LEGAL ADVICE

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13 June 2023

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 24524/16.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.

Summary

3. 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, specifically:

   a. s 14 (freedom of expression),

   b. s 17 (freedom of association),

   c. s 21 (unreasonable search and seizure),

   d. s 23(5) (rights of persons deprived of liberty to be treated with humanity and dignity),

   e. s 25(c) (right to be presumed innocent until proven guilty), and

   f. s 27 (right to justice).

4. 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.

5. We conclude that the Bill is consistent with the rights and freedoms affirmed in the Bill of Rights Act. Our analysis is set out below.

The Bill

6. The Bill introduces amendments to the principal Act intended to improve rehabilitation, reintegration and safety outcomes in the corrections system. Specifically, the measures are designed to:

a. modernise and future-proof the principal Act to clarify Corrections' powers to monitor prisoner communications and information sources for intelligence purposes;

b. make changes to the disciplinary process in prisons to ensure it is timely and incentivises good behaviour;

c. strengthen processes for the authorisation and use of non-lethal weapons on prisoners;

d. support improved rehabilitation and reintegration outcomes for Māori under Corrections' management;

e. enable the limited mixing of remand accused and convicted prisoners;

f. introduce miscellaneous amendments that are intended to enable best-practice operations in prisons.

Section 21 – Unreasonable search and seizure

7. Section 21 of the Bill of Rights Act affirms the right to be secure against unreasonable search and seizure, whether it be of the person, property, correspondence or otherwise. The right protects an amalgam of values including property, personal freedom, privacy and dignity. The touchstone of this section is the protection of reasonable expectations of privacy, although it does not provide a general protection of personal privacy.[1]

8. The Bill includes various provisions that we consider constitute, or may constitute, a search or seizure for the purposes of s 21. These include provisions for the search of prisoners and cells which replace existing provisions in s 98 of the principal Act.

9. Ordinarily, a provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held that logically, an unreasonable search cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.[2] Rather, in order for a statutory power to be consistent with s 21, engagement of the right must not be unreasonable. Whether a search will be unreasonable turns on a number of factors, including the nature of the place or object being searched, the degree of intrusiveness into personal privacy and the rationale of the search.[3]

Refusal to issue or allow at-risk prisoners to keep authorised property

10. The Bill amends s 43(3) of the principal Act to enable the prison manager to refuse to issue or allow a prisoner to keep an item of authorised property if the prisoner is an at-risk prisoner.

11. To the extent that this provision constitutes seizure under s 21, we consider it to be reasonable in the circumstances. At-risk prisoners are prisoners who have been assessed

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1 See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

2 Ibid at [162] per Blanchard J.

3 Ibid at [172] per Blanchard J.

as being at risk of self-harm.[4] We note that the principal Act already allows a prison manager to refuse to issue or allow a prisoner to keep an item of property where there are reasonable grounds to believe that the item may be used to injure the prisoner or another person. However, the Department of Corrections advises it is possible that even where property may not be used for that purpose, it may still be inappropriate or harmful given the prisoner's at-risk status.

Scanner searches to identify the risk of communicable disease

12. New s 98A(2) of the principal Act enables a scanner search of any prisoner for the purpose of measuring their body temperature to identify the risk that they may be carrying a communicable disease. As the definition of scanner search in the Bill is not limited to non-contact or non-invasive methods of measuring body temperature,[5] this may constitute a search for the purposes of s 21 of the Bill of Rights Act in instances where more invasive methods are used.

13. The Bill contains safeguards around the authorisation of a scanner search. New s 103AAA(1) provides that the prison manager may authorise a scanner search for the purpose of measuring a person's body temperature if:

    a. the scanner search is necessary and justifiable to identify the risk that the person entering the prison may be carrying a communicable disease; and

    b. the prison manager has taken into account advice from a registered health professional on the matter; and

    c. the chief executive has approved the device as suitable for the purpose.

14. To the extent that s 98A(2) engages s 21 of the Bill of Rights Act, we consider it a reasonable search given the risk that communicable diseases pose to the health of all in the prison and the safeguards around authorisation of the search.

Searches for the purpose of detecting unauthorised items

15. New ss 98-98B of the principal Act enable the following searches to be conducted at any time, for the purpose of detecting any unauthorised item:

    a. a search of any prison cell;

    b. a scanner search of any prisoner;

    c. a rub-down search of any prisoner.

16. We consider these searches to be reasonable. We note that the threshold for conducting these searches is lower than that for a strip search under new s 98D (discussed below), in that there is no requirement for the officer to have reasonable grounds to believe that the prisoner possesses an unauthorised item. However, this reflects that searches of a

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4 See s 3 of the principal Act.

5 New s 92A(1)(b) defines 'scanner search' for this purpose as "a search of a person using an electronic device (whether or not the device uses imaging technology) designed to measure a person's body temperature."

cell, scanner searches and rub-down searches are less invasive search methods. In addition, the Bill provides for an imaging technology search to be used as an alternative to a rub-down search in certain circumstances.

Strip searches

17. New ss 98C-98E of the principal Act provide for:

    a. mandatory strip searches for prisoners at the time of admission or transfer, and for at-risk prisoners in specified circumstances;

    b. strip searches where an officer has reasonable grounds for believing that the prisoner has an unauthorised item in their possession;

    c. strip searches to detect whether a prisoner who is required to submit to a drug or alcohol test has used drugs or alcohol.

18. A physical search or seizure of the person is a restraint on freedom and an affront to human dignity.[6] Strip searches are inherently degrading and can be considered an affront to the person being searched. The high degree of intrusiveness increases the need for justification and attendant safeguards.

19. While strip searches are an intrusion on 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 to support efficient operation of prisons. Furthermore, there are safeguards in place to minimise the intrusion on privacy, which include the following:

    a. "Reasonable grounds" strip searches require managerial approval (unless this would endanger health or safety, or prejudice security) and can be conducted only if necessary for the purpose of detecting an unauthorised item.

    b. A strip search to detect the use of drugs or alcohol may only be carried out if necessary to ensure that a sample is not diluted, contaminated or tampered with.

    c. The principal Act requires all searches to 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.

    d. A scanner search may replace a strip search where the search device has been approved by the chief executive as suitable for the purposes of replacing a strip search.

20. As a result, we consider these provisions to be reasonable in terms of s 21 of the Bill of Rights Act.

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6 *R v Jefferies* [1994] 1 NZLR 290, 300 (1993) 1 HRNZ 478, 490 (CA).

Search of persons other than prisoners

21. The Bill also enables scanner searches of people other than prisoners who are entering the prison. These searches may be for the purpose of detecting unauthorised items or measuring body temperature to identify risk of disease.

22. We consider these provisions reasonable. The ability to search visitors to the prison for these purposes is necessary to support effective management of the prison and help manage risks to the health of prisoners and staff. As we note above, a scanner search for the purposes of measuring body temperature is not limited to non-contact or non-invasive methods. However, unlike a prisoner, a visitor to the prison would have the opportunity to decide not to undergo a more invasive method. This may result in them not being allowed entry to the prison, but we do not consider in light of the purpose that this would amount to an unreasonable search.

Monitoring and collecting prisoner communications and information sources

23. Proposed new subpart 4A amends the principal Act by including provision for the monitoring, collecting, using and disclosing of prisoner communications and information sources. The new subpart 4A responds to changes in technology by extending the types of communications that can be monitored, collected, used and disclosed to include any communications to or from a prisoner, except for specified exemptions.

24. We consider that new subpart 4A engages s 21 of the Bill of Rights Act. As noted above, the touchstone of s 21 is the protection of reasonable expectations of privacy. We acknowledge that reasonable expectations of privacy in relation to prisoner communications is likely to be relatively low, given the prison environment and the requirement (in new s 127P) for the chief executive to take practical steps to ensure that prisoners and visitors are advised in advance that communications may be monitored, collected, used and disclosed. On the other hand, the provisions recognise (in new s 127G(a)) that prisoners and their correspondents and visitors have a privacy interest, which must be protected as far as practicable. Alongside other provisions of subpart 4A and the scheme of the principal Act,[7] this suggests that some expectation of privacy remains intact. As prisoners and their visitors have no choice but to use communication methods which may be monitored, we do not consider they could be deemed to be waiving all expectation of privacy by using those methods.

25. However, we do not consider that the powers in subpart 4A constitute unreasonable search and seizure, because:

    a. the powers can only be exercised by an authorised intelligence person authorised by the chief executive (new s 127F);

[7] See s 6(1)(g) (sentences and orders must not be administered more restrictively than is reasonably necessary) and s 6(1)(i) (contact between prisoners and their families must generally be encouraged and supported).

b. the monitoring, collection and use of prisoner communications can only be implemented in narrow circumstances and for a defined intelligence purpose (new s 127H);[8]

c. monitoring of visits can only occur where the chief executive has reasonable grounds to believe that monitoring is necessary under new section 127J, including that the information communicated in the visit may threaten the security, good order and discipline of the prison, threaten the safety of any person or encourage or facilitate the commission of an offence; and

d. new ss 127M-127O limit the circumstances in which prison communications can be shared and disclosed.

26. There is a strong public interest in the monitoring, collection and use of information where that information can be used to identify risk and to deter and prevent harm; to support the good order, safety and security of prisons; and to contribute to the maintenance of a just society.

27. We therefore conclude that new subpart 4A appears to be consistent with section 21 of the Bill of Rights Act.

Section 14 – Freedom of expression

28. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind and in any form. The right to freedom of expression is recognised as one of the essential foundations of a democratic society.[9]

29. We have also considered whether new subpart 4A may engage s 14 of the Bill of Rights Act, if the provisions have a chilling effect on lawful prisoner communications if prisoners and those they are communicating with know that they are being monitored.

30. If new subpart 4A does engage s 14 of the Bill of Rights Act, we consider that any limit on the right is justified. As indicated above, the provisions rationally serve an important objective and are subject to a range of safeguards.[10] This appears reasonable and proportionate in the circumstances.

31. We therefore consider the Bill appears to be consistent with s 14 of the Bill of Rights Act.

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

32. 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. Section 23(5)

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8 We note all prisoner calls can be recorded (new s 127I), though that information could only be monitored or used in accordance with new s 127H.

9 *Moncrief-Spittle v Regional Facilities Auckland Limited* [2021] NZCA 142, [2021] 2 NZLR 795 at [65].

10 New s 127E also identifies a list of persons whose communications with prisoners are exempt from monitoring, for example communications related to the prisoner's legal affairs.

captures conduct that lacks humanity but falls short of cruelty, conduct that is demeaning, and/or conduct that is clearly excessive in the circumstances but not grossly so. Whether s 23(5) has been breached will require a court to consider a wide range of factors and circumstances in an individual case.

33. The Bill includes new s 61CA of the principal Act, which enables a prison manager to direct that an at-risk prisoner's opportunity for association with other prisoners be restricted or denied. By enabling segregation of at-risk prisoners, this provision engages s 23(5) of the Bill of Rights Act.

34. Under s 5 of the Bill of Rights Act, a limit on a right may be justifiable where the limit serves an important objective; and where the limit is rationally connected to achieving that objective, no greater than reasonably necessary to achieve it, and proportional to its importance.[11]

35. We consider any limit on this right to be justified. As noted above, an at-risk prisoner has been assessed as being at risk of self-harm. New s 61CA allows such a prisoner's association to be limited only if the prison's health centre manager recommends that it is desirable to address the risk of self-harm, and only to the extent necessary for the safety of the prisoner. The provision is therefore rationally connected and proportionate to an important objective and appears no greater than reasonably necessary to achieve that objective.

36. We therefore consider the Bill to be consistent with the rights of persons arrested or detained affirmed in s 23(5) of the Bill of Rights Act.

37. We note that this provision also prima facie limits s 17 of the Bill of Rights Act (right to freedom of association). For the reasons discussed above, we also consider this limit justified.

Section 25(c) – Right to be presumed innocent until proven guilty

38. Section 25(c) of the Bill of Rights Act affirms that anyone charged with an offence has the right to be presumed innocent until proven guilty according to the law.

39. The Bill amends s 202 of the principal Act so that, despite any international obligations, regulations may provide for the mixing of accused and convicted persons:

    a. for non-offence-based programmes, such as therapeutic, education, kaupapa Māori, or religious-based programmes, if it is not practicable or therapeutic to provide the programmes separately, and

    b. who are allowed to keep their children with them in prison if it is not practical or therapeutic to keep the persons separate.

40. Any such regulations may limit the presumption of innocence.

41. Regarding the mixing of accused and convicted persons for programmes, the Department of Corrections advises that there are times when it cannot provide parallel, non-offence focused programmes to these groups of prisoners (for example, because there are not

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11 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

enough participants, or it is not financially feasible to do so), and that this prevents the design or implementation of innovative programmes that prioritise the interests of the prisoner. We understand it is intended that mixing for such programmes would only be with the consent of the remand accused person.

42. We note for completeness that any regulations made under this provision must be consistent with the Bill of Rights Act, otherwise there is a risk they will be ultra vires (go beyond the authority of the primary legislation).

Section 27 – Right to justice

43. Section 27(1) of the Bill of Rights Act provides that every person has the right to the observance of the principles of natural justice by any public authority with the power to make a determination in respect of their rights, obligations, or interests protected or recognised by law.

44. The Bill amends the principal Act by adding a new s 133A, authorising a hearing adjudicator to proceed with a hearing without the prisoner present; and a new s 138A, authorising a Visiting Justice to proceed with a hearing without the prisoner being present. The amendments relate to the internal disciplinary process which ensures prisoner misconduct is dealt with through disciplinary hearings and the imposition of penalties by hearing adjudicators or Visiting Justices. We consider that these provisions prima facie engage s 27(1) of the Bill of Rights Act.

45. We consider the limit on s 27(1) to be justified in terms of s 5 of the Bill of Rights Act. The amendments are rationally connected to the important objective of maintaining safety and wellbeing of staff and prisoners and appear proportionate to that objective. They also appear a reasonable limit on the right to be heard, as:

    a. the hearing may only proceed without the prisoner if the hearing adjudicator or Visiting Justice is satisfied the prisoner has refused to attend or they required the prisoner to leave the hearing on the grounds of disruptive behaviour, and

    b. where an offence is proved before a Visiting Justice without the prisoner present, the prisoner may request a re-hearing.

46. We therefore consider the Bill appears to be consistent with s 27 of the Bill of Rights Act.

Conclusion

47. 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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