CORRECTIVE SERVICES AMENDMENT BILL 1998

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

The main objects of this Bill are:-

(a) To amend the CS Act to clarify and strengthen the powers of custodial correctional officers to:

(1) discharge firearms against prisoners and other persons in or near a prison;

(2) search persons entering prisons and also search anything in their possession; and

(3) order prisoners at random to provide urine samples.

(b) To provide that regulations may be made to prohibit articles in a prisoner's possession.

(c) To amend the *Corrective Services Act* 1988 (CS Act) to remove prisoner access to Statements of Reason and Statutory Orders of Review under the *Judicial Review Act* 1991 (JR Act) in respect of any decision relating to a prisoner's control or management, remission of sentence, extended leave, home detention or parole.

(d) To introduce a new part in the CS Act requiring officers to give prisoners clear reasons for decisions and establishing an independent Review Commissioner to review the merits and process regarding certain decisions affecting a prisoner's control, management or remission of sentence.

Reasons for the objectives and how they will be achieved

(a) Deficiencies in legislation governing prison security were identified and highlighted following recent serious escapes. There is considerable uncertainty as to the extent of force that can be employed by armed correctional officers, in particular where prisoners are escaping from custody, possibly with assistance from other persons. Legislation also fails to define the manner in which persons entering prisons may be searched and to state whether such persons can be touched in the process of being searched. While there is a power for a correctional officer to arrest a person entering a prison who is believed to be involved in the commission of certain offences, the CS Act is silent on the officer's power to detain such a person pending police intervention. Finally, the CS Act permits samples of a prisoner's breath, urine, hair or blood to be obtained only if it is believed that the sample will provide evidence of a prisoner offence. This prevents random urine testing to determine the presence of drugs, a practice which is commonplace in prisons in other Australian jurisdictions.

The Bill clarifies when firearms can be discharged against prisoners and other persons by custodial correctional officers. It sets down the types of searches that correctional officers may order in respect of persons entering prisons and establishes that correctional officers may not strip search such persons. Prisoners, however, must be strip searched in defined circumstances set down in the Bill. Where a person is reasonably suspected of committing an offence in a prison, a correctional officers can arrest and detain a person for up to three hours before placing the person under the control of the police. The Bill establishes that urine samples of a prisoner can be obtained at random.

(b) Articles that may be in a prisoner's possession are listed in a Commission's Rule. Prisoners have claimed that they do not always have access to Commission's Rules. To avoid any possibility that prisoners are unaware which items of property are prohibited in a prison, it is proposed to list the items in a regulation rather than a rule as regulations are more readily

available in prisons.

(c) The decision to remove prisoner entitlement to seek Statements of Reason and Statutory Orders of Review under the JR Act was made in response to complaints from prison management and Community Corrections Boards that the requirement to give detailed written reasons to prisoners for a range of decisions proves time consuming and difficult. Further, prisoners who initiate proceedings for a Statutory Order of Review in the Supreme Court find that the Court cannot grant relief on the merits of the decision which is, in most cases, the source of the grievance. The resulting decision may be identical to the one reviewed despite much court time and public moneys expended in the process. One object of this Bill is to introduce a mechanism for reviewing the substance of prisoner grievances. Prisoners will continue to have access to the courts to seek the remedies available under Part 5 of the JR Act.

(d) It is expressly desired that the quality of decision making and the accountability of the prison system not suffer as a result of certain relief under the JR Act being removed. A new part in the CS Act sets out the requirement that prisoners be given clear, concise and readily understandable explanations for decisions affecting them. Where a decision is made under corrections legislation, an explanation can also be sought in writing.

In addition, an independent Review Commissioner, accountable to the Minister, will review the merits and process of specified prisoner decisions after a mandatory internal review process is followed. The Review Commissioner will be empowered to set aside, affirm or vary decisions or return them to the original decider with directions.

Administrative cost to Government of implementation

There are no anticipated costs in respect of the security measures proposed in the Bill. Officers presently receive rigorous training in the use of weapons. The quality of training should improve with greater legislative clarity regarding the discharge of firearms. Searching of persons entering prisons can be conducted with greater efficiency if the ambit of any search

is defined. Prisoners voluntarily submit to random urine tests as a matter of practice. This measure will not attract costs. There will be administrative costs associated with the establishment of a Review Commissioner. These will be offset by a reduction in the costs associated with providing detailed statements of reason under the JR Act and defending Court applications for a statutory order of review. Community corrections boards , as well as prison administrators, have had to allocate resources for these specific functions. These can be diverted to essential core activities. The Review Commissioner is not intended to be an expensive rights creating form of relief. The essence of the initiative is speedy, informal resolution of prisoner complaints which otherwise can generate a virtual "paper war". Cost efficiencies should be realised as prisoners will be less inclined to pursue court action promising only procedural relief where there is the credible alternative of having decisions reviewed and, where appropriate, changed substantially.

Fundamental legislative principles

1. Section 4(3) of the *Legislative Standards Act* 1992 ("LSA") sets down criteria for determining whether a Bill has sufficient regard to the rights and liberties of individuals. The first criterion asks whether legislation, making rights and liberties depend on administrative power, is sufficiently defined and subject to appropriate review.

   Amendments to section 44 of the CS Act which deal with control of prisoners will permit a custodial correctional officer or police officer to discharge a firearm against a prisoner escaping from secure custody or against a person assisting the prisoner to escape from secure custody. Such extreme force can be used only if the officer, having given a verbal warning of the intent to shoot, believes on reasonable grounds that the discharge is the only practicable way to stop the escape and provided that the action places no other person at unnecessary risk of death or grievous bodily harm. The conferring of administrative power to harm and possibly kill another person is extraordinary and highly sensitive, particularly since it may be used against convicted and unconvicted prisoners. However, the safety of the public must be the paramount consideration where prisoners are considered by a

court of law to be sufficiently dangerous to be incarcerated. Prisoners in a remand prison pose different levels of dangerousness. However, officers cannot readily gauge risk factors in the heat of an escape where it may be impossible to identify a prisoner. They cannot be required to make reliable split second assessments of the relative risk individuals pose if the escape succeeds. The legislation requires an officer to believe on reasonable grounds that there is no practicable alternative means to prevent an escape other than through discharge of a firearm against the prisoner or person assisting the prisoner. The officer may not shoot if to do so would place another person at unnecessary risk of death or grievous bodily harm. Further, an officer may not shoot until a verbal warning of this intention is given, provided the warning would not increase the likelihood of serious harm to another person. Only prisoners who escape from secure custody may be shot. "Secure Custody" will not extend to prison farms or WORC camps, nor will prisoners of low or open security classification under escort be deemed to be in secure custody.

These qualifications on the exercise of extreme force are defined with sufficient clarity to allow officers, prisoners and other persons to understand and appreciate their ramifications.

2. Section 4(3)(g) of the LSA asks, in part, whether the legislation adversely affects rights and liberties.

   In two respects it may be perceived that prisoners' rights and liberties are adversely affected by the legislative changes. Firstly, prisoners cannot presently be required to provide a sample of their breath, urine, hair, saliva or blood unless the general manager of a prison believes on reasonable grounds that the sample may afford evidence of the commission of an offence or breach of discipline by the prisoner.

   Prisoners will now be required to comply with an order to provide a sample of their breath or urine, at random, regardless of suspicion. Within the prison system there is a continuing need to monitor the level of drug use to minimise the incidence of drug related deaths or injury. All other Australian jurisdictions have legislated to permit random urine testing of prisoners. Prisoners

in Queensland customarily supply urine samples for drugs testing programs on a voluntary basis. They are not likely to perceive legislation allowing random testing as unduly intrusive. However, if punishment by disciplinary action is the outcome of a positive drugs test, some prisoners may react adversely. In spite of this, prison security demands that punitive action be an available option where prisoners ingest drugs.

Secondly, prisoners deprived of access to statements of reason and statutory orders of review under the JR Act could argue that the range of remedies available to prisoners as a group has significantly diminished and that prisoners suffer a collective form of discrimination in the result.

While prisoners will be denied formal statements of reasons, they will have enhanced rights to seek oral reasons for all decisions, not just those under an enactment. If aggrieved by a decision made under corrections legislation, prisoners may further seek written reasons. The requirement at law that prisoners be given clear and readily understandable reasons, whether oral or written, is an attempt to ensure that more satisfactory explanations are communicated to prisoners. Prisoners will continue to have access to the Supreme Court for judicial review of any decision under Part 5 of the JR Act. Further, a merits review mechanism, previously unknown to prisoners in Queensland, will be introduced as a more satisfactory means of resolving prisoner grievances.

3. Section 4(3)(b) of the LSA asks whether legislation is consistent with principles of natural justice.

New section 196G(3) allows the Review Commissioner, despite any other law, to prohibit or limit access by a prisoner to documents or information on which the decision on review is made if the Review Commissioner reasonably believes that giving the access would adversely affect -

(a) the security of the prison;

(b) the safety of any person; or

(c) the expeditious conduct of the review.

It is arguable that prisoners will be denied procedural fairness, there being no assurance that prisoners will be given the opportunity in all cases to know, examine and respond to adverse allegations against them made to the Review Commissioner. The success of the Review Commissioner's function pivots on a fair-minded appreciation of all the issues and speedy turnaround of grievances. To afford prisoners natural justice in all cases could jeopardise prison security and the safety of informants and would unnecessarily prolong a number of reviews. The Review Commissioner will be fully apprised of all facts and circumstances relevant to the grievance and will place such weight on adverse material as the Commissioner sees fit. In the interests of a speedy, safe and fair outcome, however, the Review Commissioner needs a broad discretion to refuse a prisoner access to information where this is deemed necessary.

Consultation

The content of this Bill was discussed with officers in the Department of Justice, including the office of the Parliamentary Commissioner, the Queensland Police Service and the Queensland Community Corrections Board. The Prisoners Legal Service, Catholic Prison Ministry, the Queensland Council for Civil Liberties, Victims of Crime, the International Commission of Jurists, Sisters Inside and the Queensland Aboriginal and Islander Legal Services Secretariat were among stakeholder groups consulted on all aspects of the Bill other than the proposal to introduce an external review mechanism for prisoner grievances. This initiative emerged as a response to broad concern that decisions concerning prisoners should be reviewed impartially, transparently and effectively.

NOTES ON PROVISIONS

PART 1 - PRELIMINARY

Clause 1 sets out the short title of the Act.

PART 2 - AMENDMENT OF THE *CORRECTIVE SERVICES ACT* 1988

Clause 2 provides that the Act commences on a day fixed by proclamation.

Clause 3 provides that the *Corrective Services Act* 1988 is amended by this Act.

Clause 4 inserts new definitions for "person entering a prison", "Review Commissioner" and "search" by reference to the sections in the Act in which these terms arise.

Clause 5 inserts new subsections (4) to (9) in section 44 which deals with control of prisoners and the use of force against prisoners.

New subsection 44(4) allows a custodial correctional officer or police officer to discharge a firearm harmlessly, where a prisoner is escaping or attempting to escape, as a warning to either the prisoner or to a person assisting him or her in the escape.

New subsection 44(5) allows a custodial correctional officer or police officer to discharge a firearm against:

- a prisoner escaping or attempting to escape from secure custody or a person assisting in that escape;
- a person other than a prisoner who threatens or uses force against any person in a prison including an officer, employee or prisoner which is likely to cause death or grievous bodily harm;
- a prisoner who threatens or uses force against any person likely to cause death or grievous bodily harm

if the officer believes on reasonable grounds that the discharge is the only practicable way to stop the escape or the force being used.

New subsection 44(6) authorises the discharge of the firearm in the

circumstances outlined in new subsection 44(5) even though this may cause death, grievous bodily harm or other injury.

New subsection 44(7) sets a precaution on the discharge of a firearm against persons mentioned in new subsection (5) namely, that the discharge not place another person at unnecessary risk of death or grievous bodily harm and the requirement that the officer intending to shoot issue a verbal warning of such intent.

New subsection 44(8) clarifies that the warning need not be given by the officer if he or she believes on reasonable grounds that the warning would increase the likelihood of death or grievous bodily harm against the officer or another person.

New subsection 44(9) defines "escaping from secure custody" to include continuing escape in the immediate proximity after the prisoner has departed from secure custody. The subsection defines "secure custody" as custody in a prison with a perimeter constructed as a barrier to prevent escape or, where a prisoner is being escorted, custody of a prisoner of maximum, high or medium security classification. The latter security classifications are defined as given to a prisoner under a regulation.

Clause 6 amends section 47 by inserting new subsections (2) and (3). Subsection (2) provides that a general manager must order a custodial correctional officer to search a prisoner if the general manager reasonably suspects that a person entering a prison has given the prisoner a prohibited article.

New subsection (3) requires that a search ordered under subsection (2) must involve the removal of clothing but may involve only such touching as is necessary to ensure the prisoner complies with the order.

New subsection 47(4) clarifies that the above circumstance for a mandatory search is distinct from other circumstances where the commission may prescribe by rule that prisoners must be searched.

New subsection 44(13) defines a person entering prison to be any person other than a prisoner or holder of judicial office including a visitor, a staff member or employee or officer of the commission. A prohibited article is defined by reference to section 93(1)(c) which, as amended, will provide that these articles to be prescribed in a regulation.

Clause 7 amends section 48 by inserting the term "doctor" (defined in

the *Acts Interpretation Act* 1954) in lieu of “legally qualified medical practitioner”. It omits subsection 48(4) and inserts a new subsection (4) which removes the necessity for the general manager to hold a reasonable belief that a sample of breath or urine will provide evidence of the commission of an offence or breach of discipline by the prisoner while in prison. The new subsection allows a general manager or the person in charge of a community corrections centre or place prescribed by rule to order a prisoner to provide a sample of the prisoner’s breath or urine for the purpose of a test to indicate whether the prisoner has ingested anything that the prisoner may not lawfully possess. New subsection (4A) retains the need for the general manager to reasonably believe that a sample of a prisoner’s blood, saliva or hair may afford evidence of an offence or disciplinary breach by a prisoner before the sample can be obtained.

Clause 8 omits reference to a rule in section 93(1)(c) as prohibited articles will be listed in a regulation.

Clause 9 omits section 107 and inserts a new section 107 which deals with action that may be taken by correctional officers who suspect on reasonable grounds that a person is involved in the commission of an offence that may threaten the security or management of a prison or prisoner. New subsection 107(2) provides that the correctional officer may use force that is reasonably necessary to arrest without warrant and detain such persons. The correctional officer must immediately report the circumstances of the arrest to a police officer and may detain the person arrested until the police officer takes control or for a period of no more than 3 hours. If, after the police officer has been contacted, the correctional officer no longer has reason to suspect the person detained is or was involved in the commission of an offence, the person must be immediately released.

Clause 10 omits sections 108 and 109 and inserts new sections 108 and 109.

New section 108 defines a person entering a prison as any person other than a prisoner or holder of judicial office including a visitor, a staff member, an officer or employee or a commission officer or employee. New section 108 defines search to cover 3 types of search namely, search with a hand-held scanning device, a pat down search of a person’s clothed body or search of anything in a person’s possession including a vehicle. A child may be searched by any or all of these 3 methods.

New section 109 establishes that persons are to be warned by a notice posted at the entry gate that they may be subject to a search order which the general manager may give for any purpose. A custodial correctional officer ordered by the general manager to conduct the search can in turn give any necessary order to the person being searched to facilitate the search.

Touching of any person in the course of a search can only be to the extent necessary and a pat down search must be conducted by a person of the same gender as the person searched. While things in a person's possession may be searched, a custodial correctional officer may not search legal documents brought into a prison by a prisoner's lawyer. A person who refuses to be searched can be removed from the prison by order of the general manager. Such force as is reasonably necessary may be used to effect the removal of the person from the prison.

New section 109A allows a custodial correctional officer to seize anything in the course of a search that the officer suspects on reasonable grounds provides evidence of the commission of an offence.

Clause 11 inserts a new subdivision 3 and new section 110A which empowers a general manager of a prison to order a person not to enter a prison or to leave a prison if the general manager believes on reasonable grounds that the order is necessary for the security or management of the prison. A custodial correctional officer can be ordered to remove the person using reasonable force. This power is presently contained in old subsection 108(3)(b) in the context of searches of visitors. It is more appropriately removed from this subsection and isolated as a general power that may be applied when any person, including an officer or employee, needs to be removed in the interests of the security or management of the prison.

Clause 12 amends section 130 by inserting a new regulation making power prohibiting things that may not be possessed in a prison.

Clause 13 omits section 192 which precludes action by way of prerogative orders under the JR Act in respect of any action taken or decision made by a Community Corrections Board. This will allow prisoners to seek a review of decisions made by Community Corrections Boards pursuant to Part 5 of the JR Act.

Clause 14 inserts a new Part 5 which deals with review of decisions affecting prisoners. New sections 196A and 196B provide for the removal of the application of Parts 3 and 4 of the JR Act and section 27B of the *Acts*

Interpretation Act 1954 in respect of certain decisions made under the CS Act. New section 196C states that reasons for decisions must be given to prisoners in a clear and readily understandable fashion. A prisoner will be entitled to oral reasons for any decision unless this is impracticable. For example, if a prisoner is being removed in haste to a safe section of a prison in an emergency such as a fire or in a riot, it may not be practicable to give even brief oral reasons for the action taken. Prisoners may request reasons in writing for decisions made under corrections legislation. Such reasons must be sought within 28 days of the decision and supplied within 28 days of the request. Reasons must be given in a clear and concise form which communicates to the prisoner why the decision was made.

New section 196D clarifies that a review under the Act can only be sought in respect of transfer, leave, remission, classification, discipline and special treatment decisions. A reference is made in this provision to new section 196F which provides for internal review of decisions. Discipline and special treatment decisions under the CS Act have statutory review mechanisms. In respect of transfer, leave, remission and classification decisions, there is no established procedure in any Act or regulation for internally reviewing the decisions.

New section 196E states the purpose of the Review Commissioner initiative which is intended to provide speedy resolution of prisoner grievances in a way that is cost effective, efficient, informal and as simple as possible.

New section 196F provides that internal reviews of four types of decisions (ie. transfers, classification, remission and leave) must be carried out. An internal reviewer is to be independent of the original decider and appropriately qualified to review the matter.

New section 196G clarifies that a review by a Review Commissioner must be preceded by an internal review as set down in the CS Act or otherwise by regulation under new section 196F. A prisoner may apply from the internal reviewer's decision to the Review Commissioner who may affirm, vary or set aside the decision substituting it with a new decision or returning it to the original decider with appropriate directions.

New subsection 196G(3) states that the Review Commissioner can prohibit or limit prisoner access to documents or information relevant to a decision under review if the Review Commissioner reasonably believes that

access would adversely affect prison security, a person's safety or the speedy conduct of the review.

New section 196H reiterates the need for speed and informality in the conduct of reviews. It clarifies that a decision under review will not be stayed unless an express decision is made to that effect. To overcome difficulties with delegation of powers to reviewers, new subsection 196H(3) states that the person reviewing a decision has the same powers as the original decider.

Subsection 196H(4) allows for regulations covering the conduct of reviews including the prohibition on legal representation, the ways in which reviews may be heard and the ability of the Review Commissioner to decide procedural matters for the conduct of the review.

New section 196I describes how the Review Commissioner is appointed and provides for absences and a vacancy in the office. It also provides for the commission to provide staff and resources to the Review Commissioner to allow him or her access to a range of information and documents. The Review Commissioner must prepare annual reports and cause them to be laid before Parliament. The operations of this division of the Act will be reviewed within the first 2 years. The Review Commissioner is to be regarded as a tribunal for the purposes of the *Parliamentary Commissioner Act* 1974.

Clause 15 inserts new sections 207A and 207B.

New section 207A states that the director-general may approve forms for use under the Act. Consequential minor amendments in the Schedule omit the expression "prescribed form" and replace it with "approved form". As some positions prescribed in regulation have been superseded by administrative reorganisation, reference to a particular rank in regulation is removed also.

New section 207B is a transitional provision which allows that prescribed forms will be replaced by approved forms but that the prescribed form will be deemed to be an approved form for the 12 months following the commencement of the Act.

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