New Zealand Law Society
Te Kāhui Ture o Aotearoa

Corrections Amendment Bill

10/8/2023

Corrections Amendment Bill

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Corrections Amendment Bill (the **Bill**).

1.2 This submission has been prepared with input from the Law Society's Criminal Law Committee.[1]

1.3 The Law Society does not wish to be heard on the Bill.

2 Clause 21: Use of non-lethal weapons

2.1 Proposed new section 85(1A) limits the use of non-lethal weapons against prisoners who passively resist a lawful order to situations where there are reasonable grounds for believing there is an imminent threat of injury or harm to the prisoner or another person. The subsection includes two subclauses, (a) and (b), that must be satisfied before non-lethal weapons can be used in such situations. However, rather than being distinct prerequisites, (b) provides an exhaustive definition of the phrase used in (a). This effectively makes (a) redundant – if subsection (b) is satisfied, then (a) must also be satisfied.

2.2 This section could be simplified while maintaining its intended effect by redrafting it as follows:

> (1A) An officer may only use a non-lethal weapon prescribed for use in dealing with a prisoner who is passively resisting a lawful order in the situation described in section 83(1)(c)(ii) if the officer has reasonable grounds for believing there is an imminent threat of injury or harm to the prisoner or any other person.

2.3 The courts and Government have recognised that, in some circumstances, the use of non-lethal weapons can raise issues of inconsistency with the right for people who have been detained to be treated with humanity and dignity, as protected by s 23(5) of the New Zealand Bill of Rights Act 1990 (Bill of Rights).[2] This is not addressed in the Ministry of Justice's advice to the Attorney-General on the Bill's consistency with the Bill of Rights (the **Attorney-General's Bill of Rights advice**).[3] The Law Society considers that any use of weapons provided for under the Act should be subject to an additional requirement that this course of action only be used when other potential responses that do not involve the use of weapons would be insufficient.[4]

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1 More information regarding this committee is available on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/criminal-law-committee/.

2 *Cripps v Attorney-General* [2022] NZHC 1532 at [189] and [224]

3 https://www.justice.govt.nz/assets/Documents/Publications/20230621-Corrections-Amendment-Bill.pdf

4 For completeness, we note that the current section 83(2) provides that officers or Corrections Staff may not use any more physical force than is reasonably necessary in the circumstances. It is not clear whether the use of all forms of non-lethal weapons would be captured by this section – for example, it is questionable whether the use of pepper spray would be regarded as 'physical force', and we are not aware of whether this has been tested in courts before.

3 Clause 23: retention of images from imaging technology searches

3.1 Under proposed section 92C(2), images taken as part of an imaging technology search for unauthorised items can only be retained for up to 24 hours. We consider this limited retention time takes an appropriately privacy-consistent approach. However, an image taken under an imaging technology search has the potential to have evidential value in some criminal proceedings (for example, if a visitor was charged in relation to an attempt to bring prohibited items into the prison). Given this, it may be appropriate for this clause to include a savings provision to allow the retention of images beyond 24 hours in the event the images may be needed for anticipated legal proceedings.

4 Clause 28: Searches of prisoners and cells

4.1 These proposed provisions restate the powers of prison staff to engage in searches of prisoner's cells and bodies. The Attorney-General's Bill of Rights advice gives only a passing analysis of the justification for random searches of cells and pat-down searches of prisoners, appearing to take the position that these are justified largely because they are less invasive than other forms of search permitted under the Act (such as strip searches). In our view, these random searches are likely to be inconsistent with the right to be secure against unreasonable searches of their person and property.[5] We encourage the Select Committee to consider whether the proposed search powers should include a requirement that the relevant staff members have reasonable grounds to suspect that a prisoner may hold an unauthorised item before a search under the proposed sections 98-98B can be carried out.

5 Clause 33: monitoring, collection, use and disclosure of prisoner communications

5.1 The proposed new subpart 4A of part 2 widens Corrections' intelligence gathering powers to include newer forms of communication and in-person visits. When Corrections were consulting on the proposed amendments to the Act that preceded this Bill, the Law Society agreed that extending the Act's monitoring powers to include video calling and internet-facilitated messaging could be a justified reaction to new forms of communication, but that any move to increase powers to enable monitoring of in-person visits raises clear privacy issues.

5.2 One of the guiding principles of the Act is that "contact between prisoners and their families must be encouraged and supported, so far as is reasonable and practicable and within the resources available, and to the extent that this contact is consistent with the maintenance of safety and security requirements."[6] Granting Corrections the power to monitor in-person visits could be a strong disincentive for many whānau and family members and other pro-social visitors to continue visits, out of concern for their own privacy, and may limit the benefit of any visits as a result. An environment of surveillance and monitoring can also run counter to fostering a relationship of trust and confidence which is key to supporting rehabilitation.

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5 Bill of Rights, section 21

6 Corrections Act 2004, s 6(1)(i)

5.3 The Law Society concluded that the monitoring of in-person visits should not be permitted under the Act, but noted that if these were to be allowed, the powers should be clearly expressed and subject to appropriate oversight, safeguards and limitations.

5.4 While we maintain our concerns about the privacy risks associated with the potential monitoring in-person meetings, in our view the proposed powers do have appropriate safeguards and limitations, in the form of approval being needed at a chief executive level prior to any monitoring taking place,[7] and only being available based on information that has previously been collected via other forms of prisoner communications and information sources.[8]

6 Clauses 35, 37 and 40: availability of suspended penalties for prison discipline proceedings

6.1 The Law Society supports the availability of suspended penalties provided by the proposed new section 133(4A). This would allow for a lower-level response to minor offending, and promote ongoing good behaviour. However, we consider that the clause raises questions around how this would work in practice – for example whether they be used where a prisoner would be eligible for release on parole, or ending their sentence, during the period of suspension. If a suspended penalty was not available in those circumstances, there would be an appearance of unfairness that those prisoners were effectively more harshly treated.

6.2 It is also unclear exactly what form a suspended penalty would take – would this be a warning given in a similar manner to an order to come up for sentence if called upon under section 110 of the Sentencing Act 2002, or would the adjudicator express a specific penalty that has been suspended. If it is the latter, then proposed sections 135A and 138B (which allow an adjudicator or visiting justice to impose a penalty that has been suspended in the event of subsequent disciplinary offending during the suspension period) raise additional concerns. Under those sections, the adjudicator or visiting justice can impose any of the penalties under section 133(3) or (4) in respect of the offence that had initially resulted in a suspended penalty. This potentially means that a prisoner may be subject to a more significant penalty than what was initially specified as part of the suspended penalty, which raises concerns around fairness and consistency in the disciplinary process.

6.3 We recommend these matters be clarified to note:

(a) A suspended penalty can be imposed regardless of a prisoner's upcoming release or parole eligibility; and

(b) Either:

(i) that a suspended penalty does not involve the adjudicator/visiting justice indicating an actual penalty; or

(ii) that the penalty imposed at the later disciplinary proceeding cannot be more severe than what was first imposed and suspended.

6.4 Given the Bill seeks to amend the prison discipline regime, the Select Committee may wish to consider whether the limitation on rights caused by the current regime is demonstrably

[7] Proposed section 127J(1)

[8] Proposed section 127J(2)

justified. In particular, the use of adjudicators is likely to be inconsistent with natural justice principles[9] due to the lack of impartiality inherent in having a Corrections staff member presiding over a disciplinary case that is brought by another member of their organisation. It is suggested that very few prisoners would consider an adjudicator drawn from the staff of a prison to be impartial when assessing the credibility of evidence given by their colleagues. This is also arguably inconsistent with the principles in the Act that guide the corrections system, which places an obligation on Corrections to ensure the fair treatment of persons under its control or supervision.[10] It is apparent that this limitation on prisoner's rights is not by necessity, given the current Act already provides for an independent decision-maker in the form of visiting justices. It is hoped that the Select Committee will take this opportunity to turn its mind to whether the current prison disciplinary regime is appropriate.

7 Clause 36: holding disciplinary proceedings in absence of prisoner

7.1 Proposed sections 133A and 138A allow for an adjudicator or visiting justice to proceed with a hearing in the absence of a prisoner. The circumstances in which this is available essentially reflects the position in criminal matters under the Criminal Procedure Act. However, we note that for hearings before an adjudicator that proceed in the absence of a prisoner, there is no provision to allow a prisoner to seek a rehearing where there is an excuse for their non-attendance (though there is such a provision for hearings before a visiting justice). It is not clear why this has not been included. It may be that the availability of an appeal to a visiting justice is seen as appropriately dealing with this. However, this would effectively exhaust a prisoner's appeal rights (as there is no ability to appeal a decision of a visiting justice). We consider it strongly preferable that the Bill allow for a rehearing before an adjudicator where a matter proceeds in the absence of a prisoner, on the same grounds as would apply to hearings before a visiting justice under the proposed section 138A(3).

8 Clause 45: permitting the mixing of remand and sentenced prisoners, and young people and adult prisoners

8.1 The Law Society considers that the limited access to rehabilitation services and programmes made available to remand accused is a significant problem and has advocated for this to be changed for some time. Remand accused currently make up a significant portion of the prison population, and this is expected to increase. It is also becoming more common for remand accused to remain in custody for longer periods of time, due to delays in matters reaching trial or resolution. In the Law Society's view, it is best for remand accused and society as a whole if this time can be used productively.

8.2 It is strongly preferable for programmes to be provided separately. Article 10 of the International Covenant on Civil and Political Rights (the **ICCPR**) requires that accused persons be segregated from convicted persons and subject to separate treatment, except in exceptional circumstances. The beneficial changes the Bill seeks to make are capable of being realised without breaching this obligation, through greater resourcing of rehabilitation services and programmes in the prison system, so that separate programmes can be offered

9 New Zealand Bill of Rights Act 1990, section 27

10 Corrections Act 2004, section 6(1)(f)

for remand and sentenced prisoners. A solution that is inconsistent with our international obligations should only be used as a last resort.

8.3 However, where offering separate programmes is not possible, we consider that having suitable programmes with a mix of remand accused, remand convicted, and sentenced prisoners is preferable to remand accused being excluded from these programmes altogether. This should be subject to any right of objection by any remand accused prisoner who is being considered for inclusion in a programme. Objection by any remand accused, on the basis of concerns about interaction with sentenced prisoners, should not be taken or reported as an unwillingness to participate in therapeutic or rehabilitative programmes.

8.4 While this would be inconsistent with New Zealand's international obligations under the ICCPR, we note that Article 10 also provides that the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Therefore, a failure to provide programmes and services to remand accused is similarly inconsistent with the ICCPR.

8.5 In relation to the mixing of young persons and adult prisoners, we consider that it would be appropriate for the interests of both parties be taken into account. If there is any indication that mixing may have adverse consequences to any of the individuals involved (whether they be adults or young persons), then the preferable course of action is to keep them separate or find other suitable mixing arrangements.

David Campbell
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