NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Corrections Amendment Bill

17/05/2018

Corrections Amendment Bill

INTRODUCTION

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Corrections Amendment Bill (**Bill**).

2. The Bill provides for a number of changes to the Corrections Act 2004 (**Act**). As the Regulatory Impact Statement (**RIS**) sets out, the sixteen issues addressed in the Bill can grouped into three subject areas:

   (a) amendments relating to the safe and humane management of prisoners,

   (b) amendments relating to prisoner discipline and prison safety, and

   (c) amendments relating to the fair treatment of persons.

3. The Law Society has significant concerns regarding amendments allowing the use of mechanical restraints on prisoners in hospital for more than 24 hours, and cell sharing provisions, for the reasons set out in Part A below.

4. Part B of this submission recommends refinements to a number of provisions in the Bill relating to: segregation of prisoners at risk of self-harm; use of chains and irons in prisons; use of imaging technology to detect contraband; delegation of health centre managers' powers and functions; and mothers being able to appeal decisions relating to baby placements. Part B also discusses the New Zealand Bill of Rights Act 1990 (NZBORA) vetting issue relating to making tattooing a disciplinary offence.

5. The Law Society would appreciate the opportunity to appear before the committee.

PART A: SIGNIFICANT CONCERNS

6. The parts of the Bill relating to the use of mechanical restraints on prisoners in hospital for more than 24 hours, and the cell sharing ('double-bunking') provisions raise significant issues.

7. These aspects of the Bill were considered by the Ministry of Justice in its examination of whether the Bill is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act (its view being that the Bill was consistent with those rights and freedoms).

(A1) Use of mechanical restraints on prisoners being treated in hospital (clause 20 amending section 87 of the Act)

8. The amendments to section 87 of the Act include enabling the use of mechanical restraints for more than 24 hours for prisoners in hospital.

9. As the Ministry of Justice notes in its advice on the Bill's consistency with NZBORA, the "*use of mechanical restraints has significant implications for individuals' humanity and dignity, particularly in relation to the most restrictive types of restraint such as a 'tie-down bed*"".[1]

[1] Advice to the Attorney-General on consistency of Corrections Amendments Bill with NZBORA, 2 March 2018, at paragraph 29.

The use of restraints for lengthy periods is plainly degrading treatment and inconsistent with the right of detained persons to be treated with humanity and dignity.

10. The Ministry of Justice cites the March 2017 report of the Ombudsman, which found that the use of the tie-down bed and/or waist restraints in the circumstances of five prisoners amounted to cruel, inhuman or degrading treatment or punishment for the purpose of Article 16 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[2] It notes that tie-down beds are not used in comparable jurisdictions that have ratified the Optional Protocol to the Convention Against Torture, including England and Wales, Scotland and Sweden.

11. In this context the Law Society questions the Ministry of Justice's conclusion that the use of mechanical restraints for extended periods on prisoners in hospital is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act.

12. It is not clear from the materials supporting the Bill that the proposed amendment is rationally connected with and proportionate to the objective of managing prisoners safely. The Regulatory Impact Statement does not provide any information on actual or attempted prisoner escapes from hospital. It is therefore difficult to assess the proportionality of the proposed amendment to the nature of the perceived problem.

13. No other less invasive measures or options that might achieve the objective of preventing prisoner escapes from hospital have been identified in the RIS. There are likely to be less invasive options (such as a guard being present).

14. The Law Society **recommends** that the select committee seek advice from officials on:

    (a) less rights-limiting alternatives that can achieve the public safety objectives; and

    (b) other safeguards that may lessen the impact of degrading treatment (for example, excluding tie-down beds from the mechanical restraints authorised for use for more than 24 hours).

(A2) Cell sharing
(clause 19, inserting new section 82A; clause 35, replacing Regulation 66)

15. Clauses 19 and 35 amend the Act and Regulations respectively, removing the current preference for single-cell accommodation. The preference for single-cell accommodation expressed in Regulation 66 is consistent with the *United Nations Standard Minimum Rules for the Treatment of Prisoners.*[3]

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2 Office of the Ombudsman *A question of restraint – Care and management for prisoners considered to be at risk of suicide and self-harm* (1 March 2017) available: http://www.ombudsman.parliament.nz/resources-and-publications/documents/a-question-of-restraint.

3 See https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

16. The *United Nations Standard Minimum Rules for the Treatment of Prisoners* (Minimum Rules)[4] states, at rule 9(1):

> Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.

17. This rule is further elaborated on in the *United Nations list of prison-related standards and norms*[5] which provides:

> Cells for individuals shall not be used to accommodate more than one person overnight. Communal cells shall only house prisoners who have been carefully selected to share them. All facilities shall meet the requirements regarding health, heating, ventilation, floor space, sanitary facilities and lighting.

18. The Act provides statutory recognition of these United Nations standards. Section 5 states:

> **5 Purpose of Corrections system**
>
> (1) The purpose of the Corrections system is to improve public safety and contribute to the maintenance of a just society by –
>
> …
>
> (b) providing for Corrections facilities to be operated in accordance with rules set out in this Act and regulations made under this Act that are based, amongst other matters, on the United Nations Standard Minimum Rules for the Treatment of Prisoners …

19. Currently, regulation 66 reasonably reflects the Minimum Rules. While the Minimum Rules allow for shared cells, they do so only where "special reasons, such as temporary overcrowding" exist. The Bill, however, removes the preference for single-cell accommodation. It makes shared cells the norm, rather than the exception where special circumstances apply.

20. The Law Society is concerned that the Bill is inconsistent with the Minimum Rules because:

(a) the objective of the Minimum Rules – that Corrections facilities aspire to providing single-cell accommodation in all circumstances – is not adhered to;

(b) the Bill provides no criteria by which the prison manager is to assess whether a prisoner is suited or unsuited to shared cell accommodation;

(c) the Bill does not require the prison manager to ensure that prisoners accommodated in shared cells are carefully selected; and

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4 See https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

5 See http://www.unodc.org/newsletter/en/perspectives/no02/page004a.html.

(d) the Bill deletes the current requirement (in regulation 66(2A)) that shared cells should be regulated by the Chief Executive issuing instructions for the purpose of ensuring that the use of shared cells is safe, secure, humane, and effective.

21. The Law Society acknowledges that the explanatory note to the Bill records (at page 4) that "research has shown that cell sharing is acceptable if properly managed". In a 2012 Department of Corrections report, *Prisoner double-bunking: Perceptions and impacts*,[6] the Department concluded "the overall impression gained from the interviews was that, when assigned to a double bunked cell, prisoners simply got on with things and made the best of the situation". However, the report also noted that the "majority of prisoners interviewed preferred single cell accommodation in prison, as it provides privacy, and reduces exposure to conflict".

22. The finding that single-cell accommodation better reduces risk of conflict is consistent with the determinations of the Report of the Zahid Mubarek Inquiry in 2006.[7] That Inquiry took place after Mr Mubarek was murdered by his cellmate at the Feltham Young Offenders' institution in London in 2000. The Inquiry, chaired by Hon Justice Brian Keith, extensively considered the risks associated with shared cell accommodation in prisons. Relevantly, it found that "inmates overwhelmingly expressed a strong preference to be in cells on their own", because "there are countless things prisoners are comfortable about doing in private, but less comfortable about doing if someone else is there". It recommended that, despite the impracticalities involved, the Prison Service in the United Kingdom should place a high priority on eliminating enforced cell-sharing.

23. Accordingly, the Law Society **recommends** that the Bill be amended by deleting clause 35 so that no change is made to regulation 66 as it currently stands. While cell-sharing may be unavoidable in some cases, it should not be the statutorily prescribed norm.

PART B: SUGGESTED REFINEMENTS

(B1) Segregation of prisoners at risk of self-harm

(Clause 10, amending section 49; clause 13, amending section 60; clause 14, inserting new sections 61A to 61H)

24. The Bill introduces a legislative framework, separate from the segregation regime, for the management of prisoners at risk of self-harm. The Law Society recommends the following changes to improve clarity and workability of the new regime.

Timing of observations and visits

25. New section 61B(b) and (c) propose that the prisoner is observed at intervals specified by the prison manager, and that the prisoner must be seen at least twice per day unless the health care manager is satisfied in the circumstances it is unnecessary. The addition of criteria for determining the prisoner observation intervals and registered health

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6 See http://www.Corrections.govt.nz/__data/assets/pdf_file/0003/708195/Doublebunking_research_report_combined_phases_1_and_2.pdf, at page 28.

7 See https://www.gov.uk/government/publications/report-of-the-zahid-mubarek-inquiry, at pp445-446.

professional visits (such as "adequate to protect the prisoner from self-harm") would be helpful.

"Prescribed standards" for at-risk cells

26. New section 61H(3) includes a requirement that at-risk cells must have items and features prescribed by regulations and that these items and features must meet "prescribed standards." If those standards are to be prescribed in regulations, the Law Society suggests amending the subsection to read "must meet standards prescribed in regulation." If the standards are to be prescribed outside of regulations, the section should identify where the standards are to be specified (in the interests of making relevant tertiary level regulation visible and accessible).

Privacy in at-risk cells

27. The Law Society notes that, as emphasised in the Chief Ombudsman's March 2018 *OPCAT Report on an unannounced inspection of Upper Hutt (Arohata) Under the Crimes of Torture Act 1989*, an issue arises from the lack of privacy in the use of toilets and when prisoners are in states of undress in at-risk cells.[8] The Chief Ombudsman considers the lack of privacy is degrading treatment or punishment for the purposes of the Convention against Torture.

28. However, the Chief Ombudsman notes the tension arising from the Corrections Regulations that provide that prisoners at risk of self-harm must have "*no privacy screening or other barrier that prevents a full view of the cell from the door window*."[9]

29. The OPCAT report indicates that potential options for at-risk prisoner privacy are due to be reported in August 2018. There may therefore be an opportunity to address this privacy issue as the Bill progresses. The Law Society would welcome the opportunity to comment on any proposed privacy reforms that may be included in the Bill as it is considered by the select committee

(B2) Restraint of prisoners – prohibition on use of chains and irons in prisons (clause 20, amending section 87(6) and inserting new section 87(7))

30. The proposed clarification that chains and irons must not be fitted or attached to a prisoner in any circumstances is welcomed.

31. While subsection 87(7) as amended will expressly provide that *handcuffs* are not "chains or irons", those terms are otherwise not defined. In the context of an absolute prohibition on the use of chains or irons, definition of those terms is essential to the workability of the legislation and the Law Society therefore **recommends** that definitions be included in the Bill.

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8 http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/2706/original/arohata_upper_prison_inspection_report.pdf?1522807575

9 Ibid, at p13.

(B3) Delegation of health centre manager's powers and functions (clause 6, inserting new section 19B)

32. Clause 6 will enable a prison health centre manager's powers and functions to be delegated to suitably qualified medical practitioners.

33. The RIS identified the issue as difficulties arising when the health centre manager is not available outside normal working hours. However, the power to delegate is much more broadly worded. The amendment would enable others to exercise delegated authority, even when the health centre manager is on-site at the prison.

34. The Law Society **recommends** an amendment that expressly confines the delegation of the health centre managers' powers and functions to the operational problem identified in the RIS.

(B4) Use of imaging technology to detect contraband (clause 21, amending sections 91 and 92; clause 22 amending section 94; clause 23, amending section 96; clause 25, amending section 98)

35. Clause 21 proposes to authorise imaging technology searches. It appears on the face of it that these could be used as alternatives to strip searches in certain situations.

36. The Law Society acknowledges that the RIS says that imaging scans are less intrusive and could "reduce reliance on strip searches".[10] However, it is disappointing that the opportunity has not been taken in this Bill to amend the provisions of the Act governing strip searches that have been criticised by the United Nations Committee Against Torture.

37. In its shadow report to the United Nations Committee Against Torture dated 13 February 2015,[11] the Law Society raised concerns that the prisoner strip-searching rules introduced by the Corrections Amendment Act 2013 authorised mandatory strip-searching of prisoners in a broader range of circumstances, in a more invasive manner and with fewer safeguards than had been provided for under previous legislation.

38. The Law Society expressed its concern that justification was not evident for the following three features of the new strip-searching regime (see paragraph 11, Appendix A):

(a) providing that a prisoner may be required to bend his or her knees, with legs spread apart, until his or her buttocks are adjacent to his or her heels in all strip searches;

(b) extending authority to use an illuminating or magnifying device to conduct a visual examination around the anal and genital areas to all strip searches;

(c) providing for mandatory strip-searching when prisoners are placed in, and each time the prisoner is returned to, segregation areas when subject to a segregation direction because of a risk of self-harm.

39. The essence of the Law Society's concern was that these measures were not anchored in a requirement that there be reasonable grounds to believe that a prisoner had in his or her

10 Box L.3, page 25 of the Regulatory Impact Statement, 13 February 2018.

11 See https://www.lawsociety.org.nz/__data/assets/pdf_file/0017/87101/I-UNCAT-NZ-6th-PR-13-2-15.pdf. The relevant paragraphs are set out in **Appendix A** to this submission.

possession an unauthorised item (in the case of paragraphs 38(a) and 38(b) above) and that there was no provision for discretion in respect of mandatory strip-searching for segregated prisoners (paragraph 38(c) above).

40. The United Nations Committee agreed with the Law Society's concerns about mandatory strip-searching and recommended that the Corrections Amendment Act 2013 be amended accordingly (see paragraph 13 of the Committee's concluding observations, Appendix B).[12]

41. The Law Society therefore **recommends** that the Bill be revised so as to amend the provisions of the current Corrections Act 2004 (inserted by the Corrections Amendment Act 2013), in order to comply with the views of the United Nations Committee Against Torture.

(B5) Mothers' right to appeal decision relating to baby placement

(clause 5, amending section 10 of the Act; clause 17, amending section 81A; clause 18 inserting new section 81AB)

42. The Bill introduces a statutory review process regarding decisions on the placement of prisoners and their babies in Mothers with Babies Units. Given the significance of a decision to permit (or not) or to end the placement of a child with its mother in prison, it is appropriate to enact a statutory right for mothers to seek the Chief Executive's reconsideration.

43. The requirement that the Chief Executive cannot delegate this power ensures the reconsideration is by a person not involved in the original decision (first instance decisions technically being the Chief Executive's, but in practice being delegated to a multi-disciplinary group).

44. The proposed amendment suggests a *de novo* consideration of a mother's request or a decision to end the child's placement. However, the amendment provides that the Chief Executive is not required to consult the Chief Executive of Oranga Tamariki or to seek the advice of a child development specialist when reconsidering the decision.

45. If the intention is that the Chief Executive is making a *de novo* decision, the Law Society considers that the Chief Executive should be required to take those steps, in the interests of ensuring the Chief Executive has all relevant information before making a *de novo* decision.

46. If, however, the intention is to provide for a statutory process of a review of the first instance decision, it is appropriate that the reconsideration is on the basis of information available to the first instance decision maker/s. In this context the requirement not to consult the Chief Executive of Oranga Tamariki or to seek the advice of a child development specialist would be logical.

47. The Law Society **recommends** an amendment to the Bill clarifying whether the Chief Executive's reconsideration is a *de novo* decision or a review on the papers of the first instance decision. If the latter, an express provision should be included enabling the Chief Executive to rely on pre-existing information.

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[12] See https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/110/91/PDF/G1511091.pdf?OpenElement. The relevant paragraphs are set out in **Appendix B**.

48. Such reconsideration is time sensitive, given the impact on mother and child contact. The Law Society therefore **recommends** including a timeframe for the Chief Executive's reconsideration (such as 5 working days) and a default outcome if that timeframe is not complied with.

(B6) Tattooing in prison a disciplinary offence
(clause 26, amending section 128)

49. The Law Society appreciates the health and safety issues that arise from tattooing carried out in prison, which is only possible using prohibited paraphernalia.

50. There is however an issue that may have been overlooked by the Ministry of Justice when preparing its advice on whether the Bill is consistent with the rights and freedoms under the New Zealand Bill of Rights Act.

51. The Department of Corrections notes in the RIS that making tattooing a disciplinary offence could be considered to infringe the right to freedom of expression.

52. However, this issue is not discussed in the Ministry's advice on whether the Bill is consistent with the rights and freedoms under the New Zealand Bill of Rights.

53. The select committee may wish to ask the Ministry for its opinion on the freedom of expression issue noted in the RIS.

Kathryn Beck
President

17 May 2018

Appendices A, B

Appendix A

Excerpt from NZLS Shadow Report 13.2.15 to United Nations Committee Against Torture, in relation to New Zealand's 6th periodic review under the United Nations Convention against Torture [refer submission paragraphs 24 – 27, Imaging technology search]:

"**Corrections Amendment Act 2013** (article 16)

10. The Corrections Amendment Act 2013 authorises mandatory strip-searching of prisoners in a broader range of circumstances, in a more invasive manner and with fewer safeguards than previously provided for. While the Law Society accepted that strip-searching of prisoners is necessary in certain circumstances, it noted that it was obviously degrading and that its use must be carefully circumscribed.

11. In the Law Society's view, the justification for the following legislative measures was not evident:

    a. providing that a prisoner may be required to bend his or her knees, with legs spread apart, until his or her buttocks are adjacent to his or her heels in all strip searches (rather than only where there are reasonable grounds for believing that a prisoner has in his or her possession an unauthorised item);

    b. extending authority to use an illuminating or magnifying device to conduct a visual examination around the anal and genital areas to all strip searches (rather than only where there are reasonable grounds for believing that a prisoner has in his or her possession an unauthorised item); and

    c. providing for mandatory strip-searching when prisoners are placed in, and each time the prisoner is returned to, segregation areas when subject to a segregation direction because of a risk of self-harm (the Law Society noted that provision for discretionary strip-searching would better allow for the traumatic and potentially risk-exacerbating nature of the strip-search to be balanced against the need to mitigate the risk of self-harm).

12. The Ministry of Justice's legal advice to the Attorney-General was that while a physical search is a restraint on freedom and an affront to human dignity, the Bill was consistent with the Bill of Rights (focusing on the right against unreasonable search of the person affirmed in section 21 of the Bill of Rights).

13. The Law Society respectfully disagreed with the legal advice to the Attorney General, noting that it did not address the right not to be subjected to degrading treatment, and the right of persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the person, affirmed by sections 9 and 23 of the Bill of Rights respectively.

14. The Law Society considers that the Act breaches sections 9, 21 and 23 of the Bill of Rights, and may well result in degrading treatment in breach of article 16 of the Convention.

Recommendation: That the Corrections Amendment Act 2013 be repealed or amended to the extent required to remove its apparent inconsistency with the Convention and the corresponding protections under the New Zealand Bill of Rights Act 1990."

Appendix B

Excerpt from the United Nations Committee against Torture, Concluding Observations on the 6th periodic report of New Zealand, 2 June 2015

[refer submission paragraph 28, Imaging technology search]:

*"**Arrangements for the custody and treatment of persons deprived of liberty***

13. Bearing in mind its previous concluding observations (see CAT/C/NZL/CO/5, para. 9) and the report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its visit to the State party, the Committee is concerned at reports that, despite remedial measures taken by authorities, overcrowding remains a problem in many places of detention. The Committee is concerned at reports that, in a number of such places, the material conditions and health-care services, in particular mental health-care services, are inadequate. **The Committee is concerned at provisions of the Corrections Amendment Act 2013 authorizing the mandatory strip-searching of prisoners in a broad range of circumstances.** Finally, the Committee is concerned at information received that the rate of violence between prisoners and the rate of assaults of prisoners on guards is higher in the privately-run Mount Eden Corrections Facility than in other comparable public correction facilities (arts. 2, 11 and 16).

The State party should strengthen its efforts to bring the conditions of detention in all places of deprivation of liberty in line with relevant international norms and standards, including the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, in particular by:

(a) Continuing to reduce overcrowding, particularly through the wider application of non-custodial measures as an alternative to imprisonment, in the light of the United Nations Standard Minimum Rules for Non-custodial Measures;

(b) Ensuring that adequate mental health care is provided for all persons deprived of their liberty;

(c) Amending the Corrections Amendment Act 2013 to the extent required to remove inconsistencies with the relevant provision of the Convention.

While taking note of the statement made by the representative of New Zealand that "contract managed prisons must comply with the same domestic laws, international standards and obligations relating to prisoners' welfare and management as publicly managed prisons", the Committee recommends that the State party ensure that privately run places of detention fully comply with those laws, standards and obligations."

[emphasis added]