



OmbudsmanSA

# FINAL REPORT

---

DEPARTMENT FOR CORRECTIONAL SERVICES

June 2011

<b>Date complaint received</b>	15 February 2011
<b>Agency</b>	Department for Correctional Services
<b>Complainant</b>	Ombudsman 'own initiative' investigation, under section 13(2) of the <i>Ombudsman Act 1972</i>
<b>Allegations</b>	<ol style="list-style-type: none"><li>1. DCS has no legal authority to charge the prisoner amenities levy</li><li>2. DCS has failed to disclose the amount of the prisoner amenities levy</li><li>3. DCS has failed to inform prisoners on how funds collected from the prisoner amenities levy are disbursed</li></ol>

## JURISDICTION

This investigation stems from two complaints I received from individual prisoners concerning charges on items purchased from prison canteens run by the Department for Correctional Services (DCS). As a result of the complaints, I became concerned about DCS' administration of an additional margin which is applied as a surcharge on items purchased from the canteens. This margin is commonly referred to as the amenities levy (**the prisoner amenities levy**), and for the reasons explained below, in my view this term correctly describes the nature of the charge.

In order to conduct a consolidated investigation, it was convenient for me to amalgamate the complaints into an 'own initiative' investigation.

I advised the individual complainants of my intention, and that based on the information then provided to me, it was not possible for me to conclude whether the actions by DCS in relation to these charges were unlawful, unreasonable or wrong within the meaning of section 25(1) of the *Ombudsman Act 1972*. Consequently I decided not to pursue the complaints as individual investigations.

## INVESTIGATION

My investigation has comprised:

- assessing the information provided by the individual prisoner complainants
- seeking a response from the department
- clarifying the response
- considering legal advice obtained by DCS, the *Correctional Services Act 1982* (**the Act**), the *Fees Regulation Act 1927* and the DCS Departmental Instruction No. 88 dated 18 October 1985 (**the DI**)
- preparing a provisional report and providing it to DCS for comment
- considering DCS' response
- preparing this final report.

## STANDARD OF PROOF

The standard of proof applied is on the balance of probabilities. However, in determining whether that has been met, in accordance with the *Briginshaw* principle I have borne in mind the nature of the allegations and the consequences if they were to be upheld. That decision recognises that questions of fact vary greatly in nature, and greater care is needed in scrutinising the evidence in some cases.<sup>1</sup> It is best summed up in the well-known statement of Dixon J:

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 to the reasonable satisfaction of the tribunal.<sup>2</sup>

## RESPONSE TO MY PROVISIONAL REPORT

On 25 May 2011, the Chief Executive of DCS (Mr Peter Severin) responded to my provisional report, strongly disagreeing with my provisional views. He made the following points:

- he considers that DCS does not impose a levy of 10 per cent on items sold through prison canteens. He acknowledges that it:
  - ... does apply a margin of 10% to the cost of non tobacco goods acquired for sale however it is not appropriate that this be labelled “a levy” or “the levy”. I do note that some DCS staff may refer to this margin as a levy, but that is simply a convenience, or the use of a term colloquially. This use is not appropriate in any formal or legal sense of the word. It is more a matter of convenience that staff refer to a levy rather than a “margin applied to the cost of goods acquired to partially cover some of the costs incurred by DCS in making goods available for sale.”
- ‘(i)t is not the 10% margin that is accumulated in the Amenities Reserve Account, rather the surplus on canteen sales (as calculated by deducting from the GST exclusive sales price the cost of goods sold, shrinkage, damaged goods etc, and other costs such as the cost of the Bizgate canteen system charges)’
- ‘there is no profit-making business occurring’. The costs incurred by DCS in providing the canteen items for sale of all goods (including tobacco) by far exceed the 10% margin that is applied to the cost of the non tobacco goods sold. Consequently it is open for DCS to increase the ‘margin’ and the price of goods sold
- there is no legislative requirement for DCS to disclose how the sale price is determined
- it is arguable that but for the DI, DCS ‘has no more need to consult with prisoners about the use of these departmental funds than it does on any other expenditure of departmental funds’
- DCS is reviewing the DI with a view to establishing a policy and procedure in relation to the financial arrangements pertaining to prison canteens, but this will require that prisoners are consulted and informed about how any surplus from canteen sales is used. However, the Chief Executive will consider how best to use the Prisoner Needs Committees (or similar) in informing the various prisons of prisoner requests and informing prisoners of purchases and how best to reflect that in the policy and procedure.

<sup>1</sup> see *Briginshaw v Briginshaw* (1938) 60 CLR 336. Applied in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449 at 449-450 per Mason CJ, Brennan, Deane and Gaudron JJ.

<sup>2</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362.

I have considered the Chief Executive's comments and taken account of them as I consider appropriate in finalising my views.

## FINAL VIEWS

### Background

1. Section 32 of the Act requires a prison manager to make personal use items available for purchase by prisoners. It provides as follows:

#### **32—Purchase of items of personal use by prisoners**

The manager of a correctional institution must make available for purchase by prisoners such items of personal use or consumption as may be prescribed, and may make available for purchase any other items that the manager thinks fit, but withdrawals of money for the purchase of items made available under this section are at the discretion of the manager in accordance with section 31.

2. The DI is titled 'Amenities', and has been in operation since 18 October 1985. After defining relevant terms and the roles of various officers, its operative provisions deal with the management of amenities activities. Paragraph 4.1 of the DI states:

4.1 The amenities activity shall be funded from profits from prisoners' canteens

3. In implementing the DI, as a matter of practice, DCS has applied an additional margin of 10 per cent to the cost of each item purchased through a prison canteen. The total cost i.e. cost price plus the additional margin is then subject to the application of the Goods and Services Tax (**GST**), and the resulting amount is charged to the prisoner for the supply of the item.
4. In its response to my provisional report, DCS notes that Paragraph 3.3 of the DI states that 'levies on canteen profits' are accumulated in the Amenities Reserve Account (**the amenities account**). However, because there is no specific mention of a levy within the DI, or of a levy of 10 per cent, DCS disputes whether my description of the charge as 'a levy of 10 per cent' is accurate. It does, however, acknowledge that it applies 'a margin of 10% to the cost of non tobacco goods acquired for sale'.
5. Whether the charge can be described as a levy is relevant because it goes to the question of the legal authority for it. The Shorter Oxford English Dictionary relevantly defines a levy as:
  1. a. The collection of an assessment, duty, or tax (formerly also, of a debt or fine) ME.
  - b. A tax, *esp.* one raised for a particular purpose; a call for or contribution of so much per member of a society. M17

The Macquarie Dictionary definition is:

1. a. raising or collecting, as of money or troops, by authority or force. 2. that which is raised, as a tax assessment or a body of troops

6. In my view it is accurate to describe the additional margin as a levy, as so defined. I will continue to use that terminology in the remainder of this report.
7. The amenities account has been used to acquire recreational items for prisoners including sporting equipment, video hire, playing cards and board games, squash

rackets, weight equipment and maintenance, balls, and music equipment. In some sites the account has addressed prisoner requests, and has been used for digital televisions, a smoking shelter and internal prisoner activities such as sporting competitions.

8. Arising from two individual prisoner complaints, I became concerned that:
- there was no legal authority for the imposition of the prisoner amenities levy
  - the prisoner amenities levy was being charged without notice to prisoners, simply as an undisclosed component of the purchase price for an item
  - the GST was being wrongly levied on the total cost including the prisoner amenities levy, rather than on the cost of the item alone
- I also sought an explanation of why tobacco products are excluded from the application of the prisoner amenities levy.
9. In my view DCS's duty of care extends to the provision of facilities to ensure that prisoners are gainfully occupied during their incarceration. However, I accept as a matter of principle that it is reasonable for prisoners to make a contribution towards the cost of recreational items which assist in making their terms of imprisonment less burdensome than would otherwise be the case.

### Whether DCS has legal authority to charge the prisoner amenities levy

10. The first issue is whether DCS has the legal authority to charge the prisoner amenities levy. DCS advises that it has imposed the levy (which it describes as a margin), and operated the amenities account, for over 25 years under the DI.
11. In my view section 32 of the Act does not empower the manager to operate a profit-making business by selling items to prisoners, and in my view it does not provide legislative authority for the imposition of the prisoner amenities levy. I consider that the legal obligation on managers to make personal use items available for purchase carries with it an implication that the charge for those items must be reasonable.
12. I note that DCS states that 'there is certainly no profit-making business occurring', but the DI clearly contemplates that some profit will be made. It refers expressly to 'canteen profits'<sup>3</sup>, and 'profits from prisoners' canteens';<sup>4</sup> and indeed there would be no purpose in establishing the amenities fund if the sale of personal use items were to be undertaken purely on a cost recovery basis.
13. I have also considered whether legislative authority for the prisoner amenities levy may be supplied by the *Fees Regulation Act 1927*. Section 4(f) of that Act provides that the Act applies only if the levy is a 'fee' for the purposes of that Act. Because section 32 of the *Correctional Services Act 1982* already establishes that the items are to be purchased, in my view the prisoner amenities levy cannot be described as a fee for the service of making of goods available for sale.
14. Whilst I do not consider that either of these provisions permits the charging of the prisoner amenities levy in its current form, I note that in my view there is nothing which precludes DCS from charging an additional amount on the wholesale cost of the goods, in order to recoup some of the cost of supplying them for sale to prisoners. In order to establish the necessary linkage between the cost of supplying the goods and the service charge levied on prisoners, it would be reasonable to calculate the actual costs incurred on an overall basis, and then apply that overall cost as a percentage margin on the wholesale price.

<sup>3</sup> Paragraphs 3.3 and 4.4.

<sup>4</sup> Paragraph 4.1.

15. However, DCS has provided no evidence to my investigation that the prisoner amenities levy is calculated by reference to the costs of providing items for sale. To the contrary, it has acknowledged that it simply levies an additional 10 per cent on each and every non tobacco item sold in prison canteens.
16. I understand that the practice adopted by DCS has been to charge GST on the wholesale cost of the goods, plus the prisoner amenities levy. I am advised that there is no basis upon which the GST can be charged on the levy whilst it is characterised as such. If the 10 per cent additional charge is characterised as recovering the costs of supplying the items, the imposition of the GST is likely to be unobjectionable.
17. The Chief Executive advised me in May 2010 that DI 88 is under review, but that completion of the review awaited further legal advice. At this time, I am not aware of the outcome of the review. However, the Chief Executive advised me on 4 April 2011 that the Minister has agreed to include amendments in a Bill currently being prepared to amend the Act, to address any issues that may require attention. On 6 June 2011, he provided me with draft legislation for this purpose, and advised me that he expects the Bill will be introduced to Parliament in the very near future.
18. My final view is that there is currently no legal authority for the imposition of the prisoner amenities levy, and that DCS's action in imposing the levy is contrary to law within the meaning of section 25(1)(a) of the *Ombudsman Act 1972*.
19. I have given consideration to the making of a recommendation under section 25(2)(b) of the *Ombudsman Act 1972* to rectify or mitigate the effect of DCS' actions. I have decided not to make any such recommendation, for the following reasons:
  - there would be insurmountable practical difficulty in identifying which items have been purchased by individual prisoners, and arranging reimbursement
  - I have no evidence that the funds collected have been used for anything other than benefits to prisoners
  - DCS has confirmed to me that steps are being taken to amend the Act to authorise the imposition of the prisoner amenities levy in the future.

### Whether DCS failed to disclose the amount of the prisoner amenities levy

20. The Chief Executive advises that DCS does not identify the prisoner amenities levy on canteen price lists or prisoner buy sheets, as DCS does not consider it to be a separate cost, and that the price of an item including the levy is shown as the pre-GST price. It therefore appears to me that the prisoner amenities levy has been charged without specific notice to prisoners, simply as a component of the purchase price for an item. In this respect, the levy is unlike the GST, which is separately identified as an additional charge.
21. In the absence of any publication of the prisoner amenities levy, prisoners will not necessarily be aware of its imposition. My office was informed that this advice may be provided at Prisoner Needs Committee meetings, but that this was not standard practice across all institutions. I accept also that it is possible that prisoners will become aware of the existence of the levy through informal means.
22. However, in my view DCS should have specifically disclosed to prisoners the fact that an amount is charged on each canteen purchase for the prisoner amenities levy. I consider that prisoners would have a reasonable expectation that their legal entitlement to purchase items of personal use under section 32 of the Act could be exercised at a price commensurate to the cost to DCS of supplying the

item. It appears to me that not only is there currently no legislative authority for the prisoner amenities levy, but that prisoners have been charged the levy without being advised that it was being imposed.

23. In his response to my provisional report, the Chief Executive stated:

Having to break out the various components of the cost of a good for sale would be both impractical and unnecessary. In any event there is no "levy" applied, and the legal basis on which (I) consider the actions of DCS to be wrong is not clear to (the Chief Executive) from the report.

24. Put simply, my view is that DCS is under a legal obligation to provide items for purchase by prisoners, and it is a necessary implication that the price charged for those items must be reasonable. DCS should be able to explain or justify the additional levy which it charges by reference to costs which it incurs. It has not provided any evidence to me that it has done so. In fact, the DI indicates that DCS seeks to make a profit from the canteen activities. Further, DCS does not advise prisoners of the extent of the prisoner amenities levy.

25. My final view is that DCS's failure to specifically disclose the existence of the prisoner amenities levy as a component of the price of items supplied under section 32 of the Act is wrong within the meaning of section 25(1)(g) of the *Ombudsman Act 1972*.

### Whether DCS failed to inform prisoners on how funds collected from the prisoner amenities levy are disbursed

26. The third issue is whether DCS has properly consulted with, and informed prisoners about, how funds from the account are spent within each prison. The Chief Executive has advised me that the account has been used to buy recreational items for prisoners including sporting equipment and board games. In his response to my provisional report he stated that:

DCS does not agree that it must consult with prisoners on how it may apply funds that it chooses to make available for prisoner amenities. As with all departmental expenditure that has an impact on prisoners (uniforms, food, library material, programs etc) DCS will as a matter of good practice take into account the view of relevant stakeholders where possible and appropriate, and where it is practical to do so.

The use of the Prisoner Needs Committee for this purpose, is evidence of DCS intentions in this regard. As it would be open to DCS not to apply any component of the canteen proceeds (which do not cover its costs) to the ARA and it is only Departmental practice (rather than any legislative requirement) that provides for this treatment, but for DI 88 it is arguable DCS has no more need to consult with prisoners about the use of these departmental funds than it does on any other expenditure of departmental funds.

27. I accept as a matter of principle that it is reasonable for prisoners to make a contribution towards the cost of recreational items which assist in making their terms of imprisonment less burdensome than would otherwise be the case. However, the Chief Executive's statement above in my view fails to acknowledge that these funds are unlike other departmental funds. They are raised directly from prisoners, as a surcharge on items which the department is legally obliged to supply to them.

28. I consider that the disbursement of funds accumulated through the operation of the levy should be undertaken in close consultation with prisoners, from whom the funds are raised. It appears to me that this has not always been the case. The Chief Executive has advised me that at prisons with 'longer term, more stable

populations', prisoner needs committees or recreation staff discuss the sort of items to be bought using the account, and in my view this is commendable. I appreciate that in prisons with more transient populations, discerning the wishes of the prisoners will be more difficult.

29. Nonetheless, the account comprises funds contributed by prisoners for facilities and services which would otherwise be - at least to some extent - within the responsibility of DCS to provide. It appears to me that DCS has not universally appreciated and respected the true nature of the funds. I consider that a consistent approach across the system to the disbursement of these funds should be adopted and that this should involve strong prisoner involvement.
30. My final view is that DCS's failure consistently to consult and inform prisoners on how funds raised through the prisoner amenities levy are disbursed is wrong within the meaning of section 25(1)(g) of the *Ombudsman Act 1972*.

## OPINION

In imposing and collecting a prisoner amenities levy in a way which is not directly referable to the costs of providing personal use items for purchase by prisoners, DCS has acted in a manner which is contrary to law within the meaning of section 25(1)(a) of the *Ombudsman Act 1972*.

In failing to disclose the existence of the prisoner amenities levy as a component of the price of items supplied under section 32 of the Act, DCS has acted in a manner which is wrong within the meaning of section 25(1)(g) of the *Ombudsman Act 1972*.

In failing consistently to consult and inform prisoners on how funds raised through the prisoner amenities levy are disbursed, DCS has acted in a manner which is wrong within the meaning of section 25(1)(g) of the *Ombudsman Act 1972*.

Under section 25(2)(b) of the *Ombudsman Act 1972*, to rectify or mitigate the effect of DCS' actions, I recommend that DCS should review its practices to ensure that system-wide procedures are in place to consult and inform prisoners about how funds raised through the prisoner amenities levy are disbursed.

Under section 25(4) of the *Ombudsman Act 1972* I can request an agency to report to me on what steps have been taken to give effect to a recommendation and, if no such steps have been taken, the reason for the inaction.

I request that DCS inform me of its decision in relation to the above recommendation by 31 July 2011 and, if it intends not to accept the recommendation, its reason for doing so.

Richard Bingham  
**SA OMBUDSMAN**

7 June 2011