FROM THE COURTS

Where there's smoke there's fiery litigation

BY NIKKI PENDER AND PAM MCMILLAN*

A RECENT High Court decision, *Taylor v Manager of Auckland Prison* [2012] NZHC 3591, which declared a rule banning smoking in Auckland Prison to be unlawful, may have pulled the rug out from under the Government's smoke-free prison policy.

This decision reminds lawmakers that rules and regulations must not only fall within the scope of an empowering act, but should also be consistent with other primary legislation. It also serves as a warning to the Executive that irrespective of their merits, blanket bans or other curbs on freedoms will be vulnerable to review unless they have been expressly sanctioned by Parliament.

Background

In June 2010 the Minister of Corrections announced that as from July 2011, all New Zealand prisons would be smoke-free. This policy was ground-breaking, with New Zealand the first country in the world to implement such a measure.

Yet despite the novelty of the policy and the 12-month lead-in time, no legislation was considered necessary to give it effect. Instead, the Corrections Chief Executive, relying on an existing power under s33(1) of the Corrections Act 2004 (CA), directed all prison managers to introduce a rule prohibiting smoking in all areas of their prisons. The purpose was "to implement the department's policy decision that except for designated smoking areas outside the secure prison perimeter, the prison estate would be smoke-free from 1 July 2011".

A sample rule was included as part of the direction. Prison managers duly complied, and the ban took effect almost immediately. Tobacco and smoking-related items were then included in the Prohibited Items Schedule to the Prison Services Operational Manual.

Following the Chief Executive's edict on 1 June 2011, the Prison Manager at Auckland implemented the sample rule and imposed a total ban on smoking in Auckland Prison. Arthur William Taylor, a non-smoking inmate at Auckland Prison, challenged the validity of this rule (Auckland Prison "Prisoner Instructions – Prison Rule – Auckland Prison Smoking Policy" (1 June 2011)).

High Court decision

Section 33(1) of the CA empowers the Chief Executive to "authorise the manager of a corrections prison to make rules that the manager considers appropriate for the management of the prison and for the conduct and safe custody of the prisoners".

Justice Gilbert interpreted the rulemaking power under s33 in light of the power's purpose, which was to be read within the context of the CA as a whole as well as all other relevant legislation, at [10] with reference to *Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767. As to the latter, the judge included the Smoke-free Environments Act 1990 (SEA), the New Zealand Bill of Rights Act 1990 (NZBORA) and regulations made under the CA, at [12].

The SEA provides an exception in the case of prisons to that Act's more general ban on smoking in workplaces. Section 6A of the SEA requires that prisons have written policies on smoking in prison cells. The prison primarily relied on its policies under the SEA to enforce the smoking ban rule made under s33 of the CA.

Justice Gilbert observed that subject only to the restrictions under the SEA, smoking was a lawful activity outside prisons and one to which prisoners had previously had access. The ban therefore amounted to the removal of a right and the curbing of a freedom, at [5],[6].

Implicit in this observation was that putting aside any value judgement about the right itself (which is a matter for Parliament) the NZBORA required that the policy be more closely scrutinised than might otherwise have been the case.

Justice Gilbert considered it significant that while s6A of the SEA amounts to a statutory directive that prison managers **must** ensure there is a written policy, s33 of the CA only **enables** the making of rules. He found that Parliament must have intended that the regulation of smoking in prisons be done under the auspices of the SEA and not the CA, at [28].

He went on to find the smoking ban to be contrary to the purpose of the SEA as "it [was] clear from s6A that Parliament intended that prisoners would retain the right to smoke in their cells", at [22]. The ban did not in any event fit snugly within the scope of the CA and could not be reconciled with the exemption of tobacco from the list of privileges which could be subject to forfeiture under regulation 158(1)(h) of the Corrections Regulations 2005, at [30].

He said at [31]: "A rule imposing a blanket ban on smoking by prisoners in all areas of the prison does not serve the purpose of ensuring that custodial sentences are administered in a safe, secure, humane and effective manner. Nor is the ban reasonably necessary to ensure the maintenance of the law or the safety of the public, corrections staff and other prisoners. In my view, the ban falls outside the scope of the rule-making power under s33 of the CA. It is inconsistent with s6A of the SEA and, at the time the rule was made, it was also inconsistent with reg 158(1)(h) of the Corrections Regulations 2005."

Consequently, Justice Gilbert ruled that s33 did not empower prison managers to ban smoking in prisons and the rule was invalid.

The judge went on to hold that even if the prison manager had been empowered under s33, he had fettered his discretion by simply following the Chief Executive's direction to make a predetermined rule, at [33].

Finally, he refused the prison manager's request to defer the granting of relief for six months, finding no reason to prolong a policy which unlawfully restricted the rights of over 600 prisoners held in Auckland Prison alone, at [38].

Not the end of the story

Corrections Minister Anne Tolley responded publicly to the decision, saying: "The smoking ban in prisons has been a great success and there is no way we are backing away from it. Prisons are safer and healthier places for staff and offenders, and if we need to change the law to maintain this then that is what we will do" (Andrew Koubaridis, "Prison smokes ban rules unlawful" (The NZ Herald, 24 Dec 2012)).

The decision has not so far led to a cessation of the smoking ban. The Corrections Amendment Regulations 2012 (which were promulgated after the hearing of this case but before the decision) declare tobacco and smoking-related equipment to be unauthorised items and remove tobacco from the list of exempted privileges under reg 158(1)(h).

For his part, Mr Taylor hasn't given up the fight. He will test the validity of the new regulations in a hearing scheduled for February 2013 before Justice Courtenay (Ian Steward "Taylor back in court over tobacco ban" (Stuff website, 17 January 2013)).

If Justice Courtenay sides with Justice Gilbert as to the scope of the CA and the primacy of SEA on this issue, these regulations may well suffer the same fate as the original rule. In that case, Corrections will need to do what it perhaps should have done in the first place: persuade Parliament to sanction the policy through legislative change.

Watch this space.

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