

Redacted Report
Full investigation - *Ombudsman Act 1972*

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| Complainant | [The complainant] |
| Department | Department for Correctional Services (DCS) |
| Ombudsman reference | 2017/04856 |
| Date complaint received | 11 May 2017 |
| Issues | <ol style="list-style-type: none">1. Whether the department was wrong in failing to ensure that the complainant understood the induction process2. Whether the department was wrong in failing to provide the complainant with documents in Somalian |

Jurisdiction

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

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- meeting with the complainant
- seeking a response from the department
- considering the *Correctional Services Act 1982*
- considering the DCS Standard Operating Procedure, SOP001A *Custodial - Admission - Case Management*, version 6, approved 25 June 2014 (**SOP001A**)
- providing the department and the complainant with my provisional report for comment, and considering the department's response
- 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:

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

Response to my provisional report

The department responded to my provisional report by letter dated 3 November 2017, in summary, that it:

- accepts that the complainant was not provided with a translator
- remains of the view that there is no evidence that [the complainant] was not able to sufficiently understand the induction process when it was explained to him verbally by officers
- accepts that a translator would have assisted the process
- accepts that work should be undertaken to assess how induction paperwork (and other documentation) could be translated into at least some foreign languages.

The department also advised me that it has already commenced work in line with my recommendations and provided details of the steps it has taken.

I have not revised my views in response to the department's submission.

The complainant did not provide a response to my provisional report. I note that I sent the provisional report to the complainant and to his partner with letters advising that I wished to make an appointment for the complainant to attend my Office to meet with a Somalian interpreter to have the provisional report read to him in Somalian and to give him the opportunity to ask any questions. The complainant did not contact me to arrange to meet the interpreter. My Office made a number of attempts to contact the complainant's partner by telephone to follow up on arranging the meeting with the complainant and the complainant but was not able to make contact.

Background

1. The complainant, is Somalian and has limited English. He was in Yatala Labour Prison (YLP) from 6 December 2016 to 7 December 2016 and 12 January 2017 to 25 January 2017.
2. The complainant has complained that when he was in YLP he asked for an interpreter and was told by the officer that there was not one available.
3. The complainant said that when he was inducted in YLP an officer sat beside him and read the contents of the forms to him in English and he signed them.
4. The complainant had no visitors and made no phone calls during his time at YLP. When he was released his family was not advised and he caught a bus to the city.
5. The Chief Executive of the department, Mr David Brown, provided my Office with a response to the allegations by letter dated 13 September 2017 (**the department's response**).

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

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

Relevant law/policies

6. Section 83(4) of the Correctional Services Act provides:

The Minister must cause rules made under this section to be published for the benefit of prisoners in such a manner as the Minister thinks fit and, in giving effect to this section, must ensure, as far as is reasonably practicable, that the rules are made known to any prisoner who is illiterate or whose principal language is not the English language.

7. SOP001A prescribes the procedures to be followed by DCS employees when undertaking the admission of prisoners. Clause 3.11.8 states that prisoners must be:

...made aware of the Prisoner Induction Handbook, ensuring that if a prisoner is illiterate or is from non-English speaking background they are made aware of its existence and content.

Standards/guidelines

8. There are international standards that provide guidance as to the acceptable standards for the treatment of prisoners. These include the three main United Nations standards relating specifically to prisons, namely:

- the Standard Minimum Rules for the Treatment of Prisoners (**the UN Standard Minimum Rules**)³
- the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (**the UN Body of Principles**)⁴
- the Basic Principles for the Treatment of Prisoners (**the UN Basic Principles**).⁵

9. Whilst the United Nations standards are not legally binding, they seek to describe a model prison system. The Australian Institute of Criminology website states that these standards:

... set out what is accepted to be good general principle and practice in the treatment of prisoners. They represent the minimum conditions which are accepted as suitable by the United Nations and, as such, are also intended to guard against mistreatment, particularly in connection with the enforcement of discipline and the use of instruments of restraint in penal institutions.⁶

10. Rule 6 in the UN Standard Minimum Rules prohibits any discriminatory treatment of prisoners which is based on the grounds of ...language... or other status.

11. Rule 35 is as follows:

(1) Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution.

³ Standard Minimum Rules for the Treatment of Prisoners, United Nations, 13 May 1977.

⁴ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, United Nations, 9 December 1988.

⁵ Basic Principles for the Treatment of Prisoners, United Nations, 14 December, 1990.

⁶ http://www.aic.gov.au/criminal_justice_system/corrections/reform/standards.aspx

12. Both the UN Body of Principles and the UN Basic Principles provide that there should be no discrimination on the grounds of language.⁷ Principle 14 of the UN Body of Principles is as follows:

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

13. Principle 13 is as follows:

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on an explanation of his rights and how to avail himself of such rights.

14. The international instruments referred to above are not incorporated into domestic law in the way required by section 3 of the *Administrative Decisions (Effect of International Instruments) Act 1995* (SA). This Act provides that international instruments that are binding in international law are binding on state administrative decisions 'only to the extent the instrument has the force of domestic law under an Act of the Parliament of the Commonwealth or the State.'⁸ Nonetheless, it is my view that in a community such as South Australia, we should be aiming to exceed these minimum international standards in the humane treatment of prisoners.

15. The Standard Guidelines for Corrections in Australia (**the Standard Guidelines**) were first published in 1978.⁹ They have been periodically reviewed, revised and updated, with the last revision undertaken in 2012.¹⁰ They are modelled on the UN Standard Minimum Rules and, whilst they do not have the force of law, are widely accepted as providing appropriate standards for the management of prisoners in Australia.

16. The Standard Guidelines set out ten guiding principles. Guiding Principle for Community Corrections 7 provides that the design and management of community correctional services should reflect specific needs of offenders that may arise from their gender, age, cultural background, physical or mental impairment, health status, or other potential sources of discrimination. Guiding Principle for the Management of Prisoners 2 states that prisoners should be managed equitably, with recognition of their diverse needs.

17. Guideline 1.4 of the Standard Guidelines states:

All prisoners should be inducted into the prison by undergoing a formal reception process as soon as practicable after receipt that provides key summary information necessary to the prisoner understanding the prison regime and the requirements placed on prisoners.

18. Guideline 1.5 states:

If a prisoner is illiterate, information should be conveyed orally. Such information should be presented in a linguistic and culturally relevant form, using interpreters where necessary.

⁷ Basic Principles for the Treatment of Prisoners, United Nations, 14 December, 1990, Principle 2. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment United Nations, 9 December 1988, Principle 5.

⁸ *Administrative Decisions (Effect of International Instruments) Act 1995* (SA), sub-section 3(1).

⁹ Standard Guidelines for Corrections in Australia, Revised 2012.

¹⁰ Ibid.

19. Guideline 1.6 states:

A further or extended period for assessment and orientation should also be provided where practicable, using interpreters where necessary in order to maximise prisoners' understanding of information, and to aid better assessment.

20. In summary, the international and national standards and practice acknowledge that prisoners should not be discriminated against on the grounds of language and should be provided with information in a language that they understand.

Whether the department was wrong in failing to ensure that the complainant understood the induction process

21. I have considered whether the department met the appropriate international and national standards and practices, acknowledging that prisoners should not be discriminated against on the grounds of language and should be provided with information in a language that they understand.
22. It is clear from the complainant's prison documents that he advised department officers that he did not understand English and required an interpreter.
23. The complainant's 'Prisoner Screening Form' dated 6 December 2016 records that he is from a non-English speaking background and notes the language he speaks as 'African'.
24. The complainant's 'Prisoner Interview Form' dated 6 December 2016 records as follows:
- his country of birth as Somalia
 - his 'Cultural Group' as 'other non-English speaking'
 - that he cannot read English
 - that he cannot write in English
 - that an interpreter is required
 - that he has special requirements, being that 'can't speak English very well'.
25. The complainant's 'Prisoner Movement Order / Special needs Information Form' dated 25 January 2017 records that he is 'Aboriginal or Torres Strait Islander' and 'speaks English'.
26. The complainant made a 'Request Form' on 15 January 2017 requesting a Duty Solicitor and a Somali interpreter; a handwritten note on the form states 'I need interpreter Somalia'.
27. When the department was initially approached by my Office in relation to this matter, it advised my Office as follows by email dated 10 July 2017:

From review of documentation available, during the most recent admission there is no evidence either way (to suggest that he did/didn't request an interpreter).¹¹

28. It is unclear to me why, in the circumstances, this response was provided, and it was because my Office requested all relevant documentation that I became aware that it was misleading. Later, by email dated 3 August 2017, the department acknowledged that the complainant requested an interpreter and may not have understood the induction process, as follows:

...Whilst prison management has previously stated that there was no evidence available that [the complainant] did, or didn't request an interpreter, and there is evidence to suggest that he was able to understand and communicate with staff and other prisoners at times, from

¹¹ Email from Ms Jacqueline Casey, Director Governance and Executive Support, DCS to my officer on 19 July 2017.

review of his now archived prisoner file (and the attached documentation), it has been determined that there are inconsistencies with that advice.¹²

29. Further, the department's response includes:

DCS accepts that from the evidence available, [the complainant] was not provided with a translator upon admission (on both occasions). Prison Management has advised me however that there is no evidence that [the complainant] was not able to sufficiently understand the induction process when it was explained to him (verbally) by officers. As indicated in earlier responses to your office, there is some evidence to suggest that [the complainant] was able to understand and communicate (verbally) with staff and other prisoners during his brief periods of imprisonment. Regardless, the Department accepts that a translator would have assisted this process further.

30. The department repeated these views in its response to my provisional report. I, however, question whether there is sufficient evidence that the complainant was able to understand and communicate in English.

31. I note that the complainant's '7-Day Observation Form' commencing on 13 January 2017 records 'no' for each of the 7 consecutive days for the question 'does the prisoner appear to have trouble communicating and understanding instructions?' However, on 27 June 2017 two of my officers met with the complainant. It is apparent from the recording of the meeting that the complainant does not have a good understanding of English and would not have clearly understood the induction process. My Office has subsequently either communicated with the complainant in writing translated into Somalian or has offered to arrange to meet him with an interpreter.

32. I further note that the complainant told my investigation that both Centrelink and the Magistrate's Court have supplied interpreters to assist him.

33. In any event, the department, however, acknowledged that it 'was wrong or unreasonable' in failing to engage an interpreter for the complainant.¹³ In my view, whenever a prisoner requests an interpreter they should be provided with one and it is wrong not to do so.

34. I further accept that the complainant was unable to make phone calls to his family or have them visit him or inform them of his release time as he did not understand the rules and protocols for phone calls and visits.

35. Given the above, it is my final view that the department acted in a manner that was wrong by failing to provide the complainant with an interpreter during his induction process, particularly in relation to his second period of imprisonment from 12 January 2017 to 25 January 2017. I acknowledge that it may not have been possible for the department to arrange an interpreter for the prisoner during his first period of imprisonment from 6 December 2016 to 7 December 2016 given the short timeframe and the possible lack of availability of Somalian interpreters at the time.

36. No prisoner, however, should be disadvantaged in accessing services and programs, understanding their rights and understanding the induction process, as a consequence of their non-English speaking background. Language services should be arranged not only when communication with a prisoner is impossible, but also when the prisoner may be disadvantaged without the services of an interpreter.

¹² Email from Ms Megan Deer, Acting Manager Systems and Security, Statewide Operations to Ombudsman SA on 3 August 2017.

¹³ Letter from the Chief Executive of the department, Mr David Brown, to the Ombudsman dated 13 September 2017 (the department's response).

37. The department has acknowledged that there is 'currently no central process for translation and interpreter services within existing Departmental process' and has advised that these services are currently 'arranged locally through escalation to the Manager Offender Development or Social Worker.'¹⁴ As such, it appears to me that, irrespective of whether or not a prisoner states that they do not speak English and/or requests an interpreter, the decision is left to the discretion of the individual officers conducting the induction process, without guidance from any policy or procedure.
38. In my view, upon reception into custody, officers must identify the prisoner's preferred language and, where appropriate, arrange language services to facilitate the induction process. It is the responsibility of department officers to use the most effective range of language services when a prisoner has expressed, or has been observed to have, difficulty communicating in English and, as such, the department must ensure that it:
- identifies linguistically diverse prisoners on their reception into custody
 - is responsible for arranging appropriate language services, as required, to complete the reception and induction process
 - recognises the rights of all prisoners to fair and equitable access to the services, regardless of their cultural and ethnic background, national origin
 - provides prisoners from culturally or linguistically diverse backgrounds the same information and opportunities as prisoners who speak English fluently
 - manages linguistically diverse prisoners with dignity and understanding, and in a manner that is sensitive to their cultural needs
 - where necessary, provides assistance from accredited interpreters and translation services.
39. In my view, an accredited interpreter should be engaged in the following circumstances:
- when a prisoner has requested an interpreter
 - when there is any doubt about the prisoner's ability to comprehend or express themselves in English
 - when a prisoner has any difficulties using, reading or understanding English
 - when a prisoner has basic English language skills, but not the skills necessary to understand information provided to them.
40. In 2016 overseas born prisoners accounted for 18% of the South Australian adult prisoner population. There were over 300 prisoners in South Australia originating from countries of birth where English is not the primary language spoken in that country.¹⁵
41. The South Australian Government has a Multicultural Action Plan for South Australia that reflects a whole of government commitment 'to strengthen the capacity to respond to the fundamental social issues of our culturally diverse communities' and to 'improve the way government departments respond to cultural diversity in their service delivery.'¹⁶ The Action Plan states that it will:
- ...release an Interpreting and Translation Policy to guide South Australian Government agencies on the use of interpreters and translators for people from culturally and linguistically diverse backgrounds.¹⁷
42. I acknowledge the department's positive reaction to the issue raised in this investigation. In its response it advised me as follows:

¹⁴ Email from Ms Megan Deer, Acting Manager Systems and Security, Statewide Operations to Ombudsman SA on 3 August 2017.

¹⁵ <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~South%20Australia~21>

¹⁶ Government of South Australia, Department for Communities and Social Inclusion, 'Multicultural Action Plan for South Australia 2017-2018', November 2016, page 12.

¹⁷ Ibid.

As indicated in earlier responses to your office, the Department accepts that there are currently no formal processes (through the application of a Standard Operating Procedure or Policy) that guide staff in relation to the engagement of translation and interpreter services. To remedy this gap, an instruction will be issued to General Managers to remind them that requests for translators noted at the time of admission must be escalated as a matter of priority to the Manager Offender Development. A copy of this will be provided to your office once drafted.

I also bring to your attention the approach currently being considered for a Government-wide Interpreter and Translation Policy. DCS supported the proposal given the benefit to having a central policy system.

As such, the Department's Offender Development Directorate has been tasked to undertake the work required to develop a policy. In addition, I will request that the same project consider how induction paperwork can be translated into common languages (other than English). I am of the view that combined with the instruction to General Managers, this work will appropriately address the issue of interpreter and translation services across the prison system.

43. I consider that the South Australian Government's Action Plan and the department's proposed approach will address the discrimination of prisoners on the grounds of language and will ensure that prisoners are provided with information in a language that they understand.
44. As such, my recommendations are in accord with the approach of the department.

Conclusion

In light of the above, my final view is that, by failing to engage an interpreter and ensure that the complainant understood the induction process, the department acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

Recommendations

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

1. issue an instruction to General Managers to remind them that requests for translators noted at the time of admission must be escalated as a matter of priority to the Manager Offender Development
2. implement a policy for the reception, induction and management of Non-English speaking prisoners
3. translate induction paperwork into common languages (other than English).

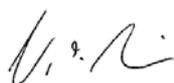
Whether the department was wrong in failing to provide the complainant with documents in Somalian

45. I have considered whether the department acted in a manner that was wrong by failing to provide the complainant with induction documents in Somalian.
46. I consider that the department should use translated documents when practicable and necessary to aid communication with non-English speaking prisoners in order to best ensure that linguistically diverse prisoners fully understand their rights and responsibilities as well as the regimes and processes they will be subject to in prison.

47. I do acknowledge, however, that this may not always be possible, particularly in the case of the complainant, who was only in prison for a very short time and spoke a language that is not common amongst South Australian prisoners.
48. The department provided the following response, *inter alia*, to this issue:
- ...DCS does not accept that induction paperwork should have been provided to [the complainant] in Somali on this occasion given processes were not in place to facilitate this at the time. Further, I am informed that there are at least three dialects of Somali.
- As at 7 September 2017, there were prisoners from 76 different nationalities accommodated across the prison system, none of whom identified as Somalian. Whilst the provision of induction paperwork in all languages other than English would be difficult, the Department does accept that work should be undertaken to assess how induction paperwork (and other documentation) could be translated into at least some foreign languages...
49. I agree with the view of the department. I consider that it is not practical to have induction documents translated into all languages other than English, but that it is appropriate for the department to have induction documents available in some of the most common languages of prisoners in South Australia other than English.
50. Whilst I do not consider that the department was wrong in failing to provide the complainant with induction documents in Somalian in these circumstances, it is, however, necessary for the department to comply with clause 3.11.8 of SOP001A. Clause 3.11.8 provides that illiterate or non-English speaking prisoners must be made aware of the existence and contents of the Prisoner Induction Handbook.
51. Whilst I am of the view that the department acted in breach of clause 3.11.8 of SOP001A because I do not consider that the complainant was sufficiently made aware of the existence and contents of the Prisoner Induction Handbook, I do not think that translating the induction documents into Somalian was necessary to avoid this error. The department could have ensured that the complainant was made aware of the existence and contents of the Prisoner Induction Handbook by providing an accredited translator during the induction process.

Conclusion

In light of the above, my final view is that, by failing to have the induction documents translated into Somalian, the department did not act in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.



Wayne Lines
SA OMBUDSMAN

9 November 2017