

15 February 2024

Hon Judith Collins KC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Corrections (Victim Protection) Amendment Bill

Purpose

1. We have considered whether the Corrections (Victim Protection) Amendment Bill (the Bill), a member's Bill in the name of Rima Nakhle MP, is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression) of the Bill of Rights Act. Our analysis is set out below.

The Bill

3. The Bill amends the Corrections Act 2004 (Act) to require:
 - a. the chief executive of the Department of Corrections (Corrections) and prison managers to ensure processes are established and maintained to protect victims of offences and persons for whose benefit protection orders under the Family Violence Act 2018 (Family Violence Act) are in place, from unwanted contact with prisoners and persons under control or supervision of Corrections; and
 - b. Corrections to report on the way the chief executive has carried out these functions and prison managers have undertaken their functions in its annual report under s 43 of the Public Finance Act 1989.

Existing powers under the Act

4. Sections 103A – 110C of the Act regulate Corrections' powers to open, read, and withhold inbound and outbound prisoner mail.
 - a. Section 104 of the Act sets out the general considerations that all Corrections staff must consider when dealing with prisoner mail. Of particular relevance are s 104(e) and (g), the need to ensure the safety of any person and the interests of victims. As far as practicable in the circumstances, staff must take these into consideration when dealing with any mail to or from prisoners.
 - b. Under s 106, mail to or from a prisoner may be opened and examined for unauthorised items. Section 106 is subject to ss 109 – 110 which protects the confidentiality of

prisoners' correspondence with members of Parliament, official agencies, and legal counsel.

- c. Section 107 provides that an authorised person may read correspondence between a prisoner and another person for the purpose of ascertaining whether it may be withheld and s 108 provides mail withholding grounds.¹
5. Sections 112 – 122 of the Act regulate Corrections' powers to monitor prisoner phone calls. Section 112(1) sets out the principal purpose of monitoring prisoners' calls and s 112(2) provides additional reasons.
6. Under s 113, any prisoner call that is not an exempt call may be monitored. Exemptions are outlined in s 114. However, none are relevant to the Bill.
7. Section 196 of the Act enables the chief executive to issue guidelines and instructions in relation to the management of prisons. In exercising this function, the chief executive must take into account the principles set out in s 6 of the Act. These include the consideration of victims' interests.
8. The Prison Operations Manual (Manual) provides instructions to Corrections' staff on the day-to-day activities relating to managing a prison. All staff are required to ensure that they perform their duties in line with the Manual.²
9. The Manual recognises the need of certain people to be protected from unwanted contact with prisoners. Section C.01.Res.05 requires all practicable steps to be taken to prevent contact from occurring between prisoners and those with any type of contact restriction in place and between a prisoner and anyone who has asked that contact not be permitted by that prisoner. Contact restrictions include:
 - a. where a prisoner's remand warrant includes a no contact condition;
 - b. where a prisoner is a respondent to a protection order under the Family Violence Act;
 - c. where a prisoner is subject to a restraining order under the Oranga Tamariki Act 1989;
 - d. where a prisoner is subject to a restraining order under the Harassment Act 1997; and
 - e. where a victim of a specified violent offence³ has applied for and been granted a non-contact order under the Victims' Orders Against Violent Offenders Act 2014.
10. There are existing systems in place to restrict a prisoner's ability to contact their victim. Alerts are generated and staff are required to prevent contact from occurring in accordance with the conditions of any contact restrictions or a person's request.⁴
11. Under the Act there are already powers to monitor prisoner phone calls, open, read and withhold mail and give consideration to victims. Processes have also been established through the Manual to prevent contact occurring between prisoners and those with any type

¹ Withholding grounds include where a court order (including a protection order under the Family Violence Act) is in place and where an individual has requested that correspondence be withheld.

² The Manual takes precedence over any conflicting instructions or guidelines issued by Corrections.

³ s. 4 of the Victims' Orders Against Violent Offenders Act 2014 defines specified violent offence.

⁴ See s C.01.Res.05 of the Prison Operations Manual.

of contact restriction (including a protection order under the Family Violence Act) and anyone who has asked that contact be restricted.

12. We consider that the Bill does not confer any new powers to monitor or withhold prisoners' communications, but rather is intended to confer obligations on Corrections to establish and maintain processes in relation to, and report on the use of, the existing powers. The Bill does not provide any detail on what further processes might be put in place.
13. We note that the Bill also refers to establishing processes to protect victims and others from unwanted contact from persons "under control and supervision." Under the Act, a person who is under control or supervision includes prisoners, but also includes a person who is subject to a community-based sentence, a person who is subject to a sentence of home detention, and/or a person who is subject to conditions under the Parole Act 2002 or under section 80N or 93 of the Sentencing Act 2002. There are no existing powers under the Act to monitor and withhold communications by persons under supervision and control who are not prisoners. In our view the Bill does not confer any new powers in relation to those persons under supervision and control who are not prisoners. Accordingly, we do not need to consider Bill of Rights Act implications in this regard. However, we note that any proposal to extend the power to monitor and withhold communications to people under supervision and control who are not prisoners would engage s 14, and potentially ss 17 and 18 of the Bill of Rights Act.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

14. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form. The right to freedom of expression is "as wide as human thought and imagination" and includes any activity which conveys or attempts to convey a meaning.
15. We have considered whether the requirement in the Bill to establish and maintain processes to protect victims and those with protection orders from unwanted communications with prisoners engages any of the rights in the Bill of Rights Act.
16. In respect of prisoners, the Act and the Prison Manual already provide for the monitoring, opening, and withholding of mail, and the monitoring and restriction of phone calls, to victims and those with protection orders. These restrictions engage s 14 of the Bill of Rights in that they place limitations on a prisoner's right to freedom of expression. Further, in respect of the existing law and processes, the chief executive and prison managers must act in a way that is consistent with the Bill of Rights Act when deciding to withhold mail or restrict phone calls. In cases involving challenges to decisions made by prison managers, the courts have indicated that the decision-maker should have considered the right of freedom of expression as a mandatory consideration and undertaken a proportionality analysis when reaching their decision.⁵
17. A requirement to establish processes about contact by prisoners does not, of itself, engage the Bill of Rights Act. However, care will have to be taken when establishing the processes

⁵ *Smith v Attorney-General on behalf of the Department of Corrections* [2017] NZHC 463 at [87]-[88]; *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477 at [84].

(most likely by way of issuing guidelines under s 196 of the Act) to ensure that the processes and the way they are applied are consistent with the Bill of Rights Act.

Conclusion

18. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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