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ALL SMOKE AND MIRRORS? THE *TAYLOR* LITIGATION AND ISSUES SURROUNDING THE SMOKING BAN IN NEW ZEALAND PRISONS

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Abstract:

A 2005 prisoner health survey found that almost three quarters of the New Zealand prison population identified as smokers. Tobacco was deeply engrained in prison culture and smoking was viewed as an aid for managing the stress and boredom associated with prison life. The Department of Corrections implemented a policy on 1 July 2011, banning smoking in all areas of all prisons in New Zealand. The policy aimed to improve the long-term health of prisoners, and create a healthier workplace environment. Arthur Taylor, a notorious and litigious criminal, successfully challenged the delegated legislation implementing the policy by way of judicial review. This paper argues that the judicial reasoning was flawed, as it was based on erroneous assumptions without a thorough assessment and interpretation of the legislative history. Despite Taylor's successful claims, the smoking ban was then incorporated into primary legislation. This paper examines the method of implementation, finding issues with retrospective and privative clauses introduced by a late stage supplementary order paper. Prisoners are a group especially vulnerable to curtailment of rights and freedoms, and this paper concludes that removal of the freedom to smoke in prison cells and outside in prison yards was a step too far.

Key words: Judicial Review, Corrections Act 2004, New Zealand Bill of Rights Act 1990, Smoke-free Environments Act 1990, Prisoners.

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I Introduction

Tobacco has long been deeply embedded in prison culture.[1] Almost three quarters of New Zealand's prisoners are smokers, a proportion three times higher than the general population.[2] Under previous Corrections policy, prisoners were free to smoke in their cells and other designated areas.[3] From 1 July 2011 the New Zealand Government implemented a blanket smoking ban. This ban affected all prisoners, whether convicted or on remand, at all times and in all areas of prisons. Smoking is a lawful activity outside of prison, subject to restrictions in the Smoke-free Environments Act 1990.

The blanket ban resulted in two successful judicial review challenges by a notorious career criminal, Arthur Taylor. I analyse these decisions of the High Court of New Zealand, *Taylor v Manager of Auckland Prison* and *Taylor v Attorney-General.*[4] Taylor successfully sought declarations that the Crown had acted ultra vires and unlawfully in implementing the smoking ban. I argue these judgments were flawed in their treatment of the Smoke-free Environments Act and made erroneous assumptions about the legislation without a thorough assessment and interpretation of the legislative history.

Although the ban has been incorporated into primary legislation, constitutional issues in this incorporation warrant a closer look. Legislative provisions were given retrospective application. The ouster provisions contained in the amendments prevent further claims questioning the validity of the rules and regulations that enforce the ban. The implementation of the ban, through supplementary order paper, sidestepped important safeguards. I argue that a potential inconsistency with the New Zealand Bill of Rights was not identified as a result. The effect of the ouster clause may not be comprehensive and the government may have left themselves open to future claims.

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[1] R Richmond and others "Tobacco in prisons: a focus group study" (2009) 18(3) Tob Control 176.

[2] Kirsten Lindbery and Ken Huang "Results from the Prisoner Health Survey 2005" (Ministry of Health, Occasional Bulletin No 37, December 2006) at 28.

[3] Department of Corrections "Prisoner smoking ban set for 1 July 2011" (press release, 28 June 2010)

[4] *Taylor v Manager of Auckland Prison* [2012] NZHC 3591; *Taylor v Attorney-General* [2013] NZHC 1659.

I believe that the government, attempting to implement a novel and controversial smoking ban, should have sought parliamentary and public sanction through primary legislative processes and select committee scrutiny. This would have been in line with constitutional principles and avoided two High Court declarations of illegality. The lack of scrutiny is especially relevant in this context, as the ban was likely inconsistent with the Bill of Rights and therefore the opportunity to issue a s 7 report to that effect was missed.

II Procedural History

In June 2010, the Department of Corrections announced that a total smoking ban would be implemented in all New Zealand prisons from 1 July 2011.[5] The aim of this policy was to improve the long-term health of prisoners, and create a healthier workplace environment.[6] In the year following the announcement, a nationwide campaign was carried out to inform and support prisoners in preparation for the ban. The ban denied prisoners access to an activity lawful outside of prison, including remand prisoners who are still presumed by law to be innocent.[7] This significant policy change did not follow a consultation or public submission process and did not have democratic endorsement. Instead, prison managers were directed to make a rule under s 33 of the Corrections Act.

The first High Court decision found that the rule was outside what Parliament must have intended to be an appropriate rule under s 33. The second decision examined the validity of the subsequent regulations, which were also held to be outside the scope of the relevant empowering provision and therefore invalid. In both decisions, the secondary legislation was considered by the court to be in conflict with s 6A of the Smoke-free Environments Act.

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[5] Department of Corrections, above n 3.

[6] *Taylor v Manager of Auckland Prison*, above n 4, at [2]

[7] Subject to the restrictions in the Smoke-free Environments Act 1990.

A Taylor v Manager of Auckland Prison*: Prison Rule Unlawful*

On 1 June 2011, the manager of Auckland Prison made a rule prohibiting smoking on Auckland Prison property. The rule was made in line with a sample rule provided to all prisoner managers by the Chief Executive of the Department of Corrections and was to be effective from 1 July 2011:[8]

> **Prisoner Instruction – Auckland Prison Smoking Policy**
> Pursuant to Section 33 of the Corrections Act 2004, I am instituting a rule that forbids any prisoner smoking tobacco or any other substance, or have in possession any tobacco or tobacco related item on Auckland prison property…Furthermore prisoners are also forbidden from smoking while on temporary removal from Auckland Prison.

Tobacco and smoking-related items were reclassified as unauthorised items in the Prison Services Operation Manual, and on the day the rule came into force tobacco and smoking-related products were removed from the list of authorised items prisoners were able to purchase.

Arthur Taylor, a non-smoking prisoner at Auckland Prison, brought proceedings in the High Court to challenge, by way of judicial review, the validity of the rule made under the Corrections Act.[9] Taylor sought an order declaring that the rule was invalid and of no effect. The first ground of challenge was that the prison manager had no power under the Corrections Act to impose a total ban on smoking in all areas of the prison, including cells.[10] Gilbert J examined the scope of the rule-making power under s 33 in the light of its purpose, reviewing the Corrections Act as a whole and other relevant legislation.[11]

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[8] At [3].
[9] At [7].
[10] At [7].
[11] At [11].

Section 33 of the Corrections Act provides:[12]

> (1) The chief executive may, subject to subsection (6), 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

A review of the legislative context centred on the impact of the Smoke-free Environments Act. Enacted in 1990 as a response to growing public health concerns, the Smoke-free Environments Act seeks to reduce non-smokers' exposure to detrimental health effects caused by exposure to second-hand smoke.[13] Different requirements are imposed by the Smoke-free Environments Act in respect of different prison areas.[14] Smoking is restricted in the parts of the prison that fall under the definition of "workplace" in s 2. The Smoke-free Environments Act does not restrict smoking in the prison yard at Auckland Prison as it is open overhead and falls within the s 2 definition of an "open area". Of most relevance to the High Court's decision, Parliament had specifically addressed smoking in cells in s 6A:[15]

> **6A Smoking in prison cells**
> (1) The superintendent of a prison must ensure that there is a written policy on smoking in the prison's cells, prepared for the protection of the health of employees and inmates.

Gilbert J found the purported rule to be inconsistent with s 6A. He found it clear from s 6A that prisoners retained the right to smoke in their cells, subject to the written policy required by the statute.[16] The favoured interpretation was that this policy was intended to control but not prohibit smoking. Prison cells are excluded from the definition of "workplace" under s 2 and Gilbert J found nothing to suggest Parliament intended to remove the right to smoke either in cells or the prison yard.[17]

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[12] Corrections Act 2004, s 33.
[13] Smoke-free Environments Act 1990, s 3A(1)(a).
[14] At [17].
[15] Section 6A
[16] At [22].
[17] The prison yard qualifies as an open area under s 2 of the Smoke-free Environments Act.

The rule was also held to be outside the scope of the purposes of the empowering Act, laid out in ss 5 and 6 of the Corrections Act. A blanket ban on smoking by prisoners in all areas does not serve the purpose of ensuring that sentences are administered in a safe, secure, humane and effective manner.[18] The ban was also found to conflict with the guiding principle that sentences should be administered no more restrictively than is necessary to ensure the safety of the public, corrections staff and other prisoners.[19]

Before the delivery of the judgment, the government had already moved to amend regulations through the Corrections Amendment Regulations 2012. These regulations were not retrospective and therefore did not affect the decision. Gilbert J held that at the time the rule was made, it was inconsistent with reg 158(1)(h) of the Corrections Regulations 2005. Prior to November 2012, reg 158(1)(h) had exempted tobacco from the list of privileges that may be forfeited as a penalty imposed on a prisoner under the Corrections Act. Therefore, the rule purporting to remove the right to possess tobacco was inconsistent with that regulation. Any rule made under s 33 must not be inconsistent with regulations made under the Corrections Act.[20]

The second ground of challenge alleged that, if the Chief Executive did have power under the Act to make the rule, he did not properly exercise his discretion.[21] It was not necessary for Gilbert J to decide this alternative ground as the first ground was made out.[22] However, Gilbert J considered that the manager had acted under direction from the Chief Executive. The rule was simply made in line with the sample rule received that same day, without genuine assessment of the circumstances at Auckland Prison as required by s 33.[23]

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[18] At [31].
[19] At [31].
[20] Section 33(5).
[21] At [7].
[22] At [32].
[23] At [33].

The government submitted that any declaration of unlawfulness should be delayed for six months, stating that it would be disruptive to reintroduce tobacco to the prison environment and would detrimentally affect the entire prison population and staff. It was also submitted that Taylor had no legitimate reason to wish to smoke and was not affected by the rule. These submissions were readily dismissed by Gilbert J. Taylor did not lack standing, and the fact that he was less affected by the rule than other prisoners was not considered a good reason to delay the relief that would normally follow a successful application for judicial review.[24] After finding that the ban on smoking had unlawfully restricted the rights of over 600 prisoners, Gilbert J made an order declaring that the rule banning smoking in all areas of Auckland Prison was unlawful, invalid and of no effect.[25]

B Government Response to Ruling

Despite the court ruling the government was determined to keep prisons smoke-free. The Corrections Minister endorsed the success of the policy since introduction, and confirmed the priority of removing any potential uncertainty of its lawfulness.[26] The Corrections Regulations 2005 were amended by the Corrections Amendment Regulations 2012 before the delivery of the first judgment.[27] Therefore, even if the High Court found the prison rule to be unlawful, the regulations would operate independently to continue the smoking ban. Arthur Taylor filed proceedings on 7 January 2013 challenging these new regulations.[28]

Subsequent to the filing of proceedings, Supplementary Order Paper 171 (SOP 171) was tabled on 12 February 2013.[29] SOP 171 proposed to amend the Corrections Amendment Bill 2011, which was already in the later stages of the enactment process and had not until then addressed smoking in prisons. The effect of the amendments included in SOP 171 was to incorporate the ban into primary legislation. The definition of unauthorised item in s 3(1)

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[24] At [37].
[25] At [40].
[26] (26 February 2013) 687 NZPD 8186
[27] The Corrections Amendment Regulations 2012 commenced on 2 November 2012.
[28] *Taylor v Attorney-General*, above n 4, at [9].
[29] Supplementary Order Paper 2013 (171) Corrections Amendment Bill 2011 (330-3).

of the Corrections Act was amended to include tobacco and related equipment.[30] Smoking was made a disciplinary offence under s 129.[31] Section 6A of the Smoke-free Environments Act was repealed and the "prison cell" exemption was removed from the ban on smoking in the workplace.[32]

The new s 179AA(1) retrospectively validated previous rules made by prison managers before 12 February 2013 by providing that they be treated as if they were made after Part 3 of the Bill came into force.[33] Part 3 repeals s 6A of the Smoke-free Environments Act.[34] Therefore, the rules could no longer be considered to be in conflict with the Smoke-free Environments Act. SOP 171 also included an ouster clause. Section 179AA(2) prevents, from 12 February 2013, the bringing of further proceedings against the Crown "questioning the validity" of the rules and regulations. Section 179AA(3) restricts relief in proceedings relating to the regulations to the period preceding 12 February 2013.[35]

SOP 171 was considered by the Committee of the Whole House the next day and the amendments were narrowly passed. The Bill received Royal Assent on 4 March 2013 and the smoking ban is now encapsulated in primary legislation.

C Taylor v Attorney-General*: Regulations Unlawful*

Taylor's second judicial review challenged the validity of the Corrections Amendment Regulations 2012.[36] The Corrections Amendment Act 2013 had come into force before proceedings began. Therefore under New Zealand law, prisoners are banned from possessing tobacco and smoking tobacco is a disciplinary offence under the Corrections Act. Even if the regulations were declared unlawful, the smoking ban would still remain in force as the policy was now enshrined in legislation. Brewer J nevertheless saw public

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[30] At 1.
[31] At 1.
[32] At 3.
[33] At 2.
[34] At 3.
[35] At 2.
[36] *Taylor v Attorney-General*, above n 4, at [9].

utility in addressing allegations of government misuse of a coercive power, especially where a freedom otherwise enjoyed by the public had been restricted.[37] There was also practical utility in delivering judgment, as those who had been disciplined before the regulations were retrospectively validated could apply for relief.[38]

The Corrections Amendment Regulations 2012 came into force on 2 November 2012 and amended the Corrections Regulations 2005.[39] Regulation 4 inserted a new reg 32A, which declared tobacco and any equipment used for smoking tobacco to be unauthorised items.[40] This is significant because prison officers can conduct cell searches and strip-searches where there is a reasonable belief in the presence of an unauthorised item.[41] Secondly, regulation 6 amended reg 158(1)(h) by deleting the reference to "tobacco" in the list of privileges that could not be suspended as disciplinary treatment.[42] This removed the conflict between regulations made under the Corrections Act and the original s 33 rule.

The issue before Brewer J was whether the Corrections Act authorised the regulations. Sections 200 and 201 of the Corrections Act confer the relevant power.[43] Section 200 provides that the Governor-General may make regulations covering a broad span of prison management areas, such as to ensure the "good management of prisons" and to prescribe the "powers and functions of staff members of prisons".[44] Section 201 elaborates on, without limiting, the s 200 powers. The Governor-General may regulate to ensure safe custody and to control granting and removal of privileges.[45]

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[37] At [13].
[38] At [14].
[39] Corrections Amendment Regulations 2012, reg 2.
[40] Reg 4.
[41] Corrections Act, s 98.
[42] Reg 6.
[43] At [19].
[44] Section 201(a) and (b).
[45] Section 201(d).

The main argument advanced by Taylor was that the Corrections Act cannot authorise regulations contrary to other statutes. The Crown submitted that regulations reducing the likelihood of tobacco being available in prisons were in line with the wider Smoke-free Environments Act purpose of reducing smoking. I will later argue that this submission should not have been dismissed. However, Brewer J agreed with Gilbert J that the Smoke-free Environments Act recognises an existing right of prisoners to smoke, confirmed by the exclusion of cells from the ban of smoking in workplaces.[46] Brewer J also agreed with Gilbert J's view that banning tobacco was inconsistent with the purposes and guiding principles of the overall corrections system.[47] The judgment highlighted the inhumane nature of forcing prisoners into nicotine withdrawal and the restrictive nature of depriving prisoners of an otherwise lawful substance.[48]

It was held that the purpose of the Smoke-free Environments Act in this area is to require policies balancing the rights of smokers and non-smokers rather than conferring an absolute right to acquire, possess and smoke tobacco.[49] The explanatory note to the 2012 regulations stated that reg 158(1)(h) was necessary to remove an inconsistency with the reg 32A ban.[50] Brewer J held that this purpose meant reg 32A was ultra vires, but it would have been within the scope of the s 201 power if it had been amended for the purpose of discipline rather than to remove an inconsistency.[51]

Brewer J made a declaration that reg 4 (which inserted reg 32A) and reg 6 (which amended reg 158(1)(h)) of the Corrections Amendment Regulations 2012 were unlawful, invalid and of no effect.[52] It was recognized that the utility of the decision was subject to the Corrections Amendment Act 2013.[53] For a second time, the High Court declared the smoking ban in Auckland Prison to be unlawful.

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[46] At [30].
[47] At [31].
[48] At [31].
[49] At [31].
[50] Corrections Amendment Regulations 2012 (explanatory note).
[51] At [32].
[52] At [35].
[53] At [36].

III Critique of Judgments

Parliament, as supreme law-maker, often delegates law-making powers to the executive branch. The practice of delegated legislation has been described as "indispensable" to modern government, due to time pressures and the complexity of the wide-ranging subject matter.[54] Judicial review of delegated legislation plays an important role in upholding the rule of law and sovereignty of Parliament.[55] The risk that the executive will use delegated powers to legislate on substantive policy is counterbalanced by the power of the High Court to ensure that this authority is exercised in accordance with the power creating it, and in the spirit of the enabling statute.[56]

Regulation and rule-making powers are also limited by legislation outside of the empowering provision. The doctrine of repugnancy provides that, unless permitted by the empowering statute, subordinate legislation may not override or otherwise be inconsistent with an Act.[57] From this it follows that secondary legislation cannot permit activity that a statute expressly forbids, nor forbid that which a statute expressly permits.[58] The dominant argument advanced in both cases was that the smoking ban, firstly through the rule, and secondly the regulations, was inconsistent with the Smoke-free Environments Act 1990. The Smoke-free Environments Act, as a Parliamentary enactment, is a higher source of law. It is often argued that subordinate legislation cannot repeal or interfere with the operation of any statute without authority of Parliament itself.[59] However, every statutory instrument under an Act could be regarded as having the effect of altering the Act.

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[54] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 1103.
[55] Joseph, above n 54, at 1103.
[56] Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (Lexis Nexis, Wellington, 2013) at 228.
[57] Carter, McHerron and Malone, above n 56, at 265.
[58] *Powell v May* [1946] KB 330 at 335.
[59] *Combined State Unions v State Services Co-ordinating Committee* [1982] 1 NZLR 742 (CA) at 745.

A better view may be that "repugnancy" requires fundamental or irreconcilable differences with the primary legislation.[60] This would require more than simple proof that secondary legislation deals with matters covered by another enactment.[61] I contend that the inconsistency between the Smoke-free Environments Act and the delegated legislation at issue in the *Taylor* decisions is not fundamentally irreconcilable. This argument is explored below, concluding that the written policy required under s 6A does not require an affirmation of a right to smoke in cells and therefore the delegated legislation cannot properly be said to be "repugnant" to the Smoke-free Environments Act. There were no guidelines as to what the policy could or could not cover, and the rules and regulations could be viewed as filling in this gap rather than operating inconsistently with the existing legislation.

A Inconsistency with the Smoke-free Environments Act 1990

Both High Court judgments favoured the same interpretation of the Smoke-free Environments Act. Gilbert J found, and Brewer J agreed, that the Smoke-free Environments Act intended that prisoners would retain the right to smoke in their cells.[62] Parliament was held to have intended smoking in prison cells to be regulated by the required policy under s 6A rather than through delegated legislation, specifically the rule made under s 33 or regulations made under s 200 of the Corrections Act.[63] I argue that the interpretation of s 6A is not as unequivocal as the judgment suggests and in fact warrants a closer look. The assumptions made by both judges are flawed and this taints the decisions reached. This argument is based on an examination of the legislative history, which reveals no intention from Parliament to expressly permit smoking in cells.

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[60] Joseph, above n 54, at 1126.

[61] Dean Knight "Power to make bylaws" (2005) NZLJ 165 at 167.

[62] *Taylor v Manager of Auckland Prison*, above n 4, at [22]; *Taylor v Attorney-General*, above n 4, at [31].

[63] *Taylor v Manager of Auckland Prison*, above n 4, at [28].

The Smoke-free Environments Act must be interpreted from its text and in light of its purpose.[64] On its plain text, s 6A required the superintendent of a prison to ensure there is a written policy on smoking in the prison's cells, prepared for the protection of the health of employees and inmates. Managers have an obligation to ensure good management and safe custody and welfare of prisoners.[65] The policy had to be based on guiding principles laid out in s 6A(2): [66]

> (i) as far as is reasonably practicable, an employee or inmate who does not smoke, or who does not wish to smoke in the prison, must be protected from smoke arising from smoking in the prison's cells:
> (ii) unless it is not reasonably practicable to do otherwise, an inmate who does not wish to smoke in his or cell must not be required to share it with an inmate who does wish to smoke in it

The argument accepted by the courts was based on an implication that prisoners had the right to smoke in their cell, as Parliament would have made it clear that smoking was not permitted in s 6A if a ban was allowed. I do not find strong support for this assumption from the wording of the legislation. The converse argument should also be considered. If Parliament had intended smoking to be an activity allowed to continue, this could have been expressly stated in s 6A. Such an express permission for employers to allow smoking exists elsewhere in the Smoke-free Environments Act. Under s 5A an employer may permit smoking in a vehicle provided by the employer where there is consent from all passengers. Under s 6 employers in hospital care institutions and rest homes may allocate a dedicated smoking room. Smoking is also permitted in a small passenger service vehicle (other than an operating taxi) where the driver and every passenger in the vehicle agree that smoking shall be permitted.[67] These examples show that if Parliament had intended to permit smoking in prison cells, subject to a written policy, it could have used similar permissive language to say a superintendent "may" permit smoking.

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[64] Interpretation Act 1999, s 5(1).
[65] Corrections Act, s 5(1)(a).
[66] Smoke-free Environments Act, s 6A(2).
[67] Smoke-free Environments Act, s 9(3).

I will now consider the legislative history and purposes of the Smoke-free Environments Act to reveal the flaws in judicial reasoning. There is no suggestion either in the legislative history, or the statutory purposes included in the legislation, that Parliament intended to protect the right to smoke. Instead, analysis shows that these factors point towards supporting a smoking ban, as it better serves the purpose of reducing non-smokers exposure to smoke.

1 Legislative History

Neither judgment conducted an enquiry into the legislative history.[68] Section 6A was implemented under the Smoke-free Environments Amendment Act 2003. These amendments expanded prior restrictions, imposing a total ban on smoking in all indoor workplaces including prisons.[69] On Gilbert J's interpretation of the definition in s 5, this would include all internal areas of prison buildings excluding cells.

Section 6A replaced s 6(2) which had allowed smoking in prison cells as well as permitting prison managers to designate indoor common areas as 'permitted' smoking areas. There was no significant change relating to smoking in cells in the 2003 amendment, but the amendments did remove the permission to designate an indoor common smoking area. This permission remains for employers in hospital care institutions, residential disability care institutions, and rest homes.[70] This appears to be another indication that Parliament did not intend there to be a right to smoke in prisons. The changes removed practical difficulties resulting from partial restriction of smoking in prison areas.[71]

The select committee report on s 6A recognised that the prison cell exclusion in s 5 was based on the principle that a cell is like a prisoner's home, even if only temporarily.[72] The practice at the time was to allow smoking in cells and outdoor areas only. The report recommended that all prisons should be required to have a written policy regarding

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[68] Hanna Wilberg "Administrative Law" [2013] NZ L Rev 715 at 727.
[69] Ministry of Health "Smoke-free Environments Amendment Act 2003" <www.health.govt.nz>.
[70] Smoke-free Environments Act, s 6.
[71] Richard Edwards and others "After the Smoke has Cleared" Evaluation of the Impact of a New Smokefree Law" (Ministry of Health, December 2006) at 70.
[72] Smoke-free Environments (Enhanced Protection) Amendment Bill (310-2) (select committee report) at 4.

smoking in cells and emphasised that prisoners may be allowed to smoke in their own cells so long as non-smokers are not required to share a cell with them.[73] However, this does not support an unequivocal argument that smoking must be allowed in cells. The failure to include a ban on smoking in cells in the Smoke-free Environments Act could have been due to a lack of sufficient information as to the feasibility of such a ban.[74] There is no suggestion in the legislative history that Parliament intended prisoners to be protected from second hand smoke by restricting smoking by the least means possible.

2 Purposes of the Smoke-free Environments Act

The reduction of smoking by smokers is not one of the stated purposes of the Smoke-free Environments Act.[75] Section 6A contains a statutory directive that prison managers must ensure that there is a written policy on smoking in prison cells. Gilbert J's acceptance that s 6A requires a policy that permits smoking goes beyond the fairer interpretation that it may simply contemplate such a policy. The purposes of the Smoke-Free Environments Act are laid out in s 3A. The most relevant purpose hereis s 3A(1):

> **3A Purposes of this Act**
>
> (1) The purposes of this Act are, in general, as follows:
>
> (a) to reduce the exposure of people who do not themselves smoke to any detrimental effect on their health caused by smoking by others.

S 6A is located in Part 1 of the Act, which contains its own purpose section. The relevant purpose is:[76]

> (a) to prevent the detrimental effect of other people's smoking on the health of people in workplaces, or in certain public enclosed areas, who do not smoke or do not wish to smoke there.

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[73] At 4.

[74] Wilberg, above n 68, at 727.

[75] *Progressive Meats Ltd v Ministry of Health* [2008] NZCA 162, [2008] NZAR 633 at [39].

[76] Smoke-free Environments Act, s 4(a).

These wider purposes, I argue, show the key driver behind the Smoke-free Environments Act is more acceptably to protect inmates and staff from second hand smoke. This far from entrenches a right to smoke. Where the purpose of an Act is sufficiently clear, it may prevail over the text of a relevant part of it.[77] The policy required by s 6A should ensure that as far as reasonably practicable those that do not wish to smoke should not be exposed to smoke. There are no further guidelines about what the policy was entitled to cover or not cover.

I argue it strains the interpretation of s 6A to require a policy that expressly permits and affirms a right to smoke in prison cells. The Crown submission, although dismissed by Brewer J, was that a policy banning smoking was the best way to serve the wider purpose of reducing harm to non-smokers.[78] There does not seem to be a logical reason why a policy banning smoking would not serve this purpose, simply because a lesser policy may have been sufficient. Both High Court decisions neglected to consider the legislative history of the Smoke-free Environments Act, or adequately assess the wider legislative purpose. For these reasons, the decisions are not robust. The ban has now been formalised into primary legislation and I will now consider the wider issues that arose with this implementation.

IV Wider Issues with Implementation of Ban

Despite two successful judicial review claims, smoking and the possession of tobacco is now banned in prisons throughout New Zealand. However the method of statutory implementation leaves itself open to criticism. Here, I will discuss the bypass of important vetting stages that stemmed from the enactment of a supplementary order paper at a late stage of the legislative process. Some provisions contained in this supplementary order paper had retrospective effect and restrict potential for future challenges, and yet there was no public submission, select committee scrutiny or vetting by the Attorney-General for inconsistency with the New Zealand Bill of Rights Act 1990. I will argue that s 7 vetting would have revealed an inconsistency with the New Zealand Bill of Rights Act, which bolsters the claim that statutory implementation bypassed important constitutional safeguards.

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[77] JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, Lexis Nexis, Wellington, 2009) at 212.
[78] *Taylor v Attorney-General*, above n 4, at [29].

A Supplementary Order Paper 171

After the prison rule was declared to be invalid and unlawful, the Government had to react. There was clear intention to proceed with the prison smoking policy, and I argue the next step should have been to go through Parliamentary processes to sanction the policy through legislative change. In the health sector, Waitemata District Health Board took a "slow and cautious" approach when banning smoking on hospital grounds. This serves as a useful example of an authority introducing such a policy without disregard for the wider legislative context.[79] However, in the interim between the first and second High Court judgments, Supplementary Order Paper 171 was tabled. Supplementary order papers can be prepared and tabled in the House at any time up to and including the committee of the whole House stage of a Bill.[80] The amendments incorporated in this paper have been detailed earlier.

SOP 171 was derided in Parliament for being introduced "at the eleventh hour".[81] It was tabled only after the Corrections Amendment Bill 2011 had been reported back from the Law and Order Select Committee. Opposition members called the supplementary order paper the most "insidious" part of the Bill and concerns were expressed about passing a law that had not withstood public or select committee scrutiny.[82] The following analysis will cover issues surrounding the scope of the empowering bill, the retrospective nature of new provisions therein contained, potential inconsistency with the New Zealand Bill of Rights Act and the controversial exclusion of ongoing review jurisdiction.

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[79] *B v Waitemata District Health Board* [2013] NZHC 1702, [2013] NZAR 937 at [48].

[80] Legislation Advisory Committee "Guidelines on Process and Content of Legislation: 2001 edition and amendments" (May 2001) <www.justice.govt.nz/lac> at 17.2.2.

[81] (26 February 2013) 687 NZPD 8186.

[82] (26 February 2013) 687 NZPD 8186.

1 Amendments Outside Scope of Empowering Bill

Aside from any Bill of Rights issues that I will canvas later, an immediate concern with SOP 171 is that it contains provisions outside the scope of the Bill that it amends. The Speakers' Rulings provide that "an amendment or new clause must be within the scope or purview of the bill, as defined by its contents as originally introduced." [83]

By using the Corrections Amendment Bill to introduce anti-smoking measures, the government introduced major new substantive parts to the Bill with only a remote connection to the initial purpose. The Legislation Advisory Committee (LAC) Guidelines state that any amendment to a Bill proposed after introduction should be within the scope of the Bill as introduced.[84] This discourages Parliament from passing laws that have not been clearly signalled to the public or the House, without proper scrutiny.[85] SOP 171 had the purpose of expressly including the smoking ban in primary legislation after the first successful judicial review. A second challenge to subsequent regulations had been filed, and proceedings were underway.

Although the SOP did seek to amend the Corrections Act, LAC Guidelines state that:[86]

> ...an SOP to an amending Bill, dealing with one Part of the Act which the Bill amends, may be outside the scope of a Bill which, as introduced, deals only with another Part of that Act.

The Corrections Amendment Bill was originally focused on strip-search procedures, prisons managed under contract and the quality of prison health services.[87] The provisions in SOP 171 focused on amending clearly different parts of the Corrections Act. SOP 171 also included amendments to the Smoke-free Environment Act, legislation which was not previously within the purview of the Bill. The Law Society has recently expressed concerns

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[83] Speakers' Rulings 2012, at 118.
[84] At 17.3.1.
[85] At 17.3.1.
[86] At 17.3.1
[87] (28 February 2012) 677 NZPD 617.

about such practices, where a similar late stage SOP introduced new provisions with wide ranging effect without subjection to public scrutiny.[88] When a SOP contains amendments to a bill that are out of scope, the House technically needs to issue an instruction before the committee can consider it and this was another vetting procedure that did not occur.[89] SOP 171 was introduced on the 11th February and was considered by committee of the whole house two days later.[90]

2 Amendments Have Retrospective Effect

Provisions included in SOP 171 have retrospective effect. This was viewed in the House as a "particularly concerning" element of the SOP.[91] Laws should generally be prospective rather than retrospective.[92] SOP 171 proposed to validate retrospectively the rules or regulations made under the Corrections Act before 12 February 2013 by providing that they must be treated after the relevant part of the Bill came into force. The second High Court decision, in declaring these regulations invalid, held that prisoners who had disciplinary action taken against them between the implementation of the regulations and the subsequent retrospective validation could seek administrative relief.[93] Nevertheless, there is still a period of time where the legislation retrospectively validated regulations and therefore applied new law to old events.[94] Legislation should not create penalties retrospectively.[95] An adverse disciplinary record can affect consideration of parole.[96] If the ouster clauses in SOP 171 operate to preclude judicial relief for disciplinary action over this period, then prisoners could have been punished for smoking when it was not unlawful at the time of the offence.

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[88] New Zealand Law Society "Minister urged to call for submissions on SOP" (09 July 2013) <www.lawsociety.org.nz>.

[89] Legislation Advisory Committee, above n 80, at 17.3.2.

[90] Corrections Amendment Bill 2011 (330-1).

[91] (13 February 2013) 687 NZPD 7832.

[92] Burrows and Carter, above n 77, at 586.

[93] *Taylor v Attorney-General*, above n 4, at [14].

[94] The Amendment Act retrospectively validates the regulations from the 12 February 2013 and the regulations operated until the Corrections Amendment Act 2013 came into force on 5 March 2013.

[95] Legislation Advisory Committee, above n 80, at 3.3.3.

[96] *Taylor v Attorney-General*, above n 4, at [14].

In summary, safeguards of the legislative process were circumvented. SOP 171 contains retrospective clauses, and was not within scope of the Bill it sought to amend. Furthermore, the use of a SOP to implement the policy precluded the Attorney-General from vetting the provisions for Bill of Rights inconsistencies.

3 Amendments Inconsistent with the New Zealand Bill of Rights Act

Section 7 of the New Zealand Bill of Rights Act 1990 imposes an obligation on the Attorney-General to review proposed legislation upon introduction. The Attorney-General must report to the House of Representatives when any provision in any Bill appears to be inconsistent with any of the rights or freedoms included in the Bill of Rights.[97] This reporting duty promotes compliance with the Bill of Rights in the legislative process.[98] It also ensures that Parliament does not decide to limit a right or freedom without fully informed consideration or in ignorance of protected rights and freedoms.[99]

Introducing the smoking ban to legislation through a SOP excluded the opportunity to make Bill of Rights considerations a significant focus in the formulation of the policy. LAC Guidelines warn officials to be alert for Bill of Rights inconsistencies in amendments to Bills including SOPs.[100] While there is nothing to prevent the Attorney-General from alerting Parliament to inconsistencies at this stage, they are not under the same statutory obligation as at the introduction of the Bill.[101] As a result, statutes may "slip onto the statute book" without the benefit of a formal report.[102]

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[97] New Zealand Bill of Rights Act 1990, s 7.
[98] Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 195.
[99] Joseph, above n 54, at 1277.
[100] Legislation Advisory Committee, above n 80, at 17.2.2.
[101] Nikki Pender and Pam McMillan "SOP sinks mining protestors" (2013) 817 LawTalk 18 at .
[102] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (LexisNexis, Wellington, 2005).at 8.14.6.

Here I will consider whether there is an apparent inconsistency with any rights or freedoms contained in the Bill of Rights that would have triggered a s 7 report. It is relevant that the Attorney-General did not table a report for the Corrections Amendment Bill 2011 at its introduction.[103] The original Bill extended disciplinary offences under the Corrections Act and extended search powers to an entirely new category of offences. This context may hinder an argument that a smoking ban would trigger a report of inconsistency, when the original Bill did not. The smoking ban also affects fundamental rights by introducing additional powers to search prisoners and their visitors for tobacco contraband.

The reporting duty arises where a provision in the introductory copy of a Bill "appears to be inconsistent with a right or freedom".[104] Rights contained in the Bill of Rights are not absolute and s 7 cannot be read in isolation from the Bill of Rights as a whole.[105] Section 5 recognises that rights may be subject to reasonable limits that can be demonstrably justified in a free and democratic society.[106] In line with this, the practice of Attorney-Generals has been to issue a report only where a provision in a Bill would impose an unreasonable limit on a right or freedom.[107] In the second proceeding, Taylor alleged that the anti-smoking regulations undermine respect for the dignity of the person and are thereby an unjustified infringement of s 23(5) of the New Zealand Bill of Rights Act. Brewer J declined to rule on whether the regulations breached the rights legislation, having already decided that they were not authorised by the Corrections Act. Here, I will consider whether Taylor's allegation holds weight and whether an unjustified infringement of s 23(5) did exist, such that a report would have been issued. The relevant right is:

> **23 Rights of persons arrested or detained**
>
> **…**
>
> (5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

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[103] SOP 171 incorporated the smoking ban into this Bill.
[104] New Zealand Bill of Rights Act, s 7.
[105] Rishworth, above n 98, at 197.
[106] New Zealand Bill of Rights Act, s 5.
[107] Butler and Butler, above n 102, at 8.6.1.

The Supreme Court in *Taunoa v Attorney-General* considered that a breach of s 23(5) involves less reprehensible conduct than a breach of the s 9 right to freedom from torture.[108] Blanchard J stated that s 23(5) involves conduct "which lacks humanity, but falls short of being cruel; which demeans the person, but not to an extent which is degrading; or which is clearly excessive in the circumstances but not grossly so".[109] Section 23(5) was considered to impose a positive instruction to protect persons such as prisoners who are regarded as "particularly vulnerable".[110]

I argue that there is an apparent inconsistency with s 23(5) in this situation. The smoking ban enforced withdrawal from an addictive substance, and resulted in the loss of personal autonomy to make choices about whether to engage in a lawful activity. The ban therefore disrespects the inherent dignity of the person. In the course of proceedings, both Brewer J and Gilbert J considered the blanket ban to be "inhumane".[111] This concern was more significant in respect of remand prisoners who could find themselves "arrested, detained in custody, and forced to undergo nicotine withdrawal, all within the same day".[112] A 2000 Report of the Royal College of Physicians concluded that "the extent to which smokers are addicted to nicotine is comparable with an addiction to 'hard' drugs such as heroin and cocaine".[113] Although cessation programmes were in place to mitigate the harmful effects of withdrawal, remand prisoners do not enjoy the benefits of the year-long lead up campaign available to existing inmates.

If a provision is found to be apparently inconsistent with a right or freedom, as I argue is the case with the smoking ban, it may nevertheless be consistent with the Bill of Rights if it can be considered a reasonable limitation. Section 5 contemplates that the rights and

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[108] *Taunoa v Attorney-General* [2007] NZSC 70, [2008] NZLR 429 at [285].
[109] At [177].
[110] At [177].
[111] *Taylor v Attorney-General*, above n 4, at [31].
[112] *Taylor v Manager of Auckland Prison*, above n 4, at [5].
[113] Royal College of Physicians of London Tobacco Advisory Group *Nicotine Addiction in Britain: A Report of the Tobacco Advisory Group of the Royal College of Physicians* (Royal College of Physicians, London, 2000).

freedoms set out in the Act are subject to reasonable and justifiable limitations.[114] The s 5 inquiry can be described as two-fold: whether the provision serves an important and significant objective, and whether there is a rational and proportionate connection between the provision and the objective.[115]

Prison managers are under an obligation to ensure good management of prisons and the safe custody and welfare of prisoners.[116] The objective of the ban, stated by Corrections, was to improve the long-term health of prisoners and create a healthier workplace environment.[117] This is a significant objective, as smoking rates in prisons are disproportionally high compared to the general population.[118] A reduction in exposure to second-hand smoke would be beneficial for the health of inmates and employees, and therefore it would be open to consider the ban a justified limitation. Although the restriction would be difficult, cessation aids were provided to assist the withdrawals.[119] The High Court has considered nicotine replacement therapy to be a "humane and meaningful" treatment of a smoker's deprivation symptoms.[120] However, I argue that the smoking ban provisions do not have a rational and proportionate connection to the objective.

When considering an objective that curtails prisoners' freedoms, it is important to recognise that prisoners are at a greater risk than any other section of the community of suffering the kinds of deprivation or restriction which constitute an infringement of rights.[121] This risk may be compounded by a pervasive public view that prisoners' rights are "legitimately curtailed" as a consequence of their crimes.[122] Supporters of this view

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[114] New Zealand Bill of Rights Act, s 5.
[115] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.
[116] Corrections Act 2004, s 5(1)(a).
[117] Department of Corrections, above n 3.
[118] Kirsten Lindbery and Ken Huang, above n 2, at 28.
[119] Lucie Collinson and others "New Zealand's smokefree prison policy appears to be working well: one year on" (2012) 125 NZMJ 164.
[120] *B v Waitemata District Health Board*, above n 79, at [72].
[121] Gordon Hawkins *Prisoners' Rights: A Study of Human Rights and Commonwealth Prisoners (*Australian Human Rights Commission, Occasional Paper No 12, September 1986) at 7.
[122] Hawkins, above n 121, at 9.

would believe that prisoners do not "deserve" the pleasure derived from smoking.[123] The legislation imposes the ban on all prisoners in New Zealand regardless of classification. There is an important distinction between convicted prisoners and those held on remand. Convicted prisoners are detained as a means of punishment, whereas remand prisoners are detained for safe custody and to ensure attendance at trial.[124] Under a blanket ban this distinction is not recognised. Remand prisoners, still presumed innocent by law, are forced into immediate nicotine withdrawal.

There is no clear statement of prisoners' rights set out in the primary or secondary legislation governing prison administration.[125] The corrections system is required to administer custodial sentences in a safe, secure, humane and effective manner.[126] Imprisonment is characterised by a loss of control over normal activities and normal decisions of daily life.[127] The extreme penalty of deprivation of freedom is joined by lesser curtailments such as limited choice of food and clothing. I agree with the view that a smoking ban represents the erosion of yet another freedom to an already disenfranchised group.[128] Smoking has been described by prisoners as an aid for managing the stress and boredom associated with prison life.[129] Those detained may feel disproportionately impacted by the removal of the ability to smoke, having so few liberties to begin with.[130]

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[123] Anita Mackay "Stubbing smoking out in prisons: bans are an ineffective mechanism" (2014) 39(2) Alt LJ 99.

[124] G.D. Treverton-Jones *Imprisonment: The Legal Status and Rights of Prisoners* (Sweet & Maxwell, London, 1989) at 38.

[125] Kathy Dunstall and Kris Gledhill "Prisoners" in Margaret Bedggood and Kris Gledhill (ed) *Law into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2011) 329 at 340.

[126] Corrections Act, s 5(1).

[127] Dunstall and Gledhill, above n 125, at 335.

[128] T Butler and others "Should smoking be banned in prisons?" (2007) 16(5) Tob Control 291.

[129] R Robertson and others, above n 1.

[130] *Re CM (Judicial Review)* [2013] CSOH 143.

Corrections chief executive Ray Smith has stated that the ban has created healthier, cleaner prisons and led to a significant drop in fires within prison buildings.[131] However, I argue that the blanket ban goes beyond what was reasonably necessary to achieve the objective of creating a healthier workplace environment. It is not the function of the penal system to render the loss of freedom more unpleasant.[132] A complete ban is a disproportionate response to the situation. The Department of Corrections have stated that "during their imprisonment, prison cells become the inmate's residence".[133] No government has taken the step of prohibiting smoking in private homes, despite evidence of detrimental health risks to non-smokers, including children.[134] Smoke-free policies should not be moral statements; they should restrict where and when people can smoke rather than restricting the choice whether to smoke or not.[135] The scheme of the Smoke-free Environments Act accords with this notion, as the stated purposes of the legislation do not include the reduction of smoking by smokers.[136] Smoking is only regulated in the community to the extent necessary to prevent harm to non-smokers, and I argue that complete bans on smoking in prisons are hard to justify.[137]

The corrections system has no overriding health focus. In contrast, workplaces with significant health objectives such as hospitals allow smoking in outdoor areas. This still serves the aim of protecting third parties from smoke. In *B v Waitemata District Health Board*, psychiatric patients alleged that a smoking ban curtailed their rights.[138] Asher J concluded that the objective of protecting others from the harm of smoking justified any curtailment of rights caused by the policy.[139] However there were unique considerations at play, due to the health-care nature of the facility. The ban covered only indoor areas

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[131] "Tobacco victory goes up in a puff of smoke" *The New Zealand Herald* (online ed, Auckland, 4 July 2013).
[132] John Belgrave and Mel Smith *Ombudsmen's Investigation of the Department of Corrections In Relation to the Detention and Treatment of Prisoners* (2 December 2005) at 6.
[133] *Taylor v Manager of Auckland Prison*, above n 4, at [14].
[134] Mackay, above n 123.
[135] *Re CM (Judicial Review)* [2013] CSOH 143.
[136] *Progressive Meats Ltd v Ministry of Health,* above n 75, at [39].
[137] Mackay, above n 123.
[138] *B v Waitemata District Health Board,* above n 79, at [1].
[139] At [95].

meaning patients that were well enough could leave the building and smoke. The prison ban covers all areas of the grounds. The principles that previously guided smoking policies within prisons required that non-smokers would not be required to share cells with smokers where "reasonably practicable".[140] I argue this approach is sufficient to serve the statutory purpose of reducing the "exposure of people who do not themselves smoke to any detrimental effect on their health caused by smoking by others".[141] Allowing smoking in open areas and cells does not render it impossible to achieve the objective of protecting non-smokers.

The Supreme Court has recognised that the application of s 23(5) to particular cases will be influenced by the jurisprudence under the overseas human rights instruments.[142] The United Nations Human Rights Committee has said that prisoners must be guaranteed the same conditions as for that of free persons subject to the restrictions that are unavoidable in a closed environment.[143] A purpose of the Corrections Act is that facilities should be operated in line with rules and regulations based on the United Nations Standard Minimum Rules for the Treatment of Prisoners.[144] These rules state that institutions should seek to minimise any differences between prison life and liberty that tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.[145] Removing the right to smoke is preventing prisoners from engaging in activity lawfully enjoyed by a significant portion of New Zealand adults, lessening individual autonomy.[146]

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[140] Smoke-free Environments Act, s 6A.
[141] Smoke-free Environments Act, s 3A.
[142] *Taunoa v Attorney-General*, above n 109, at [179].
[143] Human Rights Committee *General Comment No. 21* (Office of the High Commissioner for Human Rights, HRI/GEN/1/Rev.9, 2009, 1992) at [3].
[144] Corrections Act, s 5(1)(b).
[145] United Nations Standard Minimum Rules for the Treatment of Prisoners Res 663C(XXIV) & 2076(LXII) (Approved 31 July 1957 & 13 May 1977).
[146] The latest 2012/2013 Ministry of Health Survey found that 17.6% of New Zealand adults are classified as "current smokers".

I argue that there is no reasonable justification for a complete smoking ban in prisons. The ban goes further than necessary to achieve the legislative aim of creating a healthier workplace environment, and impinges on the inherent dignity of a prisoner by curbing a freedom of choice to engage in a lawful activity, even for remand prisoners yet to stand trial.

4 Amendments Unduly Exclude Review by Courts

Taylor did not claim any relief in the second decision and therefore the High Court did not rule on the effect of the ouster clauses contained in the regulations that are now the law.[147] The LAC Guidelines provide that legislation should not "substantively limit" the availability of judicial review without a compelling reason to do so.[148] It is generally desirable for people to be able to challenge decisions that affect their rights or interests (such as removing the freedom to smoke in their prison cell) by way of judicial review. An ouster clause entirely excludes the courts' jurisdiction and therefore impinges on the courts' important role to review the law. The relevant ouster clause is s 179AA:

> **179AA Status of certain rules and regulations relating to smoking in prisons**
>
> ...
>
> (2) On and from 12 February 2013, no proceedings may be brought against the Crown questioning the validity of any rules or regulations referred to in subsection (1).

The relevant rule referred to in subsection (1) is any rule made before 12 February 2013 by a prison manager under s 33 forbidding prisoners from smoking or possessing tobacco. The regulations referred to are regulations 4 and 6 of the Corrections Amendment Regulations 2012.

The courts have always been hostile to ouster clauses, and will construe them restrictively.[149] There is a presumption that the legislature did not intend to remove the power of the courts to engage in judicial review.[150] Section 27(2) of the New Zealand Bill

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[147] *Taylor v Attorney-General*, above n 4, at [36].
[148] Legislation Advisory Committee, above n 80, at 13.7.1.
[149] Joseph, above n 54, at 909.
[150] *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at [133].

of Rights Act secures the ability to bring judicial review proceedings against the Crown, and the ouster clause in this situation seems to be inconsistent with this. The Bill of Rights, by virtue of s 6, requires an ouster clauses to be interpreted to permit judicial review, unless the only meaning the provision can bear excludes judicial review.[151] It is also likely that s 27(3) requires careful consideration to be given to any claimed immunities of the Crown.[152] However where statutory wording is clear the court will not override the provision.[153] Section 179AA imposes a clear bar to proceedings questioning the validity of the rules and regulations.

The ouster clause compounds the impact of the retrospective nature of the provisions in SOP 171. As stated earlier, prisoners could have been punished for smoking when it was not unlawful at the time of the offence. This ouster clause will prevent them from challenging the validity of disciplinary measures, as the Corrections Minister indicated in the house this would amount to a challenge on the validity of the rules and regulations.[154] An adverse disciplinary record, unable to be challenged, may have a negative effect on consideration of parole.[155]

Potential may remain for a future claim of inconsistency with s 23(5) of the New Zealand Bill of Rights Act. This would not be a "proceeding questioning the validity of any rules or regulations" and therefore may not be precluded by the ouster clause contained in s179AA of the Corrections Act. As I have argued, I believe that there is a potential inconsistency. The case for granting a declaration of inconsistency may be strengthened here, particularly because the inconsistent provision was introduced once the opportunity for a s 7 report had passed.[156]

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[151] GDS Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, Lexis Nexis, Wellington, 2014) at 2.63; *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 at [99].

[152] GDS Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, Lexis Nexis, Wellington, 2014) at 16.16.

[153] *Parker v Silver Fern Farms Ltd* [2011] NZCA 564, [2012] 1 NZLR 256.

[154] (13 February 2013) 687 NZPD 7832.

[155] *Taylor v Attorney-General*, above n 4, at [14].

[156] *Taylor v Attorney-General* [2014] NZHC 1630 at [86].

V Conclusion

The process of removing smoking from prisons has been flawed from the outset. Despite the nature of the policy, the ban was not introduced through Parliamentary sanctioned primary legislation following the usual public submission and enactment processes. Instead, two attempts were made to incorporate the ban in delegated legislation. These statutory instruments were twice held to be unlawful, invalid and of no effect in successive judgments.

These judgments are not robust, primarily because of a superficial analysis of the legislative context. Both judgments strained the interpretation of s 6A of the Smoke-free Environments Act by assuming that the wording amounted to an affirmation of the right to smoke. My analysis is that the statutory language more comfortably bears an interpretation allowing prisoners to smoke in cells, but also allowing a policy to prevent this. I have found support for this interpretation in the legislative history, which was not canvassed in either judgment.

It might be argued that prisoners forfeit many rights by their status of prisoners. This is an inevitable consequence of imprisonment, and the need for the safe management of a prison environment. However, I have argued that the removal of the freedom to smoke in prison cells and outside in prison yards was a step too far. Tobacco traditionally serves a range of functions in prisons including as a symbol of freedom in a group with few rights and privileges.[157] Prisoners are especially vulnerable to curtailment of their rights and the legislative implementation precluded the opportunity for the Attorney-General to assess the ban for compliance. Although there is now a statutory bar against claims questioning the validity of these regulations, the ouster clause may leave room for a claim that the ban was inconsistent with the Bill of Rights.

[157] T Butler and others "Should smoking be banned in prisons?" (2007) 16(5) Tob Control 291.

VI Bibliography

A Cases

1 New Zealand

B v Waitemata District Health Board [2013] NZHC 1702, [2013] NZAR 937.

Bulk Gas Users Group v Attorney-General [1983] NZLR 129 (CA) at [133].

Carroll v Attorney-General for New Zealand [1933] NZLR 1461 (CA).

Combined State Unions v State Services Co-ordinating Committee [1982] 1 NZLR 742 (CA).

Commerce Commission v Fonterra Co-operative Group Ltd [2007] NZSC 36, [2007] 3 NZLR 767.

Martin v Ryan [1990] 2 NZLR 209 (HC).

Parker v Silver Fern Farms Ltd [2011] NZCA 564, [2012] 1 NZLR 256.

Progressive Meats Ltd v Ministry of Health [2008] NZCA 162, [2008] NZAR 633.

R v Hansen [2007] NZSC 7, [2007] 3 NZLR 1.

Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667.

Taunoa v Attorney-General [2007] NZSC 70, [2008] 1 NZLR 429.

Taylor v Manager of Auckland Prison [2012] NZHC 3591.

Taylor v Attorney-General [2013] NZHC 1659.

Taylor v Attorney-General [2014] NZHC 1630.

Zaoui v Attorney-General [2005] 1 NZLR 577.

Zaoui v Attorney-General (No 2) [2005] 1 NZLR 690.

2 England and Wales

Powell v May [1946] KB 330.

R(N) v Secretary of State for Health [2009] EWCA Civ 795.

3 Scotland

Re CM (Judicial Review) [2013] CSOH 143.

McCann v State Hospitals Board for Scotland [2014] CSIH 71.

B Legislation

Corrections Act 2004.

Interpretation Act 1999.

New Zealand Bill of Rights Act 1990.

Smoke-free Environments Act 1990.

Corrections Amendment Regulations 2012.

Corrections Amendment Bill 2011 (330-3).

Smoke-free Environments (Enhanced Protection) Amendment Bill (310-2).

C Treaties

International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

United Nations Standard Minimum Rules for the Treatment of Prisoners Res 663C(XXIV) & 2076(LXII) (Approved 31 July 1957 & 13 May 1977).

D Books and Chapters in Books

Jonathan Aburn, Jonathan Moffett and Andrew Sharland *Judicial Review: Principles and Procedure* (Oxford University Press, Oxford, 2013).

Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (LexisNexis, Wellington, 2005).

JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, Lexis Nexis, Wellington, 2009).

Peter Cane *Administrative Law* (4th ed, Oxford University Press, New York, 2004).

Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (Lexis Nexis, Wellington, 2013).

Kathy Dunstall and Kris Gledhill "Prisoners" in Margaret Bedggood and Kris Gledhill (ed) *Law into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2011) 329.

A J Fowles *Prisoners' Rights in England and the United States* (Avebury, Aldershot, 1989).

Carol Harlow and Richard Rawlings *Pressure through Law* (Routledge, London, 1992).

Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014).

Stephen Livingstone, Tim Owen and Alison Macdonald *Prison Law* (4th ed, Oxford University Press, Oxford, 2007).

Tim McBride *New Zealand Civil Rights Handbook* (Craig Potton Publishing, Nelson, 2010).

David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing, Wellington, 2005).

Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003).

GDS Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, Lexis Nexis, Wellington, 2014).

G.D. Treverton-Jones *Imprisonment: The Legal Status and Rights of Prisoners* (Sweet & Maxwell, London, 1989).

E Journals

Andrew Butler "Judicial Indications of Inconsistency – a new weapon in the Bill of Rights armoury?" [2008] NZLR 43.

T Butler and others "Should smoking be banned in prisons?" (2007) 16(5) Tob Control 291.

Jeny Gautam and others "Smoke-free prisons in New Zealand: maximising the health gain" (2011) 124 NZMJ 100.

Claudia Geiringer "On a Road to Nowhere: Implied Declaration of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613.

Dean Knight "Power to make by-laws" (2005) NZLJ 165.

Anita Mackay "Stubbing smoking out in prisons: bans are an ineffective mechanism" (2014) 39(2) Alt LJ 99.

Nikki Pender and Pam McMillan "Where there's smoke there's fiery litigation" (2013) 812 LawTalk 14.

Nikki Pender and Pam McMillan "SOP sinks mining protestors" (2013) 817 LawTalk 18.

R Richmond and others "Tobacco in prisons: a focus group study" (2009) 18(3) Tob Control 176.

Hanna Wilberg "Administrative Law" [2013] NZ L Rev 715.

F Parliamentary Materials

1 Parliamentary Debates

(28 February 2012) 677 NZPD 617.

(13 February 2013) 687 NZPD 7832.

(26 February 2013) 687 NZPD 8186.

(10 April 2013) 689 NZPD 9248.

2 *Select Committee Reports*

Smoke-free Environments (Enhanced Protection) Amendment Bill (310-2) (select committee report).

G Government Materials

1 New Zealand

John Belgrave and Mel Smith *Ombudsmen's Investigation of the Department of Corrections In Relation to the Detention and Treatment of Prisoners* (2 December 2005).

Richard Edwards and others "After the Smoke has Cleared" Evaluation of the Impact of a New Smokefree Law" (Ministry of Health, December 2006).

Department of Corrections *Prison Service Operation Manual* (Department of Corrections, 2011).

Kirsten Lindbery and Ken Huang "Results from the Prisoner Health Survey 2005" (Ministry of Health, Occasional Bulletin No 37, December 2006).

2 Australia

Gordon Hawkins *Prisoners' Rights: A Study of Human Rights and Commonwealth Prisoners (*Australian Human Rights Commission, Occasional Paper No 12, September 1986).

3 United Kingdom

Royal College of Physicians of London Tobacco Advisory Group *Nicotine Addiction in Britain: A Report of the Tobacco Advisory Group of the Royal College of Physicians* (Royal College of Physicians, London, 2000).

H Internet Materials

Human Rights Commission "Human Rights in New Zealand Today: Chapter 11 The Rights of People Who are Detained" (2004) New Zealand Human Rights Commission <www.hrc.co.nz>.

Legislation Advisory Committee "Guidelines on Process and Content of Legislation: 2001 edition and amendments" (May 2001) <www.justice.govt.nz/lac>.

Ministry of Health "Smoke-free Environments Amendment Act 2003" <www.health.govt.nz>.

New Zealand Law Society "Minister urged to call for submissions on SOP" (09 July 2013) <www.lawsociety.org.nz>.

I Unpublished Research Papers

Daksha Priya Raniga "International Obligations and Sections 9 & 23(5) of the Bill of Rights" (LLB (Hons) Research Paper, Victoria University of Wellington, 2007).

Mallory Ward "Stripping Prisoners of Their Rights? An Analysis of Strip Searching in New Zealand Prisons and the Availability of Effective Remedies for State Violations" (LLB (Hons) Research Paper, Victoria University of Wellington, 2012).

J Other Resources

1 Newspaper Articles

Isaac Davison "Prison smoking ban ruled unlawful by High Court" *The New Zealand Herald* (online ed, Auckland, 3 July 2013).

"Tobacco victory goes up in a puff of smoke" *The New Zealand Herald* (online ed, Auckland, 4 July 2013).

2 Press Releases

Anne Tolley "Smoke-free prisons a success, one year on" (press release, 2 July 2012).

Department of Corrections "Prisoner smoking ban set for 1 July 2011" (press release, 28 June 2010).

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