15 April 2020

Dr Tony Ellis
Blackstone Chambers
By email to ellist@tonyellis.co.nz

Tēnā koe Tony,

Response to your letter on the suspension of statutory visits to prison facilities

On 30 March 2020, you wrote to the Members of the Epidemic Response Committee ("the Committee") regarding the decision by the Department of Corrections to suspend all visits by legal advisors, specified visitors and statutory visitors to all prison sites from midnight Wednesday 25 March 2020.[1]

In your letter, you also ask that the Human Rights Commission and the Ombudsman consider how this affects the functionality of National Preventive Mechanisms, as well as the wider constitutional position.

I am informed that on 3 April 2020 the Department of Corrections wrote to the New Zealand Law Society indicating that the Department had suspended all statutory visit to prisons *except where the visit was pre-approved* and that the Department was in close contact with the Chief Ombudsman prior to the restriction coming into force.[2] I received a substantively similar letter from the Department of Corrections on 8 April 2020.

While the second letter from the Department of Corrections addresses an immediate concern of mine, (that the Chief Ombudsman would be unable to properly carry out his statutory function and proactively protect the rights of those in Corrections detention during this emergency), I remain concerned about the decision-making and exercise of power by detaining agencies in the current crisis.

For this reason, I provide below a large proportion of the opinion I had formed *prior* to being informed of the Department's second letter. I do this not only in the interests of time and the ever-evolving circumstances of Covid-19 but also to assist the government and detaining agencies to understand their obligations in the current circumstances.

In short, in my opinion;

1. The position as set out by the Department of Corrections in their first letter, being an apparent decision to unilaterally suspend all visits to prison sites, seems to be contrary to the current and developing international human rights advice. This is inadequately addressed in the second letter.
2. The position as outlined in the first letter could be considered a breach of both section 29 of the Crimes of Torture Act and Article 20 of the Optional Protocol to the Convention Against Torture. While further clarity about the nature of the restrictions

[1] Per the correspondence provided by you to Ms Epati and Mr Anderson, dated 27 March 2020.
[2] Per the correspondence provided to Ms Epati, dated 3 April 2020, publicly available on the New Zealand Law Society website, https://www.lawsociety.org.nz/__data/assets/pdf_file/0005/145148/COVID-19-Letter-to-NZLS-030420.pdf

was provided in the second letter, I maintain concerns that the Department could still be seen as acting contrary to the Crimes of Torture Act and the Optional Protocol.

3. The decision, as outlined in the first letter seems to raise considerable constitutional issues and serious questions about consistency with international obligations and standards. This matter is not addressed in the second letter.

I outline my reasoning below. I will also make myself available to speak to the Committee further on this matter if the opportunity arises.

Measures taken by the government in a state of emergency

Governments around the world have the difficult task of appropriately and efficiently responding to protect their people from Covid-19. While international human rights law allows for emergency measures to be taken in response to significant threats, these measures must be **proportionate to the evaluated risk, necessary, and respectful of human dignity**.[3] This means having a specific focus and duration and taking the least intrusive approach possible to protect public health.

People in detention have a heightened risk of infection due to living in close proximity to one another and due to their limited opportunity to take precautionary measures to avoid infection and further spread, particularly where access to adequate health care is already poor. Prisoners also typically have poorer health and higher levels of chronic conditions which make them more vulnerable to infection and less able to fight the infection.

In the past few weeks, international bodies and experts have called on governments to take full account of the rights of people in detention when taking measures to combat the pandemic. The UN Subcommittee on the Prevention of Torture (the SPT), in its recent advice explicitly stated *NPMs cannot be completely denied access to official places of detention*. While the advice recognises that some temporary restrictions are permissible, the restrictions must still be proportionate, necessary and respectful of human dignity.[4]

The United Nations High Commissioner has recently stated that:[5]

> Measures taken amid a health crisis should not undermine the fundamental rights of detained people... Restrictions on visits to closed institutions may be required to help prevent COVID-19 outbreaks, but such steps need to be **introduced in a transparent way and communicated clearly to those affected. Suddenly halting contact with the outside world risks aggravating what may be tense, difficult and potentially dangerous situations**

The role of NPMs is to protect the rights of people in detention from coercive government power. In times of emergency, governments wield extra-ordinary powers which must be kept in check through independent and accessible monitoring. It is the responsibility of NPMs,

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[3] The Siracusa Principles and the United Nations Human Rights Committee general comment on states of emergency provide authoritative guidance on government responses that restrict human rights for reasons of public health or national emergency.

[4] Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic (adopted on 25th March 2020), https://www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf accessed 1 April 2020.

[5] UN High Commissioner for Human Rights Michelle Bachelet, *Urgent action needed to prevent COVID-19 "rampaging through places of detention*, 25 March 2020, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E, accessed 2 April 2020.

now more than ever, to monitor actively to prevent ill-treatment of those subject to these extra-ordinary detaining measures.

I am pleased to see that the Department is not looking to prevent the Chief Ombudsman from carrying out his statutory role as clarified in their second letter.

I also note that the Department has referenced the Statement of Principles issued by the European Committee for the Prevention of Torture. The Department may find the more recent advice from the Subcommittee on Prevention of Torture and comments from the High Commissioner referenced above also helpful.[6]

Is the current measure taken by Corrections proportionate, necessary and respectful of human dignity?

It is of the utmost importance that Covid-19 is not introduced and allowed to spread within places of detention. In my opinion, restrictions on visits to places of detention are certainly necessary to avoid this risk, as is judicious exercise of visiting rights by those who are entitled to visit.

However, complete suspensions applied to all visitors, including visitors tasked with independently monitoring the impact of the exercise of extra-ordinary powers on the treatment and conditions of people in detention, seems to be an excessive restriction. Complete suspension of monitoring visits risks further exposing already vulnerable people, to panic, despair, and deterioration of mental and physical health. It also unilaterally terminates an important safeguard that exists to ensure that domestic and international standards are adhered to by detaining agencies.

As we understand, the Department has put in place procedures to allow not only prison officers to enter and leave prison sites, but also to allow incoming prisoners to enter. In my opinion, the measures put in place for prison officers should, at the very least, be available to NPMs if required. In my opinion, exercised judiciously, the risk of allowing NPM inspectors into prison sites, if they have reason to believe that the exercise of such powers is necessary in the circumstances, is small, proportionate and essential to ensure the rights of people in detention are respected.

<u>Unlawful limitation to the statutory role of the NPM</u>

As you state in your letter, while both Article 14 of the Optional Protocol and section 22 of the Crimes of Torture Act allow the government to limit the UN SPT's access to places of detention; no such limitation exists in relation to New Zealand's NPMs. In fact, as you state, section 29 of the Crimes of Torture Act states that NPMs must have **unrestricted access** to places of detention and the people within them.

This is because, by its very nature, torture and ill-treatment occur in closed environments, out of public view, and at the hands of those exercising significant government power. Unrestricted access ensures NPMs can appropriately and independently examine, inspect and monitor places of detention, free from government influence.

The inability for government to restrict access to places of detention by NPMs is both intentional and essential to the proper operation of OPCAT.

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[6] Majority of the UNs advice is publicly available on their websites. The media centre of the Office of the High Commissioner on Human Rights is particularly helpful.

While I accept that the Department of Corrections has made assurances to the Chief Ombudsman that it is *not looking to prevent the Ombudsman* from carrying out their monitoring function, I remain concerned that the Department seems to indicate they are only allowing visits with pre-approval and by exception. This appears to be contrary to the **unrestricted access** provided for NPMs under the Crimes of Torture Act.

Constitutional position

In addition to asking us to consider the implications the suspension of visits has for our NPM functions, you also ask the Commission to consider the broader constitutional implications. As you note, in addition to preventing NPMs from discharging their visitation functions under the Crimes of Torture Act, absolute visiting restrictions would also affect, among other things, Visiting Justice functions under s 19 of the Corrections Act. The Act does not appear to provide the Minister of Corrections or the Chief Executive with authority to suspend or vary these functions.

In this regard, I note your reference to *Fitzgerald v Muldoon*, which concerned section 1 of the Bill of Rights 1688 which provides that the exercise of "a pretended power of suspending of laws, without the consent of Parliament, is illegal". While I do not wish to draw any conclusions at this stage as to whether any unilateral restriction on visiting would draw the same result as in that case, I note that we are currently in circumstances where the usual avenues of redress to the Courts regarding the legality of this decision are severely limited.[7]

Absolute visiting restrictions would be inconsistent, with the State's obligations under ratified international human rights treaties (as outlined above) and domestic human rights legislation and would also appear to have constitutional implications. The Supreme Court has affirmed that New Zealand law must be construed, where possible, to give effect to its international obligations.[8] And as Sir Kenneth Keith observed in ***On the Constitution of New Zealand,*** which introduces the Cabinet Manual[9], the New Zealand constitution "must also be seen in its international context, because New Zealand governmental institutions must increasingly have regard to international obligations and standards".

This matter remains unaddressed in the second letter.

Appropriate remedy

After considering the first and second letters from the Department of Corrections, I remain of the view that a revision of the current suspension on statutory visits to Corrections places of detention is in order.

We would also recommend that the Department of Corrections work with NPMs to not only review their current practices and procedures developed in response to Covid-19 but to develop them, where relevant, in conjunction with NPMs and ensure that any changes or updates are notified to NPMs prior to implementation.

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[7] I note, however, that s 179E of the Corrections Act has the effect of excluding the Crown, the Department and their employees (including contractors) from liability for failure to comply (or fully comply) with provision of the Corrections Act or regulations while an epidemic notice issued under the Epidemic Preparedness Act is in force.

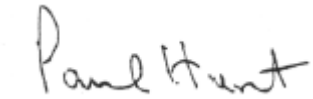
[8] *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462, (2011) 9 HRNZ 257 at [4] per Elias CJ

[9] Rt Hon Sir Kenneth Keith*, On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government*, 1990, updated 2008 and 2017 https://dpmc.govt.nz/our-business-units/cabinet-office/supporting-work-cabinet/cabinet-manual/introduction

We are supportive of all NPMs efforts to designate themselves as essential services in order to carry out their statutory functions and would expect that such designations be made in a timely manner.

Thank you for bringing these matters to my attention. It is important at this time that any extraordinary measures taken by government bodies appropriately and proportionately address the rights of people in places of detention.

Kia haumaru tonu koe, nā



Paul Hunt
Chief Human Rights Commissioner

Copy to

The Chairperson of the Epidemic Response Committee
Hon. Simon Bridges simon.bridges@parliament.govt.nz

Chief Ombudsman
Judge Peter Boshier pfboshier@ombudsman.parliament.nz

Department of Corrections
Jeremy Lightfoot jeremy.lightfoot@corrections.govt.nz