THE USE OF A MILITARY LEVEL OF FORCE ON CIVILIAN PRISONERS

Strip searching, urine testing, cell extractions and DNA sampling in Victoria

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Prisons in Australia are operated in a climate of fear generated by the staff in three principle ways. First, staff conduct large numbers of random strip searches which often border on sexual assault. Second, staff conduct large numbers of urine tests. The urine tests are referred to by prisoners as 'the piss test tyranny' and have prisoners constantly maintaining full bladders for fear of not being able to supply a sample on demand. Third, staff often use an extreme level of force to remove prisoners from cells or ensure compliance with orders.

Strip searching

Strip searching is part of the conditioning process by which prisoners are made malleable to the threat of force. This situation can then, in turn, be exploited when police, health care professionals and scientists take DNA samples from prisoners.

Refusing to subject to a strip search is not an option, as it is clear to all prisoners that force will be used until the individual complies or is physically unable to resist the removal of clothing. Prisoners are required to remove all clothing, one article at a time, and hand it to one of the two officers conducting the search. The officers physically search all clothing and throw or drop it to the floor after searching. The prisoner stands in various stages of undress holding the next item of clothing until the officer has finished with the previous item. Once naked, the prisoner is then ordered to:

- bend their head forward and run their fingers though their hair
- open their mouth (the 'mouth cavity inspection')
- remove any dentures if used
- pull down their bottom lip
- pull up their top lip
- lift and wiggle their tongue
- turn their head to the right and pull back their ear
- turn their head to the left and pull back their ear
- turn their head to the right ('ear canal inspection')
- turn their head to the left ('ear canal inspection')
- hold both their arms out and show the officers the front and back of their hands, between their fingers and under their arms
- lift their scrotum (it is possible to be required to peel back the foreskin if so ordered)
- turn around, bend over and pull the cheeks of their buttocks apart, displaying the space between the cheeks (the 'buttocks cavity and anal inspection')
- lift their right foot and wiggle their toes
- lift their left foot and wiggle their toes
- get dressed (the order to 'get dressed' is the last insult as it demonstrates just how powerless you are).

Female prisoners are required to remove any sanitary device and squat to the ground twice, as well as to bend over and part the cheeks of their buttocks.

Strip searching is not something that happens infrequently and, in some circumstances — prisoners can be strip searched up to six times a day. As an example, in 2001–02, Barwon Prison in Victoria conducted 12 893 strip searches on its 302 inmates.[1] Extrapolating this ratio to the State's 3000 prisoners, and taking into account that other prisons conduct slightly more strip searches, it can be reasonably estimated that Victoria conducts around 130 000 strip searches on its 3000 inmates per year. In the 130 000 searches, about 130 items of contraband were found. Ninety per cent of those finds were tobacco being taken into non-tobacco areas such as prison hospitals and transport vehicles. Finds of 'contraband' can also be puerile in the extreme; after a strip search of a visitor in January 2000, it was discovered that the person was carrying a quantity of the sweets known as 'gummy bears'.[2]

REFERENCES

1. Federation of Community Legal Centres and Victorian Council of Social Service, *Request for a Systemic Review of Discrimination Against Women in Victorian Prisons* (2005) 14 at <www.sistersinside.com.au/media/VICComplaint.pdf>.

2. This information was compiled as part of the background material released pursuant to the *Freedom of Information Act 1982* (Vic) for: Private Prisons Investigation Panel, Department of Justice (Victoria), *Report of the Independent Investigation into the Management and Operation of Victoria's Private Prisons* (2000)

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In 2001–02, 18 889 strip searches were conducted on the 202 women at the Dame Phyllis Frost Centre at Deer Park. Of that number, there was one reported find of 'contraband'.[3] In an extensively documented discrimination complaint lodged with the Victorian Equal Opportunity Commission (EOC) on 27 April 2005, it was claimed on behalf of the women at the Deer Park prison that they were strip searched more frequently than their male counterparts and that this practice amounted to 'sexual assault by the state', which left women 'feeling demoralised, humiliated and traumatised.'[4] Other claims were made in the EOC complaint about racial and ethnic discrimination associated with the unnecessary strip searching of women, as well as poor health care and a lack of other basic human services designed to maintain and respect human dignity.

Urine testing

Frequent urine testing, like strip searching, is not really aimed at detecting wrongdoing, but maintaining the climate of fear utilised as a management tool. If a prisoner refuses or fails to provide a urine sample within three hours, which may entail prison officers peering at the prisoner's genitals, then they are subjected to a fine as well as disallowed privileges — such as having physical contact with family members, including their own children. In 1999–2000, less than 5% of prisoners returned positive tests to drugs.[5] Despite this low level of detection, frequent testing of large numbers of prisoners occasionally involves dawn raids on cells by dozens of staff with sniffer dogs. These raids, and the urine testing that follows, produce very few results in terms of actually finding drugs. The practice of searching visitors' cars and their occupants by strip searching and sniffer dog actions produces even fewer results.

In conclusion, strip searching and urine testing of prisoners, and the searching of prisoners' visitors produces no meaningful result in preventing drugs entering and being used in the prison, so one needs to ask: What is it really about?

Cell extractions

If a prisoner refuses to leave a prison cell for a DNA sample or for any other reason, including a 'piss test', the officer in charge of the Unit will attempt to talk the prisoner into coming out. If this is unsuccessful, the procedure is to give the prisoner three separate warnings about five minutes apart. These warnings will advise that capsicum spray and a cell extraction team will be used if the prisoner does not comply and put their hands out of the trap on the door to be handcuffed and led out of the cell. A number of officers, generally four to six, dressed in protective clothing, don riot gear and gas masks. A final warning should be given, and if the prisoner does not comply, the trap on the door will be opened and capsicum spray — a chemical weapon — is deployed. The effects of the chemical weapons are horrific. The prison authorities describe the effects thus:

> While not absolutely fool-proof ... the results are quite dramatic. Imagine a blind man, with severe asthma, who has just dipped his face into a deep fat fryer, [these] effects will last from 10 to 30 minutes, depending on dosage, after removal from the contaminated environment.[6]

The chemical weapons are used to burn the eyes, nose, throat and lungs and cause an extreme amount of pain. In seconds, the nasal passages are blocked with phlegm, the throat constricts, and the lungs produce large amounts of phlegm which the individual's system then tries to expel through the constricted throat, with the result that they can hardly breathe. The pain and lack of breath are such that the whole focus of an individual's very existence is moved away from the conflict with those in authority to simply dealing with the pain and what very much feels like a fight to stay alive. There is no question that capsicum spray and other gases are potentially deadly.[7]

The cell extraction team then rush the cell. The prisoner is knocked to the floor, if they have not already collapsed, and pinned down with shields. Knees are dropped into the small of the back and booted feet stand on the prisoner's ankles and the back of the neck. The prisoner's arms are twisted behind their back and their hands are secured. This is done with handcuffs or the large electrical ties which were introduced into civilian policing from the military by the Police Special Operations Group, Australia's version of SWAT and the FBI's Hostage Rescue Team. The handcuffs or ties are applied so tightly as to cause extreme pain. The pain, and I have experienced this myself, is such that the only thought in an individual's mind is combating the pain. All of this is part of the 'pain compliance' philosophy, which involves inflicting so much pain on the individual that it has a paralytic effect so that they comply without any thought of resisting. The reward for compliance is the withdrawal of the applied pain. *I do not know what, if any, difference there is between these pain compliance procedures and what is commonly*

3. See Fergus Shiel and Gary Hughes, 'Women "Neglected" in Prison', *The Age* (Melbourne) 28 April 2005, 1, 6.

4. Ibid. See also Federation of Community Legal Centres and Victorian Council of Social Service, above n 1; Amanda George, 'Sexual Assault by the State' (1993) 18(1) *Alternative Law Journal* 31. It should be noted that many women in prison have been the victims of sexual assault and the constant strip searching can cause those past traumas to resurface

5. See Office of the Correctional Services Commissioner, Department of Justice (Victoria), *Statistical Profile: The Victorian Prison System 1995/96 to 1999/2000* (2000) 75.

6. Public Correctional Enterprise, 'Chemical Agents Instructors Course' (Workshop delivered at Port Phillip Prison, Melbourne, 30 November and 1 December 1999), 10. This same information is also contained in Public Correctional Enterprise, 'CORE Training Package on the use of chemical agents'. These documents were released by Department of Justice (Victoria) to North Melbourne Legal Service, 20 July 2000, pursuant to a Freedom of Information application.

7. Jude McCulloch, 'Capsicum Spray: Safe Alternative or Dangerous Chemical Weapon?' (2000) 7(3) *Journal of Law and Medicine* 311–23.

understood as torture. During cell extractions, I have heard prisoners' (muffled) screaming, pleading to God not to let them die. When listening to this, one is fearful that a murder is being committed.

The prisoner is then removed to another cell or a yard area. The prisoner is held up, or is dragged along the ground by their feet or arms. Officers hold the person under a shower, and the person's head is usually pulled back by the hair to face the stream of water. If there are no appropriate shower facilities (at Port Phillip Prison there are no taps in the showers but a press button system that is not very effective) a garden hose is applied to the face to wash off the chemical agent and the phlegm that is being expelled from the lungs and nose. The prisoner then has their clothing cut off by means of what is called a 'cut down knife', which is shaped like a question mark with the sharp edge on the inside of the curve. This is done because the chemical agent lodges between the fibres of the clothes and burns the arm pits and genital area. The showering or hosing continues for up to 30 minutes, until the prisoner is able to breathe properly again.[8] The prisoner is re-dressed and then, in the case of a DNA sampling, is presented to police, health care professionals and police forensic science technicians to take the forensic samples.

The use of force employed by police and prison officers is frequently disproportionate, often dispensed without warning, and sometimes life threateningly overwhelming.[9] One publicly available example of the overwhelming violence that is used in cell extractions can be found in the media reports of the opening of Barwon Prison in Lara (near Geelong, Victoria) in January 1990. The staff put on a show for the media of a cell extraction team at work. In the video footage that I saw, the prison manager is seen talking to the camera saying how it is a 'safe procedure and that prisoners would not be harmed in a cell extraction'. A prison officer is in a cell play-acting at being a prisoner, and staff are playing their role for the cameras. For the demonstration, the extraction team rush into the cell to 'restrain the prisoner', but in so doing, they cause deep lacerations to their workmate's face and throat. I recall the television news story about the opening of the prison which reported this event; it ended with footage of the ambulance racing down the driveway of the prison transporting the officer to hospital. The acceptability of using this level of force against prisoners has not in any way been addressed, as was illustrated by a recent coronial inquest into the death of a prisoner shot by a prison officer. The inquest found that nothing like the 'safety first' policy found in the 'Victoria Police Use of Force Philosophy' was in place in the prison system.[10]

The collateral benefits of strip searching and urine testing

Any person who is convicted of an offence under schedule 8 of the *Crimes Act 1958* (Vic), which spans everything from murder through to burglary and cultivating a narcotic plant, can be forced to provide a DNA sample in Victoria. This process involves such things as: pricking the finger to take blood; submitting to a mouth swab; the pulling out of hairs with the roots attached from the scalp; removing pubic hairs including the root by the application and removal of adhesive tape; and taking an anal or vaginal wipe.[11] Those taking the sample can use a reasonable level force, but the question of what constitutes 'reasonable force' is open to dispute in the prison context.[12]

Over the past four years, when prisoners have resisted DNA sampling undertaken for the purposes of building the DNA database, the Victoria Police have carried out 'cell extractions with riot gear and gas masks' to take the samples.[13] For example, on 14 March and 19 April 2000, police members, prison officers, health care professionals and police forensic science technicians took samples at Bendigo Prison by threatening the use of an extreme level of force. Prisoners understood intentions that 'officers from the force response unit are to be used as a "cell extraction team" for prisoners who refuse to give their blood'[14] as a very real and very direct threat of extreme violence, including the application of chemical weapons.[15] One fear builds on another here: fear of the use of a life-threatening level of force, and fear of the invasive forensic sampling procedure.

DNA technology offers far-reaching advantages for criminal investigators and prosecutors. However, it also raises serious ethical and practical issues for the medical professionals and scientists involved in the process of taking samples, and by those involved in the later testing of the samples which have been obtained by a life-threatening level of force. The forced sampling of prisoners is morally questionable, and this new policing technique is often accompanied by bending of the law by police and magistrates. At the start of the campaign pushing for every prisoners' DNA to be sampled, over 2000 orders were made for DNA samples to be taken from prisoners; however, these orders were subsequently found to have been made and executed unlawfully.[16]

Conclusion: the DNA database and the debasement of humanity

The use of force deployed to extract DNA samples is, in my view, manifestly excessive even in those cases where the request for a sample is legal. When a prisoner resists passively and says, 'No, you can't take my blood. No, I am not putting my hands through the trapdoor to be handcuffed and led away for DNA sampling', is it an appropriate level of force to use chemical weapons and overwhelming force, and to conduct a cell extraction in light of all that it entails? In such cases, it can hardly be maintained that the use of this military level of force is reasonable, necessary and proportionate to the passive refusal to comply with an order.

It has recently been reported in Queensland and NSW that as many as 50% of prisoners suffer from a diagnosable mental illness. Most are not treated or

8. This level of force can only be lawfully used after a prisoner has been given a warning. As has been seen, these orders are not always lawful: see *Lednar & Ors v Magistrates' Court and Anor* [2000] VSC 549. Tort law claims are currently before the Supreme Court in Victoria involving this kind of violence and a higher level of force where a prisoner was allegedly struck about the head with an iron 'pinch bar' during a cell extraction and after being given no warning about the threat of violence.

9. Jude McCulloch, *Blue Army: Paramilitary Policing in Australia* (2001) 15–32.

10. See Record of Investigation into the Death of Garry Whyte, by Lewis Phillip Byrne case No. 1328/02 delivered 12 January 2005.

11. *Crimes Act 1958* (Vic) s 30A.

12. For 'reasonable force', see ss 464T(7)(d), 464ZA(1), 464E(4) and 464ZF(9)(d) of the *Crimes Act 1958* (Vic).

13. Dan Meagher, 'The Quiet Revolution: A Brief History and Analysis of the Growth of Forensic Powers in Victoria' (2000) 24(2) *Criminal Law Journal* 76.

14. Tanya Giles and Keith Moor, 'Prisoners Face Blood Squad', *Herald Sun* (Melbourne), 26 February 2000, 28

15. McCulloch, above n 9.

16. In the months leading up to the action at Bendigo Prison, the police had made more than 2000 applications in the Melbourne Magistrates' Court against individuals who were in prison. Magistrates heard the applications ex parte and en masse in chambers. Individual circumstances were not raised and magistrates robotically rubber-stamped forms as they were fed to them by the police. In conducting the applications in such a fashion, magistrates failed to observe the procedures set out in s 464ZF(8) of the *Crimes Act*, which are designed to ensure that magistrates are satisfied that in all the circumstances the making of the orders are justified and that they make reasonable inquiries. Because of this and other failings, magistrates did not have the jurisdiction to make the orders, and these orders were determined to be illegal: see *Lednar & Ors v Magistrates' Court and Anor* [2000] VSC 549.

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are inadequately treated. In this context, it is more than fair to conclude that prisoners may not be thinking or acting rationally at the time of a request for a DNA sample and that they cannot rationally respond to the warning that force is about to be used on them.[17] The legal and human rights issues raised by these circumstances centre around the lawfulness of the level of force used and threatened to be used by the police and prison officers, not the conduct of the individual against whom the force is to be used. In the EOC complaint detailed above about the conditions at the Deer Park prison, the claim is made that prisoners who present with mental illness are not treated, whereas those with no mental illness but who exhibit 'behavioural' or 'attitudinal' issues are given psychotropic drugs to calm them down.[18]

The fact is that, in Victoria, extreme force is routinely used by police and prison officers. Sadly this problem does not only implicate police and prison officers; many medical professionals and scientists uncritically accept these procedures for taking a forensic sample. I argue this is a violation of the human rights of an individual.[19] This is no academic point. At Bendigo Prison, men were gassed and assaulted with a life-threatening level of force to make them compliant enough for unlawful DNA samples to be taken.[20] While these attacks were taking place, medical professionals and scientists stood by until it was their turn to step in and penetrate the skin and take the blood.

In Cell Block 1A in the Abu Ghraib prison, Iraqi men were humiliated, degraded and tortured. A number of US Army reservists, many of whom were prison officers in their civilian life, have been convicted of abusing prisoners there. One of the alleged ringleaders of the abuse, Specialist Charles A Graner, formerly a correctional officer with the Pennsylvania Department of Corrections, is reported to have said:

> The Christian in me knows it's wrong, but the Correctional Officer in me just loves to make a grown man piss himself.[21]

Prison culture is being commodified and exported to the mainstream community every day under the guise of 'security', 'lock-downs', other modes of 'community policing' and use of force modalities. It has been shown that military use of force philosophies have been introduced into the police and prison systems in the US and here in Australia. Such philosophies have been applied with brutal force in Iraq. There seems little to prevent the conduct we now label as atrocities being fully imported into our police and prisons when the reservists come home to the US and Australia, and when the serving army officers continue to train our police and prison staff. It seems that Iraq is not so far away after all.

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17. See B A Hocking, M Young, A Falconer, and P K O'Rourke, *Queensland Women Prisoners' Health Survey* (2000); NSW Chief Health Officer, *Report of the NSW Chief Health Officer: Prisoner Health* (2002). It is interesting to note that there are no hard figures on prisoner health in Victoria because, incredibly, there 'is no system in place ... to review health epidemiological data on the prisoner population': Kevin Lewis, Managing Director, Australasian Correctional Management, cited in Private Prisons Investigation Panel, Department of Justice (Victoria), *Report of the Independent Investigation into the Management and Operations of Victoria's Private Prisons* (2000) 92. Victoria's prisons have on-site medical facilities which include physiotherapy, psychology, psychiatry, dental, optical, x-ray, ward beds and outpatient services. However, despite all this, so poor is prisoner health that, in 1999–2000, Victoria's 2800 male prisoners attended 2552 appointments for medical care outside of their prisons. This basic data is not available for women prisoners: Private Prisons Investigation Panel, Department of Justice (Victoria), *Report of the Independent Investigation into the Management and Operations of Victoria's Private Prisons* (2000) 86.

18. Shiel and Hughes, above n 3.

19. 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person': *International Covenant on Civil and Political Rights*, art 10.1, in *Human Rights and Equal Opportunity Commission Act 1986* (Cth), schedule 2.

20. *Lednar & Ors v Magistrates' Court and Anor* [2000] VSC 549.

21. Judith Greene, 'From Abu Ghraib to America: Examining our Harsh Prison Culture' (2004) 4(1) *Ideas for an Open Society* 1.

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