

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act (WAI 2472)

AND

IN THE MATTER of the Prisoners' Voting Rights Claim (WAI 2482)

AND

IN THE MATTER of the Māori Prisoners Voting Rights Inquiry (WAI 2870)

Submissions of The Howard League for Penal Reform
Wellington NZ Incorporated (Wellington Howard League)
7 May 2019

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May it please the Tribunal:

1. The Howard League for Penal Reform Wellington NZ Incorporated (HLW) is one of three Howard Leagues (with Canterbury and Otago) which form the National Coalition of Howard Leagues for Penal Reform and has 265 members who are inmates in New Zealand prisons, many who are Māori. The HLW's Constitution includes, as one of its objects, "*To act in accordance with and to promote the Treaty of Waitangi.*"¹
2. On 7 November 2018 HLW initiated a Parliamentary Petition asking the House of Representatives to repeal section 80(1)(d) of the Electoral Act 1993 to enable all New Zealand prisoners to be eligible to vote in New Zealand elections (PET_81069). The reason for the petition is stated as follows:

*"The Wellington Howard League believes New Zealand prisoners should have the right to vote. Voting is a fundamental human right. Voting is one way of participating in society. This supports prisoners making connections to the community that support their reintegration. **The current disenfranchisement of New Zealand prisoners disproportionately affects Māori because over 50% of New Zealand prisoners are Māori, despite the fact that Māori make up only about 15% of the population**" (emphasis added).*

Structure of Submissions

3. These submissions are structured as follows:
 - A. Support for the Claim
 - B. Disenfranchisement as an unfair punishment.
 - C. The relevance of rates of Māori imprisonment.
 - D. What Treaty principles apply to the disqualification of Māori prisoners from registering as electors under s80(1)(d) of the Electoral Act 1993?
 - E. If s80(1)(d) of the Electoral Act 1993 is inconsistent with Treaty principles, does any prejudice to Māori arise and, if so, what is the nature and extent of that prejudice?
 - F. Concluding comments

¹ Constitution and Rules of the Howard League for Penal Reform Wellington NZ Incorporated
A copy of the Constitution and Rules is available via the search interface at:
http://www.societies.govt.nz/cms/banner_template/CNAME

- G. Annexure A: Access to Health Services
- H. Annexure B: Lock up and solitary confinement
- I. Annexure C: References
- J. Annexure D: Acronyms and abbreviations

A. Support for the Claim

- 4. HLW supports the WAI2870 claim that section 80(1)(d) of the Electoral Act 1993 breaches Te Tiriti o Waitangi. We are of the view that s80(1)(d) should be repealed.
- 5. It is HLW's submission that:
 - a) prisoner disenfranchisement is an unfair and additional punishment
 - b) prisoner disenfranchisement contributes to the acceptance of poor conditions in prison
 - c) Māori are disproportionately affected by s80(1)(d) and also suffer specific instances of prejudice.

B. Disenfranchisement as an unfair punishment.

- 6. Prisoner disenfranchisement is unfair because:
 - a) It is an arbitrary punishment:
 - i. If a prisoner is imprisoned for less than 3 years, it is the timing of the sentence which determines whether or not they are disenfranchised because of the three year election cycle.
 - ii. When people are sentenced, their time on remand (which may coincide with an election) will be counted as part of their sentence, but not subject to disenfranchisement. This means the timing and length of remand are factors that determine disenfranchisement.
 - iii. Those people sentenced to home detention are not disenfranchised, while those having committed the same offence sentenced to imprisonment are disenfranchised.
 - b) It is a disproportionate punishment because it is a blanket punishment applied regardless of severity of offence. This appears to be inconsistent with section 9 of the the Bill of Rights Act 1990 (BoRA) which states that "*Everyone has the right not to be subjected to ... disproportionately severe ... punishment.*"

- c) It is an extra-judicial punishment. Disenfranchisement is not a sentence available to judges under the Sentencing Act 2002. The sentence of imprisonment does not include disenfranchisement because disenfranchisement is not a condition of imprisonment prescribed in the Corrections Act 2004.
- d) All of the above disproportionately affect Māori because Māori are disproportionately incarcerated.

C. The relevance of rates of Maori imprisonment (WAI2870 #1.4.1 at [7])

- 7. The HLW submits that the specific context of the disproportionate incarceration of Māori is a highly relevant factor in determining the significance of Māori prisoner disenfranchisement. We consider this argument parallels matters raised in WAI2540 (Tu Mai te Rangi!) on disproportionate reoffending rates.
- 8. WAI2540 stressed the seriousness of Treaty breaches in strong language. Examples from the report include:

*"so long as this inequity continues, the Department must make the reduction of Māori reoffending an urgent priority"*²

*"in this situation, where Māori interests are so threatened"*³

*"The current inequity between Māori and non-Māori reoffending rates heightens the Crown's obligation actively to protect Māori interests. This situation demands that balance be restored."*⁴

*"Given the severity of the situation, to choose not to commit to a measureable strategy ... is a significant omission, and unjustified in the circumstances."*⁵

*"The gravity and enduring nature of this situation - which we say the Crown has a Treaty obligation to resolve - raises the threshold for Crown action."*⁶

*"We reiterate that in these circumstances the Crown has a Treaty obligation to prioritise reducing disparities between Māori and non-Māori regardless of their causes."*⁷

² Waitangi Tribunal, WAI 2540 at [5.1.1] (emphasis added).

³ Waitangi Tribunal, WAI 2540 at [5.1.3] (emphasis added).

⁴ Waitangi Tribunal, WAI 2540 at [5.1.2] (emphasis added).

⁵ Waitangi Tribunal, WAI 2540 at [5.1.2] (emphasis added).

⁶ Waitangi Tribunal, WAI 2540 at [4.3.1] (emphasis added).

⁷ Waitangi Tribunal, WAI 2540 at [4.3.7(2)] (emphasis added).

9. The WAI2540 report clearly indicated that such contexts or situations can mean that more urgency, greater obligation, and a higher level of remedial action is appropriate in order to address Treaty obligations **"regardless of their causes."**⁸ It might also mean that the threshold to establish that a breach has occurred is lowered because of the magnitude of the unjustness of the circumstances.
10. The wider context of the WAI2540 report was the overrepresentation in the criminal justice system. As it stated: *"There is a growing threat to Māori culture presented by the normalisation of Māori reoffending and reimprisonment rates ... this issue is situated against the backdrop of longstanding Māori overrepresentation in the criminal justice system."*⁹
11. It is well established that Māori are disproportionately incarcerated in New Zealand. The March 2019 Quarterly Prison Statistics published by the Department of Corrections¹⁰ state that 51.3% of NZ prisoners are Māori. Māori are 15% of the NZ population. The high incarceration of Māori is perhaps the most compelling demonstration of racial inequity in New Zealand. If the Māori prison population was proportionate (i.e. 15% relative to the current prison population), the New Zealand prison population would be 5,760 (not the current 10,053).¹¹ The additional 4,293 people in prison significantly exacerbates overcrowding, understaffing, and creates diminished prison conditions, including high hours of lockup and inadequate access to healthcare. Details from Ombudsman and United Nations reports document these conditions and their often persistent nature (**Annexures A and B**). The focus of the annexures is access to adequate health care and impacts of long hours of lockup.
12. **It is within a context of systematic and prolonged failure of the prison system that the disenfranchisement of Māori prisoners needs to be understood.** Our view is that this is a situation in which any possible mechanism which might achieve remediation - including re-establishing prisoner suffrage - must be utilised. The strength of language of the kind used in WAI2540 would equally be apt. While there may well be a case to argue for a Treaty breach in relation to disenfranchisement on its own merits (which is the focus of other parties to these proceedings). We submit that **disenfranchisement is one of a**

⁸ Waitangi Tribunal, WAI 2540 at [4.3.7(2)] (emphasis added).

⁹ Waitangi Tribunal, WAI 2540 at [5.3]

¹⁰ Department of Corrections, Prison facts and statistics - March 2019

¹¹ Department of Corrections, Prison facts and statistics - March 2019

number of mechanisms which sustain the persistence of substandard prison conditions.¹²

13. Disenfranchised communities are not politically influential. The evidence of Ann Sullivan and Janine Hayward identifies research supporting this. They write that *"an observation made by V. O. Key in 1949 remains true: the significance of group differences in voting and not voting is that politicians and officials are under no compulsion to pay much heed to classes and groups of citizens that do not vote"* (WAI2870 #A012 at [35]). There is a structural dependency in a democracy between power and its responsiveness to voters' interests and values. Section 80(1)(d) of the Electoral Act 1993 prohibits political representation for prisoners. Māori are disproportionately impacted on by this prohibition of political representation.

14. The significance of having a political voice on penal policy in New Zealand is clear from the report of the Chief Science Advisor who attributed growth in the prison population to politically-effective constituencies. He observed in March 2018 that:

*"The evidence is that prison growth has been driven largely by **"tough on crime" policies**, from successive administrations on both sides of the political spectrum, **encouraged by vocal, professional lobbyists**. This is known as *"penal populism"* - where politicians offer vote-winning, simplistic solutions for selected law-and-order problems - ... where reactive policy choices that are not particularly evidence-based have resulted in disproportionate incarceration and cost, with no evidence of concomitant increase in public sense of safety or realisation of decreasing crime. In reality, crime rates are falling but these are not related to prison policy.*

*Ministry calculations have shown that if no policy changes had been made since 2000, the estimated prisoner population would now be around 8,800, whereas the current prisoner population is around 10,600."*¹³

15. The above suggests that lack of political representation is likely to mean that Māori prisoners are less able to effectively influence the conditions which they are sentenced to live in.

¹² We note, in relation to the principle of equity, that WAI692 referred to *"A systematic or prolonged failure on the part of the Crown to reduce such barriers would, in the absence of countervailing factors, commonly be inconsistent with the principle of equity."* Waitangi Tribunal, WAI692 at [3.6].

¹³ Office of the Prime Minister's Chief Science Advisor *"Using evidence to build a better justice system"* at [17]-[18]. (emphasis added).

16. This is likely exacerbated by prisons operating beyond public view, further reducing the effectiveness of prisoners' voices. The hidden nature of prisons is why the United Nations' Committee Against Torture (CAT) established the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) (adopted 18 December 2002). OPCAT established a system of international and national monitoring of places of detention. The UN Subcommittee for the Prevention of Torture (SPT) is the international monitor of OPCAT. In New Zealand the Ombudsman is the National Preventive Mechanism (NPM) charged with monitoring prisons. The NZ Human Rights Commission is the Central NPM with national oversight of the process. This is legislated for in the Crimes of Torture Act 1961. The Ombudsman's role is to independently inspect, make recommendations and report on prisons. The Annexures to these submissions draw on inspection reports resulting from OPCAT monitoring.
17. Despite this system of monitoring, recommendations to address prison conditions often go unheeded. We submit that a context, where recommendations from independent monitors are not always attended to, and where prison conditions are hidden from public view, exacerbates the impacts of disenfranchisement because these factors further marginalise prisoners and undermine their ability to effect change.

D. What Treaty principles apply to the disqualification of Māori prisoners from registering as electors under s80(1)(d) of the Electoral Act 1993?
(WAI2870 #1.4.1 at [1])

18. Disenfranchisement removes from prisoners "*the right to determine their own decision makers*,"¹⁴ and so the Treaty principle of **Autonomy** is relevant to determining whether or not s80(1)(d) breaches the Treaty. Not only is the Treaty principle of **Autonomy** undermined because Māori prisoners do not have "*the right to determine their own decision makers*,"¹⁵ Māori prisoners have little political influence over the decision-makers who other people determine.
19. **Active Protection**, which extends to the proactive protection of Māori interests generally and includes the promotion of Māori well-being,¹⁶ is undermined by disenfranchisement through its contribution to the perpetration of inadequate and substandard prison conditions, some of which specifically prejudice Māori. In a democracy, political decision-

¹⁴ Waitangi Tribunal "Principles of the Treaty"

¹⁵ Waitangi Tribunal "Principles of the Treaty"

¹⁶ Waitangi Tribunal, WAI 2540 at [4.1.2]

makers are disincentivised to take note of the interests and values of those who are disenfranchised.

20. **Equity** is relevant to matters of equity of access and equity of outcome,¹⁷ or disproportionate ill treatment, such as incarceration, of Māori; "*Where Māori have been disadvantaged, the principle of equity - in conjunction with the principles of active protection and redress - requires that active measures be taken to restore the balance.*"¹⁸
21. **Redress** acknowledges a duty to repair to "*restore the honour and integrity of the Crown and the mana and status of Maori.*"¹⁹ Cruel, inhuman and degrading treatment or punishment are at odds with the restoration of the mana and status of Māori.

E. If s80(1)(d) of the Electoral Act 1993 is inconsistent with Treaty principles, does any prejudice to Māori arise and, if so, what is the nature and extent of that prejudice? (WAI2870 #1.4.1 at [9])

22. Much of the prejudicial impact on Māori resulting from s80(1)(d) directly relates to the disproportionate presence of Māori in prisons. As has been stated previously: "*Māori are the mainstream prison population.*"²⁰ There are, however, at least two instances of prison conditions which are more specifically prejudicial to Māori:
 - a) Reduced unlock hours can negatively impact on cultural activities in Te Tirohanga (Māori Focus Units). As one prisoner wrote to us, high lockup hours have "*effectively eliminated taiaha training (morakau) and the greeting of new inmates to the Unit (powhiri) (which is generally done in the mornings). I personally believe this is very disrespectful and culturally insensitive to all Māori.*" We have also heard of evening kapa haka practice being cancelled due to increased lockup hours. This reflects consequences of high lockup hours impacting on access to activities.
 - b) Dental health provisions in the Corrections Regulations 2005 are prejudiced against Māori. The Ombudsman has criticised Corrections' national dental policy which restricts dental health obligations to pain relief. In relation to Christchurch Men's Prison the Ombudsman observed that Corrections' national policy for dental health states that: "*all prisoners should be provided pain relief. It also provides that prisoners who had a history of routine dental care and visiting the*

¹⁷ Waitangi Tribunal, WAI 2540 at [4.1.3]

¹⁸ Waitangi Tribunal "Principles of the Treaty"

¹⁹ Waitangi Tribunal "Principles of the Treaty"

²⁰ Waitangi Tribunal, WAI 2540 at [4.4.1]

*dentist would be accorded similar dental care. Other prisoners would only be given pain relief. This policy is unacceptable in that it discriminates against prisoners without the financial means for regular dental treatment prior to imprisonment."*²¹

- c) A similar observation was made in the Ombudsman's Rolleston follow-up report, which stated that: "*The [dental] service was for pain management only unless a prisoner was able to evidence good oral hygiene prior to incarceration. This discriminates against prisoners without the financial means for dentistry prior to imprisonment."*²²
- d) The national policy that the Ombudsman referred to is the Corrections Regulations 2005 cl. 81(2). This states that "*[a]ny examination or treatment must be primarily concerned with the relief of pain, the maintenance of a reasonable standard of dental care relative to the dental and oral health of the prisoner concerned before the prisoner was admitted to the prison, or both."*
- e) This is inconsistent with:
 - i. the Corrections Act 2004 s75, which states that: "*A prisoner is entitled to receive medical treatment that is **reasonably necessary***" (s75(1), emphasis added) and "*The standard of health care ... must be reasonably equivalent to the standard of health care available to the public*" (s75(2)), and
 - ii. the UN's Standard Minimum Rules for the Treatment of Prisoners (SMR), which states that: "*The provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status*" (Rule 24.1).
- f) Ministry of Health statistics (2013/14) indicate that "*Māori adults were less likely than non-Māori adults to have visited a dentist in the past 12 months ... Among adults with natural teeth, Māori adults were more likely than non-Māori to report that they had never visited a dental health care worker at all, or usually only visited a dental health care worker for dental problems.*"²³ 75.8% of Māori men (15 years +) are in the category of: "*Usually only visits a dental health care worker for dental problems, or never visits*" in contrast to 53.6% of non-Māori

²¹ Ombudsman OPCAT report (2017) Christchurch Men's Prison p. 39.

²² Ombudsman OPCAT report (2017) Rolleston follow-up p. 14.

²³ Ministry of Health, Ngā mana hauora tūtohu.

men, while 45% of non-Māori men had "Visited a dental health care worked in a previous year" in contrast to 33.6% of Māori men.

- g) Corrections Regulations cl. 81(2) means that a prisoner with a history of inconsistent, or a lack of, dental visiting may qualify for only pain relief, rather than dental treatment, in prison. The Ministry of Health data indicates that Māori are more likely to be in a category of not visiting a dentist, suggesting that this regulation may discriminate against Māori prisoner access to dental care.
- h) WAI 2540 states that: "*Equity applies to equal standards of health care, where a pattern of inferior treatment of Māori compared to non-Māori would be inconsistent with the principle. ... a general equity of health outcomes for Māori as a whole was one of the expected benefits of the citizenship granted by the Treaty.*"²⁴

F. Concluding comments

- 23. It is HLW's submission that prisoner disenfranchisement impacts on the persistence of conditions inconsistent with international standards, and domestic legislation. It is undisputed that Māori are disproportionately represented in prison. In this way Māori are particularly vulnerable to the adverse effects of prisoner disenfranchisement.
- 24. We further submit that both the magnitude and persistence of these penal conditions:
 - a) reduces the threshold required to prove that Māori prisoner disenfranchisement is a breach of the Treaty
 - b) obliges the Crown to actively protect Maori interests
 - c) is inequitable, because Māori are disproportionately incarcerated
 - d) is a situation requiring urgent redress

High lockup hours, difficulty accessing medical care, long periods of time between dinner and breakfast, and confinement to cells in uncomfortable temperatures are everyday realities for many of New Zealanders' prisoners and conditions over which they have no control.


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7 May 2019

²⁴ Waitangi Tribunal, WAI 2540 at [4.3.1]

Annexure A: Access to Health Care Services

1. This Annexure details specific concerns about NZ prisons, which have been raised at international and national level, regarding prisoner access to Health care services, specifically, observations and recommendations made by the UN Committee Against Torture (CAT), the UN Subcommittee for the Prevention of Torture (SPT), the HRC, and the NZ Ombudsman. The Annexure is confined to material that is publicly available from official reports.
2. For ease of reference, relevant excerpts from international and domestic law regarding prisoner access to health care services are as follows:
 - a) The Corrections Act 2004 stipulates that "*A prisoner is entitled to receive medical treatment that is reasonably necessary*" (s75(1)) and that "*The standard of health care that is available to prisoners in a prison must be reasonably equivalent to the standard of health care available to the public*" (s75(2)). This is consistent with the SMR which states that "*Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status*" (Rule 24.1).
 - b) The Corrections Regulations 2005 stipulate that "*The chief executive must ensure that ... the health needs of prisoners are promptly met, and that, as far as practicable, the physical and mental health of prisoners is maintained to a satisfactory standard*" (cl. 72(b)), and regarding dental care, that "*Any examination or treatment must be primarily concerned with the relief of pain, the maintenance of a reasonable standard of dental care relative to the dental and oral health of the prisoner concerned before the prisoner was admitted to the prison, or both*" (cl. 81(2)).

Delaying access to health care

3. A frequent concern raised relates to delays receiving treatment.
4. In 2015 the UN's Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) stated that it was "*concerned that not all detainees received timely and adequate treatment.*"²⁵

²⁵ UN SPT CAT/OP/NZL/1 (10 February 2017) at [58]

5. Many reports from Ombudsman's inspections of NZ prisons since the 2015 SPT report also indicate long waiting times for health services. The Ombudsman has cited waiting times for medical health services of 1-3 weeks at Christchurch Men's Prison (2017)²⁶ and at Whanganui Prison (2018),²⁷ 2-3 weeks at Hawke's Bay Regional Prison (HBRP) (2017),²⁸ 3-4 weeks at Auckland South Corrections Facility (ASCF) (2019).²⁹ No indication of waiting times was reported on in the Spring Hill Corrections Facility (SHCF) report (2017), but the Ombudsman noted that "*The main issues raised [in a February 2015 patient satisfaction survey included] ... waiting times to see the doctor and dentist.*"³⁰ At Whanganui (2018): "*When asked how easy it is to see the doctor, 21 percent of survey respondents [62 prisoners] said it was very easy or quite easy, while 69 percent [203 prisoners] said it was quite difficult or very difficult.*"³¹

6. Reported waiting times for dental care by the Ombudsman are often a matter of months. At ASCF (2019), the Ombudsman reported a waitlist of over six months to see a dentist.³² At HBRP (2017), he described dental waiting times as "*lengthy, with some prisoners having to wait months. The waiting list at the time of the visit was 114.*"³³ At Whanganui (2018) again the dental "waiting list was long (90 patients), and too many patients were waiting to receive non-urgent treatment."³⁴ A similar complaint was made regarding Christchurch Men's Prison (2017).³⁵ At Arohata (2018), he stated that: "*Women were generally critical of dental services, and 61 percent of questionnaire respondents [45 prisoners] said it was difficult to access the dentist. The average waiting time for urgent referrals (priority one) was three months.*"³⁶

Mental Health

7. Inadequate mental health services have been a long standing issue in New Zealand prisons. In 2009, at the fifth periodic report of NZ on our undertakings under the UN Convention Against Torture, CAT stated that it was "*concerned at the inadequate provision of mental health care and legal services to mentally ill inmates in prisons.*"³⁷

²⁶ Ombudsman OPCAT report (2017) Christchurch Men's Prison p. 38.

²⁷ Ombudsman OPCAT report (2018) Whanganui Prison p. 32.

²⁸ Ombudsman OPCAT report (2017) HBRP p. 33.

²⁹ Ombudsman OPCAT report (2019) ASCF p. 31.

³⁰ Ombudsman OPCAT report (2017) SHCF p. 31.

³¹ Ombudsman OPCAT report (2018) Whanganui Prison p. 32.

³² Ombudsman OPCAT report (2019) ASCF p. 31.

³³ Ombudsman OPCAT report (2017) HBRP p. 35.

³⁴ Ombudsman OPCAT report (2018) Whanganui Prison p. 32.

³⁵ Ombudsman OPCAT report (2017) Christchurch Men's Prison p. 39.

³⁶ Ombudsman OPCAT report (2018) Arohata p. 27.

³⁷ UN CAT CAT/C/NZL/CO/5 at [9].

8. In April and May 2013 the UN's SPT visited New Zealand to inspect prisons. The resulting report expressed concern that: *"there did not appear to be any national strategy on the provision of mental health care in places of detention."*³⁸ The SPT also observed that: *"detainees who have made multiple suicide attempts and those with acute or chronic mental health conditions are not being transferred to appropriate psychiatric facilities and are being held in "at-risk units", often for prolonged periods of time and in conditions akin to that of a disciplinary regime. The Subcommittee believes that **the denial of qualified psychiatric assistance under such circumstances and in such conditions may amount to ill-treatment.**"*³⁹
9. SPT recommended that:
 - a) *"the State party provide, as a matter of urgency, adequate and appropriate access to professional care services in order to meet the mental health needs of detainees."*⁴⁰
 - b) NZ establish a *"comprehensive national policy and strategy be developed to ensure appropriate access to health care and mental health-care services across the criminal justice system. A significant increase in the provision of mental health-care services is required to cope with the high number of detainees with mental health problems."*⁴¹
10. In 2016, in its most recent periodic review of NZ, the CAT reiterated similar concerns: *"Bearing in mind its previous concluding observations (see CAT/C/NZL/CO/5, para.9) and the report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its visit to the State party, the Committee is concerned ... at reports that, in a number of such places, the material conditions and health-care services, in particular mental health-care services, are inadequate."*⁴² It recommended that NZ ensure that *"adequate mental health care is provided for all persons deprived of their liberty."*⁴³
11. In the most recent publicly available annual OPCAT report (2016/17), the Ombudsman identified *"[u]naddressed, or insufficiently addressed, mental health needs among prisoners is a major issue of concern. The Ombudsman has had occasion to highlight the inadequacy of specialist treatment and support for acutely unwell prisoners. Similarly, a large*

³⁸ UN SPT CAT/OP/NZL/1 at [58].

³⁹ UN SPT CAT/OP/NZL/1 at [64] (emphasis added).

⁴⁰ UN SPT CAT/OP/NZL/1 at [65].

⁴¹ UN SPT CAT/OP/NZL/1 at [59].

⁴² UN CAT CAT/C/NZL/CO/6 at [13].

⁴³ UN CAT CAT/C/NZL/CO/6 at [13(b)].

*proportion of prisoners who enter prisons with mild to moderate mental health needs often receive little or no therapeutic intervention. In a stressful custodial environment where violence and intimidation are common features, and where At Risk Units (ARU) can house highly vulnerable prisoners in settings that are inadequate for their needs, mild or moderate mental illness can be exacerbated during incarceration. **There is an urgent need to implement a comprehensive prisons programme for the identification and treatment of mental illness at all levels of severity and acuteness.***"⁴⁴

12. The NZ Human Rights Commission reported to the UN's Committee Against Torture in 2017 that "*The high prevalence of mental health issues amongst people in detention, and their access to care and treatment in detention are **longstanding issues**. Sixty to seventy percent of people in prison have either a learning disability or mental illness.*"⁴⁵

⁴⁴ NZ Human Rights Commission 2016/2017 *Monitoring Places of Detention* p. 20 (emphasis added).

⁴⁵ NZ Human Rights Commission, Submission of the New Zealand Human Rights Commission to the Committee against Torture's 60th session, at [27] (emphasis added).

Annexure B: High Lock up hours.

14. This Annexure details specific concerns about NZ prisons, which have been raised at international and national level, regarding the use of high hours of lockup and the wider impact of this. The Annexure is confined to material that is publicly available from official reports.

High Lockup Hours

15. The consequences of high lock up hours (or in cell time) can include
- a) reduced access to activities and facilities, including: cultural activities, rehabilitation and other programmes, education, work opportunities, the library, and the gymnasium,
 - b) reduced access to whānau, including reduced access to communally-located telephones
 - c) an inadequate physical environment affected by:
 - i. double bunking in cells designed for one person
 - ii. insufficient ventilation and sunlight
 - iii. hunger and pain, due to the timing of evening meal times and the timing of the distribution of medicine
16. For ease of reference, relevant excerpts from legislation and regulations regarding lockup hours are as follows:
17. The Corrections Act (CA) 2005 and Corrections Regulations (CR) 2004 have no explicit maximum restrictions on lock up, but adopt the minimum requirements regarding exercise as defining a maximum allowable lock up hours of 23 hours per day: "*Every prisoner (other than a prisoner who is engaged in outdoor work) may, on a daily basis, take at least 1 hour of physical exercise*" (s70(1)). This subsection is consistent with the SMR Rule 23 on minimum exercise requirements which states "*Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits*" (Rule 23.1).
18. While the SMR also does not state specific maximum lockup hours, it does define solitary confinement as "*the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days*" (Rule 44).
19. In 2013, the SPT inspected New Zealand prisons. Its report recommended that "*the authorities improve the detention regime, in particular regarding out-of-cell time.*"⁴⁶ This recommendation emerged

⁴⁶ UN SPT CAT/OP/NZL/1 at [84].

from observations that *"the information provided by the prison management on the daily regime of detainees differed markedly from what most detainees described and what the Subcommittee saw for itself. ... detainees are usually still in their cells until 8.30 a.m. and locked up well before 4.30 p.m., meaning that in reality many detainees are in their cells for 18-19 hours per day and even longer at weekends. The Subcommittee is **concerned at the possible harmful effects of being held in such a strict regime for many years**, especially those held at the maximum security facilities in Auckland. It was also concerned that the cells themselves were comparatively small (for example, a block at Hastings prison where the cells measured approximately 2.25 x 2.85 m²). When combined with the **lack of access to an adequate range of activities, such prolonged periods of incarceration in comparatively small cells could potentially constitute ill-treatment.**"*⁴⁷

20. During the same visit the SPT expressed particular concern that *"extended lock-downs are often used as a form of collective punishment for all those in a block or unit where there has been an incident, regardless of their involvement in the alleged offence."*⁴⁸

21. The Ombudsman has more recently observed long hours of lockup in New Zealand prisons. In the Management Unit at Christchurch Men's Prison (2017) he observed that *"Prisoners spent little time out of their cells—between one and two hours a day."*⁴⁹ Likewise, he recorded an average out of cell for prisoners in HBRP's HM units as *"between two and five hours per day"*⁵⁰ and stated that: *"Typically, prisoners in the HM units did not spend much of the day out of their cells and only limited time out of the wings. There was limited provision of purposeful activity and prisoners were bored and frustrated."*⁵¹ At SHCF (2017) he noted that, following increased lockup over Christmas, *"low-security units did not revert to their previous unlock hours ... after the holiday period. Unlock times were further eroded on the weekends, with some prisoners locked as early as 3pm and not unlocked until 8.30am the following day [17.5 hours]. All high-security units were locked by 4pm on the weekend."*⁵² In Whanganui (2018) *"The Prison did not monitor its performance in providing time out of cell. Thirty-four percent of survey respondents [100 prisoners] indicated that they spent between two and four hours out of their cell daily, and only 7 percent reported spending six hours or more*

⁴⁷ UN SPT CAT/OP/NZL/1 at [82] (emphasis added).

⁴⁸ UN SPT CAT/OP/NZL/1 at [37].

⁴⁹ Ombudsman OPCAT report (2017) Christchurch Men's Prison p. 15.

⁵⁰ Ombudsman OPCAT report (2017) HBRP p. 46.

⁵¹ Ombudsman OPCAT report (2017) HBRP p. 46.

⁵² Ombudsman OPCAT report (2017) SHCF p. 21.

out of their cell. Thirteen percent [38 prisoners] stated that they spent less than two hours out of their cell each day."⁵³

22. The Ombudsman's ASCF report (2019) attributed "exceptional periods of extended lock" to staff shortages, and the Ombudsman expressed his concern that "prisoners, particularly on HB 1, **did not have sufficient time out of their cells to promote mental wellbeing.**"⁵⁴ His report also noted that "At the time of the inspection, 15 prisoners had been on the **restricted regime for over six months,**"⁵⁵ and that "Thirty percent of survey respondents [167 prisoners] indicated that they spent between two and four hours out of the cell daily."⁵⁶ He also observed, in relation to restricted regime, that: "Inspectors reviewed a selection of prisoner's files and found limited evidence to support placement on a restricted regime. Event-based security classification reviews were also missing. **I believe this is contrary to the principles of natural justice.**"⁵⁷
23. At SHCF (2017) "Time out of cell was limited for high-security prisoners; more so for prisoners on voluntary segregation and remand, with thirty-nine percent of questionnaire respondents [219 prisoners] reporting they had fewer than four hours out of cell a day. This was compounded by having two prisoners in cells originally designed for one, and prisoners being required to eat all meals in their cell."⁵⁸ The Ombudman made a similar observation in his report of Christchurch Men's Prison. This report stated that "**A cell that is acceptable for one prisoner to spend eight hours a night in is not adequate for two prisoners to spend 20 or more hours a day.**"⁵⁹

Access to telephones

24. The SMR states that "Prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals: (a) By corresponding in writing and using, where available, telecommunication, electronic, digital and other means" (Rule 58.1).
25. The Corrections Act 2004 stipulates that prisoners are "entitled to make at least 1 outgoing telephone call of up to 5 minutes' duration per week." (CA s77(3)).

⁵³ Ombudsman OPCAT report (2018) Whanganui p. 45.

⁵⁴ Ombudsman OPCAT report (2019) ASCF p. 45 (emphasis added).

⁵⁵ Ombudsman OPCAT report (2019) ASCF p. 16 (emphasis added).

⁵⁶ Ombudsman OPCAT report (2019) ASCF p. 45.

⁵⁷ Ombudsman OPCAT report (2019) ASCF p. 17.

⁵⁸ Ombudsman OPCAT Report (2017) SHCF p. 7.

⁵⁹ Ombudsman OPCAT report (2017) Christchurch Men's Prison p. 31, ftnte 25 (emphasis added).

26. Most New Zealand prisons provide telephones in communal areas (ASCF is an exception in that most cells are provided with working telephones). Because of this lock up hours can adversely impact on access to telephones. For example, at Arohata (2018): *"Many women reported that they could only call their children at weekends as the unlock regime did not align with their children returning home from school. It was reported that there had been some 'friction' about using the phone at times of peak demand. It was suggested by senior staff that such difficulties could be addressed by providing more phones or extending unlock times to reflect the usual regime for low-security prisoners."*⁶⁰ A similar issue was identified at Whanganui (2018) where: *"There were some issues around access to telephones at times of peak demand. For high-security prisoners, and those low-security prisoners subject to an 8am to 5pm 'unlock', there were no opportunities to contact family and friends after about 4pm."*⁶¹

Access to sunlight

27. In a particularly extreme instance, the SPT observes that *"At Mount Eden prison ... prisoners were very pale and were reportedly given vitamin D pills owing to their lack of exposure to daylight."*⁶² The SPT recommended that *"the authorities improve the detention regime, in particular regarding out-of-cell time. The State party should ensure the consistent application of rules on exercise and outdoor activities and allow adequate time for such activities for all prisoners. Furthermore, all accommodation provided for the use of prisoners, including at Mount Eden prison, should meet the requirements of natural light."*⁶³

Insufficient ventilation and uncomfortable temperatures in cells

28. The SMR states that: *"All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation" (Rule 13) and that "General living conditions addressed in these rules, including those related to light, ventilation, temperature, sanitation, nutrition, drinking water, access to open air and physical exercise, personal hygiene, health care and adequate personal space, shall apply to all prisoners without exception" (Rule 42).*

⁶⁰ Ombudsman OPCAT report (2018) Arohata p. 34.

⁶¹ Ombudsman OPCAT report (2018) Whanganui p. 39.

⁶² UN SPT CAT/OP/NZL/1 at [83].

⁶³ UN SPT CAT/OP/NZL/1 at [84].

29. The Corrections Regulations refer to "*Fresh or conditioned air*" as a mandatory item in cells (Sched 2, Pt A, Sched 2, Pt A, Sched 2, Pt B, Sched 6, Pt A).
30. Long lockup hours can exacerbate insufficient cell ventilation causing extremely high internal temperatures. At HBRP (2017): "*One area of concern was excessive heat and a lack of ventilation in the cells, especially northfacing cells in summer. Prisoners were frustrated by what they perceived to be a **lack of interest and action to address the issue** and voiced a degree of irritation that they were unable to purchase effective fans through the canteen (P119 system). It was reported that cold water taps were often run for prolonged periods in an attempt to lower the temperature in the cells, which occasionally resulted in flooding. The situation was expected to get worse over the Christmas and New Year period when the Prison operated a site-wide 8am to 5pm routine, meaning that low security prisoners would be locked up two hours earlier than normally.*"⁶⁴
31. Similar issues were observed at SHCF (2017), where: "*Inspectors took a sample of temperature readings during the day, which averaged 28 degrees Celsius. Vents were clearly not working and staff advised that this had been a problem for several months. ... Some prisoners described the heat in their cells as intolerable. The lack of ventilation is very concerning. This, combined with lengthy periods of lockup, (up to 22 hours a day) has the potential to increase prisoner unrest.*"⁶⁵ At Whanganui (2018): "*Cell temperatures in Te Moenga averaged between 29 and 30 degrees Celsius at the time of the inspection. Staff and prisoners advised Inspectors that units had been far hotter in previous weeks, and staff stated the temperatures in the prison over the past three months were the hottest they had known. The heat and ventilation problems had been raised with senior management, National Office, the unions, and recorded in the health and safety risk register. The ventilation system in the high-security units had been assessed by Spotless, who stated that the system was working as designed. It remained inadequate to the task.*"⁶⁶
32. In the HBRP follow up inspection (2019) the Ombudsman noted that no improvement to the ventilation in hut units had occurred, despite his 2017 recommendation. This recommendation was rejected by Corrections. He wrote: "*My Inspectors undertook cell temperature readings and were particularly concerned about high temperatures in the low security 'hut'*

⁶⁴ Ombudsman OPCAT report (2017) HBRP p. 19 (emphasis added).

⁶⁵ Ombudsman OPCAT report (2017) SHCF p. 21.

⁶⁶ Ombudsman OPCAT report (2018) Whanganui p. 26.

*units and the youth unit 'huts'. Temperatures in cells ranged from 27 degrees Celsius to 30 degrees Celsius [on 7 November 2018]. Several senior staff members as well as prisoners informed my Inspectors that these temperatures were not reflective of how hot the cells could get in summer months, particularly in the afternoons."*⁶⁷

One hour of fresh air

33. In his recent follow-up inspection of HBRP (2019), the Ombudsman observed that his recommendation that "*All prisoners are able to spend at least one hour each day in the fresh air*"⁶⁸ had not yet been achieved. In 2016 he had noted that "*my Inspectors identified 'clear evidence that when the At Risk Unit was full, not all prisoners received their minimum entitlement to one hour exercise in the open air'*."⁶⁹ During the 2018 follow up inspection, the Intervention Support Unit (ISU), previously known as the At Risk Unit, "*was operating at full capacity. My Inspectors could not be assured that all prisoners in the ISU had been offered their minimum entitlement to one hour exercise in the open air. The ISU did not have an established system for recording that prisoners had been offered daily access to fresh air.*"⁷⁰

Hunger due to the timing of evening meal times

34. The SMR state that: "*Every prisoner shall be provided by the prison administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served*" (Rule 22.1, emphasis added) and that "*Drinking water shall be available to every prisoner whenever he or she needs it*" (Rule 22.2).
35. The Corrections Act stipulates that: "*Every prisoner must be provided with a sufficient quantity of wholesome food and drink based on the food and nutritional guidelines for the time being issued by the Ministry of Health, and drinking water must be made available to every prisoner whenever he or she needs it.*" (s72(1)).
36. The early serving of dinner due to lockup hours is not unusual. For example, in 2013 the SPT observed in NZ prisons that: "*dinner was served around 3.30 p.m., leaving detainees without food until at least 8.30*

⁶⁷ Ombudsman OPCAT report (2019) HBRP p. 9.

⁶⁸ Ombudsman OPCAT report (2019) HBRP p. 23.

⁶⁹ Ombudsman OPCAT report (2019) HBRP p. 10 (emphasis added).

⁷⁰ Ombudsman OPCAT report (2019) HBRP p. 10.

a.m. the next day."⁷¹ The Subcommittee recommended that the "*times of meals be reviewed.*"⁷²

37. The Ombudsman has observed similar scheduling of the evening meal, with breakfast usually at 8.30am. At SHCF (2017) "*evening meals [were] being served as early as 3.15pm in some units. ... Notwithstanding the two slices of bread and margarine that are issued with the evening meal to serve as supper, it was a long time [17.25 hours] between the evening meal and breakfast.*"⁷³ At Arohata (2018) "*The evening meal, consisting of sandwiches, was distributed at 4pm,*"⁷⁴ and at Whanganui (2018) "*Evening meals ... were distributed to high-security prisoners by 4.00pm, and in some cases as early as 3.20pm (West 1). Breakfast was issued between 8.15am and 8.30am.*"⁷⁵
38. In the recent follow-up inspection of HBRP (2019), the Ombudsman observed that his previous 2016 recommendation for the prison to standardise meals to normal hours had been rejected by the Department of Corrections and was not achieved, stating that: "*Inspectors observed dinners being served to prisoners at 3.30pm in the high security units on each day of the inspection, and at 3.15pm to the prisoner serving three days cell confinement in the separates area. ... I consider that the serving of evening meals at 3.30pm contravenes Rule 22 of the Nelson Mandela Rules: Every prisoner shall be provided by the prison administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.*"⁷⁶

Pain due to the timing of Medical rounds

39. In addition to experiences of hunger, prisoners on medicine can experience nocturnal pain due to the scheduling of medical rounds because, as reported in Christchurch Men's Prison (2017), "*Some night-time medications were given out as early as 3pm, which is unacceptable.*"⁷⁷

⁷¹ UN SPT CAT/OP/NZL/1 at [85].

⁷² UN SPT CAT/OP/NZL/1 at [86].

⁷³ Ombudsman OPCAT Report (2017) SHCF p. 23.

⁷⁴ Ombudsman OPCAT Report (2018) Arohata p. 23.

⁷⁵ Ombudsman OPCAT Report (2018) Whanganui p. 27.

⁷⁶ Ombudsman OPCAT Report (2019) HBRP p. 9, (emphasis added). The earlier HBRP report (2017) stated that: "*Meal times across the Prison did not reflect standard meal times. Inspectors observed breakfast being issued in HMA at 9.15am ... The evening meal was delivered to the units as early as 2.55pm and was issued and eaten on some units at 3.30pm. All meals in the HM units were eaten before prisoners were locked up by 4.25pm.*"

Ombudsman OPCAT Report (2017) HBRP p. 20.

⁷⁷ Ombudsman OPCAT report (2017) Christchurch Men's Prison p. 40.

Annexure C: References

[n.b. sometimes the urls to the UN documents redirect to their document database. On the search page "symbol" is the file document number (e.g. CAT/C/NZL/CO/6). These are highlighted in bold in UN references below].

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<https://www.health.govt.nz/our-work/populations/maori-health/tatau-kahukura-maori-health-statistics/nga-mana-hauora-tutohu-health-status-indicators/oral-health>
- New Zealand Human Rights Commission *2016/2017 Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention Against Torture (OPCAT)* (1 July 2016 to 30 June 2017)
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- Ombudsman OPCAT Report (2019, 20 February) Report on an announced inspection of **Auckland South Corrections Facility** Under the Crimes of Torture Act 1989
http://www.ombudsman.parliament.nz/ckeditor_assets/attachments/728/Final_OP_CAT_Prison_Report_-_ASCF_-_PDF_online_.pdf
- Ombudsman OPCAT Report (2019, April) Report on an announced follow up inspection of **Hawke's Bay Regional Prison** under the Crimes of Torture Act 1989
http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/3252/original/final_opcat_hb_follow-up_report_2019_-_pdf_for_web.pdf?1556592778
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http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/2889/original/opcat_report_whanganui_-_final_-_online.pdf?1536028415
- Ombudsman OPCAT Report (2018, 22 March) Report on an unannounced inspection of Upper Prison (**Arohata**) Under the Crimes of Torture Act 1989
http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/2894/original/arohata_upper_prison_inspection_report.pdf?1536028908
- Ombudsman OPCAT Report (2017, 5 December) Report on an unannounced inspection of **Christchurch Men's Prison** Under the Crimes of Torture Act 1989
www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/2453/original/online_report_on_unannounced_inspection_of_christchurch_mens_prison_december_2017.pdf?1515977898
- Ombudsman OPCAT Report (2017, 5 December) Report on an unannounced follow-up inspection of **Rolleston Prison** Under the Crimes of Torture Act

- 1989
http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/2427/original/online_rolleston_follow-up_inspection_report_december_17.pdf?1512435879
- Ombudsman OPCAT Report (2017, 2 August) Report on an unannounced inspection of **Spring Hill Corrections Facility** Under the Crimes of Torture Act 1989
http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/2297/original/opcat_spring_hill_report_pdf.pdf?1501639413
- Ombudsman OPCAT Report (2017, 6 July) Report on an announced inspection of **Hawke's Bay Regional Prison** under the Crimes of Torture Act 1989
http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/2413/original/opcat_hawkes_bay_prison_inspection_report.pdf?1512430948
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<https://www.ohchr.org/Documents/ProfessionalInterest/treatmentprisoners.pdf>
- United Nations Committee Against Torture (UN CAT) Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (18 December 2002)
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Annexure D: Acronyms and Abbreviations used in these Submissions

ARU	At Risk Units
ASCF	Auckland South Corrections Facility
BoRA	Bill of Rights Act 1990
CAT	United Nations Committee Against Torture
CoTA	Crimes of Torture Act 1961
DOC	Department of Corrections
HBRP	Hawke's Bay Regional Prison
HLW	Howard League for Penal Reform Wellington NZ Incorporated
HM Units	High Medium Units
HRC	NZ Human Rights Commission
ISU	Intervention Support Unit
NPM	National Preventive Mechanism (designated to monitor places of detention under OPCAT, legislated for in CoTA)
OPCAT	The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
SHCF	Spring Hill Corrections Facility
SMR	United Nations Standard Minimum Rules for the Treatment of Prisoners (also known as the Nelson Mandela Rules)
SPT	United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UN	United Nations