



Cayman Islands Human Rights Commission

promoting, protecting and preserving human rights

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Dear Chief Inspector Howell,

Thank you for your e-mail via the Commissions Secretariat dated 14 July, 2011 in which you requested the Human Rights Commission (HRC) to comment on the Draft RCIPS Custody Policy.

Introduction

The principles and substance of the RCIPS Custody Policy is expected, in its final version, to reflect the Government's commitment to protecting fundamental human rights under the European Convention on Human Rights in addition to individuals' rights, freedoms, and responsibilities embedded within Part I of the Cayman Islands Constitution Order 2009. Essentially, the RCIPS, in its policies and practices, is required to balance the rights of detained persons against the powers vested in constables in accordance with the law.

Section 5 of Part 1 of the Cayman Islands Constitution Order 2009, in addition to Article 5 (paragraph 1) of the European Convention on Human Rights, points to a presumption that everyone should enjoy liberty and that a person can only be deprived of their liberty in exceptional circumstances. Thus, section 5 begins with an unqualified assertion of the right, "No one shall be deprived by government of liberty and security of the person" and this is *followed* by the structure that "the right to liberty does not extend to the following measures taken in relation to a person in accordance with a procedure prescribed by law...."

HRC Comments on draft RCIPS Custody Policy

While the HRC would like to commend the RCIPS for taking an interest in ensuring its Custody Policy is compliant with the Bill of Rights, Freedoms and Responsibilities found in Part One of the Cayman Islands Constitution Order 2009, we would like to make it clear that this document in its present condition is far from ready to be published and/or utilized. It should be considered as a very first working draft and further work and review needs to be undertaken.

The Commission recognizes that the Draft RCIPS Custody Policy is based almost verbatim on the UK Home Office/Hampshire Constabulary model. In this regard, the contents of the document have not been contextualized to the Cayman jurisdiction in many instances. The following observations and queries have resulted from undertaking a comparison of the said documents:

1. Each section of the Hampshire custody policy is prefaced by a Potential Equality Impact Assessment. As Cayman is subject to European Convention of Human Rights (ECHR) as

well as Bill of Rights Freedoms and Responsibilities, why is this assessment not included in RCIPS draft policy?;

2. There are a number of sections omitted from the RCIPS policy; the most significant of which, from a human rights perspective, include Defence Attorneys, Custody Inspection, and Maintenance; and
3. Each section of the RCIPS policy omits a number of paragraphs at the section end, the most significant omissions, from a human rights perspective, include Monitoring and Review.

At present the document is repetitive and unnecessarily long. It contains a multitude of spelling errors and is grammatically poor which in some cases changes the meaning of the content. The document in itself is very difficult to follow as it jumps from section to section and, without an index, readers find themselves searching for where they need to pick back up on the same topic further into the document. Additionally, it is noted that the section titles do not accurately represent the content contained in the said section and that in one instance there are two sections considered Section 7. While in some instances the document cross-references the sections which are similar or relevant, it does not cross-reference these numbers in all cases. The document should also add as appendices those policies which it obscurely mentions such as the Use of Force Policy, Prisoner Medical Form, and the Risk Assessment Questions. Where are these policies/documents? In the second section 7 the document actually references Annex B and Annex C yet there are no Annexes attached and it is unknown what Annex A is supposed to be. Additionally the document refers to those in custody as prisoners in most instances but in some instances as detainees. The reference to those in custody should remain consistent throughout this policy and all other RCIPS policies to avoid confusion.

It should be noted that the comments contained below are neither exhaustive nor a comprehensive review of the draft document but are simply initial observations of the Commission. As such, the comments below do not constitute "guidelines" to the RCIPS Custody Policy as suggested in the policy's preamble. They are non-binding on the RCIPS, and are not a substitute for legal advice which should be sought from CIG Legal Dept.

About this Policy

The way in which the Royal Cayman Islands Police Service carries out its role of ensuring that persons detained in police custody are treated with humanity and with respect for the inherent dignity for the human person should obviously be in keeping with not only with the requirements and considerations of the Part I of the Cayman Islands Constitution Order 2009 and the European Convention for Human Rights but also in accordance with the:

- a) The Inspection Standards for Prisons, Places of Detention and Immigration Detention Centres in the Cayman Islands as agreed by the Prisons Inspection Board (PIB); and
- b) Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment (OPCAT).

We would encourage you to cross reference your policy guidelines with these documents as mentioned above.

General: Section 1

Overall this section repeatedly uses this phrase "into custody" which is confusing as the person is already in custody as it is speaking to any person who has already been arrested.

1.2 All prisoners must be seen by the Custody officer an officer of at least the rank of Sergeant as soon as practicable after their arrival at a police station. Once a prisoner has arrived at a police station it is no longer an option to release them by de-arresting them.

Comment: This paragraph give rise to concern as it is ambiguously worded in such a way to suggest that releasing a detainee by de-arresting is never an option once he/she has arrived at a police station. It is likely that this paragraph corresponds to the provisions in the Police Law (2010 Revision) and in accordance with the Bill of Rights, to the effect that – “When any person has been taken into custody without a warrant for an offence, the officer in charge of the police station or other place for the reception of arrested persons to which such person is brought shall at once enquire into the case, and if, when the enquiry is completed, there is no sufficient reason to believe that the person has committed any offence such person shall be released forthwith.” The paragraph needs to be more specific as to how someone in this category can be released upon arriving at the police station.

1.10 In all cases covered by 1.9 above the custody officer must still risk assess the prisoner...

Comment: It is expected that this should read “covered by 1.7 and 1.9” to ensure a standard procedure when dealing with any case which requires special attention.

2.18 Ensure that information about a prisoner's welfare and risk is communicated to relevant staff and, where appropriate, other agencies.

Comment: Does the RCIPS have a confidentiality policy? The document refers throughout to sharing or obtaining information (especially medical information) about a prisoner and until the very end of the document (in the second Section 7 number 6) there is no reference to ensuring confidential information is kept confidential and only shared in necessary circumstances. The RCIPS must ensure that they balance a prisoner's right to privacy with the safety and security needed during detention.

2.20 When in doubt, consult a medical practitioner and monitor the prisoner's condition.

Comment: It is assumed that 2.20 follows from 2.19 but it is unclear.

4.3 The custody record must be used to record all matters relating to the prisoner... Entries must include:...the requirement for and arrangements made to secure the attendance of an appropriate adult...

Comment: In accordance with Section 5(4) of the Bill of Rights, Freedoms and Responsibilities the RCIPS must ensure that, prior to making arrangements for any other appropriate adult to attend the station on behalf of the detained individual, that person is provided with the opportunity “at his or her own expenses, to retain and instruct without delay a legal practitioner of his or her own choice.”

Comment: In accordance with Section 5(4) of the Bill of Rights, Freedoms and Responsibilities attendance, alone, of an appropriate adult may not be sufficient enough to safeguard a minor's right due to the right of minors to be “afforded reasonable opportunity to communicate with his/her parents or guardians” specifically.

4.3 The custody record must be used to record all matters relating to the prisoner... Entries must include:...cultural, faith, religious, dietary requirements and the need of the prisoner to wear clothing/jewelry (including head gear);...

Comment: This should be expanded to include the need of the prisoner to wear jewelry which identifies a medical condition.

5.9 Once a decision has been made about which gender a prisoner is to be treated as, before a member of the service searches that prisoner, they shall be advised of the doubt as to the prisoner's gender. It is important that this is done to maintain the dignity of staff involved in the search.

Comment: This should be amended to read "...to maintain the inherent dignity of both the prisoner and the staff involved in the search."

6.12 An appropriate adult may not be given access to a prisoner's medical records unless the prisoner has given express permission for them to do so.

Comment: This should be amended to read "given express written permission..." Due to the extremely confidential nature of medical records, the RCIPS should take every precaution to ensure it has obtained the express permission as referred above.

6.13 Any apparent reason for medical treatment or any request made for medical treatment must be recorded by the Custody Officer on the Prisoner Medical Form (PMF), this form is also to be used to record non-confidential information from health care staff that relates to the well being of the prisoner.

Comment: If the 'non-confidential' information is part of the prisoner's medical record/information, an appropriate adult (including police officers) is restricted from accessing such information without prisoner consent per RCIPS Custody Policy paragraph 6.12.

Medical information may be broadly defined as any individually identifiable information, in electronic or physical form, in possession of, or derived from a provider of health care regarding the client's medical history, mental or physical condition, or treatment. Individually identifiable information may include or contain any element of personal identifying information sufficient to allow identification of the individual, such as the person's name, address, electronic mail address, telephone number, insurance number, or other information that, alone or in combination with other publicly available information, reveals that individual's identity.

What is the working definition held by the RCIPS of 'non-confidential information'?

7.4 Where a prisoner is released or transferred from custody any remaining medication will be disposed of by returning the medication to the George Town Hospital.

Comment: BOR Sections 2 and 15 are applicable. Medication prescribed to the prisoner is the property of the prisoner, issued to him/her for medical reasons in the interest of his/her wellbeing. It can be reasoned that such medication should not be withheld from the prisoner on release or transfer except under the direction of a medical doctor. Disposing of medication is essentially withholding medication, which can lead to adverse health effects on the prisoner and cause conflict with the police's duty of care and positive obligation under BOR Section 2.

10.5 While the below list is not endless, all necessary precautions should be taken to protect staff and other persons in police custody and police staff should seek advice when and where necessary regarding the symptoms, routes of transmission and control measures for the following communicable diseases:...

Comment: What are the necessary precautions RCIPS Officers are instructed to take in these instances? Are prisoners also aware of these precautions or is there a point in which they will be explained to ensure prisoners do not feel discriminated against?

11 Juveniles

Comment: In accordance with the Section 17 of the Bill of Rights a juvenile is considered someone under the age of 18. This policy refers to juveniles as those under the age of 17 and should be amended accordingly.

11.2 Juveniles should be placed in a cell area away from adult prisoners in custody.

Comment: Housing juveniles in separate cells than that of adults (within the same setting) may not comply with the juvenile-adult segregation requirement if in the setting the juveniles would still

be vulnerable to interactions with adult prisoners. In addition the RCIPS must ensure they are equipped to guarantee that in accordance with Section 6(3) of the Bill of Rights these juvenile prisoners are "treated in a manner appropriate to his or her age and legal status." It is recommended that the RCIPS seek legal advice on how they will ensure compliance with this constitutional mandate.

11.3 All female prisoners under the age of 17 will be informed by the custody officer that they may, at any time, request to speak to a female member of staff.

Comment: See general comment above regarding age of juveniles.

Comment: Why do only female juveniles have this right?

12 Appropriate Adults

Comment: It is unclear as to who an appropriate adult is although it is obvious that in some instances a medical practitioner or an attorney can be considered an appropriate adult. It may be useful to place a definition section in the front of the policy to assist in easily understanding these terms.

12.2 Appropriate adults do not have to be present during the taking of fingerprints and DNA samples from juveniles or persons suffering from mental disorder or who are otherwise mentally vulnerable.

Comment: Is someone who is under the influence of drugs and/or alcohol considered "otherwise mentally vulnerable"?

Prisoner Reception: Section 2

1.4 It is the custody officer's responsibility to determine what property, if any, the prisoner will be allowed to retain whilst in detention...

Comment: This section does not specifically address prisoners being able to retain religious apparel/resources.

Post Receptive Care: Section 3

5.1 Vulnerable Persons

Comment: This section is incomplete.

6.1 (a) Mental illness, including depression, personality disorder, anorexia and schizophrenia.

Comment: It is believed that instead of anorexia this paragraph means to refer to anxiety. In addition while it is found in a separate section, for consistency claustrophobia should also be mentioned here.

9.1 Although cells are designed for double occupancy. Cell sharing should only occur on an exceptional basis and will not take place where:

- a) A prisoner requires special provisions for any reason, e.g. disability;*
- b) There are diversity issues that would make sharing inappropriate, e.g. religious beliefs;*
- c) Prisoners are not of the same gender;*
- d) The prisoner is a juvenile.*

Comment: While it may seem obvious, a specific written reference to co-chargee's or a witness (under arrest for a related or unrelated crime) and defendant not being allowed to share a cell

should be included. As an alternative, a catch-all phrase could be added such as “at the discretion of the Custody Sergeant.”

10.5 When such a prisoner is returned to their cell and the to the care of the custody officer the member of staff who has been responsible for that person must complete a custody record entry certifying that the prisoner has been treated in fair and humane manner and has been returned to their cell.

Comment: This certification should also be signed by the prisoner to whom it references.

12.2 (c) In response to clinical direction, a person detained in relation to drugs swallowing need not be roused

Comment: Clarity is sought on why the policy specifically implies a prisoner in this category need not be roused. Does clinical direction in this instance mean medical direction and if so, was this given at the time they were discharged from A&E?

13.1 All prisoners are entitled to brief daily outdoor exercise where practicable. Where this is possible exercise will be provided individually and be supervised.

Comment: The PIB follows OPCAT and international norms and standards which emphasise at least one hour of outdoor exercise per day as an essential requirement. This principle is also laid down in the European Prison Rules (Rule 27).

19.3 ...In cases where this may be an issue, discretion lies with the Custody Sergeant and will depend upon available resources and security implications...

Comment: What discretion does the Custody Sergeant have in regards to prisoners who are acutely withdrawing from nicotine?

20.1 Prisoners will only be allowed visitors at the discretion of the custody officer. Before making a decision to allow or refuse a prisoner a visitor the custody officer will liaise with the officer in charge of the investigation.

Comment: In accordance with the PIB standards most detainees can have a weekly visit of at least one hour. The standards further dictate the environment in which visits should occur and the treatment family members should be given during visits. The right to family life is one of the basic human rights and international standards discourage the restriction of family visits as part of any disciplinary or control process.

20.5 All visits must be personally supervised by a member of custody staff or a police officer. On no account will prisoners and visitors be allowed private consultations.

Comments: Clarification regarding legal practitioners, and parents/guardians in the case of minors, is required in this section. In accordance with the Bill of Rights Section 5(4) “any person who is arrested or detained shall have the right, at any stage... to retain and instruct without delay a legal practitioner of his or her own choice, and to hold private communication with him or her, and in the case of a minor he or she shall also be afforded a reasonable opportunity of communication with his or her parents or guardian...”

Vulnerable Persons: Section 4

As an overall comment it is noted that pregnant women are not mentioned at any stage in this policy as possibly falling into the category of a vulnerable person.

4.3 Diabetes

Comments: The diabetic prisoner would have discussed with his/her doctor when and how to take their insulin, which is not only a private matter but also a matter affecting one's health, i.e. life. Each person's treatment is presumably different. Generally, persons who use regular insulin take it 30 to 60 minutes before a meal, whereas persons who use rapid-acting insulin take it immediately before they eat. A blanket policy may have adverse health effects for some prisoners who are not on the medication schedule dictated by the policy. Forcing prisoners to take insulin "after having food" may be disproportionate as the same objective can be achieved by permitting the prisoner to take his/her insulin in accordance with the instructions of a medical doctor. In addition, a blanket policy on giving glucose tablets or a cold drink with two teaspoons of sugar "unless there are medical reasons not to" may also have the same effect.

4.4 Epilepsy

Comment: It is noted that the document refers to epileptic fits where it is now more common to call these epileptic seizures. It is also noted that 4.5 should be placed ahead of 4.4 in terms of sequences.

4.5 Dealing with Fits

Comment: While the policy includes not restraining the prisoner, medical advice given in this situation is to protect the person from injury and cushion their head. The policy should also dictate that a person suffering from an epileptic seizure should not be left alone under any circumstances.

Processing Prisoners: Section 5

As a general comment, there are several sections which seem as though they are subheadings but are not treated as such (i.e. 2.7, 2.12 and 2.15) and as a result it adds confusion to the document.

2.5 Where fingerprints have been lawfully taken then they may be retained and used for the purposes of preventing and detecting crime, the investigation of an offence or the conduct of a prosecution.

Comment: In accordance with the Police Law (2010) and Section 9 of the Bill of Rights (Right to Private and Family Life) fingerprints and DNA samples can be destroyed if the person is acquitted or charges dropped. Does the RCIPS have a policy on whether they inform prisoners of this right at the time of collection?

3.6 Prisoners being photographed may be required to remove any item or substance worn on or over the head.

Comment: A caveat for what type of exceptions i.e. religious headgear should be entered here.

4.3 A non-intimate sample may be taken without consent if the appropriate consent, if...

Comment: This section is incomplete but upon completion may need to be revisited for compliance.

Prisoner Transport: Section 7 (Number 1)

1.5 In cases where the prisoner cannot quickly be released from hospital an officer of the rank of sergeant or above will attend the hospital. The prisoner will be given, if practicable, their rights and a paper custody record will be commenced and the prisoner's detention clock begins.

Comments: Clarity is required on the 'rights' being referred to in this section. Prisoners will always have their human rights – human rights are not “given...if practicable”; although, the public authority, in narrow instances, may be permitted to limit those rights with appropriate justification, proportionality, and necessity in a democratic society.

5.11 Where a custody officer receives custody of a prisoner and is handed a hard copy of a PER form the custody officer must add the prisoner's custody record number (OTRCIS Custody Record urn) to the top of the form.

Comment: What is a PER form? This has not been mentioned throughout the document until this stage.

Prisoner Transport Record – Guidance: Section 7 (Number 2)

3 Personal Details

Comment: As previously commented the age of 17 should be amended in accordance with the Bill of Rights to age 18.

Conclusion

In its present state this draft Policy is not human rights compliant. As indicated above, the HRC would advise the RCIPS to undertake further reviews of this draft document and would further encourage consultation with CIG Legal Dept, Mr. Larry Covington (OT Law Enforcement Adviser), and Mr. Steve Fradley (OT Prison Reform Coordinator). The Commission would then be most willing to review the document again to assist in ensuring it is human rights compliant.

Kind regards,



PC Richard Coles
Chairman, Human Rights Commission

cc: Deputy Governor