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HUMAN RIGHTS FOUNDATION OF NEW ZEALAND
TŪĀPAPA TIKA TANGATA O AOTEAROA

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Joint submission with the Equal Justice Project to the Law and Order Committee on the Corrections Amendment Bill 2011

1. Introduction

1.1 This submission is on behalf of the Human Rights Foundation ("HRF") of Aotearoa New Zealand and the Equal Justice Project ("EJP"). It is a submission on the Corrections Amendment Bill 2011.

1.2 The HRF was established in December 2001 to promote and defend human rights through research-based education and advocacy. We have made submissions on new laws with human rights implications. We also monitor the compliance and implementation of our international obligations in accordance with the requirements of the international conventions New Zealand has signed, and have prepared parallel reports for relevant United Nations treaty bodies to be considered alongside official reports. Recent reports have been to the United Nations Committee on Economic, Social and Cultural Rights and the Law Commission. Though the primary focus of the HRF is on human rights in New Zealand we recognise the universality of human rights and have an interest in the Pacific and beyond.

1.3 The EJP is a student-run pro bono initiative that has operated out of the University of Auckland's Faculty of Law since 2005. The Human Rights team within EJP is dedicated to developing human rights discourse by contributing to government and non-governmental initiatives. The team endeavours to promote awareness of, and encourage student participation in, debates about issues affecting fundamental human rights.

1.4 We appreciate this opportunity to present our views to the Law and Order Committee.

2. Contract Management of Prisons

2.1 Introduction

2.1.1 The Bill extends the powers that can be delegated from the Chief Executive to private contractors and their staff, including security classifications of prisoners (Clause 14), and temporary release or removal from prison (Clause 16 – 18). These amendments are consistent with the move towards the privatisation of prisons following the Corrections (Contract Management of Prisons) Act 2009.

2.1.2 This submission will outline our concerns about both the constitutional and practical implications of this amendment from a human rights perspective.

2.2 Constitutional concerns

2.2.1 The prosecution and incarceration of citizens is a primary function of the government. It is therefore logical to expect that the treatment and rehabilitation of prisoners during their sentence should also remain a function of the government, and not independent (private) contractors.

2.2.2 This constitutional concern is founded on a broader ethical concern that no one should profit from prisons. It is inappropriate for anyone, the State or otherwise, to make a profit from the incarceration of citizens. In the case of contactors, this would have the adverse effect of enabling contractors to benefit from an increase in the prison population when public policy works towards the opposite.

2.2.3 We refer the Committee to Amnesty International's submission on the Corrections (Contract Management of Prisons) Bill 2009, which highlights general concerns relating to private prisons and with which we generally agree.[1]

2.3 Practical concerns

2.3.1 A key practical concern regarding clause 14 is that risk averse private providers will be motivated to assign high security classifications to prisoners to avoid penalties for possible escapes, when in prisons run by public servants a broader (and more humane) range or criteria will be applied.

2.3.2 Such profit-driven motivation reduces the opportunity for prisoners to join the rehabilitation programmes that are crucial for their re-integration.

2.3.3 Any incentive to cut costs also threatens to diminish the standard of care of prisoners. A recent report by Elizabeth Stanley prepared for the Human Rights Commission outlines the general human rights issues relating to private prisons.[2] These include the treatment of prisoners, the incentives to cut expenditure to secure profit, and the lack of accountability for human rights violations.

2.3.4 In our view, the delegation of responsibility in the Bill gives primacy to the perceived efficiency of prison management over the protection of human rights. This approach is inappropriate, as the Bill should ensure that human rights prevail over commercial considerations, in accordance with international standards binding in New Zealand and the New Zealand Bill of Rights Act (NZBORA).

2.4 Human Rights Commitments

2.4.1 Historically, New Zealand has a record of strong commitment to human rights evidenced through international obligations, such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

[1] Amnesty International Aotearoa New Zealand submission to the Law and Order Select Committee on the Corrections (Contract Management of Prisons) Amendment Bill 2009.

[2] Elizabeth Stanley *Human Rights and Prisons: A review to the Human Rights Commission* (July 2011).

(CAT), and local legislation, including the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

2.4.2 New Zealand has a *positive* obligation to protect the human rights of all people in New Zealand, including prisoners. A sentence of imprisonment deprives prisoners of their liberty, but not all their rights. Because of the vulnerable position of prisoners it is the government's responsibility to ensure that their rights are protected.

2.4.3 The obligation of the State to protect the human rights of prisoners can be met only if there are adequate accountability mechanisms in place for any potential breach of rights. As noted above, the shift of prison management towards the private sector has the effect of attenuating these lines of accountability.

2.5 Recommendations

2.5.1 We recommend that clause 14 and clauses 16-18, relating to the delegation of power from the Chief Executive to contractors and staff in privately owned prisons, are inappropriate and risk human rights violations and should therefore not be included in the Bill.

2.5.2 If it is decided to maintain these provisions, we recommend that the Bill outline, in detail, the relevant accountability paths to protect prisoners' human rights.

2.5.3 Overall, we suggest that human rights considerations must prevail over questions of perceived efficiency in the context of the Bill.

3. **Authorisation of Prisoner Property**

3.1 In clause 13, the Bill aims to shift the task of deciding and regulating what property is authorised from Cabinet to the Chief Executive of Corrections and the Commissioner of Police for prisons and police jails respectively.

3.2 We think this is a positive change for two reasons:

3.2.1 As mentioned in the Regulatory Impact Statement, developments in technology mean the list of authorised prisoner property in the Regulations needs to be constantly updated. This is an inefficient use of Cabinet time and causes delays in approvals.

3.2.2 These delays in approvals mean delays in prisoners receiving property, which is an unnecessary hindrance.

3.3 One concern, however, is that the delegation of powers of authorisation from Cabinet to the Chief Executive of Corrections will remove some protections of the decision process.

3.4 Furthermore, if prisoners wish to complain regarding the prohibition of a particular item, the Chief Executive is required only to inquire into that complaint under s 8(1)(h) of the Corrections Act 2004.

3.5 The Regulatory Impact Statement mentions that there is a statutory framework for Chief Executive decision-making, but that framework is too broad to place any real obligations on the Chief Executive regarding such a decision. This breadth

can remove the possibility of judicial review, as seen in *Move Over Probation Incorporated v Chief Executive of the Department of Corrections*.[3]

3.6 Clause 9 prevents the task being further delegated to Prison Managers, which affords some protection, but in our view this is does not go far enough.

3.7 We recommend that the intended clause 45A be amended to include more specific guidelines as to how the Chief Executive should make decisions, and to provide some mechanism by which Cabinet can review and amend the published 'rules' if necessary.

4. Prisoner Search

4.1 We agree with the legal opinion given to the Attorney General on the consistency of the former Corrections Administration (Effectiveness and Efficiency) Bill with the Bill of Rights: that although potentially an intrusion of privacy, the amendments in this bill in respect of how a strip search is carried out in clause 26 are not unreasonable and therefore do not breach the Bill of Rights.

4.2 This is based on the reasoning given in the opinion that the amended procedure will reduce the duration of the search and the proximity of the prison authority to the prisoner, minimising discomfort of the prisoner and allowing more effective searches.

4.3 We are concerned with the removal of the obligation on the prison authority to obtain permission from the prison manager for a "reasonable belief" search. The argument is made in the Regulatory Impact Statement that seeking this approval introduces delays and uncertainty into the process.

4.4 While possibly inconvenient for the prison authorities seeking approval, we do not feel this inconvenience outweighs the importance of having a system of accountability in order to prevent an unreasonable search under s 21 NZBORA.

4.5 Even though prison authorities will be required to report any searches made to the Prison manager, these reports will be made after the fact and will not allow the Prison Manager to pre-empt a possible breach of the prisoner's rights.

4.6 Other measures can be taken to prevent prisoners disposing of concealed items, including moving the prisoner to a "dry room" (a room with no plumbing).

4.7 Clauses 27(3), (5) and (6) provide clarifications that we agree are valuable in ensuring the statute is applied correctly.

5. Drug and Alcohol Testing

5.1 Currently, for certain drug or alcohol tests on prisoners, a prison manager must have a reasonable belief that the prisoner has committed the relevant offence. The purport of Clause 34 is to lower the threshold from "reasonable belief" to "reasonable suspicion".

5.2 This lower standard increases the possibility of a prisoner being tested when they have not committed any offence, as the basis for testing is not as strict and could include unreliable information. This increases the likelihood of a breach of the prisoner's privacy and result in an unreasonable search under s 21 NZBORA.

[3] *Move Over Probation Incorporated v Chief Executive of the Department of Corrections* HC Christchurch CIV-2010-409-1197, 21 April 2011 at [15].

5.3 We recognise that prison managers need to be able to test for the presence of drugs and alcohol so as to deter their use. The current requirement of a prison manager holding a reasonable belief is may be difficult to establish when much of the information on which they are basing their decision coming from other sources. However, we consider the present standard adequate and appropriate for human rights standards in the New Zealand context.

5.4 Clause 36 makes it an offence to consume, administer or supply any substance with intent to dilute or contaminate the sample. This rule is to prevent drug or alcohol tests being ruined by prisoner's interventions.

5.5 However, this gives rise to the question of how the intent to tamper will be established. It is possible that a prisoner could commit this offence accidently if too low a threshold for "dilution" is used.

5.6 We suggest further guidelines around how intent is shown and how prisoners will be made aware of what will constitute an offence.

6. **Provision of Prison Health Services**

6.1 Prisoners have a right to adequate health facilities in prisons and to be protected from inhumane or degrading treatment under s 9 of the NZBORA and art 7 of the ICCPR. There are also a host of international standards and instruments relating directly to imprisonment and health care. The Bill purports to achieve effectiveness and efficiency, objectives that are often accompanied by resource limitations but these cannot limit the rights mentioned. Thus, it is indeed important to ensure that health care services are provided, in line with the purposes of the Bill - in a "safe, secure, humane" manner, while remaining "effective, and efficient" and to ensure that the former phrase does not override the latter.

6.2 The recent report by the Office of the Ombudsmen provides important recommendations on the delivery of health services to prisoners. The Ombudsman reported that, while prisoners currently have reasonable access to health services, there are various shortcomings leading to the conclusion that "in the future the service may not be able to effectively meet the healthcare needs of the diverse prison population".[4]

6.3 This caution emphasises the importance of ensuring that the stated objectives of the Bill are carried out consistent with prisoners' rights to fair and humane treatment and to health and wellbeing, rather than being driven by cost cutting or convenience.

6.4 Replacement of Medical Officers by Health Centre Managers

6.4.1 Clause 7 of the Bill shifts responsibility for the provision of health services from medical officers to employees of the Department of Corrections.

6.4.2 This appointment of health centre managers is in direct contradiction to the Ombudsman report, which urged that responsibility for health services should be moved away from the Department of Corrections to "an agency whose primary focus is "*health"* and therapeutic support, not *custodial services*"[5]. It

[4] Beverly Wakem and David McGee *Investigation of the Department of Corrections in relation to the Provision, Access and Availability of Prisoner Health Services* (The Office of the Ombudsmen 2012), 11.
[5] Ibid, at 117.

also highlighted a specific area of concern in noting that there are currently deficiencies in the Department of Correction's management of mentally unwell prisoners.[6]

6.4.3 These concerns were echoed in a recent report by the National Health Committee, which expressed similar support for placing the responsibility of health services onto an external agency with "health priorities". This was to avoid "fundamental conflict" within the Department of Corrections between the dual roles of custodianship and health service provider.[7]

6.4.4 It should also be noted that the United Nations Standard Minimum Rules for the Treatment of Prisoners includes various provisions relating to health, which underscore that medical services "should be organised in close relationship to the general health administration of the community or nation"[8]. Furthermore, they require that the services of at least one qualified medical officer with some knowledge of psychiatry should be available at every institution. We are concerned that the removal of external, qualified Ministry of Health medical officers, in favour of Department of Corrections health care managers, will inevitably result in prisoner health being compromised.

6.5 Presence of Medical Officers in Prisons

6.5.1 The amendments proposed by clause 8 allow for a "sufficient number" of medical officers in each prison, replacing the existing requirement of at least one medical officer for each institution. We are concerned that this ambiguous phrasing could result in situations where there are no medical officers present in a prison.

6.5.2 This broadening of the current wording in section 20, obviously the product of a risk management approach, should override the needs and rights of prisoners.

6.5.3 Documentation and commentary focusing on the heightened medical issues of prisoners is vast.[9] There is a great deal of evidence that people arrive at prisons with histories of abuse, previous neglect and in poor dental, mental and physical health[10]. Furthermore, many prisoners experience deteriorating health conditions over the duration of their sentence.[11] Therefore, it is crucial for prisoners' health and wellbeing, and the related processes of rehabilitation, that they have ready access to qualified medical practitioner, capable of giving professional and impartial care.

6.5.4 The amendment would increase the possibility of a compromised and inadequate standard of care being practiced when medical officers are not present. As has been noted above, health centre managers under the

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[6] Ibid, at 14.
[7] National Health Committee "Health in Justice" (2010) *Kia Piki te Ora, Kia Tika!* 41.
[8] United Nations Standard Minimum Rules for the Treatment of Prisoners, Rule 22(1).
[9] See Kathy Dunstall and Kris Gledhill "Prisoners" in Margaret Bedggood and Kris Gledhill (eds) *Law Into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2011) 329.
See generally Ministry of Health *Results from the Prisoner Health Survey 2005* (Wellington, 2006).
[10] Elizabeth Stanley *Human Rights and Prisons: A Review to the Human Rights Commission* (Auckland, 2011) at 62-70.
[11] Ibid, at 63.

employment of the Department operate with more restrictions than independent medical officers.

6.6 Recommendations

6.6.1 Concerns highlighted in recent reports about available medical care in prisons should be assimilated into the final draft of the Bill, in particular those relating to clause 7.

6.6.2 Clause 8, in relation to the repealing of the requirement for at least one medical officer for each prison, should be reconsidered. At the very least, mechanisms which allow prisoners to have easier access to independent medical care than the clause currently permits are needed.

7. Mechanical Restraint

7.1 Clause 25 of the Bill replaces the provision for Visiting Justices to approve the extended use of mechanical restraints on a prisoner for longer than 24 hours with the power for a prison manager to extend use on the advice of a medical officer that the restraint is necessary for protection from self-harm.

7.2 The requirement that the medical officers' authorisation be in writing, with specific details and a record of the opinion is an important procedural safeguard.

7.3 However, we are concerned that removing Visiting Justices essentially eliminates an external oversight, which may in some circumstances result in harmful effects on particularly vulnerable prisoners.

7.4 Recommendations

7.4.1 If Clause 25 is retained, there should be routine assessments of the authorisation process, to ensure strict adherence to the outlined safeguards. There should also be on-going evaluations of the effect of mechanical restraints on prisoner health.

8. Physical Exercise

8.1 Clause 22 of the Bill provides for the denial of a prisoner's minimum entitlement to physical exercise where the prisoner has been temporarily released or removed for judicial purposes.

8.2 This requirement appears to run contrary to art 21 of the United Nations Standard Minimum Rules for the Treatment of Prisoners, which provides that every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air everyday, if the weather permits.

8.3 Recommendations

8.3.1 The Clause should be removed, or qualifications added to ensure that prisoners' basic rights are not infringed.

9. Self-Employment

9.1 Clause 19's insertion of s 66A to the Corrections Act 2010, which will allow prisoners to be self-employed while in custody, is a positive step towards encouraging prisoner rehabilitation. In particular, studies show the connection between employment and skills acquired in prison, and the social environment in

which the prisoner will be released, has a positive effect on reducing recidivism.[12] Moreover, allowing opportunity for self-employment for prisoners upholds the right to work, as recognised in the International Covenant on Civil and Political Rights.[13]

9.2 However, we are concerned about paragraph that Clause 21 would add to s 28, which would allow the Minister to fix a rate at which the Chief Executive can apply towards the cost of the prisoner's detention.

9.3 We accept that the obligation of working prisoners earning a market wage, to contribute towards their board (as well as other duties such as child support, fines and court imposed reparations to victims) is a necessary step toward the prisoner's rehabilitation and decreasing the burden of the cost of imprisonment on the taxpayer. However we are concerned that the political environment may influence how the rate that will be set – especially in an election year. There should be an objective formula.

9.4 This is area of the Bill needs clarification to ensure that the authority given to the Minister is not exercised in a way that is contrary to aims of effective prisoner rehabilitation and their reintegration into society.

9.5 Recommendations

9.5.1 Clarify precisely how the fixed rate is to be determined by the Minister and the level at which it will be set.

9.5.2 Consider further employment and education programmes relevant to prisoner's rehabilitation and reintegration into society. In particular, issues of general literacy should also be address alongside IT literacy, to broaden opportunities for employment upon release.

10. **Opening Mail**

10.1 The Bill provides that any staff member may open prisoner mail (clause 29), but that only authorised officers are permitted to read prisoner mail (clauses 30-33).

10.2 The right to privacy is a fundamental human right, and Article 17 of the ICCPR affirms its position in New Zealand. Article 17 provides that:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.
>
> Everyone has the right to the protection of the law against such interference or attacks.

[12] Elizabeth Stanley "Human Rights and Prisons A review to the Human Rights Commission" (2011) Human Rights Commission at 47 <www.hrc.co.nz>.

[13] International Covenant on Civil and Political Rights (adopted 16 December, entered into force 23 March 1976), art 6.

10.3 Moreover, s 21 of the NZBORA states that "Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise".[14]

10.4 While there may be circumstances where prisoner privacy in respect of incoming mail may need to be curtailed in order to ensure the safety and security of the prison, s 104 of the Corrections Act 2004 provides matters that a staff member will have to take account of when dealing with mail either to or from a prisoner, including the need to protect the privacy or prisoners and their correspondents, the benefits to prisoners of maintaining contact with persons and organisations outside the prison. These need to be balanced against security and, particularly, efficiency considerations.

10.5 We submit that the existing framework for allowing only authorised officers to open and read mail is sufficient, and that efficiency considerations cannot justify such a broad erosion of safeguards and prisoners' privacy. Therefore, we believe that the granting of a broad authority to all staff members to open prisoners' mail is contrary to both the ICCPR and NZBORA and would amount to an unreasonable limitation under s 5 or the NZBORA – which provides that the rights and freedoms contained in the Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[15]

10.6 <u>Recommendation</u>

10.6.1 Remove the Clause permitting any staff member to open prisoners' mail.

[14] New Zealand Bill of Rights Act 1990, s 21.
[15] Ibid, s 5.