

5 May 2020

Jeremy Lightfoot
Chief Executive
Department of Corrections | Ara Poutama Aotearoa
Wellington

By email c/o: robyn.fisher@corrections.govt.nz

Dear Jeremy

Re: Covid-19 and lawyers' access to clients who are in prison

Introduction

Thank you for your recent correspondence on this issue. Further to our letter of 18 March 2020, I write on behalf of members of the legal profession who have raised ongoing concerns surrounding lawyer-prisoner access during the Level 3 lockdown. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) has identified acute concerns with Christchurch Men's Prison, Mount Eden Corrections Facility and Hawke's Bay Regional Prison.

The Law Society and other membership organisations¹ have been closely monitoring problems arising for lawyers and their clients, particularly in relation to communicating with clients in custody.

The Law Society first wrote to you on 18 March suggesting greater consideration of email as a means of contacting clients in custody during the Level 4 lockdown. The Law Society was grateful to receive your letters of 27 March and 3 April, along with various other updates from the Department of Corrections (**Corrections**),² providing the profession with confirmation that email, audio-visual link (**AVL**) and phone contact were available means for contacting clients in custody.

We acknowledge Corrections has been doing everything you can to keep everyone in your care safe and well. This has been a challenging time and we appreciate that Corrections staff are working very hard to address the concerns raised by the profession to date. We are also pleased to hear there are still no reported cases of COVID-19 within the prison system.

In summary, the specific concerns set out later in this letter highlight the difficulty in being able to take proper instructions and give legal advice. While these concerns are relevant to the current Level 3, if they are not addressed urgently, difficulties will continue during Level 2 (and beyond) with some cases not being able to progress in a timely manner.

Corrections advice – Jabber

As at 20 April 2020, Corrections advised the Law Society that Jabber would be available as an alternative method for lawyers to contact clients in custody, in addition to AVL booths (which are limited). Corrections also noted at the time that some prison sites are in a better position than others

¹ Including the Criminal Bar Association, New Zealand Bar Association and Auckland District Law Society Inc.

² Updates from Corrections were provided to the profession on 30 March, 3 April, 7 April, 15 April and 20 April 2020.

to support an AVL connection, and that there may be restrictions on the availability of an AVL connection (for example availability, staffing, other bookings, security requirements etc) in which case phone bookings would be offered as an alternative.

Right to instruct counsel

Section 23(1)(b) of the New Zealand Bill of Rights Act 1990 enshrines the right to consult or instruct a lawyer without delay. Defendants need to be able to understand the decisions they are making in order to be able to participate in their court proceeding in a meaningful way, particularly where there is significant disclosure and serious charges. While telephone calls may be a suitable alternative for short procedural conversations, they are not appropriate for discussions on matters of substance (for example whether to plead guilty to a serious charge and bail oppositions). For substantive discussions, face-to-face communication (via AVL) is necessary.

However, the advice received from Corrections on a national level regarding the availability of AVL has at times conflicted with advice given to practitioners at a local level. In some areas due to the lack of availability of AVL, defendants are being deprived of their right to instruct counsel. Practitioners have also raised practical concerns about advancing cases for clients remanded in custody. Without meaningful instructions, further delays are likely, with the added risk that delay goes beyond what any custodial sentence would be, if convicted.

Christchurch Men's Prison

Although it appears there are two suitable AVL booths at Christchurch Men's Prison (**CMP**), we understand there is currently no provision for AVL contact between counsel and their clients at CMP. Practitioners in Christchurch have advised that counsel are only able to contact their clients by telephone. Practitioners have said that on occasions it can be several days before telephone calls are able to be facilitated. Further issues around poor telephone connections, lack of confidentiality and interruptions by other prisoners and/or Corrections officers have been a cause for concern.

The Law Society understands that counsel in Christchurch received correspondence from Corrections on 23 April, stating that "as correctly noted, it was advised that there is the Jabber technology available for legal AVL calls. Unfortunately, currently at CMP we are unable to facilitate these calls."

Corrections indicated this is due to AVL systems in prison being positioned in areas that are not considered safe/secure or private and have suggested at this time they can only facilitate phone contact unless there are alternative arrangements through the AVL instruction booths.

This is at odds with previous advice from Corrections. We acknowledge that Corrections have indicated they are looking into this issue, including broader availability of Jabber. However, counsel are currently unable to attend to clients properly, which is causing delay.

Mount Eden Corrections Facility

Aligned to issues occurring at CMP, practitioners in Auckland have raised similar difficulties with contacting clients in Mount Eden Corrections Facility (**MECF**). Practitioners have noted that MECF have also stated they do not have the technical facilities to support AVL (and/or Jabber).

The Auckland District Law Society Inc wrote to Corrections on 6 April 2020 raising issues with accessing clients at MECF. We invite you to address those issues to ensure that appropriate systems are in place at MECF to facilitate lawyers' access to clients in custody.

Hawke's Bay Regional Prison

We understand that Hawke's Bay Regional Prison is not allowing new prisoners into the AVL suite, until they have been cleared after 14 days in isolation. This has the potential to delay the prisoner's case from moving forward, including not being able to advance bail applications. One possible solution to address this issue could be that a laptop is provided to defendants in isolation to appear via a Virtual Meeting Room (as some lawyers currently are). Alternatively, there could be a dedicated AVL booth for those that are required to be in isolation (separate from those prisoners not in isolation). We would be grateful if you could please advise if this is a national policy decision and if so, the basis for this decision and whether the proposed solutions are feasible.

Conclusion

Lawyers are currently experiencing difficulties with remote access to their clients in custody in Christchurch Men's Prison, Mount Eden Corrections Facility and Hawke's Bay Regional Prison. It is essential that the right to instruct counsel during all levels of the COVID-19 lockdown is properly facilitated and without delay. The inability to access defendants in custody will have a flow on effect to the courts and judiciary in terms of being able to hear substantive hearings such as bail and Judge alone trials.

I would welcome the opportunity to discuss this further with you. I can be contacted in the first instance via the Law Society's Principal Adviser, Bronwyn Jones (bronwyn.jones@lawsociety.org.nz) or Law Reform Adviser Amanda Frank (amanda.frank@lawsociety.org.nz).

I look forward to hearing from you.

Yours sincerely



Tiana Epati
New Zealand Law Society President