

**SUBMISSION TO THE FIJI LAW
REFORM COMMISSION'S
REVIEW OF PRISONS
LEGISLATION**

CITIZENS' CONSTITUTIONAL FORUM

March 2004

INTRODUCTION

The Fiji Law Reform Commission ('the FLRC') has stated that the objectives of this review are:

- to revise and update the prisons legislation, having regard to the shift from a philosophy of containment to one of correctional service delivery; and
- to improve the quality of service delivery within prisons, in conformity with international standards of human rights, as required by the (Fiji) Constitution (Amendment) Act 1997 ('the Constitution'), the Universal Declaration of Human Rights and the United Nations Standards for the Humane Treatment of Prisoners.

The Citizens' Constitutional Forum ('the CCF') strongly supports these objectives, and especially the second, which essentially reflects the truism that criminals are sent to prison AS punishment, and not FOR punishment.

We would also urge the FLRC to adopt an additional objective:

- to ensure the prisons legislation is suitably adapted to achieve the four aims of the sentencing process, namely:
 - (1) **retribution**, or just punishment of the offender in proportion to the crime committed;
 - (2) **deterrence** of the offender from re-offending, and of other potential offenders within the community;
 - (3) **protection** of the community from the commission of further crimes by the offender or others; and
 - (4) **rehabilitation** of the offender, in order to prevent re-offending and facilitate his or her re-integration into the community.

Following are the CCF's specific comments on the four issues papers released by the FLRC. For ease of reference, we have used the same numbered paragraph headings as appear in each issues paper.

ISSUES PAPER NO 1 – ASPECTS OF PRISONS ADMINISTRATION

3.2 Civil Prisoners – debtors, fine defaulters, etc

Although the issue may not be central to this review, the CCF records its view that debtors and fine defaulters should only ever be imprisoned in exceptional circumstances, such as for contempt of court.

3.6 Powers and Duties of Officers in the Prisons Service

The FLRC's observations on the provisions dealing with the powers and duties of prison officers include the suggestion that many of the existing provisions of the Prisons Act could be removed to subordinate legislation. The CCF does not necessarily oppose this; however, it is suggested that all matters which can conveniently be included in the Act should be so included, and only those matters of detail which may require frequent amendment should be included in regulations or other subordinate legislation. This is desirable in the interests of accountability and good governance, since subordinate legislation may not be considered by Parliament.

3.8 Discipline of Prison Officers

Prison officers' discipline is likely to be related to the nature and conditions of their work. Consideration should be given to ensuring that prison officers are not required to work excessively long shifts, that they are entitled to adequate recreational and sick leave, and that they have ready access to professional counselling.

3.10 Admission and Confinement of Prisoners

In addition to the separation of male and female prisoners, and the requirement that female prisoners be attended by female prison officers, the CCF also supports the separation of unconvicted prisoners (and civil prisoners, if any) from convicted prisoners, and juvenile prisoners from adults. These measures are necessary for safety reasons, to promote discipline and assist in rehabilitation. In the case of unconvicted prisoners, separation is a corollary to the presumption of innocence.

It is noted that the separation of unconvicted prisoners from convicted prisoners and juveniles from adults are required to be implemented "so far as practicable" by sub-sections 27(4) and (5) of the Constitution.

The CCF suggests that infant children of female prisoners should only be separated from their mothers in exceptional circumstances, since it will almost always be in the best interests of both mother and child that they be

accommodated together. This is consistent with Article 9 of the Convention on the Rights of the Child.

3.11 Custody and Removal of Prisoners

It is noted that the use of restraints on a prisoner would arguably violate the Constitutional right to freedom from cruel or degrading treatment (section 25(1)) if it were done for the purpose of punishment. In accordance with rule 33 of the Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Geneva, 1955), restraints should only be used to prevent escape during transfer or to protect the safety of the prisoner or any other person where other methods of control have failed.

The CCF agrees with the FLRC's observation that it is not appropriate for hospital staff to be required to take precautions to prevent the escape of prisoners who are placed under their care. This should remain the responsibility of prison officers.

3.12 Labour of Prisoners

The CCF supports the right of prisoners to be paid for work they perform while serving a term of imprisonment. Remuneration provides an important incentive to prisoners to take part in any work programs available (whether inside or outside the prison), and is likely to assist in preparing them to enter or re-enter the workforce on release. Rule 76 of the Standard Minimum Rules for the Treatment of Prisoners provides that prisoners should receive "equitable remuneration" for their work, and should be allowed to spend part of their earnings on approved articles for their own use and send part to their families, and that the prison administration should set aside part of each prisoner's earnings as "a savings fund to be handed over ... on his [or her] release".

It appears that no remuneration is currently prescribed for prisoners' labour, and the CCF urges that this situation be rectified as soon as possible.

3.13 Maintenance

Consideration might be given to allowing prisoners who are sick to obtain food, clothing, bedding and other necessities (including for example medicine) from private sources – the same as for civil and unconvicted prisoners.

3.18 Discipline of Prisoners

As with the use of restraints, solitary confinement of prisoners for the purpose of punishment would arguably violate the Constitutional right to freedom from cruel or degrading treatment (section 25(1)). Solitary confinement or "prisoner

separation” should only be used to protect the safety of the prisoner(s) concerned or of any other persons.

3.19 Discharge of Prisoners

The CCF does not oppose the provision in the Prisons Act for a prisoner to remain in prison after his or her sentence has expired on the ground of “acute or dangerous illness”, so long as the prisoner retains the right to leave if he or she so wishes. However, the legislation should not under any circumstances allow prisoners to be detained against their will for longer than their sentences require.

3.20 Miscellaneous

As mentioned above in relation to paragraph 3.6 of the issues paper, the CCF considers that, as a matter of principle, all matters which can conveniently be included in the Prisons Act should be so included, and only those matters of detail which may require frequent amendment should be included in regulations or other subordinate legislation.

ISSUES PAPER NO 2 – MATTERS PROMOTING A SHIFT FROM CONTAINMENT/CORRECTIONS

3.1 Extramural Punishment

The CCF agrees with the FLRC's observation that early release programs are "useful tools for the rehabilitation and reintegration of prisoners into the community", and supports the suggestion that prison authorities should supervise prisoners who are taking part in these programs.

3.3 Prisoner Classification and Rehabilitation

The CCF agrees with the FLRC's observation that "rehabilitation of prisoners relies largely on the opportunities provided by correctional institutions for participation in resocialisation, work and education programs prior to release." The system of prisoner classification should both encourage good behaviour and provide incentives to prisoners to take up suitable rehabilitation opportunities.

3.4 Visits and Prisoner Mail

The CCF agrees with the FLRC's observation that maintaining contact with family and friends is an important part of the rehabilitation process for prisoners.

3.5 Remission of Sentences

The CCF agrees with the FLRC's observation that the current provisions relating to remission of sentences do not provide a decision-making process which is transparent and affords natural justice to prisoners. The CCF suggests the FLRC might consider the replacement of the remission system by a program of conditional release or parole, such as exists in other jurisdictions including New South Wales and Queensland, Australia (see Part 6 of the (NSW) Crimes (Administration of Sentences) Act 1999 and Division 11 of Part 2 of the (Qld) Corrective Services Act 2000). As with the remission system, these programs provide for prisoners to be released early, so long as they have been of good behavior while imprisoned and do not pose an unacceptable risk to the community. However, conditional release or parole programs provide for conditions to be imposed on prisoners who are released early, designed to ensure the prisoner's continued good behaviour and assist his or her reintegration into the community – such as a condition that the prisoner submit to regular supervision until the time when his or her sentence expires.

The CCF understands that the Government has previously given "in principle" approval for the introduction of legislation to establish a parole board for Fiji. It is suggested that this should now be re-considered in light of the FLRC's recommendations.

ISSUES PAPER NO 3 – HUMAN RIGHTS CONSIDERATION (MINIMUM REQUIREMENTS FOR THE TREATMENT OF PRISONERS)

2.2 The Fijian Experience

The FLRC's apparently positive assessment of current standards of conduct within the Prisons Service is premature. The CCF hopes that the FLRC will not reach any conclusions in this regard until it has received submissions from all relevant stakeholders and experts – notably the Fiji Human Rights Commission ('the FHRC') and others with experience in dealing with the Prisons Service.

PART 3 – THE RELEVANT PRINCIPLES OF HUMAN RIGHTS

This part of the issues paper should have begun by referring to the Bill of Rights included in Chapter 4 of Fiji's Constitution. The Bill of Rights sets out enforceable human rights which are not only binding on the Prisons Service (section 21(1)(b)), but also on the legislature (section 21(1)(a)), so that any new laws or administrative arrangements made in relation to prisons must be consistent with those rights (section 21(3)).

3.1 Capital Punishment

Opinions differ as to whether capital punishment is compatible with the right to life guaranteed by section 22 of the Constitution. However, this issue is not directly relevant to the review. Since the death penalty was abolished in Fiji in 2002, references to capital punishment in the prisons legislation clearly need to be removed. The statement in the issues paper that "if the [death] sentence were ever to be reinstated in the laws of Fiji there may be some significant omissions in the context of the country's prisons legislation" is misguided. If the death penalty were re-introduced in the future, this would be done by amending the Penal Code, and the prisons legislation could be amended at the same time.

3.3 Solitary Confinement (Reduced Rations)

As the issues paper notes, the High Court has held that reduction of a prisoner's rations for the purpose of punishment violates the Constitutional right to freedom from cruel or degrading treatment (section 25(1)) (*Taito Rarasea v State* (unreported, Madraiwiwi J, 12 May 2000)). As mentioned above in relation to paragraph 3.18 of Issues Paper No 1, solitary confinement of prisoners for the purpose of punishment would arguably violate the same right. The CCF considers that solitary confinement or "prisoner separation" should only be used to protect the safety of the prisoner(s) concerned or of any other persons.

3.4 Respect for religious beliefs

Freedom of religion is guaranteed by section 35 of the Constitution. Unfair discrimination on the ground of a person's opinions or beliefs, which would include religion, is prohibited by section 38 of the Constitution.

Accordingly, it is essential that prisoners are not prevented from practising their religions, and desirable that they should have access to qualified religious representatives and other appropriate facilities. Of course, freedom of religion also means that prisoners who do not have a religion, or do not wish to practise it, must not be forced to do so.

3.5 Dealing with certain classes of prisoner

As mentioned above in relation to paragraph 3.10 of Issues Paper No 1, the CCF supports the separation of female prisoners from male prisoners, unconvicted prisoners (and civil prisoners, if any) from convicted prisoners, and juvenile prisoners from adults. These measures are necessary for safety reasons, to promote discipline and assist in rehabilitation. In the case of unconvicted prisoners, separation is a corollary to the presumption of innocence.

It is noted that the separation of unconvicted prisoners from convicted prisoners and juveniles from adults are required to be implemented "so far as practicable" by sub-sections 27(4) and (5) of the Constitution.

As mentioned above in relation to paragraph 3.2 of Issues Paper No 1, the CCF also considers that debtors and fine defaulters should only be imprisoned in exceptional circumstances, such as for contempt of court.

3.6 Provision of basic subsistence and utilities

The CCF supports the FLRC's suggestion that the prisons legislation should expressly refer to the Standard Minimum Rules for the Treatment of Prisoners. This could be done by including the Minimum Rules in a schedule to the Prisons Act, and would help to raise awareness of these important standards both within the Prisons Service and in the wider community.

3.8 Discipline and punishment

The CCF supports the FLRC's suggestion that the prisons legislation should make provision for disciplinary offences committed by prisoners, in accordance with rules 27-32 of the Standard Minimum Rules for the Treatment of Prisoners. The legislation should identify the elements of each offence, applicable penalties, who is to decide whether an offence has been committed in each case, and the process for so deciding. It is essential that prisoners are afforded procedural

fairness in the disciplinary process, and the CCF suggests that their rights in this regard should be set out in the Prisons Act, including:

- the right to have the process explained to him or her;
- the right to be informed of all the evidence against him or her;
- the right to be heard in his or her own defence;
- the right to cross-examine witnesses and call witnesses in his or her defence; and
- the right to be represented or assisted by another person if the prisoner is unable to properly represent him or herself for any reason (for example if he or she requires an interpreter).

3.9 Use of force and Instruments of Restraint

The CCF supports the FLRC's suggestion that the prisons legislation should reflect the Standard Minimum Rules for the Treatment of Prisoners in relation to the use of force or restraints by prison officers.

3.10 Information to and complaints by prisoners

The CCF supports the FLRC's suggestion that the prisons legislation should reflect the Standard Minimum Rules for the Treatment of Prisoners in relation to the provision of information to prisoners on admission and their right to make complaints.

In relation to the latter, the issues paper should have referred to section 29 of the Human Rights Commission Act 1999, which requires the person in charge of a prison to immediately forward to the FHRC, without opening or altering it, any letter written by a prisoner and addressed to the FHRC. It may be appropriate that the Prisons Act expressly refer to section 29 of the Human Rights Commission Act 1999 in this regard.

3.11 Contact with the outside world

As mentioned above in relation to paragraph 3.4 of Issues Paper No 2, the CCF considers that maintaining contact with family and friends is an important part of the rehabilitation process for prisoners. The current, highly restrictive provisions of the Prisons Regulations should be reviewed to reflect the Standard Minimum Rules for the Treatment of Prisoners.

3.12 Institutional Personnel

The CCF generally supports the principles set out in the Standard Minimum Rules for the Treatment of Prisoners in relation to institutional personnel. We also repeat the suggestion made above in relation to paragraph 3.8 of Issues Paper No 1, that consideration should be given to ensuring prison officers are not required to work excessively long shifts, that they are entitled to adequate

recreational and sick leave, and that they have ready access to professional counselling.

3.13 Prison Labour

As mentioned above in relation to paragraph 3.12 of Issues Paper No 1, it appears that no remuneration is currently prescribed for prisoners' labour, and the CCF urges that this situation be rectified as soon as possible.

3.14 Social Relations and After-Care

The CCF suggests that the Prisons Service should employ suitably qualified individuals to provide support and assistance to prisoners in preparing for their release. This could be linked to rehabilitation programs within the prison, and include counselling and references to appropriate organisations within the community that can provide support services post-release.

ISSUES PAPER NO 4 – HIV/AIDS IN THE PRISON CONTEXT

PART 3 – SOME KEY ISSUES

The CCF would encourage the FLRC to give careful consideration to the World Health Organisation’s “WHO Guidelines on HIV Infection and AIDS in Prisons” (Geneva, March 1993) (“the WHO Guidelines”), a copy which is attached to this submission, in formulating its recommendations in this area.

The CCF considers that the Prisons Service should develop and publish guidelines for the prevention of HIV transmission in Fiji’s prisons, and for the care of HIV-infected prisoners, based on the WHO Guidelines.

The Prisons Service should be required to provide training to prison officers to ensure they have the knowledge and skills to prevent HIV transmission in prisons, and to deal with situations where officers or prisoners have or are thought to have HIV/AIDS.

Prisoners should also be provided with education and information on the risks of HIV transmission in prisons, and preventive measures. Voluntary, confidential HIV testing should be made available to both officers and prisoners, with pre- and post-test counselling if desired.

3.1 The classes of persons affected

Section 25(2) of the Constitution guarantees the right of every person to freedom from “scientific or medical treatment or procedures without his or her informed consent”. Mandatory HIV testing of prison officers or prisoners would violate this right.

Less favourable treatment by the Prisons Service of an officer, applicant for employment as a prison officer or prisoner, who had or was thought to have HIV/AIDS, could contravene the Constitutional prohibition on unfair discrimination on the ground of “actual or supposed personal characteristics or circumstances” or disability (section 38(2)(a)).

The CCF generally supports the FLRC’s suggestions for a strategy to deal with situations where a prison officer has or is thought to have HIV/AIDS.

3.2 Dealing with infectious diseases more broadly

The CCF agrees with the FLRC’s observation that HIV/AIDS is not the only infectious disease requiring careful consideration in the context of Fiji’s prisons. However, this in no way reduces the importance of addressing the problem of HIV/AIDS.

3.3 Identifying and dealing with the transmission of infection of HIV/AIDS in prisons

In order to address the problem of HIV/AIDS effectively, the FLRC must itself be absolutely frank in identifying and discussing those sexual and other practices which present a risk of HIV transmission and are known to occur within Fiji's prisons.

3.4 Conducting tests for HIV

As mentioned above in relation to paragraph 3.1 of the issues paper, mandatory HIV testing of prison officers or prisoners would be un-Constitutional. It would also be extremely costly, and totally ineffective in preventing the spread of the disease (due in part to the long period for which the virus remains undetectable following transmission).

3.5 Keeping information confidential

The CCF supports the FLRC's suggestion that prisoners' HIV status should be kept confidential and only disclosed to appropriate senior prison officers if this is necessary to ensure the safety of others. This reflects the WHO Guidelines.

3.6 The rights of infected prisoners

The CCF supports the FLRC's suggestion that "the rights of prisoners with HIV/AIDS or other infectious diseases should not be restricted other than when absolutely necessary for medical reasons."

As mentioned above in relation to paragraph 3.13 of Issues Paper No 1, the CCF suggests that consideration might be given to allowing prisoners who are sick (including those who have HIV/AIDS) to obtain food, clothing, bedding and other necessities (including for example medicine) from private sources – the same as for civil and unconvicted prisoners.

As mentioned above in relation to paragraph 3.19 of Issues Paper No 1, the CCF does not oppose the provision in the Prisons Act for a prisoner to remain in prison after his or her sentence has expired on the ground of "acute or dangerous illness", so long as the prisoner retains the right to leave if he or she so wishes. This might include a prisoner who has HIV/AIDS. However, the legislation should not under any circumstances allow prisoners, including those with HIV/AIDS, to be detained against their will for longer than their sentences require.

3.7 Segregating infected prisoners

The CCF agrees with the FLRC's suggestion that HIV-infected prisoners should not be segregated or restricted from taking part in any activities except on the advice of medical staff, and decisions on these matters should be based on the same standards and considerations as for the general public.

As mentioned above in relation to paragraph 3.1 of the issues paper, less favourable treatment of a prisoner who had or was thought to have HIV/AIDS could contravene the Constitutional prohibition on unfair discrimination on the ground of "actual or supposed personal characteristics or circumstances" or disability (section 38(2)(a)).

3.11 Issues of liability

It is likely that the issue of prison authorities' potential liability for the transmission of HIV to prison officers or prisoners has been judicially considered in other jurisdictions. The issue would probably only arise in relation to transmission by non-consensual sexual or other activity.

As a matter of principle, the CCF considers that a prison officer or prisoner who contracts HIV should have the right to sue the Prisons Service if transmission of the virus occurred as a result of negligence on the part of the Prisons Service – such as through unsafe work practices or a failure of supervision. Individual prison officers should not be liable for acts done in good faith in the course of their duties.