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Tēnā koe Dr Edwards

**Comments of the Chief Ombudsman of New Zealand in contribution to the thematic report of the Special Rapporteur on Torture on current issues and good practices in prison management**

1. Thank you for the opportunity to provide input on current issues and good practices in prison management for your forthcoming thematic report.
2. As Chief Ombudsman, I am one of New Zealand’s designated National Preventive Mechanisms (NPM) under the New Zealand Crimes of Torture Act 1989 (COTA), which gives effect to the United Nations Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). My comments are informed by my observations as an NPM on the conditions and treatment of people deprived of their liberty in prison and where people are otherwise in the custody of Ara Poutama Aotearoa – the New Zealand Department of Corrections (Corrections). My submission also draws from observations I have made in the context of my complaint handling and investigations functions in relation to public sector agencies under the New Zealand Ombudsmen Act 1975.
3. Many of the issues I discuss in this submission were also raised with the United Nations Committee against Torture,<sup>1</sup> and in my comments on New Zealand’s upcoming Universal Periodic Review.
4. In this submission, I will discuss recent observations related to:
  - a. Legislation and leadership (p 2);
  - b. Provision of meaningful and productive activities, and access to rehabilitation and reintegration programmes (p 3);
  - c. Mental health provisions for people in prison (p 5);

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<sup>1</sup> In the context of New Zealand’s seventh periodic review by the Committee in July 2023. See Ombudsman New Zealand (2023), [Summary of the Ombudsman’s submission to the United Nations Committee against Torture](#).

- d. Experiences of specific groups in New Zealand prisons, including Māori, disabled people and women (p 6);
- e. Use of force and coercive powers (p 9);
- f. Measures and practices related to solitary confinement (p 11);
- g. 'Prisoners of Extreme Risk' (p 15); and
- h. COVID-19 and prison management (p 16).

### Legislation and leadership

5. In your call for input, you have noted a number of significant challenges facing national prison systems, which can heighten the risk that cruel, inhuman or degrading treatment or punishment may occur. Many such challenges are being experienced within the New Zealand corrections system at present, with issues such as acute staffing shortages, a high proportion of pre-trial detainees,<sup>2</sup> and ageing and outdated prison buildings and infrastructure impacting upon the conditions and treatment of people detained in prison.
6. I have considered and drawn attention to such issues in my recent self-initiated Ombudsmen Act investigation into the Department of Corrections, *Kia Whaitake | Making a Difference: Investigation into Ara Poutama Aotearoa | Department of Corrections (Kia Whaitake)*.<sup>3</sup> My investigation, prompted by what I saw as slow and inadequate progress to make improvements recommended by oversight agencies such as myself, highlighted some foundational issues which may be of interest to your thematic report. This includes my observation of a significant disconnect between Corrections' National Office and site-based staff working within prisons. Additionally, while Corrections has developed and launched a number of national policies and strategies, these have often lacked practical implementation and therefore struggled to translate into tangible examples of good practice.<sup>4</sup>
7. There are some notable exceptions, where change in practice, though slow, promises improvement. For example, Corrections has implemented a new shift pattern for custodial staff, 'Making Shifts Work', which aims to improve day-to-day routines, including meal times, for people in custody.<sup>5</sup> Improvements in body worn cameras, and processes for storing and sharing footage, as well as work towards the introduction of privacy screens and

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<sup>2</sup> At 30 September 2023, people being held on remand made up 42.5 percent (3,524) of the men's prison population and 55 percent (293) of the women's prison population. See Department of Corrections, [Prison facts and statistics – September 2023](#), 2023.

<sup>3</sup> Ombudsman New Zealand (2023), [Kia Whaitake | Making a Difference: Investigation into Ara Poutama Aotearoa | Department of Corrections](#).

<sup>4</sup> These include, for example, [Hōkai Rangī](#) and [Wāhine – E rere ana ki te pae hou: Women's Strategy 2021 – 2025](#).

<sup>5</sup> Making Shifts Work is a partnership project between the Department of Corrections, the Corrections Association of New Zealand, and the Public Service Association – Te Pūkenga Here Tikanga Mahi. The Department of Corrections has stated: 'It aims to keep staff safe, allow improved work-life balance for staff, continue the delivery of effective operations in our facilities, and enable increased unlock hours for prisoners to improve engagement in meaningful activity'. See Department of Corrections (2018), [Statement of Intent 2018-2022](#), p 20.

CCTV pixilation in cells across the network will, hopefully, enhance prison operations and the experience of people in custody.

8. A central tenet which I discuss in *Kia Whaitake* is Corrections' approach to risk and security, which is too often interpreted to be in opposition to, rather than enhanced by, the protection and promotion of the human rights of people in custody. In *Kia Whaitake*, I concluded that Corrections has adopted an unduly narrow approach to its legal obligations and to the purpose of the corrections system, not giving sufficient emphasis to the New Zealand Bill of Rights Act 1990 (NZBORA), Te Tiriti o Waitangi / the Treaty of Waitangi (Te Tiriti),<sup>6</sup> or international human rights obligations.<sup>7</sup>
9. Alongside commenting on Corrections' implementation of its legal obligations, I have also expressed my view that the legislation governing the corrections system itself, specifically the Corrections Act 2004 and the Corrections Regulations 2005, must give greater emphasis to the fair, safe, and humane treatment of those detained in prison. For example, I have repeatedly raised my concerns that recent amendments to the Corrections Regulations relating to the use of pepper spray do not comply with international human rights obligations and standards, as they permit the use of pepper spray in instances of passive resistance and in confined spaces, against individuals who have been identified as 'high risk' or with pre-existing conditions, and allow for the use of restraints following pepper spray being deployed.<sup>8</sup>
10. Ultimately, effective legislation is critical to ensuring that the management of New Zealand prisons upholds the rights of people in custody. To this end, I recommended in *Kia Whaitake* that Corrections reviews the Corrections Act and Regulations, and advises the Minister of Corrections on amendments that are necessary to ensure that Te Tiriti, the NZBORA, and relevant international human rights obligations are given greater emphasis in the purpose, principles, and detailed provisions of the Corrections Act.

### **Provision of meaningful and productive activities, and access to rehabilitation and reintegration programmes**

11. As your call for input identifies, access to meaningful activities and rehabilitative opportunities is central to the day-to-day experiences of people in custody, and to ensure that people at the end of their sentences are, and feel, prepared for release. However, I have frequently encountered situations where people in prisons across New Zealand are subject to impoverished regimes due to limited hours of unlock and a lack of meaningful and constructive activities and rehabilitative opportunities available to them. Such issues are often particularly acute for people in custody on remand.

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<sup>6</sup> I acknowledge there are two texts with different meanings.

<sup>7</sup> Such as the [United Nations Standard Minimum Rules for the Treatment of Prisoners](#) (the Nelson Mandela Rules).

<sup>8</sup> I have raised such concerns both independently and jointly with Te Kāhui Tika Tangata – the New Zealand Human Rights Commission.

12. My concerns about limited hours of unlock have been noted in several reports from recent prison inspections. For example, following my inspection of Auckland Prison in 2020,<sup>9</sup> I noted that in units accommodating people on remand, periods of unlock were affected by the number of different regimes operating to ensure the separation of different categories of people in custody. I also found that the majority of people held in Units 12 and 13 spent between 22 and 23 hours locked in their cells each day, and were subject to a basic yard-to-cell regime.
13. During this inspection, I also noted that staffing shortages were impacting on access to programmes:<sup>10</sup>

*A source of frustration for programme facilitators was regarding the limited access to prisoners. High and maximum security prisoners in Units 12 and 13 required higher staffing ratios and engagement could only be facilitated either in small groups in purpose-built programme rooms or individually through non-contact booths. As a result, there were minimal opportunities for rehabilitation and programmes for prisoners in Units 12 and 13 due to staffing pressures. Throughout the inspection, Inspectors did not observe the programme rooms in Units 12 or 13 being used.*

As a result of my inspection, I recommended that people in custody be able to access, in a timely manner, the range of educational and reintegration activities available in the Prison, and that individuals in Units 12 and 13 have access to educational and rehabilitation activities.

14. During my Auckland Prison inspection, my inspectors also observed Parole Board hearing delays, Work and Income New Zealand appointment cancellations, and other external provider appointment cancellations as a result of staffing shortages.<sup>11</sup> I consider that such cancellations can have a detrimental impact upon the rehabilitation and reintegration of people in custody.
15. In my report from my inspection of Northland Regional Corrections Facility in 2019, I noted that remand accused detainees were locked in their cells for up to 21 hours per day.<sup>12</sup> Similarly, at Auckland South Corrections Facility in 2018, staff shortages and/or rostering issues had resulted in the use of 'extended lock' regimes across the prison, with people in custody spending long periods of time in their cells and experiencing irregular unlock routines.<sup>13</sup>

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<sup>9</sup> Ombudsman New Zealand (2020), [Final report on an unannounced inspection of Auckland Prison under the Crimes of Torture Act 1989](#), p 50.

<sup>10</sup> As above n 9, p 62.

<sup>11</sup> As above n 9, p 63 – 64.

<sup>12</sup> Ombudsman New Zealand (2019), [Report on an unannounced inspection of Northland Regional Corrections Facility - August 2019](#), p 30.

<sup>13</sup> Ombudsman New Zealand (2019), [Report on an announced inspection of Auckland South Corrections Facility - 20 February 2019](#), p 45.

16. At the time of my 2020 inspection of Otago Corrections Facility,<sup>14</sup> I was pleased to note that there had been an increase in time spent out of cell for many people in custody due to the implementation of 'Making Shifts Work'. However, there had not been a corresponding increase in opportunities to engage in meaningful activities. Both staff and people in custody told my inspectors that this may have contributed to negative behaviours exhibited by some individuals.
17. In my 2017 inspection of Arohata Upper Prison,<sup>15</sup> I observed that meaningful and constructive activities were scarce. Programmes and employment opportunities were not well established, and at the time of my inspection, nearly two-thirds of women were not engaged in any purposeful activities. I considered that a lack of programmes and planned progression were having a detrimental effect on the motivation of people in custody. Social work and counselling services were stretched, and religious and cultural support limited.
18. In my 2019 inspection of Waikeria Prison, I found that a lack of appropriate rooms and facilities was causing issues with access to educational courses and programmes.<sup>16</sup>
19. Issues related to time out of cell and the limited range of constructive activities, particularly for people on remand, were also highlighted by the Subcommittee on Prevention of Torture in its 2013 visit to New Zealand.<sup>17</sup> The Subcommittee made a number of recommendations in this regard.

### Positive practices

20. I have also noted pockets of good practice in relation to access to meaningful activities and rehabilitative and reintegration programmes. For example, at Waikeria Prison in 2019,<sup>18</sup> I found that there was a large number of vocational training and employment roles available to people in custody. I was also pleased to note that the people who were voluntarily segregated were given the opportunity to work in the Prison kitchen by running separate shift patterns. Often, this is not the case for voluntarily segregated individuals.

### Mental health provisions for people in prison

21. I remain seriously concerned about the provision of mental health support for people in prison. Between 2017 and 2020, responses to prison surveys conducted across eight prison sites indicated that an average of 74 percent of respondents to my surveys did not feel

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<sup>14</sup> Ombudsman New Zealand (2022), [Report on an unannounced inspection of Otago Corrections Facility under the Crimes of Torture Act 1989](#).

<sup>15</sup> Ombudsman New Zealand (2018), [Report on an unannounced inspection of Arohata Upper Prison - 21 March 2018](#). 'Arohata Upper Prison' refers to the Upper Prison at Rimutaka Prison, which has, at times, been used to accommodate women when the number of people in custody at Arohata Prison has significantly increased.

<sup>16</sup> Ombudsman New Zealand (2020), [Final report on an unannounced inspection of Waikeria Prison under the Crimes of Torture Act 1989](#), p 48.

<sup>17</sup> United Nations Subcommittee on Prevention of Torture (2017), *Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Visit to New Zealand undertaken from 29 April to 8 May 2013: observations and recommendations addressed to the State party*, CAT/OP/NZL/1.

<sup>18</sup> As above n 16, p 46.

supported with their emotional or mental health needs. In response to my concerns, Corrections has highlighted several initiatives to support the mental health of people in its custody, including the rollout of 'Mental Health 101' training for frontline staff and the recruitment of specialist mental health clinical staff. Additionally, the new Waikeria Prison facility currently under construction will include a 100-bed specialist mental health and substance addiction facility, co-designed and co-run by Corrections and Te Whatu Ora – Health New Zealand Waikato (formerly the Waikato District Health Board).<sup>19</sup>

22. While these are welcome initiatives, I have also raised multiple concerns and made several recommendations related to improving the mental health of people deprived of their liberty in prisons which have not been addressed. These include ensuring that access to specialist mental health services is improved and timely, and that staff working in Intervention and Support Units (ISUs) in prisons, where those assessed to be 'at-risk' are transferred, have appropriate skills and training to work with people experiencing acute mental distress.

## Experiences of specific groups in New Zealand prisons

### Māori in prison

23. It is widely recognised that Māori are overrepresented at every stage in the criminal justice system in New Zealand. According to government data,<sup>20</sup> Māori comprise 37 percent of people proceeded against by the Police, 45 percent of people convicted, and 52 percent of people in prison, despite comprising approximately 17 percent of the New Zealand population.<sup>21</sup> This disproportionality is even greater for wāhine Māori (Māori women), who comprised 67 percent of women in prison in 2022.<sup>22</sup>
24. The disproportionate representation of Māori in New Zealand prisons has been the subject of numerous recommendations from both international human rights bodies (including the Subcommittee on Prevention of Torture,<sup>23</sup> the Committee against Torture,<sup>24</sup> and the Working Group on New Zealand's third Universal Periodic Review)<sup>25</sup> and domestic reports and reviews.<sup>26</sup> I consider this disproportionality to be deeply concerning, and, while complex in its causes, demands urgent and sustained attention.

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<sup>19</sup> As above n 16, p 2.

<sup>20</sup> Ministry of Justice, [Hāpaitia te Oranga Tangata](#), 2023.

<sup>21</sup> As above n 2.

<sup>22</sup> See New Zealand Government (2022), [Long-term Insights Briefing: Imprisonment in New Zealand](#).

<sup>23</sup> As above n 17, p 9.

<sup>24</sup> United Nations Committee against Torture (2023), *Concluding observations on the seventh periodic report of New Zealand*, CAT/C/NZL/CO/7, p 8.

<sup>25</sup> United Nations Human Rights Council (2019), *Report of the Working Group on the Universal Periodic Review: New Zealand*, A/HRC/41/4, p 4.

<sup>26</sup> See, for example, Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group (2019), [He Waka Roimata: Transforming Our Criminal Justice System](#); and Waitangi Tribunal (2017), [Tu Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates \(WAI 2540\)](#).

25. This issue is also exacerbated by a concerning lack of appropriate cultural provision for Māori in custody. I have reported on what I consider to be culturally inappropriate practices (including people in custody being required to eat meals in close proximity to an open toilet in their cells),<sup>27</sup> and a lack of cultural support and programmes, specifically around te reo Māori (the Māori language) and tikanga (Māori customs and protocols). I have made multiple recommendations to Corrections in this regard, and often expressed the view that prison management should build and maintain relationships with iwi (tribes) to ensure greater support is available to Māori in custody, including through the delivery of culturally appropriate services in prisons.

### **Disabled people in prison**

26. Throughout my OPCAT monitoring, I have identified some good practices in relation to support for the needs of disabled people in prison. For example, following my inspection of Auckland South Corrections Facility in 2018,<sup>28</sup> I commented that the physical environment of the prison was well designed and those with mobility needs were able to navigate their surroundings. The Prison also ensured that disabled people in custody were afforded reasonable accommodation in the workplace.
27. At Waikeria Prison in 2019,<sup>29</sup> I noted that the health services' team leaders had good knowledge of those people in custody who had complex and diverse needs. The Prison had also employed a dedicated member of health staff to support people in custody who required assistance with activities of daily living, such as showering. There was also a dedicated annex of 20 beds in a low security complex to accommodate those who required a higher level of care and oversight.
28. However, I have also regularly raised concerns about the lack of early identification of, support for, and ongoing review of individual needs for disabled people in custody. Specific concerns I have noted include, for example:
- a. A lack of co-ordination to meet the needs of disabled people in custody, with health services not holding a definitive list of those with a disability,<sup>30</sup> and, in some cases, an absence of prompt identification and assessment of disabled people in custody.<sup>31</sup>
  - b. A lack of sufficient suitable accommodation for disabled people in custody.<sup>32</sup>

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<sup>27</sup> As above n 16, p 21.

<sup>28</sup> As above n 13, p 28.

<sup>29</sup> As above n 16, p 26.

<sup>30</sup> See, for example, Ombudsman New Zealand (2018), [Report on an unannounced inspection of Whanganui Prison - 4 September 2018](#), p 31; and my reports from Northland Regional Corrections Facility (as above n 12, p 25) and Auckland Prison (as above n 9, p 37).

<sup>31</sup> See, for example, my 2018 Whanganui Prison report (as above n 30, p 41).

<sup>32</sup> See, for example, Ombudsman New Zealand (2019), [Report on an unannounced inspection of Tongariro Prison under the Crimes of Torture Act 1989](#), p 19; and my Auckland Prison report (as above n 9, p 32).



- c. The need for more tailored support for people in custody with cognitive impairments.<sup>33</sup>
29. Furthermore, results from recent prison surveys indicate that people in custody with disabilities do not feel supported. In surveys conducted across eight different prisons between 2017 and 2020, 73 percent of people who responded to the question ‘Do you feel supported with your disability needs?’ indicated that they did not.

### Women in prison

30. There are three women’s prisons in New Zealand: Christchurch Women’s Prison, Arohata Prison and Auckland Region Women’s Corrections Facility.
31. A key issue common across these prisons is inadequate opportunities for women to maintain family contact, with many women unable to receive visits due to distance and associated travel costs. Furthermore, capacity pressures have led to the transfer of women to different prisons across the country. During my 2017 inspection of Christchurch Women’s Prison (in the South Island), women in custody classified as low security expressed concerns about being transferred to Arohata Prison and Arohata Upper Prison (in the North Island), and described the ‘impossibility’ of maintaining contact with family.<sup>34</sup> Early lock up times also often prevent many women from telephoning their children after they finish school. I consider that limited visits, combined with restricted access to telephones and an unsatisfactory mail system, can significantly affect the wellbeing of women in custody.<sup>35</sup>
32. I note that in 2017, Corrections released its inaugural women’s strategy, *Change Lives Shape Futures: Wāhine – E rere ana ki te Pae Hou: Women’s Strategy 2017 – 2021*, and that an updated strategy (2021 – 2025) is now in place.<sup>36</sup> In my 2017 inspection of Arohata Upper Prison, I observed that there was little evidence of the implementation of the strategy.<sup>37</sup> I have also communicated my concerns to Corrections that a lack of tailored management plans for women is inconsistent with the 2021 – 2025 strategy.<sup>38</sup>

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<sup>33</sup> See, for example, Ombudsman New Zealand (2021), [Report on an unannounced follow up inspection of Christchurch Men’s Prison under the Crimes of Torture Act 1989](#), p 10; and Ombudsman New Zealand (2017), [Report on an unannounced inspection of Spring Hill Corrections Facility](#), p 18.

<sup>34</sup> Ombudsman New Zealand (2018), [Report on an unannounced follow-up inspection of Christchurch Women’s Prison - 4 April 2018](#), p 4. More recently, this issue has been the subject of a case in the New Zealand High Court, which found that the Department of Corrections had breached the rights of affected women to freedom from discrimination under section 19 of the New Zealand Bill of Rights Act when making recent transfers due to staffing shortages. See [Wallace v Chief Executive of the Department of Corrections](#) [2023] NZHC 2248.

<sup>35</sup> As above n 15.

<sup>36</sup> See Department of Corrections (2021), [Wāhine – E rere ana ki te pae hou: Women’s Strategy 2021 – 2025](#).

<sup>37</sup> As above n 15, p 5.

<sup>38</sup> Ombudsman New Zealand (2023), [Report on an announced targeted inspection of Arohata Prison under the Crimes of Torture Act 1989](#), p 12.



## Use of force and coercive powers

33. The use of coercive powers (as defined in the Corrections Act 2004), including the use of force, is an area in which I have frequently identified concerns and made recommendations. Use of force is regulated by section 83 of the Corrections Act, which provides that physical force can only be used in prescribed circumstances and if reasonably necessary. The level of force used must also be reasonable, and, where force has been used, a registered health professional must examine the person in custody as soon as practicable following the event.
34. Key concerns that I have raised relate to decisions to use force, the appropriateness of the use of force (ie whether the type of force used is approved and/or procedures correctly followed), as well as post-incident debriefing, recordkeeping, reporting and oversight. Examples of my observations on coercive powers and the use of force from specific inspections are outlined below:
- a. Auckland Prison, 2020.<sup>39</sup> My inspectors reviewed CCTV footage of an incident involving, in my opinion, the unwarranted use of pepper spray on a person in custody. Footage showed the person in custody activating his cell sprinkler, before standing in the yard waiting for staff response. Once the water supply to the sprinkler had been turned off, a group of officers entered the cell, stood at the entrance to his yard and ordered him to move to the back of the yard, get down on his knees and put his hands behind his back. Although footage showed that the person in custody immediately obeyed the order, he was nonetheless pepper sprayed whilst on his knees, with his hands fully visible behind his back. I did not consider this a legitimate or necessary use of force and, as such, viewed it as amounting to cruel treatment under Article 16 of the Convention.  
  
Furthermore, the incident report (as well as a prisoner misconduct report) did not reflect what my inspectors saw in the footage they reviewed. Staff had failed to report the incident accurately at the time of inspection, and the incident had not been reviewed by management, meaning that the incident could not be addressed in a timely manner. These issues were raised with the Deputy Prison Director at the time of inspection.
  - b. Otago Corrections Facility, 2020.<sup>40</sup> My inspectors reviewed a sample of on-body camera and CCTV footage relating to use of force incidents. These showed inconsistent use of de-escalation techniques, and some staff used unprofessional language. Three incidents in the sample reviewed showed what appeared to be unreasonable use of force. One of these incidents had been identified by the Prison as an unlawful use of force, and was being investigated. Ten of the 35 instances of use of force (28.5 percent) in the period I reviewed involved the use of pepper spray. I raised a concern about high use of pepper spray at the prison in my 2019 inspection report

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<sup>39</sup> As above n 9, p 10.

<sup>40</sup> As above n 14, p 9.

of the same prison.<sup>41</sup> Corrections acknowledged that there is room for improvement in terms of skilful use of non-forceful alternative ways for managing incidents.

- c. Waikeria Prison, 2019.<sup>42</sup> I highlighted my view that the use of force review process was not consistently completed in a timely manner. Thirty-eight reviews were outstanding at the time of inspection, some dating back to April 2019. Of concern was the lack of records of when pepper spray had been deployed or whether the decontamination process had been carried out. My inspectors reviewed 11 use of force incidents, including viewing CCTV and on-body camera footage, which were not always being activated prior to the use of force. Poor practice was identified in a number of incidents. This included one occasion where, in my opinion, staff used unnecessary force, when handcuffed individuals who were being transferred were directed to lie on the ground after disembarking from a transport vehicle. This was raised with senior management at the time of the inspection, who acknowledged it was unnecessary. Management assured my inspectors that training would be undertaken to ensure against further occurrences.
- d. Auckland South Corrections Facility, 2018.<sup>43</sup> I raised concerns that staff, on occasion, used non-approved techniques to control people in custody. I also considered it unacceptable that, on some other occasions, force had been used to control and restrain people in custody who were not, at the time, presenting a threat.
- e. Christchurch Women's Prison, 2021.<sup>44</sup> In the course of a short scrutiny visit, I became aware of a young person with a number of vulnerability factors who was being accommodated in the Separates Unit. A review by my inspectors of the use of force register and incident reports indicated that the person had been subjected to several use of force events, including the application of a spit hood. One incident identified by inspectors, where staff had closed the meal flap on the young person's arm, had not been recorded as a use of force. I find these use of force and restraint incidents highly concerning. Moreover, from the information available, there did not appear to be imminent risk justifying the use of force or the types of force used. For that reason, I considered the use of force was disproportionate. I was also concerned to hear that two of these events had not been reviewed, and that the Prison Director had not been proactively made aware of them.

Corrections responded to my provisional report, advising:

*We agree that spit hoods should only be used as a last resort. However, as a responsible employer, we also need to ensure staff are safe from the risks posed by bodily fluids – a risk which is only heightened in a COVID-19 environment. Young and disabled people are still capable of posing this risk to our staff. The*

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<sup>41</sup> Ombudsman New Zealand (2019), [Report on an unannounced follow up inspection of Otago Corrections Facility - June 2019](#), pp 6 – 7.

<sup>42</sup> As above n 16, p 7.

<sup>43</sup> As above n 13, p 13.

<sup>44</sup> Ombudsman New Zealand (2023), [Report on an announced targeted inspection of Christchurch Women's Prison under the Crimes of Torture Act 1989](#), pp 6 – 7.

*Corrections Act 2004 and Corrections Regulations 2005 approve and authorise the use of spit hoods.*

I agree that staff need to be protected from risk, but do not accept that spit hoods are the safest or most humane way of achieving this, irrespective of the legislative settings. I expect alternatives, including access to proper personal protective equipment, to be explored as part of addressing this issue. I therefore made a recommendation that Corrections and the prison ensure that spit hoods are never used on vulnerable detainees, including young people and disabled people. I note that the Committee against Torture, in its recent Concluding Observations from its review of New Zealand, recommended that the State party should ‘*take all measures necessary to end the use of spit hoods in all circumstances*’.<sup>45</sup>

## Measures and practices related to solitary confinement

### Legislation

35. While the practice of solitary confinement is not expressly provided for in New Zealand legislation, sections 58 to 60 of the Corrections Act allow for ‘segregation’ – that is, the denial or restriction of a person in custody’s opportunity to associate with others, including other people in custody, with friends and whānau (family), as well as staff. While review processes exist, they allow for segregation to be continued indefinitely.
36. Corrections has stated, in a submission on the ‘*Petition of Christine McCarthy: Ban prolonged solitary confinement*’,<sup>46</sup> that segregation does not constitute solitary confinement when people in custody ‘*can have meaningful contact with other people*’.<sup>47</sup> It asserts that contact may include staff members, visits from friends and whānau, contact with volunteers and, where appropriate, association with other people on a similar management regime. I consider that if segregation processes do not adequately ensure meaningful human contact, time out of cell and opportunities to exercise in the open air, then the ‘segregation’ allowed for under the Corrections Act may effectively constitute solitary confinement, and, for periods longer than 15 days, prolonged solitary confinement.
37. Furthermore, the minimum entitlements afforded to people in custody under the Corrections Act do not necessarily provide safeguards against solitary confinement.<sup>48</sup> In particular, while there is a minimum entitlement to at least one hour of physical exercise (in the open air if weather permits), there is no minimum entitlement to unlock hours/time outside of cell to ensure that no person is confined for 22 hours or more. Further, there is no requirement that where an individual *is* confined for 22 hours or more in their cell, this is

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<sup>45</sup> As above n 24, p 4.

<sup>46</sup> Petitions Committee (2022), [Report of the Petitions Committee – Petition of Christine McCarthy: Ban prolonged solitary confinement](#).

<sup>47</sup> Department of Corrections (2021), [RE: the petition of Christine McCarthy proposing to ban prolonged solitary confinement](#), p 1.

<sup>48</sup> These minimum entitlements are provided for in section 69 of the Corrections Act, and may only be denied in prescribed circumstances.

recorded and monitored to allow for potential solitary confinement to be identified and to prevent prolonged or indefinite solitary confinement.

### Solitary confinement in practice

38. In practice, I have observed on a number of occasions practices and prison regimes which are likely to amount to solitary confinement. Such practices and regimes, which may also constitute prolonged or indefinite solitary confinement in some cases, can significantly impact the wellbeing of people subjected to them. I have noted that there are a number of ways in which solitary confinement may occur, including the following:
- a. **The use of ‘directed segregation’ for more than 15 consecutive days, which may amount to prolonged solitary confinement.** For example, following my 2020 inspection of Otago Corrections Facility,<sup>49</sup> I reported on the fact that people were held in the Management Unit for more than 15 days, and needed to be provided with more opportunities for meaningful activity and human contact. One person had been segregated for over two years. Another had been segregated for ten months, and two had been segregated for more than six months. Most of those in the Management Unit were subjected to basic yard-to-cell regimes. While prison management told inspectors they emphasised allowing for ‘restricted’ association rather than ‘denied’ association, in reality, most of the people in the Management Unit had little or no opportunity for meaningful human interaction. While some were allowed to associate with others under their segregation orders, inspectors frequently saw people in custody alone in their cells or the yards during the inspection. In several cases, these conditions had lasted for longer than 15 days. In my view, this constituted prolonged solitary confinement.
  - b. **Practices which I consider amount to undocumented segregation,** where people in custody not subject to any type of segregation directive under the Corrections Act were denied association with others, in some cases to the extent that may have amounted to prolonged solitary confinement. For example:
    - i. During my 2020 inspection of Auckland Prison,<sup>50</sup> my inspectors identified a number of people subject to a ‘single unlock regime’, meaning that they had no association with other people in custody. In effect, this was a segregation regime without the statutory safeguards.
    - ii. During my 2018 inspection of Auckland South Corrections Facility,<sup>51</sup> inspectors were advised that the Prison had introduced a restricted regime (also called ‘extended lock’) following a review of instances of ‘*violence and non-co-operation*’. People in custody subjected to this regime were located in a Wing where their ability to associate with others was restricted. None of those placed on the restricted regime were subject to a segregation directive, contrary to

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<sup>49</sup> As above n 14, p 13.

<sup>50</sup> As above n 9, p 11.

<sup>51</sup> As above n 13, pp 17 – 18.

sections 58 to 60 of the Corrections Act. Some people in the Wing were either low-medium or low security classification, meaning their security classification had not been reviewed despite their being placed in the Wing due to their behaviour.

Also of concern was that some people in custody did not have file notes entered on the Integrated Offender Management System (IOMS) to explain their removal from mainstream accommodation. Inspectors reviewed a selection of individual files and found limited evidence to support placement on a restricted regime. Event-based security classification reviews were also missing.

I considered this contrary to the principles of natural justice and Rule 37 of the Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). A number of people in custody said they were unsure why they had been placed in the Wing and did not know what they had to do to in order to return to mainstream accommodation. There did not appear to be individual management plans for this group, nor regular, minuted staff meetings to review behaviours and set expectations. Inspectors were advised by people in custody and staff that some individuals had been placed on the restricted regime directly following their transfer to the prison and, consequently, had no file notes to support their segregation.

Corrections' Monitors<sup>52</sup> had submitted reports to the Prison Director highlighting how the prison had failed to meet the legislative requirements in relation to the regime on the Wing. At the time of the inspection, 15 people in custody had been on the restricted regime for over six months.

**c. People held in Intervention and Support Unit (ISU) cells, due to their assessment as being at risk of self-harm or suicide, may have been subject to solitary confinement.**

For example:

- i. On a follow up inspection of Invercargill Prison in 2019,<sup>53</sup> I reported that people in custody in the ISU were experiencing long periods of isolation of up to 23 hours. While staff informed inspectors that opportunities for suitable association in the ISU yard or day room was allowed, this was not occurring at the time of the inspection.
- ii. During my 2020 inspection of Auckland Prison,<sup>54</sup> inspectors noted that people in custody in the ISU spent prolonged periods locked in their cells and received one

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<sup>52</sup> Auckland South Corrections Facility is New Zealand's only privately run prison, operated by Serco New Zealand under a Public Private Partnership with the Department of Corrections. The role of Corrections' Monitors is to confirm whether Serco is operating the Prison according to its contractual requirements; adhering to its own and relevant Corrections' policies and procedures; and is complying with relevant legislation and mandatory international prison standards. The Monitors are able to review all aspects of the Prison's operations.

<sup>53</sup> Ombudsman New Zealand (2019), [Report on an unannounced follow up inspection of Invercargill Prison – July 2019](#), p 8.

<sup>54</sup> As above n 9, p 16.

hour yard time and one hour in the day room daily. They were not allowed to interact with one another unless they had the same security classification.

### Records and management plans

39. I have also raised my concerns in multiple OPCAT reports regarding inadequate record keeping related to regimes which may, or do, amount to solitary confinement. For example, during my inspections of Auckland Prison,<sup>55</sup> Waikeria Prison,<sup>56</sup> and Auckland South Corrections Facility,<sup>57</sup> inspectors found management plans for people on directed segregation to be generic and lacking in specific details on pathways out of directed segregation. Management plans at Auckland Prison contained entries such as *'the prisoner needs to maintain compliance with staff instruction'* or *'needs to display compliance and appropriate behaviour towards staff'*.<sup>58</sup> There was little evidence of engagement with people on directed segregation to identify and address the issues that resulted in their being segregated, and, in my opinion, limited opportunities for those people to demonstrate the *'required behaviours'* to enable their reintegration into the mainstream population due to the restrictive nature of their regime.

### Data collection

40. Correction's data, in my view, does not sufficiently assist with identifying and monitoring instances of solitary confinement, including prolonged solitary confinement. While the data collected includes the number and duration of segregations, there is no monitoring or recording of the extent to which people in custody have, or are deprived of, meaningful human contact, a defining feature of solitary confinement. There is also currently no legal requirement to record other practices that may constitute prolonged solitary confinement, such as *'hours of unlock'*.
41. I am aware Corrections is looking to take steps to improve data collection. In my view, this should be supported by drafting a statutory provision, for inclusion in either the Corrections Act or the Corrections Regulations, requiring the collection and publication of data on the use of solitary confinement in New Zealand prisons. Such provisions for data collection on the use of solitary confinement would provide stronger safeguards, as part of a wider commitment to end solitary confinement, and prohibit its use for particular groups or for prolonged or indefinite periods. Further, I see the collation of demographic information as necessary to ensure that Corrections is protecting vulnerable groups and meeting its obligations under Te Tiriti.<sup>59</sup>

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<sup>55</sup> As above n 9, p 13.

<sup>56</sup> As above n 16, p 9.

<sup>57</sup> As above n 13, p 15.

<sup>58</sup> As above n 9, p 13.

<sup>59</sup> Any data collection and reporting would need to align with the principles of Māori data sovereignty.

## Positive practices

42. I have seen some recent examples of positive practice in relation to segregation, which I would like to see as standard across all prisons. For example, during an inspection of Rimutaka Prison in 2021,<sup>60</sup> I noted that multi-disciplinary team meetings for people in the Management Unit took place weekly, and senior staff members had good knowledge of these individuals and were proactive in assessing their specific circumstances. In several cases, directed segregation orders were revoked prior to their expiry.
43. I would be interested in your views on what constitute effective safeguards against practices that may amount to undocumented, indefinite or prolonged solitary confinement, and therefore would encourage this to be considered in your thematic report.

## 'Prisoners of Extreme Risk'

44. In July 2019, Corrections established the '*Persons of Extreme Risk Directorate*' (PERD) and '*Prisoners of Extreme Risk Unit*' (PERU). Although located within the secure perimeter of Auckland Prison, the PERU is a separate custodial operation managed by the PERD. All individuals held in the PERU experience a highly restrictive regime and are subject to segregation in a 'specialised custodial environment'.<sup>61</sup>
45. The PERD and PERU are not expressly set out in legislation. Corrections has made little information available publicly about the PERD and how it operates, and the PERU was out of scope for Te Tari Tirohia – the Office of the Inspectorate's thematic inspection and subsequent report on separation and isolation in New Zealand prisons.<sup>62</sup>
46. It is a well-established principle that regimes which are particularly restrictive, or where individuals have been marked out as needing to be managed separately from the general detainee population, present a particular risk of ill-treatment.<sup>63</sup> It would be helpful for your thematic report to discuss your expectations with regard to novel or specialist regimes, and steps that you would expect states and prison management to take to ensure that such regimes do not amount to ill-treatment.

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<sup>60</sup> Report as yet unpublished.

<sup>61</sup> As above n 47, p 1.

<sup>62</sup> Office of the Inspectorate (2023), [Separation and Isolation: Prisoners who have been kept apart from the prison population](#), p 16.

<sup>63</sup> For example, the European Committee for the Prevention of Torture (CPT) has said that while '*this group of prisoners will (or at least should, if the classification system is operating satisfactorily) represent a very small proportion of the overall prison population... it is a group that is of particular concern to the CPT, as the need to take exceptional measures vis-à-vis such prisoners brings with it a greater risk of inhuman treatment*'. See CPT (2020), [Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment \(CPT\) from 23 September to 4 October 2019](#), p 29.

See also OSCE Office for Democratic Institutions and Human Rights & Penal Reform International (2021), [Protecting Human Rights in Prisons while Preventing Radicalization Leading to Terrorism or Violence: A Guide for Detention Monitors](#); and Amnesty International & Open Justice Initiative (2017), [Inhuman and Unnecessary: Human Rights Violations in Dutch High-Security Prisons in the Context of Counterterrorism](#).



## COVID-19 and prison management

47. Following the outbreak of the global COVID-19 pandemic in early 2020, I reviewed my pre-planned OPCAT inspection schedule, and my inspectors undertook targeted inspections of nine prisons across the country to understand the impact that COVID-19 was having on people in custody. These inspections were guided by my *Criteria for OPCAT COVID-19 Inspections*,<sup>64</sup> which I developed and published prior to undertaking these inspections. I published a summary of the outcomes of my inspections in my *OPCAT COVID-19 Report: Report on inspections of prisons under the Crimes of Torture Act 1989*.<sup>65</sup>
48. Overall, I was pleased to note that prisons responded to the initial COVID-19 outbreak in a well-resourced, balanced, and efficient manner, despite the complex challenges presented by COVID-19. Inspectors observed generally positive relationships between the staff and people in custody, and noted that enhanced health and safety processes were in place and effectively communicated to staff and people in custody. Prisons had taken measures to provide people in custody with relevant and up-to-date information about COVID-19, and to support them to maintain contact with friends and whānau. People in custody told my inspectors that they generally felt supported, safe, and well-informed.
49. There were some areas where I considered that the conditions and treatment of people in custody could be improved, and I made several recommendations related to these. In particular, I observed that:
- a. In most prisons, unlock times had reduced as a result of the ‘bubble’ arrangements operating in most units.<sup>66</sup> I made recommendations that all people in custody should be able to spend at least one hour each day in the fresh air, and that unit staff maintain complete and accurate records of time out-of-cell to monitor this.
  - b. People in custody in two units at different prisons did not have access to certain essential cleaning materials. I highlighted my view that these two prisons required improved systems for ensuring cleaning materials were effectively distributed to people in custody, and recommended to these two prisons that all people in custody have access to cleaning materials.
  - c. Two prisons’ recreational areas had little to no access to handwashing facilities or hand sanitiser, and I therefore recommended that people in custody have access to hygiene facilities when in these shared areas.
50. As the pandemic has progressed, I have grown increasingly concerned that restrictions introduced at the outset of the pandemic have taken considerable time to be reviewed and lifted, and some have continued in prisons across the country. For example, as a part of Correction’s COVID-19 response, in-person visits were suspended in all prisons. I am seriously concerned that, almost four years on from the outbreak of the pandemic, whānau

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<sup>64</sup> Ombudsman New Zealand (2020), [Criteria for OPCAT COVID-19 inspections](#).

<sup>65</sup> Ombudsman New Zealand (2020), [OPCAT COVID-19 Report: Report on inspections of prisons under the Crimes of Torture Act 1989](#).

<sup>66</sup> ‘Bubble’ arrangements refer to the separation of prison units into various cohorts kept separate from one another to reduce the risk of transmission of COVID-19.

visits and unlock hours have still not fully resumed to pre-pandemic arrangements. While I recognise that acute staffing shortages have hampered Corrections ability to resume to 'business as usual', I would welcome comment in your thematic report on how prison management can ensure that restrictions imposed in response to a pandemic or other emergencies are continually monitored to ensure they are lawful, necessary, proportionate, accountable and non-discriminatory for as long as they are in place.

### **Concluding comment**

51. I greatly value the opportunity to provide these comments in contribution to your thematic report on current issues and good practices in prison management. I would be happy to discuss or expand on any of the matters outlined in this submission, should this be of assistance. Any queries may be addressed to Tom Lord, Senior Advisor Strategic Advice (OPCAT) ([Tom.Lord@ombudsman.parliament.nz](mailto:Tom.Lord@ombudsman.parliament.nz)) in the first instance.

Nāku noa, nā



Peter Boshier  
Chief Ombudsman