Corrections Bill 2002

10 February 2003

Attorney-General

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

1. We have considered whether the Corrections Bill 2002 (PCO 4467/13) is consistent with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act". We understand that this Bill is to be considered by the Cabinet Legislation Committee on Thursday, 13 February 2003.

2. The Corrections Bill provides a new framework for the corrections system. It covers the administration of custodial sentences and remands, community-based sentences, home detention and parole.

3. This Bill repeals the Penal Institutions Act 1954 and its associated regulations. However, some of the provisions of the Penal Institutions Act and regulations are carried forward into the Bill. A number of the provisions in the regulations carried forward into the Bill, such as those setting out the minimum entitlements of prisoners, have human rights implications.

4. We have concluded that this Bill appears to achieve overall consistency with the Bill of Rights Act. We would, however, draw your attention to a number of the provisions of the Bill that appear to give rise to *prima facie* issues under the following sections of the Bill of Rights Act:

    - section 9 (the right not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment)
    - section 17 (the right to freedom of association)
    - section 21 (the right to be secure from unreasonable search and seizure)
    - section 22 (the right to be free from arbitrary arrest and detention)
    - section 23(5) (everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person); and
    - section 27(1) (the right to the observance of the principles of natural justice)

Section 9 and Section 23(5)

5. We consider that provisions in the Bill (in particular, those that provide officers and staff members with the power to use force, including the use of non lethal weapons on prisoners passively resisting a lawful order, and those concerning the restraint of prisoners (clauses 84, 86 and 88)) may appear to be *prima facie* inconsistent with sections 9 and 23(5) of the Bill of Rights Act.

6. However, we are of the view that the limits and restrictions placed on the exercise of these powers (clauses 84, 85, 86, 87, 88 and 89) provide adequate mechanisms to ensure that the powers are consistent with sections 9 and 23(5) of the Bill of Rights Act.

7. We also considered clause 69(3) of the Bill. Clause 69(3) provides that prisoners held in police jails may be denied 1 or more of the minimum entitlements provided for under clause 69 of the Bill having regard to the facilities available and resources at the police jail. A person sentenced to imprisonment can only be detained in a prison jail for a specified period of time (clauses 34(5)) or purpose (clause 64). We consider that clause 69(3) can be read consistently with sections 9 and 23(5) of the Bill of Rights Act and does not authorise prisoners detained in police jails to be subject to conditions that do not meet minimum health and safety requirements.

Section 21 Right to be secure against unreasonable search and seizure (in conjunction with sections 9 and 23(5))

8. 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. The provisions range from existing powers to enable officers and staff members with the power to conduct "rub down" and strip searches of prisoners and searches of their cells (clause 99), existing powers to use scanners and dogs in carrying out those searches (clauses 98 and 99), to existing powers to intercept mail and telephone conversations of prisoners (clauses 106 and 113) and powers to conduct drug and alcohol testing (clause 124).

9. The Bill also introduces new powers in association with the power to conduct searches. These new powers include the enhanced procedures relating to the use of illuminating and magnifying devices around – but not in - the anal and genital areas when performing a strip search (clause 91(4), the use of x-rays to facilitate searches (clause 99(9)), and the power to search visitors and staff (clauses 100, 101, and 102).

10. We have previously considered the issue of the enhanced procedures surrounding the use of illuminating and magnifying devices in association with searches of the anal and genital areas. We advised you on 15 February 2002 as follows:

Firstly, we consider that the requirement for inmates to "squat with their buttocks adjacent to their heels" and allow Corrections officers to visually inspect their anal and genital areas, with the option of illuminating and magnifying devices, to be inherently degrading and an affront to the dignity of inmates. We therefore consider that the exercise of such powers appears to be unreasonable in terms of sections 9, 21, and 23(5) of the Bill of Rights Act.

In stating this, we are mindful of recent statements by the Court of Appeal comments in *R v Allison* CA 387/01 26 November 2001 where the Court affirmed, at paras 22 – 23 of the judgment, the common law principles that a prison inmate retains all rights and privileges save for those that are inconsistent with the prison regime. The Court

endorsed the views of the House of Lords expressed in *R (on the application of Daly) v Secretary of State for the Home Department* [2001] HRLR 1103. The House of Lords held, at 1114, that there was 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."

11. We considered at that time that there was insufficient justification for the introduction of these enhanced procedures. However, in the course of the development of this Bill we have had the opportunity to work further with officials from the Department of Corrections to develop procedures that would limit or restrict the exercise of these powers. These procedures would still enable the objective of restricting the amount of drugs entering prisons to be met. These procedures, in addition to the other restrictions on the exercise of the search powers, mean that an officer can only conduct a strip search using these enhanced powers:

    - if he or she has reasonable grounds for believing that the prisoner has an unauthorised item in his or her possession (clause 99(3)(a))
    - if the officer has prior approval of his or her manager before conducting such a search (clause 99(3)(b))
    - and if the use of the procedures is necessary for the purposes of detecting the unauthorised item (clause 99(5)).

12. We are of the view that all the search and seizure powers conferred on officers and staff members in the Bill are reasonable for the purposes of section 21. In coming to this conclusion we have taken into account the Bill's purpose, and the limits and restrictions that constrain those powers (in addition to the clauses set out in para 5 above, which prescribe the limits of the exercise of the power, see clauses 94, 95, 104, 109, 110, 114 –122, and 125 –127). We are also mindful of the robust procedures that the Bill puts in place to enable prisoners to make a complaint about the treatment that they have received (Part 2 subpart 6 of the Bill).

Section 17 Right to freedom of association

13. We have considered those provisions in the Bill that provide prison managers with the power to segregate prisoners (clauses 57 –59) and the power of the chief executive and inspector of corrections to direct certain prisoners to be transferred to other facilities (clauses 52) for consistency with the right to freedom of association.

14. We are of the view that the limits placed on the exercise of the powers to segregate and transfer prisoners and the rights afforded prisoners means that the limits on the right to freedom of association are justifiable in terms of section 5 of the Bill of Rights Act.

Section 22 Right to be free from arbitrary arrest or detention

15. We have considered the provisions in the Bill that relate to the powers of Corrections officers to detain persons in a prison (other than prisoners) on the

grounds that they have reasonable grounds to believe that that person is in possession of a controlled drug within the meaning of the Misuse of Drugs Act 1975 (clause 103) for consistency with the right to be free from arbitrary arrest or detention (section 22 of the Bill of Rights Act).

16. This clause has been inserted into the Bill as a result of a Court of Appeal decision and a subsequent decision by Cabinet to amend the Bill to negate the effect of that decision, SDC Min (02) 8/13, confirmed by CAB Min (02) 34/6.

17. The Court of Appeal in *R v Ihaka* (CA 71/02, 17 June 2002) held that a Corrections officer was a constable for the purposes of the Misuse of Drugs Act 1975, and was authorised to conduct a strip search of a visitor for the purposes of that Act. However, the Court of Appeal held that a Corrections officer was not authorised to detain a visitor until such time as a police officer was available to conduct a strip-search. Cabinet has subsequently decided to remove the power that Corrections officers have to strip search persons other than prisoners under the Misuse of Drugs Act (clause 23(3)). Corrections officers would also be authorised to detain persons to enable a police officer to conduct a search.

18. We consider that the power in Clause 103 authorising a Corrections officer to detain persons other than prisoners for the purposes of enabling a police officer to conduct a strip-search is reasonable and therefore appears to be consistent with section 22 of the Bill of Rights Act. We note, in reaching this conclusion that a person detained under this provision must be released if the Corrections officer is made aware that a police officer is not able to conduct the search within the specified time limit of 4 hours or does not conduct the search within that period (Clauses 103(3) and 103(4) refer).

Section 27 Right to the observance of the principles of natural justice

19. We have considered those provisions in the Bill that regulate the procedures to be adopted and the powers to be exercised by hearing adjudicators and Visiting Justices when conducting hearings of complaints relating to offences against discipline and when imposing a penalty for such offences (clauses 132 to 139) for consistency with the right to the observance of the principles of natural justice (section 27(1) of the Bill of Rights Act).

20. In particular, we examined clause 134(2), which sets out the circumstances in which a prisoner may be granted permission to be represented at the hearing of a charge alleging an offence against discipline. The Court of Appeal in *Drew v Attorney-General* [2002] 1 NZLR 58 held that natural justice might require legal representation of a prisoner in a disciplinary hearing in situations where the prisoner was unable to adequately represent him or herself. These situations may be "if the [prisoner] is very young or under a disability [or] if the matter, though minor, is of unusual complexity." Even though the ability to obtain legal representation is to remain the exception rather than the rule, in our view clause 134(2) can be read consistently with 27 of the Bill of Rights

Act. The criteria in the Bill to be used to determine whether a prisoner should be legally represented closely follow the Court of Appeal's decision.

21. We also considered clause 134(3) of the Bill, which provides that whenever a prisoner is granted legal representation the hearing adjudicator must refer the prisoner's case to a Visiting Justice for hearing and determination. Clause 134(4) appears to be problematic since a Visiting Justice may impose a higher penalty on a prisoner found to have committed an offence than a hearing adjudicator; a prisoner may therefore inadvertently expose him or herself to higher penalties by seeking legal representation. We are of the view, nonetheless, that this provision appears to be consistent with section 27(1) of the Bill of Rights Act.

22. In forming this view, we note that clause 136(5) limits the range of penalties that a Visiting Judge may impose when a case is referred to the Visiting Justice in this way. The only exception being when the conduct that constitutes the offence is such that, in the opinion of the Visiting Judge, it warrants a higher penalty than can be imposed by the hearing adjudicator. This exception appears to cover those cases where an adjudicator would normally refer a case to a visiting justice as an offence that warranted a higher penalty. Therefore, we consider that in practice it would not expose a prisoner to a higher penalty merely because that prisoner chose to be represented by counsel.

23. In summary, we consider that the provisions regulating the hearing and determination of disciplinary offences appear to be consistent with section 27(1) of the Bill of Rights Act.

Conclusion

24. We consider that the provisions in the Bill appear to be consistent with the rights and freedoms contained in the Bill of Rights Act.

25. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice. A copy is also attached for referral to the Minister of Corrections if you agree.

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Bill of Rights/Human Rights Team

Cc: Minister of Justice
Minister of Corrections
Copy for your information

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