



OmbudsmanSA

FINAL REPORT

DEPARTMENT FOR CORRECTIONAL SERVICES

June 2012

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CONTENTS

Jurisdiction	1
Investigation	1
Standard of proof	1
Responses to my provisional report	2
Background	5
Whether the agency erred in failing to fulfil an agreement to transfer him to Port Augusta Prison and to ameliorate his regime	7
Opinion	11
Whether the agency erred in failing to provide reasons for the decision not to transfer the complainant to Port Augusta Prison in a timely manner	12
Opinion	13
Whether the agency has erred by failing to provide the complainant with an opportunity or means for him to progress from his regime of separation	13
Opinion	17
Final comment	17

Final Report

Agency	Department for Correctional Services
Complainant	Mr Michael Fyfe
Date complaint received	26 August 2011
Issues	<ol style="list-style-type: none">1) The agency failed to fulfil an agreement to transfer the complainant to Port Augusta Prison and to ameliorate his regime2) The agency did not provide reasons for the decision not to transfer the complainant to Port Augusta Prison in a timely manner3) The agency is not providing the complainant with an opportunity or means for him to progress from his regime of separation

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

Investigation

My investigation involved:

- assessing the information provided by the complainant
- seeking a response from the agency
- speaking with the complainant
- seeking more particulars from the agency
- considering the *Correctional Services Act 1982* and the *Schedule of Delegations by the General Manager Yatala Labour Prison to the Yatala Labour Prison Staff* dated 22 March 2012
- providing the agency and the complainant with my Provisional Report for comment, and considering their responses
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.¹ It is best summed up in the decision as follows:

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR449 at 449-450 per Mason CJ, Brennan, Deane and Gaudron JJ.

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...²

Responses to my provisional report

In response to my provisional report, the complainant made a number of comments:

- a) He advised that the agency conducted a case review with him on 8 May 2012 at which he referred to my Provisional Report and expressed the view that the agency had lied in saying there was never an agreement regarding a transfer to Port Augusta. He advised that Correctional Services Officer Henry Burzinski then stated that 'we were told by management that Fyfe was going to Port Augusta. Fyfe got shafted. He was told he was gone - promised.'

Whilst the conflicting evidence in relation to this matter is concerning, I do not consider there to be sufficient evidence before me to make a finding that there was in fact an agreement. Accordingly I have not altered my views in relation to this issue.

- b) The complainant stated that he continues to submit weekly separation forms but that the agency fails to respond meaningfully, or even return them to him.

I note with concern that this appears to be the case despite the receipt by the agency of my provisional report.

- c) The complainant reiterated that he does not have a 'sentence management plan' and has no knowledge of how to progress from his current regime.

I accept the complainant genuinely wants to know what he should do to progress and, as set out below, I am of the view that the agency has not informed him of the issues surrounding his ongoing separation in any meaningful way.

The agency responded by letter dated 1 June 2012 and I address each of its comments below:

- a) The agency agreed with my provisional view that there was no 'agreement' that Mr Fyfe would be transferred to Port Augusta Prison if he met certain criteria.
- b) The agency did not agree with my provisional finding that the agency erred in respect of the application of section 23 of the *Correctional Services Act 1982*. My provisional view was that there was no evidence that the complainant was notified before the section 23 assessment was commenced or granted an opportunity to make representations to the SOC in accordance with section 23(4). Similarly, there was no evidence before me that the complainant was afforded the opportunity to make written representations to the SOC pursuant to section 23(5). My provisional view was based on an understanding that the SOC conducted the section 23 assessments.

The agency advised that the Minister has established Case Review Panels as committees to assist the Chief Executive Officer pursuant to section 23(2) of the Act and that prisoners are 'usually given the opportunity to participate in case reviews... including speaking directly with staff, advising of placement preferences, and contributing to the overall review process overall'. In addition, the Serious Offender Committee 'reviews

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

and endorses any risk, security and placement decision of prisoners deemed as 'serious offenders' and considers any written submissions made by serious offenders along with any information obtained through the case review process. I have altered my views below to reflect the fact that section 23 assessments for serious offenders are effectively conducted by the Case Review Panels and the SOC.

The agency also submitted:

The Department considers that it meets its obligations for prisoners to make representations when he/she attends their regular case reviews. The Department feels the established processes are appropriate and provide clarity to prisoners regarding the information considered as part of an assessment under Section 23. The Department therefore does not agree with your provisional finding.

The agency did not make any specific submissions in relation to the complainant's case review under consideration (that is, that undertaken in October 2010).

The agency's submissions have not altered my view that it failed to adhere to sections 23(4) and 23(5) in the assessment process undertaken in late 2010 and early 2011. I set out these reasons in paragraphs 35 and 36 below.

The agency also reported that a case review was conducted on 8 May 2012 following 'some resistance' on the part of the complainant to the process. The agency advised that the outcomes of that review will be written up and put before the SOC and that the decision will be reported to the complainant and to this office.

The complainant has indicated he had no warning prior to the morning of 8 May 2012 as to when the case review would take place. Further, discussions with the complainant indicate that the complainant did not understand that the case review formed part of the section 23 process. If this is the case, the agency has again failed to notify the complainant before commencing the assessment in accordance with section 23(4) of the Correctional Services Act. I note that the agency has undertaken to establish a process to notify prisoners of the commencement of an assessment in writing, and comment that the implementation of this process will assist in compliance with section 23(4) in the future.

The complainant also alleges that he was advised by the case review panel on 8 May 2012 that they could not make any recommendations to the SOC and that the matter was entirely within the SOC's hands. In my view a report from the Case Review Panel to the SOC should contain recommendations: the case review forms part of the section 23 assessment. I also note that 'Standard Operating Procedure 001E Custodial - Review - Case Management' provides

All sections of the Case Review have recommendations and information entered into them and details documented of the prisoners progress with regard to participation in programs and attainment of goals as stipulated in their Program Plan or IDP.³

Further, there is no evidence that the complainant was provided with an opportunity to make written representations in relation to his assessment in accordance with section 23(5) of the Correctional Services Act.

It is clear that the process by which decisions are to be made under section 23 remains unclear to those involved (certainly to the complainant and possibly to staff involved as well). Further, the agency's procedure in relation to the most recent section 23

³ SOP 001E Custodial - Review - Case Management, paras 3.3.3.1 and 3.3.4.1.

assessment of the complainant appears to have fallen short of the legislative requirements of sections 23(4) and 23(5). For these reasons, I have not altered the recommendations made in my provisional report (see below). I also recommend that the agency report as to how the new policy has been applied in relation to the complainant within 3 months of the date of this Report.

- c) The agency agreed with my provisional view that it erred in failing to provide reasons for its decision not to transfer the complainant to Port Augusta prison. However, the agency stated that the SOC Chair will respond in writing to prisoners who write to request information about their reviews, and that the Chair did so by letter dated 19 October 2011 in response to the complainant's request for reasons. The agency submitted that my provisional report was incorrect insofar as it implied that written reasons were forwarded as a result of this investigation.

I have accepted the complainant's evidence that, prior to September 2011, he made numerous verbal requests for the reasons for refusing him the transfer since he was informed in January of the SOC's decision. I also accept the complainant's submission that he was not informed that he should write to the SOC until September 2011 and have included this point in my reasons below. I have deleted a sentence noting that the letter was only sent once the agency had been informed of my investigation (although I note that the complainant submits this was the case). These changes have not altered my finding in relation to this matter.

In relation to my recommendation, the agency submitted that 'It has previously been recognised that outcomes of Case Reviews need to note specific evidence of the areas referred to in section 23(3)' and has advised it will update its Standard Operating Procedure 001 - Case Management to 'include a quality assurance framework to ensure all areas of section 23(3) are reported against when undertaking case reviews'.

- d) The agency made various submissions in response to the section in my Provisional Report entitled 'Whether the agency has erred in failing to provide the complainant with an opportunity or means for him to progress from his current regime of separation.' In particular the agency:
- stated it 'will review weekly separation forms' with the aim of providing more relevant, and useful information to prisoners regarding the basis of ongoing separation, as well as the critical issues that may lead to a different decision in relation to future placements
 - acknowledged that the separation of prisoners should only be used sparingly and that the 'issue of prisoners remaining separated for extended periods requires sound justification, oversight and accountability'
 - stated it anticipates drafting and implementing a new procedure for the management of maximum security prisoners to strengthen existing procedures, enable appropriate reviews of separated prisoners and provide a greater degree of procedural fairness.

I note with concern the complainant's submission that the agency continues to fail to return his weekly separation forms.

In respect of the complainant the agency stated:

- he had not been offered a Violence Prevention program in a group setting as it is considered that this would pose a 'significant risk to staff and other prisoners'
- he 'continues to be offered contact with intervention staff but has declined such involvement (including on 3 June 2011, 3 February 2012 and 23 March 2012)'

I address these comments below.

I also note with concern that the agency's comments do not offer any evidence that there is any program or plan in place for the complainant. The agency made the following general statement:

... prisoners are involved in the development of their Individual Development Plans and are present at their case reviews in which appropriate program referral and participation are discussed and documented. Prisoners on long-term separation have plans developed for them with clear goals. Their placement and plans are reviewed regularly. Notwithstanding, the additional processes and procedures now under consideration will also strengthen and enhance existing procedures.

In the absence of evidence to the contrary, I can only conclude that the complainant has not in fact had a 'plan developed [for him] with clear goals'. Accordingly, I have not altered my findings in relation to this aspect of the complaint.

Background

1. The complainant is a prisoner in G Division of Yatala Labour Prison. I understand that he has been in that environment for all intents and purposes since he murdered a fellow prisoner in 1995. Olssen J has described G Division as follows:

G Division houses prisoners in a special and restrictive regime. In essence it is a section of the prison in which specific prisoners are kept separately and apart from all other prisoners, including other inmates of G Division itself.⁴
2. The complainant alleges that at a meeting in 2009, Mr Allan Slack (the then Manager of G Division), agreed that he would be transferred to Port Augusta Prison and would have his regime ameliorated (in particular, that he would no longer be separated from other prisoners) on condition that he fulfilled certain criteria. He alleges that Mr Slack required that he undertake the following (**the criteria**):
 - i. successfully complete the Violent Offender Treatment programme
 - ii. meet and co-operate with a social worker as and when required
 - iii. participate in meetings with the agency's psychologist Dr Robert Ellmer
 - iv. participate in the weekly separation review process
 - v. participate / cooperate in case reviews and all assessment processes
 - vi. participate / cooperate and communicate positively with all agency personnel.
3. He also submits that he told Mr Slack that he was concerned the transfer would not take place even in the event he did complete the criteria, but that Mr Slack assured him this was not the case.
4. The complainant states that he fulfilled the criteria between December 2009 and August 2010. He acknowledges that the staff of G Division assisted him in this process and states that they have been supportive of his progression.
5. The complainant further alleges that in approximately September 2010 he had a conversation with Mr Paul Robinson (the then Acting General Manager of Yatala Labour Prison) during which he enquired about his transfer to Port Augusta Prison. He alleges that Mr Robinson replied 'You'll be there for Christmas', and that he was led to understand that his transfer to Port Augusta would take place following 'sign-off' from the Minister.

⁴ *Fyfe v Bordoni and Ors* [1998] SASC 6860 (15 October 1998) at paragraph 17.

6. The complainant alleges that he was informed in late 2010 that the matter of his transfer to Port Augusta had been decided by the Serious Offenders Committee (SOC), and that he had been refused a transfer to Port Augusta.
7. The agency has provided me with evidence that the SOC met on 21 October 2010 to consider whether the complainant should be transferred and that it requested the agency to provide a summary of key information to assist it in the review and decision-making process. The matter was re-scheduled for 13 January 2011 and at that meeting a decision was made to refuse the transfer. Case notes indicate that the complainant was verbally informed of this decision by prison staff on 24 January 2011.
8. I understand that the SOC reviewed the complainant's case again in April 2011 and, again, determined not to endorse a transfer to Port Augusta.
9. The complainant alleges that he repeatedly requested reasons for the SOC's decision but that he was not provided with any until he lodged a complaint with my office. The complainant states that he was unable to take action to progress his situation because he did not understand why he had been refused a transfer in this instance.
10. By letter dated 26 August 2011 the complainant lodged a complaint with my office. On 4 October 2011 I notified Mr Peter Severin, the Chief Executive of the agency, of the complaint and requested documentation in relation to this matter. Mr Severin provided a detailed response by letter dated 19 October 2011.
11. By letter of same date Mr D Brown, the Chair of the SOC, wrote to the complainant providing an explanation as to why his request for a transfer to Port Augusta Prison was refused. Mr Brown stated that the SOC considered the following:
 - a. Your current age and gender, as well as current and historical factors associated with social, medical, psychological and vocational issues
 - b. Your needs with respect to education, training, medical or psychiatric treatment, and your suitability for various forms of training or employment
 - c. The nature of the offences for which you are imprisoned and the length of your sentence
 - d. Existing reports and case notes
 - e. Your behaviour whilst in prison
 - f. The security of, and availability of the prison accommodation under consideration
 - g. The question of maintaining your family ties, where relevant
 - h. Rehabilitation needs in respect to proposed release, where relevant
 - i. Any other matters considered relevant, including but not limited to, risk management.

and that 'On balance... deemed that you remain a risk of harm to staff and other inmates.'

12. On 16 March 2012 I requested copies of relevant case notes pertaining to the complainant and was provided with these on 19 March 2012.

Whether the agency erred in failing to fulfil an agreement to transfer him to Port Augusta Prison and to ameliorate his regime

13. The complainant alleges that the agency has failed to fulfil an 'agreement' to transfer him to Port Augusta Prison and ameliorate his regime. In particular, the complainant suggests that the alleged undertaking made by Mr Slack in 2009 gave rise to a legitimate expectation that he would be granted a transfer upon completion of the criteria.⁵
14. I begin by considering the question of the complainant's transfer to Port Augusta.
15. Section 23 of the Correctional Services Act provides for the annual assessment of a prisoner to determine whether or not the prisoner should be transferred to another prison. I set out section 23 in full below:

23—Initial and periodic assessment of prisoners

(1) The Chief Executive Officer must, as soon as practicable after the initial admission to a prison of a person who has been sentenced to a term of imprisonment exceeding six months, to life imprisonment or to a sentence of indeterminate duration, and thereafter at regular intervals of not more than one year, assess the prisoner and his or her circumstances and determine whether or not the prisoner should be transferred to some other prison.

(2) The Minister may, for the purpose of assisting the Chief Executive Officer in carrying out assessments under this section, establish such committees as the Minister thinks fit.

(3) In carrying out an assessment under this section, the Chief Executive Officer must have regard to—

(a) the age, sex and social, medical, psychological and vocational background and history of the prisoner; and

(b) the needs of the prisoner in respect of education or training or medical or psychiatric treatment; and

(c) the aptitude or suitability of the prisoner for any particular form of training or work; and

(d) the nature of the offence, or offences, in respect of which the prisoner is imprisoned and the length of sentence; and

(e) the information contained in any file held by a court in respect of the prisoner; and

(f) the behaviour of the prisoner while in prison; and

(g) the security of, and availability of accommodation in, any prison under consideration; and

(h) the question of maintaining the prisoner's family ties; and

(i) where relevant, any proposed plans in respect of the release of the prisoner and his or her social rehabilitation; and

(j) such other matters as the Chief Executive Officer thinks relevant.

⁵ I note by way of comment that the principle of a substantive legitimate expectation (i.e. the expectation of favourable decision of one kind or another) has been accepted as a part of the English law. However, in Australia, a legitimate expectation is only capable of grounding a procedural right (e.g. by insisting the decision-maker apply the rules of procedural fairness) (*Attorney-General (NSW) v Quin* (1990) 170 CLR 1).

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- (4) The Chief Executive Officer must notify the prisoner before commencing an assessment, and must, if the prisoner so requests, grant the prisoner an opportunity to make representations in person to the Chief Executive Officer or to a committee established pursuant to subsection (2).
- (5) The prisoner may make written representations in respect of his or her assessment to the Chief Executive Officer or to a committee established pursuant to subsection (2).
- (6) After the first assessment of a prisoner has been completed, the Chief Executive Officer must prepare a programme in relation to the prisoner that contains particulars of any proposals for the education or training or medical or psychiatric treatment of the prisoner, and may, after any subsequent assessment, add to or vary that programme.
16. I note that subsection 2 provides for the establishment of a committee to assist the Chief Executive in carrying out such assessments. I understand that the Case Review Panels and the SOC were established under that provision.
17. The Chief Executive Officer's powers under section 23 are delegated to the general manager of the Yatala Labour Prison, which in this case was Mr Slack. The complainant alleges that Mr Slack made an 'agreement' with him verbally, and that other prison officers, including Mr Robinson, had an understanding that if he completed the criteria he would be transferred to Port Augusta Prison.
18. The agency's submission supports the complainant's assertion that a plan for his future was arrived at in 2009:
- ...Mr Fyfe commenced individual intervention services with the Department's rehabilitation Programs branch in August 2009. At this time, some realistic goals were identified for Mr Fyfe, and included achieving stable employment, ongoing positive behaviour, and engaging in targeted psychological intervention.
19. In discussing the fact that the SOC met to consider the complainant's case on 21 October 2010, the agency acknowledged that:
- It had been proposed that Mr Fyfe could be considered for transfer to Port Augusta Prison and that a bridging program could be delivered by the department's Rehabilitation Programs Branch to prepare Mr Fyfe for group based intervention.
20. Case notes indicate that on 25 August 2009, Mr Joseph Decicco (a prison social worker) told the complainant that he had drafted an intervention plan and a management plan for him, and that these were provided to him on 16 October 2009. The records indicate that the complainant consistently refused to participate in any intervention plan during September and October and advised Mr Slack that this was because he had 'been let down in the past'.
21. The complainant's attitude appeared to alter from 30 October 2009. Case notes of that date indicate he met with Dr Robert Ellmer and later with Mr Slack who recorded their conversation as follows:
- Following his meeting this morning with Dr Elma [sic], I spoke to prisoner Fyfe while he was in the yard. He was polite and talkative. He appeared to have been satisfied with the meeting. We had a general conversation about the next steps, and when he asked if he was going to be 'fucked over' in regards to the new regimes, I advised him that if he continued to cooperate there would be no change made to his current regime (presently 'long term'). I informed him that I will follow up with intervention to see where we go from here. He is keen to see Dr Elma [sic] again.

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22. Case note entries for the next two months indicate that the complainant commenced participation in a rehabilitation program and that he was positive and cooperative. I note that the evidence of the complainant and the agency accord to the extent that the complainant expressed concern that the transfer may not take place.
23. However, there is no evidence within the case notes of an agreement as to what would happen should the complainant complete the intervention program. There is no specific mention of a transfer to Port Augusta at this time.
24. In my view, and applying the rule in *Briginshaw*, the evidence before me does not establish that Mr Slack made a representation to the complainant prior to the commencement of the intervention plan to the effect that if he achieved the prescribed goals, he would be transferred to Port Augusta Prison.
25. The evidence is also unclear in relation to the representation allegedly made by Mr Robinson in September 2010 that the complainant would be in Port Augusta by that Christmas. It appears Mr Robinson spoke with the complainant about the transfer in September: a case note entry made by Mr Kanas (a Correctional Services officer) on 25 August 2010 states 'A/General Manager was unable to attend review but spoke with Fyfe on 24 August regarding PTA transfer.' However, there is no record of that conversation. I am therefore unable to make a finding as to what Mr Robinson said to the complainant on that day. I am concerned that Mr Robinson failed to record a conversation of this nature.
26. Case note entries around that time indicate that prison staff were speaking about a Port Augusta transfer as being a 'possible' outcome (for example, case notes dated 3 September 2010 and 27 October 2010 made by Mr Decicco). These entries do not indicate that representations were made that this outcome was dependent on the complainant achieving the criteria and in that event that the Port Augusta transfer was a guaranteed outcome.
27. There is some evidence to suggest that the complainant was not made aware that the matter was to be referred to the SOC (and, therefore, was not a 'done deal') until late 2010. A case note from 27 October 2010 indicates that the complainant expressed frustration in not understanding the process. A case note entry made by Mr Slack on 12 November 2010 records the following:
- ...I informed him that I believed [sic] that his transfer plan is in the hands of the Serious Offenders committee which will be reviewing his placement. I also informed him that his transfer has been in principal [sic] seen as being an appropriate placement but he will need to wait until the process has been completed through the S.O.C. He appeared to be reasonably happy with this but did express some frustration in the lack of action and information...
28. I note that the case notes after this date reveal a change in the complainant's mood. An entry made by Mr Kanas on 30 November 2010 states:
- Fyfe has become quite withdrawn recently. He is disappointed that his possible transfer to PTA is taking so long. He understands that there are many stakeholders involved in such a placement that need to have input but this does not put him at ease. He has stopped talking to staff and myself.
29. An entry made by Mr Kanas on 1 December 2010 stated:
- It appears that he is disappointed with the speed of his planned progression for transfer to PTA. It was always indicated to Fyfe that a placement out of G Division would take some time but he feels progress is moving very slow and no one is taking the move to PTA seriously.

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30. It is likely, in my view, that the change in the complainant's mood was as a result of his realising that the transfer may not occur regardless of the fact he had completed the criteria. It is possible that this was because it was at this time that he was first informed that the SOC had to consider his application for a transfer.
31. I accept that the complainant had various discussions with prison officers to the effect that a transfer to Port Augusta might be possible in the event he was cooperative. I also accept that the complainant, who I understand had previously refused to participate in similar programs, had a belief that if he achieved the prescribed goals, his transfer was assured. However, in light of the rule in *Briginshaw* referred to above, I am not of the view there is sufficient evidence before me upon which to base a finding that the prison officers involved made that particular representation to him.
32. My view is therefore that there was no 'agreement' that if the complainant completed the criteria he would be transferred to Port Augusta.
33. The complainant also alleges that part of the 'agreement' was that he would no longer be separated from other prisoners. Prisoners are placed in G Division pursuant to section 36 of the Correctional Services Act which provides that the Chief Executive Officer may direct that a prisoner be kept separately and apart from all other prisoners. This power is delegated to the General Manager of Yatala Labour Prison:

36—Power to keep prisoner apart from other prisoners

(1) A prisoner must not be kept separately and apart from all other prisoners in the correctional institution except in accordance with this section.

(2) The Chief Executive Officer may direct that a prisoner be kept separately and apart from all other prisoners in the correctional institution if the Chief Executive Officer is of the opinion that it is desirable to do so—

- (a) in the interests of the proper administration of justice where an investigation is to be conducted into an offence alleged to have been committed by the prisoner; or
- (b) in the interests of the safety or welfare of the prisoner; or
- (c) in the interests of protecting other prisoners; or
- (d) in the interests of security or good order within the correctional institution.

(3) A direction given pursuant to subsection (2)(a) has effect for such period, not exceeding 30 days, as may be specified in the direction.

(4) Any other direction under subsection (2) has effect until revoked by the Chief Executive Officer.

(5) A direction cannot be given more than once pursuant to subsection (2)(a) in respect of the incident giving rise to the alleged offence.

(6) A direction given under subsection (2)—

- (a) must be in writing; and
- (b) may be revoked at any time by the Chief Executive Officer.

(7) A copy of a direction given under subsection (2) must be served personally on the prisoner within 24 hours of being so given.

(8) Despite the fact that a direction under subsection (2) is in force in respect of a prisoner, the Chief Executive Officer may permit the prisoner to have contact with such other prisoners on such occasions as the Chief Executive Officer thinks fit.

(9) If, under subsection (2), the Chief Executive Officer gives a direction—

(a) that a prisoner be kept separately and apart for a period exceeding 5 days; or

(b) that will result in a prisoner being kept separately and apart for a period exceeding 5 consecutive days, or an aggregate of 5 days within any 10 day period,

the Chief Executive Officer must, as soon as reasonably practicable after giving the direction, provide the Minister with a report of the circumstances relating to the direction.

(10) On receiving a report under subsection (9), the Minister may review the matter and may confirm or revoke the direction.

34. I refer to my description above of the evidence regarding the alleged agreement to transfer the complainant to Port Augusta Prison. I note there is no mention in the case notes of an agreement regarding a transfer out of G Division. I am therefore of the view that there is insufficient evidence to establish that representations were made to the effect that the complainant's transfer out of G Division would be effected following completion of the criteria.
35. That said, it is my view that the agency erred in respect of the application of section 23 of the Correctional Services Act. Case notes do not record a case review immediately prior to the SOC meeting in October 2010 or January 2011. There is therefore no evidence that the complainant was notified before the Case Review Panel commenced a section 23 assessment in accordance with section 23(4). Similarly, there is no evidence that the complainant was granted an opportunity to make representations in respect of his section 23 assessment pursuant to section 23(4). In fact, the evidence before me suggests the complainant did not understand the assessment process and therefore could not have properly exercised his rights.
36. Further, there is no evidence before me that the complainant was afforded the opportunity to make written representations to the Case Review Panel or the SOC pursuant to section 23(5). Case notes around this time do not record any advice of this nature. I note a case note dated 10 December 2010 at which the complainant was advised the SOC would consider his transfer in January 2011 records the complainant stating that the matter 'was out of his hands now and what will be will be.'

Opinion

In light of the above, my view in respect of the alleged 'agreement' is that the agency has not acted in a way which is unlawful, unreasonable or wrong, within the meaning of section 25(1) of the *Ombudsman Act 1972*.

However, in failing to afford the complainant with his procedural rights under sections 23(4) and 23(5) of the Correctional Services Act, I consider that the agency acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the agency:

- implement a policy to ensure that the procedure provided for under section 23 is complied with, and that the agency provides me a copy of that policy; and

- apply the correct procedure for the assessment and determination of the complainant under section 23, and that the agency provide me with evidence that this has occurred within 3 months of the date of this report.

Whether the agency erred in failing to provide reasons for the decision not to transfer the complainant to Port Augusta Prison in a timely manner

37. The complainant submitted that he made numerous requests for the reasons for refusing his transfer to Port Augusta Prison. I understand made these requests verbally with correctional services staff. At the time the complaint was received by my office, the agency had not provided the complainant with reasons for that decision.
38. The complainant submitted that in September 2009 Mr Green informed him that he should write to the SOC to request reasons for the decision, and that he did so by letter dated 22 September 2011.
39. By letter dated 19 October 2011 Mr Brown, the Chair of the Serious Offender Committee, advised the complainant that in conducting a comprehensive assessment in accordance with section 23 of the Correctional Services Act, the Committee considered a number of factors. Those outlined in the letter essentially correspond to the requirements of section 23(3) of the Correctional Services Act, although I note that after 'other matters considered relevant' Mr Brown added 'including but not limited to, risk management.' Mr Brown continued:

I can advise that the Serious Offender Committee deliberated over the above information and declined your request for a transfer to Port Augusta Prison. On balance, the Serious Offender Committee deemed that you remain a risk of harm to staff and other inmates.
40. Section 23 of the Correctional Services Act does not prescribe that the reasons for a determination as to whether a prisoner should be transferred to another prison are to be given. Further, I note there is no general rule of common law or principle of natural justice that requires reasons to be given for administrative decisions.⁶
41. Having said this, the giving of reasons for an administrative decision enhances administrative justice, and the ideal of justice being done and being seen to be done in the exercise of public power. It also allows a person to see what was taken into account in the decision affecting them, to decide whether to seek a review of the decision.
42. In this case, it took some nine months for the agency to provide reasons, despite numerous requests - albeit verbal - from the complainant. Further, the reasons provided comprised, for the most part, a duplication of section 23(3) of the Correctional Services Act. There is nothing in the letter to the complainant dated 19 October 2011 that would give him any real insight into how the decision not to approve his transfer to Port Augusta was arrived at.
43. In my view the effective provision of reasons which were comprehensible to the complainant in this case would have assisted the agency in effectively managing the complainant's future within the prison system. This is relevant to my reasoning below.

⁶ *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 per Gibbs J at 662.

Opinion

In light of the above, I consider that the agency's decision 'was done in the exercise of a power or discretion and the reasons for the act were not but should have been given', and that this is an administrative error within the meaning of section 25(1)(e) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the agency incorporate into the policy recommended above, a statement regarding the provision of reasons following a decision under section 23 of the Correctional Services Act.

Whether the agency has erred by failing to provide the complainant with an opportunity or means for him to progress from his regime of separation

44. The complainant states that since being advised of the determination to refuse him a transfer to Port Augusta, the agency has not provided him with any opportunity or means for him to progress out of G Division. In particular, the complainant submits:
- a. he has not been offered any further programs
 - b. he has not received any visits from a psychologist
 - c. Mr Cicicco (his social worker) has visited him once to request he participate in the annual review (to which his answer was no)
 - d. he asked Mr Stephen Mann, the general manager of Yatala Prison, what programs he would be offered and that he did not receive an answer
 - e. his annual review by the SOC was due to take place in January of this year, but that to date it has not occurred.

45. The agency's report to me states:

Mr Fyfe's placement is scheduled to be reviewed by the Committee in 12 months time during which, involvement by intervention and psychological staff with Mr Fyfe will continue.

46. As noted above, the decision as to whether or not to separate a prisoner is the decision of the Chief Executive Officer, or his or her delegate (the general manager of the relevant prison). I understand that the complainant is separated by virtue of section 36(2)(c) of the Correctional Services Act; that is 'in the interests of protecting other prisoners'.

47. The decision whether or not to separate a prisoner is separate and distinct from a decision to detain a prisoner in G Division⁷ and a decision under section 23 as to whether to transfer a prisoner. While the latter is required to be exercised annually, it appears that section 36 invokes an ongoing obligation:

Section 36(6)(b) provides that the direction that a prisoner be kept separately and apart from all other prisoners "may be revoked at any time by the Chief Executive Officer". There is no express duty in s 36 to keep the direction and the question of its continuance or revocation under review. It is unnecessary to explore the precise nature of the duty and whether it should be expressed as a duty to consider revocation or to consider whether it continues to be desirable to keep him separately and apart from all other prisoners. For present purposes the respondent agreed that I should proceed on the basis that s 36 imposed upon Ms Bordoni as the delegate of the Chief Executive Officer an ongoing obligation to consider whether she remained of the opinion that it was desirable to keep the applicant separately and apart from all other prisoners.⁸

⁷ *Fyfe v State of South Australia* [2000] SASC 84, at para 21.

⁸ *Fyfe v State of South Australia* [2000] SASC 84, at para 23.

48. The complainant's separation pursuant to section 36 has been the subject of several judicial review applications to the Supreme Court of South Australia. In 1998 Olsson J considered an argument put by the complainant that the 'open-ended' committal of him to G Division, with its concomitant impact on his quality of life, was so unreasonable as to constitute an abuse of power. Olsson J recognised the oppressive nature of G Division and that it is 'essentially intended to house prisoners on a relatively limited term basis.'⁹ At that time prisoners were not afforded with the opportunity to comment on the 'Review of Separation Forms' and Olsson J commented that 'given the applicant's circumstances and the very long time for which he has been on separation... [the practice seems].. unfortunate... inherently illogical and likely to breed or maintain unnecessary frustration and anger which is counter productive to rehabilitation.'¹⁰ While His Honour did not reach a conclusion that the system was so unfair and unreasonable as to constitute an abuse of power, Olsson J stated:

It seems to me that, on the evidence, that the true attitude of prison management is that, if the applicant is genuinely prepared to co-operate by participating in programmes designed to address his personality problems; to accept the professional assistance which the authorities wish to make available to him; and, with such assistance, to controlling his understandable frustration and cease making threats - and that this continues over a reasonable space of time - then there is every possibility that a change in environment will become possible. The applicant, not unreasonably, complains that he is not clear as to precisely what programmes he is expected to undertake. In this regard I would strongly suggest that he be provided with some written intimation of precisely what is expected of him in this regard, so that his actual future conduct can be tested against a specific set of criteria which he is expected to satisfy. This would provide a stable basis for assessment of his future conduct. It would also meet his contention that the absence of such criteria can, in the long term, constitute an abuse of power, because of his inability to understand and attempt to achieve standards expected of him.¹¹

49. His Honour stated the situation was not such that judicial intervention was warranted but that:

I am prepared to monitor the position in order to ensure that the applicant's rights are fully protected and all reasonable steps are taken to ensure that his continued incarceration in G Division does not amount to an abuse of his rights. If his conduct is satisfactory (as meeting reasonably established criteria as above referred to) on a sustained basis and his situation is not improved in proper recognition of that fact, then my attitude may well change.¹²

50. The complainant made another application for judicial review in 2000 arguing that his continued detention in G Division was unlawful and was such an unreasonable exercise of power that it amounted to an abuse of power. In rejecting the complainant's arguments, Martin J stated at para 34:

In all the circumstances, I am satisfied that the applicant has failed to make out his case to the date of this judgment. The limits of this Court's jurisdiction are well known. I am satisfied that judicial intervention cannot be justified at this time consistent with established legal principles. I am also satisfied that prison management remains willing to consider and implement changes in the applicant's environment and regime if, over a reasonable period of time, the applicant is prepared to cooperate by desisting from his uncooperative and aggressive behaviour and by participating in programmes aimed at addressing his personality problems. In view of his previous violent behaviour and the assessment of Mr Byrne and Mr Boer, the applicant cannot expect the authorities to allow him into contact with other prisoners until he has demonstrated on a reasonably sustained basis that it is safe to allow him such contact.¹³

⁹ *Fyfe v Bordoni and Ors* [1998] SASC 6860, at paras 19 and 83.

¹⁰ *Fyfe v Bordoni and Ors* [1998] SASC 6860, at para 80.

¹¹ *Fyfe v Bordoni and Ors* [1998] SASC 6860, at para 88.

¹² *Fyfe v Bordoni and Ors* [1998] SASC 6860, at para 90.

¹³ *Fyfe v State of South Australia* [2000] SASC 84, at para 34.

51. In that case and again in 2007 the court considered detailed evidence from the agency as to how it came to the conclusion that the complainant remain separated, and concluded that reasonable steps were taken to give the complainant the opportunity to progress. Kelly J held in 2007:

It is profoundly regrettable that the applicant has now spent over 12 years there. However, the evidence supports the conclusion that he has within his grasp the means to end his incarceration in G Division. The fact that he has not yet availed himself of the opportunity available to him to progress towards transfer to the mainstream prison population is largely a matter of his own choosing.¹⁴

52. The complainant argued before Kelly J that he was denied procedural fairness in that he was not given access to the material relied upon by the general manager in making the decision to continue to detain him separately. Kelly J noted that while the complainant did not have access to the Justice Information System, anything of significance was noted on the weekly separation review forms. Her Honour found that the complainant had been 'notified at all relevant stages of the essential information relied on by the General Manager' and that she was also:

...satisfied that the applicant has been notified at all relevant stages of the essential information relied on by the General Manager in making the decision to continue to detain him separately and apart from the other prisoners.

I am also satisfied that the applicant clearly understands what he must do to satisfy the General Manager that he is a suitable candidate to be transferred back to the mainstream prison population. He has been made fully aware of the need to engage in a sustained therapeutic relationship with the psychologist and the social worker assigned to him. Nothing which was relied on by the General Manager as the basis for continuing to keep the applicant separate and apart has been withheld from the applicant. While the applicant takes a different view about these requirements, he is aware of them and the basis for them.¹⁵

53. Her Honour continued:

The doctrine of procedural fairness does not require that the applicant be provided with exact copies of all documentation that the General Manager relied on in exercising his discretion. What it does require is that the applicant has sufficient information to understand the case he must meet. A clear statement of that principle is to be found in the judgment of Mason J, (*Kioa v West* (1985) 159 CLR 550 at 587):

The need to bring the person's attention to the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it.¹⁶

54. These decisions indicate that the test for an 'abuse of process' finding is high. In my view there is not sufficient evidence to indicate the complainant has changed his behaviour in such a manner that his continued separation warrants such a finding. However, in my view, it is not clear from the evidence before me that the agency has applied the *Kioa v West* principle in relation to its decision to continue to separate the complainant since the beginning of 2011. In particular, the evidence before me does not establish that the complainant has been informed of the issue or issues which will form the basis of his ongoing separation.

¹⁴ *Fyfe v The State of South Australia* [2007] SASC 272, at para 44.

¹⁵ *Ibid.*, at paras 38-39.

¹⁶ *Ibid.*, at para 40.

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55. Olssen J's reasoning as to whether the complainant had been properly informed of the case he had to meet in 2007 rested in a large part on the agency's weekly 'Review of Separation' Forms. I have before me the complainant's Review of Separation Forms dated 31 August 2011 to 12 October 2011 inclusive. All of them recommend that the complainant remain separated under section 36(2)(c) by virtue of 'Administration placement due to incident in YLP kitchen.' This refers to the incident which originally led to the complainant being separated in 1995. This statement is followed by some general comments about the complainant's recent activity which are generally favourable (for example, 'He is compliant with the requirements of the division and continues to communicate with selective staff.')
 56. The forms also indicate that the complainant asked the agency a number of times to provide reasons for the refusal of his 'previous planned move to PTA' and that he enquired a number of times about 'any further plans for placement outside of G Division'. It is evident that he was told that the former issue would be 'looked into' (and ultimately the reasons were provided by the SOC by way of letter dated 19 October 2011). The forms do not record a response to the complainant's enquiries about a future outside of G Division, other than the form dated 7 September 2011 which states 'It was suggested that cooperation with weekly reviews by reading and making comment would be a good start by showing Fyfe was engaging.'
 57. In my view, the complainant was, in effect, asking for that required by the rule in *Kioa v West* and applied in the judicial review cases referred to above. The forms, on their face, do not indicate that the agency provided the complainant with an understanding as to the critical issue forming the basis for his ongoing separation; in my view a reference to the incident in 1995 that led to his initial separation is not sufficient. I have not been provided with any other evidence indicating the agency has communicated to the complainant the critical issues that may lead to a different decision in the future.
 58. A report dated 17 November 2010, authored by the Sentence Management Unit and provided to the SOC to assist in its assessment of the complainant under section 23 of the Correctional Services Act, provides some insight into what may be guiding the agency as to the ongoing separation of the complainant. Following completion of one to one components of the Violence Prevention Program in 2009-2010, the complainant was still assessed as having a moderate (at the high end of moderate) risk of violent reoffending. It was noted he had not participated in group intervention programs which are deemed to be more effective at reducing recidivism and that he would 'further benefit from group VPP program'. The agency has advised this has not been offered to the complainant as it is considered that this would pose a 'significant risk to staff and other prisoners'. Nevertheless, there is no evidence that an alternative plan has been developed for the complainant, or indeed that there has been any communication to him about what issues are preventing from progressing.
 59. Indeed, while the agency refers to 'ongoing involvement by intervention and psychological staff' I have little evidence before me detailing the extent of this involvement and no specific evidence that the agency has a current Individual Development Plan for the complainant. The agency has cited three dates on which the complainant was offered and declined 'contact with intervention staff'; and I note with concern that this suggests he was not offered contact with intervention staff for some eight months.
 60. It is therefore my view that in failing to communicate to the complainant the issues upon which future decisions regarding his continued separation will turn, the agency is failing to provide procedural fairness to the complainant.

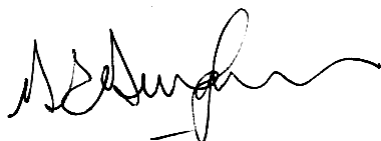
Opinion

In light of the above, I consider that the agency acted in a manner that was contrary to law within the meaning of section 25(1)() of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the agency adopt a policy or procedure to ensure that rehabilitation programs are communicated to prisoners in a clear and meaningful way and, in particular, that those prisoners separated pursuant to section 36 of the Correctional Services Act are regularly informed in writing of the criteria against which their future conduct will be tested.

Final comment

In accordance with section 25(4) of the Ombudsman Act, I request that the agency report to me by 11 September on what steps have been taken to give effect to my recommendations above; and, if no such steps have been taken, the reason(s) for the inaction.



Richard Bingham
SA OMBUDSMAN

12 June 2012