Ombudsman &
Information and Privacy
Commissioner

Submission

To: **Corrections Action Plan Implementation Office**

From: **Office of the Ombudsman**

Re: ***Corrections Act*** **Consultation**

Date: **May 2, 2008**

In my capacity as Ombudsman for the Yukon Territory, I am writing to provide input into the discussion regarding changes to the *Corrections Act.* The function of the Ombudsman, as it relates to Community and Correctional Services and the Whitehorse Correction Centre (WCC) is to investigate and bring to resolution individual complaints. My office has responsibility to review and make recommendations on policies and procedures associated with individual complaints to ensure that systemic areas of concern are properly identified and addressed.

In preparing these comments I am mindful of the goal of the Correctional Redevelopment Process to develop "a correctional system that is substantially different from the current reality" and one that is "the best correctional system in Canada". As has been identified in the *Corrections Act* Consultation Discussion Document, to achieve this goal requires fundamental changes to the operation of the correctional system. The *Corrections Act* consultation serves as an opportunity for me to share the experience of the Office of the Ombudsman in relation to several of the key issues identified in the consultation document.

My comments are limited to addressing three questions posed in the Discussion Document.

1. Offender Accountability, Security, Motivation and Healing

Who should be on an Inmate Discipline Committee?

In the early stages of the correctional redevelopment consultation, participants observed that offenders must be held accountable for their actions, including within the correctional centre by way of the disciplinary process. In my view, the makeup of the Inmate Discipline Committee is key to ensuring inmates involved in this process are treated fairly and in accordance with law.

Following an investigation, in 2003 the former Ombudsman recommended that discipline matters should be heard by a person or persons independent of the day-to-day operations of WCC. The recommendation was based on a finding that having corrections staff hear discipline matters could result in bias, or perception of bias, and unfairness in the disciplinary process. The Department of Justice agreed in principle with that recommendation but noted that the *Corrections Act* required corrections staff to hear discipline matters.

Now is the opportunity to implement this recommendation by ensuring the Inmate Disciplinary Committee is made up of members who are not correctional staff.

Recently the Alberta *Corrections Act*[1] was amended so that discipline panels are made up of independent adjudicators and appeal adjudicators who are not corrections staff. This move to independent adjudicators is the direct result of a 2006 decision by the Alberta Queen's Bench[2], which held that the provisions permitting discipline panels to be made up of senior correctional staff failed to meet the requirements of independence and impartiality required by section 7 of the Charter of Rights and Freedoms.[3] In that case, Judge Marceau expressed the view that discipline panels made up of correctional staff could result in bias or perceived bias and the only solution is independent adjudicators or at the very least an independent chairperson as is found in the federal corrections system.[4]

As is noted in the Currie decision, there is a long history of Royal Commissions and reports in relation to prison discipline. The various reports considered different models in different jurisdictions, but all came to the same conclusion: using staff in the disciplinary process results in an unfairness. Judge Marceau summarizes the conclusion from a study of the BC prison disciplinary system that used correctional staff in the disciplinary process, this way:

> *… the Warden's system has an overarching flaw: the people who are responsible for maintaining order in the institution were also the people judging whether prisoners had committed offences against that order."*[5]

This flaw leads to a reasonable perception of bias, if not actual bias, on the part of inmates, which results in unfairness in the disciplinary process. This perception of bias on the part of inmates is understandable when one considers the clear conflict between

[1] Corrections Amendment Act, 2007, S.A. 2007, c.29
[2] This decision was not appealed by the Alberta government.
[3] Currie v. Alberta (Edmonton Remand Centre), 2006 ABQB 858 (CanLII)
[4] Since 1977 federal maximum security prisons and since 1980 medium security federal prisons have had independent chairperson added to disciplinary boards for serious disciplinary offences; minor offences are dealt with by prison officials.
[5] Currie v. Alberta (Edmonton Remand Centre), 2006 ABQB 858 (CanLII)at para. 6

the duty of a correctional officer to maintain security and discipline and the duty as a hearing officer to act as an independent and impartial decision maker. It is also important to recognize that a corrections officer has a duty to his or her fellow officers and to the facility itself and that such a relationship could very easily interfere with the duty to act as an unbiased, independent hearing officer. Even if the staff member sitting may not have had any involvement with the incident leading to the charge under consideration, the identity as correctional staff is retained, especially in the eyes of inmates.

Judge Marceau also recognized a separate form of bias that can arise in such situations. In a small closed institution such as WCC, staff members are familiar with many of the inmates and may bring to the discipline hearings a great deal of personal knowledge about a particular inmate. This can sometimes create either a favourable or unfavourable bias towards the inmate. The concern is that disciplinary decisions may be made on the basis of the personal knowledge or feelings of correctional staff members, rather than on the facts presented at the hearing.

Lastly, I should point out that in his decision, Judge Marceau considered the ability of other measures such as administrative law training for discipline committee members or giving inmates the right to counsel and the actual presence of lawyers at the hearings as alternate means of achieving procedural fairness. He was of the opinion that while these measures may help, they "cannot remove the inevitable bias in favour of evidence of correctional officers and the resulting reasonable apprehension of bias" and concluded that as long as all of the members of the Inmate Discipline Committee are corrections staff, the perception of bias will persist.

I urge you to consider the previous recommendation from my office, supported by decision in the Currie case and reflected in the Alberta legislation, which provides for an Inmate Discipline Committee structure that does not include members who are employees of corrections.

In order for Yukon to have the best correctional system in Canada, the *Corrections Act* must include an independent and impartial disciplinary process that ensures fairness and inspires the confidence of inmates in the process.

2. Correctional Services

How should the *Corrections Act* provide for correction oversight?

As indicated in the Corrections Act Discussion Document, oversight of the corrections system is an important aspect of correction legislation around the world. In Yukon, as in most provinces, corrections are currently subject to the statutory oversight of the Ombudsman. As well, in the federal corrections system the Correctional Investigator is mandated as an Ombudsman for federal offenders.

The standards for legislated Ombudsman are independence, impartiality, confidentiality, and a credible investigation process. These are the characteristics of an effective oversight body. I see no reason to depart from the oversight regime currently in place for Yukon corrections.

The responsibility of my Office as it relates to corrections is to maintain an accessible, independent avenue of redress for complaints and to make recommendations which address the areas of concern raised by individual complaints. This includes making recommendations on policies and procedures associated with areas of complaints to ensure that systemic areas of concern are identified and appropriately addressed. As Ombudsman, I am legislated to investigate and to make recommendations if a government body conducts its business in a way that is contrary to law, unreasonable, unjust, oppressive, improperly discriminatory, arbitrary, or just plain wrong.

By definition, an Ombudsman's recommendations are not binding but the authority of the office lies in its ability to thoroughly and objectively investigate a wide spectrum of administrative actions and to present its findings and recommendations to a spectrum of decision-makers, including the Legislative Assembly.

However, should this consultation result in a decision to create an exception to the method of corrections oversight currently found in Canada, I strongly urge that the government adopt and include in the statute a legislated ombudsman model of oversight. The *Corrections Act* must include the accepted standards for Ombudsman, namely independence, impartiality, confidentiality and the authority to conduct credible investigations in order to have meaningful oversight for corrections.

3. Other Matters

Health Care and the *Corrections Act*

I believe there is a need for a substantial change in the current model for the delivery of health care services within the Yukon correctional facility. This was not specifically developed as a focus of the *Corrections Act* Consultation, but it has been and remains a concern for the Office of the Ombudsman.

The provision of consistent appropriate health care for inmates, be it medical, dental or mental health services, must be considered by *Corrections Act* Consultation committees and the provision for such care must be included in any new legislation.

Complaints to the Office of the Ombudsman have revealed recurring problem areas, including the following:

- Access to timely medical care
- Access to timely dental care

- Adequacy of mental health care
- Lack of respect for professional clinical standards
- Inappropriate access to personal medical information by non-clinical staff, and
- Conflicts between clinical management and security management.

It is important to state that the kinds of problems identified above are not unique to this jurisdiction. Provincial jurisdictions and the Correctional Service of Canada have identified similar problems with the institutional delivery of health care services.

All jurisdictions face daunting challenges. Correctional systems across the country are charged with the management of a shifting population of inmates who are statistically more likely than the general population to suffer from mental illness and addictions and from the infectious diseases associated with addictions.

- In the federal corrections system, approximately 26% of female inmates and 12% of male inmates suffer from serious mental illness.
- 80% of those incarcerated have addictions issues.

Some health care issues, such as diabetes, disproportionately affect First Nations people, who are in turn disproportionately represented in prison populations.

Most of these health issues do not begin when a person is incarcerated. Nor do they end when he or she is released. However, to date the predominant correctional model of health care service delivery has not provided for continuity of health care for the inmate population.

A number of jurisdictions have tackled the complex of issues around inmate health by making fundamental changes to their health care delivery models. New approaches have been in place in some jurisdictions for a number of years and are under active consideration in others. In some cases, amendments to corrections or correctional services legislation have either been made, or are being contemplated, to facilitate new models of delivery.

In each jurisdiction where changes have been made or are being considered, the focus has been on providing greater autonomy for the management of health care delivery. The emphasis in every case has been to design a model for the provision of health care services within the correctional facility that is independent from the administration of the facility.

In order to assist the Corrections Act Consultation committees, I have included here examples of “best practices” to address the delivery of health care services to inmates.

I have briefly outlined below the different models of care adopted or under consideration in Nova Scotia, Alberta, and the Correctional Service of Canada. It is important to note that several other Canadian jurisdictions have also revised or are currently revising their own systems, having in common the decision to create a service delivery model for health care services that is independent from the correctional facility.

Nova Scotia

In Nova Scotia, the Correctional Services Division of the Department of Justice no longer employs any health care workers and is not responsible for the delivery of health care within its facilities. Superintendents of correctional facilities have no operational line authority over medical services.

The Nova Scotia *Correctional Services Act* stipulates that the Minister of Health is responsible for the provision, administration and operation health services for offenders in custody. It also provides that

> *The Minister of Health may delegate the delivery of health services to*
>
> *(a) in the case of adult offenders in custody, a district health authority; or*
>
> *(b) in the case of young persons in custody, the IWK Health Centre (a hospital).*

This approach began as an administrative arrangement between the Department of Justice and the Department of Health in 2001 and was later formalized by the amendments to the *Correctional Services Act*, which were proclaimed on July 1, 2006.

I understand that initially, the contrast in cultures between Correctional Services and the Capital Health District, which was delegated to deliver health care services, made the changes quite difficult. The research shows that seven years later, the system functions very well and has yielded a better standard of health care for inmates.

The Nova Scotia model essentially integrates institutional health care with the regular health care system. It provides continuity and consistency in the level of health care provided to individuals, whether they are in or out of the correctional system, and provides for seamless administration on both admission and discharge. This is particularly important in provincial and territorial correctional systems, where the maximum sentence being served by inmates is two years and many inmates are in custody for much shorter periods on remand.

Alberta

Alberta is also not immune to the kinds of problems identified above. Consequently, it has embarked on a review of its correctional health care services delivery model by

looking at the governance of health care management and by considering the transfer of responsibility for physical and mental health services. The goal of the exercise is to strengthen the provision of care for inmates.

To this end, Correctional Services is working with Alberta Health and Wellness, the Calgary and Capital Health Regions, Alberta Drug and Alcohol Commission and the Alberta Mental Health Board to explore these matters.

According to Alberta officials, their work is informed by both the international and national context. In Great Britain, the Ministry of Health has delivered health care in correctional institutions for a number of years. Ireland formally adopted this model on April 3 of this year. Nationally, Nova Scotia, as noted above, has functioned in this manner for seven years and Quebec is making legislative changes that will allow adoption of this model of service delivery.

The primary focus of the Alberta discussions is to provide continuity of care on release to individuals in a prison population that suffer from high rates of addiction, mental health problems and infectious diseases, where individuals cycle in and out of the correctional system. In Alberta, approximately 60% of inmates are remanded on charges, and 40% are serving sentences of less than two years.

A secondary aspect of the discussions is the principle that the health care system has a responsibility to provide care to all Alberta citizens. Provision of health care services within correctional facilities by the Ministry of Health would ensure access to the same health information whether an individual was incarcerated or not, would assist diagnosis and treatment of health problems and ensure a uniform standard of care.

By early fall of 2008, the Alberta working group may be seeking authority to allow for provision of care to inmates under the *Health Act*, by health care workers who would be employees of the health system and not the correctional facility.

Correctional Service of Canada

To combat problems similar to those that have been identified here in the Yukon, the Correctional Service of Canada (CSC) chose to adopt a new governance model and a new budgetary allocation process to separate the management of health care from the management of security within its institutions.

This involved a reorganization that created a new Health Services Branch of the Correctional service. The new branch has its own leadership and a budget distinct from the operational budgets that support correctional facilities functions and staffing.

This meant the establishment of a new Assistant Deputy Minister of Health Services position, operating at the same level as ADM's overseeing other Branches of CSC. Beneath the ADM are Regional Directors of Health Services, one for each of CSC's five regions, each of them managing budgets for health services provision in their regions.

Finally, a Chief of Health Care (usually a nurse) manages health care at each specific institution, sits on its management committee and functions as a peer, not an employee, of the Warden who is responsible for overall management of the institution.

By creating this kind of independence from day-to-day facilities management for both financing and managing health care delivery, quality of service has improved. A potential shortcoming of this model is the failure to provide the level of consistency and continuity of care that could be gained by integration with the regular health care system (the Nova Scotia model). This is not as big a consideration in the federal system as it would be in the provincial or territorial context, because federal prisoners are all serving sentences of more than two years, and many are serving much longer terms, so that the prison population does not cycle in and out of the regular health care system as is the case in the provinces and territories.

In conclusion, I reiterate that the provision of health care services is an issue that must be addressed through the *Corrections Act* Consultation. There is ample evidence to suggest that the provision of adequate health care services is a challenge for the administration at Whitehorse Correctional Centre. We can learn from other jurisdictions how these issues can best be addressed.

My Office will be monitoring the progress of this consultation. As Ombudsman and Information & Privacy Commissioner, I feel it is important to have the opportunity to review and comment on the proposed legislation. I will make a request to review a draft of the proposed legislation when it becomes available.

Tracy-Anne McPhee
Ombudsman

May 2, 2008