

2 March 2018

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Corrections Amendment Bill

Purpose

1. We have considered whether the Corrections Amendment Bill ('the Bill') 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 not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 18726/12.0). We will provide you with further advice if the final version of the Bill includes amendments that affect the conclusions in this advice.
3. 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), s 21 (unreasonable search and seizure), and s 23(5) (right of persons deprived of liberty to be treated with humanity and dignity). Our analysis is set out below.

Summary

4. The Bill amends the Corrections Act 2004 ('the principal Act') and raises a number of potentially significant limitations on rights and freedoms affirmed in the Bill of Rights Act, particularly:
 - a. s 14 (freedom of expression);
 - b. s 21 (unreasonable search and seizure); and
 - c. s 23(5) (right of persons deprived of liberty to be treated with humanity and dignity).
5. These rights are fundamentally concerned with fairness, individual autonomy, privacy and dignity of individuals within the corrections system. Any limitation on these rights requires careful scrutiny and justification.
6. We conclude that the Bill is consistent with the rights and freedoms affirmed in the Bill of Rights Act.

The Bill

7. The Bill amends the principal Act to contribute to achieving the Department of Corrections' ('Corrections') objectives of ensuring compliance with sentences and orders, and managing offenders safely and humanely. Specifically, the measures are designed to:
- a. ensure the safe, humane and fair administration of sentences and orders by providing new statutory processes, frameworks, and technologies;
 - b. make improvements to the disciplinary regime in prisons by adding new offences against discipline, and ensuring prisoners are aware of what constitutes an offence;
 - c. strengthen the oversight of the corrections system through enhanced powers of the Corrections Inspectorate; and
 - d. reduce legal risks to Corrections by aligning legislation with operational practice.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of Expression

8. Section 14 of the Bill of Rights Act affirms the right of everyone to freedom of expression. Freedom of expression includes the right to seek, receive, and impart information and opinions of any kind in any form.
9. Section 128 of the principal Act, which specifies offences against discipline, is amended to include various offences relating to tattooing. It also becomes an offence to contact, or attempt to contact, a person in breach of an order or direction of a court. These amendments engage s 14 of the Bill of Rights Act as the prohibited conduct has expressive value.
10. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. The s 5 inquiry may be approached as follows:¹
- a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?

¹ *Hansen v R* [2007] NZSC 7 [123].

11. Corrections advise that there are self-evident health, safety and re-integrative reasons for having provisions against tattooing. It is also clear that there should be consequences for prisoners who attempt to contact persons where this would breach any order or direction of a court.
12. We consider the Bill's amendments to s 128 limit the freedom of expression in a way that is rationally connected to important objectives, is no more than is reasonably necessary, and is in due proportion to these objectives. We therefore consider that the Bill appears to be consistent with s 14 of the Bill of Rights Act.

Section 21 – Unreasonable search and seizure

13. Section 21 of the Bill of Rights Act affirms the right to be secure against unreasonable search and seizure. There are two limbs to the s 21 right. First, s 21 is applicable only in respect of those activities that constitute a "search or seizure". Second, where certain actions do constitute a search and seizure, s 21 protects only against those searches or seizures that are "unreasonable" in the circumstances.
14. Reasonableness will depend upon both the "subject matter" and the unique combination of "time, place and circumstance" of a particular case.² Overall, this involves the balancing of values underlying s 21 and a weighing of all the relevant values and public interests involved, and the strength of the individual concerns for privacy against the strength of society's need to detect and investigate crime.³
15. A search or seizure which is unreasonable in terms of s 21 cannot be justified in terms of s 5 of the Bill of Rights Act.⁴

Imaging technology searches and strip searches

16. New ss 91 – 92B in the Bill relate to imaging technology searches. New ss 91 and 92 explicitly add the use of imaging technology, such as X-ray machines, to the types of searches permitted by the principal Act. This technology may be used to search visitors, prisoners, or staff members.
17. New s 92A sets out restrictions in relation to imaging technology searches. The person being searched may be required to remove outer clothing and to comply with other procedures necessary to carry out the search. As far as practicable, the image produced as a result of the search must avoid showing a clear image of the body beneath clothing and any genitals in the image must be obscured or made not easily distinguishable. In addition, the person who conducts the search must not photograph, copy, or share an image produced (we note that the new s 146 makes it an offence to do so).
18. New s 92B sets out particular matters in relation to the use of imaging technology to search a prisoner as an alternative where a strip search might otherwise be used under s 98(9). In these cases the requirements not to show a clear image of the body and to obscure genitalia do not apply. We note that, even with the exception from these requirements, the imaging technology search is designed to be a less intrusive alternative to strip searching prisoners. In addition, the image produced may only be viewed by an officer or constable of the same sex and may not be viewed by another prisoner.

² *R v Grayson and Taylor* [1997] 1 NZLR 399 at 405 (CA).

³ *R v Jefferies* [1999] 17 CRNZ 128 (CA); *R v Grayson and Taylor*.

⁴ *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC) at [33].

19. The Bill also amends s 98 to specify additional circumstances in which a strip search is to be conducted, relating to at-risk prisoners.
20. While searches, and in particular strip searches, constitute an intrusion on privacy, searches of various kinds in prisons are necessary for the safety of prisoners and staff and for good order of the institution and the control of contraband within the prison setting. The reasonable expectation of privacy of a prisoner is different from that of a person outside prison. The purpose of all strip searches is to locate unauthorised items and the strip search must be necessary for that purpose.
21. We also take into account that the principal Act requires that all searches be carried out with decency and sensitivity, and in a manner that affords to the person being searched the greatest degree of privacy and dignity consistent with the purpose of the search.

Use of dogs for searches

22. The Bill also amends s 97 of the principal Act, which relates to the use of dogs for searching. The effect of the amendment is that all physical contact by a dog on a prisoner being searched is no longer prohibited, but the dog handler must take reasonable steps to prevent the dog touching the prisoner. We consider this affords to the person being searched the greatest degree of privacy and dignity consistent with the purpose of the search, while acknowledging that inadvertent but inconsequential contact may occur.

Conclusion on the right to be secure against unreasonable search and seizure

23. Taking into account the prison context and the safeguards discussed above, we consider the Bill appears to be consistent with the right to be secure against unreasonable search or seizure affirmed in s 21 of the Bill of Rights Act.

Section 23(5) – Right of persons deprived of liberty to be treated with humanity and dignity

24. Section 23(5) of the Bill of Rights Act affirms that everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person. A number of provisions in the Bill relate to the rights of persons deprived of liberty.

Segregation and management of at-risk prisoners

25. New ss 61A – 61H provide a comprehensive legislative framework for the segregation and management of at-risk prisoners, including the initial steps after an assessment, segregation, and management planning. Further, the new s 61E states that a management plan must specify any restrictions on the opportunity of the prisoner to associate with others to the extent necessary for the safety of the prisoner or other prisoners (we note this also engages the s 17 right to freedom of association).
26. The new framework in the Bill is designed to promote best practice in the management of ‘at-risk’ prisoners by mandating a planned, multi-disciplinary approach. For example, after a prisoner has been assessed as being ‘at-risk’, the prisoner must be promptly placed in a cell adequate to protect the prisoner from self-harm. The prison manager must then ensure the prisoner is observed at the specified intervals. Finally, the health centre manager must ensure that a registered health practitioner visits the prisoner at least twice a day (unless the health centre manager determines that it is not necessary in the circumstances).

27. The new 'at-risk' framework recognises that whilst it is sometimes necessary to restrict or deny an at-risk prisoner's opportunities to associate with other prisoners, this is only undertaken to the extent necessary for the safety of the prisoner or other prisoners. Any restrictions under this new framework are further mitigated by express safeguards, including requirements relating to the prisoner's assessment and observation, development of an at-risk plan, and time for review of their at-risk status.

Use of mechanical restraints

28. The Bill also amends s 87, relating to the restraint of prisoners, to explicitly allow extended use of a mechanical restraint if it is necessary to secure a prisoner being treated in a hospital outside prison.
29. This amendment will mean that prisoners could be restrained for potentially lengthy periods where they present a high risk of self-harm or escape from a hospital outside the prison. The use of mechanical restraints has significant implications for individuals' humanity and dignity, particularly in relation to the most restrictive types of restraint such as a "tie-down bed".⁵ We note, for example, that tie-down beds are not used in comparable jurisdictions that have ratified the Optional Protocol to the Convention Against Torture, including England and Wales, Scotland and Sweden.⁶ It is essential, therefore, that the use of mechanical restraints is limited by robust safeguards.
30. The safeguards in place are that a mechanical restraint (such as handcuffs but never "chains and irons") must not be used on a prisoner for more than 24 hours except when:
- a. authorised by the prison manager and, in the opinion of a medical officer, necessary to protect the prisoner from self-harm; or
 - b. necessary to secure a prisoner who has been temporarily removed to a hospital outside the prison for treatment.
31. The use of a mechanical restraint by an officer or staff member is also subject to any conditions or restrictions specified in regulations made under the principal Act. Regulations may not be made authorising the use of any kind of mechanical restraint unless the Minister is satisfied that:
- a. the use of that kind of restraint is compatible with the humane treatment of prisoners; and
 - b. the potential benefits from the use of the restraint outweigh the potential risks.
32. Moreover, the principal Act is clear that a mechanical restraint may not be used for any disciplinary purpose and must be used in a manner that minimises harm and discomfort to the prisoner.

⁵ For example, see the Office of the Ombudsman, 'A question of restraint - Care and management for prisoners considered to be at risk of suicide and self-harm', 1 March 2017.

⁶ *Ibid*, p. 23.

Accommodation and use of Police jails

33. The Bill adds new ss 82A, 82B, and 32A, which relate to prisoners' accommodation.
34. New s 82A specifies the types of permitted accommodation in a prison which includes an individual cell, a shared cell or a self-care unit. While it is recognised that single cell occupancy accommodation can be preferable,⁷ research completed by Corrections has shown that cell sharing is acceptable if properly managed and when used with appropriate safeguards.⁸ We note that this amendment does not reduce Corrections' obligations to ensure that cell sharing is operated in a safe and humane manner.
35. New s 82B provides that a prisoner does not have any legitimate expectation as to being in the same accommodation or conditions for the term of any sentence. This already features in regulations but the Bill would ensure it is also in primary legislation. This provision is designed to clarify that a prisoner's accommodation or conditions may change for various reasons throughout their sentence and their minimum entitlements under the principal Act or any regulations remain unaffected.
36. New s 32A allows the Minister to declare that a Police jail, or part of a Police jail, is to be treated as part of a particular established Corrections prison. There are restrictions on the operation of Police jails that are declared to be part of a Corrections prison as follows:
 - a. persons under 18 years of age must not be detained in any of these facilities;
 - b. new s 34AA sets a maximum period of detention for a prisoner of seven consecutive days and 21 days over a 12-month period; and
 - c. the Bill amends s 69 which currently provides for exceptions from some of the minimum entitlements for prisoners in such a facility but not those entitlements which relate to food and drink, beds, and access to legal advisers and medical treatment. The change in the Bill requires that minimum entitlements are only denied if, after all reasonable steps have been taken, it is not practicable to provide those entitlements.

Conclusion on the right of persons deprived of liberty to be treated with humanity and dignity

37. In our view, the powers discussed above are rationally connected to important objectives of ensuring compliance with sentences and orders, and managing offenders safely and humanely. We also consider that the limits and restrictions placed on the exercise of these powers provide adequate mechanisms to ensure that the powers are consistent with s 23(5) of the Bill of Rights Act.
38. For these reasons, we consider that the Bill appears to be consistent with the rights of persons arrested or detained affirmed in s 23(5) of the Bill of Rights Act.

⁷ For example see Molleman, T and van Ginnekan, E F J C *A multilevel analysis of the relationship between cell sharing, staff-prisoner relationships, and prisoners' perceptions of prison quality*, International Journal of Offender Therapy and Comparative Criminology, 11 March 2014.

⁸ *Prisoner double-bunking: perceptions and impacts*, Department of Corrections, April 2012.

Conclusion

39. 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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