* (Duckworth, London, 1989) 1.

protection from unnecessary harm would recognise that solitary confinement (as a recognised form of harm) should only occur when there are outweighing benefits such as protection of a dangerous inmate.

The right to protection from unnecessary harm and cruel or unusual punishment would also recognise that the conditions faced by inmates in solitary confinement need to be of a reasonable standard. The conditions suggested by an expert witness in the *McCann v The Queen* case⁶⁶ illustrate the sort of conditions which would be necessary to avoid unnecessary harm to prisoners while in solitary confinement. The programme proposes that:⁶⁷

- (1) (There should be) a physically secure perimeter within that perimeter, the inmates must have all their ordinary rights and privileges
- (2) They should be allowed visits from other inmates within the secure area.
- (3) They should also be allowed visits from outside volunteers such as clergymen and individuals interested in penal reform...
- (4) (They should be allowed) access to therapists
- (5) (There should be) larger cells...
- (6) (There should be) exercise under the sky...
- (7) (There should be) less deprivation of personal articles...

As a further extension of the right to respect, prisoners should be protected from abuses of power or authority. This is discussed above as being also relevant to the right to equality.

D Summary

The right to equality of the person and the right to respect for the person would recognise that physical treatment of prisoners which does not respect them as people or does not treat them as equals with ordinary citizens (such as substandard living conditions) must not occur. These rights

⁶⁶ *McCann v The Queen* [1976] 1 FC 560 Heald J.

⁶⁷ *McCann v The Queen* [1976] 1 FC 560, 593 Heald J.

must, therefore, be upheld for prisoners to ensure that they receive appropriate physical treatment while in prison. The extent to which these rights are recognised in New Zealand law will be discussed in the following sections.

IV PRISONER'S RIGHTS UNDER NEW ZEALAND LAW

In New Zealand, positive rights are primarily provided for under the New Zealand Bill of Rights Act 1990. In addition to this, New Zealand has ratified a number of United Nation human rights instruments.

This section will identify and discuss the provisions of New Zealand human rights law that might be relevant as protection of appropriate physical treatment of inmates while in prison. As discussed in the preceding section, the main rights relevant to the protection of appropriate physical treatment are the right to equality and the right to respect for the person.

Before discussing the specific human rights provisions it is necessary to mention the limits on the applicability of the Bill of Rights Act and how the United Nations human rights instruments may be applied in New Zealand.

A Limits of New Zealand Human Rights Law

Unlike the human rights legislation of many other nations, the New Zealand Bill of Rights Act 1990 has only the force of an ordinary statute. The most obvious impact of the status of the Act on human rights protection is that the Bill of Rights will not prevail over any other legislation.⁶⁸ Theoretically, this could mean that another statute could authorise some treatment of prisoners which would be regarded as "cruel or unusual" under the Bill of Rights.

⁶⁸ New Zealand Bill of Rights Act 1990, s4.

Section 4 and Section 5 provide for the limits on all rights provided for under the New Zealand Bill of Rights. The inclusion of these sections means that the Bill of Rights is regarded as a Bill of reasonable rights rather than a Bill of absolute rights.⁶⁹

The status of the Bill of Rights in relation to other Acts is made clear by section 4. Section 4 provides that:

Other Enactments not affected---No court shall, in relation to any enactment (whether passed or made before or after the commencement of the Bill of Rights), ---

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(b) Decline to apply any provision of the enactment---

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

Section four of the Act serves to diminish the effectiveness of any human rights protection. One commentator has argued that "section 4 makes it plain that the legislature has reserved its ability to infringe rights if it desires."⁷⁰

As well as allowing legislation that is inconsistent with the Bill of Rights Act, the Act also allows for justifiable limits on the rights guaranteed in the Act. Section 5 provides that:

Justified Limitations--- Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

⁶⁹ Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms, The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 106.

⁷⁰ Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms, The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 106.

In *Noort v Ministry of Transport*⁷¹ the Court discussed the application of this section. The majority held that the section means that a court should strive to adopt meanings of statutes which impose only reasonable limits on rights in preference to meanings which would impose unreasonable limits.⁷²

Unlike the sections that precede it, section 6 attempts to preserve human rights by "reading down" other enactments. Section 6 provides:

Interpretation consistent with Bill of Rights to be preferred--Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

In the case of section 6 being adhered to, section four will have no application.⁷³

Another limit on the positive rights provided for under New Zealand law is the status of United Nations human rights instruments. Some aspects of these documents have been expressly incorporated into New Zealand law by legislating for them in New Zealand Acts. These provisions will therefore have the usual force of New Zealand law. Further more, In the case of a statute incorporating an international covenant, it has been held that the treaty may be used as an aid to interpretation of the statute to try to ensure that the interpretation is consistent with the treaty obligations.⁷⁴ However, where United Nations documents have not been incorporated into New Zealand law, New Zealand has obligations as a party to each document to comply with the document in question.

⁷¹ *Noort v Ministry of Transport* [1992] 3 NZLR 260.

⁷² *Noort v Ministry of Transport* [1992] 3 NZLR 260.

⁷³ Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms, The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 107.

⁷⁴ *Ashby v Minister of Immigration* [1981] 1 NZLR 222, 229.

B *Equal Treatment by the State*

There are some positive rights under New Zealand law and in United Nations human rights instruments that might serve to protect a prisoner's right to equal treatment. The right to equality is expressly recognised in the Universal Declaration of Human Rights. Article 1 of the declaration states that "All human beings are born free and equal in dignity and rights..." This article, therefore, recognises that all people (this would include prisoners) are equal and should receive equal treatment by the state.

There is no similar provision recognising the right to equality under the New Zealand Bill of Rights Act 1990. However, it might be argued that some rights included in the Bill of Rights do allude to the right to equal treatment for prisoners. Under section 23(5) it reads "everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person." It can be argued that treating a prisoner with respect will include being treated as equals with ordinary citizens. Support for this proposition exists in the United Nation general comments on the right to respect. The comments recognise the link between equality and respect and state that "respect for ... dignity...must be guaranteed under the same conditions as for that of free persons."⁷⁵ Therefore recognising that part of the right to respect means equal treatment.

The absence of an express equality provision under the New Zealand Bill of Rights Act is notable. An express provision is often found in the human rights legislation of a country. For example, the Canadian Charter of Rights provides that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, mental or physical

⁷⁵ Office for the High Commissioner *General Comment 21* (1992, Geneva)
<[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR+General+comment+21.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR+General+comment+21.En?OpenDocument)>(last accessed 1 Oct 2001).

disability.”⁷⁶ New Zealand does provide for protection against discrimination under the Human Rights Act 1993, however, the discrimination referred to in the act does not cover discrimination against prisoners.

1 A fair trial

There is protection under the New Zealand Bill of Rights Act of the right to a fair trial. (Discussed above as being an extension of the right to equality). Under the New Zealand Bill of Rights Act the right to a fair trial is recognised under section 27. Section 27 states that “Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person’s rights obligations, or interests protected or recognised by law.” This section will therefore apply when a prisoner is involved in a disciplinary hearing. The right to observance of the principles of natural justice would cover the aspects that would comprise a fair trial, such as the right to be heard.

The entitlements of a prisoner involved in a disciplinary hearing are discussed in detail in the Penal Institutions Regulations 2000. Under the Penal Institutions Regulations 2000 Schedule 4, the disciplinary proceeding procedures are set out. The schedule states that an inmate is to be charged promptly, “...after a staff member becomes aware of the act or omission alleged to constitute that disciplinary offence.” The schedule further provides for the information that is to be given to the inmate. The information is to be given at the same time as the charge is laid or promptly afterwards and is to include the charge involved. The schedule further provides that the charge is to be heard promptly, ...but the inmate must be given sufficient time to prepare his or her case. The Schedule also deals with the assistance to be given to an inmate. The superintendent is to ensure that the inmate has necessary pens, paper, and is to help facilitate contact

⁷⁶ Canadian Charter of Rights and Freedoms, s15(1), Part I of the Constitution Act 1982 (Canada Act 1982 (UK), sch B).

between the inmate and any adviser. Part 19 of the regulations states that "An inmate may, at his or her own expense, contact his or her legal adviser for the purpose of assisting with the preparation of his or her defence, but the inmate's legal adviser may not represent the inmate at the disciplinary hearing." (this will be discussed below). The schedule also states that an inmate may have a support person if required, at the hearing of the charge. The schedule further provides that if an inmate is awaiting a disciplinary hearing "the inmate retains the minimum entitlements as in regulation 42(1) and that the inmate must not be punished at any time before the disciplinary hearing has concluded." The schedule further states that "No inmate may be punished more than once for the same disciplinary offence."

The requirements under the Penal Institutions Regulations that an inmate's legal adviser does not represent an inmate at a disciplinary hearing may deprive a prisoner of the right to a fair trial. This is because, without legal representation, a prisoner may not be given the best chance to present his or her case. The New Zealand Court of Appeal has recently discussed this issue. The Court of Appeal decision will be discussed in the following section of the essay.

2 *Protection from abuse of power*

There is some protection from abuse of power under the New Zealand Bill of Rights Act. (Also discussed above as being an extension of the right to equality). A number of provisions under the New Zealand Bill of Rights Act will be relevant in ensuring protection from abuse of power. Under section 23(5), the right to respect for prisoners is provided for (set out above). The right to respect for the person will protect prisoners from abuses of power by prison officers since if a prison officer is abusing his or her power over a prisoner they will not be showing respect to the inmate. A further section that is relevant in ensuring protection from abuse of power is section 9 of the Bill of Rights Act. Section 9 provides for the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment. Therefore, if a prison officer is physically harming

an inmate through some abuse of arbitrary use of power, he or she will not be respecting the prisoner's right to protection from cruel or unusual punishment. A further section of the Bill of Rights Act that is relevant as protection against abuse of power is section 21. Section 21 provides for the right to be "secure against unreasonable search or seizure whether of the person, property, or correspondence or otherwise."

As well as protection under the New Zealand Bill of Rights Act, United Nations instruments also contain some protection against abuses of power by prison officers. Article 3 of the United Declaration of Human Rights provides that everyone has the right to life, liberty, and security of the person.⁷⁷ This right is similarly provided for under the International Covenant on Civil and political rights.⁷⁸ Protection against abuse of power would be mainly relevant under the right to security of the person.

New Zealand does not have a right to security of the person as provided for under the United Declaration of Human Rights and the International Covenant on Civil and Political Rights. The absence of the right to security could be regarded as a weakness in the law. It could be suggested that the right to security of the person could be effectively utilised when dealing with abuses of power by prison officers.

Further protection for prisoners from abuses of power by prison officers can be found in complaint procedures that can be used in the event of such abuse or arbitrary use of power occurring. An adequate complaints procedure will help protect prisoners because it will remedy breaches, and may prevent reoffending. In New Zealand, Prison inmates have the right to talk to the General Manager, inspector, visiting justice and Ministers of Parliament. Inmates may further write to the Ombudsman.⁷⁹ The Penal Institutions Regulations 2000 further regulate the necessary complaints

⁷⁷ Universal Declaration of Human Rights (10 December 1948) art 3.

⁷⁸ International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 9.

⁷⁹ Basil Logan *Ministerial Inquiry into Management practices at Mangarua Prison – Arising from alleged incidents of Staff Misconduct* (Wellington, 1993) 55.

procedures to be available to prisoners in New Zealand prisons. The Regulations, state that every institution must have a formal internal complaints system.⁸⁰ The regulations also emphasise that it is ensured that the inmates are aware of the complaints procedure and are able to use the procedure when necessary.⁸¹ Regulation 179 specifies that there be:

Notices prominently displayed in each unit in the institution explaining-

- (a) the complaints resolution process generally; and
- (b) how inmates may obtain forms for requesting interviews or for making formal complaints; and
- (c) the right of inmates to request, at any time, assistance from an outside agency

When an inmate is in the process of resolving a complaint, they are allowed assistance from outside agencies.⁸² Inmates are entitled to interviews with the agency assisting them.⁸³

C Treated with Respect for the Person

There are also some positive rights under New Zealand law and United Nations human rights instruments that recognises a prisoner's right to be treated with respect for the person. There is an express reference to the right of prisoners to be treated with respect for their person under the New Zealand Bill of Rights Act. As discussed above, section 23(5) provides that "Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person." A similar provision appears in article 10 of the International Covenant on Civil and Political Rights.⁸⁴ The ambit of the right to protection of humanity and respect for the person under the New Zealand Bill of Rights may be determined by reference to the General Comments on the International Covenant on Civil and Political Rights of the United Nations Assembly. (Since the International Covenant

⁸⁰ Penal Institutions Regulations 2000, reg 179.

⁸¹ Penal Institutions Regulations 2000, reg 178.

⁸² Penal Institutions Regulations 2000, reg 181.

⁸³ Penal Institutions Regulations 2000, reg 183.

⁸⁴ International Covenant on Civil and Political Rights (19 December 1966) art 10.

on Civil and Political Rights is partially incorporated into the New Zealand Bill of Rights and therefore presumably our provision modelled on that in the International Covenant on Civil and Political Rights). The comments state that the protection imposes a positive duty on states to protect "person who are particularly vulnerable because of their status as persons deprived of liberty...".⁸⁵ The comments further state that the provision means that prisoners cannot "be subjected to any hardship or constraint other than that resulting from the deprivation of liberty."⁸⁶ Further recognition of the right to respect for the person is contained within other rights in the Bill of Rights Act. For example, section 9 of the Act which provides for protection from cruel and unusual punishment deals with one aspect of what is necessary to show respect for a person. The General Comments of the United Nations recognise that the right to humane treatment of persons deprived of liberty is complementary to the right to no torture or other cruel, inhuman or degrading punishment.⁸⁷

The Penal Institutions Act and Regulations 2000 further serve to protect prisoner's rights to be treated with humanity and respect for the person. The regulations set out a number of requirements with regard to the condition of prisons. These have been discussed above in the first section of the essay.

Although there is express recognition of the right for prisoners to be treated with respect, this recognition may be hindered by the vague nature of this right. Despite some guidance from the United Nations comments, what the right to respect is intended to cover is conceptually uncertain. However, it may be argued that the concept of respect is inherently uncertain in nature and there is little any legal reform to the concept could do to improve the

⁸⁵ Office for the High Commissioner *General Comment 21* (1992, Geneva) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR+General+comment+21.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR+General+comment+21.En?OpenDocument)>(last accessed 1 Oct 2001).

⁸⁶ Office for the High Commissioner *General Comment 21* (1992, Geneva) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR+General+comment+21.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR+General+comment+21.En?OpenDocument)>(last accessed 1 Oct 2001).

⁸⁷ Office for the High Commissioner *General Comment 21* (1992, Geneva) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR+General+comment+21.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR+General+comment+21.En?OpenDocument)>(last accessed 1 Oct 2001).

effectiveness of the right. The uncertainty of the nature of the right to respect may however, lead to problems in implementation of the right.

1 Protection from cruel or unusual punishment

There is express protection under the New Zealand Bill of Rights Act and United Nations human rights instruments of the right to protection from cruel and unusual punishment. (Discussed above as an extension of the right to respect for the person). Section 9 of the New Zealand Bill of Rights Act provides for protection against cruel or unusual punishment. (As mentioned above). The provisions which provide for the right to respect for the person and equality (also mentioned above) may further be argued to protect prisoners from harm. (The argument following that for a prisoner to be respected as a person and to be treated equally with other citizens, they should not be subjected to any unnecessary harm). The ambit of the right to no cruel or unusual punishment is intended to cover may be determined by looking at United Nations Comments on International Covenant on Civil and Political Rights section 7. The comments state that the aim of the provision is "to protect both the dignity and the physical and mental integrity of the individual."⁸⁸ The comments further emphasise that this right places a duty on the states "to afford everyone protection through legislation and other measures as may be necessary against the acts prohibited ... whether inflicted by persons acting in their official capacity, outside their official capacity or in a private capacity."⁸⁹

The right to protection from cruel and unusual punishment is also provided for under article 5 of the Universal Declaration of Human Rights,⁹⁰ article 7 of the International Covenant on Civil and Political Rights,⁹¹ and

⁸⁸ Office for the High Commissioner *General Comment 20* (1992, Geneva) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR+General+comment+20.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR+General+comment+20.En?OpenDocument)>(last accessed 1 Oct 2001).

⁸⁹ Office for the High Commissioner *General Comment 20* (1992, Geneva) <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR+General+comment+20.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR+General+comment+20.En?OpenDocument)>(last accessed 1 Oct 2001).

⁹⁰ Universal Declaration of Human Rights (10 December 1948) art 5.

⁹¹ International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 7.

under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.⁹²

Aspects of the Penal Institutions Regulations 2000 regulate treatment of prisoners and therefore help to ensure the treatment is appropriate. As discussed above in part II of the essay, the regulation of solitary confinement provides that certain procedures must be followed when placing someone in solitary, and that certain conditions should be met.

The right to protection against cruel and unusual punishment will cover prisoners being subjected to unnecessary harm since this would be likely to be regarded as cruel and unusual treatment of the prisoner. However as discussed above, the New Zealand Bill of Rights Act does not contain a right to security of the person as is contained in some countries human rights laws. It could be argued that the right to security of the person could better protect situations of physical harm of prisoners.

2 *Protection from abuse of power*

As discussed above, protection from abuse of power and authority is an extension of both the right to equality and the right to respect for the person. The protection from abuse in New Zealand is discussed above under the right to equality.

D Summary

There is reasonably comprehensive recognition of prisoner's rights to equality and to respect for the person under New Zealand law. The provisions of the New Zealand Bill of Rights Act, and the United Nations human rights instruments that have been ratified by New Zealand discussed above illustrate this recognition of prisoner's rights. There are, however,

⁹² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.

some areas of the law that could be reformed to provide further recognition of prisoner's rights.

Furthermore, as discussed in the introduction to this section, there may be limits placed on the rights guaranteed under the New Zealand Bill of Rights Act. Therefore, at first glance, what might appear excellent recognition of prisoner's rights, may be negated by contradictory legislation.

V *RECOGNITION OF PRISONER'S RIGHTS IN PRACTICE*

Although there are a number of theoretical provisions that recognise a prisoner's right to equality and respect (as discussed above), in practice it may be that prisoner's rights to equality and respect are not being adequately upheld. This part of the paper will examine the treatment of prisoners that occurs in New Zealand and therefore how well the right to equality and the right to respect are being upheld to ensure appropriate physical treatment of prisoners in practice.

A *Equal Treatment by the State*

Despite the theoretical protection outlined above, in practice it appears that prisoners will not always be treated as equals to other citizens (having regard to the necessary limits due to the fact of imprisonment). An example of unequal treatment of prisoners occurring in New Zealand is the Invercargill prison which was subject to an inquiry into the conditions of the institution in 1990.⁹³ The report found that the cells were in poor condition, the general cleanliness of the whole institution was problematic, and there was an urgent need to upgrade all toilet, shower, ablution and sluice rooms.⁹⁴ These sort of conditions are clearly not treating prisoners as equal to ordinary citizens. The New Zealand law stipulates a certain standard is necessary for dwellings in which citizens live, and it is arguable that the Invercargill prison, or other prisons with similar conditions, would not

⁹³ Group Manager of Corrections, Secretary for Justice *Invercargill Prison Inquiry* (Wellington, July 1990).

satisfy the standards required for houses occupied by ordinary citizens. It is not equal treatment if the government is requiring a certain standard of living for ordinary citizens, but not upholding this standard in prisons.

1 *A fair trial*

Equal treatment of prisoners by way of a fair trial has recently been upheld as important to prisoners by the New Zealand Court of Appeal in the case of *Drew v Attorney-General*.⁹⁵ In *Drew v Attorney-General*, an inmate appealed to the High Court and then the Court of Appeal over a superintendent refusing to consider legal representation for the inmate in disciplinary proceedings before the superintendent and then the visiting justice.

In the disciplinary proceedings at issue, the visiting justice upheld the superintendents' findings of the inmate being guilty of using heroin without the authority of the medical officer. The visiting justice further upheld the penalty of seven days in cell confinement, 28 days loss of privileges, and seven days loss of remission of sentence.

The issue in this case was whether a visiting justice should consider an inmate's request for legal representation at a disciplinary hearing. This issue required the court to interpret regulations 136(4) and 144 of the Penal Institutions Regulations. Regulation 136(4) allows for an inmate to get advice from a legal adviser but also states that "...the inmates legal adviser may not represent the inmate at the disciplinary hearing." Regulation 144 similarly provides for the same right for advice, but prohibition on representation for an inmate who appeals his or her decision.

The Court allowed the inmates appeal and quashed his conviction and penalties, finding that regulation 144 does allow for a visiting justice to

⁹⁴ Group Manager of Corrections, Secretary for Justice *Invercargill Prison Inquiry* (Wellington, July 1990) 8-10.

consider an inmate's request for legal representation. The Court took into account a number of factors. These were:⁹⁶

- The decision makers hold judicial office and exercise judicial power
- They follow a procedure which is essentially that of a court
- They may have to resolve difficult issues of fact and law
- The prisoners may not be able, if unrepresented, to address effectively those issues – to the disadvantage both of themselves and the decision maker
- The penalties may be substantial; in the regular criminal justice system they would call for legal representation

The court also commented on whether a superintendent or person hearing a disciplinary charge at first instance had the power to decide whether an inmate could have legal representation. The majority thought that the superintendent should have this power. However, the minority judge distinguished the two situations and said he thought the rule should not apply to a hearing at first instance.

This case, therefore, illustrates that in recent years prisoners may not have been receiving a fair trial at disciplinary hearings since they like Drew may have been denied legal representation, and thus been disadvantaged in the proceedings. However, the result of this case means that prisoner's rights to a fair trial will need to be upheld in the future, at least in terms of legal representation where necessary. The reasoning of the court that legal representation should be considered, because it exists in the regular criminal justice system, is recognising that prisoners have equal rights to ordinary citizens.

⁹⁵ *Drew v Attorney-General* (12 July 2001) Court of Appeal, CA 189/00 Blanchard J, for the Court.

⁹⁶ *Drew v Attorney-General* (12 July 2001) Court of Appeal, CA 189/00, 20 Blanchard J for the Court.

2 *Protection from abuse of power*

Although some protection from abuse of power exists under New Zealand law, it is evident that abuses of power do occur in practice. One example of an abuse of power occurring in a New Zealand Prison is the assaults on prisoners that occurred at Mangaroa Prison in 1993.⁹⁷

At Mangaroa prison, it was alleged that in January 1993 prison officers assaulted prison inmates over a number of days and left them outside, naked, overnight.⁹⁸ Following this incident, the Ministry of Justice commissioned investigation into the management practices of Mangaroa Prison.

The report, referred to as the "Logan Report," found that there were various allegations of staff misconduct.⁹⁹ The report described the alleged abuse of inmates as lasting for several days, including degrading demeanour, ridicule, and neglect of care.¹⁰⁰ These incidents received extensive media coverage, outlining the misconduct, but the report found that "more illicit punishments were applied to the prisoners than were made public knowledge."¹⁰¹ The investigation also found that the January assaults were not the only assaults occurring and that inmates had been abused in October 1991.¹⁰² The assaults in January 1993 were regarded as particularly unacceptable because they were unprovoked and continued over a number of days.¹⁰³

⁹⁷ Basil Logan *Ministerial Inquiry into Management practices at Mangaroa Prison – Arising from alleged incidents of Staff Misconduct* (Wellington, 1993).

⁹⁸ Basil Logan *Ministerial Inquiry into Management practices at Mangaroa Prison – Arising from alleged incidents of Staff Misconduct* (Wellington, 1993) 6.

⁹⁹ Basil Logan *Ministerial Inquiry into Management practices at Mangaroa Prison – Arising from alleged incidents of Staff Misconduct* (Wellington, 1993) 7.

¹⁰⁰ Basil Logan *Ministerial Inquiry into Management practices at Mangaroa Prison – Arising from alleged incidents of Staff Misconduct* (Wellington, 1993) 7.

¹⁰¹ Basil Logan *Ministerial Inquiry into Management practices at Mangaroa Prison – Arising from alleged incidents of Staff Misconduct* (Wellington, 1993) 10.

¹⁰² Basil Logan *Ministerial Inquiry into Management practices at Mangaroa Prison – Arising from alleged incidents of Staff Misconduct* (Wellington, 1993) 33.

¹⁰³ Basil Logan *Ministerial Inquiry into Management practices at Mangaroa Prison – Arising from alleged incidents of Staff Misconduct* (Wellington, 1993) 33.

The report concluded that the assaults were in part due to the attitudes of prison staff.¹⁰⁴ This attitude was described as being “towards the use of force as a means of controlling inmates.”¹⁰⁵ The report regarded these attitudes, of a few, as possibly affecting the whole institution.¹⁰⁶ The report also stated that use of physical force was not in any way unique to Mangaroa, and also occurred in other New Zealand prisons.¹⁰⁷

Following the ministerial inquiry by Basil Logan, twelve prison officers were fired.¹⁰⁸ However, none of the prison officers were charged.¹⁰⁹ Crown Law justified the lack of charges by saying that they thought that it would be too difficult to get a jury to believe the prisoners over the prison officers.¹¹⁰

Four of the inmates, who alleged they were victims of the assaults at Mangaroa sued the Crown.¹¹¹ In September 2000, the inmates received an apology from the Crown and an undisclosed sum of compensation.¹¹² The lawyer of two of the inmates confirmed that the compensation was for a “substantial amount.”¹¹³

Although inmates received compensation and an apology from the Crown, the fact that the incidents at Mangaroa prison were allowed to occur illustrates how the State can fail in its duty to protect its citizens from cruel

¹⁰⁴ Basil Logan *Ministerial Inquiry into Management practices at Mangaroa Prison – Arising from alleged incidents of Staff Misconduct* (Wellington, 1993) 7.

¹⁰⁵ Basil Logan *Ministerial Inquiry into Management practices at Mangaroa Prison – Arising from alleged incidents of Staff Misconduct* (Wellington, 1993) 7.

¹⁰⁶ Basil Logan *Ministerial Inquiry into Management practices at Mangaroa Prison – Arising from alleged incidents of Staff Misconduct* (Wellington, 1993) 33.

¹⁰⁷ Basil Logan *Ministerial Inquiry into Management practices at Mangaroa Prison – Arising from alleged incidents of Staff Misconduct* (Wellington, 1993) 7.

¹⁰⁸ Cameron Bates “Crown Compensates Abused Inmates” (7 September 2000) *The Dominion* Wellington 1.

¹⁰⁹ Cameron Bates “Crown Compensates Abused Inmates” (7 September 2000) *The Dominion* Wellington 1.

¹¹⁰ Cameron Bates “Crown Compensates Abused Inmates” (7 September 2000) *The Dominion* Wellington 1.

¹¹¹ “Crown Apologises after Mongrel Mob Inmates Claim they were Stripped and Beaten” (6 September 2000) *The Evening Post* Wellington 1.

¹¹² “Crown apologises after Mongrel Mob Inmates Claim they were Stripped and Beaten” (6 September 2000) *The Evening Post* Wellington 1.

¹¹³ Cameron Bates “Crown Compensates Abused Inmates” (7 September 2000) *The Dominion* Wellington 1.

and unusual punishment. Additionally, the States decision to not charge the prison officers involved with the assault may be viewed as a further breach of their duty since the officers actions were not recognised as cruel and unusual punishment worthy of criminal sanction. This is also an example of inequality since a similar incidence outside of a prison would have been likely to attract a criminal charge.

Other examples of abuses of power by prison officials have occurred recently in New Zealand with incidents of unreasonable searches of inmates. These searches, discussed above, allegedly included the use of excessive force and intimidatory tactics.

As discussed in the previous section, one mechanism for protecting prisoner's rights is the complaints procedure available to prisoners. However, despite regulations over necessary complaints procedures for prisons, in practice it appears that a number of prisoners are not aware of their rights or their rights regarding the complaints procedures.¹¹⁴ The Logan report expressed concerns over the lack of prisoner knowledge, and also over unwillingness for inmates to make their complaints heard. The unwillingness to complain was said to be due to inmates believing that some staff had a sceptical or disapproving attitude to dealing with complaints.¹¹⁵

The report further found that when complaints were resolved, the amount of compensation did not encourage inmates to pursue complaints.¹¹⁶ The Logan Report found that at Mangarua Prison, "although there was some evidence that notices outlining the procedures for making complaints were posted in the wings...there was little sign that inmates were adequately educated in their rights..."¹¹⁷

¹¹⁴ Basil Logan *Ministerial Inquiry into Management practices at Mangarua Prison – Arising from alleged incidents of Staff Misconduct* (Wellington, 1993) 10.

¹¹⁵ Basil Logan *Ministerial Inquiry into Management practices at Mangarua Prison – Arising from alleged incidents of Staff Misconduct* (Wellington, 1993) 10.

¹¹⁶ Basil Logan *Ministerial Inquiry into Management practices at Mangarua Prison – Arising from alleged incidents of Staff Misconduct* (Wellington, 1993) 55.

B *Treated with Respect for the Person*

Despite theoretical protection under New Zealand law, the extent to which prisoners are in fact treated with respect is debateable. One example of disrespect of prisoners which has occurred in a number of New Zealand prisons is the existence of substandard prison conditions. Particular examples of possible prisons conditions were described in part II of the paper. Referring, for example to the descriptions of Paparoa prison where there were reports of pigeon mites and open sewers, illustrates the sort of conditions which would be disrespectful to most people and therefore is not respecting the prisoners as human beings.¹¹⁸ The Roper Report supports the allegations of the existence of substandard prison conditions in New Zealand.¹¹⁹ The report stated that "the committee has been appalled at the austerity of conditions prevailing in older prisons."¹²⁰ The report further stated that "closely linked to the physical conditions of many older prisons is the presence of pests including cockroaches, mice, rats, flies, and pigeons. The presence of headlice, skin and viral infections are also indications of unhygienic surroundings."¹²¹

As discussed in the previous section, an argument can be made that the right to respect means that prisoners should not be subject to any hardship or constraint other than that resulting from the deprivation of liberty.¹²² The existence of substandard prison conditions such as these is a form of hardship that is not necessary as a part of depriving a prisoner of his or her liberty. These conditions are therefore disrespectful to prisoners.

¹¹⁷ Basil Logan *Ministerial Inquiry into Management practices at Mangaroa Prison – Arising from alleged incidents of Staff Misconduct* (Wellington, 1993) 55.

¹¹⁸ Sean Scanton "Canterbury Jail Cells 'Disgusting'" (5 January 2001) *The Press* Canterbury 3.

¹¹⁹ Ministerial Inquiry into the Prisons System *Prison Review Te Ara Hau: The New Way* (Government Printer, Wellington, 1989).

¹²⁰ Ministerial Inquiry into the Prisons System *Prison Review Te Ara Hau: The New Way* (Government Printer, Wellington, 1989) 106.

¹²¹ Ministerial Inquiry into the Prison System *Prison Review Te Ara Hau: The New Way* (Government Printer, Wellington, 1989) 106.

¹²² Office for the High Commissioner *General Comment 21* (1992, Geneva)
<[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR+General+comment+21.En?Open](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR+General+comment+21.En?Open)

1 *Protection from cruel and unusual punishment*

Although there is an express right protecting people from cruel and unusual punishment, it is evident that there are situations where prisoners are being subjected to unnecessary harm. Solitary Confinement (discussed in part II above) may be seen as one example where, in some circumstances, prisoners may be caused unnecessary harm. The first sort of situation where solitary confinement will arguably cause unnecessary harm is where it is wrongfully imposed. One example of this occurring recently in New Zealand is at Rimutaka Prison.¹²³ A convicted fraudster was sentenced to ten days in solitary confinement as a punishment for "gross misconduct."¹²⁴ The gross misconduct in question was faxing the ombudsmen to query over receiving a computer to help him prepare for his appeal. The inmate faxed the ombudsman when the prison authorities had refused to give him a computer.¹²⁵ At a judicial conference, Justice Heron overturned the penalty.¹²⁶ However, the inmate had already served five days in solitary confinement before he was returned to his normal cell pending a full hearing.¹²⁷ In the sort of situation as occurred at Rimutaka prison, it is arguable that the prisoner was harmed (by being in solitary confinement) and that this harm was unnecessary.

It is further suggested by this paper that even when solitary confinement is strictly within the prison regulations, inmates may still be being caused unnecessary harm. An example of solitary confinement in New Zealand and the harm suffered may be illustrated by a description by an inmate who spent time in D block at Paremoremo. The inmate wrote, describing D block:¹²⁸

Document>(last accessed 1 Oct 2001).

¹²³ "Court Reviews Solitary Sentence" (1 August 2000) *The Dominion* Wellington 5

¹²⁴ "Review Quashes Prison Penalty" (5 August 2000) *The Evening Post* Wellington 7.

¹²⁵ "Review quashes Prison Penalty" (5 August 2000) *The Evening Post* Wellington 7.

¹²⁶ "Review quashes Prison Penalty" (5 August 2000) *The Evening Post* Wellington 7.

¹²⁷ Court reviews Solitary Sentence" (1 August 2000) *The Dominion* Wellington 5.

¹²⁸ Peter Williams QC *A Passion for Justice* (Shoal Bay Press, Christchurch, 1997) 203.

The only way I can describe D Block is that it is a small set of cells within one large cell, each cell having no window to the outside world. Across a passage from some source you can catch a small glimpse of the sky but apart from this an inmate never goes outside or even feels the rays of the sun upon him. Being in a cell in D block is like being incarcerated in a steel oven of a large stove without the heat being turned on. There is no possibility of escape and the whole place is bleak and completely hopeless.

The inmate also described his time in D block as being one of "an invariable routine of absolutely nothing."¹²⁹ He said that:¹³⁰

Each day I spent in my cell, walking up and down the two or three square yards of cell floor, sometimes talking to myself and sometimes just sitting with my head in my hands. My first spell in D block was in the upper tier of cells and I spent about two months without any privileges at all, confined to my cell the total time except on rare occasions when I would be taken by three warders to a yard to exercise for an hour or so. These occasions were not regular and sometimes over a week would go by during which I would have spent the whole time in solitary confinement.

A recent report from the office of the Ombudsmen further highlights the existence of unsatisfactory conditions in the solitary confinement block in Paremoro prison (D block).¹³¹ The report was concerned with a behavioural management regime.¹³² The Ombudsmen's report stated that there were insufficient procedures to ensure that the potential for unfairness was minimised.¹³³ Peter Williams QC described the conditions present in D block stating that "The physical environment is so harsh and destructive. It's shockingly deprived...we're talking men in small cages with no natural

¹²⁹ Peter Williams QC *A Passion for Justice* (Shoal Bay Press, Christchurch, 1997) 203.

¹³⁰ Peter Williams QC *A Passion for Justice* (Shoal Bay Press, Christchurch, 1997) 203.

¹³¹ Glen Scanlon "Jail Punishment "Depraved" – Report (29 September 2001) *The Dominion* Wellington 6.

¹³² Glen Scanlon "Jail Punishment "Depraved" – Report (29 September 2001) *The Dominion* Wellington 6.

¹³³ Glen Scanlon "Jail Punishment "Depraved" – Report (29 September 2001) *The Dominion* Wellington 6.

light. Its opposed to everything New Zealand stands for.”¹³⁴ He further said that the conditions of the block pushed inmates and guards to breaking point, with many inmates hurting themselves.¹³⁵ The conditions of D block included inmates potentially being locked up for 23 hours a day and being given only eight minutes to clean their cell and shower.¹³⁶

The court of Appeal in the case of *Drew v Attorney- General*¹³⁷ (discussed in detail below) has also commented on the serious nature of a penalty of solitary confinement. The judge stated that the maximum penalty which a visiting justice can order, of 15 days is “in itself a considerable penalty.”¹³⁸ The judgment also cited the Roper Report’s comments of the potentially harmful effects of solitary confinement.¹³⁹

The recent case before the High Court of *Karaitiana v Superintendent of Wellington Prison*¹⁴⁰ illustrates how solitary confinement imposed under an administrative ground may breach inmate’s rights. It was argued that solitary confinement under an administrative ground may be used to avoid giving meaningful reasons (necessary to take the case to court). Therefore, management could effectively punish an inmate by placing them in solitary confinement under an administrative ground and the inmate would have difficulty challenging the decision.

In this case, a Wellington inmate applied for a writ of habeas corpus, alleging he had been arbitrarily detained in solitary confinement without the correct processes followed. The inmate was placed in solitary confinement

¹³⁴ Glen Scanlon “Jail Punishment “Depraved” – Report (29 September 2001) *The Dominion* Wellington 6.

¹³⁵ Glen Scanlon “Jail Punishment “Depraved” – Report (29 September 2001) *The Dominion* Wellington 6.

¹³⁶ Glen Scanlon “Jail Punishment “Depraved” – Report (29 September 2001) *The Dominion* Wellington 6.

¹³⁷ *Drew v Attorney- General* (12 July 2001) Court of Appeal, CA 189/00 Blanchard J for the Court.

¹³⁸ *Drew v Attorney- General* (12 July 2001) Court of Appeal, CA 189/00, 16, Blanchard J for the Court.

¹³⁹ *Drew v Attorney- General* (12 July 2001) Court of Appeal, CA 189/00, 15, Blanchard J for the Court.

¹⁴⁰ *Karaitiana v Superintendent of Wellington Prison and the Attorney- General* (5 September 2001) High Court Wellington, CP 207/01 Ellis J.

under the administrative ground (section 7(1A) of the Penal Institutions Act 1954) on suspicion of using cannabis in prisons and using standover tactics against other inmates to obtain supply. The inmate management plan stated the conditions of the plaintiffs confinement to be that he was kept separate from all other inmates, was to exercise in a cage, and was given limited visiting, controlled eating conditions and some use of the telephone.

The High Court Judge dismissed the case, finding that there were reasonable grounds for the decision. However, the Judge noted concern that “the applicant should have the means to show he was drug free and to answer as best he could any allegations of lack of discipline.” The Judge also emphasised that allegations of solitary confinement should be properly dealt with. It was stated that “this Court should scrutinise instances of alleged solitary confinement... . (Because) Basic human rights are at stake.”

3 *Protection from abuse of power*

As discussed above, protection from abuse of power is an extension of the right to equality as well as an extension of the right to respect for the person. Protection from abuse of power in practice in New Zealand is discussed above under the right to equal treatment by the State.

C *Summary*

Despite the legislative provisions outlined under part IV of this essay, there is evidence of inappropriate physical treatment of prisoners in New Zealand. There is evidence of inequality between prisoners and citizens through the substandard conditions present at many prisons and the abuses of power by prison officers that occur. However, the right to a fair trial has at least in part been positively affirmed by the recent case of *Drew v Attorney General*.¹⁴¹

¹⁴¹ *Drew v Attorney- General* (12 July 2001) Court of Appeal, CA 189/00 Blanchard J for the Court.

There is further evidence of the disrespect being shown to prisoners. Again the substandard prison conditions illustrate this. Additionally, this essay has suggested that disrespect may occur to prisoners through the use of solitary confinement and the associated conditions.

VI CONCLUSION

Recognition of a prisoner's right to equality and right to respect for the person is essential to ensure prisoners are treated appropriately. Because of the nature of penal institutions, these human rights are particularly important.

The nature of penal institutions inherently leads to tensions with the concept of human rights. This conflict means that human rights in prisons will be unable to exist as they do in the rest of society. However, although tensions exist between the nature of prisons and human rights, there are also abuses of human rights that occur within prisons that could be avoided.

This essay has illustrated many examples of New Zealand prisoners being treated in ways that do not respect their human rights.

Prisoner's rights are not being respected in many cases of solitary confinement. Prisoners in New Zealand are placed in solitary confinement cells as a regular procedure despite evidence of harmful effects. A prisoner in solitary confinement could have further rights breached by possible unsatisfactory conditions associated with the confinement. Additionally, solitary confinement may be imposed on an administrative ground and therefore provide an inmate insufficient opportunity to review the decision.

Prisoner's rights are further being breached in New Zealand where prisoners are forced to live in substandard accommodation. There is evidence of unhygienic surroundings in New Zealand prisons and these sorts of conditions fail to respect prisoners as human beings.

Furthermore, prisoner's rights are being violated where prison officers abuse prisoners. There is evidence in New Zealand of inmates being assaulted by prison officers and being subjected to unreasonable searches. This conduct is not treating prisoners as equal citizens nor treating them with respect.

This treatment indicates that prisoner's rights to equality and respect for the person are not being given sufficient recognition in New Zealand. The insufficient recognition of prisoner's rights in New Zealand may be in part due to the extent of the recognition of prisoner's rights under New Zealand law. The New Zealand Bill of Rights Act and some international human rights instruments contain a number of rights that may theoretically recognise protection of appropriate physical treatment of prisoners. In analysing the existence of these rights, the limits on the rights (particularly as provided for under the New Zealand Bill of Rights Act) must be noted.

Prisoner's rights under New Zealand law could be improved on a theoretical level by some law reform. Prisoner's rights could be given more express recognition. Additionally, a general equality provision and a right to security of the person provision could be incorporated into New Zealand human rights law.

Despite these possible changes to the law, any reforms will not necessarily achieve any increase in recognition of prisoner's rights. This is because of the conceptually uncertain nature of human rights and, therefore, unclear directions on what the human rights intend to cover. Additionally, any reform to increase recognition of prisoner's rights at a theoretical level will not necessarily correspond to increased recognition of prisoner's rights in practice.

Therefore, a more effective way to achieve increased recognition of prisoner's rights to equality and respect would be to focus on the causes of prisoner's rights breaches at a practical level. This would involve improving

management practices in New Zealand prisons. In the report on the inquiry into the assaults at Mangaroa prison, Basil Logan suggested a focus on management practices was a necessary response to the situation at Mangaroa. He stated that ensuring "clear behavioural standards, training and practices sustained by a set of shared values regarding the purposes of prisons" were necessary.¹⁴² The training and practices suggested in response to the situation at Mangaroa could be effectively used to educate prison officials about the importance of prisoner's rights in general and how prisoners should be treated in all aspects of prison life to ensure that prisoner's human rights are being respected.

The human rights abuses outlined in this essay are unacceptable if a prisoner's right to equality and right to respect are believed to be important. To ensure these rights are upheld, prison management practices should be improved to ensure that both solitary confinement and any force by prison officers are only used when justified. Furthermore, it should be ensured that prison conditions are of such a standard that they recognise prisoners as human beings and citizens of New Zealand.

¹⁴² Basil Logan *Ministerial Inquiry into Management practices at Mangaroa Prison – Arising from alleged incidents of Staff Misconduct* (Wellington, 1993) 4.

VII BIBLIOGRAPHY

Government Reports

Group Manager of Corrections, Secretary for Justice *Invercargill Prison Inquiry* (Wellington, July 1990).

Basil Logan *Ministerial Inquiry into Management practices at Mangaroa Prison – Arising from alleged incidents of Staff Misconduct* (Wellington, 1993).

John Meek, Department of Justice *Paremoremo: New Zealand's Maximum Security Prison* (Wellington, June 1986).

Ministerial Inquiry into the Prison System *Prison Review Te Ara Hou: The New Way* (Government Printer, Wellington, 1989).

Newspaper Articles

Debra Alaalatoa "Crim's Grim Tales of Jail draw Blank (22 March 1996) *Truth New Zealand* 4.

Cameron Bates "Crown Compensates Abused Inmates" (7 September 2000) *The Dominion* Wellington 1.

Victoria Clausen "Jail's Cold Food causes Stomach Bug Inmate" (19 January 2000) *The Press*, Canterbury, 4.

"Court Reviews Solitary Sentence" (1 August 2000) *The Dominion* Wellington 5.

"Crown Apologises after Mongrel Mob Inmates claim they were Stripped and Beaten" (6 September 2000) *The Evening Post* Wellington 1.

Tom McKinlay "No Escape from Historic Prison" (18 January 2001) *The Southland Times* Southland 24.

Nicholas Maling "Prisoners get Moisturiser but not Hygienic Medical Rooms (18 March 2001) *Sunday Star Times* New Zealand 4.

Yvonne Martin "Inmate paid Compensation" (6 March 2001) *The Press* Canterbury 8.

"Prison investigates Strip Search Claim" (21 February 2001) *The Press* Canterbury 4.

"Prisoner's Fare gets Chef's Thumbs Down" (24 December 1999) *The Dominion* Wellington 6.

"Review quashes Prison Penalty" (5 August) *The Evening Post* Wellington 7.

Glen Scanlon "Jail Punishment "Depraved" – Report (29 September 2001) *The Dominion* Wellington 6.

Sean Scanlon "Canterbury Jail Cells 'Disgusting'" (5 January 2001) *The Press* Canterbury 3.

Phil Taylor "Prison Suicide Freshens Debate" (4 March 1995) *The Dominion* Wellington 1.

Brenda Webb "Prison Part Three: A day at Paparua (13 September 2000) *The Marlborough Express* Blenheim.

Texts

Peter Bailey *Human Rights – Australia in an International Context* (Butterworths, Sydney, 1990).

Gerald A Beaudoin and Ed Ratushny *The Canadian Charter of Rights and Freedoms* (2ed, Carswell, Toronto, 1989).

Fritz Berolzheimer *The World's Legal Philosophies* (The Boston Book Company, Boston 1912).

Robert Blackburn and John Taylor *Human Rights in the 1990s – Legal, Political and Ethical Issues* (Mansell Publishing Limited, Great Britain, 1991).

Maurice Cranston *What are Human Rights* (The Bodley Head Ltd, London, 1973).

A J Fowles *Prisoners' Rights in England and United States* (Athenaem Press Limited, London, 1989).

Andrew Haplin *Rights and Law – Analysis and Theory* (Hart Publishing, Oxford, 1997).

Lawrence M Hinman *Ethics: A Pluralistic Approach to Moral Theory* (2 ed, Harcourt Brace, Fort Worth, 1997) <<http://ethics.acusd.edu/ed2>>(last accessed 26 August 2001).

Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms, The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995).

Michael Jackson *Prisoners of Isolation – Solitary Confinement in Canada* (University of Toronto Press, Vancouver, 1988).

Donald P Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, Durham, 1989).

Tim McBride *New Zealand Civil Rights Handbook* (Butterworth, Wellington, 1980).

David McDonald *Legal Rights in the Canadian Charter of Rights and Freedoms* (2ed, The Carswell Company Limited, Toronto, 1989).

Donald F MacKenzie *While we have Prisons* (Methuen, Trentham, 1980).

Bayard Marin *Inside Justice – A Comparative Analysis of Practices and Procedures for the Determination of Offences against Discipline in Prisons of Britain and the United States* (Fairleigh Dickinson University Press, USA, 1983).

Sabine Michalowski and Lorna Woods *German Constitutional Law – The Protection of Civil Liberties* (Dartmouth Publishing Company Limited, England, 1999).

Anthony Quinton *Utilitarian Ethics* (Duckworth, London, 1989).

G D Treverton – Jones *Imprisonment: The Legal Status and Rights of Prisoners* (Sweet and Maxwell, London, 1989).

Patricia M Webb *A History of Custodial and Related Penalties in New Zealand* (Government Printer, Wellington, 1982).

Peter Williams QC *A Passion for Justice* (Shoal Bay Press, Christchurch, 1997).

Morton E Winston (ed) *The Philosophy of Human Rights* (Wadsworth Inc, California, 1989).

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United Nations Comments

Office for the High Commissioner *General Comment 20* (1992, Geneva)

<[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR+General+comment+20](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR+General+comment+20).

En?OpenDocument>(last accessed 1 Oct 2001).

Office for the High Commissioner *General Comment 21* (1992, Geneva)

<[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR+General+comment+21](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR+General+comment+21).

En?OpenDocument>(last accessed 1 Oct 2001).

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