Corrections Amendment Bill (No 2)

10 October 2007

Attorney-General

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
CORRECTIONS AMENDMENT BILL (NO 2)

1. We have considered the Corrections Amendment Bill (No 2) (PCO 8113/10) ('the Bill') for consistency with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). We understand that the Bill is scheduled to be considered by Cabinet Legislation Committee at its meeting on Thursday, 11 October 2007.

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 possible inconsistencies with freedom of expression, freedom from discrimination, and the right to be secure against unreasonable search and seizure.

PURPOSE OF THE BILL

3. The Bill makes amendments to the Corrections Act 2004 ('the Act') that are intended to improve the operations of the corrections system. These changes are driven by technological advances in forms of electronic communication since the passage of the Act, and the need to incrementally improve the control of contraband in prisons. The main features of the Bill relate to:

- control of contraband in prisons through additional search, detection and offence provisions for prisoners and for staff;
- monitoring of prisoners' telephone calls and mail;
- limiting the Crown's liability in an emergency situation (caused by an epidemic, civil defence emergency or specific prison situation);
- information-sharing about highest-risk offenders;
- new offences for unauthorised communications with prisoners;
- the use of firearms for animal and pest control in prison grounds;
- the use of communion wine in prisons; and
- interference with wireless transmissions in order to prevent or stop the use of unauthorised electronic communication devices.

POSSIBLE INCONSISTENCIES WITH THE BILL OF RIGHTS ACT

4. In the advice we provided on the Corrections Bill in 2002, we noted that prisoners retain all rights and privileges save for those that are inconsistent with the prison regime.[1] There is a presumption that there should be "the minimum intrusion into the rights of prisoners consistent with the need to maintain security, order and discipline in prisons."[2] This principle lay behind the drafting of the Act and is reflected in the Bill.

5. We have nonetheless identified some features that appear to raise issues of inconsistency with the rights and freedoms protected by the Bill of Rights Act. However, where an issue arises a provision may nevertheless be consistent with the Bill of Rights Act if it can be considered a "reasonable limit" that is "justifiable" in terms of section 5 of that Act. The section 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and that objective.[3]

Freedom of Expression

6. 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.

Prisoners' Mail

7. Clause 14 of the Bill repeals and replaces section 107(1) of the Act. New section 107(1) permits an authorised officer to read correspondence between a prisoner and another person for the purpose of ascertaining whether it may be withheld under section 108(1). Currently, section 107(1) authorises only the prison manager to read prisoner correspondence and only in specified circumstances.

8. Clause 15 amends section 108(1)(d) of the Act by including new grounds for withholding prisoner correspondence, namely if the manager believes on reasonable grounds that the correspondence is likely to:

- prejudice the maintenance of the law; or
- breach an order or direction of any court or constitute contempt of court.

9. Reading (as it may have a chilling effect on communication) and withholding correspondence has the potential to interfere with the freedom of expression of the individuals concerned. We consider, however, that the proposed changes to these provisions are justifiable in terms of section 5 of the Bill of Rights Act.

10. The Department of Corrections (the "Department") has advised that while authorised prison officers are able to monitor prisoner's telephone calls, their ability to read prisoners' correspondence is limited. This has meant that a number of letters of concern (namely letters that are threatening or intimidating, endanger a person's safety, pose a threat to prison security, or contribute to offending) are leaving prisons. The proposed change to section 107(1) will reduce the likelihood of this occurring, and we consider this to be an important and significant objective.

11. Widening the criteria in section 108(1)(d) for withholding prisoner mail will not only protect the maintenance of the law (including the prevention, detection, investigation, prosecution, and punishment of offences and the right to a fair trial) but will also guard against non-compliance with the law, including court orders. For instance, the breach of a name suppression order by a prisoner writing to several people from prison and naming a person who is the subject of the order. Again, we consider these to be important and significant objectives.

12. The proposed changes to sections 107(1) and 108(1)(d) are also rational and proportionate. In reaching this conclusion, we note that the current protections in section 108 and 109 of the Act (which, in general terms, prohibit the reading and withholding of mail between prisoners and their legal advisers, members of Parliament or official agencies) would still apply. Also, the prison manager requires reasonable grounds before the power to withhold mail can be exercised.

Unauthorised Electronic Communications

13. Clause 31 of the Bill inserts a new section 189B into the Act which enables the detection, interception, monitoring, disablement, disruption or interference with electronic radiocommunications within prison boundaries.

14. Although this provision raises an issue under section 14 of the Bill of Rights Act, we consider it justifiable in terms of section 5 of that Act.

15. The Department has advised that the illicit use of cellphones in prisons has become increasingly difficult to manage through traditional search and seizure techniques. Within prison walls, cellphones have been used by prisoners to organise further criminal offending, to threaten and harass witnesses and others, and arrange escape.

16. We note that entry solutions (such as scanner devices at the entrance to a prison) protect against some illicit cellphone activity. However, the most effective method for dealing with the problem appears to be the use of disabling and interference solutions, as they can completely eliminate cellphone coverage prison boundaries. We consider that this is a rational and proportionate measure to prevent illicit use of cellphones.

17. There may be some disruption of legitimate communications within the prison boundaries (such as between a staff member and his/her family): however, in such situations the persons concerned may approach the manager or another authorised person and request the use of a land-line. We further note that new section 189B does not permit harmful interference with communications outside prison boundaries. The term "harmful interference" has the same meaning as the Radio Communications Act 1989 and includes interference which seriously degrades, obstructs, or repeatedly interrupts radiocommunications. Accordingly, the possibility of interference with the legitimate communications outside prison boundaries is remote.

Freedom from Discrimination

18. Section 19 of the Bill of Rights Act affirms the right of everyone to freedom from discrimination on the grounds set out in section 21 of the Human Rights Act 1993, including religious belief.

19. The Bill amends section 79 of the Act to ensure that section 129(a) (which forbids the consumption of alcohol by prisoners other on medical grounds) does not operate to prohibit the consumption of wine by a prisoner partaking in the Eucharist, Holy Communion, Mass or Communion.

20. The amendment draws a distinction between Christian religious services and non-Christian services. However, we are satisfied that the distinction does not give rise to any disadvantage (which is required for discrimination to occur). This provision is designed to address the particular problem of wine used for religious purposes. In any case, section 79(1) of the Act requires the chief executive of the Department of Corrections to ensure that, so far as is reasonable and practicable, appropriate provision is made for the various religious and spiritual needs of prisoners.

Search and Seizure

21. We considered that a number and wide variety of provisions in the Bill raise issues of consistency with section 21 of the Bill of Rights Act. This provision affirms the right of everyone to be secure against unreasonable search and seizure.

Strip searches

22. The Bill amends section 90(2) to empower a prison officer to direct a prisoner subject to a strip search to "lift or raise any part of his or her body (including for example, rolls of fat, genitalia, and breasts)". Section 90(3) is also amended to empower a prison officer to conduct a visual examination of the anal and genital areas (without the use of any instrument or device designed to illuminate or magnify).

23. We considered the existing strip search powers in the Act prior to the introduction of the Corrections Bill in 2002 and concluded these powers were reasonable for the purposes of section 21. The proposed changes to the strip search powers do not change this view.

24. In reaching this conclusion, we note that the Department has advised that:

"[I]tems that prisoners attempt to smuggle in are often very small (for example, tabs of LSD, "P", SIM cards) and the inability to request that *all* body parts be lifted limits the effectiveness of the search. A requirement to request that body parts be lifted is less intrusive than some of the other current search provisions […] and is required to ensure that the screening for contraband is complete and not avoidable by external concealment beneath parts of the body."

25. The Department has also commented that it is very easy for friends and family to slip items of contraband to prisoners during prison visits and, for example, at Parole Board hearings where they mingle freely before proceedings commence. They consider that enhancing the strip search provisions is a better approach to address this problem than curtailing visits or meetings before hearings.

26. The presence of contraband in prisons has consequences for the health, well being and rehabilitation of prisoners, the good order of prisons, and (in the case of drugs and electronic equipment) the potential to lead to further crimes. The very small or modest size

of contraband makes it easy for a prisoner to conceal the item on their person, for instance under a flesh coloured bandage.

27. We acknowledge that strip searches are inherently degrading and can be considered an affront to the person being searched, particularly when their anal and genital areas are visually examined. But although such searches interfere with the prisoner's privacy, the reasonable expectation of privacy of a prisoner is different from that of a person outside prison. 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.

28. Although officers are no-longer limited to visually examining the anal and genital areas only when they have a reasonable belief that the prisoner is carrying contraband, in Warriner v Kingston Penitentiary[4], the Federal Court of Canada observed that:

"A strip search, including the order to bend over for visual examination of the anal cavity area, instituted as part of a routine search procedure following an open or contact visit, on the belief of the Warden that such searches are essential for the safety [of inmates and staff] and good order of the institution does not require a coincidental belief on the part of the searching officers that contraband is concealed on the person of the inmate searched."

29. The Federal Court of Canada found that such a search was not unreasonable and was consistent with the Canadian Charter of Rights and Freedoms.

30. We also note that, when conducting a visual examination of the anal and genital areas, officers may not use any instrument or device designed to illuminate or magnify those areas. Moreover, officers are obliged to conduct strip searches in a reasonable manner – they do not have a completely free hand in these matters. Such searches must always be bona fide. They cannot be used with the intent of intimidating, humiliating or harassing inmates or of inflicting punishment. In this regard, the Department has advised that it is sensitive to the intrusion on privacy that strip searches involve and has procedures in place to minimise the affront to individuals.

31. We have also examined the proposed changes to section 98 of the Act. Under the proposed changes, a prisoner may be strip searched immediately after a hearing or examination or appeal before a Visiting Justice, or appearing before a hearing adjudicator, tribunal or court (clause 9(1)). A prisoner may also be strip searched before and after a hearing before the New Zealand Parole Board (clause 9(2)) and immediately before the prisoner submits to further drug or alcohol testing (where the manager has reasonable grounds to believe that the prisoner's previous sample was diluted, tainted or contaminated) (clause 9(3)).

32. We consider that the changes to these search powers are "reasonable" in terms of section 21 bearing in mind the objectives of the Act, and the limits and restrictions that constrain these powers (in particular, section 94 (Restrictions on searches)). We are also mindful that the availability of the robust complaints procedure which is set out in Part 2, subpart 6 of the Act will encourage compliance with section 21 of the Bill of Rights Act.

Search of Staff Lockers etc

33. Section 100(1) of the Act currently authorises an officer to search any place in a prison set aside for the exclusive use of a person other than a prisoner (for example a staff member's locker) where the officer has reasonable grounds to suspect that there is an unauthorised

item in that place. Clause 10 repeals this provision and replaces it with a section that no longer requires that an officer have reasonable grounds to suspect that there is an unauthorised item in that place.

34. The Department has expressed concern over the way that contraband makes its way into prisons, and considers that there does not seem to be any justification for retaining the 'reasonable grounds' proviso. The Department also advises that the proviso's removal would protect staff from prisoner intimidation as it would increase the likelihood that contraband carried in by prison staff would be found.

35. While we do not have any way to verify this claim, we are comfortable that the proposed changes to the power to search staff lockers and other areas set aside for the exclusive use of people other than prisoners will not cause this provision to be inconsistent with section 21 of the Bill of Rights Act. In reaching this decision, we note that the officer is still obliged to carry out the search in a reasonable manner. This includes ensuring that a search is not carried out arbitrarily – that is, the search cannot be capricious, unreasoned or without reasonable cause. This means, amongst other things, the prison authorities must have reasonable grounds to believe that contraband is being stored in staff lockers as opposed, which is the current requirement, that they believe contraband is located in a specific staff member's locker. We also note that the person carrying out the search must have the prior approval of the prison manager to conduct the search, and contact the persons concerned, advise them of the search and allow them to be present at that search.

Reading and withholding correspondence

36. As we noted above, clauses 14 and 15 make a number of changes to the regime for reading and withholding prisoner correspondence. We consider that these changes are consistent with the right to be secure against unreasonable search and seizure. In reaching this conclusion, we note that the regime continues to be subject to the protections under the Act relating to mail between the prisoner and legal advisers, official agencies, and members of Parliament.

Emergency Management Provisions

37. Proposed new section 179E provides that there is no cause of action against the Crown or Crown servants for any harm or loss arising from:

- Any act or omission by any person in the exercise of his or her functions, duties or powers under any provision of the Act or the regulations that is modified by Order in Council under the Epidemic Preparedness Act 2006; or

- Any failure by any person to comply with any provision of the Act or the regulations during a prison emergency, or an epidemic emergency or state of emergency affecting a prison or prisoners, if it is impossible or unreasonable to comply with the Act or regulations in those circumstances.

38. It can be argued that this proposed new section raises an issue of consistency with section 27(3) of the Bill of Rights Act

"Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals."

39. We do not consider that there is any inconsistency with the rights of individuals in civil proceedings with the Crown. We have reached this conclusion after considering the scope of section 27(3), which can be interpreted in two ways. It could be argued that section 27(3) goes to substantive liability and so impacts on Parliament's ability to determine that the Crown shall not be liable for conduct which, without the exclusion, could create liability. Alternatively, it could be said that section 27(3) is procedural in effect, and means simply that the procedure to be adopted in any proceedings against the Crown will be the same as that applicable in litigation between private parties.

40. In *Matthews v Ministry of Defence*[5], the House of Lords had to consider whether section 10 of the Crown Proceedings Act 1947 (UK), which exempted the Crown from liability in tort for injury suffered by members of the armed forces in certain circumstances, was compatible with Article 6(1) of the European Convention. Their Lordships held that the Crown's exemption from liability in tort was a matter of substantive law, so that the claimant had no "civil right" to which Article 6(1) might apply. Their Lordships treated the limitation on liability in section 10 as going to the substantive claim (i.e. it did not exist), rather than creating a procedural bar. Article 6(1) was, in principle, concerned with procedural fairness and the integrity of a State's judicial system, and not with the substantive content of its national law.

41. The analysis in Their Lordships' speeches is consistent with the view that the new section 179E does not infringe section 27(3). This conclusion is supported by the history of Crown liability in New Zealand and the many provisions which afford protection to officials acting in the course of their duties in good faith and, in some instances, without negligence.

CONCLUSION

42. For the reasons given above, we have concluded that the Bill appears to be consistent with the Bill of Rights Act.

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Footnotes

1 R v Allison CA 387/01 26 November 2001

2 R (on the application of Daly) v Secretary of State for the Home Department [2001] HRLR 1103

3 See *Moonen v Film Literature Board of Review* [2000] 2 NZLR 9 and *R v Oakes* (1986) 26 DLR (4th).

4 (1991) 39 F.T.R. 285, [1991] 2 F.C. 88 (F.C.T.D.)

5 [2003] 2 WLR 435

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