IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2020-485-718
[2022] NZHC 1532

BETWEEN	KARMA CYNTILLA CRIPPS and MIHI ISIBELLA BASSETT Applicants
AND	ATTORNEY-GENERAL Respondent

Hearing: 28 February – 2 March 2022

Appearances: D A Ewen and J S McHerron for applicants
D Jones and C N Tocher for respondent

Judgment: 30 June 2022

JUDGMENT OF ELLIS J

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[1] Karma Cripps and Mihi Bassett are serving prisoners. While incarcerated in Auckland Region Women's Corrections Facility (ARWCF) they and at least two other women detained there were, on several occasions, the subject of a "cell extraction" process that involves Department of Corrections (Corrections) staff pumping pepper spray into their closed cells by means of a fog delivery device known as "Cell Buster". The District Court has already found that—at least as regards Ms Bassett—this process involved a use of force that went "some distance beyond what was reasonably necessary to extract her from her cell".[1]

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1 *R v Bassett* [2020] NZDC 24454 at [89]. This finding was treated as an ameliorating factor when Ms Bassett was sentenced on a charge of setting fire to her cell: *R v Bassett* [2021] NZDC 5067. Evidence was not called by the Crown as to what alternatives to Cell Buster might (or might not) be available to Corrections staff.

[2] The focus in these judicial review proceedings, however, is not on the use of pepper spray on particular occasions or on particular prisoners. Rather, Ms Cripps and Ms Bassett challenge the use of pepper spray (and Cell Buster in particular) in New Zealand prisons more generally, on purely legal grounds. They say the use of Cell Buster in prison in any circumstances has, since its first purported approval in 2009, been unlawful. They say this illegality arises due to legal defects in the authorising regulations and—more widely again—because the intentional infliction of pain on confined prisoners in this way constitutes cruel, inhumane and degrading treatment that is incapable of justification in a free and democratic society.

PEPPER SPRAY

Oleoresin Capsicum

[3] The pepper spray used historically by Corrections in New Zealand prisons is "soluble Oleoresin Capsicum (OC) and ultraviolet marking dye". This is the "pepper-based irritant" referred to in the regulations. Since 2017, however, the Regulations have also authorised the use of "synthetic" sprays, such as PAVA, used in prisons in the United Kingdom.

Delivery mechanisms

[4] There are several potential delivery mechanisms for pepper spray. For the purposes of this judgment it is necessary to consider only on those three presently used by Corrections in New Zealand. These are:

(a) The handheld "MK-9" (large canister). This is aimed at the face of the prisoner sought to be restrained. It delivers pepper spray though a high-volume stream (HVS) device, which has a long range.

(b) "Cell Buster" which is a "MK-9" canister with an extension wand attached (which can be placed under cell doors). The wand is not aimed directly at the prisoner, but rather creates a fog in the cell.

(c) The "MK-3" (small canister). This too is aimed at the face of the prisoner sought to be restrained. It is handheld and carried on the belt.

It can be used as a tactical option in a use of force incident that arises spontaneously. It has a range of up to six metres and is similar to the pepper spray carried and used by Police.

[5] As already noted, the present application for review is primarily concerned with the larger delivery devices, and with Cell Buster in particular. The manufacturer's specifications for this type of canister and deployment method are:

> SABRE CELL BUSTER - FOG DELIVERY (920060-W)
> MK-9 with extension wand
> 18.5 ozs / 518 gr/ 555ml
> Pistol Grip with safety and wand extension
> Propellant: HFC 134a and Nitrogen
> Formulation: soluble Oleoresin Capsicum and ultraviolet marking dye. The formation is non-flammable.

[6] Pepper spray is distributed from the Cell Buster by means of an aerosol propellant (HFC 134a). The spray also contains an ultraviolet marking dye, which does not change the concentration or effects of the spray. Each canister can deliver spray for up to 20 seconds, either continuously or in staggered bursts.

[7] Pepper spray distributed from the handheld MK-9 canister (without an extension wand) does not contain HFC 134a. The spray is propelled by nitrogen.

[8] The contents of both the Cell Buster and handheld MK-9 are 10 per cent OC. And in terms of the strength of capsaicinoids themselves:

(a) the handheld MK-9 has strengths ranging from 0.33 to 1.33 per cent;[2] and

(b) Cell Buster comes in a single strength of 1.33 per cent capsaicinoids.

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[2] It is not known which of these strengths is in the MK-9s used by Corrections in New Zealand.

Effects

[9] The point of pepper spray is, of course, to cause pain at a level likely to render compliance in the subject. In 2006 the European Court of Human Rights described the known effects in the following terms: [3]

> It is recognised that the use of "pepper spray" can produce effects such as respiratory problems, nausea, vomiting, irritation of the respiratory tract, irritation of the tear ducts and eyes, spasms, chest pain, dermatitis or allergies. In strong doses, it may cause necrosis of tissue in the respiratory or digestive tract, pulmonary oedema or internal haemorrhaging (haemorrhaging of the suprarenal gland).

[10] There are some reported cases (from the United States in particular) of pepper spray death being a cause—or at least a contributing cause—of a prisoner's death.[4]

[11] In this case, specific expert evidence was called by both the applicants and the Crown as to the physiological effects of pepper spray deployed by the MK-9 and Cell Buster.[5] The experts conferred and produced a joint report, which addressed (amongst other things) what difference the deployment device made to the effects of pepper spray on the subject. They agreed that:

> The direct spray may cause more severe reactions on the skin and eyes, while the fog may have a greater impact on breathing. But the severity of each response, no matter the delivery system, will be impacted to the greatest extent by the strength, volume and length of OC exposure.

[12] The experts agreed that the less severe effects of Cell Buster in terms of "skin pain and inflammation and eye pain and damage" was, however, dependent on prompt decontamination of the subject. Overall toxicity was also noted to be dependent on:

(a) capsaicinoid strength;

(b) number of bursts applied;

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3 *Oya Ataman v Turkey* (2006) ECHR 481 at [18].

4 *Christie v Scott* 923 F.Supp.2d 1308 (2013), discussed at [145] and [146] below. In another case, a lawsuit over the death of a prisoner, Tyrone Briggs, following the administration of pepper spray in a Pennsylvania Corrections facility, with minimal decontamination or medical follow up resulted in the payment of a $8.5 million settlement in 2021: Pa. prisons pledge reform, agree to pay $8.5M after inmate died from pepper spray (corrections1.com)

5 Dr Leo Schep was the applicants' expert. Dr Lyn Wise and Dr David Hartshorn were the Crown's experts.

(c) extent and site of coverage achieved;

(d) duration of exposure;

(e) the volume/air concentration of the delivered fog (which may differ in different parts of the cell, potentially increasing OC exposure when the recipient is prone); and

(f) length of time before decontamination is achieved.

[13] The experts were also agreed that:

> … an extended delay in extracting and decontaminating prisoners will likely increase the severity of the OC symptoms, the decontamination time and the recovery time. This will particularly be the case when high concentrations of OC were administered in confined spaces.

[14] The experts did not address—and there appears to have been little research on—the psychological effects of the use of pepper spray, particularly in confined spaces or on subjects with mental health issues.

INTERNATIONAL LAW CONTEXT

[15] There are several international instruments that have a bearing on the use of force in prison generally, and the use of pepper spray, specifically.

Chemical Weapons Convention

[16] Under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the CWC), pepper spray is not classed as a chemical weapon but, rather, falls within the definition of "riot control agent".[6] The CWC makes it clear that the use of riot control agents is

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6 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1974 UNTS 45 (opened for signature on 13 January 1993, entered into force 29 April 1997). Article 2(7) defines a riot control agent as any chemical "which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure".

permitted for the purpose of law enforcement, including domestic riot control, but not as a method of warfare.[7] This has led a Judge in the United States to observe:[8]

> The use of pepper spray is no small thing. The chemical agent, which temporarily blinds its recipients, is—unlike tasers—banned for use in war …

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

[17] In 2009, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT) first expressed concerns over the use of pepper spray in a law enforcement context. In its report on its visit to Bosnia and Herzegovina the CPT noted:[9]

> 79. ... *Pepper spray is a potentially dangerous substance and should not be used in confined spaces. Even when used in open spaces the CPT has serious reservations; if exceptionally it needs to be used, there should be clearly defined safeguards in place.* For example, persons exposed to pepper spray should be granted immediate access to a medical doctor and be offered an antidote. Pepper spray should never be deployed against a prisoner who has already been brought under control. Further, it should not form part of the standard equipment of a prison officer.
>
> The CPT recommends that the authorities of Bosnia and Herzegovina draw up a clear directive governing the use of pepper spray, which should include, as a minimum:
>
> – *clear instructions as to when pepper spray may be used, which should state explicitly that pepper spray should not be used in a confined area;*
>
> – *the right of prisoners exposed to pepper spray to be granted immediate access to a doctor and to be offered an antidote;*
>
> – *the qualifications, training and skills of staff members authorised to use pepper spray;*
>
> – *an adequate reporting and inspection mechanism with respect to the use of pepper spray.*
>
> (emphasis added)

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7 Articles 1(5) and 2(9).

8 *McCoy v Alamu* 950 F3d 226 (5th Cir 2020) at 235, per Costa J.

9 Report to the Government of Bosnia and Herzegovina on the visit to Bosnia and Herzegovina carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 19 to 30 March 2007 (2009)..

[18] Similar observations and recommendations were made by the CPT in its report on its visit to the Czech Republic that same year.[10]

United Nations Standard Minimum Rules for the Treatment of Prisoners

[19] Rule 1 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (also known as the Nelson Mandela Rules) provides:[11]

> All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.

[20] The use of force is addressed specifically in r 82:

> 1. Prison staff shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Prison staff who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the prison director.
>
> 2. Prison staff shall be given special physical training to enable them to restrain aggressive prisoners.
>
> 3. Except in special circumstances, prison staff performing duties which bring them into direct contact with prisoners should not be armed. Furthermore, prison staff should in no circumstances be provided with arms unless they have been trained in their use.

United Nations Guidance on Less-Lethal Weapons in Law Enforcement

[21] The United Nations' Guidance on Less-Lethal Weapons in Law Enforcement provides instruction about when the use of chemical irritants, including pepper spray, will be lawful or unlawful.[12]

[22] The Guidance specifies that a chemical irritant should only be used:[13]

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10 See Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 March to 24 April 2008 (2009) at [49].

11 *United Nations Standard Minimum Rules for the Treatment of Prisoners* GA Res 70/175 (2015), r 1.

12 Office of the United Nations High Commissioner for Human Rights *Guidance on Less-Lethal Weapons in Law Enforcement* UN doc HR/PUB/20/1 (2020) at [7.2.3]–[7.2.7].

13 At [7.2.3].

(a) where sufficient toxicological information is available to confirm that it will not cause any unwarranted health problems;

(b) when its delivery against a target is accurate; and

(c) where a law enforcement official has reason to believe there is an imminent threat of injury.

[23] The Guidance warns that a chemical irritant *shall* not be used where irritants contain carcinogenic substances or hazardous levels of active agents and should not be used:[14]

(a) repeatedly or in a manner that causes prolonged exposure;

(b) in situations of purely passive resistance;

(c) where a person is already under the control of a law enforcement official; or

(d) in closed environments without adequate ventilation or a viable exit.

OVERVIEW AND AMBIT OF APPLICANTS' CLAIMS

[24] The focus of the application for review is on the validity (and effectiveness) of the regulations authorising use of pepper spray in prisons. There are three relevant iterations of the regulations at issue: the Corrections Amendment Regulations 2009 (CAR09), the Corrections Amendment Regulations 2012 (CAR12) and the Corrections Amendment Regulations 2017 (CAR17).[15] While the claim itself has its origins in events that occurred after the CAR17 came into effect, the matters which allegedly make the regulations unlawful apply equally to the earlier versions. Moreover, the nature of the second cause of action requires consideration of the regulation-making process throughout this time.

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14 At [7.2.6] – [7.2.7].

15 A consequential 2009 amendment to the Arms Regulations 1992 is also impugned by the applicants' claims.

[25] The applicants' third amended statement of claim contains three causes of action, the first two of which overlap. Mr Ewen crystallised the three claims at the hearing as follows:[16]

(a) first, the applicants contend that pepper spray was not authorised by the CAR17 or its predecessors because the regulations approved only the possession of the spray itself, not the means of dispersal;

(b) secondly, they contend that in approving the various regulations the respective Ministers of Corrections could not have been satisfied that the use of pepper spray was consistent with the humane treatment of prisoners, as required by the Corrections Act 2004; and

(c) thirdly, they say that use of Cell Buster in prisons is prohibited per se because it can never be reconciled with prisoners' rights under ss 9 of the New Zealand Bill of Rights Act 1990 (the NZBORA) to be free from torture, cruel, degrading or disproportionately severe treatment and their rights under s 23(5) of the NZBORA to be treated with humanity and respect for dignity.

[26] The applicants seek orders quashing the relevant regulations or declarations that:

(a) the use of Cell Buster and/or the MK-9 (or their analogues) is unlawful; and

(b) the use of Cell Buster on them was (therefore) unlawful.

Preliminary question: are the first and second causes of action now moot?

[27] Shortly before I heard the review application, the Corrections Amendment Regulations 2022 (CAR22) were drafted. Without prejudice to its continued denials of the first and second causes of action, the Crown said these new regulations address

[16] While this summary does not wholly reflect the pleadings it nonetheless does capture—and usefully differentiates between—the three distinct contentions contained in them.

the matters which the applicants say rendered the earlier iterations of the regulations unlawful. The Crown contended that this renders the first and second causes of action moot because:

(a) it is no longer possible to quash the earlier regulations (because, by the time of judgment, they will have been replaced by the CAR22);[17]

(b) to the extent there was any illegality it has been remedied; and

(c) any difficulties with prior Ministerial approvals to the earlier regulations have been cured by the approval of the CAR22.

[28] The Crown accordingly submitted that I should not therefore engage with those first two causes of action.

[29] But I do not accept that the CAR22 render these claims moot. While they undoubtedly affect one of the remedies sought (quashing the earlier regulations), whether they remedy any defects in those earlier regulations is not a matter before me and was not addressed by counsel. Even if they do, pepper spray was deployed on the applicants and other prisoners at an earlier point in time. It is undisputed that such use potentially engaged their fundamental right to be free from degrading and inhumane treatment. So they must be entitled to know—and there is a real and ongoing wider public interest in knowing—whether the deployment of pepper spray by Corrections was lawful *at that time*. All three causes of action require consideration, accordingly.

THE USE OF PEPPER SPRAY IN NEW ZEALAND PRISONS: A FACTUAL AND LEGISLATIVE CHRONOLOGY

The Arms Act 1983

[30] It is instructive to begin the legislative chronology with the primary statute regulating the possession and use of weapons in New Zealand: the Arms Act 1983.

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[17] The Corrections Amendment Regulations 2022 came into force after the hearing, on 1 April 2022.

[31] The Arms Act distinguishes between "prohibited firearms" and "restricted weapons". Section 2 defines the term "restricted weapon" as:

> … any weapon, whether a firearm or not, declared by the Governor-General, by Order in Council made under section 4, to be a restricted weapon:

[32] Under the Arms Act, no one may possess a restricted weapon without an endorsement on a relevant licence. Section 3(2)(a) creates exceptions for members of the New Zealand Defence Force, the Police and others, but not Corrections officers. Section 3(2)(b) also provides that others may be authorised to possess such weapons (where the weapons belong to the Crown) by regulations made under the Arms Act. Section 4 then confers upon the Governor-General the power to declare any weapon to be a restricted weapon by way of Order in Council.

The Arms (Restricted Weapons and Specially Dangerous Airguns) Order 1984

[33] The Arms (Restricted Weapons and Specially Dangerous Airguns) Order 1984 (the 1984 Order) classified weapons specified in its Schedule as restricted weapons. Clauses 8 and 9 of that Schedule provide:

> 8 Every firearm, weapon, and device designed for the purpose of discharging any lachrymatory, deleterious, or toxic gas, smoke, or other stupefying or overpowering thing capable of rendering any person either wholly or partially incapable of resistance (other than any device designed and intended solely for any medical, surgical, veterinary, scientific, agricultural, industrial, or other similar lawful purpose).
>
> 9 Any gas, substance, material, or thing specially intended or adapted for use in conjunction with any firearm, weapon, or device specified in clause 8.

[34] There is no dispute that pepper spray (and whatever device discharges it) is covered by this Order.

The Corrections Act 2004

[35] Section 5 of the Corrections Act stipulates that the purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society by (amongst other things):

> … providing for corrections facilities to be operated in accordance with rules set out in this Act and regulations made under this Act that are based, amongst other matters, on the United Nations Standard Minimum Rules for the Treatment of Prisoners …

[36] The use of weapons by officers and staff in prisons is governed by subpt 4 of pt 2 of the Act, entitled *Coercive Powers*. Sections 83 and 85 respectively provide:

> **83 Use of force**
>
> (1) No officer or staff member may use physical force in dealing with any prisoner unless the officer or staff member has reasonable grounds for believing that the use of physical force is reasonably necessary—
>
> (a) in self-defence, in the defence of another person, or to protect the prisoner from injury; or
>
> (b) in the case of an escape or attempted escape (including the recapture of any person who is fleeing after escape); or
>
> (c) in the case of an officer,—
>
> (i) to prevent the prisoner from damaging any property; or
>
> (ii) in the case of active or passive resistance to a lawful order.
>
> (2) An officer or staff member who uses physical force for any of the purposes or in any of the circumstances referred to in subsection (1) may not use any more physical force than is reasonably necessary in the circumstances.
>
> (3) If an officer or staff member uses physical force in dealing with any prisoner, the prisoner must, as soon as practicable after the application of that force, be examined by a registered health professional, unless that application of force is limited to the use of handcuffs of a kind that have been authorised for use as a mechanical restraint.
>
> …
>
> **85 Use of non-lethal weapons**
>
> (1) In any situation described in section 83(1) or in any other situation where an officer or staff member is authorised by any other provision in this Act or any other enactment to use physical force, any officer or staff member may, if necessary, *use any kind of nonlethal weapon prescribed for use*.
>
> (2) The use of a non-lethal weapon by an officer or a staff member—
>
> (a) is subject to any conditions or restrictions specified in regulations made under this Act; and

(b) must, if the weapon is used in any situation described in section 83(1), be in accordance with section 83(2).

(3) Regulations may not be made authorising the use of any kind of non-lethal weapon unless the Minister is satisfied that—

(a) the use of that kind of weapon is compatible with the humane treatment of prisoners; and

(b) the potential benefits from the use of the weapon outweigh the potential risks.

(4) In this section, **non-lethal weapon** means any weapon designed—

(a) to temporarily disable a person against whom it is used; or

(b) to incapacitate a person against whom it is used.

…

(emphasis added)

[37] Section 86 places tight restrictions on the carriage and use of firearms in prisons and s 87 governs the use of prescribed mechanical restraints. The first three subsections of s 87 are expressed in materially identical terms to s 85(1)–(3), including the same specific requirement that, before approving regulations authorising the use of any kind of mechanical restraint, the Minister must be satisfied that such use is compatible with the humane treatment of prisoners. Subsections (4) to (7) of s 87 also, themselves, contain statutory conditions on the use of restraints:

(4) A mechanical restraint—

(a) may not be used for any disciplinary purpose:

(b) must be used in a manner that minimises harm and discomfort to the prisoner.

(5) A mechanical restraint must not be used on a prisoner for more than 24 hours at a time unless the use of the restraint for more than 24 hours—

(a) is authorised by the prison manager and is, in the opinion of a medical officer, necessary to protect the prisoner from self-harm; or

(b) is, in the case of a prisoner who has been temporarily removed to a hospital outside the prison for treatment, necessary to prevent the escape of the prisoner or to maintain public safety.

(5A) An authorisation under subsection (5)(a) must—

(a) be in writing; and

(b) specify the type of restraint to be used; and

(c) specify the time during which the prisoner is to be kept under restraint; and

(d) include a record of the medical officer's opinion that the restraint is necessary to protect the prisoner from self-harm.

(6) Despite subsections (1) to (5), chains or irons must not be fitted or attached to a prisoner in any circumstances.

(7) In subsection (6), **chains or irons** does not include handcuffs.

[38] And s 88 provides that the particulars of any use of force, non-lethal weapons, and mechanical restraints must:

> … wherever required by regulations made under this Act,—
>
> (a) be recorded; and
>
> (b) be given by notice in writing to the chief executive and to any other person or persons specified in those regulations.

[39] The regulation-making powers themselves are contained in ss 200–203 of the Act. Section 200(1)(c) authorises the making of regulations for the purpose of "ensuring the safe custody of prisoners". This is elaborated in s 202, which (relevantly) contemplates the promulgation of regulations:

> (j) regulating the use and reporting of the use of force, authorising and regulating the use and reporting of the use of specified kinds of mechanical restraints in particular circumstances, and *authorising and regulating the use of and reporting of the use of specified kinds of non-lethal weapons*:
>
> (emphasis added)

Corrections Regulations 2005

[40] The use of force, non-lethal weapons and mechanical restraints are dealt with in pt 9 of the Corrections Regulations 2005 (the CR05). Up until 2009 only batons and mechanical restraints were dealt with in pt 9. The general prohibition in the Arms Act therefore precluded the use of pepper spray by Corrections staff in prisons.

[41] For reasons that will later become clear, it is relevant to note how pt 9 deals with mechanical restraints. Regulation 124 (which immediately follows the regulations dealing with batons, and now pepper spray) provides that that:

> A mechanical restraint may be used to restrain a prisoner only if—
>
> (a) the restraint is authorised by Schedule 5; *and*
>
> (b) the restraint is used *in accordance with the requirements* of Schedule 5.
>
> (emphasis added)

[42] The mechanical restraints authorised by sch 5 are specific. At the time of writing this judgment, only handcuffs for general use, handcuffs for emergency use, waist restraints used in conjunction with handcuffs, torso restraints, head protectors and spit hoods are so authorised.[18]

[43] And the more detailed requirements governing the use of these mechanical restraints contained in sch 5 include that:

> (a) a prisoner may not be handcuffed or restrained to any part of a vehicle used for transportation or a cell grill.
>
> (b) where handcuffs, or waist restraints used in conjunction with handcuffs, are applied on a prisoner who is being escorted to or from medical treatment, or receiving medical treatment, escorting officers must, taking into account the advice of the treating medical practitioner,—
>
> (i) implement any measures that are reasonably necessary to ensure that the mechanical restraint does not adversely affect the health and comfort of the prisoner; and
>
> (ii) remove the mechanical restraint if necessary to allow the prisoner to receive medical treatment.

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[18] The authorisation of tie-down beds and wrist bed restraints was revoked in 2019.

(c) handcuffs for general use must not be fitted so as to impede circulation;

(d) handcuffs for emergency use must be regularly checked to ensure that circulation is not being impeded and must, as soon as practicable, be removed and replaced with handcuffs for general use; and

(e) head protectors may only be used on medical advice.

Corrections Amendment Regulations 2009

[44] It seems that the possible authorisation of pepper spray for use in prison was first raised in 2009. As will be evident from the legislative overview above, such authorisation required the approval of the Minister of Corrections, which could only be given if she was satisfied that the use of pepper spray would be consistent with the humane treatment of prisoners. Because the second cause of action in these proceedings impugns that approval process (both in 2009 and subsequently) it will be necessary to set out the evidence about that in some detail here.

[45] The evidence about the Ministerial approval processes filed by the Crown largely took the form of papers submitted by respective Ministers over time, seeking Cabinet approval for the relevant amendments to the CR05. These papers were annexed to an affidavit sworn by a Corrections employee; some are not signed and some contained quite significant redactions. Crown counsel accepted that, to the extent those documents do not refer to matters found relevant to these proceedings, the Court may infer that the Minister was unaware of those matters and (so) did not take them into account. That is the approach I propose to take.

Ministerial and Cabinet approval

[46] The documents before the Court indicate that, in 2009, the possible use of pepper spray in prisons was raised in response to growing concerns about the safety of Corrections staff. The documents record that reported assaults on staff members had trebled over the previous five years.

[47] The initial proposal was that the CR05 and the Arms Regulations 1992 (the AR) be amended to permit an "operational trial" of pepper spray in prisons, and then continued use "if the trial showed positive results".

[48] A briefing paper on the proposal for the Cabinet Business Committee (CBC) from the then Minister of Corrections, the Hon Judith Collins, relevantly advised that:

(a) the Minister had to be satisfied of the matters specified in s 85(3) of the Corrections Act before making regulations authorising use of non-lethal weapons;

(b) pepper spray causes tears, pain and even temporary blindness;

(c) there are a variety of ways in which pepper spray can be dispersed;[19]

(d) the circumstances in which pepper spray would be used were to be limited to situations that would reduce the risk of assault and violence towards others and self-harm by prisoners, and was to be a "last resort";

(e) any use of pepper spray "would have to be" carefully controlled and documented to ensure it was not discriminatorily or punitively used;

(f) there were operational benefits in officers having a range of tactical responses to call upon in cases of prisoner violence;

(g) New Zealand Police have used pepper spray since 1997 and use it on average 2,000 times a year;

(h) there were isolated examples of problems arising from the use of pepper spray, but no evidence of systemic concerns;

[19] There was no elaboration on the different dispersal mechanisms.

(i) pepper spray is available for use by corrections authorities in some Australian jurisdictions (ACT and Victoria), as well as in Scotland and Northern Ireland;

(j) the "Act and Regulations would set out the limited circumstances in which nonlethal weapons may be used", and it was envisioned that pepper spray would be deployed in circumstances similar to those where the use of batons was permitted;

(k) the operational trial would assist Corrections to determine appropriate safeguards and standards, which would also "draw on Police's standards based on their experience since 1997 with the use of pepper spray"; and

(l) there was some risk of adverse consequences "especially to respiratory and visual functioning", but a 2002 review of available research suggested that "when used appropriately, pepper spray's safety profile appears to be acceptable".

[49] The Minister advised the CBC that:

> I am satisfied that the use by corrections staff members of pepper spray for the purposes set out in section 83(1) of the Act is compatible with the humane treatment of prisoners, and that the potential benefits outweigh the potential risks. It is recommended that the Corrections Regulations be amended to authorise the use of pepper spray on prisoners using the current provisions in the Regulations for the use of batons as a model.

[50] This paper went before the Committee on 28 September 2009. CBC Min (09) 11/5 records that (with the authority of Cabinet to act) the Committee:

> 6 **agreed** to amend Part 9 of the Corrections Regulations 2005 to put in place a regime for the use of pepper spray as a non-lethal weapon that is the same as that for the use of batons, involving:
>
> 6.1 defining the meaning of pepper spray;
>
> 6.2 restricting the carriage of pepper spray to those situations where it has been issued at the direction of a prison manager and the staff member has received adequate training;

6.3 setting out the rules for the storage and use of pepper spray, including the grounds under which pepper spray would be used:

6.3.1 where there is a serious threat to prison security or the safety of any person;

6.3.2 where the use of the pepper spray would reduce or eliminate that serious threat and other means of doing so would be ineffective;

7 **agreed** to amend the Arms Regulations 1992 to specify staff members of corrections prisons as a class of person permitted to have possession of pepper spray;

8 **noted** that pepper spray will not be introduced nationally until Corrections has carried out, and evaluated, a trail to determine whether the use of pepper spray is appropriate;

The Regulations

[51] As foreshadowed by the Minister, the CAR09 regulated pepper spray in the same way as batons were already regulated under the CAR05. The term "pepper spray" was defined as:

> **…** an aerosol spray that—
>
> (a) contains a pepper-based irritant to the eyes and respiratory passages (for example, oleoresin capsicum); and
>
> (b) is designed for use as a disabling weapon.

[52] Conditions on the use of pepper spray and batons were identical, and were contained in the new (replacement) regs 121–123:

> **121 Restrictions on carrying batons or pepper spray**
>
> (1) A security officer must not carry a baton or pepper spray while performing his or her functions as a security officer in any circumstance.
>
> (2) A staff member of a prison must not carry a baton or pepper spray outside a prison while performing his or her functions as a staff member in any circumstance.
>
> (3) A staff member of a prison may carry a baton or pepper spray only if—
>
> (a) the baton or pepper spray was issued at the direction of the manager; and

(b) the staff member has received adequate training in the use of the baton or pepper spray, as the case may be.

(4) Staff members trained to use batons or pepper spray must undergo refresher courses, approved by the chief executive, in the use of batons or pepper spray, as the case may be, at least once a year.

122 Issue and storage of batons or pepper spray

(1) The manager must ensure that batons and pepper spray are securely stored at all times except when they have been issued to staff members.

(2) The manager may direct the issuing of batons or pepper spray to staff members only if he or she reasonably believes that—

(a) there is a serious threat to prison security or to the safety of any person; and

(b) the use of batons or pepper spray, as the case may be, will reduce or eliminate the serious threat; and

(c) other means of reducing or eliminating the serious threat have been or are likely to be ineffective.

(3) The manager must promptly direct that batons and pepper spray be returned to storage once the serious threat no longer exists.

123 Use of batons or pepper spray

(1) A staff member who has been issued a baton or pepper spray may draw or use the baton or pepper spray only if the manager's approval has been obtained, unless it is impracticable in the circumstances.

(2) A staff member must use the baton or pepper spray in a way that minimises pain or injury to the prisoner, as far as it is consistent with protecting prison security or the safety of any person.

[53] At the same time, the AR were amended to include reg 30A(2), which relevantly provided:[20]

(2) A staff member of a corrections prison may carry or possess pepper spray belonging to the Crown for the purposes of regulations 121 to 123 of the Corrections Regulations 2005.

[54] Regulation 30A(1) provided that "pepper spray" had the same meaning as in reg 120A of the CR.

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[20] Arms Amendment Regulations 2009.

[55] The general requirements as to the reporting of any use of force or non-lethal weapons contained in the existing regs 128 and 129 applied equally to the newly authorised use of pepper spray.

The trial

[56] The trial of pepper spray in prisons then began. It was approved to take place in two stages. The relevant Corrections Manager, Mr Eamonn Coulter, deposed that the primary objective of stage one was to determine which, if any, "standard" deployment options available in the marketplace were suitable for use in New Zealand prisons. If findings from stage one identified appropriate options, Corrections would proceed with stage two, to evaluate those option(s) during a 12-month, nationwide, operational use trial. The training and operational policy developed in stage one would also be assessed, in that operational context.

Stage one

[57] Stage one was completed between 19 and 22 October 2009. According to Mr Coulter, it comprised five phases:

> 21.1 General Deployment: To evaluate the delivery system of each OC deployment option in an open-air environment.
>
> 21.2 Cross Contamination: To assess the level of cross contamination on staff entering the cell as part of a planned Control & Restraint (C&R) intervention.
>
> 21.3 Environmental Factors: To assess the impact of OC spray on the different types of cell designs, ventilation systems and surrounding area.
>
> 21.4 Operational Testing: To determine the advantages and disadvantages of each deployment option within existing C&R techniques.
>
> 21.5 Final Evaluation: To evaluate the results of the trial and outline the recommendations to the Prison Senior Management Team.

[58] One of the deployment options trialled was Cell Buster. It was tested on around 10 volunteers (Corrections employees, both men and women), who entered a cell into

which Cell Buster had been sprayed. The staff members remained in the cell for as long as they were able, signalling when they wanted to be let out.[21]

[59] At certain stages of the test, Corrections attempted to replicate the physical tension staff experienced whilst managing cell extractions. This was done by requiring the volunteers to complete aerobic exercises for two minutes while next to a mannequin treated with pepper spray to simulate the physical exertion experienced by a Control and Restraint (C&R) team restraining a non-compliant prisoner. Volunteers were also asked to run up and down stairs for five minutes to simulate the level of exertion a non-compliant prisoner experiences during a planned C&R incident.

[60] In their joint report prepared for these proceedings, the expert witnesses noted:

> 7. Trials into the use of pepper spray in Corrections' facilities in 2009 showed that the intensity of burning sensation on the eyes, for example, was less following use of Cell Buster than with the direct spray MK-9 HVS, as were recovery times. When directed into the face of volunteers who agreed to participate in direct spray, after 1 burst of the MK-9 HVS, the reaction to pain was intense and lasted 10 seconds before decontamination was requested. When remaining in a cell that was contaminated with the contents of Cell Buster, a volunteer lasted in the cell for 1 minute and 20 seconds; they stated they could not breathe. Indeed, when a 3-second burst of a fogging device was applied to the cell of a non-compliant prisoner [sic], the prisoner immediately fell to the ground and was successfully removed.
>
> 8. Following a very brief exposure to these products, a summary of these investigations by the Prison Service, under closely controlled conditions, suggests direct spray from the MK-9 HVS may cause greater localised adverse effects than Cell Buster, because it is a more targeted delivery mechanism. We agree … that "[t]he direct spray may cause more severe reactions on the skin and eyes, while the fog may have a greater impact on breathing." …

[61] The experts expressly qualified that assessment by noting that the less severe effects of OC fog (in terms of skin pain and inflammation and eye pain and damage) was dependent on prompt decontamination of the subject. They also noted:

> 10. One of the investigations from 2009 ascertaining cross contamination (live spray) in an unventilated cell showed that the effects of the spray delivered from the MK-9 HVS system were still in the room after 3 minutes, with volunteers experiencing only a slight cough. In contrast, after application

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[21] Volunteers were assessed to determine whether they had medical conditions that might make the exercise unsafe. They were provided with instructions on the process before the spray was deployed.

> of the Cell Buster, it was discovered that when the cell door was opened, the effects on subjects in the adjacent room were so high that they had to leave the room; it took an hour to remove the effects form the Control and Restraint Room. When Control and Restraint staff entered a cell after application of this fog, due to the high level of contamination, they would be required to wear respirators.

[62] The evaluation panel concluded that Cell Buster could significantly contribute towards the safety of officers and staff. Even where there might be initial resistance, the overwhelming coughing response meant that subjects would want to get out of the cell as quickly as possible. Moreover, it had advantages over the handheld MK-3 and MK-9 because the cell door did not need to be opened for it to be used, thereby avoiding physical confrontation with the prisoner and (given effective use of the MK-3 and MK-9 depended on accurately aiming at prisoners' eyes) risking a violent response if the target was missed.

Medical advice

[63] As part of the first stage of the trial, Corrections also obtained a Health Assessment Report from Dr David Hartshorn, who also gave expert evidence in this proceeding. This report was based on a literature review, rather than any particular experience of the author.

[64] After noting the effects on skin, respiration and eyes, Dr Hartshorn observed that there was no good evidence that repeated exposure to pepper spray causes adverse health effects or that it is carcinogenic. As far as the effect of pepper spray on asthmatics is concerned, Dr Hartshorn said:

> OC spray has irritant effects and as such there is concern that OC spray may have an effect to cause acute worsening of lung function which may pose a risk to the prisoner or to corrections officers due to cross contamination should they have asthma. … there appears to be some evidence to suggest that the respiratory effects of OC spray are not overtly different in asthmatic subjects compared to those without asthma.
>
> …
>
> … There are however significant gaps in the literature with no data looking at fromal [sic] lung function changes in asthmatics exposed to OC spray. The doses of capsaicin used in some of the laboratory testing may not represent the doses in OC spray use in the field. The field data in terms of post OC spray effects is very likely limited to the use of HVS or foam applications. The inhalational dose with the fog may well be higher and thus it is possible

> that respiratory effects may be more pronounced in this application. There is no data upon which to base conclusions in this regard.

[65] This part of the report concluded there was no evidence to suggest pepper spray will cause or induce an attack in someone who suffers from asthma and noted that other forms of C&R can also have adverse effects on asthmatics.

[66] In terms of the effects of the HFC 134a propellant (the propellant used in Cell Buster) the report stated:

> An issue that does need to be considered is the fact that HFC 134a is heavier than air and in a confined space may accumulate at ground level and displace air (oxygen). Thus the use of this in a cell may result in a layer of HFC134a at ground level. Air movement such as ventilation, drafts, wind, or air movement due to activity within the cell may also reduce this tendency. Whether this is a practical concern will depend on the volume of OC spray used and the size, shape, and ventilation of the cell. This issue could be clarified by oxygen analysis within a cell after a cell buster has been emptied into the cell. A small cell, with no ventilation, drafts, or people movement will approximate the worst case scenario in this regard. If this generates an area of non-breathable air or compromises the breathability [it] may lead to a requirement for mitigation strategies. This could include fan ventilation, changes to the use of prone restraint which may place the breathing zone into lowly oxygenated air, limiting the use of cell buster to ventilated facilities.

[67] But the report concluded:

> The use of OC spray may introduce some new risks. There is a risk of respiratory effects although the available data suggests that this is very unlikely to be a serious risk except in rare situations. There does not appear to be good evidence to suggest that asthma is a major problem for OC spray use although there are gaps in the data. The risk profile of OC spray for heart disease appears better than current C&R practice and the risk of respiratory compromise appears to be higher for prone restraint than for OC spray use based upon the available data.

[68] The first stage of the trial identified ways to mitigate safety concerns about the use of Cell Buster:

(a) ensuring line of sight so that Corrections officers could constantly see the prisoner in the cell;

(b) ensuring there are no barricades in the cell, so the prisoner could be removed immediately;

(c) ensuring a decontamination area is set up prior to deployment; and

(d) requiring respirators for C&R staff extracting the prisoner from the cell.

[69] On 11 February 2010, following consideration of the trial's detailed findings, the Prison Senior Management Team approved the commencement of stage two. It was agreed that Cell Buster and the MK-9 High Volume Stream would be tested during that stage for "planned control and restraint incidents".

Stage two

[70] Stage two (12 months of operational use) took place between 18 November 2010 and 17 November 2011 across 10 prison sites.

[71] The Evaluation Report on this trial, dated 9 May 2012, records that over the course of this year there were 56 planned use of force incidents at the 10 sites. The majority of these (39) did not meet the policy or criteria, or were otherwise deemed inappropriate, for the use of pepper spray. There were 17 occasions when the criteria for the use of pepper spray were met. Of these, pepper spray was deployed once and approved for use in two further other incidents.[22]

[72] The main issue identified was that the CAR09 suggested that pepper spray was only to be used a last resort. As a result, many staff believed pepper spray could only be used *after* a C&R event and that they could not otherwise request permission to use pepper spray. This explained why pepper spray had not always been considered in planned use-of-force incidents, and why pepper spray had been ruled out in cases where, on paper, the conditions indicated it was an appropriate option.

[73] Based on its successful use in the single incident, its deterrent value, and staff views, the overall finding was that pepper spray could be an effective and efficient tactical option to improve staff safety and reduce the risk of injury to staff and prisoners in planned use-of-force incidents.

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[22] In these two incidents, the prisoner was reported to have become compliant as a result of the threat that pepper spray would be used.

[74] The Evaluation Report noted the key risks associated with the use of pepper spray were death of a prisoner,[23] cross-contamination, and legal and reputational risks. "[T]o enable the full potential of pepper spray to be realised", it proposed several changes to the regulatory framework, policy regime, and departmental procedures. These were intended to remove areas of uncertainty in the regulatory framework, improve and clarify the policy, and streamline processes to make pepper spray more accessible to staff in planned use of force situations.

[75] On 9 May 2012, following receipt of the Evaluation Report, Corrections' Executive Leadership Team approved pepper spray for implementation nationally.

Corrections Amendment Regulations 2012

Ministerial and Cabinet approval

[76] The main proposed change to the CR05 following the operational trial was an amendment permitting pepper spray to be issued to trained Corrections officers more widely than before, including in any situation where they reasonably believed it was necessary to use force against a prisoner for any of the purposes referred to in s 83(1) of the Corrections Act (self-defence, preventing escape, preventing damage to prison property, or active or passive resistance to a lawful order).

[77] In August 2012 the then Minister of Corrections (the Hon Anne Tolley) submitted a paper to the Cabinet Social Policy Committee (the CSPC) seeking agreement to these amendments. She advised the CSPC that:

(a) amendments to the regulations were required to make the process for issuing and using pepper spray in prisons more straightforward, and not just as an option of "last resort";

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[23] In this respect the Report noted that:

> While pepper spray in itself is unlikely to kill someone, there have been a range of reports of deaths in overseas jurisdictions following the use of pepper spray. Many of these deaths have been caused by positional asphyxia. Because of this, both the operational policy for custodial staff and the clinical guidelines for health services require staff to ensure that the prisoner is placed in a position that maintains the airway and prevents positional asphyxia.

(b) protections against inappropriate or excessive used "*will remain in the Regulations, and will be reflected in departmental guidelines*";

(c) the 12-month operational trial had seen:

(i) a single use of pepper spray in prison, which "proved highly effective in gaining control of the prisoner and resolving the incident, without injuries to staff or long-term ill-effects for the prisoner";

(ii) two other occasions on which compliance was achieved "because of the presence of pepper spray";

(d) that the proposed changes would allow pepper spray to be issued where either the prison manager or (where that was not practicable) a trained staff member reasonably believed that it is or will be necessary to use force against a prisoner; and

(e) she was satisfied that:

> ... the use of pepper spray as proposed is compatible with the humane treatment of prisoners and the potential benefits from the use of pepper spray outweigh the potential risk of its inappropriate use. The requirement in the Regulations relating to how pepper spray must be used, as well as general statutory provisions relating to the appropriate use of force against prisoners (as detailed in tile Regulatory Impact Statement) would continue to apply. Pepper spray would continue to be returned to storage after use and Departmental guidelines relating to the deployment of pepper spray would inform operational practice.

[78] Under the heading "Human Rights" the Minister advised:

> 26 The proposed regulatory change does not further impact upon the human rights of prisoners than is already provided for under the Corrections Act 2004 and Corrections Regulations 2005, and may in fact prove to be more humane than the current regulations as use of force incidents are likely to be reduced .

[79] And then, after further (redacted) paragraphs, she recorded:

Gender implications

> 31 The proposals in this paper will almost exclusively impact male offenders as they make up approximately 94 percent of the prison population. Operational policy on the use of pepper spray states pepper spray must not be used where a prisoner is pregnant. There are no other gender implications.
>
> **Disability perspective**
>
> 32 Disabilities that may increase the health risks of using pepper spray will be identified prior to the deployment of pepper spray. Health staff generally provide information to custodial staff prior to deployment on known pre-existing conditions and allergies that may lead to adverse effects when pepper spray is used. The correct procedures for engaging any health risk and decontaminating the prisoner are subsequently identified and followed. The proposals in this paper do not have any further disability implications.

[80] The accompanying Regulatory Impact Statement (prepared by Corrections and referred to by the Minister in her advice to the Committee) advised that the policy options identified (amendment to regulations or regulations remaining the same) "will not override the principle that the law should conform with international law". It also contained a section headed "Risk to prisoner and staff health" which advised:

> 19 Due to its nature as an irritant, pepper spray is designed to cause immediate closing of the eyes, difficulty breathing, runny nose, and spray, but the average full effect lasts around 20-45 minutes. there may be concern that increased use of pepper spray may lead to a greater risk of unintentional harm to prisoner and staff health (through cross-contamination).
>
> 20 The Clinical guidelines for health services sets out the conditions for which health staff need to provide information to custodial staff before the use of pepper spray, and the assessment and treatment of prisoners following the use of pepper spray. This process ensures that known pre-existing conditions and allergies that may lead to adverse effects when pepper spray is used are identified, and that correct procedures for managing any health risks and decontaminating the prisoner (and staff if required) are followed.

[81] On 28 August 2012 the Cabinet Social Policy Committee agreed to the proposed amendments.

The Regulations

[82] The CAR12 separated out the use of pepper spray from the use of batons.

[83] New reg 123A specified that pepper spray may only be issued at the direction of a prison manager or (if that is impractical) another officer who has received adequate training.

[84] New reg 123B broadened the circumstances in which prison managers could issue pepper spray from the "necessary to reduce or eliminate serious threat" test contained in CAR09. It provided:

> **123B Issue and Storage of Pepper Spray**
>
> (1) …
>
> (2) The manager, or officer, as the case may be, may direct the issue of pepper spray to officers only if he or she reasonably believes that it is, or will be, necessary to use force against a prisoner.

[85] Similarly, the authority conferred by the replacement for reg 123(1) (reg 123C) was in broader terms than before, providing:

> **123C Use of pepper spray**
>
> (1) An officer who has been issued pepper spray may draw or use the pepper spray if he or she has reasonable grounds for believing that the use of physical force is reasonably necessary for any of the purposes in section 83(1) of the Act.
>
> …

[86] The definition of "pepper spray" remained the same.

Corrections Amendment Regulations 2017

Ministerial and Cabinet approval

[87] On 29 January 2016, a Pepper Spray Working Group was convened to assess the existing policies and procedures of pepper spray deployment during incidents within a prison. The Working Group concluded that that front-line Corrections Officers should be permitted to have ready access to (handheld) pepper spray for use when facing violent situations.

[88] A briefing on the proposed changes was provided to the Minister of Corrections (the Hon Louise Upston) in mid-February 2016. The briefing paper (which was before

the Court) on its face suggests that it was not provided to the Minister but, rather, used "to provide support notes for the Chief Custodial Offices briefing to the Minister on the proposed changes to the use of pepper spray in NZ prisons". It is the only such document before the Court that refers expressly to Cell Buster. In this regard the paper records:

> **Current situation**
>
> 8. Pepper spray is available in Prisons for use in pre-planned Control & Restraint (C&R) incidents.
>
> 9. It is stored centrally and needs the Prison Director, or other trained staff member, to approve its use in C&R incidents.
>
> 10. The need to obtain approval and getting a team of trained staff together to form a C&R team has the potential to cause delays in deploying the pepper spray and hence could lead to more violence and injuries to those involved in bringing the incident to its conclusion.
>
> 11. The types of pepper spray currently in use are the Cell Buster, designed to introduce pepper spray by a wand type nozzle in to a confined space such as a cell and the MK-9 canister that delivers a stream of pepper spray which is aimed at the face of the prisoner.
>
> **Proposed changes**
>
> 12. The use of the Cell Buster will remain as is the current policy.
>
> 13. The MK-9 pepper spray canisters will be moved forward to Unit Control/Guard Rooms where they will be stored in a secure safe. The Unit PCO or SCO will be trained to assess violent and/or threatening incidents and if appropriate approve the deployment of the spray.

[89] In her subsequent paper for the CSPC seeking agreement to the amended regulations, the Minister advised that:

> (a) there were risks in giving staff greater access to pepper spray and, in particular:
>
> > 8 … There are health and safety risks in using pepper spray in confined spaces, such as escort vehicles, and in some prisons due to the nature of the ventilation system. If officers routinely carried pepper spray, there would be increased risks of inappropriate use, canisters being taken by prisoners and used against staff, and adverse impacts on the relationship between prisoners and staff. It is also possible that members of the public could become involved in incidents involving the use of pepper spray against prisoners. For example, if

> pepper spray is carried when escorting prisoners in the community, there is a risk that an innocent bystander could be affected when the spray is discharged. This could raise legal and reputational issues for the Department of Corrections.

(b) Corrections would mitigate these risks by providing thorough guidance and training to the relevant officers and the Prison Operations Manual "will continue to require staff to follow clear operational rules, which detail the circumstances when pepper spray may and may not be used, health checks, and decontamination procedures that must be followed after use, and strict processes for logging and reporting incidents";

[90] Under the heading "Human Rights" the Minister advised:

> 42 The Corrections Regulations 2005 are consistent with the Bill of Rights Act 1990 and the Human Rights Act 1993 with respect to the five areas in which amendments are proposed: the use of pepper spray and mechanical restraints, private visitors, temporary release and removal, and media interviews with prisoners. The new powers and requirements proposed in these areas are considered necessary to improve staff and public safety and to uphold the interests of victims. The proposed regulations also introduce new protections and safeguards to ensure that prisoners' human rights are protected.

[91] And under the heading "Disability perspective" she said:[24]

> 47 There is overseas evidence that mentally ill prisoners are more likely to commit disciplinary infractions and have force used against them. It seems likely that enabling officers to carry pepper spray would result in more frequent use of pepper spray against mentally ill prisoners. However, it may mean that alternative forms of force, such as control and restraint techniques, which can be as or more harmful, have to be used less frequently.

[92] On this occasion the Minister does not appear to have specifically referred to her obligation under s 83 of the Corrections Act, although the CAR17 themselves expressly recorded that they were made:

> (b) on the advice of the Minister of Corrections who, in accordance with section 85(3) of that Act, is satisfied that—
>
> (i) the use of pepper spray is compatible with the humane treatment of prisoners; and

---

[24] This paragraph also footnoted a 2015 Human Rights Watch paper entitled *Callous and cruel: Use of force against inmates with mental disabilities in US jails and prisons*.

(ii) the potential benefits from the use of pepper spray outweigh the potential risks.

[93] The accompanying Regulatory Impact Statement also referred to the relevant risks, noting:

> 8 There are some risks to extending the use of pepper spray. There are some health risks associated with pepper spray so its inclusion in everyday practice could increase the likelihood of health incidents. This risk is higher in spaces where the ventilation systems are not designed for rapid dispersal of chemical agents, such as in escort vehicles and some prison facilities. Other potential risks include:
>
> - pepper spray being used without reasonable cause;
> - canisters being taken by prisoners and used against staff or other prisoners;
> - adverse impact on relationships between staff and prisoners;
> - *adverse impact on vulnerable groups, particularly prisoners with serious mental health issues; and*
> - incidents involving members of the public, with attendant litigation and reputational issues.
>
> 9 Overall, pepper spray is a safe tactical option, with a low risk of injury compared with other means of force. The risks identified above can be mitigated to a large extent by ensuring that staff receive appropriate training and guidance.
>
> (emphasis added)

[94] The CSPC agreed to the proposed amendments on 15 March 2017.

The Regulations

[95] The CAR17 revoked reg 120A, reworked regs 123A to 123C and added a new reg 123D.

[96] The definition of pepper spray was expanded to include an "aerosol spray or other aerosol substance" that contains a *synthetic* irritant. Again, the regulations did not prescribe as a non-lethal weapon the means by which pepper spray was to be deployed.

[97] The Explanatory Note to the CAR17 explains the effect of the other amendments as follows:

> The principal regulations currently provide that pepper spray may be issued only if the prison manager (or another adequately trained officer in limited circumstances) reasonably believes that force is, or will be, necessary against a prisoner. The amendments allow pepper spray to be issued without this requirement, but only to officers who have received adequate training in its use and subject to any further conditions or restrictions imposed by the chief executive.
>
> Security officers, and staff members who are not officers, continue to be prohibited from carrying pepper spray.
>
> An officer to whom pepper spray has been issued must keep it secure, and the prison manager must ensure that it is securely stored when it is not issued to an officer.
>
> The amendments allow officers who have been issued pepper spray to draw and use it both in the prison and while carrying out escort duty outside the prison.
>
> The amendments also set out the following restrictions with respect to the drawing and use of pepper spray:
>
> - pepper spray may not be drawn or used unless the officer has reasonable grounds for believing that physical force is reasonably necessary for any of the purposes in section 83(1) of the Act:
> - pepper spray must be used in a way that minimises pain or injury to the prisoner so far as that is consistent with protecting prison security or a person's safety (as in the current provisions):
> - *the drawing and use of pepper spray are subject to any further conditions or restrictions imposed by the chief executive:*
> - officers trained in the use of pepper spray must undergo refresher courses (as in the current provisions).
>
> …
>
> (emphasis added)

[98] Notwithstanding the Minister's advice that the new regulations would introduce "new protections and safeguards to ensure that prisoners' human rights are protected",[25] the only new safeguard in the regulations appears to be the inclusion of a new requirement (in the new regs 123B(4) and 123C(5)) that the issuing, drawing

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[25] See the passage at [90] above.

and use of pepper spray must comply with any further conditions or restrictions imposed by the Chief Executive.

Corrections' internal policies and procedures regarding pepper spray

[99] Evidence was given about Corrections' relevant policies and procedures around the use of pepper spray by Mr Robert Hall, who is currently Corrections' Principal Adviser, Tactical Operations. He annexed to his affidavit three documents in which the relevant policies and procedures that were current at the time the present claim was filed are set out: the Tactical Options Manual of Guidance (TOMG), the Tactical Options Instructors Guide (TOIG) and the Custodial Practice Manual (CPM). These documents considerably overlap, although there are some inconsistencies between and (within) them.[26]

[100] For present purposes I propose to focus primarily on the CPM which is stated to form part of the "Incident response process" contained in the Prison Operations Manual (POM). As I understand it, the POM itself provides that, in the event that the instructions in the POM conflict with other Departmental manuals and directives the POM instructions take precedence.

[101] The relevant part of the CPM is headed "Request and approval to use pepper spray on planned use of force". It expressly states that this section relates to "Mark 9 and Cell buster containers". It begins as follows:

> **1. Request procedures**
>
> 1. A corrections officer may request the issuing of pepper spray, only after the first responding officer in attendance has determined whether:
>
> a. other non physical intervention strategies will be inadequate to resolve the incident safely; and
>
> b. use of force is necessary.
>
> 2. Before making a request for the issuing of pepper spray, a corrections officer must complete a risk assessment to determine whether use of pepper spray would be appropriate given the circumstances and

[26] I do not know whether the contents of earlier iterations of these documents were similar to the versions before me. The date on the CPM is 3 August 2018.

determine whether pepper spray can be used in the area where the incident is occurring, based on cross contamination testing results.

3. Where practicable, seek advice from Health Services on whether the prisoner has any medical conditions that would prevent the use of pepper spray unless impracticable to do so.

2. Approval process

1. The prison director (or a delegated authority who has been trained) must consider whether to approve the use of force, including the issuing of pepper spray, only if they have reasonable grounds for believing force is necessary:

    a. in self-defence, in the defence of another person, or to protect the prisoner from injury, or

    b. in the case of an escape or attempted escape (including the recapture of any person who is fleeing after escape); or

    c. to prevent the prisoner from damaging property, or in the case of active or passive resistance to a lawful order.

2. The prison director (or a delegated authority who has been trained) may only issue pepper spray to a corrections officer who has been trained in its use.

[102] The prerequisites for approval referred to in the CPM here reflect (and replicate) s 83(1) of the Corrections Act. The requirement that only trained corrections officers may be "issued" with pepper spray reflects reg 123B of the CAR17.

[103] The next section stipulates that prior to use of pepper spray, a decontamination area must be set up and Health staff must be available at that area and remain there during the decontamination process to manage any medical emergencies.

[104] Then there is a larger heading "Procedures for using pepper spray", which begins as follows:

1. Use of pepper spray

1. A corrections officer trained in the use of pepper spray may only use pepper spray when all of the following conditions apply:

    a. there is a planned control & restraint (C&R) incident

    b. all members of the C&R team are trained and current in C&R and pepper spray

    c. health staff are available at the decontamination area

d. *the prisoner is displaying 'assaultive' behaviour*; and

e. approval to use force, including the issuing of pepper spray, has been given by the prison director (or delegated authority who has been trained on the use of pepper spray).

Note: It is the responsibility of a corrections officer issued with pepper spray to ensure the canister's security.

2. The pepper spray will not be used against:

a. a prisoner armed with a firearm (notify Police immediately to respond to the situation)

b. pregnant prisoners

c. prisoners on a roof or other areas where the use of pepper spray at such a height may cause the prisoner to be injured if they were to fall.

d. prisoners who cannot be continually observed

e. prisoners located in an area that cannot be accessed quickly (e.g. the entry/ exit point has been barricaded)

f. a prisoner who is restrained (i.e. C&R locks or mechanical restraint).

3. A corrections officer designated as "Number 1" within a Control and Restraint team has the final decision on whether to use pepper spray, including the type of pepper spray canister to be used.

4. Pepper spray must be used in a way that minimises pain or injury to the prisoner, as far as it is consistent with protecting prison security or the safety of any person.

5. *The officer may only draw or use the pepper spray against a prisoner and only if the officer has reasonable grounds for believing that the use of physical force is reasonably necessary as per use of force requirements set out in the "Approval Process" above.*

Note: Corrections officers must be trained, familiar with, and adhere to the Department's approved pepper spray training manual.[27]

(emphasis added)

[105] There appears to be a conflict between the two passages I have italicised here. On the one hand para 1(d) appears to confine the use of pepper spray to cases involving "assaultive behaviour", which is defined in the TOMG as:

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[27] I assume this to be a reference to the TOMG.

> … actively hostile behaviour, accompanied by physical actions or intent, expressed either verbally and/or through body language to cause physical harm. Examples include kicking, punching or aggressive body language signalling an intention to assault.

[106] On the other, para 5 appears to authorise the planned use of pepper spray in any if the circumstances referred to in s 83, including "*passive* resistance to a lawful order".[28]

[107] The next parts of the CPM set out the procedures that apply in the aftermath of the deployment of pepper spray:

> **2. Procedures after pepper spray has been used**
>
> 1. The Incident Supervisor is responsible for ensuring the canister is secured and returned to the locked cabinet once he or she reasonably believes that it is no longer necessary to use force against a prisoner.
>
>   **Note:** Ultimate responsibility to direct the return of the pepper spray lies with the person (i.e. the prison director or delegated authority who has been trained in the use of pepper spray) who directed that pepper spray be issued.
>
> 2. After the pepper spray has been used on the prisoner a corrections officer must:
>
>   - check that the prisoner's breathing has not been severely affected
>
>   - immediately request medical assistance from health staff if the prisoner has difficulty resuming normal breathing before relocating the prisoner.
>
>   ensure the prisoner is not left lying face down with their hands restrained behind their back.
>
> 3. After the pepper spray has been used the corrections officer must consider whether the use of handcuffs is reasonabl[y] necessary to protect the prisoner from injury, or to defend themselves or another person. Any use of handcuffs must be done in a manner that minimises harm and discomfort to the prisoner. A corrections officer should consider whether or not the use of handcuffs is justified in the circumstances. For example:
>
>   - The prisoner becomes violent during the decontamination process and tries to harm a staff member or themselves.
>
>   - The prisoner is attempting to transfer the pepper spray onto others for example by wiping it onto another person.

[28] The same conflict is apparent in the TOMG itself.

4. The post incident procedures must be followed as per POM IR.05 Post Incident.

3. De-contamination process

1. The decontamination procedure can commence in the area where the pepper spray has been deployed, or any other appropriate area. If the prisoner is being escorted to another area of the prison for full decontamination, the corrections officer must make an individual case by case assessment as to whether they have reasonable grounds to believe the use of handcuffs is necessary in the circumstances.

2. The prisoner must not have their faces covered; the use of a spit hood is not permitted.[29]

3. A corrections officer trained in the use of pepper spray is responsible for the decontamination process.

4. Decontamination will only commence when the prisoner is compliant and safely contained. This will be carried out by a corrections officer.

5. During the decontamination procedure the corrections officer may consider whether the use of handcuffs is reasonably necessary to protect the prisoner from injury, or to defend themselves or another person.[30] Any use of handcuffs must be done in a manner that minimises harm and discomfort to the prisoner. A corrections officer should consider whether or not the use of handcuffs is justified in the circumstances. For example:

    - The prisoner becomes violent during the decontamination process and tried to harm a staff member or themselves.

    - The prisoner is attempting to transfer the pepper spray onto another person.

6. If the corrections officer determines that it is necessary to use handcuffs in the circumstances, they should first take into account whether contact lenses or affected clothing for example need to be removed first. Any guidance from health staff in this regard should be taken into account.

7. Once a corrections officer has completed decontamination, the prisoner must be provided with alternative clothing and an opportunity to shower (if required).

8. A corrections officer, or any other person, affected by pepper spray or physically injured as a result of the incident, will be seen by health staff if requiring immediate medical attention.

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29 By contrast, see the case of *Christie v Scott*, discussed at [145] and [146] below.

30 It may be observed that the discretion conferred on Corrections officers around the procedures here regarding the use of handcuffs during decontamination appear inconsistent with the equivalent procedures in the TOMG and TOIG, which specify that handcuffs must remain on a prisoner immediately before and during the decontamination process, unless health staff request otherwise.

[108] It may be interpolated at this point that the discretion conferred on Corrections officers around the procedures here regarding the use of handcuffs during decontamination appears inconsistent with the equivalent procedures in the TOMG and TOIG, which specify that handcuffs must remain on a prisoner immediately before and during the decontamination process, unless health staff request otherwise.

[109] The CPM then goes on to deal with other aspects of the decontamination process:

> **4. Decontamination procedure**
>
> 1. Reassure the prisoner that the effects are only temporary and that you will assist.
>
> 2. Hold decontamination spray 30 cm from face and spray liberally on all contaminated areas as soon as possible.
>
> 3. After 5-10 seconds **blot** affected areas with a clean cloth or paper towels.
>
> 4. Continue to use cool clean water to cool and wash skin and flush eyes.
>
> 5. Do not **wipe** spray from face as this will only spread the pepper spray and cause further contamination.

[110] The remainder of the relevant part of the CPM are concerned with procedures around the preservation of evidence, cleaning contaminated areas, clean-up of staff and equipment and reporting. The relevant requirements in this last respect are that:

> 1. All incidents involving the issuing or use of pepper spray on a prisoner must be reported (as per POM IR.06 Incident Reporting) within two hours.
>
> 2. In addition, if pepper spray is used the Prison Director and Regional Commissioner must be informed within two hours.
>
> 3. A video recording of the incident must be provided to the National Office Chief Custodial Officer's team within 72 hours of the incident occurring.
>
> 4. If a corrections officer has been exposed to pepper spray and experiences any physical symptoms as a result of being sprayed, the corrections officer must complete the H&S Tracker Report.

[111] The CPM does not contain any more detailed procedures around the use of Cell Buster. Rather, the TOIG sets out the relevant instructions, as follows:

A corrections officer designated as **'Number 1'** within a Control and Restraint team has the final decision on whether to use pepper spray, including the type of pepper spray canister to be used.

…

The C&R team is formed and approaches the prisoner's door.

Number 1 gives the prisoner a final warning.

"Prisoner can you hear me? This is your last opportunity to move peacefully or force will be used against you, including the use of pepper spray. Do you understand?"

If the prisoner decides to comply, relocate as you would normally.

…

If the prisoner does not comply and a decision is made to use the Cell Buster, follow these instructions:

- On **Number 1's** command, **Number 4** removes the pin from the canister and locates the thumb indentation with their thumb and states: "canister armed".
- Prior to deployment the team must ensure that their respirators are in place.
- **Number 4** places the nozzle under the door, with it pointing upwards into the cell, or any gap into the cell.
- The thumb indentation identifies which way the hose is pointing into the cell.
- **Number 4** presses down on the trigger for three seconds.
- **Number 1** ensures that the prisoner is able to be seen and that there is access into the cell.
- Continue to observe and talk to the prisoner.
- Evaluate if another 3 second spray is required.
- **Number 4** replaces the pin and states: "canister safe", and then passes the canister to the supervisor who is responsible for securing it.
- If the prisoner becomes compliant, direct the prisoner to walk out of the cell following your instructions.
- The operator must only use 2 x 3 second burst - maximum.

The experience of Ms Cripps and other women at ARWCF

[112] As noted earlier, the unchallenged evidence before Judge McNaughton in the District Court was that the deployment of pepper spray in the case of Ms Cripps and other women held with her in ARWCF did not accord with the above procedures. As summarised in the experts' joint report referred to earlier:[31]

> Contrary to Corrections' standard operating procedures, the plaintiff was exposed to capsaicinoid fog in her enclosed cell for 20 to 30 minutes. Furthermore, Ms Cripps' evidence is that ". . . the officers deployed about four canisters at one go. When they put the hose in and deploy gas inside your cell, officers put towels under the door so as to keep the gas inside."
>
> Given each canister can deliver 20 one second bursts of the fog, Ms Cripps' evidence is that she was exposed to a total of 80 one second bursts of capsaicinoid fog.

[113] As I have said, however, these proceedings are not directly concerned with what happened to Ms Cripps or Ms Bassett. Accordingly I do not need to address these matters further. Nonetheless, some issues arising from a lack of clarity in the relevant guidelines, and the potential for abuse of the standard operating procedures, remain relevant to the second cause of action and will be discussed in that context, later.

PEPPER SPRAY IN THE DOMESTIC, OVERSEAS AND INTERNATIONAL COURTS

[114] Pepper spray is used for law enforcement purposes (including, often, in prisons) in most cognate jurisdictions. In some, Cell Buster is used. It is, accordingly, instructive to review how challenges to its use has been dealt with by the Courts in those jurisdictions. But I begin with a New Zealand case.

New Zealand

Falwasser

[115] The only domestic authority dealing with the use of pepper spray as a law enforcement tool is the 2010 High Court decision in *Falwasser v Attorney-General*.[32]

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31 Referring to *R v Bassett* [2020] NZDC 24454 at [26].
32 *Falwasser v Attorney-General* [2010] NZAR 445 (HC).

Mr Falwasser claimed (among other things) damages for breach of his rights under ss 9 and 23(5) of the NZBORA as a result of Police officers' use of pepper spray on him while he was detained in a Police cell. Mr Falwasser had been arrested because Police suspected he possessed a stolen car. He had passively refused to leave his cell or to permit himself to be handcuffed when Police officers attempted to fingerprint and photograph him. Stevens J described what happened next:

> [15] In the face of such refusal, Sergeant Parsons then decided to embark on a strategy that counsel for the Attorney-General accepted was "flawed". Sergeant Parsons informed Mr Falwasser that, if he did not comply with the instructions given to him, he would be pepper sprayed. Shortly after 2.30pm, in the face of the persistent refusals by Mr Falwasser to comply with instructions, Sergeant Parsons used pepper spray on him. Shortly thereafter a second officer, Sergeant Busby, struck Mr Falwasser with a baton. At one point, Mr Falwasser sought to advance out of the cell and a baton was also used by Sergeant Parsons. One of the baton blows caused a wound on his scalp. He retreated inside the cell and Sergeant Parsons closed the cell door at around 2.32pm.
>
> [16] There followed a discussion between various police officers to determine a possible different strategy to remove Mr Falwasser from the cell. A plan was formulated to enter the cell using plastic shields and then employ plastic handcuffs to restrain Mr Falwasser so that he could be moved. The plan was put into action shortly after 2.39pm. During this phase, another Constable used pepper spray, whereupon Mr Falwasser charged at the officers as he sought to exit the cell. It was not possible for the officers to enter the cell to implement the new strategy. The cell door was closed shortly thereafter. Again, counsel for the Attorney-General accepted that, once it was clear to the police officers that minimum force was ineffective to deal with Mr Falwasser, this new strategy was also flawed and inappropriate.
>
> [17] After this second plan was abandoned, there was no further attempt by police officers to enter the cell. But the CCTV footage shows various attempts being made, particularly by Constable Mills, to deploy pepper spray through the vents of the cell. On several occasions the spraying was carried out by two officers spraying at the same time, both from the top vents and through an aperture at the ground level. One officer poked a baton through the floor aperture to force Mr Falwasser to remove his foot that he was using to attempt to block the entry of pepper spray. Mr Falwasser received injuries to his foot from such baton use. This period of pepper spray use concluded shortly after 2.40pm.
>
> [18] At this stage, all police officers left the cell area, no doubt because of the effects of the pepper spray in the enclosed space. One officer approached the cell holding a long baton and seemed to be trying to persuade Mr Falwasser to comply with instructions. During this period, Mr Falwasser can be seen bending down by the floor aperture, no doubt endeavouring to breathe air less affected by the pepper spray.
>
> [19] Shortly after 2.43pm, Constable Mills returned to the cell and resumed the use of pepper spray through the floor aperture. Again, Mr Falwasser

> attempted to block the aperture with his foot. The use of pepper spray by Constable Mills and others (including Senior Constable Laing) continued on an intermittent basis until just after 2.51pm. Various police officers were present during this time, some wearing masks, coming and going from the cell area to other parts of the building or outside. The use of such force by police officers concluded at 2.51pm. Mr Falwasser remained inside the cell in obvious discomfort from the pepper spray and the bleeding head wound received from one of the baton blows.
>
> [20] Constable Secker was instructed to call a doctor to attend Mr Falwasser. Dr Waxman arrived at the station some time before 3pm. Shortly after 3pm, Mr Smith, the DAO, returned to be joined by his supervisor Dr Egyedi. Mr Falwasser was then attended to by the medical personnel. Thereafter, Mr Falwasser's brother returned to the station. Mr Falwasser calmed down and Constable Secker was able to process him.
>
> [21] In summary, the use of pepper spray commenced just after 2.31pm and the final application of it occurred at around 2.51pm, a period of 20 minutes. The investigation by the New Zealand Police found that pepper spray was used by Sergeant Parsons nine times, Constable Oswald four times, Constable Mills 41 times and Senior Constable Laing 11 times, a total of 65 times. All but the first deployment of pepper spray occurred after Mr Falwasser had received the six centimetre laceration midline to his scalp.

[116] After consideration of dicta from the leading case (both then and now) on s 9 and 23(5),[33] Stevens J found that Mr Falwasser's s 9 right had not been breached:

> [75] … I am satisfied that what occurred to Mr Falwasser did not amount to torture, or treatment or punishment that was cruel, degrading or disproportionately severe. The police officers concerned in the incident were not motivated by a desire to inflict physical or mental distress on Mr Falwasser. I am satisfied that Mr Falwasser has not established that there was an intention or recklessness on the part of the officers concerned to cause damage or distress.

[117] But, the Judge's conclusion about the claimed breach of s 23(5) was different. He said:

> [76] On the other hand, I am satisfied that the concession by the defence as to a breach of the s 23(5) BORA right was properly made. Mr Falwasser was, despite his lack of compliance and intransigence, entitled to be treated during that 20 minute period of the incident with humanity and with respect for the inherent dignity of the person. He was not. The breach of the s 23(5) BORA right in this case was, in my opinion, such that it lacked humanity, but fell short of being cruel. The Police conduct during the incident did demean Mr Falwasser, but was not to such an extent that it was degrading. The application of force in all the circumstances was clearly excessive, but not grossly so. Therefore, I have concluded that, in terms of the degrees of reprehensibility, the conduct in question during the incident ought properly to

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[33] *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429, discussed in more detail later in this judgment.

> be characterised as a serious breach of the s 23(5) BORA right of Mr Falwasser.

[118] The Judge awarded NZBORA damages of $30,000 for this breach and made a declaration that the use of batons and pepper spray by Police on Mr Falwasser was excessive, unnecessary and an abuse of power which amounted to a failure to treat him with humanity and respect for the inherent dignity of the person, in breach of s 23(5).

United States

[119] Pepper spray has been used as a means of control and restraint in some prisons in the United States (US) for decades. From time to time, its use in individual cases has been challenged under the Fourth, Eighth or Fourteenth Amendments to the US Constitution. For present purposes it is the Eighth Amendment (which prohibits the infliction of cruel and unusual punishments) that is most relevant.[34] In that regard the US Courts have long since confirmed that:[35]

> Whatever rights one may lose at the prison gates, … the full protections of the eighth amendment most certainly remain in force. The whole point of the amendment is to protect persons convicted of crimes.

[120] Punishments repugnant to the Eighth Amendment are those incompatible with "the evolving standards of decency that mark the progress of a maturing society," or which "involve the unnecessary and wanton infliction of pain,"[36] including (in the case of prisoners) the infliction of pain that is "totally without penological justification."[37]

[121] The question of breach in Eighth Amendment cases is determined by reference to the Supreme Court's decision in *Hudson v McMillan* (not itself a pepper spray case).[38] The core inquiry whenever prison officials stand accused of using excessive physical force is whether force was applied in a good-faith effort to maintain or restore

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34 The Fourth Amendment protects individuals against unreasonable searches and seizures. The Fourteenth Amendment prohibits the deprivation of life, liberty or property without due process. From the relevant case law, it appears the Fourth is generally used as a basis for challenging the use of pepper spray by Police, while the Eighth and Fourteenth are typically used as a basis for challenging the use of pepper spray by Corrections officers or on people in pre-trial detention.

35 *Spain v Procunier* 600 F 2d 189, 193-194 (9th Cir. 1979).

36 *Estelle v. Gamble,* 429 U.S. 97, 102-03, 97 S.Ct. 285, 290, 50 L.Ed.2d 251(1976).

37 *Rhodes v. Chapman,* 452 U.S. 337, 346, 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981).

38 *Hudson v McMillian* 503 U.S. 1, 6–7 (1992).

discipline, or maliciously and sadistically to cause harm. The Court identified the following five factors as relevant to that inquiry:

(a) the need for the application of force;

(b) the relationship between that need and the amount of force used;

(c) the threat reasonably perceived by the responsible official;

(d) any efforts to temper the severity of the response; and

(e) the extent of any injury suffered.

[122] The Supreme Court has also said on a number of occasions that courts must accord a degree of deference to prison or jail officials as they attempt to maintain order and discipline within dangerous institutional settings, particularly where "the ever-present potential for violent confrontation and conflagration, ripens into actual unrest and conflict".[39]

[123] I have read quite a number of the US cases only some of which were referred to me by counsel. The majority of them have arisen in the context of an application for summary judgment by the prison authorities, based on a claim for qualified immunity and so do not involve any substantive determination on the facts.[40] They are instructive principally because they contain examples of certain matters regarded by the courts there potentially to make a difference between the use of pepper spray that is authorised and justified, and use that is inhumane. I have attempted to group them using headings that reflect those matters. Many of them overlap, however.

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[39] *Jones v North Carolina Prisoners' Labor Union, Inc* 433 U. S. 119, 132 (1977). See also *Whitley v Albers,* 475 US 312, 321 (1986).

[40] Protection from liability based on the doctrine of qualified immunity turns on negative answers to two questions: (a) whether on the most favourable light to the party asserting injury, the facts show the violation of a constitutional right and (b) whether, given the context, it would have been clear to a reasonable official actor that the impugned conduct was unlawful.

Cell extraction and proportionate use

[124] *Spain v Procunier*—decided in 1979—was not a summary judgment case and for that and other reasons is perhaps the most significant of the relevant decisions. It involved a substantive Eighth Amendment challenge brought by a number of high security prisoners who were held in the "adjustment center" (AC) at California's San Quentin prison, to various conditions of their confinement.[41] The trial judge (after a 29-day trial and a site visit to the prison) found that the prisoners' constitutional rights had been violated in a number of significant respects, including by the use of tear gas to extract them from their cells. The prison authorities appealed.

[125] The United States Court of Appeals, Ninth Circuit began by noting that:

> The case is difficult because it requires us to pass upon measures adopted by prison officials for the safe custody of some of the most dangerous men in the prison population. Each of these plaintiffs had been either charged or convicted of violent acts while in prison even before an outbreak of further violence on August 21, 1971. On that date, it is alleged, each of the prisoners had responsibility in some degree for crimes in which three prison officers and two inmates were slain. As the trial court stated, "Director Procunier testified that the incident of August 21, 1971 was the worst in his eight years as Director of Corrections." … The plaintiffs here were jointly indicted for that incident upon various charges depending on their degree of alleged participation, and the indictment contained three counts of murder of correctional officers, two counts of murder of other inmates, one count of conspiracy to escape, kidnap and possess a weapon, and counts of aggravated assault upon three other officers.

[126] The Court described the nature of the tear gas aspect of the claim as follows:[42]

> The plaintiffs sought to prohibit prison personnel from using tear gas against them. It was alleged that this painful substance was used to remove recalcitrant prisoners from their cells and that the use of the chemical caused anguish to prisoners in adjacent cells even if they were not the ones refusing to cooperate with prison officials.

[127] After noting the state's submission that the courts should use great restraint before making orders based on a finding that there had been state illegality "in discharging the unenviable task of keeping dangerous men in safe custody under humane conditions" the Court of Appeals said:

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41 *Spain v Procunier* 408 F. Supp. 534 (N.D. Cal. 1976).

42 The prison authorities accepted that tear gas had been used as a means of cell extraction.

> … it must also be remembered that enforcement of the eighth amendment is not always consistent with allowing complete deference to all administrative determinations by prison officials. Whatever rights one may lose at the prison gates … the full protections of the eighth amendment most certainly remain in force. The whole point of the amendment is to protect persons convicted of crimes. Eighth amendment protections are not forfeited by one's prior acts. Mechanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary. The ultimate duty of the federal court to order that conditions of state confinement be altered where necessary to eliminate cruel and unusual punishments is well established.

[128] The Court noted that the trial court had focused its attention on "technical testimony concerning the properties and physiological effects of tear gas." An expert in pharmacology had given evidence, who explained that:

> … tear gas can be lethal in the confines of a small cell, such as in the adjustment center. The amount of tear gas used and the extent of exposure are critical factors in measuring the dangers of this weapon. Tear gas in the AC was dispensed from either a tear gas billy or a dust projector. The billy contained well below a lethal dose, even when used in a confined area. The dust projector, however, contained what appellants admitted is close to a lethal dose.

[129] Based on this evidence, the trial judge had found that:

> [t]ear gas and other chemical agents are dangerous, inflict pain, and can cause permanent injury and even death. … The use of such chemicals in closed places, such as the AC, where the chemicals affect not only the target, but neighboring prisoners as well, imposes punishment upon prisoners who are innocent of even alleged wrongdoing. …

[130] The judge had, accordingly, enjoined state authorities from using tear gas, against the plaintiffs, unless there is an "actual or imminent threat of death or bodily harm or escape, an actual or imminent threat of serious damage to a substantial amount of valuable property, or an actual or incipient riot involving a large number of unconfined inmates."

[131] On appeal, the prisoners supported the terms of this order. The prison authorities submitted that its ambit should be extended to authorise use of pepper spray where there was only a reasonable probability of danger. But the Court said a different focus was required:

> We think both arguments lack a necessary predicate since neither is related to the amount of the substance or extent of exposure. Neither the court's findings

> nor the record establishes that the substance is dangerous in every quantity. In those circumstances in which, given the probable extent of exposure, the quantity used is dangerous, then the conditions for its use set forth by the district court are necessary to implement eighth amendment protections. The infliction of pain and the danger of serious harm may be necessary if there is a threat of an equal or greater harm to others, as is reflected in the doctrine of self defense which permits one to do harm to another person who threatens unlawfully to do an equal or greater harm to another. … Inherent in the doctrine of self defense is the concept of proportion. If then the tear gas is used in dangerous quantities, we agree with the district court that its use is justified only in those grave circumstances which would justify the use of severe and potentially lethal force.
>
> We think the record further indicates, however, that use of the substance in small amounts may be a necessary prison technique if a prisoner refuses after adequate warning to move from a cell or upon other provocation presenting a reasonable possibility that slight force will be required. In these circumstances the substance may be a legitimate means for preventing small disturbances from becoming dangerous to other inmates or the prison personnel. We infer that the trial court was concerned that even if tear gas might legitimately be used in small quantities for this purpose, there might be a temptation, from a desire to punish a particular group or segment of inmates, to cause discomfort to prisoners who occupy adjacent cells. We share that concern and do not sanction the use of tear gas as punishment, but in our view the order should be modified in certain respects.

[132] The Court noted that although the use of tear gas had already been sanctioned by US Courts in a number of other cases, after an examination of those cases:

> … we think it fair to say that those holdings were not shaped or formed by expert testimony such as that presented in this case. Those courts did not consider evidence, such as that presented to the trial court in this case, that use of the substance can be extremely dangerous. For example, in *Bethea v.* Crouse, … the court without any analysis of the effects of tear gas simply asserted that it was "a purely disciplinary measure" and that "no reasonable man would say that it [the use of tear gas] amounted to cruel and unusual punishment." And in *Landman v. Peyton…* , the court specifically noted that it was not presented any evidence concerning possible complications from overexposure to tear gas and strongly implied that such evidence might have affected its decision. A number of other courts have, however, condemned the use of tear gas in particular circumstances as violative of the eighth amendment or of due process or both.

[133] The Court therefore rejected the proposition that the use of tear gas could never be a breach of the Eighth Amendment and agreed with the trial judge that use of potentially dangerous quantities was justified "only under narrowly defined circumstances". But the Court further concluded that:

> … use of nondangerous quantities of the substance in order to prevent a perceived future danger does not violate "evolving standards of decency" or

> constitute an "unnecessary and wanton infliction of pain." Therefore, where there are safeguards to insure that tear gas is not used in dangerous quantities we think its use can be justified in situations which are reasonably likely to result in injury to persons or a substantial amount of valuable property, and that use of potentially dangerous quantities is appropriately reserved for the circumstances narrowly defined by the district court in its opinion. We therefore remand to the district court for determination of appropriate standards concerning dosage level and manner of use to delineate between dangerous and nondangerous use of the chemical. In addition, we request the court to formulate a standard consistent with this opinion so that tear gas may be used in nondangerous quantities if no more convenient or safe control method is available and if feasible steps are taken to protect the nonrecalcitrant inmates. In so doing, the court may take into account but is not limited to prison regulations on the use of tear gas.

Passive resistance and prior warnings

[134] In *Williams v. Curtin* the Court of Appeals, Sixth Circuit held that a prisoner had a valid excessive-force claim when he allege[d] that, when instructed to 'pack up,' he inquired, 'What for, sir?,' at which point an 'assault team' had entered the cell and used a chemical agent on him.[43]

[135] The same conclusion was reached by the same Court in *Roberson v Torres*.[44] A correctional officer claimed the prisoner did not comply with orders to submit to restraints, prompting the officer to spray a chemical agent into his cell. The prisoner claimed he was asleep and completely covered with a blanket at the time his cell was sprayed and so did not hear the prior order. The Court denied qualified immunity to the correctional officer on the basis that if the facts were as the inmate alleged, the use of force would violate established law.

> Torres again presupposes that Roberson "disobeyed ... direct orders," …, but that assumption cannot support an argument that the use of the chemical agent would not have violated clearly established law even in the absence of disobedience. Although the use of a chemical spray may be preferable to a physical altercation under certain circumstances, we reject the false dichotomy that Torres poses: Torres undoubtedly had other means of waking Roberson at his disposal—or at least of reasonably assuring that he was awake—before having to resort to either a chemical agent or physical force. For example, as Roberson notes, "the officer could have used a PA system, an air horn, or simply banged on the cell door with a baton." … 5. Under the circumstances as alleged, we hold that spraying a sleeping prisoner with a chemical agent was unreasonable.

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43 *Williams v. Curtin,* 631 F.3d 380, 384 (6th Cir. 2011),

44 *Roberson v Torres* 770 F.3d 398 (6th Cir. 2014).

[136] *Burns v Eaton*[45] involved a prisoner who was pepper sprayed after refusing to return to his cell. The Court of Appeals, Eighth Circuit, noted the prisoner had been warned that he would be pepper sprayed if he did not comply with orders and upheld qualified immunity for one corrections officer on that basis.

[137] *Furnace v Sullivan*[46] involved a prisoner who claimed a corrections officer used pepper spray on him with no warning, after he had placed his fingertips on his cell's open food port. The Court of Appeals, Ninth Circuit, denied the officer qualified immunity because it was unclear (even on the corrections officer's version of events) whether force was required or the inmate posed a threat. In coming to that conclusion, the Court put particular emphasis on the absence of any prior order or warning.

Medical inquiries before the fact

[138] In *Ogle v. Thompson* the Court held that pepper spraying an inmate (who was known to suffer from asthma) following his refusal to comply with an order (to remove the toilet paper with which he had covered his cell window, following a dispute over his meal) was a reasonable use of force.[47] The Court noted that the use of pepper spray was often less harmful than the alternatives:

> The decision to use a chemical agent to obtain physical control is generally preferable to the use of physical force. The court assumes that prison officials could have attempted a "cell-rush" with shields, truncheons, and handcuffs to forcibly enter Plaintiff's cell in an attempt to subdue and restrain him, rather than using gas. However, other courts have found that these types of physical confrontations are less safe than using tear gas or mace because of the greater risk of injury to staff, the inmate, or both. … Thus, the Defendants in this action chose to use a lesser degree of force.

[139] The Court dismissed the claim that the plaintiff should not have been sprayed because of his asthma because the plaintiff's own evidence showed that the Health Service was contacted beforehand and had determined that he "was a normal risk for chemical agents". Moreover, because the plaintiff had not alleged that he suffered any long-term injuries as a result of being sprayed. His alleged injuries—including coughing and difficulty breathing—appeared to "be no more than the normal after-

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45 *Burns v Eaton* 2014 U.S. App. Lexis 9596 (8th Cir.).
46 *Furnace v Sullivan* 2013 U.S. App. Lexis 1110 (9th Cir.).
47 *Ogle v. Thompson,* No. 05–289, 2006 WL 416246 (WD Mich Feb 17, 2006)

effects of being exposed to gas and/or chemical agents". Accordingly the court found that the fact that he was asthmatic did not appear to have been a factor in his injuries.

Mental Illness

[140] *Thomas v Bryant* involved a challenge to the use of chemical agents on mentally ill prisoners by corrections officers in Florida.[48] The first instance Court had found (in relation to one prisoner) that this was cruel and unusual punishment that violated the Eighth Amendment. On appeal, the Court noted that "there are constitutional boundaries" to the use of such agents and confirmed the lower Court's finding that, given the prisoner's mental illness rendered him unable to comply with orders, using pepper spray to induce compliance was without justification, giving rise to a breach.[49] Moreover it concluded that, spraying mentally ill prisoners with chemical agents when they were secured, did not present a threat of immediate harm and could not understand or comply with orders constituted extreme deprivation violating the Eighth Amendment.[50] The Court also held the lower Court did not err in finding that the prisoner had suffered psychological injury (intense helplessness, suicidal ideation, and exacerbated mental illness) from being sprayed, and upheld an injunction against the "non-spontaneous" use of chemical agents on the plaintiff without consultation with trained mental health staff.

Medical Attention after the fact

[141] In *Danley v Allen* Police had arrested Mr Danley for drunk driving and placed him in a detention centre.[51] After being made to use a dirty toilet in a small, poorly ventilated cell, he refused to comply with instructions. A jailer pepper sprayed him, then left him for 20 minutes before allowing him a two-minute shower. He was subsequently moved to another poorly ventilated cell with pepper spray still on his body and clothes. After 12 hours without medical attention (despite experiencing breathing difficulty) Mr Danley was released.

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48 *Thomas v Bryant* 614 F.3d 1288 (11th Circuit, 2010). Under Florida correctional policy on non-spontaneous use of force, correctional officers were able to spray three one-second bursts of pepper spray where inmates were not complying with their orders, after receiving approval from their direct supervisor and medical staff (among other requirements).

49 At 1310.

50 At 1312.

51 *Danley v Allen* 540 F.3d 1298 (11th Cir. 2008).

[142] The Court observed that failure to comply with orders gives rise to a need for force, and a short burst of pepper spray was not disproportionate to that need.[52] But confining Mr Danley in a poorly ventilated cell without medical attention following the spray, and after he had stopped resisting, was excessive. It concluded that, on the alleged facts, the jailers acted maliciously and sadistically in violation of the Fourteenth Amendment.[53]

[143] *Nasseri v City of Athens* involved an arrestee who was pepper sprayed while in a jail booking room, then placed in the back seat of a patrol car for an hour.[54] He claimed he was never allowed to decontaminate, that he repeatedly complained of breathing problems, and that multiple requests for medical attention were ignored. The Court of Appeals, Eleventh Circuit, found that the arrestee had adequately established that an officer was aware of and ignored his serious need for medical attention, giving rise to a claim for violation of the Fourteenth Amendment.

Decontamination

[144] *Danley v Allen* involved an inmate who refused to obey orders and was pepper sprayed.[55] He alleged he was then confined in a small cell and not permitted to wash off the spray. The Court of Appeals, Eleventh Circuit, dismissed claims that the immediate application of spray was excessive, but held that the inmate's claim he was confined without being decontaminated was sufficient to allow a claim for excessive use of force to proceed.

[145] In *Christie v Scott*, Mr Christie had been arrested for public intoxication.[56] He told corrections officers of his serious health problems (including asthma and diabetes). The day after he was released, he was arrested again. Upon being detained he was belligerent but not physically violent. He was pepper sprayed more than 12 times in approximately 36 hours, including while restrained naked in a chair for over five hours. He was not decontaminated after spraying and was at times while

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52 At 1307.
53 At 1309.
54 *Nasseri v City of Athens* 2010 US App Lexis 7297 (Unpub. 11th Cir.).
55 *Danley v Allen* 2008 U.S. App. Lexis 17837 (11th Cir.).
56 *Christie v Scott* 923 F.Supp.2d 1308 (2013).

restrained forced to wear a spit hood over his nose and mouth. He died two days later. The coroner identified the cause of death as pepper spray poisoning.

[146] The District Court noted that the relevant (Fourteenth Amendment) inquiry was "whether force was applied in a good-faith effort to maintain or restore discipline".[57] In declining summary judgment, the Court decided there was evidence on which a jury could conclude the corrections officers "were not attempting to maintain or restore discipline but rather were simply attempting to harm Christie."[58]

[147] *Santiago v Blair* involved a prisoner who failed to cooperate with corrections officers trying to take him to segregation.[59] The officers used pepper spray, threw him to the floor, applied mechanical restraints, and allegedly dislocated his wrist. The prisoner claimed excessive force (saying he was no longer resisting by the time of these events) and that he was forced to wait 35 minutes for a decontamination shower. The Court of Appeals, Eighth Circuit, held the officers were protected by qualified immunity for the excessive force claim, but not for the claim that they acted with deliberate indifference by delaying allowing the prisoner to wash off the pepper spray.

Cross Contamination

[148] *Redmond v Crowther*[60] examined a situation where tear gas deployed in a prison yard to secure compliance by an aggressive prisoner had been drawn in by an intake valve and spread to compliant prisoners throughout the rest of the prison. Prisoners in two sections were evacuated, but prisoners in two other sections were not. The Court of Appeals, Tenth Circuit, upheld summary judgment for the defendant corrections officers on the basis that the exposure to tear gas was an accident and therefore qualified by qualified immunity. The Court did, however, note that the corrections officers conduct was "textbook negligence".

[149] *Clement v Gomez*[61] also involve cross-contamination. Pepper spray had been used to quell a fight between two prisoners. Vapours then drifted into the cells of other

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57 *Wilkins v Gaddy* 130 S.Ct. 1175 (2010) at 1178.
58 *Christie v Scott*, above n 24, at 1328.
59 *Santiago v Blair* 2012 U.S. App. Lexis 26854 (8th Cir.).
60 *Redmond v Crowther* 882 F.3d 927 (10th Cir. 2018).
61 *Clement v Gomez* 2002 U.S. App. Lexis 15659 (9th Cir.).

prisoners, who claimed they were not given showers or medical attention for four hours. The Court of Appeals, Ninth Circuit, held that the corrections officers were not entitled to qualified immunity against claims they were deliberately indifferent to the medical needs of other affected prisoners in the cell block.

Cell Buster

[150] *Staples v Gerry* is one of two cases specifically involving Cell Buster.[62] Mr Staples was to be moved from one prison cell to another. He alleged the move was retaliation for noncompliance with the prison's short facial hair policy.[63] Corrections officers warned he would be pepper sprayed if he did not comply. When he refused to comply, Cell Buster was deployed. The Court of Appeals, First Circuit, held that corrections officers had a legitimate reason to use pepper spray (noncompliance when moving a prisoner), had attempted to verbally secure compliance, had filmed the encounter, had warned Mr Staples pepper spray would be used, and disengaged to consider other options when the spray did not secure compliance. The Court also found that deploying a mist spray for nine seconds (after which Mr Staples was offered a shower and medical attention) was not, in itself, wanton.

[151] *Chatman v Roy* is the other.[64] After his request to use the phone was refused, Mr Chatman and another prisoner lit fires in and around their cells. When Mr Chatman peered out of his cell's tray slot, a correctional officer sprayed his face with a fire extinguisher and, when the fire in front of Mr Chatman's cell later began moving back, sprayed the extinguisher into his cell for 10 seconds. Another correctional officer then told Mr Chatman to come to the door so he could be handcuffed. When Mr Chatman allegedly refused to comply, Cell Buster was deployed. The Court declined to grant summary judgment in relation to the Eighth Amendment claim in relation to the spraying of the fire extinguisher, which it held served no penological purpose.[65] In relation to the Cell Buster claim, the Court held that regardless of whose account was

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62 *Staples v Gerry* 923 F.3d 7 (1st Cir. 2019). Although the *Spain v Procunier* decision plainly involved something akin to Cell Buster and other of the cases noted here involved the use of pepper spray more generally in a confined space (a prisoner's cell).

63 Mr Staples was Taoist, which involved keeping his hair long.

64 *Chatman v Roy* 2019 WL 4621676 (2019).

65 *Chatman v Roy*, above n 22, at [1.b].

believed, the fires posed a significant threat to inmates and officers, making it necessary to use force to restore order. It observed that "chemical agents similar to Sabre Red [Cell Buster] are 'accepted non-lethal means of controlling unruly inmates'."[66] Nonetheless, the Court found there was a potential breach if pepper spray had been deployed after Mr Chatman had been subdued and removed from his cell as that could involve the gratuitous infliction of pain. Summary judgment was granted on the first aspect of the Cell Buster claim but denied on the second.

Canada

[152] In Canada, the relevant cases largely concern alleged "excessive force" breaches of s 12 of the Canadian Charter of Rights and Freedoms and s 25 of the Canadian Criminal Code. For both, the question is whether the person using pepper spray had a reasonable belief that it was necessary in the circumstances, had made reasonable efforts at de-escalation, and used it as a last resort before physical violence. I am aware of three cases.

[153] The first is *R v Marenchuk*, where an intoxicated man who had been detained threatened to commit suicide.[67] Police officers asked him to strip so they could put him in a stitched gown. The man kept his underwear on, lay on the ground, and was passively uncooperative. One of the officers, Mr Marenchuk, sprayed pepper spray under the closed door of the cell, incapacitating the man and allowing Police to remove the man's underwear. The issue for the Court was whether this use of pepper spray was reasonable or necessary. Cooper J in the Nunavut Court of Justice held that, given the suicide risk, Police could not allow the man to keep his underwear (which could be used as a noose) and that some force was required given the man's resistance. The Judge accepted Mr Marenchuk's evidence that he believed pepper spray was a less extreme option than physical force, and that Mr Marenchuk had a reasonable belief pepper spray was necessary in the circumstances.

[154] Secondly, there is *R v Ogden*.[68] Mr Ogden had been held in a corrections centre awaiting sentencing. An altercation erupted between Mr Ogden and three correctional

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66 At [2.a].
67 *R v Marenchuk* [2018] NUCJ 14.
68 *R v Ogden* [2018] ONCJ 84.

officers when Mr Ogden refused to withdraw his arms back through the meal tray slot while asking about an item that had been thrown out. One correctional officer tried to push his arms back, then sprayed him in the face with pepper spray. The issue for the Court was whether this breached Mr Ogden's rights under ss 7 (security of the person) and 12 (right not to be subjected to cruel/unusual treatment) of the Charter. Harpur J in the Ontario Court of Justice found no violation. There had been a risk that Mr Ogden could throw something through the hatch if it remained open, the correctional officers believed (honestly, but incorrectly) Mr Ogden was trying to grab them, there had been an attempt at verbal de-escalation, and pepper spray was used a last resort.

[155] Thirdly, *R v Grant*.[69] Mr Grant had refused to submit to a strip search upon his arrival at a detention centre. He was later woken by correctional officers with riot shields ordering him to strip and warning him that chemical weapons would be used if he did not comply. The correctional officers then deployed Cell Buster and pepper sprayed Mr Grant in the face. He was pinned to the ground, handcuffed, and strip-searched. André J in the Ontario Superior Court of Justice concluded that routine strip searches are permissible in a prison context under Canadian law, and that since Mr Grant had been given repeated warnings about the consequences of failing to comply, prison officers were justified in using force. In assessing whether the force was excessive, André J focused on allegations of punching and kicking. He appeared willing to tolerate the use of Cell Buster/application of pepper spray to Mr Grant's face. The Judge concluded Mr Grant's rights under ss 2 and 12 of the Canadian Charter had not been violated.

Australia

[156] There are two Australian cases that are incidentally concerned with official use of pepper spray. The Australian courts have accepted that—although pepper spray can in some situations be a tolerable limit on an individual's human rights—if used unnecessarily, excessively or indiscriminately, or on a particularly vulnerable individual, or if the circumstances mean its effects are difficult to alleviate—it can constitute cruel, inhuman or degrading treatment.

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69 *R v Grant* [2019] ONSC 3616.

[157] *Bare v Independent Broad-based Anti-corruption Commission* involved a man who complained he had been seriously assaulted and racially vilified by Police. He alleged an officer handcuffed him, forced him to the ground, pushed his head into the gutter and sprayed him in the face with pepper spray (causing injury to his teeth, scarring, and breathing difficulties). He said he was then taken to a nearby house, where officers held his head under water for a long period, before formally arresting him. He alleged this was a breach of his right under s 10(b) of the Charter of Human Rights and Responsibilities not to be subjected to torture or cruel, inhuman or degrading treatment. He asked the Independent Broad-based Anti-corruption Commission (IBAC) to investigate his claim, but the IBAC twice refused. He sought judicial review on the basis that IBAC had violated s 38(1) of the Charter.

[158] The Victorian Court of Appeal decided, among other things, that s 10(b) includes a procedural right to an effective investigation where a credible complaint of cruel, inhuman or degrading treatment is made and that by failing to consider this right in making their decision, the IBAC breached s 38(1). Implicitly, this suggests that the Court considered that if the claim was proven, the alleged conduct would amount to a breach of the substantive element of s 10(b): in other words, that if "officers physically [with pepper spray and physical beating] and verbally abused him, and denied him treatment from the injuries they had inflicted", that would constitute cruel, inhuman or degrading treatment.

[159] *Certain Children v Minister for Families and Children* (No 2) involved several children between 15 and 18 years old who were detained in prison.[70] They sought orders removing them to another unit on the basis that their current unit was not a lawful place of detention. There were a significant number of concerns raised, but one of them was that pepper spray was authorised for use in the unit, which the claimants said was inappropriate because the unit's small size and lack of ventilation meant any use would cause indiscriminate and disproportionate suffering.

[160] The Supreme Court of Victoria held that s 10(b) was not engaged in the circumstances, but that the authorisation of pepper spray did limit ss 17(2) and 22(1)

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[70] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251.

of the Charter of Human Rights and Responsibilities (a child's right to protection in their best interests and the right to humane treatment when deprived of liberty). Those limits were, however, found to be justifiably proportionate, because the policies surrounding the use of pepper spray provided significant protections (it could only be used by correctional officers who underwent specific training, and to ensure prison security or the safety of any detainee, among other things) and the alternative (physical confrontation) would likely place more substantial limitations on the relevant rights.[71]

[161] But the Court also held that in at least one instance those policies were not properly complied with: during an incident where pepper spray was used, no satisfactory evacuation route from the poorly ventilated unit was provided and it appeared no suitably trained youth justice medical professional was present. Prompt and full decontamination of affected detainees also did not appear to have occurred. The Court found that this was a foreseeable result of the cramped, unventilated and under-resourced nature of the facility. Accordingly, the Court concluded that the policies were not practical or realistic and the public authority had not given proper consideration to the human rights at stake in violation of s 38(1) of the Charter (which provides it is unlawful for a public authority to act in a manner incompatible with a human right, or when making a decision, to fail to give proper consideration to a relevant human right).

International cases

Oya Ataman v. Turkey

[162] As far as I am aware, the European Court was called upon to consider the use of pepper spray for the first time in 2006.[72] The context was not custodial, but rather concerned its use by authorities to disperse lawful protestors.[73] Under the heading "International regulations on the use of "tear gas", the Court recorded:

> 17. Under Article I § 5 of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 13 January 1993 ("the CWC"), each State Party

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71 At [485]-[486].

72 *Oya Ataman v. Turkey,* above n 4. The case concerned the use of "a kind of tear gas known as 'pepper spray' ".

73 Who, as it happens, were protesting about prisons.

> undertakes not to use riot control agents as a method of warfare. Tear gas or so-called "pepper spray" are not considered chemical weapons (the CWC contains an annex listing the names of prohibited chemical products). The use of such methods is authorised for the purpose of law enforcement, including domestic riot control (Article II § 9 (d)). Nor does the CWC state which State bodies may be involved in maintaining public order. This remains a matter for the sovereign power of the State concerned.

[163] Ms Ataman claimed the use of pepper spray on her and the other demonstrators was a breach of her right under Article 3 of the European Convention on Human Rights, which provides:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[164] The European Court dismissed this aspect of Ms Ataman's application because she had submitted no medical evidence showing she had suffered any ill-effects after being exposed to the spray.

Ali Güneş v. Turkey

[165] The European Court was called upon to consider the treatment of protestors by Turkish Police, who used tear gas to disperse a political demonstration (the protestors contended they were peaceful, while Turkish authorities said the protestors attacked Police with sticks).[74] After noting both what had been said about the effects of pepper spray in *Oya Ataman v Turkey* and the CPT's two reports (referred to at [17] and [18] above) the Court said:

> 41. The Court shares the CPT's concerns and concurs with the above-mentioned recommendations. It stresses, in particular, that there can be no justification for the use of such gases against an individual who has already been taken under the control of the law enforcement authorities, as was the case in the present application.
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> …
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> 43. Having regard to the effects the gases cause and the potential health risks they entail …, the Court considers that *the unwarranted spraying of the applicant's face in the circumstances described above must have subjected him to intense physical and mental suffering and was such as to arouse in him feelings of fear, anguish and inferiority capable of humiliating and debasing him* … . It thus concludes that by spraying the applicant in such circumstances

[74] *Ali Güneş v Turkey*, no. 9829/07, 10 April 2012.

the police officers subjected him to inhuman and degrading treatment within the meaning of Article 3 of the Convention.

(emphasis added)

Tali v Estonia

[166] In *Tali*, the European Court was called upon to consider the treatment of a prisoner serving a sentence of life imprisonment who, after refusing to comply with the orders of prison officers, was (amongst other things) pepper sprayed while still in his cell, then tied to a restraint bed for almost four hours.[75] He suffered several injuries in the course of these events.

[167] The Court said:[76]

> 55. As the Court has stated on many occasions, Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. It prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's conduct …
>
> 56. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. *The assessment of this minimum level of severity is relative*: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and health of the victim …
>
> 57. *Thus, treatment has been held by the Court to be "inhuman" because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering, and also "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them* … . In order for punishment or treatment to be "inhuman" or "degrading", *the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment* … .
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> 58. *The use of handcuffs or other instruments of restraint does not normally give rise to an issue under Article 3 of the Convention where the measure has been imposed in connection with lawful detention and does not entail the use of force, or public exposure, exceeding what is reasonably considered necessary. In this regard, it is important to consider, for instance, the danger of the person's absconding or causing injury or damage* … .

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75 *Tali v Estonia*, no. 66393/10, 13 February 2014.

76 Footnotes omitted.

> 59. *The Court is mindful of the potential for violence that exists in penal institutions and of the fact that disobedience by detainees may quickly cause a situation to degenerate* … The Court accepts that the use of force may be necessary on occasion to ensure prison security, and to maintain order or prevent crime in detention facilities … *Recourse to physical force which has not been made strictly necessary by the detainee's own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention* …
>
> …
>
> (emphasis added)

[168] Later, the Court said:

> 78. As regards the legitimacy of the use of pepper spray against the applicant, the Court refers to the concerns expressed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") in respect of the use of such agents in law enforcement. According to the CPT pepper spray is a potentially dangerous substance and should not be used in confined spaces; if exceptionally it needs to be used in open spaces, there should be clearly defined safeguards in place. Pepper spray should never be deployed against a prisoner who has already been brought under control …

[169] After referring again to the physiological effects of pepper spray, the Court observed:

> Having regard to these potentially serious effects of the use of pepper spray in a confined space on the one hand and the alternative equipment at the disposal of the prison guards, such as flak jackets, helmets and shields on the other, the Court finds that the circumstances did not justify the use of pepper spray.

[170] The Court found that when the unjustified use of pepper spray was viewed cumulatively with other factors (including in particular the extended use of restraints and the suffering caused): "the applicant was subjected to inhuman and degrading treatment in violation of Article 3 of the Convention".

DO THE CLAIMS FOR REVIEW SUCCEED?

[171] It is against the background set out above that I now turn to consider the specific claims made by the applicants in this case.

First cause of action

[172] Prior to the CAR09, pepper spray and its means of dispersal were separately classified as restricted weapons by virtue of the 1984 Order made under the Arms Act. The possession and use of either, without separate and specific authority was therefore unlawful. The main arguments under the first cause of action are that:[77]

(a) the CAR09, the CAR12, the CAR17 and the Arms Amendment Regulations 2009 (the AAR09) are ambiguous, uncertain and so void because they appear to authorise only the use of the spray rather than the dispersal mechanism (which therefore remains a restricted weapon); and

(b) the adoption in the AAR09 of the CAR09 definition of pepper spray:

(i) makes the AAR09 ultra vires the relevant regulation-making power in the Arms Act; and

(ii) renders the AAR09 repugnant, because they purport to permit that which is expressly not permitted by the Arms Act.

Discussion

[173] As noted earlier, all the relevant amendments to the CR05 (collectively, CARs) defined "pepper spray" as "an aerosol spray" that contains certain ingredients and is "designed for use as a disabling weapon".

[174] There can be no doubt that this definition differs from the relevant definitions in the 1984 Order made under the Arms Act; it makes no obvious distinction between the spray and the means of its dispersal. This is, at the least, unhelpful and confusing: if the object of the CARs was to authorise possession and use of weapons classified as restricted under the Arms Act, it might logically be expected that the descriptors used would be the same (or similar) as those used in the 1984 Order. The fact that the

[77] A third "unlawful delegation" argument is better dealt with under the third cause of action.

simultaneous amendment to the Arms Regulations also adopts the confusing and inconsistent terminology used in the CARs is even more surprising.

[175] Crown Counsel nonetheless submitted that the word "aerosol" in the CARs' definition can be interpreted as including the means of dispersal. Reference was made to an Oxford English Dictionary definition of that word:

> 1. A system of colloidal particles dispersed in the air or in a gas, as mist, fog, etc; and
>
> 2. A substance packed under pressure in a container with a spraying device, esp. attrib., as aerosol bomb, aerosol pack, aerosol spray, etc. Hence, a container of this kind.

[176] The words used in the regulatory definition is not simply "aerosol", but "aerosol spray that … contains a pepper-based irritant". On one reading, that suggests a focus on the substance itself. But on another, and as recognised in this dictionary definition, the words "aerosol spray" can refer to both the substance packed in a container with a spraying device, and the container itself.

[177] While I accept that the CARs' definition is seemingly ambiguous, I do not agree with the applicants that this ambiguity renders the CARs void for uncertainty. As Mr Jones for the Crown submitted, the "uncertainty" threshold is a high one; a regulation is to be treated as valid unless it is so unclear in its effect as to be incapable of certain application in any case.[78] And here, the intent of the relevant CARs is clear enough, when read in context and in light of their purpose. It would make no sense for the regulations to authorise the possession of a substance that cannot be used *without* being inside a container. Moreover, without such a container, how could the pepper spray be "carried" or "used" by an officer under reg 121, "issued" under reg 122 (or "carried" under reg 30A of the AAR)?

[178] Put simply, the regulations can be given an "ascertainable and reasonable meaning": pepper spray in aerosol form, together with the receptacle that contains it and from which it is discharged:

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[78] *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774.

(a) is a prescribed non-lethal weapon under the Corrections Act; and

(b) where it is owned by the Crown and possessed or carried by Corrections officers, is excepted from the Arms Act's proscription on its possession.

[179] The applicants also say that the adoption in the AAR09 of the definition of pepper spray from the CAR09 is legally problematic for the twin reasons I have attempted to articulate at [172](b) above.

[180] The first argument is that the AAR09 are ultra vires the relevant regulation-making power in the Arms Act which, at the relevant time, could only have been that contained in s 74(1)(s). Section 74(1)(s) authorised the promulgation of regulations:

> providing for such matters as are contemplated by or necessary for giving full effect to this Act and for its due administration.

[181] As I have already commented, the AAR09 do not sit particularly happily with the 1984 Order. But I do not consider they can be said to be ultra vires s 74(1)(s). Section 3(2)(b) of the Arms Act provides that nothing in the Act renders unlawful the carriage or possession of arms items, ammunition, or explosives:

> by any other person authorised pursuant to regulations made under this Act to carry or possess arms items, ammunition, or explosives belonging to the Crown.

[182] I agree with Mr Jones that regulations made authorising the use of pepper spray by Corrections are regulations that provide for matters contemplated by s 3(2)(b), namely rendering lawful the carriage by Corrections officers of "arms items" (pepper spray) " belonging to the Crown". They are therefore made for the purpose "providing for such matters as are contemplated" by the AA.

[183] For essentially the same reason, I also agree with the Crown that the AAR09 do not purport to permit something that is expressly not permitted by the AA. On the contrary, they permit something that is contemplated by the AA. This is not a "Henry VIII" clause case, and I say no more about that particular argument.

[184] The first cause of action is dismissed, for the reasons I have given.

Second cause of action

[185] The question raised by the second cause of action is whether the successive Ministers of Corrections (when they respectively approved the CAR09, the CAR0912 and the CAR17) could reasonably and lawfully have been satisfied under s 85(3) of the CA that the use of the MK-9 in direct mode or Cell Buster "is compatible with the humane treatment of prisoners". More specifically, the applicants say the Ministers could not have been so satisfied unless:[79]

(a) they knew that the dispersal mechanisms proposed to be used by Corrections was the MK-9 in direct mode and Cell Buster, not the handheld MK-3 device similar to that used by Police;

(b) they had first turned their minds to matters or conditions of a kind that might make the difference between humane and inhumane treatment; and

(c) matters or conditions of a kind that might make the difference between humane and inhumane treatment were or would be addressed (made the subject of restrictions and conditions) in the CARs themselves (rather than in Departmental guidelines).[80]

[186] The Crown's response is that:

(a) On each occasion the Minister stated that he or she was satisfied of the matters that he or she was required to be satisfied of under s 85(3). That statement should be accepted on its face unless there is a good reason to justify going behind it.

(b) On each occasion the Minister was provided with a briefing paper setting out the matters of which he or she had to be satisfied of under s 85(3).

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79 I have reframed the questions (which are interrelated) slightly.
80 This is what the applicants call "unlawful delegation".

(c) There were no "mandatory considerations", beyond the requirements of s 85(3) itself, *provided* the material considered by the Minister was sufficiently clear and informative to enable the Minister to be satisfied of those matters.

[187] It is, I think, the proviso to the third of these propositions that is one of the key issues here. The question concerns the adequacy of the information that was before the Ministers, in light of the statutory context and the nature of the decision they were required to make. The question can properly be viewed equally as one of process as it can of substance. While the question might be framed as: could the Ministers reasonably have been satisfied under s 85(3)(a) *without* considering the matters referred to by the applicants, it could equally be framed as: did the Ministers take into account all the considerations relevant to the s 85(3) inquiry.

[188] For that reason, it is probably not necessary to dive into troubled "intensity of review" waters.[81] I do nonetheless observe that the present case is undoubtedly one in which "heightened scrutiny" would be appropriate if it ever might be. It is centrally concerned with the Minister's approval of the use by Corrections officers of weapons designed deliberately to inflict pain and suffering on prisoners. The humane treatment of prisoners is an obligation that arises both as a matter of international and domestic law, including ss 9 and 23(5) of the NZBORA. As far as s 9 (at least) is concerned, there can be no reasonable justification for breaching that right. So this is not a case like *Ministry of Justice v Kim*, which was centrally concerned with matters of State (foreign relations with China) and where deference to the expertise of the Executive (the Minister of Justice, with input from the Minister of Foreign Affairs) might be seen as warranted.

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[81] I note that the Supreme Court has also expressly declined to enter those waters: *Ministry of Justice v Kim* [2021] NZSC 57, [2021] 1 NZLR 338 at [51]. And in the course of argument during the hearing of *Astrazeneca Ltd v Commerce Commission* (NZSC, transcript, 8 July 2009, SC 91/2008) Elias CJ (as she then was) voiced criticism of the concept of intensity of review, referring to the concept of a spectrum of unreasonableness as a "New Zealand perversion of recent years". Dr Dean Knight has suggested that the Court's reticence should be seen as "implicit disapproval" of the lower courts' partial adoption of the intensity of review approach: Dean Knight "Mapping the Rainbow of Review" (2010) NZ Law Rev 393 at 408.

What might make the difference between humane and inhumane treatment?

[189] As noted earlier, in 2009, the Minister advised the CBC of the Ministry of Justice's advice that the proposed regulations "could appear to raise issues of inconsistency with section 9 (right to be free from degrading treatment) and section 23(5) (right to be treated with humanity and dignity) of the NZBORA. Whether they did so would depend on the totality of the conditions surrounding their implementation". She advised the Committee that Corrections officials would continue to work with Ministry of Justice officials to ensure the regulatory proposals are established in a manner that is consistent with the NZBORA.

[190] The cases referred to earlier, the CPM and the expert evidence in this case, confirm that the difference between the use of pepper spray that is consistent with humane treatment and use that is not will, indeed, be dependent on a number of "conditions" surrounding such use.[82] In my view these are not limited to those specifically referred to by the applicants but rather include:

(a) whether the use is spontaneous or planned;

(b) the circumstances in which pepper spray is deployed (for example whether it is used in response to an active threat as opposed to passive resistance or where the prisoner is already under control);

(c) whether the prisoner has already been restrained;

(d) whether, prior to any non-spontaneous use, the prisoner is warned of the proposed deployment of pepper spray beforehand and given an opportunity to avoid it (by becoming compliant);

(e) the capsaicinoid strength of the spray used;

(f) the mode and strength of delivery (direct spray or fog);

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[82] For present purposes I am putting to one side the applicants' overarching contention (pursued in the third cause of action) that the deployment of Cell Buster on prisoners can never be humane.

(g) the number of bursts applied;

(h) the extent of coverage achieved;

(i) the location of the prisoner and so where the spray is deployed (closed cell, roof, observation lines, adequacy of ventilation and so on);

(j) cross-contamination risk;

(k) the duration of exposure;

(l) the prisoner's relevant underlying medical conditions, including mental health conditions;

(m) the availability of immediate and appropriate decontamination procedures;

(n) the availability of a registered medical practitioner to examine the prisoner;

(o) whether any restraints are applied to the prisoner after deployment, and the effect those have on the positioning of the prisoner; and

(p) proper recording and reporting requirements.

[191] So the first question is whether the Ministers were aware of such matters, and then, whether they took them appropriately into account.

What did the Ministers know?

[192] The Ministerial papers from 2012 and 2017 discussed earlier contain passing references to issues around the use of pepper spray on pregnant prisoners, the availability of relevant health information prior to deployment, decontamination, cross-contamination and ventilation and (in 2017) use on mentally ill prisoners. There was no reference to any of the other things just listed.

[193] That said, however, it is nonetheless to be assumed that the relevant legislation *was* known to, and understood by, the respective Ministers. So to the extent there were restrictions on the use of pepper spray contained in the Corrections Act itself, the Ministers were entitled to assume they would be complied with and so to take that into account when making their assessment under s 85(3)(a).

[194] More particularly, the outer limits of the use of any non-lethal weapon in a prison setting have always been contained in s 83(1). The Ministers can be taken to have known, therefore, that, once pepper spray had been authorised as such a weapon, it could only lawfully be used by Corrections officers in circumstances where the use of physical force was reasonably necessary; namely—

(a) in self-defence, in the defence of another person, or to protect the prisoner from injury; or

(b) in the case of an escape or attempted escape (including the recapture of any person who is fleeing after escape); or

(c) to prevent the prisoner from damaging any property; or

(d) in the case of active or passive resistance to a lawful order.

[195] Similarly, by dint of s 83(2), the Ministers also knew the use of pepper spray would only be lawful if the force applied was no more than that which was reasonably necessary in the circumstances. And by dint of s 83(3), they knew that as soon as practicable after any use of force (including pepper spray), the prisoner was required to be examined by a registered health professional. The general recording/reporting requirements contained in s 88 can also be taken to have been known.

[196] The Ministers can also be taken to have known about whatever further restrictions would flow from the CR05 and from the amendments to them, contained in whatever iteration of the CARs they happened to be promoting. Thus:

(a) In 2009, the Minister knew that (if the CAR09 were promulgated):

(i) pepper spray could not be carried by security officers, or by staff members outside a prison;

(ii) a staff member could only "carry" pepper spray issued at the direction of the manager;

(iii) pepper spray would only be "carried" by staff members with adequate training in its use;

(iv) the manager would only direct "issuing" of pepper spray in more limited circumstances than contemplated by s 83, namely where:

- there was a serious threat to prison security or to the safety of any person;
- the use of pepper spray would eliminate or reduce that threat; and
- any other means of dealing with the threat were likely to be ineffective;

(v) pepper spray could only be "drawn" with the manager's approval, unless impracticable;

(vi) pepper spray would be securely stored; and

(vii) pepper spray had to be used in a way that minimised pain or injury to the prisoner, so far as that is consistent with protecting prison security or the safety of any person.

(b) In 2012, the Minister knew that (if the CAR12 were promulgated):

(i) pepper spray could not be carried by security officers, or by staff members outside a prison;

(ii) a staff member could only "carry" pepper spray issued at the direction of the manager;

(iii) pepper spray would only be "carried" by staff members with adequate training in its use;

(iv) pepper spray would be securely stored;

(v) the manager would only direct the issuing of pepper spray in the circumstances contemplated by s 83(1), namely where he or she reasonably believed it was necessary to use force against a prisoner;

(vi) pepper spray could only be drawn or used by an officer if he or she had reasonable grounds for believing the use of physical force was necessary for the purposes of s 83(1) of the Corrections Act; and

(vii) pepper spray had to be used in a way that minimised pain or injury to the prisoner, so far as that was consistent with protecting prison security or the safety of any person.

(c) In 2017, the Minister knew that (if the CAR17 were promulgated):

(i) pepper spray could not be issued to or carried by security officers, or a staff member who was not an officer;

(ii) pepper spray could only be issued to officers with adequate training;

(iii) pepper spray could only be issued at the direction of the manager of, if that was impracticable, at the direction of an officer with adequate training in its use;

(iv) pepper spray issued to an officer would be kept secure and the manager would ensure secure storage at all other times;

(v) an officer issued with pepper spray could use it only if he or she had reasonable grounds for believing the use of physical force was necessary for the purposes of s 83(1) of the Corrections Act;

(vi) pepper spray had to be used in a way that minimises pain or injury to the prisoner, so far as that was consistent with protecting prison security or the safety of any person;

(vii) both the issue of pepper spray and its use was required to comply with any further conditions or restrictions imposed by the Chief Executive.

Discussion

[197] For the reasons just given, I consider that the Ministers could reasonably have taken the view that *some* of the matters listed at [189] above would be adequately addressed through assumed adherence to the statutory prerequisites relating to the use of force and the proposed regulatory requirements relating to the issue and use of pepper spray more specifically. Those prerequisites could, for example, reasonably be seen as operating (regardless of the deployment device) to prevent use on a prisoner who was already restrained, or to control the number of "bursts" of spray that could be applied from any particular device on any given occasion, provided the Corrections officers concerned had adequate training (and operational guidance) in the use and effects of pepper spray. The requirement for such training was, of course, provided for in regulations from the outset. Reporting of use-of-force incidents—albeit in less stringent form than the reporting of the use of pepper spray required by the CPM—was also required by the Corrections Act.

[198] But I am not persuaded that these high-level restrictions on the use of force/non-lethal weapons can be relied on as giving sufficient assurance as to humane use of pepper spray, particularly in the case of Cell Buster. There are four specific points that can usefully be made about that.

[199] First, my earlier review of the CPM suggests that the statutory requirements governing the non-lethal use of force were *not* in fact regarded by Corrections as sufficient to protect against inappropriate (and possibly inhumane) treatment arising from the use of Cell Buster. It can only be for that reason that the CPM does *not* permit its use in response to acts of passive resistance (which s 83(1) of the Corrections Act would otherwise potentially permit) and, instead, restricts use to "assaultive" incidents.[83]

[200] Secondly, by the time the CAR12 were promulgated:

(a) Cell Buster—the whole purpose of which was to discharge pepper spray into a closed cell—had already been used by Corrections and that use was proposed to continue;

(b) Both the CPT and the ECHR had expressed the view that discharging pepper spray into a confined space (such as a closed cell) was inhumane; and

(c) discharging pepper spray into a closed cell had—albeit in somewhat different circumstances—led to this Court reaching a similar conclusion in *Falwasser*.

[201] The evidence before the Court does not, however, suggest that in 2012 the Minister knew any of those things. Rather, the relevant ministerial papers (summarised earlier) give the impression that the pepper spray proposed for use in prisons was the same as that used by Police (small canister, worn on the belt and aimed at the face). For example, the 2012 Cabinet paper repeatedly refers to pepper spray being "drawn", which seems an inapt verb to describe the use of Cell Buster. And nothing in the papers suggest the Minister in 2012 even knew Cell Buster had been involved in the single instance of the use of pepper spray on a prisoner during the second stage of Corrections' trial in 2011.

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[83] In that regard I note that the CAR22 provide that pepper spray of the MK-9 or Cell Buster variety may not be issued unless the prison manager reasonably believes that (a) there is a serious threat to prison security or to the safety of any person; and (b) the use of pepper spray will reduce or eliminate the serious threat.

[202] Thirdly, and regardless of whether the deployment of Cell Buster might, in a particular moment, be regarded as a use of force that was justified and proportionate (in terms of the Corrections Act) some of the things listed at [189]—and which might well make the difference between humane and in humane use—are concerned with events either prior or subsequent to the use of force itself. While I would be inclined to accept that it might be *arguable* that a prohibition on the use of excessive force *could* be seen as controlling what happens either before or after an incident involving the use of force, it certainly does not do so unequivocally. The statutory restrictions on the use of force contained in s 83(1) are primarily concerned with defining the circumstances in which force is permitted. And even the s 83(2) qualification that only "reasonably necessary" force may be used does not clearly or obviously require:

(a) officers to seek medical advice before the deployment of Cell Buster as to the existence of any mental or physical health conditions (including pregnancy) that would make the use of pepper spray on the prisoner inhumane;

(b) restrictions on the use of Cell Buster in certain locations where:

(i) ventilation is poor and cross-contamination is a risk;

(ii) the prisoner is on a roof or in another area where, if pepper spray was used and caused the prisoner to fall, further injury is likely;

(iii) the prisoner cannot be continually observed;

(iv) the prisoner is in an area that cannot be accessed quickly;

(c) a warning to be given prior to deployment (in a planned C&R operation);

(d) a decontamination area to be set up before deployment, and for health staff to be on hand;

(e) prompt access to an appropriate decontamination process after deployment;[84] or

(f) a prohibition on any use of restraints after deployment that might risk a prisoner suffering from positional asphyxia.

[203] While these and other such matters *are* addressed in (at least) the 2018 iteration of the CPM, none is addressed in any of the CARs.

[204] I have noted already that passing reference was made by the Minister in her 2012 briefing paper to pre-use health inquiries and to decontamination (albeit without any specific reference to Cell Buster). So I am prepared to assume that she was generally aware of the possible importance of those things, at least from what was termed in the paper as a "disability perspective".[85] But that is far from a complete answer here. Even ignoring the fact that no reference is made in the papers to the other matters just listed, it merely leads to the second (and possibly more important) question posed by the second cause of action (and set out at [185] above): did it suffice for Ministers to leave such matters to be dealt with as a matter of Departmental policy and procedure, or were they required, as a matter of law, to be included as conditions on use in the regulations themselves?

[205] Sections 85(2) and 202(j) of the Corrections Act certainly *contemplate* that restrictions and conditions on use *might* be contained in regulations, but I accept that neither provision expressly states that they must be. There is, nonetheless, a good argument that such a requirement is implicit in relation to matters of the kind I am discussing, for the reasons that follow.

[206] For Corrections officers to be able to use a non-lethal weapon such as pepper spray in the circumstances set out in s 85(1) of the Corrections Act, the weapon must be "prescribed for use". "Prescribed" of course means prescribed in regulations made

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84 In a context where access to active and immediate decontamination may make the difference between humane and inhumane treatment, I do not consider that the s 83(3) requirement that a prisoner must as soon "as practicable after the application of that force, be examined by a registered health professional" suffices to give adequate assurance that a decontamination area will be set up in advance or that decontamination will occur.

85 That being the context in which they were addressed in the briefing paper.

under ss 200(1)(c)/202(j). So the starting point is that regulations in some form *must* be promulgated, in order for pepper spray to be authorised at all.

[207] Next—and at the risk of repetition—any such regulations can only be made with the Minister's s 85(3) approval, which can only be given if she is satisfied that the use of the relevant weapon would be compatible with the humane treatment of prisoners. That obligation is, undoubtedly, a deeply serious one. It undoubtedly engages and coincides with NZBORA rights and safeguards New Zealand's compliance with the Nelson Mandela Rules. It is an obligation that is, for those reasons, personal to the Minister.

[208] There is therefore a compelling logic to the proposition that regulations that authorise the use of a non-lethal weapon must *also* contain any conditions or restrictions on the use of that weapon, at least to the extent that:

(a) they are not obviously encompassed by the statutory restrictions on the use of force; and

(b) the existence of those conditions or restrictions could make a difference to whether or not the use of weapon will be humane (and so to the Ministers' s 85(3) assessment).

[209] It is my clear view that the matters I have listed at [202] are precisely of that kind.

[210] So even assuming that the Minsters knew that these matters would be dealt with in Corrections' internal procedures and guidelines (and I am not persuaded on the evidence that they did) it is difficult to see how this could satisfy them to the standard required by s 85(3). Knowledge that matters that are critical to the humane use of pepper spray are, or will be, dealt with through operational guidelines (or even knowledge that the CAR17 require that such procedures be complied with) could not suffice because those guidelines do not have the force of law. Moreover, they can, presumably, be changed at any time without the Minister's knowledge or consent.

[211] This argument is, I think, strengthened by a further point. Ever since the Court of Appeal's decision in *Drew v Attorney-General* it has been clear that (absent some express provision to the contrary) statutory provisions that authorise the promulgation of regulations do not empower regulations that are inconsistent with the NZBORA.[86] Regulations that are inconsistent with the NZBORA will be regarded as ultra vires the empowering statute. And here:

(a) regulations were promulgated under ss 200/202 (as s 85(1) required) authorising the use of pepper spray in prisons;

(b) the regulation-making powers (ss 200/202) must be assumed only to authorise regulations that are consistent with the rights confirmed by the NZBORA;

(c) under s 23(5) of the NZBORA all detainees have the right to be treated with humanity and with respect for the inherent dignity of the person;[87]

(d) the cases suggest that the use of pepper spray by Corrections officers is capable of breaching s 23(5), regardless of whether the use of force is authorised by the Corrections Act and is not, by and of itself, excessive;

(e) conditions going to the matters listed at [202] above might be determinative of whether s 23(5) has been breached in any given case;

(f) regulations that simply authorise the use of pepper spray without *also* addressing such matters—by specifying them as further restrictions and conditions on use—leave the question of compliance with s 23(5) at large (or, at best, to unenforceable guidelines); and

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86 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [68].

87 Section 23(5) is discussed in more detail under the third cause of action. There is a considerable degree of congruence between the s 85(3)(a) (humane treatment) threshold and the s 23(5) right.

(g) the regulations cannot be said to be consistent with s 23(5) and so are ultra vires the Corrections Act.

[212] I am further fortified in this view by one last point. The CRs seem already to follow what I consider to be the proper approach in relation to the use of mechanical restraints, which are also dealt with in pt 9 of those regulations.[88] As noted at [37] above, the Corrections Act provision dealing with mechanical restraints (s 87) begins in identical terms to s 85 and—just like s 85—requires the Minister to be satisfied that the regulations authorising such restraints are consistent with the humane treatment of prisoners.[89]

[213] Significantly (and as detailed earlier at [41]to [43]), the provisions of CR05 dealing with mechanical restraints are both quite specific about the different *types* of restraints authorised and also as to further conditions designed to ensure their humane use. There is no obvious reason why the same approach was not be taken in relation to key conditions on the use of pepper spray (especially Cell Buster) and there are some very good reasons why it should have been.

[214] As will be clear by now, I do not go so far as to suggest that all the matters listed in [189] above needed to be addressed in regulations. As noted, Ministers were entitled to take some assurance from the assumption that Corrections officers would comply with the existing statutory parameters relating to the use of force.[90] They were also entitled to expect the development of Departmental policies designed to guide officers in achieving compliance with those parameters.

[215] But I also consider that for Ministers to be reasonably satisfied the use of pepper spray was compatible with the humane treatment of prisoners, they needed:

(a) to know that Cell Buster was or would be in use in planned use of force incidents;

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88 As noted earlier, pt 9 is concerned with "Use of force, non-lethal weapons, and mechanical restraints".

89 Unlike s 85, s 87 itself contains a number of use conditions that appear to focus on that requirement.

90 Although that did not obviate the need for some inquiry as to whether those parameters should, themselves, have been narrowed, in the case of Cell Buster.

(b) to turn their minds to the views expressed by the CPT and the European Court and the potential for abuse of pepper spray when used in confined spaces raised by *Falwasser*;

(c) to ask whether the general (s 83(1) and (2)) restrictions on the use of force by Corrections officers needed further limitation, particularly in relation to Cell Buster;

(d) assurance (in the form of enforceable regulatory requirements) that there would be restrictions and conditions on use of the kind set out in [202] above.

[216] Leaving any or all of those matters to be dealt with as a matter of Departmental policy or operating procedures was not good enough. Ministers could not properly be satisfied that the use of pepper spray would be compatible with the humane treatment of prisoners without first knowing that matters on which the humanity of such treatment depended would be addressed as a matter of enforceable legal (regulatory) obligation.

[217] It follows that it was necessary to authorise Cell Buster (and its analogues) as a non-lethal weapon separately from other forms of pepper spray. A considerable number of the matters discussed *only* arise in planned use of force cases where Cell Buster is deployed. As just noted, I consider that Ministers needed to be specifically advised that Cell Buster was to be used in prisons in order to turn their minds to the human rights ramifications that were particular to it.

[218] I do not think it is necessary to reach a decisive view about whether these findings also extend to the authorisation of the MK-9 for use in direct mode. It was not really the focus of the hearing and it was not (as I understand it) what was experienced by the applicants. I simply observe that, especially to the extent it is deployed or is intended to be deployed in planned C&R incidents, many of the preconditions discussed above would be likely again to be at play, when considering whether it can be used in prisons humanely.

[219] It suffices for present purposes to conclude that to the extent the Ministers' respective approvals of the CAR09, CAR12 and CAR17 purported to authorise the use of Cell Buster in prisons, they did not lawfully do so. Without further information, and without further restrictions and conditions on use being contained in the regulations themselves, Ministers could not have been satisfied that the use of Cell Buster would be consistent with the humane treatment of prisoners. The use of Cell Buster pursuant to those regulations was also therefore unlawful.

Third cause of action

[220] The applicants also say the use of pepper spray in prisons discharged by either the MK-9 or the MK-9 in Cell Buster form cannot under any circumstances be reconciled with prisoners' rights under NZBORA s 9 (the right not to be tortured or subject to cruel or degrading treatment) or under s 23(5) (the right to be treated with humanity and respect for dignity). And because the Corrections Act does not empower the making of regulations that are contrary to those rights, they say regulations purporting to permit the use of those devices in prisons are not, and could never be, valid or lawful.

[221] There are three preliminary points.

[222] First, although this cause of action encompasses both the MK-9 and Cell Buster, there was little focus on the MK-9 "simpliciter" at the hearing. There is no evidential basis for concluding that the use of MK-9 is *more* likely to infringe the relevant rights than the MK-9 with a wand attachment. So, again it is convenient to focus on Cell Buster here.

[223] Secondly, the analysis below necessarily puts to one side my finding of invalidity under the second cause of action. That finding does not render the third cause of action moot because it does not entail or imply a finding that Cell Buster could *never* lawfully be authorised but rather that, by dint of some important omissions from the CARs, it has not been in this case. The third cause of action therefore remains of some potential moment for the future.

[224] And thirdly, it is important to emphasise that the *possibility* that Cell Buster *could* be used unlawfully and in breach of s 9 or s 23(5) does not suffice to establish this cause of action. Indeed, I necessarily proceed on the assumption that—just as the use by Corrections officers of batons and mechanical restraints also might constitute a breach—it could. That is not only self-evident but is borne out in my earlier review of the decided cases and, of course, from Judge McNaughton's findings in the District Court about what happened in Ms Bassett's case.

[225] Rather, I agree with the Crown that the burden here falls on the applicants to satisfy the Court that the use of Cell Buster could *never* (or perhaps, could only rarely) be consistent with s 9 or s 23(5), even when used in the limited way contemplated by the Corrections Act and any valid regulations.[91] I will return to that point shortly.

The content of the ss 9 and 23(5) rights

[226] The Supreme Court's decision in *Taunoa v Attorney-General* remains the leading authority on the application and ambit of ss 9 and 23(5).[92] The Court there held that ss 9 and 23(5) establish a hierarchy of proscribed conduct. Thus:

(a) s 9 is "reserved for truly egregious cases",[93] involving official conduct "which is to be utterly condemned as outrageous and unacceptable in any circumstances"; and[94]

(b) by contrast, s 23(5) is breached by State conduct that is less reprehensible, but still unacceptable.[95]

[227] Conduct breaching s 9 will usually involve an intention to harm or conscious and reckless indifference to the causing of harm, as well as significant physical or mental suffering. Thus:

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91 *R (Bibi) v Secretary of State for the Home Department (Liberty intervening)* [2015] UKSC 68, [2015] 1 WLR 5055 at [69]; *A v SSHD* [2021] UKSC 37 at [76]–[78].

92 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429. But see also the more recent discussion in *Fitzgerald v R*.

93 At [297] per Tipping J.

94 At [170] per Blanchard J.

95 At [170] per Blanchard J and [285] per Tipping J.

(a) "torture" involves deliberately inflicting severe physical or mental suffering for a proscribed purpose, such as obtaining information;[96]

(b) "cruel" treatment involves deliberately inflicting suffering or treatment that results in severe suffering or distress;[97]

(c) "degrading" treatment gravely humiliates and debases the person subjected to it;[98] and

(d) "disproportionately severe" treatment is conduct so severe that it shocks the national conscience or is so disproportionate as to cause shock and revulsion. It means conduct which is well beyond treatment that is manifestly excessive.[99]

[228] Conduct breaching s 9 will usually involve an intention to harm or conscious and reckless indifference to the causing of harm, as well as significant physical or mental suffering.

[229] The Court identified the following factors as potentially relevant to an assessment of an alleged breach of s 9:[100]

(a) the nature of the conduct being examined;

(b) the state of mind of the party responsible for the conduct; and

(c) the effect of the conduct on its victims.

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96 At [81] per Elias CJ and [171] per Blanchard J. The purposes that are specifically (but without limitation) proscribed in art 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment are: (a) obtaining information or a confession from the subject or a third person, (b) punishment for an act the subject or a third person has committed or is suspected of having committed, (c) intimidating or coercing the subject or a third person, or (d) for any reason based on discrimination of any kind.

97 At [171] per Blanchard J and [282]–[283] per Tipping J.

98 At [171] per Blanchard J.

99 At [172] per Blanchard J and [289] per Tipping J.

100 At [291], [294] and [295] per Tipping J, and [353] and [360] per McGrath J.

[230] As far as s 23(5) is concerned, the following points emerge:[101]

(a) s 23(5) responds to the special vulnerability of prisoners and others deprived of their liberty;[102]

(b) s 23(5) imposes a positive duty of humane treatment on the Crown;[103]

(c) s 23(5) is based on art 10(1) of the ICCPR,[104] and so the Nelson Mandela Rules—which are used by the Human Rights Committee as a tool for assessing compliance with art 10 of the ICCPR—will influence New Zealand decisions on compliance with it;[105]

(d) while the content of the s 23(5) right will be informed by an analysis of comparative jurisprudence, it will ultimately be determined by reference to New Zealand standards and values; a relevant touchstone would be conduct which, while not outrageous or reprehensible, is regarded as unacceptable in contemporary New Zealand society;[106] and

(e) s 23(5) captures "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".[107]

[231] The cases both here and overseas make it clear that a use of force that is unnecessary or excessive will be held to be inhumane and inconsistent with the dignity of a detainee. More specifically, this Court has (as mentioned earlier) found a breach of s 23(5) when Police officers intentionally inflicted injuries on, and inappropriately used pepper spray against a person in custody.[108]

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101 By the time *Taunoa* reached the Supreme Court, the Crown had conceded the so-called "Behaviour Management Regime" that had been implemented at Paremoremo prison breached s 23(5), so there is arguably less analysis of this aspect of the claim.

102 *Taunoa v Attorney-General*, above n 92, at [78] per Elias CJ and [177] per Blanchard J.

103 At [78] per Elias CJ, [177] per Blanchard J, and [294] per Tipping J.

104 At [28]–[31] and [78] per Elias CJ, and [162]–[163] per Blanchard J.

105 At [28]–[31] per Elias CJ and [180] per Blanchard J.

106 At [11] per Elias CJ, [179] and [213] per Blanchard J, and [279] and [292] per Tipping J.

107 At [177] per Blanchard J.

108 *Falwasser v Attorney-General*, above n 32.

Discussion

[232] I propose to begin my analysis by focusing on whether Cell Buster is incapable of use in a way that is consistent with s 23(5). Given the theoretical nature of the inquiry in this case, and given the hierarchy between s 23(5) and s 9, it follows that, if I find against the applicants on that point, there will be no need to consider s 9.[109]

[233] I record at the outset that I understand the driver behind the applicants' position here. The notion of intentionally and remotely inflicting pain on a prisoner—a vulnerable person by definition—while locked in his or her cell is instinctively unpalatable. Devoid of context, at least, I would even be prepared to accept that the idea could get close to being "unacceptable in contemporary New Zealand society".

[234] I also acknowledge that there is arguably a material and qualitative difference between the use of Cell Buster and the use of batons (the only other non-lethal weapon to have been authorised for use in prisons). Use of batons involves a direct kind of engagement between Corrections officers and a prisoner and (of course) some risk to the officers themselves. It is, perhaps, the ability to deploy Cell Buster in a more calculated and impersonal way—to inflict pain on a person who cannot escape, while observing their suffering from a safe distance—that has the potential to rob the process of its humanity, and the prisoner of their inherent dignity.

[235] But ultimately, it is impossible to speak in generalisations of this kind. All that reasonably can be said (or repeated) is that it is undoubtedly *possible* to use Cell Buster in a way and in circumstances that engage s 23(5) (or even s 9). Some of the decisions discussed earlier give a flavour of the kinds of cases in which it might do so.

[236] Conversely, however, it is not difficult to conceive of circumstances where the New Zealand public (or the majority of New Zealanders) would likely accept that the use of Cell Buster was not only warranted, but more humane than the alternatives that are already lawfully available. Using Cell Buster would surely not only be seen as an

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[109] If I find in favour of the applicants on s 23(5), however, I accept it would be necessary to go on to consider s 9 as well.

appropriate use of force, but likely a less harmful use of force, when used on a prisoner who:[110]

(a) is not suffering from any mental or physical disability;

(b) is in his cell, armed with (say) some form of knife;

(c) has already attacked another prisoner and is threatening to injure themselves or anyone who attempts to enter;[111]

(d) has been ordered to surrender and warned that Cell Buster will be deployed if they do not;

(e) continues to behave threateningly and declines to surrender; and

(f) is decontaminated immediately after deployment.

[237] The only potential support for the absolutist proposition (that the use of Cell Buster in prison can never be consistent with s 23(5)) is the statement by the CPT about the use of pepper spray in confined spaces, and its subsequent repetition in the dicta from the European Court in *Tali*.[112]

[238] *Tali* itself, however, was a case where it was the use of pepper spray in a confined space *combined* with other seriously aggravating events that were found to breach the cognate right (art 3 of the European Convention). I note as well that in *Taunoa*, after reviewing a number of decisions of European Court where breaches of art 3 had been found (again, often as a result of a combination of factors), Blanchard J said:

> [161] That a breach of art 3 was found in these circumstances can perhaps be seen to reflect an evolution in the ECHR jurisprudence towards a more

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110 For present purposes it is not necessary to be troubled by the more difficult cases at the margins.

111 As the Nelson Mandela Rules confirm, prison authorities owe an overarching obligation not just to ensure the safety and security of prisoners, but also to ensure the safety of staff, service providers and visitors at all times.

112 *Tali v Estonia*, above n 75.

> demanding view of the requirements of the article, particularly in the context of the treatment of prisoners. …[113]

[239] There is, however, a more fundamental and decisive point. As the Chief Justice observed, it is the provisions of the Corrections Act itself that:[114]

> … are perhaps the best guide to what is unacceptable in contemporary New Zealand. As such, they are highly significant in assessing whether the treatment of the prisoners conforms with ss 9 and 23(5) of the New Zealand Bill of Rights Act.

[240] So whatever views might be held by individuals about prisons and penal policy more generally, Parliament (speaking through the Corrections Act) has declared that force may be used by Corrections officers in certain circumstances and that such force may include the use of non-lethal weapons, where those weapons have been lawfully prescribed. As will by now be very clear, these circumstances are limited to those described in s 83, which require that the force may only be used in certain circumstances and must be proportionate. Importantly, s 83 is consistent with (and indeed reflects) the relevant Nelson Mandela Rules.

[241] And ultimately, the s 85(3) requirement—that non-lethal weapons may only be prescribed for use in prisons where the Minister is satisfied that such use is consistent with the humane treatment of prisoners—leaves no real room for s 23(5) to operate in any kind of general way here. Ministerial approval does not and cannot guarantee that pepper spray will, in every instance, be used in a way that is consistent with s 23(5), because it cannot preclude the possibility that individual corrections officers might sometimes act beyond their authority. But approval does—provided it is given lawfully—provide a very significant level of assurance that pepper spray *can* be used in prisons consistently with s 23(5). As the present case exemplifies, that assurance is heightened still further by the fact that the lawfulness of any approval remains subject to oversight by the Courts.

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113 As Blanchard J noted, the ECHR contains no equivalent of s 23(5) of the NZBORA; it imposes no separate obligation upon states and their officials to ensure prisoners are treated with humanity. Instead, the European Court has captured the flavour of s 23(5) within its art 3 jurisprudence in emphasising that, in order to prevent the inhuman treatment of persons deprived of liberty.

114 The statute in issue in *Taunoa* was the predecessor to the Corrections Act, the Penal Institutions Act 1954.

[242] In my view this is really a complete answer to the generalised s 23(5) claim here and it must fail accordingly. There is, accordingly, no need separately to consider the (generalised) s 9 aspect of the third cause of action.

Result

[243] For the reasons I have given, the first and third cause of action are dismissed.

[244] But the second cause of action succeeds. I make declarations as follows:

(a) Prior to approving the CAR09, CAR12 and CAR17, Ministers could not properly have been satisfied under s 85(3) that the use of Cell Buster in prisons would be consistent with the humane treatment of prisoners because:

(i) they did not have sufficient information to make that assessment; and

(ii) there were matters (such as those set out in [202] in particular) likely to be determinative of humane use that were not adequately covered by the general restrictions on the use of force contained in the Corrections Act and which could not properly be left to unenforceable departmental guidelines;

(iii) those matters should have been included as conditions and restrictions on use in the regulations themselves.

(b) To the extent the CAR09, CAR12 and CAR17 purported to authorise the use of Cell Buster in prisons, they did not lawfully do so.

(c) The use of Cell Buster in prisons while those regulations were in force was also therefore unlawful.

Costs

[245] The applicants have succeeded and, subject to the applicants' legal aid position, 2B costs should follow that event. I would certify for second counsel.

Post-script: what about the CAR22?

[246] I noted earlier in this judgment that the CAR22 are not before me in these proceedings and so I expressly make no formal findings about their lawfulness (or otherwise). They are similar to the CAR17 but do differentiate between the three types of deployment mechanism, including Cell Buster and the MK-9 in direct mode (or their analogues), and do restrict their use.

[247] I was also provided with a copy of the briefing paper that was provided to the current Minister (the Hon Kelvin Davis) before their promulgation, seeking his approval under s 85(3) and agreement to recommend the amendments to Cabinet. I put on record that this paper was a model of its kind; it clearly addressed considerations of the kind relevant to the approval decision and the relevant NZBORA issues.

[248] That said, however, there are other matters raised by my conclusions in relation to the second cause of action that remain relevant to the validity of the Minister's approval and of the new regulations themselves. I simply flag these for further consideration.

Rebecca Ellis J

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