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10 April 2012

The Chairperson
Law and Order Select Committee
Parliament Buildings
P O Box 18 041
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Dear Jacqui Dean

CORRECTIONS AMENDMENT BILL 2011

1. After consideration of issues raised by this bill the Legislation Advisory Committee (LAC) thought it might be helpful for Select Committee members to see a copy of the report on the bill provided to us by the Law Commission. This report analyses the bill in relation to compliance with Legislation Advisory Committee Guidelines.

2.. Legislation Advisory Committee was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. It has produced, and updates, Guidelines on the Process and Content of Legislation as appropriate benchmarks for legislation, which have been adopted by Cabinet.

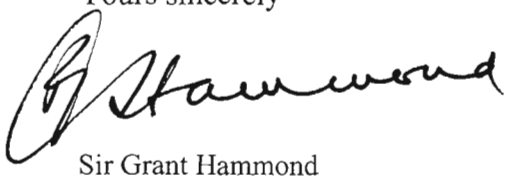
3.. The terms of reference of the LAC include:

- to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues;

- to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

4. The Committee does not wish to be heard on this submissin.

Yours sincerely



Sir Grant Hammond
Chair

LAW COMMISSION REPORT TO LAC

Name of Bill	**Corrections** Amendment Bill 2011 330-1
Name of Commissioner	Dr John Burrows
Report to LAC	30 March 2012
Current Status of Bill	First reading 28/2/12, at Law & Order Select Cttee with subs due 12/4/12,
Nature & Size of Bill	This bill amends the Corrections Act 2004 in relation to drug testing and strip searching,management of prison health services, delegation of statutory powers arising from establishment of contract prisons, and provision for self-employment of inmates. The bill has 46 clauses.

LAC CHECKLIST

1 Appropriate means of achieving the policy objective

The policy objectives require legislative amendment. Several of the amendments relate to the introduction of contract managed prisons but several introduce changes that affect all prisons. The polices were developed over some time as there are 4 RISs, with the first in July 2010.

One of the major policy changes is that the responsibility for providing prison health services will now be with Health Centre Managers who are employees rather than with contracted medical practitioners. The CE or contractor must appoint a health centre manager for each prison, who must either be a medical practitioner or a nurse. There must also be "a sufficient number of medical practitioners to meet prisoner needs for medical care and treatment" (cls 7, 8 amending ss 19, 20). Several amendments are consequential on this change.

The RIS states that in reality health centre managers have the central role in delivering health services. It says, "There is a poor fit between the legislative provisions and the actual organisation and operation of prison health services that has created inefficiencies, and that may make prison health services less effective".

As noted in the 1st reading speeches, the change is somewhat controversial as the Ombudsmen recently published a report "*Investigation of the Department of Corrections in relation to the Provision, Access and Availability of Prisoner Health Services* (A.3(A2012)". This was an own motion investigation, undertaken because "we considered that Health Services to prisoners are so fundamental to the general welfare of prisoners that they merited examination by the Ombudsmen as part of their general oversight of prison administration".

Some of the amendments in the Bill differ from the Ombudsmen's conclusions. In particular the Ombudsmen state as a "principal opinion" that "Health Services for prisoners should be funded and delivered by an agency whose primary focus is health and therapeutic support, not custodial".

2 Understandable and accessible legislation

No issues raised.

3 Basic principles of New Zealand's legal and constitutional system

At present the delegation of powers and functions of the CE of Corrections is constrained by s10 of the Act which lists certain delegations that cannot be made. Subject to s10, the bill provides that the CE can now delegate any of the functions of powers under this Act to a contractor or employee of a contractor (cl 199AA).

Delegation under the new s199AA does not "affect the responsibility of the CE for the actions of any persons acting under the delegation" (cl 199AA(5)), and there are new reporting requirements relating to any functions delegated under S199AA. There are considerable reporting requirements already in place for contract managed prisons.

Security reclassification and temporary release

This bill also includes some new amendments that explicitly extend authority currently delegated by the CE of Corrections to government employees to the employees of contract managed prisons. These are:

- Review of security classification requested by a prisoner (this must be carried out by an employee of the Dept or contractor approved by the CE who is not a staff member of a prison (cl14 amending s48).
- Temporary release from custody or temporary removal from prison (cls16, 17, 18 amending ss62, 63 and 64).

Some commentators view the delegation of core State functions such as changing the security classification of an inmate or the temporary removal or release of inmates from prisons as powers that should only be exercised by the State through employees accountable to the Minister, who is ultimately accountable to Parliament.

There are new reporting requirements relating to security reclassification, and Monitors are already required to review and report on decisions relating to temporary release of prisoners. Whether reporting requirements through the Chief Executive provide appropriate accountability to Parliament in relation to security reclassification and to temporary release of prisoners is a possible question for LAC.

Segregation for medical oversight

At present Prison Managers, on the recommendation of Medical Officers can direct segregation of prisoners to assess and ensure their physical and mental health. The amendments mean that Health Centre Managers will now make such recommendations, but must consult a medical practioner where the matter is outside their scope of practice. At present the Prison Manager must arrange for visits by a registered health professional

every day (twice if risk of self-harm) unless the medical officer directs otherwise. Under the amendment the Health Centre Manager must arrange for health professional visits *unless satisfied they are not necessary*. The RIS discusses the appointment of Health Centre Managers in general terms without reference to this particular provision.

It could be argued that segregation of prisoners is a matter that should have a level of independent medical assessment. It might, for example, be a requirement for a medical officer to visit the prisoner if the segregation continues beyond a certain time. International obligations that may be relevant to this issue are listed in Item 8 below.

Minimum Entitlement

This amendment is called to the attention of LAC as it reduces a current right of prisoners recently endorsed by the Ombudsmen.

The Act lists certain entitlements that every prisoner has, and the circumstances in which these may be denied. An amendment will allow the minimum entitlement of 1 hour's physical exercise a day to be denied if the prisoner is temporarily away from the prison and "in the opinion of the prison manager, it is not practicable to provide the entitlement during the times the prisoner is in prison" (cl 22 amending s 69(4)).

The RIS gives the reasons for this change:

"The Chief Ombudsmen recently determined that prisoners must receive their entitlement to at least one hour of exercise on days when they attend court. However, remand units operate on an 8 am – 5 pm unlock regime, with a lower staffing level outside those hours. If a prisoner is absent at court throughout the unlock period, assigning an officer to supervise that prisoner's exercise is likely to mean that there are not enough staff to carry out other functions that are essential for the management of the unit."

4 Statutory interpretation

No issues raised.

5 New Zealand Bill of Rights Act 1990

The Bill raises several possible inconsistencies with BoRA.

The BoRA vet considers several provisions under s21 of BoRA relating to search and seizure and concludes that the provisions are reasonable. The provisions are about:

- testing of prisoners suspected of using drugs or alcohol
- procedures around strip searching
- removal of Manager's approval for "reasonable grounds" strip searches, and
- mandatory strip searches

The vet also discusses a possible inconsistency under Section 22 BoRA relating to liberty of a person. At present inmates can only be mechanically restrained for more than 24 hours under the written order of a Visiting Justice. The bill empowers Prison Managers (ie managers of both contract and Crown run prisons) to approve mechanical restraint of

prisoners for more than 24 hours, on the written advice (including specification of the type and time of the restraint) of a medical officer (ie a medical practitioner), if necessary to protect the prisoner from self-harm (cl25 amending s87). While independent oversight of mechanical restraint for more than 24 hours is thus removed, the authority is limited to situations of possible self harm, defined as "harm inflicted by the prisoner on himself or herself".

The RIS says "The Department's ability to use mechanical restraints in prisons in the most humane and effective manner is limited by the detailed policy prescription in the Regulations", and gives details of problems with particular restraints. The BoRA vet concludes the provisions are reasonable for the following reasons.

"para 26.Extending the application of a mechanical restraint beyond 24 hours is a serious measure. There is a risk when removing external oversight in situations where prisoners are most vulnerable. However, it is proposed that the prison manager can only extend the use of a mechanical restraint in order to protect the prisoner from self-harm and only if it is considered necessary in the opinion of a medical officer. This authorisation must be set out in writing and specify the type(s) of restraint to be used and the length of time during which the prisoner may be kept under restraint.

para 27.As the rationale for extending the restraint is essentially to preserve the prisoner's health, a medical officer is best placed to advise on whether this is the most appropriate course of action in the circumstances. While it could be argued that medical officers are less independent than the Visiting Justices (as they are employed by the Department) they are still constrained by medical legal ethics, which in turn provide a sufficient level of independence. Furthermore, in terms of safeguards, the prison manager will have to make decisions which are consistent with the Bill of Rights Act."

6 Human Rights Act 1993

No issues raised

7 Principles of the Treaty of Waitangi

No issues raised.

8 International obligations and standards

- The *International Covenant on Economic, Social and Cultural Rights* (Article 12) provides that "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

- *The Memorandum of Understanding (MOU) between the Department of Corrections and the Ministry of Health (July 2004)* is relevant to the International Covenant. It states that, "The health services to be provided to prison inmates will be the same standard as is provided to the general population of New Zealand."

- The *United Nations Standard Minimum Rules for the Treatment of Prisoners* includes Articles 22-26 relating to Medical Services", as follows.

22 (1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organised in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.

(2) Sick prisoners who require specialist treatment shall be transferred to specialised institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.

(3) The services of a qualified dental officer shall be available to every prisoner.

23. (1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.

(2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.

24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.

25. (1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.
(2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.

26. (1) The medical officer shall regularly inspect and advise the director upon:
(a) The quantity, quality, preparation and service of food;
(b) The hygiene and cleanliness of the institution and the prisoners;
(c) The sanitation, heating, lighting and ventilation of the institution;
(d) The suitability and cleanliness of the prisoners' clothing and bedding;
(e) The observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities.

(2) The director shall take into consideration the reports and advice that the medical officer submits according to rules 25(2) and 26 and, in case he concurs with the

recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within his competence of if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority.

The Ombudsmen in their 2012 report, after considering these collective obligations, conclude "that access to medical services should not be adversely affected by imprisonment".

The provisions may be relevant in considering the issue of segregation for medical oversight raised in Item 3 above.

9 Relationship to existing law

No issues raised.

10 Creation of a new public power

No issues raised.

11 Creation of a new public body

No issues raised.

12 Delegation of legislative power

Authorised Property

At present, under s43 Corrections Act, regulations can be made to prescribe the property prisoners may be issued with or allowed to keep, subject to conditions imposed by the prison manager or set out in regulations. Clause 13 inserting s45A now requires the CE of all prisons and the Commissioner of Police in respect of all Police jails to make rules declaring what items may be issued or prisoners allowed to keep and to impose related conditions. These rules are deemed to be regulations "for the purposes of the Regulations Disallowance Act 1989 but not for the purposes of the Acts and Regulations Publication Act 1989".

The July 2010 RIS states that:

"Currently, the Regulations list items of property that prisoners can be issued with or are allowed to keep. In order to change items in the list it is necessary to make regulations amending Schedule 1. The Schedule can rapidly become obsolete due to rapid changes in technology. The Act needs to be changed to allow the Chief Executive of the Department of Corrections (the Chief Executive) to approve authorised property. This will reduce the timeframe for the approval of prisoner property by three months on average."

The effect of this provision is to shift the power to make regulations about authorised property from Order-in-Council to officials, and they will make "deemed" regulations rather than "traditional" regulations.

The list of items prisoners can have may seem initially to be a matter of detailed administration. It is arguable, however, that the specification of what property inmates are

entitled to have is a fundamental right, particularly because most other freedoms and rights are restricted by virtue of being in prison. The CE and Commissioner of Police are given broad discretion with no other guidance, nor requirement for consultation, in making decisions about authorised property for inmates. There is no review process other than reference to the Regulations Review Committee.

It is suggested that this delegation raises issues beyond technical matters and requires weighing up competing interests and rights. This raises some questions. Whether it is reasonable to give officials unfettered discretion in relation to such potentially contentious decisions. Whether the transfer of authority from Order-in-Council to officials to make rules about the authorised property of prisoners is appropriate and, if it is, whether the Act should include statutory guidance about the nature of the rules that can be so made? The RIS does not discuss these aspects.

Although the rules are not to be regulations for the purpose of the *Acts and Regulations Publication Act 1989*, the Bill provides for publication on the internet and that they must be available for inspection and purchase.

13 Remedies
No issues raised.

14 Criminal offences
No issues raised.

15 Appeal and review
No issues raised.

16 Powers of entry and search
The Bill includes a series of amendments relate to strip searches and testing prisoners suspected of using drugs and alcohol (cls26, 27, 28 amending 90, 98, 102, 124, 125, 129). These are discussed in some detail in the BoRA vet and not discussed further here.

17 Cross-border issues
No issues raised.

18 Alternative Dispute Resolution
No issues raised

19 Privacy/Information Sharing

Opening of Mail
At present prisoner mail must be opened and examined by an authorised officer in the presence of another authorised officer (s106). Authorised officers "must not open, read or withhold mail" between prisoners, official agencies and MPs" (s109). Authorised officers must not open, read or withhold mail between a prisoner and legal adviser "unless authorised to do so under any of subsections (2) to (6)". (s110)

Under the Bill (cl 31 replacing s106(2)):
Any mail to or from a prisoner that is to be opened or examined must be opened and

examined by a staff member in the presence of 1 other staff member". (This is a return to the situation before a 2009 amendment.)

Under the Bill (cl 32 replacing s 109):
"*A staff member must not open any mail and an authorised officer must not read any correspondence or withhold any mail that—*

(a) is from a prisoner to an official agency; or

(b) is from a prisoner to a member of Parliament and is addressed to that member at Parliament; or

(c) is from an official agency or member of Parliament to a prisoner, and accompanied by a covering letter addressed to the prison manager stating that the agency or member of Parliament is acting in an official capacity in respect of the prisoner."

Under the Bill (cl 33 replacing s110 (1):
"*A staff member must not open any mail and an authorised officer must not read any correspondence or withhold any mail between a prisoner and his or her legal adviser, unless authorised to do so under any of subsections (2) to (6).*"

The effect of the amendments is that:

- all staff members can open and examine mail, except for mail in certain categories.
- staff members may not open mail between prisoners official agencies and members of parliament.
- authorised officers may open but not read mail between prisoners official agencies and members of parliament.
- staff members may not open mail between prisoners and legal advisers, but can do so if authorised to do so by s110(2)-(6).
- authorised officers may open but not read mail between prisoners and legal advisers, but can read mail if authorised to do so by s110(2)-(6).

In summary, at present only authorised officers can open and examine mail, and they cannot open mail between prisoners, official agencies and MPs, nor between a prisoner and legal adviser except under certain protocols.

Under the bill, all staff can open and examine mail apart from certain categories of mail. Authorised officers can open but not read mail between prisoners, official agencies and MPs. Authorised officers can open but not read mail between a prisoner and legal adviser unless authorised under certain protocols. Staff can open mail between a prisoner and legal adviser if authorised under certain protocols.

The Explanatory Note says that under the amendments "any staff member may open prisoner mail but only authorised officers may read prisoner mail". The statement in the RIS reads "Only members of the custodial staff may be authorised by the manager to open and read prisoner mail. This increases the risk that unauthorised items enter the prisons, while authorised items such as money for prisoners must then be returned to administrative staff to be accounted for and deposited in prisoners' trust accounts."

There is no discussion of the possible privacy implications of the changes in the RIS, nor of the possible implications for legal professional privilege and in relation to prisoner complaints to the Ombudsmen.

Corrections Administration (Effectiveness and Efficiency) Bill

Note - the Corrections Administration (Effectiveness and Efficiency) Bill was divided into the Corrections Amendment Bill and the Administration of Community Sentences and Orders Bill prior to introduction.

9 September 2011

ATTORNEY-GENERAL
LEGAL ADVICE: CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990

1. We have considered the Corrections Administration (Effectiveness and Efficiency) Bill (PCO 14746/9.2) ('the Bill') for consistency with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). We understand that the Bill is scheduled to be considered by Cabinet Domestic Policy Committee at its meeting on Wednesday, 14 September 2011.

2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered possible inconsistencies with the right to be secure against unreasonable search and seizure (s 21), the right to liberty (s 22) and the right to be free from double jeopardy (s26(2)).

PURPOSE OF THE BILL

3. The Bill proposes amendments to improve the overall operation of the corrections system and remove provisions which have been identified as barriers to effectiveness and efficiency in the management of offenders in prison and in the community.

4. The Bill amends the Bail Act 2000, Corrections Act 2004, Courts Security Act 1999, Parole Act 2002, and Sentencing Act 2002.

POSSIBLE INCONSISTENCIES WITH THE BILL OF RIGHTS ACT

5. We have identified some amendments that appear to limit rights and freedoms affirmed by the Bill of Rights Act. However, where a provision appears to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a "reasonable limit" that is "justifiable" in terms of s 5 of that Act. Following the guidance of the New Zealand Supreme Court decision of *Hansen v R,* the s 5 inquiry may be summarised as: [1]

(a) does the objective serve a purpose sufficiently important to justify some limitation of the right or freedom?
(b) If so, then:

i. is the limit rationally connected with the objective?
ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
iii. is the limit in due proportion to the importance of the objective?

Section 21 Search and Seizure

6. Section 21 of the Bill of Rights Act provides the right to be secure against unreasonable search and seizure. There are two limbs to the s 21 right. First, s 21 is applicable only in respect of those activities that constitute a "search or seizure". Second, where certain actions do constitute a search and seizure, s 21 protects only against those searches or seizures that are "unreasonable" in the circumstances.

7. Reasonableness will depend upon both the "subject matter" and the unique combination of "time, place and circumstance" of a particular case. [2] Overall, this involves the balancing of values underlying s 21 and a weighing of all the relevant values and public interests involved, and the strength of the individual concerns for privacy against the strength of society's need to detect and investigate crime. [3] A search or seizure which is unreasonable in terms of s 21 cannot be justified in terms of s 5 of the Bill of Rights Act. [4]

8. Issues in the Bill that may give rise to an unreasonable search and seizure are the:

   - testing of prisoners suspected of using drugs or alcohol
   - procedures around strip searching
   - removal of Manager's approval for "reasonable grounds" strip searches, and
   - mandatory strip searches.

Testing prisoners suspected of using drugs or alcohol

9. A requirement to supply a bodily sample, and the analysis of that sample, constitutes a search. [5] Under s 124 of the Corrections Act, there are four situations where prisoners may be required to submit to alcohol or drug testing, this includes where the prison manager "believes" on reasonable grounds that a prisoner has committed an offence relating to drugs and alcohol (s 124(2)(a)). Clause 39 amends s 124(2)(a) so that a prison manager need only "suspect" on reasonable grounds that a prisoner has committed an offence relating to drugs and alcohol.

10. The current test is limited in its effectiveness as it is a high threshold. For example, intelligence that a prisoner has been given drugs may not reach this threshold. The

Department of Corrections considers that the amendment will play an important role in the deterrence and detection of drug and alcohol use by prisoners.

11. The more flexible test in cl 39 could potentially generate more drug and alcohol tests being performed on prisoners. However, the privacy interests of the prisoner need to be balanced against the need to detect and investigate crime for the safety of both prisoners and staff. Furthermore, although the test in cl 39 is a lower threshold, the manager's suspicion is still required to be based on "reasonable grounds". The amendment therefore appears to be reasonable and so is consistent with s 21 of the Bill of Rights Act.

Procedures for strip searching

12. The Corrections Act currently provides for two types of strip searching and specifies different procedures for performing each:

    - "routine searches" on first admission to a prison and in a range of other circumstances set out in the Act, such as when a prisoner leaves or returns to prison, and
    - "reasonable grounds searches" performed if the prisoner is believed to be concealing an unauthorised item, where prisoners can be required to adopt a squatting position and visual magnifying devices may be used to illuminate or magnify the mouth, nose, ears, and anal and genital areas.

13. Clause 31 amends s 90(2)(f) to allow the person conducting a strip search to require the person being searched to, with his or her legs spread apart, bend his or her knees until his or her buttocks are adjacent to his or her heels. It also repeals s 90(3) and (4) and inserts a new subsection which allows "reasonable ground searches" to be applied to all strip searches. Conducting "reasonable grounds searches" increases the intrusive nature of the search and could be seen to be especially demeaning for prisoners. However it does not authorise the insertion of any instrument, device or thing into any orifice.

14. 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, particularly when devices or instruments are used to illuminate or magnify areas. The Court of Appeal has said that the "touchstone" of s 21 is the protection of reasonable expectations of privacy. [7] It follows that the greater the degree of intrusiveness, the greater the justification required and, further, the greater need for safeguards to ensure the justification is present. [8]

15. The Department advised that having two different procedures makes the legislation more complex to administer and therefore increases the risk of unlawful searches. There also appears to be lack of clarity with regard to the degree of knee bend that may be required of prisoners during a "routine search". This search is rendered less effective due to the inability to use devices such as lights and mirrors to assist visual inspection. Replacing the "routine" search with a requirement to squat (buttocks next to heels) is considered to be more comfortable for the prisoner as well as more effective. While the use of

instruments and devices such as lights and mirrors is intrusive, it is considered preferable, both for the prisoner and the staff member, for these to be used as it reduces the need for close, unaided visual inspection.

16. 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. The purpose of all strip searches is to locate unauthorised items. Searches of various kinds in prisons are necessary for the safety of prisoners and staff and for good order of the institution and the control of contraband within the prison setting. We also take into account that the Act requires that all searches 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.

17. As a result, we consider the search to be reasonable in terms of s 21 of the Bill of Rights Act.

Removal of Manager's approval for "reasonable grounds" strip searches

18. Clause 32 amends s 98 by removing the requirement for an officer to obtain the manager's approval to conduct a strip search of a prisoner who the officer believes on reasonable grounds possesses an unauthorised item (new s 98(3)(a)). It also repeals s 98(4) which gives an exception to the requirement for prior approval if the delay involved in obtaining that approval would endanger the health or safety of any person or prejudice the maintenance of security at the prison.

19. As noted above "reasonable ground searches" are intrusive and inherently degrading. This amendment removes an important safeguard and could increase the risk of unlawful searches.

20. The Department advised that under the current provisions the prison officer has to make two judgements: firstly whether a strip search is warranted on statutory grounds; and secondly, whether the requirement to get the manager's approval will cause undue delay and so fits within the exception in s 98(4). The Department notes that at the outset an officer may not know whether any potential delay will meet the high threshold in s 98(4). These provisions introduce uncertainty and delays into the decision-making process and give the prisoner an opportunity to dispose of concealed items. There needs to be close supervision by officers to prevent disposal of items. These delays could also create anxieties for prisoners. In situations where a prisoner is believed to be concealing contraband, such as weapons or drugs, it is generally desirable to conduct a strip search as soon as possible.

21. We consider that for these reasons the search is reasonable under s 21, especially as the legislation will continue to require the details of the strip searches to be promptly reported to the prison manager (s 102(2)(a)), who must ensure that a record of that report is made and kept (s 102(5)).

Mandatory strip searching

22. The Act provides for mandatory strip searches in three situations. Clause 32 amends s 98(7) to require a prisoner to undergo a strip search on returning to the prison from an escorted absence in the control of an officer unless the prisoner is returning from work. This will further limit prisoners' right not to be subject to unreasonable search and seizure.

23. The Department advised that current legislation does not cover the highest risk situations for the entry of contraband when a prisoner returns from Court or from other escorted outings. In such situations, the risk is sufficiently great that the prisoner will be exposed to contraband material and could introduce this into prison.

24. As a result, we consider that, bearing in mind the limits and restrictions that constrain these powers (in particular, s 94 (restrictions on searches) and the exclusion of temporary releases) and the complaints procedure set out in subpart 6 of the Act, the search is reasonable under s 21.

Section 22 Liberty of a person

Extending the use of a restraint beyond 24 hours

25. Clause 11 repeals s 19(4)(f) which sets out the power of Visiting Justices to extend the use of mechanical restraints for longer than 24 hours. New s 87(5) gives this power to prison managers.

26. Extending the application of a mechanical restraint beyond 24 hours is a serious measure. There is a risk when removing external oversight in situations where prisoners are most vulnerable. However, it is proposed that the prison manager can only extend the use of a mechanical restraint in order to protect the prisoner from self-harm and only if it is considered necessary in the opinion of a medical officer. This authorisation must be set out in writing and specify the type(s) of restraint to be used and the length of time during which the prisoner may be kept under restraint.

27. As the rationale for extending the restraint is essentially to preserve the prisoner's health, a medical officer is best placed to advise on whether this is the most appropriate course of action in the circumstances. While it could be argued that medical officers are less independent than the Visiting Justices (as they are employed by the Department) they are still constrained by medical legal ethics, which in turn provide a sufficient level of independence. Furthermore, in terms of safeguards, the prison manager will have to make decisions which are consistent with the Bill of Rights Act.

Section 26(2) Double jeopardy

28. Clause 91 of the Bill amends s 107L of the Parole Act 2002 to make changes to the extended supervision regime where an offender is released early under s 52 (because their statutory release date falls between 15 December and 5 January), The extended supervision conditions will come into force on the offender's actual release date but time does not begin to run on the order until the offender's statutory release date. The same

applies in cl 92 which amends s 107P regarding the reactivation of the extended supervision conditions and any special conditions.

29. In 2003 and 2009, the extended supervision regime was found to place an unjustified limit on the right to be free from double jeopardy affirmed in s 26(2) of the Bill of Rights Act, and was brought to the attention of the House of Representatives under s7 of that Act. In this case, we have concluded that cls 91 and 92 are minor adjustments to the extended supervision regime and so do not place a further limitation on the right.

CONCLUSION

30. For the reasons given above, we have concluded that the Bill appears to be consistent with the Bill of Rights Act.

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

Footnotes:

1. The proportionality test under s 5 of the Bill of Rights Act, as applied in *Hansen v R* [2007] NZSC 7 [123], draws on the test articulated by the Canadian Supreme Court in *R v Oakes* [1986] 1 SCR 103, *R v Edwards Books and Art Ltd* [1986] 2 SCR 713 and *R v Chaulk* [1990] 3 SCR 1303. See for example, *Hansen,* at [42] per Elias CJ; [64] and [79] per Blanchard J; [103], [104] and [120]-[138] per Tipping J; [185] and [217] per McGrath J; and [272] per Anderson J.
2. Rishworth p435, see also *R v Grayson and Taylor* [1997] 1 NZLR 399 at 405 (CA)
3. The Court of Appeal in *R v Jefferies* [1999] 17 CRNZ 128. *R v Grayson and Taylor*
4. *Cropp v Judicial Committee* [2008] 3 NZLR 774, [33]
5. *Cropp v Judicial Committee* [2008] 3 NZLR 774, [18]
6. *R v Jefferies* [1994] 1 NZLR 290, 300 (1993) 1 HRNZ 478, 490 (CA)
7. *R v Williams* [2007] 3 NZLR 207 (CA) at [48] and [236]
8. For example, *R v Williams* [2007] 3 NZLR 207, [113]