

USE OF COURT CELLS FOR OVER-FLOW PRISONERS: REGULATORY IMPACT STATEMENT

EXECUTIVE SUMMARY

Measures are being taken to address prison population pressures, including approval for extended double-bunking at five prisons. However, there is uncertainty about the ability to access the additional double-bunked capacity. If this cannot be done, the 2008 and draft 2009 Justice Sector Prison Forecasts indicate that there may be insufficient accommodation for prisoners from June 2010. The option of last resort, once regional capacity at Police jails is exhausted, is the use of court cells to accommodate over-flow prisoners. Although ten blocks of court cells (101 cells) have been gazetted as parts of prisons, the Resource Management Act 1991 (the RMA) prevents them from being used for the overnight accommodation of prisoners. One approach is to seek planning approvals under the RMA. However, this is estimated to cost at least \$198,000 and the outcome is uncertain. The preferred option is to amend the Corrections Act 2004 (the Act) so that the requirements of section 9 of the RMA do not apply to the detention of prisoners in court cell blocks that have been declared by notice in the *Gazette* to be parts of corrections prisons. This means that, where there is an acute shortage of prison accommodation, court cells can be used to accommodate over-flow prisoners without undue delay or cost.

ADEQUACY STATEMENT

This RIS has been reviewed by the Department of Corrections. The Department considers the statement to be adequate, in terms of the adequacy criteria agreed by Cabinet.

STATUS QUO AND PROBLEM

The prison system is under pressure from an increasing population. While there is Cabinet approval to extend double-bunking at five prisons, the ability to access double-bunked capacity is uncertain, and is the subject of a case currently being decided in the Employment Court. The 2008 and draft 2009 justice sector prison forecasts indicate that, if it is not possible to access the additional double-bunked capacity, there may be insufficient accommodation for prisoners from the first half of 2010. While other options are under consideration, there is no certainty that these will be accepted or that they will have any impact in the short term.

The option of last resort is to use court cells to accommodate over-flow prisoners. This option has been used in the past in acute accommodation shortages. To enable this to occur, ten blocks of court cells (101 cells) have been declared to be parts of existing prisons by notice in the *Gazette*. However, according to Crown Law advice, the *Gazette* notices were not sufficient authority to house over-flow prisoners in court cells. It would also be necessary to obtain planning approvals under the RMA.

While the focus is on an impending shortage of accommodation, it is considered that the option of using court cells for over-flow prisoners needs to be available on an ongoing basis, in case there are future occasions when the prison population exceeds Corrections and Police cell capacity.

OBJECTIVES

The objective of this policy is to enable the Department of Corrections, during an acute shortage of prison accommodation, to continue to manage the prison population within the available resources in a manner that is safe, secure, humane and effective. The ability to use court cells for over-flow prisoners can make a small but significant contribution to achieving that objective, by providing additional temporary accommodation for around 100 prisoners if required.

ALTERNATIVE OPTIONS

Legislation to enable the use of court cells for over-flow prisoners

The preferred option, as detailed below, is to amend legislation so that court cells may be used for over-flow prisoners without having to meet the requirements of section 9 of the RMA.

Obtaining planning approvals to use court cells for over-flow prisoners

Another option is to seek appropriate planning approvals under the RMA. Officials commenced work on this approach under a direction from the previous Government [POL Min (08) 17/21]. A Certificate of Compliance was obtained for the cells at the Christchurch High Court / District Court, which means that those cells may be used to house over-flow corrections prisoners. However, planning advice from Opus International indicated that, for most of the other blocks of court cells, overnight accommodation of prisoners would not comply with the relevant district plans. Therefore, seeking approval to use the cells in this way would be a more time consuming and costly exercise (total cost estimated to be at least \$198,000) with uncertain outcomes.

Alternatives to using court cells for over-flow prisoners

There is a broad range of other options with the potential to address prison accommodation shortages. Such options are being developed, notably under the “drivers of crime” initiatives, and will be separately reported to Ministers.

PREFERRED OPTION

The preferred option is to amend the Corrections Act so that the requirements of section 9 of the RMA do not apply to the detention of prisoners in court cell blocks that have been declared by notice in the *Gazette* to be parts of corrections prisons. This means that, where there is an acute shortage of prison accommodation, court cells can be used to accommodate over-flow prisoners without undue delay or cost. Although the legislation does not place restrictions on the use of court cells, administrative safeguards will be put in place. The cells will be operated in accordance with an agreement between the Secretary for

Justice and the Chief Executive of the Department of Corrections. To ensure that all prisoners would receive their statutory minimum entitlements, Cabinet has agreed that the maximum period of detention in court cells would be four days (96 hours).

A disadvantage of the preferred option is that it prevents neighbouring residents and other affected parties from challenging the overnight accommodation of prisoners in court cells. Therefore, the legislation could be controversial. Granting an exemption from RMA requirements also sets a precedent. Government agencies seeking to carry out urgent building work or other activities with an environmental impact could seek similar exemptions.

The exemption sought is, however, very limited in scope. It would not authorise the Crown to undertake works with a significant environmental impact, such as erecting new buildings. The only activity that would be authorised is the overnight detention of prisoners in buildings that are already being used to detain prisoners during the day. There is also a high threshold before court cell blocks that have been declared by notice in the *Gazette* to be part of a corrections prison will be used to detain prisoners overnight.

The preferred option carries litigation risks, in that prisoners housed in court cells may claim that their treatment does not comply with provisions of the New Zealand Bill of Rights Act or other legislative requirements. It is also possible that New Zealand's compliance with international conventions could be challenged. In this regard, the Chief Ombudsman has indicated that the Ombudsmen may issue adverse reports under Part 2 of the Crimes of Torture Act 1989 if their concerns are not addressed.

While acknowledging these risks, the Department notes that using court cells for over-flow prisoners is not new policy. Court cells have been used in the past, and in doing so, the Department was able to meet its obligations under domestic and international law. In any future use of court cells, the Department will comply with legislative requirements, including provisions for the minimum entitlements of prisoners.

IMPLEMENTATION AND REVIEW

It is proposed that a Corrections Amendment Bill be introduced and passed under urgency this year, so that the Department of Corrections will have access to court cells to house over-flow prisoners by the first half of 2010, when they may be needed. Concurrently with the legislative process, the Ministry of Justice and Department of Corrections will work to develop an agreement specifying the cells that may be used for over-flow prisoners, the circumstances in which the cells will be made available for this purpose, and how the cells will be operated. This agreement will be signed once the legislation comes into force.

The proposed legislation is merely enabling. The court cells will only be used for over-flow prisoners in the event of an acute shortage of prison accommodation, and if other administrative criteria are met. Furthermore, the interagency agreement will make it clear that the use of the cells for this purpose is

temporary, and must cease as soon as there are other reasonably practicable means of housing any over-flow prisoners. Therefore, once a block of court cells is being used to accommodate corrections prisoners, the Department of Corrections and Ministry of Justice will monitor the situation to determine that the ongoing use of the cells for this purpose is necessary.

CONSULTATION

The Ministry of Justice, Ministry for the Environment, Department of Building and Housing, Police and Treasury have been consulted on this proposal. The Department of the Prime Minister and Cabinet has been informed.