

## ARTICLE

## Holding Corrections to Account and What Happens When We Fail: The Waikeria Prison Protest

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Prisoners<sup>1</sup> exist in extremely vulnerable situations. Prison officers wield considerable power over prisoners' lives, and prisoners are secured in facilities away from the public eye. Because of this, Aotearoa New Zealand must have safeguards that help protect the rights of those detained in prisons. Without adequate protection, human rights abuses are guaranteed. Aotearoa is required by both domestic laws and international agreements to protect prisoners and uphold their inherent dignity and mana. This article discusses two mechanisms designed to protect prisoners' rights. Internally, prisoners can raise issues through the PC01 complaint forms. Externally, the Ombudsman conducts inspections of prisons to assess their quality. Despite these standards, there are still numerous examples of prisoners' rights being violated by the Department of Corrections/Te Ara Poutama Aotearoa, which raises questions about whether those standards are adequate to protect rights. One such example can be seen with Waikeria Prison, which had poor conditions that saw little improvement despite multiple Ombudsman reports and prisoner complaints. This resulted in the Waikeria Prison protest in 2020–2021. Similar issues are likely found in other prisons around Aotearoa. This article asserts that the Ombudsman and PC01 forms are not effective at protecting the rights of prisoners, and that broader reforms are required.

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1 This article uses the term “prisoners” for brevity. However, it should be remembered that prisoners are not defined by their condition of being incarcerated; they are first and foremost people.

## I Introduction

Prisoners are in an incredibly vulnerable position. Prison authorities hold an enormous amount of direct power over those in their care, shaping the conditions in which prisoners live.<sup>2</sup> Therefore, having an effective prisoner complaints process and independent monitoring body to regulate prison conditions are important not only for prisoners, but for their whānau and wider society. Aotearoa New Zealand has seen a range of high-profile cases demonstrating human rights abuses in prisons around the country.<sup>3</sup> Some of these violations have resulted in people questioning the effectiveness of both the complaints processes and the external monitoring processes.<sup>4</sup> Nothing in recent times has highlighted these issues like the Waikeria Prison protest, which took place from the end of 2020 into early 2021. This protest drew attention to the deplorable conditions at Waikeria Prison, which have seen little change in recent years.

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

Prisons are a Western concept, imported into Aotearoa through colonisation, marginalising Māori ideas of justice.<sup>5</sup> Initially focused on deterrence, the focus of prisons shifted to reform around the turn of the 20th century.<sup>6</sup> Many question whether prisons have succeeded in achieving this new goal, as 39 per cent of those released from prison are convicted of a new offence and returned to prison within 24 months of release.<sup>7</sup>

When discussing issues around prison conditions in Aotearoa, it is essential to keep in mind that the overwhelming majority of victims of these poor conditions and the lack of redress are Māori. As of September 2022, there are a total of 7,964 prisoners spread across the 18 prisons in Aotearoa.<sup>8</sup> Of those prisoners, 53 per cent are Māori.<sup>9</sup> However, this is not a new development—Māori comprised at least 50 per cent of the prison population in

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2 Dirk van Zyl Smit “Regulation of Prison Conditions” (2010) 39 *Crime and Justice* 503 at 504.

3 See, for example, Guyon Espiner “Prison guards threaten pepper spray moments after suicide attempt” (4 March 2021) Radio New Zealand <[www.rnz.co.nz](http://www.rnz.co.nz)>; and Maiki Sherman “Exclusive: Human Rights Commission blasts Corrections over face-to-face visits” (4 October 2022) 1 News <[www.1news.co.nz](http://www.1news.co.nz)>.

4 See, for example, “Waikeria Prison surrender: Family members claim complaints about ‘disgusting’ conditions made, despite Corrections saying otherwise” (4 January 2021) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

5 See Juan Tauri “Criminal Justice as a Colonial Project in Contemporary Settler Colonialism” (2014) 8 *AJCJS* 20 at 27.

6 JustSpeak *Unlocking Prisons: How we can improve New Zealand’s prison system* (June 2014) at 50. For evidence of Aotearoa’s shift towards reform and rehabilitation, see Ara Poutama Aotearoa Department of Corrections “About Us” <[www.corrections.govt.nz](http://www.corrections.govt.nz)>.

7 Ara Poutama Aotearoa Department of Corrections *Annual Report 1 July 2021–30 June 2022* (2022) at 177.

8 Ara Poutama Aotearoa Department of Corrections “Prison facts and statistics – September 2022” <[www.corrections.govt.nz](http://www.corrections.govt.nz)>.

9 Ara Poutama Aotearoa Department of Corrections, above n 8.

the 1980s.<sup>10</sup> This is despite Māori only making up approximately 17.4 per cent of the overall population in Aotearoa as of 2022.<sup>11</sup>

The justice system in Aotearoa is viewed by criminologists such as Juan Tauri as a form of structural violence, one that is continuing the project of colonisation.<sup>12</sup> Moana Jackson's *He Whaipāanga Hou* documents the gross mistreatment of Māori within the justice system, with detail given to the continual influence of cultural bias.<sup>13</sup> However, little has changed over the 34 years since Jackson's work was published. Those in power have neither accepted nor understood the depth of change necessary.<sup>14</sup> Despite shifts in the language used within our justice system, such as the Department of Corrections now often using its te reo Māori name Te Ara Poutama Aotearoa, and the introduction of new policies like Hōkai Rangi,<sup>15</sup> Māori are still disproportionately suffering under this system.

Part II of this article examines why it is important for prisoners to have processes to address their grievances and why there is a need for external monitoring bodies to address prison conditions. Part III then details the main avenues for redress relevant to Waikeria Prison: the PC01 prison complaints forms and the external reviews undertaken by the Ombudsman. Finally, Part IV investigates the issues with Waikeria Prison and the resulting protest, examining how this could be seen as an example of the complaints system and the Ombudsman being ineffective in protecting prisoners' rights.

## II The Need to Protect Prisoners' Rights

Prisoners are in a precarious situation. They are deprived of their liberty and rely on others to provide for their basic needs. Often, they were already in vulnerable situations prior to incarceration.<sup>16</sup> Given this vulnerability, it is imperative that there are processes to ensure that prisoners are not placed in poor conditions and that their voices can be heard. Being incarcerated is incredibly disempowering and many prisoners experience challenges in drawing attention to issues with their environment.<sup>17</sup> Fundamental mechanisms that assist in a prison system's compliance with human rights include regular independent inspections of the prisons and an effective process for prisoner complaints.<sup>18</sup> Human rights abuses are inevitable without a comprehensive system that ensures rights are upheld.<sup>19</sup>

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10 Kim Workman "From a Search for Rangatiratanga to a Struggle for Survival – Criminal Justice, the State and Māori, 1985 to 2015" (2016) 22 JNZS 89 at 91.

11 Tatauranga Aotearoa Stats NZ "Māori population estimates: At 30 June 2022" (17 November 2022) <www.stats.govt.nz>.

12 Tauri, above n 5, at 27.

13 See Moana Jackson *The Maori and the Criminal Justice System: A New Perspective: He Whaipāanga Hou* (Department of Justice, February 1987).

14 Te Ohu Whakatika *Ināia Tonu Nei: Hui Māori Report* (July 2019) at 9.

15 Ara Poutama Aotearoa Department of Corrections *Hōkai Rangi Ara Poutama Aotearoa Strategy 2019–2024* (2019).

16 Michael White "The role and scope of OPCAT in protecting those deprived of liberty: a critical analysis of the New Zealand experience" (2019) 25 Australian Journal of Human Rights 44 at 44.

17 Stephen Livingstone "Prisoners' rights in the context of the European Convention on Human Rights" (2000) 2 Punishment & Society 309 at 310.

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

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

Despite their incarceration, prisoners are human beings who have accompanying human rights that must be recognised—including a right to dignity.<sup>20</sup> Without accountability processes to check whether prisons are meeting human rights standards, prison conditions might not enable prisoners to survive with their dignity and humanity intact. This lack of respect will not aid in prisoner rehabilitation.<sup>21</sup> When researcher Diana Medlicott interviewed a prisoner about what he would like changed about prison, he answered: “You know, just to be treated as human”.<sup>22</sup> It is imperative that the prison system in Aotearoa operates in a way that upholds prisoners’ human rights and inherent dignity.

### *A Challenges faced by prisoners*

The incredible power imbalance between prisoners and prison officers requires proactivity in the protection of prisoners’ rights. Prison officers control almost every aspect of a prisoner’s life, including when they eat, their clothes, access to showers and access to complaint forms. Officers also have the power to use force on those under their control. Such a power imbalance means it can be very difficult for prisoners to assert rights for themselves.<sup>23</sup> Prisons are also places with high rates of abuse and assault.<sup>24</sup> Just as prisoners deserve access to dignity and the same human rights as their non-incarcerated counterparts, the deprivation of liberty and autonomy in prisons calls for even more stringent accountability mechanisms in order to uphold prisoners’ rights.<sup>25</sup>

The very nature of prisons and their separation from society is another complicating factor. Prisons are closed off from the media and the public. This means it can take a long time, if ever, for people to discover human rights abuses that have occurred inside prisons.<sup>26</sup> Society as a whole often does not know about, nor have an interest in, prison conditions.<sup>27</sup>

The way prisons are structured also poses an obstacle to the complaints process.<sup>28</sup> Historically, prison structures have made it difficult to enforce accountability and responsibility.<sup>29</sup> Prison staff and those in charge often become used to the way things are and fail to realise that they are complicit in harmful behaviours. Another related issue is the disparity between what those at the upper levels believe is going on and what

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20 Van Zyl Smit, above n 2, at 504.

21 At 504.

22 Diana Medlicott “The Unbearable Brutality of Being: Casual Cruelty in Prison and What This Tells Us About Who We Really Are” in Margaret Sönser Breen (ed) *Minding Evil: Explorations of Human Iniquity* (Rodopi, Amsterdam, 2005) 75 at 77.

23 Nick Hardwick “Inspecting the prison” in Yvonne Jewkes, Jamie Bennett and Ben Crewe (eds) *Handbook on Prisons* (2nd ed, Routledge, London, 2016) 641 at 646.

24 Peter Boshier *OPCAT Report: Final report on an unannounced inspection of Waikeria Prison under the Crimes of Torture Act 1989* (Tari o te Kaitiaki Mana Tangata Office of the Ombudsman, August 2020) at 1.

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

26 Hardwick, above n 23, at 646.

27 Manfred Nowak “Fact-Finding on Torture and Ill-Treatment and Conditions of Detention” (2009) 1 JHRP 101 at 110.

28 Mary Seneviratne “Ombudsmen and prisoner complaints in the UK” (2012) 34 JSWFL 339 at 340.

29 Diana Medlicott “Preventing Torture and Casual Cruelty in Prisons Through Independent Monitoring” in Phil Scraton and Jude McCulloch (eds) *The Violence of Incarceration* (Routledge, New York, 2009) 244 at 256.

prisoners actually experience.<sup>30</sup> Without effective monitoring of prisons, cruelty and mistreatment, even when unintentional, can flourish.

### B *Legal requirements*

Despite all these challenges, treating prisoners with dignity is not merely the right thing to do; it is required by law. Both international human rights standards and domestic legislation require Aotearoa to treat prisoners in a certain manner. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) set out good practices for the treatment of prisoners.<sup>31</sup> Rule 1 stipulates that all prisoners must be treated with respect due to their inherent dignity and value as human beings and that prisoners shall be protected from cruel or degrading treatment. Rule 13 stipulates that the accommodation for prisoners must meet all requirements of health, particularly lighting, heating and ventilation. Rule 56 states that every prisoner must have the opportunity to make complaints to both prison staff and inspectors without censorship of the substance. Rule 57 holds that these complaints must be dealt with promptly and that safeguards must exist to ensure that these complaints can be made in a safe and confidential manner.

At the domestic level, Aotearoa has a range of legislative and policy directives on the treatment of prisoners. Under s 23(5) of the New Zealand Bill of Rights Act 1990, “[e]veryone deprived of liberty shall be treated with humanity and with respect” in order to uphold “the inherent dignity” of that person. Sections 69 to 82 of the Corrections Act 2004 set out more specific guidelines on requirements, such as minimum standards for exercise and bedding.

### C *Policy directives*

In terms of policy commitments, Te Ara Poutama Aotearoa has implemented Hōkai Rangi, a wide-reaching strategy which, amongst other things, aims to address the over-representation of Māori in prisons.<sup>32</sup> Under the aim of humanising and healing, the strategy states that Te Ara Poutama Aotearoa will respect the “human dignity and inherent mana of all people in [its] care”.<sup>33</sup>

Hōkai Rangi also outlines the need to embed the values of manaaki, whānau, wairua, kaitiaki and rangatira in the day-to-day operations of Te Ara Poutama Aotearoa.<sup>34</sup> These concepts are significant under tikanga Māori. Every Māori person is born with mana.<sup>35</sup> An individual’s mana must be respected, and practices in prison should aim to uplift the mana of participants.<sup>36</sup> Manaaki is based on ideas of nurturing relationships and looking after people.<sup>37</sup> Prison staff should therefore look after those in their care. Whānau focuses on

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30 Hardwick, above n 23, at 646.

31 *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* GA Res 70/175 (2016).

32 Ara Poutama Aotearoa Department of Corrections, above n 15, at 1.

33 At 20.

34 At 25.

35 See generally Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 49–50; and Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) for a more in-depth discussion of these values and principles.

36 Mead, above n 35, at 50.

37 At 31–32.

the importance of relationships, through both whakapapa relationships and broader relationships with wider society.<sup>38</sup> This indicates that prison staff should form respectful relationships and connections with those in their care. Wairua refers to something akin to soul or spirit, and this is vulnerable to damage through mistreatment.<sup>39</sup> Prison staff should ensure that the wairua of those in prison remains intact, by treating prisoners with respect. Kaitiaki can be defined as an ethic of guardianship, and refers to the protective duties one has over their sphere of influence.<sup>40</sup> Prison staff have kaitiaki duties over the prisoners within their care, and must ensure that they are looked after. The value of rangatiratanga concerns authority, and the roles and responsibilities of those in charge.<sup>41</sup> This indicates to prison staff that they must ensure they are exercising their rangatiratanga in a way which is beneficial to those in the prison.

These principles and values of Hōkai Rangī, in conjunction with the legislative directives, mean prisoners must be treated with a certain level of dignity and held in adequate conditions. Maintaining good prison conditions not only ensures that Aotearoa is upholding human rights obligations, as well as its national and international legal obligations, but also contributes to the rehabilitative process prisoners undergo—enabling their emergence as more responsible citizens.<sup>42</sup>

#### *D Current failures in Aotearoa prisons*

Despite these legislative and policy directives, there remains a number of issues with prisoner treatment and prison conditions in Aotearoa. The overuse of seclusion and restraint is one such persistent issue.<sup>43</sup> There have been a range of high-profile cases demonstrating issues with the quality of prison conditions and treatment of prisoners in 2021. One such case is Mihi Bassett, who attempted suicide after being unlawfully segregated at the Auckland Region Women’s Corrections Facility. She was further threatened with pepper spray soon after this attempt. Manukau District Court Judge David McNaughton described this treatment and the treatment of other women in the prison as “inhumane”, “cruel” and “degrading”.<sup>44</sup> Instances like these demonstrate that, notwithstanding laws and policies mandating certain levels of care, Te Ara Poutama Aotearoa is still falling short of fundamental standards.

One common justification for such failures is that the increase in the prison population places significant pressure on prisons. This in turn causes issues through the continued use of old facilities and requires measures such as double-bunking (sharing cells between prisoners).<sup>45</sup> However, having increases in the prison population is not a valid excuse. Upholding human dignity is an absolute minimum that should never be compromised, least of all by budgetary constraints.

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38 At 32–33.

39 At 59–60.

40 Benton, Frame and Meredith, above n 35, at 105.

41 At 325.

42 Zinger, above n 19, at 127.

43 White, above n 16, at 58.

44 Guyon Espiner “Prison guards threaten pepper spray moments after suicide attempt” (4 March 2021) Radio New Zealand <[www.rnz.co.nz](http://www.rnz.co.nz)>.

45 Elizabeth Stanley *Human Rights and Prisons: A review to the Human Rights Commission* (Te Kāhui Tika Tangata Human Rights Commission, July 2011) at 6.

These deficiencies can also be taken as evidence of the Crown's failures as a partner to Māori under Te Tiriti o Waitangi.<sup>46</sup> The way the justice system has been implemented is clearly failing Māori and does not address the legacy of colonisation.<sup>47</sup> The presence of racism and bias in the justice system undermines its inherent ideal that it be fair and just.

### III Keeping Te Ara Poutama Aotearoa in Check

When prisons fall short of legislated standards, as they appear to be in Aotearoa today, it is important to have effective mechanisms to draw attention to these failures and to address them. This Part explores possible methods to hold Te Ara Poutama Aotearoa accountable. First, it examines a prisoner-initiated mechanism known as the PC01 form process, before moving on to look at non-prisoner-initiated mechanisms, which operate as prison watchdogs. This article will further explore the effectiveness of these processes in the Waikeria Prison in Part IV.

#### A Prisoner-initiated—PC01 forms

The main avenue for the incarcerated to assert their rights and make a complaint is through the PC01 form process. Subpart 6 of the Corrections Act sets out the process for complaints. Section 152 sets out the objectives of the corrections complaints system. Subsection (1)(c) states that complaints are to be investigated in a fair, timely and effective manner. Section 153(3) states that notices must be prominently displayed in each unit that explain the complaints process and how prisoners may obtain the necessary forms. Section 154 describes how assistance must be provided to help make complaints when required.

The Prison Operations Manual outlines the process of making complaints in more detail. This manual states that complaints are to be resolved informally at the lowest level but can be escalated if this is not possible.<sup>48</sup> It is international best practice to have these complaints resolved internally for reasons of speed and efficiency.<sup>49</sup> Staff are required to take all reasonable steps to address the issue. If at this point the issue is not resolved, the staff member must advise the prisoner of the internal complaints process and provide them with a PC01 form. Staff are required to assist prisoners who have difficulties in filling out the form, and the prisoner is to be advised that they are allowed a support person to help with the complaint. The staff member must complete the rest of the form, then give a copy to the prisoner as confirmation that the complaint has been received.<sup>50</sup>

In theory, the ideal complaints system would be one where prisoners have trust in the system, have accessible avenues to make a complaint and have their complaints heard and resolved in a timely manner.<sup>51</sup> While the Prisoner Operations Manual and the

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46 Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 62.

47 Te Ohu Whakatika, above n 14, at 11.

48 Ara Poutama Aotearoa Department of Corrections "Prisoner complaints" <[www.corrections.govt.nz](http://www.corrections.govt.nz)>.

49 Cormac Behan and Richard Kirkham "Monitoring, Inspection and Complaints Adjudication in Prison: The Limits of Prison Accountability Frameworks" (2016) 55 *Howard J Crime Justice* 432 at 435.

50 Ara Poutama Aotearoa Department of Corrections, above n 48.

51 Behan and Kirkham, above n 49, at 445.

Corrections Act present a system that theoretically complies with those goals, in reality, the experience of many prisoners in Aotearoa is contrary to the ideal. Surveys of prisoners across Aotearoa indicate that 80 per cent have no faith in the complaints processes, and 75 per cent feel complaints are not dealt with promptly or fairly.<sup>52</sup> Bruce, who is in prison, wrote a “how-to” guide for making a PC01 complaint, published in the prison newsletter *Take No Prisoners*.<sup>53</sup> When asking for a PC01 form, Bruce claimed “the officers will try to persuade you not to make a complaint”,<sup>54</sup> and said this behaviour was repeated when a prisoner handed in their form. The guide goes on to describe how prisoners should insist upon a receipt and to make sure to take the name of the officer, amongst numerous other methods to avoid being tricked by the system.<sup>55</sup> The extent to which Bruce describes “safe” navigation of this complaints process, in conjunction with the officer’s unwillingness to cooperate, shows a PC01 system that is ineffective at dealing with complaints.

Aside from these attempts at dissuading prisoner complaints, other identified issues include a lack of confidentiality in making complaints. One example of this is the lack of a submissions box. Prisoners would have to ask for a PC01 form from a staff member and return it for further action to be taken.<sup>56</sup> This poses a barrier as the forms and their content are subject to staff discretion, meaning that biased staff could easily abuse this power by ensuring forms are never received by the appropriate authorities.

Even when complaints are made, there are further issues with the process. The quality and speed of responses to complaints reviewed by the Human Rights Commission were extremely varied. This variation was also seen in processes of quality assurance.<sup>57</sup> As a result, some prisoners will not report complaints, as they feel it a pointless exercise—seeing that they may be released before the complaint is even addressed.<sup>58</sup>

Another crucial aspect of best practice for complaints mechanisms is that prisoners must have trust in the system. Trust is an essential ingredient for an effective complaints system, as prisoners must feel that they are able to lodge complaints.<sup>59</sup> In Aotearoa, there appears to be a lack of trust in the complaints mechanism. Many prisoners are too intimidated to lodge complaints due to a fear of repercussion.<sup>60</sup> This is doubly true for vulnerable groups within prison populations, such as youth or LGBTQ+ prisoners.<sup>61</sup> For Māori, a lack of faith in the system is extremely reasonable, given the reports detailing the extent of racial bias running through the entire justice system.<sup>62</sup> When prisoners have no trust in prison systems, it begs the question whether it is possible to ever achieve an effective and trustworthy complaints process.

External bodies have commented on the ineffectiveness of this complaints process. In 2013, the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) identified the inadequacy of complaints mechanisms as a

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52 People Against Prisons Aotearoa *Take No Prisoners* (Issue 5, February 2021) at 4–5.

53 People Against Prisons Aotearoa *Take No Prisoners* (Issue 6, May 2021) at 6.

54 At 6.

55 At 7.

56 Sharon Shalev *Thinking Outside the Box? A review of seclusion and restraint practices in New Zealand* (Te Kāhui Tika Tangata Human Rights Commission, April 2017) at 49.

57 At 49.

58 Behan and Kirkham, above n 49, at 444.

59 At 445.

60 Medlicott, above n 29, at 257.

61 At 257.

62 Te Uepū Hāpai i te Ora Safe and Effective Justice Advisory Group *He Waka Roimata (A Vessel of Tears) – Transforming Our Criminal Justice System* (June 2019) at 25.



major problem with detention in Aotearoa.<sup>63</sup> The effectiveness of the prisoner complaint process was cited as a major repeat area of concern in the Human Rights Commission's annual report on monitoring places of detention. Three prisoner surveys also noted a lack of faith and confidence in the complaints system.<sup>64</sup>

Despite the complaints process appearing comprehensive and effective in legislation and policy, in reality, prisoners seem to fall into one of two groups: they either do not have their complaints heard at all, or do not have their complaints heard in a timely or effective manner.<sup>65</sup> In turn, this poses a significant threat to the effectiveness of the processes that keep Te Ara Poutama Aotearoa in check. If complaints are not being heard or not being resolved, prisoners may find their rights violated with limited recourse available to them.

### B *Non-prisoner-initiated*

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

#### (1) The Corrections Inspectorate

The Corrections Inspectorate is a body established under the Corrections Act that operates within Te Ara Poutama Aotearoa. The Inspectorate acts as a dedicated complaints resolution body. The inspectors perform regular visits to facilities and conduct interviews with both prisoners and prison staff.<sup>66</sup> Prisoners can contact inspectors at any time on a free phone line. Of the 2,799 complaints in 2008–2009, only 93 were found to be justified complaints requiring intervention. The Inspectorate has been useful in identifying the discrepancies between the law or policy and the practice of staff members in prisons.<sup>67</sup> However, many prisoners do not trust the Inspectorate due to their lack of independence from Te Ara Poutama Aotearoa.<sup>68</sup> The Inspectorate also suffers from a high workload and are less able to undertake prompt investigations.<sup>69</sup>

#### (2) The Ombudsman

The main body in Aotearoa that operates to keep prisons in check is the Office of the Ombudsman. The ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) created a new role for the Ombudsman as a prison watchdog. OPCAT was adopted by the United Nations

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63 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 – Report of the Subcommittee* UN Doc CAT/OP/NZL/1 (10 February 2017) at [44] and [87].

64 New Zealand National Preventive Mechanism *Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention Against Torture (OPCAT) – 1 July 2017 to 30 June 2018* (Te Kāhui Tika Tangata Human Rights Commission, April 2019) at 19.

65 Boshier, above n 24, at 38.

66 Warren Young *Prison policy, prison regime and prisoners' rights in New Zealand* (Te Kāhui Tika Tangata Human Rights Commission, June 2008) at 507.

67 See Part IV of this article.

68 Stanley, above n 45, at 104.

69 At 104.

General Assembly in 2002.<sup>70</sup> The introduction of OPCAT has been heralded as a significant instrument in preventing harms to those in detention.<sup>71</sup>

OPCAT established both international and domestic bodies to monitor places of detention. The international body is the SPT, mandated to visit places of detention.<sup>72</sup> The domestic bodies are called National Preventative Mechanisms (NPMs). In theory, NPMs visit all places where people are detained,<sup>73</sup> in the hopes of improving conditions and deterring ill-treatment. NPMs then make recommendations for improvements under OPCAT to their relevant national authorities.<sup>74</sup>

Following Aotearoa's ratification of OPCAT in 2007, the treaty was implemented into domestic law through amendments to the Crimes of Torture Act 1989.<sup>75</sup> Section 27 identifies the functions of NPMs. These include examining the conditions of detention and the treatment of detainees at regular intervals. This section also requires NPMs to make a written report to the relevant authorities each year.<sup>76</sup> Section 28 notes that NPMs must be allowed access to information relating to the treatment of detainees in places of detention and the conditions of that detention.<sup>77</sup>

Out of the possible places of detention NPMs monitor, the Office of the Ombudsman is the NPM responsible for prisons in Aotearoa.<sup>78</sup> Previously, the Ombudsman was tasked with investigating complaints against the government. The designation of the Ombudsman as a NPM expands their role, leaving them responsible for monitoring court cells, immigration detention facilities, childcare and youth justice residences, and health and disability places of detention.<sup>79</sup>

Through visits, NPMs can prevent human rights abuses by acting as a deterrent and engaging in constructive dialogue with detention management to improve conditions and move towards solutions.<sup>80</sup> The ability of NPMs to exercise oversight is essential given how immeasurable and irremediable the impacts of human rights abuses can be on victims.<sup>81</sup> Furthermore, the relatively regular presence of NPMs at these institutions supposedly acts as a deterrent, as those who perpetrate torture or ill-treatment will likely stop, either due to a fear of sanctions or to avoid social condemnation.<sup>82</sup> The presence of regular, independent visits to prisons has reportedly led to positive change by deterring

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70 United Nations Office of the High Commissioner of Human Rights "Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment" <[www.ohchr.org](http://www.ohchr.org)>.

71 Natalie Pierce "Implementing Human Rights in Closed Environments: The OPCAT Framework and the New Zealand Experience" (2014) 34 LIC 154 at 154.

72 Judy McGregor, Sylvia Bell and Margaret Wilson *Human Rights in New Zealand: Emerging Faultlines* (Bridget Williams Books, Wellington, 2016) at 150.

73 Amy Dixon "The Case for Publishing OPCAT Visit Reports in New Zealand" (2013) 11 NZJPIL 553 at 556-557.

74 At 553-554.

75 At 558.

76 Crimes of Torture Act 1989, s 27. The Ombudsman, as an independent Officer of Parliament, must provide its report to the House of Representatives.

77 Section 28.

78 Dixon, above n 73, at 559.

79 Judy McGregor "The challenges and limitations of OPCAT national preventive mechanisms: lessons from New Zealand" (2017) 23 Australian Journal of Human Rights 351 at 355-356.

80 Pierce, above n 71, at 186.

81 At 162.

82 Dixon, above n 74, at 568.

mistreatment of prisoners, and putting pressure on Corrections to improve transparency and conditions.<sup>83</sup>

Internationally, the best practice for monitoring systems involves a structure that embraces, accepts and acts on Ombudsman reports to improve practices within prisons.<sup>84</sup> Aotearoa has seen the fruits of such a system, with a range of benefits and changes stemming directly from Ombudsman visits and reports. Approximately 87 per cent of Ombudsman recommendations made in the 2012–2013 financial year were accepted or partially accepted by authorities responsible for detainment.<sup>85</sup> Notable impacts of the OPCAT monitoring process include upgrades to facilities, changes in policy and practice, and the identification and addressing of problems related to detention.<sup>86</sup> Some other examples of concrete changes include prison exercise areas now allowing greater access to the outdoors and better management of seclusion and restraint practices.<sup>87</sup> This is a positive indication of the willingness of Te Ara Poutama Aotearoa to work with the Ombudsman to protect prisoners' rights.

Despite these positive gains, there remain persistent issues that indicate the Ombudsman is not operating at its full potential as a prison watchdog. The Ombudsman has consistently raised systemic human rights issues related to prisoners as an area of concern, but these have not been adequately addressed by the government or by Te Ara Poutama Aotearoa.<sup>88</sup> Some of these major issues—including those identified by the SPT during its 2013 inspection, such as the over-incarceration of Māori—are beyond the powers of the Ombudsman, as they require far greater systemic change to be adequately addressed.<sup>89</sup> However, it should be noted that, while all of the NPMs have expressed concern over the high rates of Māori incarceration, little change has occurred in this area despite shifts in policy.<sup>90</sup>

Other areas of concern include the Ombudsman lacking the power to enforce its findings and ensure compliance. This leads to situations where monitoring agencies publicly report on deficiencies and failures, which are then met with no government response until the issue receives media attention.<sup>91</sup> It should also be noted that the Ombudsman, as an independent institution, lacks the direct accountability that comes with government institutions, as they are not overseen by a Minister and do not submit frequent reports to the government. Similarly, there are questions as to the independence of NPMs, considering that they must balance their work within the bounds of funding structures and resource constraints. It is important that processes within these independent bodies are also reviewed.<sup>92</sup>

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83 McGregor, above n 79, at 356–357.

84 Behan and Kirkham, above n 49, at 450.

85 Pierce, above n 71, at 193.

86 White, above n 16, at 45.

87 At 53.

88 McGregor, above n 79, at 362.

89 White, above n 16, at 56.

90 Te Kāhui Tika Tangata Human Rights Commission, above n 64, at 1–2.

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

92 White, above n 16, at 56.

## IV The Waikeria Case Study

Although the Ombudsman has been successful in encouraging Te Ara Poutama Aotearoa to improve conditions in a range of areas, there remain some gaps. This raises questions about the effectiveness of the review body in protecting prisoners' rights. This Part considers the example of Waikeria Prison and how the PC01 forms and Ombudsman reports operated in that situation. This Part first sets out the background context for Waikeria Prison and details the reviews on its prison conditions before the protest. It then discusses the 2020–2021 protest that took place in response to those conditions, before demonstrating how the Waikeria case study exemplifies the problems with the current processes used to protect prisoners' rights.

### *A Introduction to Waikeria Prison and its conditions*

Waikeria Prison has been operating since 1911 and is located near Te Awamutu in the Waikato region of Aotearoa. The prison can hold 803 people and has a range of security classifications, from minimum to high.<sup>93</sup> In 2020, the prison had a 67 per cent Māori population.<sup>94</sup> The prison is said to be facing challenging conditions, as many facilities are over 100 years old.<sup>95</sup> In 2012, some of the original prison units were closed as they were not fit for purpose. In 2015, the remaining units were due to be closed, but an increase in the prison population meant not all of these closures went ahead. Four of these original units remained in use as high-security units.<sup>96</sup>

An October 2019 inspection by the Ombudsman found that tāne (male) prisoners in the high-security complex were kept in poor living conditions, with many in double-bunked cells that were originally intended only for one person.<sup>97</sup> Some prisoners were unable to sit upright on the bottom bunk due to its proximity to the top bunk.<sup>98</sup> The cells were in a poor state and were not adequately ventilated.<sup>99</sup> A survey of Waikeria Prison conditions saw many tāne draw attention to this poor ventilation, with comments like: “lack of fresh air in our cell, can't breathe”, “[n]ot allowed fans in high mediums – why?”, “[a]sthmatic, can't breathe at times” and “[v]entilation doesn't work, need to open up windows”.<sup>100</sup> This lack of fresh or conditioned air was deemed contrary to the Corrections Regulations 2005 and r 13 of the Mandela Rules.<sup>101</sup>

These were not the only issues with prison conditions. Cells in the high-security complex were found to lack storage space and many toilets did not have lids. This posed an issue as tāne ate most meals within their cells, meaning they were forced to eat near uncovered toilets, a practice both unsanitary and culturally inappropriate.<sup>102</sup> The low-security complex was much better maintained, although both complexes had issues with

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93 Boshier, above n 24, at 3.

94 At 1.

95 Te Tari Tirohia Office of the Inspectorate *Waikeria Prison: Unannounced Follow-up Inspection* (Ara Poutama Aotearoa Department of Corrections, August 2019) at 3. See also Boshier, above n 24, at 8, 10, 11 and 22 for photographs of the conditions at Waikeria Prison.

96 Te Tari Tirohia Office of the Inspectorate, above n 95, at 10–11.

97 Boshier, above n 24, at 1.

98 At 21.

99 At 21.

100 At 21.

101 At 22.

102 At 21.

the supply and quality of both clothing and bedding.<sup>103</sup> Many tāne complained about the quality and quantity of both items during the inspection. Whilst 68 per cent of tāne said they usually received clean sheets every week, 52 per cent reported that they were not given enough access to clean and appropriate clothes.<sup>104</sup>

Another major area of concern was the separate confinement units. They were described as not fit for purpose due to their lack of natural light, poor ventilation and small size,<sup>105</sup> with all units in the high-security complex found to be in a poor state of repair.<sup>106</sup> However, this was not the first time that these units were deemed unsuitable. The Ombudsman had reported on poor living conditions in these separate units as early as 2011 and 2014. At the time, the units were described as “deplorable” and the recommendation was to immediately upgrade them.<sup>107</sup> This did not occur, as the Ombudsman’s 2016 report again described the condition of these units as “deplorable”.<sup>108</sup> The separate units in the lower security complex were also found to be not fit for purpose.<sup>109</sup> The Office of the Inspectorate described the high-security units as “an environment not conducive for the humane treatment of prisoners”.<sup>110</sup>

A further concern was the significant number of tāne who described issues with the water quality, stating it was often dirty and cloudy. The inspectors also noted this variation in colour, although senior managers maintained that water quality was regularly tested.<sup>111</sup>

The Inspectorate’s 2019 report noted that there had been no meaningful improvement in the conditions and physical environment of the high security facility since their previous 2017 report.<sup>112</sup> Overall, these findings led Chief Ombudsman Peter Boshier to hold that the high-security complex was not fit for purpose and was adversely impacting on the treatment of the tāne.<sup>113</sup>

The 2019 Inspectorate report referred multiple times to the fact that a new facility was under construction to open in 2022, presumably implying that this would solve many of the facility’s overcrowding issues.<sup>114</sup> However, this planned facility did nothing to alleviate the inhumane conditions already in existence. These poor conditions, which had not changed over many years, were seen as triggers for the 2020–2021 Waikeria protest.

## B *The Waikeria protest*

A protest took place at Waikeria Prison between December 2020 and January 2021. The tāne were reported to be protesting against the unacceptable prison conditions and

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103 At 1.

104 At 23.

105 At 1. For images of the units, see Appendix One.

106 At 9.

107 New Zealand National Preventive Mechanism *Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention Against Torture (OPCAT) – 1 July 2014 to 30 June 2015* (Te Kāhui Tika Tangata Human Rights Commission, December 2015) at 30.

108 Boshier, above n 24, at 10.

109 At 11.

110 Te Tari Tirohia Office of the Inspectorate, above n 95, at 3.

111 At 29.

112 At 6–7.

113 Boshier, above n 24, at 2.

114 Te Tari Tirohia Office of the Inspectorate, above n 95, at 7.

because their complaints on the issue had been ignored.<sup>115</sup> The protesters took control of the top part of the prison and lit fires, causing substantial damage.<sup>116</sup>

Below is the manifesto of the inmates involved in the Waikeria protest, passed onto People Against Prisons Aotearoa by whānau of the protesters:<sup>117</sup>

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

This manifesto definitively identifies the poor prison conditions as the cause of the protest. It outlines aspects explicitly mentioned in the Ombudsman’s report, such as the drinking water being discoloured,<sup>118</sup> a lack of bedding and clothes,<sup>119</sup> and the lack of toilet seats.<sup>120</sup>

It is also significant to note that the protesters were drawing attention to their status as tangata whenua. They explicitly mention the fact that they are trapped in a Pākehā system that is largely operated by and for Pākehā. Not only are Western standards of human rights being violated, but many also consider the prison system to be a breach of Te Tiriti o Waitangi. Consequently, 14 of those involved at the Waikeria Protest have filed Waitangi Tribunal claims.<sup>121</sup>

The protest ended after a six day stand-off when the tāne surrendered to authorities after Te Pāti Māori co-leader Rawiri Waititi spoke with them.<sup>122</sup> Seventeen tāne were subsequently charged with arson and disorder-related offences.<sup>123</sup> Despite widespread media attention surrounding the 2020 Ombudsman’s report into Waikeria Prison and the wide distribution of the protesters’ manifesto, Te Ara Poutama Aotearoa Chief Executive Jeremy Lightfoot was not swayed by this evidence, quoted as saying there was no excuse for the protesters’ actions and that there were “many channels to complain”.<sup>124</sup>

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115 Te Kāhui Tika Tangata Human Rights Commission “Human Rights Commission calls for inquiry into Waikeria protest” (4 January 2021) <[www.hrc.co.nz](http://www.hrc.co.nz)>.

116 Radio New Zealand “The legacy of the Waikeria Prison riots” (27 April 2021) <[www.rnz.co.nz](http://www.rnz.co.nz)>.

117 People Against Prisons Aotearoa, above n 52, at 5.

118 Boshier, above n 24, at 24.

119 At 1.

120 At 21.

121 Te Pāti Māori “Waikeria Protesters To File Civil Rights Cases” (press release, 31 March 2021).

122 Radio New Zealand “Waikeria Prison protesters surrender to authorities” (3 January 2021) <[www.rnz.co.nz](http://www.rnz.co.nz)>.

123 1 News “Seventeen men charged with arson, disorder-related offences over Waikeria Prison Protest” (5 February 2021) <[www.1news.co.nz](http://www.1news.co.nz)>.

124 Radio New Zealand, above n 122.

Te Ara Poutama Aotearoa is proceeding with two internal reviews to investigate the situation, while the Human Rights Commission has also called for the Ombudsman to carry out an independent inquiry into the protest.<sup>125</sup> Chief Commissioner Paul Hunt said that poor conditions were a vital part of the reason behind this protest and noted that despite the fact the failings of the prison system were common knowledge, “progress is glacial”.<sup>126</sup>

### *C Analysis on the effectiveness of the complaints process in the context of Waikeria*

Ask any [prison officer] or manager and they’ll tell you that if you have a problem, just write a complaint. And then you watch as they put that PC01 right in the toilet, under a chair, or in a shredder.

—Take No Prisoners<sup>127</sup>

The PC01 system was mentioned by the whānau of the Waikeria protestors<sup>128</sup> as well as in the Ombudsman’s 2020 report. This 2020 inspection found that the complaints process was not advertised well enough across all wings of the high security complex and that complaint forms were not readily available to prisoners. Many tāne informed inspectors that they felt the complaint forms were intentionally made difficult to access to discourage prisoners from complaining.<sup>129</sup> It was found that 77 per cent of tāne did not have faith in the complaints process and that 78 per cent did not feel complaints were dealt with promptly. In addition, 75 per cent felt complaints were not dealt with fairly. Moreover, in the six-month period ending on 30 September 2019, only 67 per cent of complaints were found to have been responded to within the mandated three-day timeframe.<sup>130</sup> When asked if it was easy or difficult to get a PC01 complaint form, 42 per cent of respondents said that it was difficult and 38 per cent said they did not know. Concerningly, 28 per cent of tāne did not know how to make a complaint.<sup>131</sup>

It was reported that, prior to the 2020–2021 protest, staff had refused the PC01 forms to prisoners.<sup>132</sup> The protestors made it clear that they felt they had exhausted all channels available to them. A press release from People Against Prisons Aotearoa, authored by whānau of the Waikeria protestors, stated that “[o]ur loved ones inside also tried many times to make complaints, but were denied access to PC01 complaint forms.”<sup>133</sup>

Once more, these issues do not appear to be unique to Waikeria. A 2020 investigation into Paremoremo Prison found that the processes for prisoners to request reviews involving incidents of force were not robust. The inspectors watched CCTV footage of an incident involving a prisoner being pepper sprayed while on his knees with his hands behind his back.<sup>134</sup> This incident would amount to cruel treatment under the OPCAT. However, it was concerning to find that the report pertaining to the incident was

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125 Te Kāhui Tika Tangata Human Rights Commission, above n 115.

126 Te Kāhui Tika Tangata Human Rights Commission, above n 115.

127 People Against Prisons Aotearoa, above n 52, at 4.

128 People Against Prisons Aotearoa “Statement From The Waikeria Uprising Whānau” (press release, 3 January 2021).

129 Boshier, above n 24, at 37.

130 At 38.

131 At 66.

132 Te Pāti Māori, above n 121.

133 People Against Prisons Aotearoa, above n 128.

134 Peter Boshier *OPCAT Report: Final report on an unannounced inspection of Auckland Prison under the Crimes of Torture Act 1989* (Tari o te Kaitiaki Mana Tangata Office of the Ombudsman, December 2020) at 10.

inaccurate.<sup>135</sup> It is imperative that prisoners have accessible processes to review incidents like this, and that the complaints they make are not altered or ignored.

The 2020 Paremoremo inspection also found that many prisoners had difficulties accessing the PC01 complaint forms from staff members.<sup>136</sup> Forty-six per cent of prisoners from one unit said it was difficult to get a complaint form. Inspectors were further concerned upon finding a total lack of corresponding complaint records from prisoners in that unit. Broader responses from across the prison included statements such as “[y]ou do NOT ask for PC01 forms in this unit... you will be kicked out if you do!”, “[y]ou’re not allowed to ask or receive PC01 form” and “I feel if I make a complaint I will be sent to the maximum security block”.<sup>137</sup> Similar to Waikeria, it was noted that the complaints process was not well advertised around the prison, and many complaints were not handled in a timely manner.<sup>138</sup> Likewise, a 2020 inspection of the Auckland Region Women’s Correctional Facility found that whilst the complaints procedure was well-understood, it was not timely, effective or well-administrated by staff.<sup>139</sup>

During the Waikeria inspection, several prisoners informed the inspectors that they were unable to read or write.<sup>140</sup> In the 2020 inspection of Paremoremo, one tāne informed the inspector that “they gave me a whole lot of paper and said all the info is in there but did not explain cause I can’t read”.<sup>141</sup> This not only poses a significant barrier to the complaints process but also with regard to filling out the surveys provided by those conducting external investigations. It is not fair to limit access to justice based on one’s ability to read or write. Although both the Prison Operations Manual and the Corrections Act stipulate that staff must help those who need assistance, such as those from the above accounts, it is not clear that this does in fact take place.<sup>142</sup>

The fact that the complaints process is neither timely nor effective, and that prisoners feel they cannot use the process, is incredibly concerning. It does not indicate much confidence in the PC01 system in protecting the rights of prisoners. The evidence suggests that urgent changes are needed to better defend a prisoner’s right to advocate for themselves without fear of repercussion.

#### *D Analysis on the effectiveness of the Ombudsman in the context of Waikeria*

The Waikeria Protest draws attention to the idea that the Ombudsman is not operating as an effective check on Te Ara Poutama Aotearoa. Despite multiple reports drawing attention to the same issues, such as the “deplorable” separate units at Waikeria identified in 2016,<sup>143</sup> the lack of improvements since these reports implies that prisons are not being kept in check. This lack of change following multiple reports is seen to be the cause of the Waikeria Protest. All of this is damning evidence of the Ombudsman’s ineffectiveness in operating as a watchdog for prisons in Aotearoa.

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135 At 1.

136 At 45.

137 At 45.

138 At 45.

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

140 Boshier, above n 24, at 38.

141 Boshier, above n 134, at 32.

142 Corrections Act 2004, s 154; and Ara Poutama Aotearoa Department of Corrections, above n 48.

143 Boshier, above n 24, at 10.



The inaction following the knowledge of poor conditions at Waikeria Prison was not a one-off situation. In responding to the Waikeria protest, Chief Commissioner Paul Hunt said it was wrong to see it as an isolated incident.<sup>144</sup> Waikeria is but one example of the Ombudsman identifying human rights violations and Te Ara Poutama Aotearoa then failing to take any steps to resolve issues. In 2014, the Ombudsman identified that Mount Eden Prison lacked a Youth Unit despite having a large number of young detainees.<sup>145</sup> The youth were also subject to extended periods of lockdown during the day and limited access to fresh air. Te Ara Poutama Aotearoa did not take action to develop a Youth Unit, as it determined that this section of the prison population would decrease. Later Ombudsman visits in 2014 and 2015 found that this was not the case and that young people were placed in extremely vulnerable situations. Youth offenders suffer higher levels of mental health issues and are victimised by other prisoners.<sup>146</sup> Despite this, Te Ara Poutama Aotearoa still dismissed the call for a Youth Unit.<sup>147</sup>

Others have deemed the present accountability mechanisms insufficient for certain groups of prisoners, such as those from the transgender community.<sup>148</sup> It took almost 20 years for change to occur, which was only achieved after many complaints and reports were made around the issue of the safety of transgender prisoners.<sup>149</sup>

A lack of progress has also been demonstrated in the area of seclusion and restraint. Issues related to the overuse of seclusion and restraint were identified in a 2017 report from the Chief Ombudsman, which found that Te Ara Poutama Aotearoa had breached the Convention Against Torture and the Corrections Act.<sup>150</sup> Despite much media interest and a review into the case, Te Ara Poutama Aotearoa still deemed tie-down beds to be an acceptable method of restraint.<sup>151</sup>

Another example of Te Ara Poutama Aotearoa not accepting recommendations can be seen in the 2013–2015 OPCAT report.<sup>152</sup> In this report, 15 recommendations from the Ombudsman were rejected.<sup>153</sup> Some of these recommendations pertained to practices described by the Ombudsman as cruel, inhumane and degrading.<sup>154</sup> It is troubling that recommendations to rectify practices described in such a severe manner were not implemented.

These examples demonstrate the limits of the Ombudsman in effecting actual change, due to its purely advisory nature. Internationally, other systems in the same position as Aotearoa's Ombudsman have also been subject to criticism following those in power

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144 Te Kāhui Tika Tangata Human Rights Commission, above n 115.

145 Tari o te Kaitiaki Mana Tangata Office of the Ombudsman *Report of the Ombudsman Tari o te Kaitiaki Mana Tangata for the year ended 30 June 2014* (1 October 2014) at 45.

146 Stephen Woodwark and Nessa Lynch “‘Decidedly but Differently Accountable’? — Young Adults in the Criminal Justice System” [2021] NZ L Rev 109 at 123.

147 McGregor, above n 79, at 362–363.

148 Battell-Wallace, above n 25, at 44.

149 At 44.

150 Peter Boshier *A question of restraint – Care and management for prisoners considered to be at risk of suicide and self-harm: observations and findings from OPCAT inspectors* (Tari o te Kaitiaki Mana Tangata Office of the Ombudsman, 1 March 2017) at 42.

151 White, above n 16, at 58–59.

152 New Zealand National Preventive Mechanism *Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) – 1 July 2013 to 30 June 2014* (Te Kāhui Tika Tangata Human Rights Commission, December 2014).

153 At 21.

154 McGregor, Bell and Wilson, above n 72, at 152.

ignoring their recommendations to improve prison conditions.<sup>155</sup> Where the government and Te Ara Poutama Aotearoa are unwilling to implement the changes suggested by the Ombudsman, there will be no changes to conditions. Reliance on goodwill between the Ombudsman and Te Ara Poutama Aotearoa is sometimes sufficient to ensure improvements to conditions. However, in other situations, such as with the separate confinement units at Waikeria, the Ombudsman's recommendations are ignored and few improvements are actually made. This demonstrates that where the Ombudsman is purely a recommendatory body, it is an ineffective mechanism. Considering the examples of Te Ara Poutama Aotearoa not taking significant steps to address multiple Ombudsman reports of prisoners being subject to deplorable and inhumane conditions, there seems to be a deep problem with the Ombudsman's effectiveness as an agent in ensuring prison accountability.

## V Alternatives to the Present Tools for Accountability

There are a range of possible solutions to these issues. A detailed examination of these solutions is beyond the scope of this article. However, this Part will explore some possible options that require further consideration but are important to bear in mind when considering what changes are needed.

One comparatively simple response is the implementation of a fully independent prison inspectorate. This idea is sponsored by groups such as the Howard League for Penal Reform. They are critical of the current framework for addressing prisoner complaints and inspections, instead calling for an independent prison inspectorate.<sup>156</sup> However, even with the strongest monitoring and inspection standards, prisoners' rights may still be violated. Enhanced formal accountability for Te Ara Poutama Aotearoa on its own is not likely to create full and proper protection of the rights of prisoners.<sup>157</sup>

Overseas evidence suggests that, although increases in monitoring may reduce physical injuries, prison staff may assert their power over prisoners in other ways.<sup>158</sup> This experience is made worse when prisoners do not feel able to communicate possible abuses due to a lack of faith in a system that has historically caused them so much harm.<sup>159</sup> The current lack of faith in the complaints system is one such example of this already happening.

In 2022, Amnesty International, JustSpeak and the New Zealand Council for Civil Liberties collaborated to form Aotearoa Justice Watch, aiming to provide a safe way for prisoners to tell their stories.<sup>160</sup> Amnesty International hosts an online form in which submitters can record details about incidents they have witnessed or been involved in.<sup>161</sup> Whilst this is a promising way for people to share experiences and feel heard, non-governmental organisations should not have to take on the role of the state in protecting the rights of incarcerated people, and an online form is likely inaccessible for many in prisons.

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155 Behan and Kirkham, above n 49, at 444.

156 Stanley, above n 45, at 108.

157 Behan and Kirkham, above n 49, at 447.

158 Stanley, above n 45, at 109.

159 At 109.

160 New Zealand Council for Civil Liberties "Launch: Aotearoa Justice Watch" (29 October 2021) <<https://nzcl.org.nz>>.

161 See Aotearoa Justice Watch "Share your story" <<https://aotearoajusticewatch.org.nz>>.

The state must lead change in this area. Independent monitoring mechanisms are not able to change things alone. The very nature of prisons means they are places where cruelty and inhumane treatment are able to flourish.<sup>162</sup> Monitoring may help, but transformation extending beyond piecemeal reforms are needed for our prison systems in Aotearoa. Fundamental changes that benefit everyone are required, such as those explored below.<sup>163</sup>

It will be difficult to purge institutional racism and the violation of human rights from a system that has proved itself complicit in these actions for many years. When considering how to monitor prisons more effectively, “it is important that a human rights approach to imprisonment does not become detached from questions of the criminal justice system as a whole”.<sup>164</sup> Aotearoa must continue to discuss both methods to improve rights for prisoners now and broader transformations for the future of the justice system.

Questions of justice reform are linked to questions of constitutional reform. In order to see real change in our justice system, the rights promised under Te Tiriti o Waitangi need to be given their full effect, with Māori having decision-making powers equal to the Crown.<sup>165</sup> Power must be returned to Māori, and it is they who must lead the reformation of the justice system.<sup>166</sup> The government must adopt the recommendations in *Ināia Tonu Nei, He Waka Roimata* and *Turuki! Turuki!*.<sup>167</sup> Specific recommendations outlined in the above are essential to ensure that the Crown can rectify its failings as a Treaty partner to Māori and work in partnership with Māori as envisaged by Te Tiriti o Waitangi. These include the need for an equal power governance model, a transfer of resources to Māori for developing Māori-led responses to offending, significant investments in rehabilitation programmes and a gradual replacement of most prisons with community-based rehabilitation centres. Only once these things have been achieved will it be possible to have a truly just society that protects human rights.

## VI Conclusion

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

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

The main prisoner-initiated method to raise issues and complaints are the PC01 forms. Non-prisoner-initiated methods of overseeing conditions include the internal Corrections

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162 Medlicott, above n 29, at 256.

163 Te Ohu Whakatika, above n 14, at 12.

164 Livingstone, above n 17, at 321.

165 Te Uepū Hāpai i te Ora Safe and Effective Justice Advisory Group *Turuki! Turuki! Move together! – Transforming our criminal justice system* (December 2019) at 25.

166 Te Ohu Whakatika, above n 14, at 2.

167 Te Uepū Hāpai i te Ora Safe and Effective Justice Advisory Group, above n 62; Te Uepū Hāpai i te Ora Safe and Effective Justice Advisory Group, above n 165; and Te Ohu Whakatika, above n 14.

Inspectorate and the OPCAT-mandated Ombudsman. The 2020–2021 Waikeria Prison Protest demonstrates the flaws with these processes. The poor conditions at Waikeria Prison were reported on several occasions yet only saw limited change. This article argues that the Waikeria Protest illustrates the inadequacy of the current systems that act to keep prisons in check. Despite multiple damning reports from the Ombudsman, the Prison Inspectorate, and numerous prisoner complaints, very little changed. A similar story is apparent at Mt Eden Prison, and in relation to nationwide processes on seclusion and restraint. The current systems of keeping Te Ara Poutama Aotearoa in check appear inadequate.

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