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Agency reference:

FINAL REPORT

Date complaint received	27 October 2009 (superseded individual complaints 77970, 78795, 78796, 79076 & 79275; earliest received 12 February 2009)
Agency	Department for Correctional Services (DCS)
Complainant	The Ombudsman
Allegation (s)	1. Unreasonable destruction of personal property 2. Unreasonable denial of reimbursement for loss of personal property
Complainant	Ombudsman 'own initiative' investigation, section 13(2) <i>Ombudsman Act 1972</i>

Aspects of allegations within jurisdiction

The investigation arose from four separate complaints lodged with my Office by individual prisoners. In order to consolidate those complaints I decided to commence an own initiative investigation. The subject of the investigation is fully within the jurisdiction of the Ombudsman.

DCS advises that five prisoners were recently charged in relation to the riot at Port Augusta Prison in October 2008 and that these charges are currently before the courts. I understand that none of the original complainants in this matter is one of the prisoners facing charges. The prosecution of the charged prisoners does not provide prisoners affected by the administrative acts in this matter with a remedy by way of legal proceedings. Therefore, section 13(3) of the Ombudsman Act, does not prevent me from proceeding with the investigation while the prosecutions are extant.

Investigation

My investigation has comprised:

- assessing the information provided by complainants
- seeking a response from DCS
- considering the *Correctional Services Act 1982*, the *Occupational Health, Safety and Welfare Act 1986*, the Correctional Services Regulations 2001 and the Occupational Health, Safety and Welfare Regulations 1995.
- providing DCS with an initial provisional report for comment and considering its responses

- providing the agency with a revised provisional report for comment, and considering its responses
- preparing this final report.

Response to my revised provisional report

In summary, Mr Peter Severin, Chief Executive of DCS responded that:

- DCS requests that I do not disclose the names of DCS officers, other than the Chief Executive, in the report that I provide to the original complainant prisoners.
- DCS advises that a number of prisoners were recently charged in relation to the riot at Port Augusta Prison in October 2008.
- DCS seeks clarification and confirmation of:
 - my statement about the apparent lack of policy support for the denial of reimbursement to prisoners for their destroyed property
 - my statements about DCS' duty of care
 - my request that DCS consider reimbursement for the recorded value of destroyed property.

Mr Severin also provided detailed responses to several paragraphs in my Revised Provisional Views Report of 25 June 2010. Where appropriate, I will cite these responses below.

Final Views

Background

1. Several prisoners held at Port Augusta Prison (**PAP**) prior to a disturbance on 9 and 10 October 2008 complained about DCS's subsequent actions, particularly in relation to the prisoners' personal property. The prisoners complained that:
 - DCS unreasonably destroyed their property, that was in their cells at the time of the disturbance
 - prisoner files located in the Bluebush building prior to the disturbance were returned to service
 - DCS denied prisoners compensation for the destroyed property.
2. DCS advised my office that:
 - in October 2008, unrest took place at PAP involving prisoners in the Bluebush building
 - the unrest resulted in extensive damage to the Bluebush and Greenbush cell blocks and the gymnasium, necessitating repairs that have cost \$960,000
 - the damage included breakage of asbestos eave linings, windows with sealant containing asbestos and floor tiles with asbestos backing
 - some prisoner property was also exposed to water and effluent due to damaged toilet pans in cells
 - various contractors were engaged by DCS through the Department of Transport, Energy and Infrastructure (DTEI) to undertake the clean up and repairs. Asbestos

removal was done by McMahon Services Australia Pty Ltd and asbestos fibre monitoring was done by Tyne Environmental Management Services

- following the unrest, prisoners' property in both wings of the Bluebush building was searched for contraband, bagged and stored at PAP
- the bagged materials and property, including some agency property, was suspected of contamination with asbestos fibres and effluent and was subsequently destroyed
- the decision not to offer compensation for prisoner cell property was made by the Acting Chief Executive in May 2009.

Whether DCS's decision to destroy prisoners' property on the basis of alleged asbestos contamination was reasonable

3. Based on the complaints received from prisoners, it appears to me that most of the prisoners' personal property in their cells was packed into plastic boxes and bags and not damaged during the unrest.

4. On this point DCS advised my office:

... many prisoners prior to the unrest packed all of their clothing and belongings in light weight plastic bags and left them in their cells. Some prisoners have suggested that it was agreed among them that the bags were not to be touched during the unrest. Notwithstanding, a number of the bags were broken open and damaged either by the prisoners themselves during the unrest or by staff when they were clearing the damaged unit and searching prisoner property for weapons, tools and other contraband following the unrest. (letter from Mr Peter Severin, Chief Executive, 30 September 2009)

5. Based on the DCS response to my initial provisional report, I acknowledge that the prisoners had access to their property during the two days of the disturbance and it is possible that property bagged beforehand may have been opened in that time.

6. In relation to the risk of asbestos contamination, DCS has advised that it:

... became aware of the potential asbestos risks when the Department [of] Transport Energy and Infrastructure (DTEI) conducted its initial inspection. Prisoners had damaged the roof of building 2 ('Bluebush') by smashing the asbestos eave linings from above, they also smashed windows to the raised roof area subsequently exposing the window putty/sealant which also contained asbestos. In addition, floor tiles containing asbestos backing were damaged.

Following the disturbance, the prisoner property in both wings of ... 'Bluebush' was bagged and stored. This was done as an initial response to concerns about the risk of contamination from asbestos fibres ... (letter from Peter Severin, Chief Executive, 10 December 2009)

7. DCS advised that the removal and disposal of asbestos and asbestos contaminated items was done in accordance with guidelines in *Asbestos Management in Government Buildings* (a South Australian Government publication by the former Department of Administrative and Information Services, 2004) and that in destroying the prisoner property, DCS acted to ensure the health and safety of all prisoners and staff. However, DCS did not respond to my question about the extent of the suspected contamination.

8. DCS also advised:

'the building remained open to the elements until the cleaners bagged the possibly contaminated materials including all cell contents and **paperwork not salvaged**'. (my emphasis).

This indicates that the complainants' assertion about prisoner files being returned to service may have been correct.

9. DCS further advised that the following tasks were undertaken:
 - asbestos removal by McMahon Services Australia Pty Ltd (**McMahon**)
 - airborne fibre monitoring by Tyne Environmental Management Services (**Tyne**)
 - cleaning of debris, by McMahon, Pearce Earthmovers (**Pearce**), C&C Salvage, Transpacific Industrial Solutions (**Transpacific**) and Building and Training services.
10. I have obtained relevant documents provided to complainants in response to requests under the *Freedom of Information Act 1991*. They include copies of invoices from McMahon, Transpacific and Pearce and inspection certificates provided by Tyne to DTEI for the asbestos removal work at PAP. The inspection certificates indicate that 'asbestos contaminated waste', and 'asbestos floor tiles and window frames' were removed by McMahon from the ground and first floors of the Bluebush building on 17, 18, 24, 25, 27 and 31 October 2008 and on 3,4 and 5 November 2008. None of the inspection certificates or associated reports refers to removal of debris or other material from the cells. The invoice from Transpacific is for 'Pt Augusta Prison Clean up 16-23.10.08'. The invoice from Pearce is for 'Remove contaminated rubbish from Pt Augusta Prison and bury immediately' and is dated 20 March 2009.
11. The inspection certificates relating to the removal of waste (and of floor tiles on 27 October) state, 'No asbestos debris material was located'. This apparently refers to visual inspections carried out after the asbestos contaminated waste and tiles were removed. The remaining certificates relating to the removal of floor tiles and window frames state, 'There are still asbestos floor tiles under cupboards and around perimeter at inaccessible areas.'
12. All of the inspection certificates state, 'The airborne fibre monitoring results indicated that the readings were at or below detectable limits during removal work.' The accompanying reports of 'Results of Airborne Fibre Monitoring using Filter Membrane Method' state that each of the 44 air samples taken over periods of several hours, had a reading of '<0.01' fibres per millilitre of air (f/ml).
13. According to clause 4.2.3(1) of the *Occupational Health, Safety and Welfare Regulations 1995*, '... exposure standards for airborne asbestos fibres will be determined according to NOHSC's (National Occupational Health & Safety Commission) *Exposure Standards for Atmospheric Contaminants in the Occupational Environment* (National Exposure Standards)'. The National Exposure Standard for all but one type of asbestos (i.e. Amosite, Crocidolite and others, including a mixture of types) is 0.1 f/ml. For Chrysotile the exposure standard is 1 f/ml.
14. Compared to the National Exposure Standards, the air samples taken during the removal of asbestos debris and other asbestos material eight days after the prisoner unrest at PAP show less than one-tenth of the allowable exposure to asbestos fibres.
15. Based on the information provided by DCS and the documents obtained by complainants under FOI, I have no evidence that the prisoners' property in the Bluebush cells was exposed to significant contamination by asbestos, measured by the legislated standards. Further, DCS apparently considered that the health and safety of its staff and prisoners

were not jeopardised by the salvaging of some paperwork (possibly prisoner files) from the Bluebush building.

16. Based on DCS's advice and documents obtained by complainants under FOI, it appears that the prisoners' property was bagged and stored before the asbestos debris and material was removed. It also appears that the property remained in storage at PAP for over five months until it was removed and buried by Pearce on 20 March 2009, some 5 months after the disturbance.
17. In its response to my provisional views, DCS asserts that there is no evidence that the prisoners' property was not contaminated by asbestos, and there was a risk that it was contaminated, given that DTEI identified three sources of damaged asbestos.
18. I accept that DCS's decision to dispose of prisoners' property on the basis of asbestos contamination was not based on evidence of contamination, but was based on advice of a risk of contamination. On that basis, my final view is that the disposal of prisoners' property was not unreasonable.

Whether the DCS decision to deny prisoners reimbursement for destroyed property was lawful and reasonable

19. Based on the complaints received, the prisoners formerly held in Bluebush prior to the unrest, were formally advised by DCS in May or June 2009 that it would not be 'compensating' them for their disposed property. DCS had provided the following reasons for the denial of compensation:
 - each prisoner's personal property and 'all Government owned property' was disposed of due to risks of exposure to asbestos
 - personal property is issued to prisoners after they have signed a disclaimer accepting responsibility for damage or loss
 - the items were destroyed for the health and safety of prisoners and staff.
20. DCS has advised me that the decision not to offer compensation was made on the basis that:
 - the property was directly damaged and/or contaminated by the prisoners and/or as a direct consequence of the disturbance they caused
 - the department had taken all reasonable measures to avoid such a disturbance and damage to the prisoner property
 - it is a condition for prisoners being permitted to retain personal property in their cell that they agree the department accepts no liability offer [sic] loss or damage to those items.

(Letter from Mr Peter Severin, Chief Executive, 10 December 2009)

21. The documents provided to complainants in response to requests under the *Freedom of Information Act 1991* include a Minute to DCS staff, the Director Finance and Asset Services and the Director Custodial Services from the Manager Asset and Risk Services, dated 11 February 2009. The sentence about Crown law opinion was considered exempt under an external review by my Office.

22. The Minute obtained agreement to 'dispose of prisoner property associated with prisoners accommodated in Bluebush at the time of the (Port Augusta) disturbance.' The Minute stated:

The property is currently bagged and being stored at Port Augusta.

SAICORP advised that the items are not claimable under the DCS Insurance Policy. [deleted sentence re Crown law opinion] Risk services have undertaken a review of the potential liability and estimate that the total cost of the contents recorded in the cells is approximately \$6200.

...

Taking into account that the items have been bagged and in most cases were wet when bagged, the items could potentially be contaminated with asbestos and any electrical items damaged with water it is proposed that the items be disposed of appropriately and that claims for reimbursement for items considered as submitted by the prisoners.

23. The *Correctional Services Act 1982* provides for the purchase of items of personal use by a prisoner (section 32), the conditions under which a prisoner may receive certain goods from outside the prison (section 33A) and how a former prisoner's property is to be dealt with (sections 39A and 39B). Regulation 7(1) of the Correctional Services Regulations 2001 provides that:

(1) On admission to a correctional institution, a prisoner must be permitted by the manager to retain at the institution such personal property -

(a) the total value of which does not exceed \$200; and

(b) that is capable of being stored in a clothes protector and a locker area that measures 45 centimetres x 41 centimetres x 29 centimetres.

24. The Regulations also prescribe items of personal use or consumption (Reg 8) and prohibit certain items (Reg 9).
25. DCS provided a copy of its *Service Specification 5 - Prisoner Owned Property, Version 1 dated 23 November 1999* (SS5) and advised that it is 'currently under review to be replaced with Standard Operating Procedure 21 Property'. SS5 provides minimum standards for General Managers for the care, security and access of prisoner owned property. Paragraph 7.2.17 states, 'all claims made by a prisoner for lost, stolen or damaged property items are to be investigated and copies of the documentation maintained'.
26. Appendix B of SS5, *Prisoner Owned Property Request* is to be signed by the prisoner and includes, under Part B - Terms and Conditions:
- to acknowledge the Department for Correctional Services accepts no liability for my property
 - should my property be lost, stolen or damaged in any way, that such property is entirely my responsibility.
27. DCS also provided to my office a copy of PAP's *Local Operating Procedure 67, Prisoner Property* (LOP 67), Version No. 7 dated 30 October 2006. LOP 67 sets down detailed procedures for managing prisoners' property in various circumstances. Paragraph 5.5.5 of LOP 67 states:

In the case of an urgent transfer between units at Port Augusta Prison or to another institution (due to disciplinary, medical or other reasons) the cell will be secured immediately. Two custodial officers **must**:

- Complete and sign the Cell Clearance form.
- Place the prisoner's property into resealable bags.
- Deliver the bags of property to the Property Store, along with the Cell Clearance form.

The Property Officer will check the list against the Property Record card, note and investigate any discrepancies. NOTE: **The Property Officer must**, if the prisoner has been transferred to another prison, arrange with Group 4 to transport the property to the receiving institution. (original emphasis)

28. Paragraph 5.16 of LOP 67 provides procedures for dealing with prisoner property claims. Paragraph 5.16.5 states:

Where it is found that the department is liable for the loss of a prisoner's personal property, the prisoner will be offered recompense to the declared value of the item on the Property record card. **The item will not be replaced.**

- The offer is valid for 28 days.
- The prisoner must sign the Indemnity and Discharge Form.
- Upon advise [sic], the **Prisoner Finance Officer** will arrange for monies to be credited into the prisoner's general account to the value of the recompense payment. ... (original emphasis)

29. Regulation 10(a) of the Correctional Services Regulations 2001 provides that 'a riot, insurrection or disturbance in a correctional institution' is a prohibited activity. I understand that DCS has conducted a significant investigation of the disturbance, and that recent charges against five prisoners in relation to the riot at PAP in October 2008 are before the courts. I note that none of the original complainants in this matter is one of the prisoners facing charges.

30. Based on the information provided and the relevant legislation, it appears that:

- prisoners have a legally conferred entitlement to hold some personal property whilst in prison
- to receive any property, prisoners are required to acknowledge that DCS accepts no liability for it
- notwithstanding the above, DCS's procedures provide for documented investigation and compensation for loss or damage to property owned by prisoners
- DCS's decision in February 2009, to dispose of the prisoners' property was accompanied by approval of a recommendation to consider claims by prisoners for reimbursement for the property's recorded value; and
- the subsequent blanket denial of reimbursement to the prisoners for property damaged during the disturbance did not cite any legislative authority, nor does it appear to be supported by the policy documents provided to me by DCS.

31. Mr Severin requests that I clarify the last point by specifying the policy document(s) to which I refer. The DCS policy documents attached to Mr Severin's letter on this matter dated 10 December 2009 were *Service Specification 5 - Prisoner Owned Property* and *Port Augusta Prison Local Operating Procedure (LOP) 67 - Prisoner Property*. Neither document provides for a denial of compensation to all prisoners in a building for personal property destroyed by DCS following prisoner unrest.

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32. I was not specifically referring to clause 5.16.5 of LOP 67 (quoted above at paragraph 24). However, as that clause shows, DCS does offer recompense for a prisoner's lost property where DCS is liable for the loss.
 33. I confirm my view that the blanket denial of compensation to prisoners for their destroyed property is not specifically supported by relevant DCS policies and that the offering of compensation in some circumstances is supported by LOP 67.
 34. It appears that DCS considers its denial of reimbursement to prisoners for their destroyed property to be a reasonable consequence of the disturbance in which some prisoners were involved. Nonetheless, in my view it appears that this action is not supported by DCS's policies or procedures. While charges have now been laid against a small number of prisoners, and others may have taken part in the disturbance, in my view the denial of compensation to all prisoners then in Bluebush is not justified. Each case should be considered on its merits.
 35. In its response to my initial provisional views, DCS asserted that LOP 67 applies to damage to a prisoner's property for which it has a legal liability. DCS contends, and I accept, that it does not have 'a clearly established liability' for the property destroyed due to suspected contamination resulting from asbestos damaged by prisoners during the disturbance. Nonetheless DCS's stated reason for its decision to destroy the Bluebush prisoners' property appears to be weakened by its disclosure that it also salvaged paperwork that had been exposed to the same risk of contamination. There is neither legislative provision nor DCS Operating Procedure that applies to the unusual circumstances in which it decided to destroy the Bluebush prisoners' property.
 36. In this case there is a statutory entitlement for prisoners to hold some personal property and in my view, correctional authorities generally owe a concomitant duty of care to inmates and to not damage their property.
 37. Mr Severin asks whether I am suggesting that DCS did not exercise an appropriate duty of care. I am not making that direct assertion; I am making the observation that a legal determination may reach that conclusion.
 38. I expect that a legal determination would consider the facts that DCS did not prevent a prisoner disturbance involving damage to a building known to contain asbestos and that DCS then destroyed prisoners' private property despite having salvaged DCS 'paperwork' from the same building.
 39. Further, as Mr Severin states in his letter dated 5 March 2010, 'the reason for the property potentially being contaminated ... was the acts of **particular prisoners**' (my emphasis). DCS concedes that only some, perhaps a minority, of the prisoners in Bluebush were responsible for the disturbance and the resulting damage. However, DCS decided to deny reimbursement to every such prisoner for the recorded value of their destroyed property. In my view this was an unfair penalty on those prisoners who were not directly responsible for the disturbance or the damage to the building.
 40. It is not apparent to me why DCS chose not to consider claims on a case by case basis, as was proposed in the Minute dated 11 February 2009. I understand that this course would have required consideration of the individual circumstances of each prisoner, and the extent of their participation in the disturbance. However, I presume that this consideration

would have been given to determine whether charges arising from the disturbance should be laid. Deciding claims for reimbursement on the same basis would have avoided the unfairness caused by the destruction of property belonging to those prisoners who were not active participants in the disturbance.

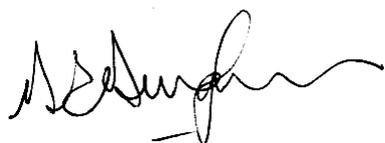
41. Mr Severin asks me to clarify the apparent implication in this paragraph that DCS could have considered claims for compensation on the basis of whether the claimants were charged in relation to the disturbance. I understand that DCS may have intelligence that certain prisoners were active participants in the disturbance but that laying charges against those prisoners may not be justified. Nonetheless, my observation that prisoners' claims for compensation could have been considered, taking into account the extent of their participation in the disturbance, remains valid.
42. In conclusion, my final view is that DCS's blanket denial of reimbursement to prisoners for their destroyed property was not unlawful, but was unjust within the meaning of section 25(1)(b) of the *Ombudsman Act 1972*.

Opinion

DCS has acted in a manner which is unjust within the meaning of section 25(1)(b) of the *Ombudsman Act 1972*.

Under sub-sections 25(2)(a) and 25(2)(b) of the Ombudsman Act and to remedy this error, I recommend that DCS consider reimbursement to affected prisoners for the recorded value of their destroyed property, taking into account:

- the limit on the total value of a prisoner's personal property prescribed by regulation 7(1)(a) of the Correctional Services Regulations 2001
- the extent of the prisoner's participation in the disturbance.



Richard Bingham
SA OMBUDSMAN

25 August 2010