

# Corrections Bill 2002 - Appendix 1

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Attorney-General

Legal Advice

Consistency with the New Zealand Bill of Rights Act 1990: Corrections Bill 2002

## Appendix one:

### Approach to sections 9, 18, 21, 23(5) and 27(1) of the Bill of Rights Act.

#### The right not to be subjected to torture or to cruel, degrading punishment

1. Almost anything can be treatment for the purposes of section 9 where the state has actively interacted with an individual in a disciplinary context. The caselaw in New Zealand to date, while focusing on the threshold of disproportionality (etc) indicates that the courts will accept that most conduct will be treatment for the purposes of section 9.
2. In order for the treatment or punishment to be cruel or disproportionately severe, the courts have consistently held that the punishment or treatment must be so excessive as to outrage standards of decency given to the nature of the treatment or punishment and the context within which it is applied *R v Smith* [1987] 1 SCR 1045, pp1072, 1088-1089); *R v Leitch* [1998] 1 NZLR 420; (1997) 15 CRNZ 321 (CA), at p 431.
3. The notion that treatment or punishment should not be degrading is concerned with the effect that the treatment or punishment is likely to have on an individual. On "degrading" the European Court of Human Rights has held<sup>[1]</sup>:

Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking the individual's moral and physical resistance, it may be characterised as degrading.

4. Even though all forms of treatment or punishment are likely to have an element of degradation it is clear that the level of degradation must exceed society's expectations of what is appropriate in a particular context. One of the leading UK cases on "degrading" is the case of *Tyrer v UK* (1978-79) 2 EHRR. The European Court in *Tyrer* held that when considering whether a form of treatment or punishment is degrading, consideration will be given to a number of factors including the nature of the act, the context within which it is delivered, the manner of its execution, and the impact it has on the victim.

## **Section 17 The right to freedom of association**

5. Although the New Zealand courts have not fully determined the issue, the Ministry's view is that the right to freely associate includes the right not to associate as well as the right to associate.
6. The Ministry's position on this issue is consistent with the courts' approach to the freedom of expression - that the right to freedom of expression includes the right not to make any statement.

## **Section 21 Right to be secure against unreasonable search and seizure**

7. Section 21 of the Bill of Rights Act provides for the right to be secure against unreasonable search or seizure. In assessing the substantive "reasonableness" of any power of search or seizure, the Ministry is of the view that section 5 of the Bill of Rights Act (justified limitations) is of limited application. The justification for any limitation of the right provided in section 21 is whether the search is "reasonable" in the circumstances.
8. However, a number of the considerations which are normally relevant in the context of the section 5 inquiry will also be material in assessing the "reasonableness" of a power of search or seizure. "Reasonable" in the context of section 21 essentially means that the power to search or seize is substantively justified in the context of balancing legitimate state interest against the expectations of privacy.

## **Section 22 Right to be free from arbitrary arrest or detention**

9. Not every deprivation of liberty involves a detention for the purposes of section 22 of the Bill of Rights Act. The detention must be substantial - that is, more than a "temporary check, hindrance, or intrusion on the citizen's liberty<sup>[2]</sup>" and include a certain threshold of compulsion.
10. The Courts in New Zealand and elsewhere have held that consideration of whether an arrest or form of detention is arbitrary or not involves more than a consideration as to whether the arrest or detention was lawful; it "must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability" *Van Alphen v The Netherlands*<sup>[3]</sup>.
11. Any discretionary power to detain a person also needs to be accompanied by appropriate criteria governing its exercise so that the decision can be made with reference to an adequate determining principle and in accordance with proper procedures<sup>[4]</sup>. The detention should also not continue beyond the period for which the State can provide appropriate justification.

## **Section 23(5) Everyone deprived of liberty shall be treated with humanity...**

12. Section 23(5) applies to the deprivation of liberty. The White Paper, para 10.102, notes that the provision clearly has relevance to standards of police detention and prison administration and other forms of detention authorised

by the state. As the White Paper also notes there is an overlap between it and section 9. The UNHRC has noted that persons deprived of liberty should not be:

...subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment<sup>[5]</sup>.

### **Section 27(1) Right to the observance of the principles of natural justice**

13. The observance of natural justice has traditionally required compliance with two broad principles. The first principle relates to the right to hear the other side and the second to the freedom from bias or partiality on the part of the decision-maker. The right in section 27(1) is considered to be a flexible doctrine, the scope and content of which adapts to particular situations. The requirements of natural justice depend on a number of factors, including the circumstances of the case, the rules under which the tribunal or public authority is acting, the matter that is being dealt with, the sanctions that could be imposed and the nature of the inquiry or determination.

#### Footnotes:

1. *Diane Pretty* (Application No. 2346/02) para 52
2. *Police v. Smith and Herewini* [1994] 2 NZLR 306, 316; (1993) 11 CRNZ 78, 88; per Richardson J.
3. UN Human Rights Committee 305/88
4. *Neilsen v A-G* 3/5/01, CA101/00
5. General Comment 21[44], adopted on 3/04/1992