2006

LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

CORRECTIONS MANAGEMENT BILL 2006

EXPLANATORY STATEMENT

Circulated by authority of
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Corrections Management Bill 2006

Outline

The Corrections Management Bill 2006 (the Bill) provides the law that will govern the treatment and management of prisoners and other detainees in the Australian Capital Territory.

The Bill is informed by human rights principles and jurisprudence as it stands at the time of the Bill's introduction to the Assembly. Powers and decisions contemplated by the Bill are also crafted to reflect contemporary administrative law principles, which in many cases are also an expression of human rights jurisprudence.

It is the government's intention that this Bill would replace the *Remand Centres Act 1976.* The new Act would govern the new prison anticipated for the ACT, the Alexander Maconochie Centre (AMC), as well as any present and future corrections facilities.

The ACT's *Human Rights Act 2004* protects fundamental rights. Any limits on these rights are only permissible if they are authorised by a Territory law and are reasonable and demonstrably justifiable in a democratic society. The Bill contemplates the minimum conditions and management of people, whose right to liberty is lawfully limited.

Consistent with section 28 of the *Human Rights Act 2004*, the Bill sets out reasonable limitations upon a sentenced offender's human rights, or a detainee's rights, consistent with the object of the Bill.

The Bill's provisions are consistent with modern prison management. The Bill covers admission, living conditions, searches, segregation, alcohol and drug testing, the use of force, disciplinary processes and leave processes. The powers and discretions assigned to the government are not open-ended: they are clear rules for all concerned to abide.

Following the passage of the *Crimes (Sentencing) Act 2005* and the *Crimes (Sentence Administration) Act 2005*, the Corrections Management Bill 2006 completes the suite of new legislation contemplating sentences in the ACT. The three pieces of law use consistent concepts, methods, and replace many duplicate sets of powers and processes with one set.

Corrections Management Bill 2006

Detail

Preamble

In Australia, courts interpret a preamble as part of an Act. The ACT's *Legislation Act 2001* enables this common law presumption about Acts to apply in conjunction with the *Legislation Act 2001*.

Although the preamble is recognised as part of the Act, in *Bowtell v Goldsbrough, Mort & Co Ltd* (1905) 3 CLR 444 and *Wacando v Commonwealth of Australia and the State of Queensland* (1981) 148 CLR 1 the High Court recognised the preamble as a means to assist in the interpretation of a provision of the Act. The preamble cannot be relied upon to restrict or "cut down" unambiguous provisions of an Act.

The Bill's preamble is written in the context of the fundamental legal relationship between the citizens of a community and the community's government. A government may only act in accord with a law that permits it to do so: citizens, conversely, are free to act in any manner that does not breach the law.

The Executive arm of government does not have unlimited power when managing prisoners and other detainees. An important measure of maintaining society's confidence in the criminal justice system is the lawful treatment of prisoners.

In order to maintain the community's confidence in the criminal justice system, the government is bound to ensure that people found guilty of breaking the law are themselves treated lawfully. In a *Letter from Birmingham Jail, 1963* Martin Luther King made the point that "Injustice anywhere is a threat to justice everywhere."

Item one of the preamble evokes Article 10 of the International Convent on Civil and Political Rights: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

Item two ensures that the Corrections Management Bill is intended to be interpreted in a manner that upholds the *Human Rights Act 2004.*

Item three states the principle that the deprivation of liberty is the punishment that flows from a sentence of imprisonment. The conditions of imprisonment and the management of prisoners are not to be so harsh as to create an additional punishment to the sentence.

This reflects the guiding principle in the *Standard Guidelines for Corrections in Australia 1996*, endorsed by Corrective Services Ministers in Melbourne during 1996, that correctional programs are by the deprivation of liberty to varying degrees. The deprivation of liberty is the punishment and any correctional program should not aggravate the suffering inherent in the punishment.

The *Alexander Maconochie Centre Functional Brief*, published in March 2005, states that the AMC "is to be a secure and safe place that will have a positive effect on the lives of prisoners held there and on staff who work there. Its management and operations will give substance to the dictum of Sir Alexander Paterson that offenders are sent to prison as punishment, not for punishment" [at page 5].

In *Kalashnikov v Russia* 47095/99 ECHR 2002, the European Court of Human Rights considered whether the conditions of a Russian prison exceeded acceptable consequences of the deprivation of liberty. In that case the court considered prison conditions of overcrowding, infestation of vermin, failure to quarantine prisoners with serious communicable diseases, lack of adequate ventilation etc. The court noted that:

> . . . the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured. [at 95]

Likewise, the Human Rights Committee of the United Nations notes that States have:

> . . . a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. [General Comment 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 33 (1994), at para 3]

This is also consistent with chapter 25 of the *Human Rights Act 2004: Guidelines For ACT Departments Developing Legislation and Policy* and the case law supporting the guidelines.

Item four speaks to the management of offenders by the Territory's corrections authority. One of the fundamental purposes of the Bill is to promote community safety and to uphold the law by ensuring that those sentenced to imprisonment, or otherwise lawfully detained, remain in custody for the relevant time.

Detainees in the government's custody should be managed in a manner that respects the needs of victims, works to rehabilitate offenders and is humane.

Chapter 1 — Preliminary

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act would be the *Corrections Management Act 2006.*

Clause 2— Commencement

This clause enables the Act to commence on a day nominated by the Minister in a commencement notice. The provisions for a commencement notice are set out in section 77 of the *Legislation Act 2001*.

If the Minister does not commence the Act six months after the Act is notified on the Legislation Register, then the Act automatically commences the following day. The provisions for automatic commencement are set out in section 79 of the *Legislation Act 2001*.

Clause 3— Dictionary

This is a technical clause identifying the dictionary and explaining conventions used to define words and terms.

Clause 4 — Notes

This is a technical clause explaining the status of notes to the Act.

Clause 5 — Offences against Act — application of Criminal Code etc

This clause makes it clear that the *Criminal Code 2002* applies to the Act. The subsequent Act should also be read in conjunction with the *Legislation Act 2001,* which provides for interpretation, common definitions, and legislative machinery for the ACT.

Clause 6 — Application of Act — detainees

Clause 6 specifies that the Act will apply to people who are to be detained because they are sentenced to imprisonment, remanded or otherwise lawfully ordered to be detained.

Clause 6(a) refers to part 3.1 of the *Crimes (Sentence Administration) Act 2005,* which groups the sources of authority to determine, impose and re-impose sentences of imprisonment under the concepts of committal order and committing authority.

Part 3.1 of the *Crimes (Sentence Administration) Act 2005,* contemplates the court's authority to determine and impose a sentence; the sentence administration board's authority to suspend or cancel periodic detention, or cancel parole, and hence re-impose an existing sentence; and the board's power to cancel a release licence and hence re-commit an offender to prison.

Clause 6(b) refers to part 5.3 of the *Crimes (Sentence Administration) Act 2005.* An offender sentenced to serve imprisonment by way of periodic detention must report for each detention period within the term of their sentence. They must report at the correct time on the correct day. They must report in accord with any directions given by the chief executive.

Clause 6(c) refers to part 3.2 of the *Crimes (Sentence Administration) Act 2005*. This part provides the chief executive with the authority to detain remandees, as distinct from prisoners. In some cases the remandee will be both a prisoner and a remandee if the person is serving a sentence and is required to attend a hearing.

Clause 6(d) contemplates detainees who are held in custody at an ACT corrections facility by any other law that could apply to the ACT's jurisdiction. Examples are given for the kinds of authority, and hence the kinds of detainees, contemplated by clause 6(d).

(2) clarifies that the Bill is not intended to displace the provisions in part 4.3 of the *Crimes (Sentence Administration) Act 2005* that authorise NSW custodial law to apply to ACT prisoners imprisoned in NSW.

(3) clarifies that the Bill does not displace any custodial provisions in the *Children and Young People Act 1999* that apply to any children and young people sentenced under that Act. However, there are exceptional provisions in the *Children and Young People Act 1999* that authorise detention of young people in adult facilities. In those circumstances this Bill would apply to those people.

Chapter 2 — Objects and principles

Clause 7 — Main objects of Act

The main function of a prison or a remand centre is to hold people in secure custody. This function is a means to both uphold the law and provide protection to the community from people who pose a risk to the community in the context of criminal justice.

Clause 7 also reflects the philosophy of the 'Healthy Prison'. As set out in the *Alexander Maconochie Centre Functional Brief,* "A Healthy Prison is one in which:

- everyone is, and feels, safe;
- everyone is treated with respect as a fellow human being;
- everyone is encouraged to improve himself or herself and is given the opportunity to do so through the provision of purposeful activity; and
- everyone is enabled to maintain contact with their families and is prepared for release." [2005, page 5]

The objects in (a), (b), (c) and (d) summarise the overarching tasks of the relevant Minister when administering the foreshadowed Act.

Clause 8 — Management of correctional services

Akin to clause 7, clause 8 summarises the overarching tasks of the relevant agency, currently ACT Corrective Services, when administering the foreshadowed Act.

Clause 8(a) clarifies that public safety is the most important consideration in the management of detainees. The reason for the Act's existence, and the agency's responsibilities under the Act, is to secure relevant people in custody.

While the Bill is a comprehensive expression of the powers the Territory's correction agency may exercise, it is not possible to foretell every possible crisis a corrections facility may face. The intent of this clause is to ensure that if a decision has to be made regarding the security of the corrections facility — and the law for that decision is not set out in the Act — the corrections agency is obliged to regard public safety as its first task and its ultimate task.

In carrying out the task of detention, clause 8(b) invokes the obligation that the agency should carry out the task in a manner that respects the humanity of all involved.

Clause 8(c) promotes best practice in the Territory's corrections agency. The International Centre for Prison Studies at Kings College in the United Kingdom has emphasised the importance of ethical prison management and staff:

> "Prison management needs to operate in an ethical context. Without a strong ethical context, the situation where one group of people is given considerable power over another can easily become an abuse of power . . . A sense of the ethical basis of imprisonment needs to pervade the management process from the top down." [*A Human Rights Approach to Prison Management*, 2002, page 13]

Clause 8(d) reflects the fact that the Bill will provide the Territory's corrections agency with various powers that may impact upon victims. For example, the Bill contemplates special leave for prisoners, the ability for prisoners to use the phone or mail. Unfortunately, some offenders want to keep harassing their victims even during their imprisonment. Clause 8(d) ensures that the protection of victims is an overarching consideration in any decision exercised under the Act.

Clause 9 — Treatment of detainees generally

Clause 9 provides that the Bill's functions are to be implemented in a manner that upholds human rights. Consistent with section 28 of the *Human Rights Act 2004,* the Bill sets out reasonable limitations upon a sentenced offender's human rights, or a detainee's rights.

Clause 9(a) to (c) ensures that any exercise of power under the Bill must uphold a detainee's human rights, ensure humane and just treatment and cannot be used to engage in torture or cruel, inhuman or degrading treatment.

Clause 9(d) emphasises the principle that there is no arbitrary power, or right, for the government to inflict additional punishments on prisoners. As discussed under item three of the preamble, prisoners and detainees retain their rights as human beings with the exception of those rights lost as a consequence of their detention. Following human rights jurisprudence, the totality of the conditions of the sentence or remand should not create a further form of punishment, or cruel treatment, beyond the sentence itself. For example, the purposeful creation of hot conditions, the purposeful deprivation of sleep etc.

Clause 9(e) refers to the minimum conditions listed in section 12 and detailed in chapter 6 of this Bill.

Clause 9(f) requires that the treatment of an offender should promote rehabilitation, in conjunction with any formal rehabilitation programs contemplated by clause 7(d). This is consistent with the 'healthy prison' concept, discussed above at clause 7.

Clause 10 — Treatment of remandees

Akin to clause 9, clause 10 ensures that the Bill's functions in relation to remandees are consistent with human rights. In addition to the provisions of clause 9, clause 10 ensures that a remandee's right to be presumed innocent is upheld and that the circumstance of detention is not a punishment of the person.

Clause 10(2) contemplates remandees who are convicted for the offence in question or imprisoned for another offence. In these cases detention may be regarded as punishment and a presumption of innocence does not apply to offences proven. If a person is already serving a sentence of imprisonment, and is imprisoned, but the person is also remanded during a hearing for another offence, section 18 of the *Crimes (Sentence Administration) Act 2005* provides the corrections agency with the authority to determine where the person should be held.

Clause 11 — Treatment of certain detainees

Clause 11 ensures that anyone held in custody is recognised and that any of the Bill's functions applicable to this category of person are to be implemented in a manner that upholds human rights.

As discussed in clause 6 above, it is possible that detainees may be held in custody at an ACT corrections facility by another law that could apply to the ACT. For example, a person held on a warrant under the *Royal Commissions Act 1991* (Cth), or a person detained under the *Migration Act 1958* (Cth).

Clause 11(3) enables the Executive to make regulations where the law authorising the detention and how that detention is to be exercised conflicts with the Bill. The aim of the clause is to authorise necessary modifications to reconcile the conflicting laws. For example, a Commonwealth law may be more restrictive about the rights of certain detainees to communicate with the community. In this instance there may be a conflict with the Bill. Generally, where an ACT law is found to be inconsistent with Commonwealth law, Commonwealth law has the right of way. Under these circumstances the ACT Executive may make regulations to resolve the inconsistency.

Clause 12 — Correctional centres — minimum living conditions

Clause 12 lists the minimum standards that must apply at correctional centres. The detail of each standard is set out in chapter 6, below.

These conditions are derived from the *United Nations Standard Minimum Rules for the Treatment of Prisoners* (1957); *A Human Rights Approach to Prison Management,* The International Centre for Prison Studies at Kings College, United Kingdom, 2002; *International Prison Policy Development Instrument,* International Centre for Criminal Law Reform and Criminal Justice Policy, Vancouver, Canada, 2001; *European Prison Rules,* Council of Europe Committee of Ministers to Member States, 2006.

Chapter 3 — Administration

Historically, prisons were seen as the absolute realm of gaolers: prisoners were either formally stripped of legal rights, or prevented from exercising any rights. In 1949 the High Court held the view that prisoners did not have legal rights to challenge decisions made by prison administrators. In *Flynn v King* (1949) 79 CLR 1 the then Justice Dixon said:

> ". . . if prisoners could resort to legal remedies to enforce gaol regulations, responsibility for the discipline and control of prisoners in gaol would be in some measure transferred to the courts administering justice. For if statutes dealing with this subject matter were construed as intending to confer fixed legal rights upon prisoners it would result in application to the courts by prisoners, for legal remedies addressed to the Crown or to the gaoler in whose custody they remain. Such a construction of the regulation making power was plainly never intended by the legislature and should be avoided." [at 8]

In essence the High Court ruled in 1949 that unlike other citizens, prisoners had no recourse to seek judicial review of Executive acts that directly affected them.

As with any power left unchecked, prison culture reached breaking point in the 1970s resulting in a series of riots and revelations of institutional violence. The NSW Government commissioned Justice Nagle to conduct a Royal Commission into NSW Prisons, resulting in the *Nagle Report.* Commissioner Nagle documented the kinds of unchecked powers that were being abused by prison authorities and denied prisoners the most basic of rights. The statutory proceedings governing discipline processes, for example, were not being followed and decisions were affected by bias without due regard to evidence.

In the United Kingdom the 1979 case of *R v Board of Visitors of Hull Prison; ex parte St Germain (No.1)* [1979] QB 425, revealed that a lack of judicial scrutiny of prison disciplinary systems allowed processes that failed the basic principles of natural justice. In *St Germain* the Court of Appeal determined that the relevant authority determining prison discipline was subject to the supervisory jurisdiction of the UK High Court. In essence, that the administrative decisions relevant to discipline could be reviewed for lawfulness by a court with appropriate jurisdiction.

Since the 1970s Australian courts have set aside the ruling of *Dixon* in Flynn and allowed prisoners to apply for judicial review on a range of matters.

Matters can include:

- Decisions affecting release — *Smith v Corrective Services Cmr of NSW* (1980) 147 CLR 134, *Kelleher v Parole Board of NSW* (1984) 156 CLR 364, *Ex parte Fritz* (1992) 59 A Crim R 132;

- Procedural fairness in disciplinary processes — *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533; *Bromley v Dawes* (1983) 34 SASR 73; *Maybury v Osborne* [1984] 1 NSWLR 579; *Hogan v Sawyer; Ex parte Sawyer* [1992] 1 Qd R 32;

- Conditions of imprisonment: *R v Walker* [1993] 2 Qd R 345, *Binse v Williams & anor* [1998] 1 VR 381; *Collins v State of South Australia* (1999) 74 SASR 200; and

- Leave from prison: *Jackson v Director-General of Corrective Services* (1990) 21 ALD 261.

While Australian courts have recognised the rights of prisoners to seek judicial review, at the time of this Bill courts have paid great deference to the decisions made by prison administrators.

The Bill is drafted with the intent of clearly setting the boundaries of any power allocated to the Territory's corrections authority. This aims to assist any court reviewing a decision to ascertain the extent of the powers the Assembly intended to give the Minister, the chief executive or corrections officers.

This is also consistent with human rights jurisprudence and best practice. Section 30 of the *Human Rights Act 2004* (*HRA*) requires all ACT laws to be interpreted, as far as possible, in a way that is consistent with the rights set out in the *HRA.* The *Guidelines for Developing Policy and Legislation under the HRA* (March 2005) state that: "In practice, section 30 means that courts, tribunals and administrative decision makers must act consistently with the HRA unless a Territory law clearly provides otherwise. A person exercising a statutory discretion must exercise that discretion consistently with human rights" [page 7].

By clearly setting out the limitations of any discretions to be exercised by corrections officers, the Bill aims to leave no doubt as to what is intended to be lawful, and what is not.

Rather than allocate various open-ended powers to standing orders, as is currently the case, the Bill provides a context for how the powers are to be exercised. Consequently, the Bill authorises the chief executive to prescribe operating procedures and policies that are within the boundaries set by the Bill.

Part 3.1 — Administration — General

Clause 13 — Ministerial directions to chief executive

Clause 13 provides an ability for the government to direct the chief executive to administer specified functions in the Act in a particular way. The direction would enable modification or change of operating procedures under clause 14, for example, or require the chief executive to put an operating procedure in place.

The power is included to enable the government to act without delay to decisions of the Supreme Court, or recommendations from any inquiry or royal commission.

Any direction must be publicly notified in accord with the *Legislation Act 2001*.

Clause 14 — Corrections policies and operating procedures

In her review of Quamby, the place of detention for offenders under 18 years old, the ACT Human Rights Commissioner noted that there were important matters that were not in the substance of the *Children and Young People Act 1999* relating to detention, the use of force, personal searches etc. The Commissioner wrote that the substance of matters like these should be in the principle legislation, not in regulations or standing orders [*Human Rights Audit of Quamby Detention Centre*, ACT Human Rights Office, June 2005, pages 29 & 30].

Mindful of the Commissioner's advice and her contribution to the development of this Bill, the Bill provides the substance to the powers and functions to be exercised by ACT Corrective Services.

Clause 14 enables the chief executive to make and notify policies and operating procedures within the framework of the powers set out in the Bill.

Consistent with accountability, 14(2) and (3) ensure that policies and procedures are public documents, and are also available to detainees. These documents may be exempted from being a public document under section 15.

Clause 15 — Exclusion from notified corrections policies and operating procedures

Clause 15 enables policies and operating procedures that relate to the security of the prison, or may endanger public safety etc, to be exempt from notification or availability for perusal.

Clause 15(2) ensures that the documents are still open to accountability by requiring them to be available for inspection by the officials listed.

The clause enables regulations to be made to prescribe any criteria that would make a policy or procedure eligible for exemption. Regulations can also be made to extend the list of officials who are entitled to examine exempted documents.

Clause 16 — Chief executive directions

Clause 16 provides an overarching power for the chief executive to give directions to detainees. Under (3) the direction can be verbal or written. The direction can be to one detainee, or all detainees.

The items in (2) provide for the most likely rationale that would inform a direction from the chief executive. However, the power is not limited to the three purposes in (a), (b) and (c).

Clause 16(4) ensures that the substance of any lawful direction given by the chief executive is upheld if there is something wrong with the form of the direction. For example, if a direction is normally issued by way of a standard form the fact that the form was not used would not render the direction invalid. However, if the chief executive was required by the Act to use a prescribed form, or a prescribed set of words, the direction may be unlawful.

Clause 17 — Chief executive delegations

Clause 17 expressly provides for the delegation of any of the chief executive's powers to corrections officers.

The *Australian Capital Territory (Self-Government) Act 1988* (Cth) and the *Public Sector Management Act 1994* authorise the ACT Government of the day to allocate the administration of Territory Acts to Ministers and departments via the administrative orders.

The present Administrative Orders allocates relevant corrections Acts to the Chief Executive of the Department of Justice and Community Safety, who in turn delegates these powers to the Executive Director of ACT Corrective Services.

Future governments may wish to change these arrangements. The reference throughout the Bill to the office of chief executive enables the powers to be delegated flexibly once the Administrative Orders are made. In this way the Bill does not inadvertently dictate the structure and tasks of any agency that may be assigned to carry out the functions in the Bill.

Clause 18 — Chief police officer delegations

Clause 18 expressly provides for the delegation of any of the chief police officer's powers under this Bill to police officers.

Rather than presume, or predetermine, the organisational division of labour of ACT Policing, the Bill allocates any relevant powers to the chief police officer, or police upholding ACT law in general. This clause facilitates the chief police officer's ability to create a division of labour by authorising the chief police officer to delegate functions.

Part 3.2 — Corrections officers

Clause 19 — Corrections officers — appointment

Clause 19 enables the chief executive to appoint public servants as corrections officers, or appoint people who are not public servants as corrections officers.

Part 5 of the *Public Sector Management Act 1994* covers the appointment of public servants. Section 68 sets out the factors that must be considered when appointing a public servant:

> (1) Subject to subsection (2), the appointment of a person to the service as an officer shall be made by the relevant chief executive.
>
> (2) A person shall not be appointed to the service unless—
>
> (a) he or she has been selected for appointment in accordance with the provisions of this Act and the management standards; and
>
> (b) the person is an Australian citizen or a permanent resident of Australia; and

(c) the commissioner, or the chief executive making the appointment, as the case may be, has certified in writing that after due inquiry he or she is satisfied that the person is a fit and proper person to be so appointed having regard to—

(i) verification of the person's identity; and

(ii) whether the person has any prior criminal convictions; and

(iii) the previous employment record of the person; and

(iv) the need for suitable references in support of the person's application for appointment; and

(v) verification of the person's educational qualifications required for the appointment.

Clause 19(2) ensures that anyone appointed as a corrections officer, whether a public servant or not, has the requisite skills, experience or qualifications to be a corrections officer.

Clause 20 — Corrections officers — functions

As discussed in relation to clause 17, above, expressly provides for the delegation of any the chief executive's powers to corrections officers. The Bill also allocates powers to corrections officers in general by referring to corrections officers when stipulating the power or function.

Clause 20 and clause 17 informs the Bill's references to the functions of the chief executive and corrections officers. Clause 20(1)(b) clarifies that any function allocated to corrections officers in general does not displace the chief executive's authority to give directions in the exercise of those functions. Likewise, any directions given by a delegate of the chief executive must also be followed.

Clause 20(2) enables for a more formal division of labour to be created amongst corrections officers, a hierarchy of powers for different ranking corrections officers, or a limitation of powers depending upon where or what the officer is assigned to.

Clause 21 — Doctors — health service appointment

Clause 21 requires the chief executive to appoint at least one doctor for each correctional centre. The appointed doctor contemplated by this clause would only provide therapeutic services to detainees. Clause 22 below creates an authority to appoint other health professionals, including doctors, to conduct medical tasks that are not therapeutic.

The purpose of creating two sets of appointed health professionals is to prevent treating doctors from having to engage in medical tasks that are related to the security of the corrections facility. Best medical and human rights practice advocates separate people to conduct therapeutic and non-therapeutic tasks in a detention setting. The rationale for this separation is to protect detainees' trust and confidence in any doctor who provides treatment.

The Bill relies upon the *Legislation Act 2001* definition of 'doctor':

> (a) means a person unconditionally registered as a medical practitioner under the Health Professionals Act 2004; and
> (b) for an activity, includes a person conditionally registered as a medical practitioner under the Health Professionals Act 2004 to the extent that the person is allowed to do the activity under the person's conditional registration.

Clause 21(2) requires appointed doctors to provide health care to detainees and to take steps to prevent health problems at corrections facilities.

Clause 21(3) sets a statutory minimum level of service to be made available to detainees each week.

To ensure any medical decisions to prevent the spread disease are implemented, clause 21(4) empowers appointed doctors to give written directions to the chief executive. However, (5) ensures that any direction of this nature would not compromise security or order at the facility.

The power in (5) is provided only to be used when absolutely necessary. The government envisages that ACT Health and ACT Corrective Services will establish the relevant agreements and protocols to foster a close working relationship between health service providers and corrections officers.

The effect of clauses 21 and 22 do not prevent a non-convicted detainee from seeking therapeutic treatment from a doctor of their choice. In these circumstances, the chief executive is not obliged to pay for the service.

Clause 22 — Health professionals — non-therapeutic functions

Clause 22(1) requires the chief executive to appoint health professionals to carry out medical tasks under the foreshadowed Act that are not therapeutic. For example, taking a blood sample for a drug test, or conducting a body search. The clause contemplates health professionals as set out in the *Health Professionals Act 2004,* as some tasks may not require a doctor only.

Each provision of the Bill that requires a medical procedure also stipulates the kind of doctor or health professional that may carry out the task.

Clause 23 — Identity cards

Clause 23 sets out the particulars of identity cards that must be issued to corrections officers and health officers, and returned by former officers.

It is an offence not to return an identity card within 7 days after a person stops being a corrections officer. The government has determined that the offence warrants being a strict liability offence on the basis that identity cards at large would pose a significant risk to the security of corrections facilities and other corrections activities. People appointed to work in a corrections service would be reasonably expected to know that retaining personal possession of an identity card poses a risk to the facility's security.

The defences to strict liability offences are set out in section 36 of the *Criminal Code 2002.*

Part 3.3 — Correctional centres

Clause 24 — Correctional centres — declaration

Clause 24 enables the Minister to declare places to be correctional centres. Any declaration must be notified on the Legislation register.

The examples provided are to demonstrate that the declaration may be made in broad terms and can include land around a building.

Clause 25 — Correctional centres — arrangements with NSW

Since the formation of the ACT people sentenced to imprisonment in the Territory have been imprisoned in NSW. Part 4.3 of the *Crimes (Sentence Administration) Act 2005* authorises that practice to continue.

Clause 25 enables the ACT Government to make arrangements with the NSW Government to provide relevant services to ACT prisoners and reports about ACT prisoners. Of particular relevance will be reports that inform parole decisions made by the Sentence Administration Board.

Part 3.4 Administration — special provisions

Clause 26 — Declaration of emergency

Clause 26 authorises the chief executive to declare an emergency at a correctional centre on the basis of a threat to the order or security of a facility, or the safety of anyone at the centre or elsewhere.

A declaration of emergency triggers the emergency powers in clause 27, discussed below.

Clause 26(2) limits each declaration of emergency to a span of three days. However, the chief executive may make any number of subsequent emergency declarations under 26(3). The effect of these counter-posed provisions is to ensure that the chief executive makes a decision to declare an emergency at least every three days, if a threatening situation lasts longer than three days. The requirement to make regular decisions ensures that the any extended use of emergency powers remain reasonably justified.

Another period for (2) may be prescribed by regulation. A regulation must be presented to the Legislative Assembly within six sitting days and the Assembly has authority to disallow the regulation.

Clauses 26(4) and (5) stipulates that a notice of the declaration must be prepared and notified under the *Legislation Act 2001.* The notification does not have to be made immediately, but must be made within 48 hours. The time of notification does not prevent the exercise of the emergency powers. Once the chief executive decides to declare an emergency the powers may be exercised.

Clause 27 — Emergency powers

Clause 27 sets out what emergency powers can be exercised following the declaration of an emergency. As discussed in clause 26 above, the chief executive may exercise the powers once a declaration is made without having to wait for the notification of the instrument.

The powers that may be exercised further restrict the liberty and rights to communicate of detainees. Consequently, they can only be exercised if an emergency is declared and the action taken is necessary and reasonable.

Clause 27(1)(a) authorises the chief executive to modify or cease any work or activity at the facility. The Bill's dictionary uses the definition of 'activity' in the *Crimes (Sentence Administration) Act 2005*, which includes education, counselling, and personal development programs.

Clause 27(1)(b) authorises the chief executive to control access to, or from, the correction facility to the ultimate degree. Likewise, the chief executive can further control movement within the centre to the ultimate degree. The exercise of this power will further restrict the liberty of detainees. The power will only be compliant with the *Human Rights Act 2004* if it is exercised in a proportionate and reasonable manner, and is least restrictive upon the rights of detainees under the circumstances.

Clause 27(1)(c) authorises the chief executive to control communications to the ultimate degree between detainees and anyone else. Anyone else includes other detainees. The exercise of this power will further restrict the detainees freedom of expression and impact upon the right to be treated humanely while detained. The power will only be compliant with the *Human Rights Act 2004* if it is exercised in a proportionate and reasonable manner, and is least restrictive upon the rights of detainees under the circumstances.

During circumstances of an emergency the power in clause 27(1)(d) enables the chief executive to delegate powers under the Act to police and other public servants. This power contemplates circumstances where an emergency causes an issue in relation to staffing and security of the prison, for example during an epidemic or natural disaster.

Clause 27(2) ensures that the exercise of emergency powers are proportionate and rationally connected to the task of maintaining order, security and safety.

Clause 28 — Arrangements with police

Clause 28 empowers the chief executive to make arrangements with police to facilitate the function of the *Crimes (Sentencing) Act 2005*, the *Crimes (Sentence Administration) Act 2005* and this Bill.

Examples of arrangements include transport protocols and police assistance during an emergency at a corrections facility.

Clause 28(3) enables police assisting the chief executive to exercise any power set out in the Act. However, the powers must be exercised in accordance with any directions given by the chief executive, or relevant delegate.

Chapter 4 — Detention in police and court cells

Clause 29 — Definitions

The ACT currently has only two courts. The definition of court cells is intended to cover any cell at a court. The definition is intended to cover any future courts.

The definition of police cell is intended to cover any cell at any police station in the jurisdiction of the ACT Government.

Clause 30 — Detention in police cells

Clause 30 authorises detention in police cells for custodial purposes. The clause contemplates those people who are detained by police in a cell but have not undergone an admissions process under chapter 9 of this Bill.

Clause 30(2) sets a maximum time limit of 36 continuous hours that a person can be detained in a police cell before an admissions process under chapter 9 must be conducted. The limit of 36 hours also corresponds to the maximum time between conventional hearing times for bail decisions under the *Bail Act 1992*.

Clause 30(3) facilitates the transfer of a person who is in lawful police custody to the chief executive.

Clause 30(4) authorises the chief executive to take custody of the person and conduct an admissions process under chapter 8 of the Bill. 30(4) also enables the person to be detained at a corrections facility, enables police access to the person and enables the person to be returned to the custody of the police as needed.

Clause 30(5) contemplates the law authorising police custody and consequently the fact that the chief executive has custody does not oust any police obligations or duties under the law that initiated the detention of the person.

Clause 31 — Detention in police cells — search powers

Clause 31 authorises police to conduct searches for custodial purposes. The power is limited to the context of custody in a police cell. The clause authorises police to conduct scanning, frisk, ordinary or strip searches in accord with part 9.4 of the Bill. This clause provides the chief police officer with the same powers and obligations as a corrections officer directed by the chief executive in part 9.4.

The clause also authorises police to seize property in accord with part 9.5 of the Bill. This clause provides the chief police officer with the same powers and obligations as a corrections officer directed by the chief executive in part 9.5.

Clause 32 — Other police powers not limited

This clause clarifies that the power provided to police to engage in searches for custodial purposes does not limit any other lawful search power. Police powers to search for investigative purposes under a warrant or otherwise are not limited or qualified by the clauses in this chapter.

Clause 33 — Detention in court cells

This clause contemplates people who are detained in a court cell but are yet to be admitted under chapter 8 of this Bill. The clause also contemplates court cells as being administered by the Executive arm of the ACT Government.

The clause places an obligation upon the chief executive to admit a person under chapter 8 of this Bill if the person has been detained at a court cell for 36 continuous hours. This does not apply to people already admitted and are lawfully in a court cell under the provisions of clause 34.

Because a detainee at a court cell is in the chief executive's custody the effect of the Bill would apply to those detainees.

Clause 34 — Detainees accommodated away from correctional centre

Clause 34 remakes a power in the *Remand Centre Act 1976* that enabled police and court cells to be used temporarily to accommodate detainees.

Any decision to exercise this power must set a time when the power ends and must be notified on the legislation register. For example, a direction may set a time of four hours, or two days.

It is envisaged that this power would be exercised on rare occasion. Examples for the exercise of the power are given.

Detainees would only be able to be detained away from a correctional centre for the purpose of the declaration during the period set out in the declaration.

This clause only applies to detainees who are admitted to a corrections facility, consequently the 36 hour rule is redundant. However, the full effect of the foreshadowed Act would apply to the detainees.

Chapter 5 — Escorting detainees

Clause 35 — Escorting officer functions

An escort officer is defined in this Bill's dictionary as a corrections officer who is engaged in duties of escorting a detainee, or a police officer.

Clause 35(1) authorises police and corrections officers to be an escort of any detainee in the custody of the chief executive, irrespective of the purpose of the escort.

Clause 35(2)(a) and (b) stipulates the escort officer has the authority to escort the detainee and that the detainee is deemed to be in the custody of the chief executive. Clause 35(2)(c) clarifies that corrections officers who are doing escort duties are able to exercise any powers allocated to corrections officers in this Bill and any powers delegated to the officers by the chief executive under this Bill.

Clause 36 — Escorting arrested person to court

This clause addresses the overlap between police and corrections officers when escorting a person in police custody to a court, or other place, where a judicial or quasi-judicial entity requires the detainee to attend.

The clause enables police or corrections officers engaged to escort the person to take the person into custody and bring them to the relevant court or tribunal.

Detainees who are not admitted to a corrections centre under chapter 8 are subject to the protections in chapter 4, dealing with custody in police and court cells.

Clause 37 — Custody during proceedings

Clause 37 provides escort officers with authority to uphold the safety and welfare of the person during judicial or quasi-judicial proceedings. Escort officers are also empowered to prevent the detainee from obstructing or hindering the proceedings.

These powers are subject to the direction of the court.

Clause 38 — Executing warrants of imprisonment or remand

This clause enables escort officers to take a person into custody as a consequence of judicial or quasi-judicial proceedings.

Subsection (2) allows an order or direction of a court to take a person into custody to be exercised by any officer assigned to escort duties.

Clause 39 — Other powers not limited

Clause 39 clarifies that this chapter is to be read as extending the law in relation to escorting detainees. The chapter is not intended limit any other powers applying to escorts.

Chapter 6 — Living conditions at correctional centres

Chapter six provides a statutory basis for rules 9 to 26, 37 to 39, 41 and 42 of the *Standard Minimum Rules for the Treatment of Prisoners* (1957) dealing with living conditions.

The intent of chapter six is to provide a set of minimum conditions that must be afforded to every detainee. Chapter six also draws a line between the minimum conditions that are regarded as entitlements and conditions that may be considered to be privileges. The distinction between entitlements and privileges is important to enable the discipline process to work and to ensure that segregation for reasons other than discipline are fairly applied.

The first note in chapter six explains that any withdrawal of privileges as a consequence of disciplinary action does not affect any entitlement set out under chapter six. Conversely, any condition in chapter six that is not prescribed to be an entitlement can be regarded as a privilege.

Clause 40 — Food and drink

Clause 40(1) requires detainees to be fed properly, have access to drinks and clean drinking water. Meals should be provided at times consistent with cultural norms. 'Cultural norms' are those standards or patterns that are, "shared and understood, but tacitly rather than explicitly" [Schein, E. H. *Organizational culture and leadership,* (1985)].

Clause 40(2) recognises that food and drink also play an important part of religious or spiritual occasions. The clause is not prescriptive about what is to be regarded as practical, or impractical, as the needs and requests for particular food and drink will be varied. The chief executive must exercise a discretion in deciding whether provision of particular foods at particular times is practically possible.

Clause 40(3) requires the chief executive to provide a detainee with food and drink that satisfies a diet prescribed by a doctor. The clause is not absolute in the obligation, as is may not be logistically possible to meet the provision of all of the specific food required. For example, because of seasonal reasons, availability etc. The clause excludes doctors who are appointed to carry out non-therapeutic tasks (see explanation of clauses 21 and 22).

Clause 40(4) stipulates the items in the clause that are entitlements and not to be regarded as privileges for the purposes of disciplinary action.

Clause 40(5) enables the chief executive to set out the nutritional standards to be provided for detainees, provide nutritional advice to detainees and appoint a nutritionist.

Clause 40(6) stipulates that any food and drink entitlement articulated in the instruments made under 40(5) become entitlements for the purposes of disciplinary action.

Clause 41 — Clothing

Clause 41 requires clothing to be provided to detainees. The clothing must be suitable for the seasonal conditions. The international standards, such as rule 7 of the *Standard Minimum Rules for the Treatment of Prisoners* (1957), forbid clothing that would degrade or humiliate detainees. For example in clothes with archetypal arrows or lines.

Clause 41(2) obliges the chief executive to ensure the clothing is clean and hygienic.

Clause 41(3) stipulates that all of the matters in the clause are entitlements and not to be regarded as privileges for the purposes of disciplinary action.

Clause 42 — Personal hygiene

Clause 42 stipulates that toilet, washing and showering facilities must be provided at correctional centres. These facilities need to be kept in a state of cleanliness, and provide privacy, as would be expected in the context of Australia's cultural norms.

Clause 42(2) stipulates that all of the matters in the clause are entitlements and not to be regarded as privileges for the purposes of disciplinary action.

Clause 43 — Sleeping areas

Clause 43 obliges the chief executive to provide suitable beds and bedcovers. Bedding must be clean, hygienic and provide reasonable comfort and privacy.

Clause 43(2) stipulates that all of the matters in the clause are entitlements and not to be regarded as privileges for the purposes of disciplinary action.

Clause 44 — Treatment of convicted and non-convicted detainees

It is a human rights principle that non-convicted detainees should not be accommodated with convicted detainees. However, an exception to this principle lies where some non-convicted individuals may be vulnerable to another non-convicted individual.

The clause gives an example of an exception to the principle of separating convicted and non-convicted detainees.

The clause is not to be interpreted as applying to people who have ever been convicted. The clause applies to people who are serving imprisonment as a consequence of a particular conviction or convictions.

This clause also obliges the chief executive to make a policy or operating procedure to give effect to differential treatment of non-convicted detainees. The operating procedure must address the *United Nations Standard Minimum Rules for the Treatment of Prisoners* (1957) rules 87, 89, 90 and 91.

These rules enable non-convicted people to be able to:

- procure food at their own expense;
- be offered the opportunity to work without obligation to work;
- procure books, writing materials, newspapers etc at their own expense;
- procure private therapeutic treatment from a doctor or dentist of their choice at their own expense.

Clause 45 — Access to open air and exercise

Clause 45 prescribes a statutory minimum of an hour’s access to open air per day for each detainee, and an hour’s access to exercise.

Access to open air and exercise may be combined in the same hour for each detainee.

The entitlement is not absolute, as there may be practical reasons why the entitlement cannot be implemented every day. For example a state of emergency, or a natural disaster etc.

Clause 45(3) stipulates that all of the matters in the clause are entitlements and not to be regarded as privileges for the purposes of disciplinary action.

Clause 46 — Communication with family and others

Clause 46 places an obligation upon the chief executive to be proactive in providing opportunities for detainees to maintain contact with the community. As discussed earlier, most prisoners will return to the community. Positive changes in behaviour will be greatly influenced by relationships with family and close associates. Maintaining these relationships during detention is an important factor in successful rehabilitation and release of prisoners. The use of the term 'associate' in no way authorises criminal association.

Clause 46(2) follows human rights jurisprudence that requires consideration of the non-convicted status of a detainee when a corrections authority makes a decision that affects the detainee's opportunity to communicate. This does not mean that the non-convicted status of the detainee outweighs all other considerations.

46(3) and (4) are a prohibition on constructive incommunicado. Incommunicado is the State unlawfully preventing a person from communicating with all facets of civil society: institutions and family.

(5) ensures that any discipline process does not create an authority to impose constructive incommunicado upon a detainee.

(6) clarifies that the prohibition on incommunicado does not prevent the chief executive from preventing communication, providing it is lawful, reasonable and proportionate.

Clause 47 — Telephone calls

Clause 47(1) requires the chief executive to provide telephone infrastructure to enable detainees to make calls, and receive calls.

Clause 47(2) sets out the minimum calls each week that a detainee must be allowed to make.

A family member includes the detainee's partner, children, parents, grandparents, siblings, guardian or carer. For children, parents, and siblings this includes non-biological relationships, such as a step-parent.

Clause 47(3) clarifies that the minimum calls are not the only calls a detainee is entitled to make or receive. Further calls can be made, consistent with the principle set out on clause 46 above.

The chief executive has the discretion to determine what constitutes a necessary phone call and an unnecessary phone call.

Clause 47(4) stipulates that detainees must pay for any phone call they make unless there are good reasons why they cannot pay for the call. Clause 83 enables the chief executive to establish a bank account in trust for detainees. Detainees' may earn nominal amounts for tasks completed in detention, and other income may be deposited into the account.

Payments for phone calls and mail will be met by this account.

Clause 47(5) stipulates that the matters in (2) and (3) of the clause are entitlements and not to be regarded as privileges for the purposes of disciplinary action.

Clause 47(6) empowers the chief executive to deny or limit a detainee's phone calls if the chief executive suspects the detainee will engage in any of the behaviour listed in (a) to (d).

An example of (a) is the use of a phone call to communicate a threat to other detainees via third parties. An example of (b) is a phone call to a third party, or a victim themself, to taunt or harass the victim. An example of (c) is a phone call that would pre-empt, prejudice or impair the investigation of a complaint or the conduct of a disciplinary process. An example of (d) is a phone call to a journalist, or other individuals, to goad or provoke community feeling by glorifying offending behaviour such as rape, violence, paedophilia etc.

Clause 47(7) clarifies that phone calls are subject to security monitoring set out in part 9.3 and to any operating procedures that apply to phone calls.

Clause 47(8) authorises the chief executive to make operating procedures about what times during the day phone calls may be made; the maximum time allowed for phone calls; and what charges should be applied for phone calls.

Consistent with Australian common law and Human Rights jurisprudence, any decision made to make an operating procedure or impose an operating procedure must be reasonable and proportionate to its lawful purpose.

Clause 48 — Mail

Clause 48(1) enables detainees to send and receive as much mail as they wish. However, this should not be regarded as an absolute entitlement if the amount of mail exceeds the ability of the correctional centre to properly process and move the mail.

Clause 48(2) entitles a detainee to write to nominated family members and to accredited people. A family member is both singular and plural by the effect of section 145(b) of the *Legislation Act 2001*, which interprets words in Acts as meaning both singular and plural unless explicitly stated otherwise.

A family member includes the detainee's partner, children, parents, grandparents, siblings, guardian or carer. For children, parents, and siblings this includes non-biological relationships, such as a step-parent.

Clause 48(3) stipulates that detainees must pay for any mail they post unless there are good reasons why they cannot pay for the postage. Clause 68 enables the chief executive to establish bank accounts in trust for detainees. Detainees may earn nominal amounts for tasks completed in detention, and other income may be deposited into the account.

Clause 48(4) stipulates that the matters in (2) of the clause are entitlements and not to be regarded as privileges for the purposes of disciplinary action.

Clause 48(5) empowers the chief executive to deny or limit a detainee's mail if the chief executive suspects the detainee will engage in any of the behaviour listed in (a) to (d).

An example of (a) is the use of mail to communicate a threat to other detainees via third parties. An example of (b) is mail to a third party, or a victim themself, to taunt or harass the victim. An example of (c) is mail that would pre-empt, prejudice or impair the investigation of a complaint or the conduct of a disciplinary process. An example of (d) is mail to a journalist, or other individuals, to goad or provoke community feeling by glorifying offending behaviour such as rape, violence, paedophilia etc.

Clause 48(6) clarifies that mail is subject to security monitoring set out in part 9.3 and to any operating procedures that apply to mail.

Clause 48(7) authorises the chief executive to make operating procedures about how mail is sent or received; the provision of material for letters etc; and what charges should be applied for mail.

Consistent with Australian common law and Human Rights jurisprudence, any decision made to make an operating procedure or impose an operating procedure must be reasonable and proportionate to its lawful purpose.

Clause 49 — Visits by family members etc

As discussed earlier, the majority of prisoners will return to the community. Positive changes in behaviour will be greatly influenced by relationships with family and friends. Maintaining these relationships during detention is an important factor in successful rehabilitation and release of prisoners.

Clause 49(1) obliges the chief executive to provide suitable facilities at any correctional centre for detainees to receive visits.

Clause 49(2) provides detainees with an entitlement to a minimum of a 30 minute visit by a family member every week. A week being the standard week of seven consecutive days. Family member can be singular and plural by the effect of section 145(b) of the *Legislation Act 2001*, which interprets words in Acts as meaning both singular and plural unless explicitly stated otherwise.

A family member includes the detainee's partner, children, parents, grandparents, siblings, guardian or carer. For children, parents, and siblings this includes non-biological relationships, such as a step-parent.

Clause 49(3) stipulates that the matters in (2) of the clause are entitlements and not to be regarded as privileges for the purposes of disciplinary action.

Clause 49(4) empowers the chief executive to deny or limit a detainee's visits if the chief executive suspects the detainee will engage in any of the behaviour listed in (a) to (d).

An example of (a) is the use of visits to communicate a threat to other detainees via third parties. An example of (b) is a visit by a third party to taunt or harass a victim. An example of (c) is a visit that would pre-empt, prejudice or impair the investigation of a complaint or the conduct of a disciplinary process. An example of (d) is a visit by a journalist, or other individual, with the intent of goading or provoking community feeling by glorifying offending behaviour such as rape, violence, paedophilia etc.

Visits are conditional on visitors abiding by the correctional centre's laws and procedures. Consequently, clause 49(5) stipulates that visits are subject to visiting conditions set out in part 9.8.

Clause 50 — Contact with accredited people

An accredited person is a an official involved in the administration of the person's sentence, a detainee's lawyer, an official visitor, the human rights commissioner, the ombudsman, or any other person prescribed by regulation.

At common law and in human rights jurisprudence detainees have a right to access their lawyer and various relevant office holders.

Clause 50(1) enables accredited people to phone, mail or visit detainees. No minimum or maximum number of visits or period of time for each visit is set. However, this is not an absolute entitlement as the visiting conditions in part 9.8 apply.

Clause 50(2) stipulates that the matters in (1) of the clause are entitlements and not to be regarded as privileges for the purposes of disciplinary action.

Clause 50(3) empowers the chief executive to deny or limit a detainee's visits if the chief executive suspects the detainee will engage in any of the behaviour listed in (a) and (b).

An example of (a) is the use of visits to communicate a threat to other detainees via third parties. An example of (c) is a visit that would pre-empt, prejudice or impair the investigation of a complaint or the conduct of a disciplinary process.

Visits are conditional on visitors abiding by the correctional centre's laws and procedures. Consequently, clause 50(4) stipulates that visits are subject to visiting conditions set out in part 9.8.

Clause 51 — News and educational services

Detainees are not exiles to be held in isolation from the community. *A Human Rights Approach to Prison Management,* states that:

> Prisoners should also be able to keep up to date with events which are taking place in civil society, both in the communities from which they have come and in the wider world. This is a way of reducing the abnormality of the prison experience and also of

> making sure that the prisoner does not become completely detached from the community to which he or she will return on release. For these reasons prisoners should have access to books, newspapers, magazines, radio and television wherever possible. [2002, page 97]

Clause 51(1) enables detainees access to media available in the general community and to a library.

Rule 77 of the *Standard Minimum Rules for the Treatment of Prisoners* (1957) states:

> (1) Provision shall be made for the further education of all prisoners capable of profiting thereby, including religious instruction in the countries where this is possible. The education of illiterates and young prisoners shall be compulsory and special attention shall be paid to it by the administration.
> (2) So far as practicable, the education of prisoners shall be integrated with the educational system of the country so that after their release they may continue their education without difficulty.

Likewise, *A Human Rights Approach to Prison Management* notes:

> Education is not to be regarded as an optional extra to the list of activities for prisoners. Instead it is central to the whole concept of using the period in prison as an opportunity to help prisoners to re-order their lives in a positive manner. In the first place it should be focussed on basic needs so that everyone who is in prison for any length of time can be taught to read, write and make basic arithmetical calculations which will help them to survive in the modern world. [2002, page 91]

Clause 51(2) provides for academic, vocational or cultural education or training of detainees. The chief executive may approve any educational or training program provided the program provides the detainee with relevant skills, promotes rehabilitation or promotes the detainee's personal development.

Academic education contemplates certificates or degrees available at secondary or tertiary institutions. Vocational education is covered by the *Vocational Education and Training Act 2003*, which includes traineeships, apprenticeships, and other work related training. Cultural education includes learning an art or craft, a musical instrument, written art forms, textile production etc.

Clause 51(3) stipulates that approved education or training, referred to in (2) of the clause, are entitlements and not to be regarded as privileges for the purposes of disciplinary action.

Clause 52 — Health care

Clause 52 is essentially a codification of the ACT's current practice and standards. Clause 52 is also an expression of international standards of health care in prisons and remand centres.

The crux of the principle is that detainees should receive health care equivalent to the community standard. The fact of detention should not be an impediment to health care consistent with Australian norms.

Clause 52(1) provides an entitlement of health care and health care prevention to a degree equal to that provided for the Territory community.

Clause 52(2)(a) to (c) prescribes the duties the chief executive must exercise to meet the standard of health care. Clause 52(2)(d) and (e) prescribes the duties the chief executive must exercise, as far as practicable, to meet the standard of health care.

Clause 52(2)(e) uses the term rehabilitation in the medical sense. The subclause contemplates medical rehabilitation after an accident or other medical trauma. For example after a burn injury or a stroke.

Clause 52(3) stipulates the matters in the clause that are entitlements and not to be regarded as privileges for the purposes of disciplinary action.

Clause 52(4) authorises the Executive to make regulations to provide for the matters listed in (a) to (e). Subclause (d) contemplates medical rehabilitation after an accident or other medical trauma. For example after a burn injury or a stroke.

Clause 52(5) stipulates that any regulations made under 52(4) that include entitlements are to be regarded as an entitlements for the purposes of disciplinary action.

Clause 53 — Transfers to health facilities

Clause 53 sets out a way of providing health care in an ACT Health facility while also accounting for the need to continue the secure custody of a detainee.

Clause 53 provides the chief executive with the power to transfer a detainee to a health facility upon the advice of an appointed therapeutic doctor.

In transferring a detainee, corrections officers or police officers may be assigned to escort the detainee to the facility.

A detainee may only be discharged from the health facility if the health care provider believes the person is fit enough to be discharged, or circumstances warrant the chief executive directing the person be removed.

Clause 53(5) ensures that a detainee is returned to the relevant correctional centre after discharge. This clause clarifies that there is no power to discharge without ensuring that the detainee is returned to the correctional centre.

Clause 53(6) stipulates that all of the matters in the clause are entitlements and not to be regarded as privileges for the purposes of disciplinary action.

Clause 54 — Religious, spiritual and cultural needs

Section 14 of the *Human Rights Act 2004* states:

> **Freedom of thought, conscience, religion and belief**
> (1) Everyone has the right to freedom of thought, conscience and religion. This right includes—
> (a) the freedom to have or to adopt a religion or belief of his or her choice; and
> (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.
> (2) No-one may be coerced in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

Imprisonment or other forms of detention do not exclude this right.

Clause 54 requires the chief executive to provide for detainees to practice their religion or spiritual beliefs.

Clause 54(2) stipulates that where practical, detainees must have access to priests, lamas, rabbis, imams, elders or other people who lead spiritual or religious activity.

Services, texts and relevant artifacts should also be provided to detainees, where practical. The practicality of providing for religious worship or exercise of spirituality will depend upon the logistics required to meet the needs of the detainee, or detainees.

Clause 54(3) empowers the chief executive to deny or limit a detainee's practice, or request to practice, if the chief executive suspects the detainee will engage in any of the behaviour listed in (a) to (d).

An example of (a) is the use of religious services to communicate a threat to other detainee. Or the use of religious books or artefacts to hide contraband. An example of (b) is behaviour at a religious service to taunt or harass a victim. An example of (c) is behaviour or communication at a religious service that would pre-empt, prejudice or impair the investigation of a complaint or the conduct of a disciplinary process. An example of (d) is attendance at a religious service with the intent of goading or provoking community feeling, for example making anti-semitic comments at a jewish service.

Clause 54(4) upholds detainees' right not to participate in any religious, spiritual or cultural practices.

Clause 54(5) stipulates the matters in the clause that are entitlements and not to be regarded as privileges for the purposes of disciplinary action.

Clause 54(6) uses a reference to a commonwealth definition from the *Marriage Act 1961*. In the *Marriage Act 1961:*

> ***minister of religion*** means:
> (a) a person recognized by a religious body or a religious organization as having authority to solemnize marriages in accordance with the rites or customs of the body or organization; or
> (b) in relation to a religious body or a religious organization in respect of which paragraph (a) is not applicable, a person nominated by:
>
> (i) the head, or the governing authority, in a State or Territory, of that body or organization; or
>
> (ii) such other person or authority acting on behalf of that body or organization as is prescribed;
>
> to be an authorized celebrant for the purposes of this Act.

Chapter 7 — Inspection of correctional centres

A Human Rights Approach to Prison Management notes that:

> All prisons are places where men and women are detained against their will. The potential for abuse is always present. Therefore they must be institutions which are managed in a way which is fair and just. All institutions which are managed by or on behalf of the state should be subject to public scrutiny. This is especially important in the case of prisons because of their coercive nature. [2002, at page 111]

Rule 55 of the United Nations *Standard Minimum Rules for the Treatment of Prisoners* (1957) states that:

> There shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be in particular to ensure that these institutions are administered in accordance with existing laws and regulations and with a view to bringing about the objectives of penal and correctional services.

Since the *Remand Centres Act 1976* the ACT has had an official visitor that inspects the Territory's remand centres to ensure the centres are run in accordance with the law and to hear any complaints made by remandees.

The provisions in chapter 7 continue this function of the official visitor while also expanding the official visitor's responsibilities to include all detainees. Chapter 7 also remakes traditional powers of inspection by a range of statutory and non-statutory office holders.

Clause 55 — Independent inspections

Clause 55 remakes the power in the *Remand Centres Act 1976* to enable judges, magistrates and Legislative Assembly members to inspect corrections centres. The clause adds the Ombudsman and the Human Rights Commissioner as an officer who may inspect corrections centres. Staff of the Ombudsman and the Human Rights

Commissioner are included in the people who may inspect a corrections centre by the effect of section 184A of the *Legislation Act 2001*.

Clause 55(2) extends the power to places where detainees are engaged in work or other activities.

Clause 56 — Official visitors — appointment

Clause 56 requires the Minister to appoint at least one official visitor. More than one official visitor may be appointed.

The Minister must appoint a person who has suitable qualifications or experience.

Clause 56(3) excludes public servants from being eligible to be an official visitor. A public servant is obliged to follow the direction of a relevant chief executive and their Minister. Appointing a public servant would create a conflict of interest between the individuals obligations to their Minister, and their obligation to fulfil the functions as an independent officer under clause 57. This provision is consistent with the international instruments as set out in *A Human Rights Approach to Prison Management,* 2002, pp 111–113.

Because the individual appointed will not be a public servant, the appointment will be subject to Part 19.3 of the *Legislation Act 2001*.

The term of an official visitor's appointment is limited to three years under clause 56(4). This does not prevent the same person being appointed for a subsequent term.

Conditions of remuneration and any other terms of appointment are to be agreed between the Minister and are subject to determinations made by the remuneration tribunal.

Clause 57 — Official visitors — functions

Clause 57(1) lists the functions of an official visitor. The official visitor is authorised to visit correctional centres and any place detainees are directed to work outside a centre.

Official visitors also receive and investigate complaints under clauses 58 and 59.

Clause 57(1)(b) enables other laws to assign functions to the official visitor.

Clause 57(2) stipulates that the official visitor must make the minimum number of visits set out in the conditions of the official visitor's appointment. The official visitor may make visits at reasonable times. Examples are given of reasonableness. It is expected that the chief executive will make every effort to enable the official visitor at any time the visitor requests. However, in some circumstances a visit will create a risk to the official visitor.

Clause 57(3) provides the official visitor with the power to report any concerns about a correctional centre directly to the Minister. The report must be in writing.

Clause 57(4) obliges corrections officers to cooperate with the official visitor's endeavours to carry out the visitor's duties.

Clause 58 — Complaints to official visitors

Clause 58 enables detainees to make complaints to the official visitor. Complaints must be directed to issues about: the detainee's detention; the operation of the correctional centre; or conditions of the centre, work, or activities required of the detainee.

Clause 58(2) obliges the chief executive to tell the official visitor a detainee wishes to see the visitor without any undue delay.

Clause 58(3) ensures that the detainee is not obliged to disclose the nature of the complaint to the chief executive.

Clause 59 — Investigation etc by official visitors

Clause 59 obliges official visitors to investigate complaints. Frivolous or vexatious complaints may be set aside by the visitor.

Clause 59(2) gives the official visitor the discretion to make a recommendation directly to the chief executive, or report to the Minister about the complaint.

As a means of accounting for the official visitors investigations and to inform the Minister of the condition of correctional centres, clauses 59(3) and 59(4) require the official visitor to report quarterly to the Minister.

Clause 60 — Official visitors — end of appointment

Clause 60(1) gives the Minister the power to end the appointment of an official visitor if the official visitor does anything listed in (a) to (f), or under (g) if the visitor has an incapacity that precludes the exercise of their duties.

If the official visitor becomes a public servant, the appointment is automatically ceased.

By section 210 of the *Legislation Act 2001*, the official visitor may also resign their appointment.

Clause 61 — Relationship with other inspection laws

This clause clarifies that any existing Act that authorises inspections for the public benefit or to uphold the law still applies to a corrections facility. This Bill and any Act authorising inspection must be read to be consistent with the inspection law unless the Acts set out a contrary intention.

The clause qualifies any open-ended inspection power by enabling the chief executive to make arrangements for the safety of inspectors carrying out their duty. The clause also obliges any inspectors or police to abide by any direction given by the chief executive that is relevant to safety and security.

Chapter 8 — Admission to correctional centres

The *Alexander Maconochie Centre Functional Brief* notes:

> The early hours and days following reception and admission are particularly vulnerable times for new arrivals. Accordingly, the emphasis during prisoner admission and assessment needs to be on one-on-one interviews and the timely and comprehensive sharing of information to manage risk and to give effect to duty of care considerations. [2005, page 44]

Understanding the physical and mental health of a detainee is essential for the first difficult weeks of detention and to ensure the detainee remains healthy until the detention ends.

Admission is also a time of risk for getting basic facts wrong and for the start of a prisoner's rehabilitation to be delayed. Likewise, admission poses the greatest risk for the smuggling of drugs and other contraband.

Chapter 8 sets out what needs to be done, and what powers may be exercised, to admit a detainee to a corrections centre.

Clause 62 — Meaning of admission to correctional centres

Clause 62 provides a short-hand definition of admission to clarify that admission also means the first session of periodic detention to be served by an offender, but not every subsequent session the offender is required to attend.

Clause 63 — Authority for detention

Clause 63 stipulates that there must be a relevant warrant for imprisonment, remand or other form of detention. Detention other than remand or imprisonment may not require a warrant, but some form of discernible authority must be provided.

Clause 63(2) requires the authority to detain a person to be given to the centre's administrator before the person is admitted.

Clause 63(3) clarifies that a person may be detained even if there is a defect in the warrant or relevant instrument, provided that the authority for detention is demonstrable.

Chapter 3 of the *Crimes (Sentence Administration) Act 2005* sets out the relationship between committal orders, remand orders, and their respective warrants. In essence, the order to commit an offender or remand a person remains valid despite there being a defect in the warrant.

Clause 64 — Identification of detainees

To ensure the identity of a detainee is confirmed and maintained throughout detention, the chief executive may take the things mentioned in 64(1)(a) to (g).

These things must be destroyed if the person is acquitted (apart from special verdicts relating to mental states of mind) or the offence is no longer prosecuted.

Clause 64(3) clarifies that things taken of, or from, the detainees body to identify the detainee should not be destroyed if the person is acquitted of one offence but convicted of another or a prosecution for another offence remains on foot.

Clause 64(4) stipulates that blood samples may only be taken by a health professional appointed for non-therapeutic tasks. This provision does not prevent blood samples being taken by authorised officers under the *Crimes (Forensic Procedures) Act 2000.*

Clause 65 — Information about entitlements and obligations

Clause 65 ensures that the chief executive provides each detainee with the information listed in 65(1)(a) to (g). The information provided to each detainee is not limited to this list. The examples of other information that might be provided are given. Clause 65(2) enables the chief executive to use plain language when providing the information.

Subclauses (3) and (4) obliges the chief executive to use interpreter services if the person cannot speak English, has trouble with English, or uses another form of communication such as AUSLAN.

Clause 65(5) requires the chief executive to enable detainees to access copies of the Act, its regulations, corrections policies, and operating procedures. This clause does not oblige the chief executive to make, or give, each and every detainee a copy of these documents. Nor does it prevent the chief executive from giving a copy of a document to a detainee upon request.

Clause 65(6) obliges the chief executive to contact diplomatic or consular representatives upon the request of a foreign national being admitted to a correctional centre.

Clause 66 — Initial assessment

Clause 66 directs the chief executive to assess each detainee admitted to a centre for any risks and needs associated with the detainee's health, safety or security.

Clause 66(b) requires the chief executive to act upon any immediate risks or needs identified.

Any ongoing risks and needs must be addressed in the case management plan.

Clause 67 — Health assessments

Principle 24 of the United Nation's *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988) states:

> A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after [their] admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Clause 67(1) creates a statutory requirement for health assessments to occur within 24 hours of a detainee's admission into a corrections centre.

Clause 67(2) enables an initial assessment by a nurse and subsequent review by a medical officer, who must be a doctor appointed under clause 21. Alternatively, the assessment may be conducted by the doctor in the first instance.

Clause 67(3) ensures that an assessment of the risk of self harm is inherently part of every initial assessment.

Clause 68 — Alcohol and drug tests on admission

Alexander Maconochie Centre Functional Brief states that:

> Illicit drugs pose one of the most serious problems in prisons. Drug use can cause death or serious illness (through overdosing), spread blood borne viruses and diseases such as AIDS/HIV and Hepatitis B and C (through shared use of dirty needles), react badly with prescribed drugs, cause violent behaviour, jeopardise rehabilitation, and impact negatively on families. [2005, page 49]

A market for illicit drugs in a prison or remand centre also creates a greater risk for the corruption of people who work at the facility.

Clause 68 provides an explicit authority for the chief executive to direct detainees to provide samples for drug testing.

Division 9.6.2 sets out the procedure for taking samples.

Clause 69 — Strip search on admission

Preventing contraband finding its way into a prison, particularly weapons and drugs, is an important method of keeping every detainee and employee safe.

Part 9.4 empowers the chief executive officer to direct searches and sets out how searches must be carried out. Clause 69 authorises the chief executive to direct a strip search upon admission without the need to decide if a search is warranted by any evidence of a detainee concealing something. Clause 69 intends to enable a strip search to occur as a routine part of the admissions process.

Part 9.5 enables any contraband, or suspected contraband, to be seized by the chief executive.

Clause 70 — Property of detainees

Clause 70 gives the chief executive the discretion to allow detainees' property to be brought into a corrections facility.

70(2) allows the chief executive to qualify the nature and amount of property, where it may be kept in the facility and how it may be used. For example, the chief executive may allow a hand-held computer game to be kept in a detainee's accommodation but may not allow it to be used during a work shift.

Any allowed property taken into the centre by a detainee must be recorded in the register set out in chapter 9.

Clause 70(4) authorises a policy or operating procedure to be made that sets out the detail of the issues mentioned in (a) to (e). An operating procedure or policy would not supersede the provisions of this Bill, nor supersede any civil law property rights not affected by this Bill.

Clause 71 — Security classification

As part of the checklist for admission, clause 71 requires a detainee admitted to the corrections centre to be classified for security. Clause 79 below sets out the matters that must be considered when classifying a detainee.

The detainee's security classification will affect the placement of the person in the prison.

Clause 72 — Case management plan

The overwhelming majority of prisoners will finish their sentence and return to the broader community. Preparation for release and management of the offender's health and time during detention needs to start as soon as possible after admission.

As part of the checklist for admission, clause 72 requires the chief executive to prepare a case management plan for each detainee. Clause 77, below, governs what must be included in the plan.

Clause 73 — Entries in register of detainees

Consistent with the identification of detainees and the correct legal disposition associated with each detainee, clause 73 requires the chief executive to record the details of each detainee in the register.

Chapter 9, clause 75, establishes the register and is discussed below.

Chapter 9 — Management and security

The prime operational task of a correctional facility is to provide secure custody of people committed to detention. The management of that custody must be humane and attend to the common human needs of detainees.

Alexander Maconochie Centre Functional Brief, states that:

> The Operating Model of the Centre will be located on a continuum from indirect supervision to direct supervision. The major features of the former are a heavy reliance on distant electronic surveillance and the confinement of officers to secure stations. In contrast, the direct supervision model of the AMC is based on extensive staff (as role models) and prisoner contact, the development of positive relationships with attendant improved surveillance and security and institutional "climate". [2005, page 9]

Part 9.1 — Management and Security — general

Clause 74 — Compliance with chief executive's directions

Clause 74 is an overarching power for the chief executive to give directions to a detainee. The directions can be oral or in writing. The power to give directions can be delegated, as discussed in clause 16 above.

Clause 74 — Register of detainees

A register of detainees is a means to ensure the lawfulness of a person's detention. The register envisaged by this Bill also enables continuity of management by providing a record of the person's identity, relevant health matters, case management plans, and any specific needs of the detainee. The records required to be kept are set out in 74(2).

Clause 75(3) stipulates that anyone authorised to inspect a correctional centre under chapter 7, discussed above, may also inspect the register.

Clause 75 does not prescribe that the register must be a hard-copy book. The register may be electronic.

Clause 76 — Health reports

The Minister and department assigned the foreshadowed Act by the government will ultimately responsible for the care of detainees.

Over many years coroners and courts have expressed the need for corrections agencies to know about the health of detainees in order to avert a crises, or to respond to one. For example: Anthony KENNEDY, Victoria, 2002; Dylan Robert GREEN, WA, 2002; Hendrik Jan GROOTHEDDE, WA, 2003; Damien George GARLETT, WA, 2003; Craig Mark ALLEN, SA, 2000; Margaret LINDSAY, SA, 2001; Darryl Kym WALKER, SA, 2003; Bruce LIM-WARD, NSW, 2003; Cedric DIXON, NSW, 2002; Mario NAVASCUES, NSW, 2003; Edward James RUSSELL, NSW, 1999; Gregory Francis McCARTHY, NSW, 2002; Marcus Patrick McTAGGART, NSW, 2001; James BRINDLE, NSW, 1997.

Clause 76 provides an explicit authority for the chief executive administering the foreshadowed Act to require health information from other chief executives mentioned in 76(8).

Compliance with a request for information is an obligation, not a discretion. The government intends this clause to be a lawful authority for health agencies to provide health records about detainees without having to decide compliance with the privacy principles in the *Health Records (Privacy and Access) Act 1997.* Section 6 of the *Health Records (Privacy and Access) Act 1997* enables application of a Territory law as lawful authority not to comply with the privacy principles.

Clause 76 does not oust any existing or future obligations upon the chief executive, or corrections officers, to treat any information about detainees as confidential.

Section 9(m) of the *Public Sector Management Act 1994* obliges public servants:

> (m) not disclose, without lawful authority—
> (i) any information acquired by him or her as a consequence of his or her employment; or
> (ii) any information acquired by him or her from any document to which he or she has access as a consequence of his or her employment;

Any corrections officers who are authorised access to health information of detainees as part of their duties would be obliged to keep that information confidential outside of their duties.

Clause 76(4) obliges the chief executive to organise the doctor appointed under clause 21 to assess the reports and prepare a health schedule for each detainee's case management plan.

The health schedule is a summary of the detainee's medical conditions, medical risks, potential symptoms, and treatment for the detainee. The health schedule will be able to be accessed in a medical crisis to facilitate quick assessment of the situation and organise any necessary assistance or treatment for a detainee.

Clause 76(6) enables an operating procedure to be made to set out the detail to be included in a health schedule. The procedure would be able to also specify who may access the schedule.

Clause 76(7) is an obligation upon the chief executive ensure access to medical information is only available to those who have authority to access the information.

Clause 77 — Case management plans

The rehabilitation of offenders sentenced to imprisonment needs to start at the earliest point in their sentence. The government intends that case management plans for prisoners will be an important part of a prisoner's rehabilitation and preparation for release.

The plans envisaged incorporate issues relevant to the management of the prisoner as well as long-term rehabilitation goals.

Clause 77(1) requires the chief executive to prepare case management plans for prisoners, but allows a discretion for remandees. In the case of remandees, the chief executive may develop some elements of a plan, but not others.

Clause 77(2) sets out what must be in a case management plan. 77(2)(d) contemplates the various programs and courses that address offending behaviour. If an offender genuinely deals with their offending behaviour, the record will contribute to the offender's preparation for parole inquiries — if they are eligible for parole.

Clause 77(3) sets out what can be included in a case management plan. 77(3)(f) ensures that strategies can be put in place for detainees who have a disability, or

impairment, of any nature. The provision is particularly important for assisting offenders in this category to prepare for their release, including preparation for parole inquiries.

Clause 77(3)(g) provides explicitly for a case management plan to assist a prisoner to prepare for a parole inquiry and to ensure the prisoner is aware of their earliest release date.

Clause 77(3)(h) authorises the Executive to add further matters to the case management plan by regulation.

Clause 78 — Transgender and intersex detainees — sexual identity

Section 169A of the *Legislation Act 2001* defines a 'transgender person' as a person who identifies, or has identified, as a member of a different sex by living, or seeking to live, as a member of that sex.

Section 169A of the *Legislation Act 2001* defines an 'intersex person' as a person who, because of a genetic condition, was born with reproductive organs or sex chromosomes that are not exclusively male or female.

The sexual identity of a person has a critical impact upon the person's placement within a remand centre or prison and how intimate searches are conducted.

It is important that the corrections agency knows how the person identifies upon admission.

Clause 78(3) provides a decision-making choice for the detainee and the chief executive if the detainee doesn't or refuses to nominate an identity. The chief executive must take advice on the matter from a doctor, by way of (5).

Under clause 78(4) the chief executive may change the sexual identity associated with the detainee, if the detainee requests so. The chief executive must take advice on the matter from a non-therapeutic doctor, by way of (5).

A detainee must be notified of any decision regarding the detainee's sexual identity. The register in clause 75 must also be amended accordingly.

Clause 79 — Security classification — basis etc

The government has foreshadowed in the *Alexander Maconochie Centre Functional Brief*, 2005, that the prison will be designed with relatively small units and separation between areas to allow for the accommodation of different prisoners according to security classification.

Clause 79 requires detainees to be classed for their security risk. This classification is subject to yearly review.

Clause 79(2) sets out the factors that must be considered when deciding the class of security risk the detainee poses. The factors contemplate the risk the person may pose within the prison, as well as the risk they pose if they escape.

Clause 79(4) invokes the human rights principle of proportionality in relation to classing detainees. Proportionality requires that the exercise must be: necessary and rationally connected to the objective; the least restrictive in order to accomplish the object; and not have a disproportionately severe effect on the person to whom it applies.

Clause 80 — Prohibited things

Preventing contraband from being kept, or smuggled into, a correctional centre is a key way of keeping every detainee and employee safe.

Clause 80 enables the chief executive to declare things, or classes of things, to be prohibited. Section 145(b) of the *Legislation Act 2001* interprets words in Acts as meaning both singular and plural unless explicitly stated otherwise. Any prohibited thing under clause 80 would apply to the whole class of things. For example, if scissors were prohibited then all scissors would be prohibited.

Upon admission the chief executive must inform detainees of their obligation not to possess prohibited things.

Any declaration must be notified on the ACT's legislation register in accordance with the *Legislation Act 2001*.

Clause 81 — Possession of prohibited things

Clause 81 creates an offence for a detainee to possess a prohibited thing, notified in clause 80.

It is a defence to the offence if the chief executive approves the detainee's possession of the thing.

Possession of a prohibited thing is also a disciplinary breach under chapter 10.

Clause 82 — Work by detainees

Clause 82 authorises the Executive to make regulations about work that may be done by detainees and nominal payments for that work.

Clause 217, discussed below, stipulates that there is no employment relationship between detainees and the ACT Government irrespective of any work completed or nominal payments made.

It is envisaged that detainees would be assigned tasks within correctional centres and that some prisoners would engage in community service while under guard.

Any payments made would be deposited into the trust account discussed at clause 83 below.

Clause 83 — Trust accounts for detainees

Clause 83 requires the chief executive to hold money belonging or owing to detainees in a trust account.

Clause 83 authorises any fines incurred as a consequence of discipline to be deducted from a detainee's account.

Detainees may pay for approved goods and services from this account.

Clause 83(3) empowers the executive to make regulations about the management of trust accounts.

Clause 84 — Prohibited areas

This clause provides the chief executive with a power to declare parts of correctional facilities to be prohibited areas. The areas may be prohibited to detainees, visitors, classes of workers at facilities or classes of corrections officers.

The clause does not create an offence in its own right. However, a disciplinary breach would apply to detainees and an offence for visitors would apply if they disobeyed a direction not to enter a prohibited area. Likewise for corrections officers and other staff, entering a prohibited area would be a disciplinary breach under the *Public Sector Management Act 1994* or of their relevant contract.

Clause 85 — Non-smoking areas

Tobacco, coffee and tea are likely to be the only legally available drugs within the prison or remand centres. The government foreshadows that quit-smoking programs will be readily available to all prisoners. However, a ban on all smoking in the prison would create considerable behavioural problems at this time in history.

Consequently, clause 85 displaces existing public law regulating smoking and authorises the chief executive to regulate non-smoking and smoking areas in the prison.

Clause 86 — Management and security — corrections policies and operating procedures

This clause enables further policies and operating procedures to be made that sets out the operation, policy or other detail of management and security. As set out in section 14 any policy or operating procedure must be consistent with this Act.

Subsection (2) requires the chief executive to make operating procedures to account for births, deaths and marriages within the prison.

Part 9.2 — Segregation

The segregation of detainees is a fundamental way of managing the safety and health of detainees. The segregation contemplated in part 9.2, which may include separate confinement, must be distinguished from the sanction of separate confinement for a breach of discipline in chapter 10. Although the results may be similar, the purposes of segregation in part 9.2 are for the purposes of managing safety and health.

A breach of human rights would occur if the powers in part 9.2 were exercised for a purpose other than health and safety.

The exercise of any power in this part must apply the human rights principle of proportionality. Proportionality requires that the exercise of powers must be: necessary and rationally connected to the objective; the least restrictive in order to accomplish the object; and not have a disproportionately severe effect on the person to whom it applies.

The imposition of segregation is open to external review provided by the Bill and judicial review under common law and the *Administrative Decisions (Judicial Review) Act 1989.*

Clause 87 — Meaning of segregation

'Segregation' has a wide meaning. It can mean anything from restricting a detainee from being in certain parts of a centre at certain times, through to restricting a detainee to a particular cell.

The government foreshadows that the Alexander Maconochie Centre will have a management unit with dedicated cells to enable separation of prisoners, individually or as a group, from the main body of detainees.

Clause 88 — Segregation under Part 9.2 — purpose

A breach of this Bill and human rights would occur if the powers in part 9.2 were exercised for a purpose other than health and safety.

Clause 89 — Segregation — safety and security

Clause 89 empowers the chief executive to segregate a detainee if the detainee poses a risk to another detainee or staff member at a centre; or if the detainee poses a risk to the security or order of the correctional centre.

Clause 89(2) requires the chief executive to consider the impact of segregation upon a detainee because of cultural reasons. This is particularly the case if the person is indigenous. In some cases the chief executive may not be aware of any cultural considerations, consequently the obligation would not apply.

Clause 89(3) requires the chief executive to notify the detainee of the direction and give reasons for the direction.

Clause 89(4) enables the chief executive to revoke the direction if the situation requiring segregation has changed.

Clause 89(5) enables the chief executive to review segregation at any time upon their own initiative or upon a request from the detainee. This clause also requires the chief executive to review a segregation direction if a transfer to another centre is imminant. As a matter of course, the chief executive must review a segregation direction every 21 days.

Clause 89(6) requires the chief executive to make an active decision about segregation after a review. This ensures that each decision made to continue segregation is accountable and can be varified by any authority reviewing the decision or inspecting the prison.

Clause 89(7) clarifies that many directions to segregate may be made consecutively.

Clause 89(8) provides a means for ending segregation directions upon a detainee's transfer to NSW. Once custody of a detainee is passed to the NSW system, the NSW authorities are responsible for making decisions for any necessary segregation.

(8) also automatically expires a second or subsequent direction under (6)(b) after 90 days. This provision ensures that in the absence of any further decision there is a maximum time a person may lawfully be in segregation. The intention of the provision is to enhance the obligation upon the chief executive to make decisions following review in (5)(c).

Clause 90 — Segregation — protective custody

Clause 90 empowers the chief executive to segregate a detainee if the detainee is at risk from another detainee or detainees. The power may be exercised by the chief executive at their own volition, or upon request by the detainee.

Clause 90(3) requires the chief executive to notify the detainee of the direction and give reasons for the direction.

Clause 90(4) enables the chief executive to revoke the direction if the situation requiring segregation has changed.

Clause 90(5) enables the chief executive to review segregation at any time upon their own initiative or request from the detainee. This clause also requires the chief executive to review a segregation direction if a transfer to another centre is imminant. As a matter of course, the chief executive must review a segregation direction every 21 days.

Clause 90(6) requires the chief executive to make an active decision about segregation after a review. This ensures that each decision made to continue segregation is accountable and can be varified by any authority reviewing the decision or inspecting the prison.

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(8) also automatically expires a second or subsequent direction under (6)(b) after 90 days. This provision ensures that in the absence of any further decision there is a maximum time a person may lawfully be in segregation. The intention of the provision is to enhance the obligation upon the chief executive to make decisions following review in (5)(c).

Clause 91 — Segregation — health

Clause 79 empowers the chief executive to segregate a detainee if the detainee is at risk because of their physical or mental health, or poses a risk to anyone else because of their physical or mental health.

For example, a detainee who has a mental health condition may be experiencing behavioural problems while adjusting to a new medication. If the detainee poses a risk of violence during this period the chief executive may segregate the detainee to prevent violence.

Another example would be a detainee who is illiciting symptoms of illness but is in denial about the symptoms and won't discuss them with the doctor. The chief executive may segregate the person to better assess their health.

Clause 91(2) requires the chief executive to notify the detainee of the direction and give reasons for the direction.

Clause 91(3) enables the chief executive to revoke the direction if the situation requiring segregation has changed.

Clause 91(4) enables the chief executive to review segregation at any time upon their own initiative or a request from the detainee. If a therapeutic doctor requests the review, the chief executive must review the segregation direction. This clause also requires the chief executive to review a segregation direction if a transfer to another centre is imminant. As a matter of course, the chief executive must review a segregation direction every 21 days.

Clause 91(5) requires the chief executive to make an active decision about segregation after a review. This ensures that each decision made to continue segregation is accountable and can be varified by any authority reviewing the decision or inspecting the prison.

Clause 91(6) clarifies that many directions to segregate may be made consecutively.

Clause 91(7) clarifies that in making a decision to segregate, or when reviewing segregation, the chief executive is obliged to consider the doctor's advice.

Clause 92 — Interstate segregated detainees transferred to ACT

Clause 92 enables interstate segregation orders to continue to apply to a detainee by translating the order into a relevant direction under part 9.2 of the Bill.

The interstate order only lasts three days once a person is in the custody of the Territory. Before or after three days the chief executive may decide if a segregation order is necessary for the detainee in the Territory.

Clause 92(3) clarifies that an interstate direction or order is an order that corresponds in substance but not form. It also recognises a direction or order made by any Australian jurisdiction under corresponding law.

Clause 93 — Segregated detainees removed to NSW

Section 26 of the *Crimes (Sentence Administration) Act 2005* recognises that historically, people sentenced to imprisonment under ACT law have been committed to NSW to serve their sentence. The foreshadowed ACT prison will inverse the current number of ACT offenders serving sentences in NSW. Once the prison is commissioned, the number of ACT offenders serving their sentence in NSW will be a minority, not the majority.

Clause 93 enables segregation directions to continue applying after a detainee is transferred to NSW custody.

Clause 93(2) enables the direction to be interpreted and modified according to NSW law. The direction ends three days after the detainee is in NSW custody.

Clause 94 — Segregation not to affect minimum living conditions

Clause 94 ensures that the conditions prescribed by clause 12 and chapter 6 of the Bill are not ousted by segregation directions.

However, 94(2) ensures that the application of the standards does not set aside the effect of the segregation direction. In some cases the circumstances may require a temporary suspension of the conditions. For example, if a detainee is segregated because they have a contagious disease, a visit, as prescribed by clause 49, may not be possible.

Clause 95 — Application for review of segregation directions

Clause 95 enables a detainee to apply for a review of a segregation decision under this part of the Bill.

An application is made to an adjudicator, and it must be made within 7 days of the detainee being notified of a segregation decision.

An ‘adjudicator’ is a magistrate appointed to review disciplinary matters and segregation decisions. Appointments of adjudicators is at clause 176 below.

Clause 95(3) stipulates that the segregation decision is not to be stayed, set aside or stopped in any way if an application for review is made. The segregation decision remains in force unless an adjudicator makes another decision in its place or revokes the decision.

Clause 96 — Review of segregation directions

Clause 96 empowers an adjudicator to review a segregation direction or refuse to do so.

If an adjudicator decides to review a segregation direction the inquiry procedure in chapter 11 must be used. If an adjudicator refuses to review the segregation clause 96(5) requires the adjudicator to provide reasons for the refusal. The clause enables the Executive to make regulations modifying the chapter 11 procedures.

After an inquiry, the adjudicator may confirm the segregation direction; or make a decision that the chief executive has the power to make, which substitutes for the existing decision. The adjudicator can vary the existing direction, or set it aside. The clause enables the adjudicator to lift segregation.

Clause 97 — Other separation of detainees

Clause 97 obliges the chief executive to separately accommodate men and women in a corrections centre.

Clause 97 empowers the chief executive to make policies or operating procedures that provide for the general separation of detainees.

An operating procedure may separate classes of detainees from using particular facilities at the same time; or require work teams to be separated on the basis of detention status or other factors such as vulnerability.

Part 9.3 — Monitoring

Section 12 of the *Human Rights Act 2004* states that everyone has the right not to have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

A consequence of lawful detention is the inevitable displacement of that right to a degree necessary to secure the person in custody and run a safe prison or remand centre.

Monitoring the activities and whereabouts of detainees is a way to prevent violence, dealing in drugs or other contraband and escape. It is an essential part of modern prisons and remand centres.

Clause 98 — General considerations

Clause 98 sets out the factors in (a) to (g) the chief executive must engage when establishing systems to monitor detainees, or exercising the powers to monitor individual detainees.

A number of the factors are counterposed, such as the need to detect prohibited things entering a prison versus the need to protect the privacy of a detainee. In this sense, the chief executive or their delegate must exercise their good judgment.

Clause 98 requires the application of the human rights principle of proportionality. In this case, proportionality requires the exercise of powers must be: necessary and rationally connected to the objective; the least restrictive in order to accomplish the object; and not have a disproportionately severe effect on the person to whom it applies.

Clause 99 — Monitoring at correctional centres

Clause 99 provides authority for monitoring any part of a correctional centre. It is envisaged that the Alexander Maconochie Centre would have extensive closed circuit cameras.

Clause 99 is subject to clause 98.

Clause 100 — Personal monitoring devices

As discussed earlier, the new prison will be designed with relatively small units and separation between areas to allow for the accommodation of different prisoners according to their security classification.

In addition to ensuring detainees are where they should be, it is also important to the safety of corrections staff and other employees for security manager to know where they are during their duties.

Clause 100 empowers the chief executive to direct anyone entering a correctional centre to wear an electronic monitoring device.

The government foreshadows that the Alexander Maconochie Centre will use radio devices worn on the wrists of detainees, staff and relevant visitors. These devices will be monitored by a central area. Each device is uniquely identified and signals the location of the wearer within metres of accuracy.

The use of such a system will reduce the level of observation required. The system will also improve the safety of the prison by enabling corrections staff to immediately know the location of detainees, staff and relevant visitors in the event of violence, accident or other emergency.

Clause 101 — Interfering with personal monitoring devices

Clause 101 makes it an offence to interfere with personal monitoring devices that are required to be worn by clause 100.

The devises envisaged will be tamper proof and will detect attempts to remove the device or block its signal.

Interfering with a device will also be a disciplinary breach in chapter 10.

Clause 101(2) clarifies that the liability is not limited to the wearer of the device. If another person interferes with the device they are liable for the offence.

Clause 101(3) provides a defence to the offence if the interference is authorised by the chief executive.

Clause 101(4) defines ‘interfere’ to include a range of things that would hinder or stop the function of the device.

Clause 101 is not a strict liability offence.

Clause 102 — Monitoring telephone calls etc

As discussed in clause 49, the chief executive has a power to deny or limit a detainee’s phone calls or other electronic communication, such as e-mails, if the chief executive suspects the detainee will undermine security at a prison, re-victimise a victim, circumvent an investigation or cause community distress.

Clause 102 authorises the chief executive to monitor phone calls, and other electronic communication, to detect for the matters mentioned above and for any other criminal activity. The parties to a communication must be informed that the communication is open to monitoring.

If evidence of a criminal offence is gleaned from monitoring, the police must be advised. Investigations of offences are a function of the police.

The chief executive is not authorised to monitor protected communication, which is communication with the people mentioned in 102(5) acting in an official capacity.

102(5) also contemplates 'electronic communication' in broad terms and includes technology that does not yet exist at the time of the introduction of this Bill.

Clause 103 — Monitoring ordinary mail

Akin to the reasons informing the power to monitor phone calls, discussed above, clause 103 empowers the chief executive to monitor ordinary mail. Ordinary mail is any mail other than the categories of mail set out in the definition of protected mail in 103(4).

The chief executive may open and inspect a detainee's ordinary mail. Ordinary mail may be read if the chief executive believes the mail will undermine security, revictimise a victim or circumvent any investigative process.

If the monitoring of mail reveals evidence of an offence the police must be advised. Investigations of offences are a function of the police. See clause 105 below.

Clause 103(3) authorises the chief executive to conduct random reading of detainees' mail in addition to the suspicion based power of clause 103(2). An operating procedure can be drafted to set out the detail of how this power will be exercised.

Clause 103(4) defines 'protected mail' as correspondence between a detainee and the people listed in (a) to (e) acting in their official capacity. 'Search' is also defined broadly so that it would be unnecessary to physically open every piece of mail.

Clause 104 — Monitoring protected mail

Protected mail may be opened in the presence of a detainee if it is suspected that the mail is dangerous or contains contraband.

Protected mail may only be read with the written consent of the detainee.

Clause 105 — Mail searches — consequences

Clause 105 requires any mail that is searched, but not seized, to be delivered as intended to the addressee.

Clause 105(2) requires the chief executive to pass on information that may be evidence of an offence to the police.

Part 9.4 — Searches

A Human Rights Approach to Prison Management states:

> Individual prisoners . . . will also have to be personally searched on a regular basis to make sure that they are not carrying items which can be used in escape attempts or to injure other people or themselves, or items which are not allowed, such as illegal drugs. The intensity of such searches will vary according to circumstances.
>
> . . . On other occasions, especially if there is reason to believe that individual prisoners have something secreted about their person or when they are designated as high risk prisoners, it will be necessary to carry out what is known as a strip search. This involves requiring prisoners to remove all clothing and to show that they have nothing hidden about their person.
>
> There should be a detailed set of procedures which staff have to follow when carrying out personal searches. These procedures:
> - should define the circumstances in which such searches are allowed;
> - should ensure that prisoners are not humiliated by the searching process, for
> - example, by having to be completely naked at any time;
> - should stipulate that prisoners should be searched by staff of the same gender;
> - should prohibit security staff from carrying out internal searches of a prisoner's body. [2002, page 64]

Part 9.4 provides for searches of people and places within the boundaries of correctional facilities. Each kind of search sets out the circumstances that trigger the power to conduct the search and the intrusiveness allowed by the search.

Division 9.4.1 — Searches — general

Clause 106 — Definitions — searches

Clause 106 sets out the definitions of the types of searches contemplated by part 9.4.

The definitions are derived from the *Crimes Act 1900,* part 10.

Clause 107 — Intrusiveness of searches

Clause 107 obliges the officer conducting the search to engage the type of search that is commensurate with the circumstances.

Clause 107 also invokes the principle of proportionality, the exercise of the power must be: necessary and rationally connected to the objective; the least restrictive in order to accomplish the object; and not have a disproportionately severe effect on the person to whom it applies.

Clause 108 — Searches of transgender and intersex detainees

Clause 108 clarifies that the sex of the person to be searched is the sex recorded in the register of detainees. How a detainee's sexual identity is established is set out in clause 78, above.

Clause 109 — Register of strip and body searches

Clause 109 requires the chief executive to keep a register of strip searches and body searches. The register must include the information set out in 109(2)(a) to (f).

Clause 109(4) stipulates that anyone authorised to inspect a correctional centre under chapter 7, discussed above, may also inspect the register.

Clause 109 does not prescribe that the register must be a hard-copy book. The register may be electronic.

Division 9.4.2 — Scanning, frisk and ordinary searches

Clause 110 — Scanning, frisk and ordinary searches — directions

Clause 110 empowers the chief executive to direct a scanning search, frisk search or ordinary search of a detainee, corrections officer or anyone else who is working at a correctional centre or visiting a correctional centre. The discretion to order a search by the chief executive must be based upon the need to uphold the safety and security of the correction centre. The exercise of this discretion is not based upon individualised suspicion.

Clause 110(2) empowers all corrections officers to conduct a scanning, frisk or ordinary search of a detainee if the officer suspects the detainee is carrying contraband or something that is a risk to the safety or security of the centre.

Clause 110(1) may be exercised by way of operating procedure. For example, the chief executive may direct that all people entering the prison, or parts of the prison, must enter through a scanning device. Alternatively, all detainees returning from work duties outside of a remand centre must undergo a frisk search.

Clause 111 — Scanning, frisk and ordinary searches — requirements

Clause 111 sets out the procedure required for scanning, frisk and ordinary searches.

Officers must be the same sex as the detainee, which includes identifying as a particular sex — see clauses 78 and 108 above. Alternatively, another corrections officer or employee working at the corrections centre who is the same gender as the detainee, must be present. The other person of the same gender observing the search of the detainee, cannot themselves be a detainee.

Division 9.4.3 — Strip searches

Clause 112 — Strip searches — directions

Clause 112 empowers the chief executive to conduct a strip search if the chief executive believes that the detainee is concealing something that:

- may be a prohibited thing;
- may be used to intimidate someone;
- may be used to engaged in an offence or disciplinary breach;
- may be a risk to safety; or
- may be a risk to the security or good order of the centre.

Clause 112(2) clarifies that a strip search may be conducted immediately after a less intrusive search. However, this does not oust the requirement of grounds for a strip search.

Clause 113 — Strip search requirements

Clause 113 sets out the procedure required for strip searches.

Officers must be the same sex as the detainee, which includes identifying as a particular sex — see clauses 78 and 108 above. At least one other correction officer must also be present and may assist in the search.

Clause 113(2) ensures that a strip search does not involve any more officers than necessary. A group of officers observing a strip search may be regarded as humiliating treatment and would be a breach of human rights.

Clause 113(3) authorises other corrections officers present to assist in the search.

Clause 113(4) authorises the corrections officer conducting the search to give the detainee directions in order to facilitate the search. The clause contemplates directions to the detainee that would enable reasonable view of parts of the body that may not readily visible. For example, behind the ears, under arms, under feet. While a direction that a detainee open their mouth would be reasonable, only a visual inspection of the mouth by the officers in question would be lawful.

Clause 114 — Strip searches — general rules

Clause 114 ensures that the dignity and privacy of the person being strip searched is upheld as far as practicable.

Clause 114(1) requires strip searches to be conduced in a private area or an area that provides reasonable privacy.

Clause 114(2) prohibits strip searches to be conducted in the presence of a person of the opposite sex. The presence of other people not necessary for the search, whether they are correction officers or not, is also prohibited.

Clause 114(3) prohibits the search from requiring the detainee to be totally naked. The search must be conducted in a manner that does not require the removal of more clothes than necessary. These prohibitions do not prevent a search of the clothes themselves once removed from the person.

Clause 114(4) prohibits corrections officers from touching a detainee when a strip search is conducted. However, the prohibition on touching is nullified if the use of force is required. It should be noted that the use of force must be a last resort, must be proportionate to the circumstances and can only involve force that is reasonable and necessary to achieve the purpose (see part 9.7).

Clause 114(5) creates an obligation upon all corrections officers engaged in a strip search to conduct the search in a private, humane and dignified manner.

The detainee must be provided with suitable clothing if any clothing is seized during the search.

Division 9.4.4 — Body searches

Body searches are the most intrusive search possible. This search enables contact and manipulation of a detainee's cavities to enable a physical search of the detainee's cavities.

Clause 115 — Body searches — directions

Clause 115(1) empowers the chief executive to authorise a non-therapeutic doctor to conduct a body search of a detainee if the chief executive suspects: the detainee has ingested something that may be harmful; the detainee is concealing contraband; or the detainee is concealing something that is evidence of an offence or disciplinary breach.

Clause 116 — Body searches — presence of nurse and corrections officers

Clause 116 ensures a nurse is also present at the search and that, of the two medical people conducting the search, at least one must be the same sex as the detainee. The nurse must be a non-therapeutic health professional appointed under clause 22.
Clause 116(3) authorises one or more corrections officers to be present during the search. The officers must be the same gender as the detainee.

Clause 116(4) ensures that a body search does not involve any more officers than necessary. A group of officers observing a body search may be regarded as humiliating treatment and would be a breach of human rights.
Clause 116(5) creates an obligation to conduct a body search in a private area.

Clause 117 — Body searches — assistance from corrections officer

Clause 117(1) authorises the doctor conducting a body search to seek assistance from a corrections officer.

Any corrections officer assisting must be the same sex as the detainee.

Clause 118 — Body searches — rules about detainee's clothing

Clause 118(1) prohibits the search from requiring the detainee to be totally naked. The search must be conducted in a manner that does not require the removal of more clothes than necessary. These prohibitions do not prevent a search of the clothes themselves once removed from the person.

The detainee must be allowed to dress in private following the search. The detainee must be provided with suitable clothing if any clothing is seized during the search.

Clause 119 — Body searches — rules about touching detainees

Clause 119 authorises the doctor or nurse of the same sex of the detainee to touch the detainee and examine the detainee's orifices.

Clause 120 — Body searches — seizing things

Anything discovered during the search that could be evidence of an offence or disciplinary breach may be seized by the doctor, unless seizing the thing would cause

injury to the detainee. Anything seized must be passed on to the relevant corrections officer.

Division 9.4.5 — Searches of premises and property

Clause 121 — Searches — premises and property

Clause 121 empowers the chief executive to search any part of a correctional centre; anything at a centre; and any vehicle used by the centre. The examples provided clarify the intended extent of the powers. The power extends to any possessions in a detainee's cell or carried by a detainee, but not to the extent of the detainee's clothing.

The power does not extend to searches of detainees or visitors. Searches of detainees are covered by divisions 9.4.2 to 9.4.4 above. Searches of visitors are covered by part 9.8 below.

Searches may be conducted physically or with the aid of a device, dogs or other technology.

Clause 122 — Searches of detainee cells — legally privileged material

The case of *R (Daly) v Secretary of State for the Home Department* 2 AC 2001 dealt with two conflicting principles: firstly, the principle that the Executive should not have inherent access to a person's legally privileged material (predominantly letters to and from their lawyer); secondly, that regular searches of cells should take place in the absence of prisoners to protect the search methods used by prison staff.

The House of Lords decided that a blanket approach to excluding a detainee from being present during a search of legally privileged material was not acceptable. As a matter of law the Lords determined that a prisoner should be present when legally privileged material was being searched. The Lords' decisions also mention other means of separating the material from the search if the prisoner was not present to prevent the conundrum.

Clauses 122 and 123 set out the rules for searches involving legally privileged material.

Clause 122 enables a search of a detainee's cell in the absence of the detainee if the detainee takes legally privileged material with them or the material is stored somewhere else. For example, a corrections facility may issue standard storage containers for legally privileged material, or a system of lockers.

Clause 122 enables an operating procedure or policy to be made that sets out the detail of any storage options for legally privileged material.

Clause 123 — Searches of detainee cells — suspected legally privileged material

Under clause 123(1) the existence of a storage system for legally privileged material does not absolve responsibility of corrections officers if they find material that they believe to be legally privileged. If a corrections officer finds material during a search that they suspect to be legally privileged, the search must either stop or the detainee must be present.

Clause 123(1) also means that if the legally privileged material is still in the cell, the detainee must be present during its search.

Clause 123(2) authorises an examination of legally privileged material if the detainee is present.

Clause 123(3) prohibits the reading of legally privileged material unless the detainee is present and consents to the material being read; or there is reasonable suspicion that the material may threaten the security of the facility; or the material contains information that may be evidence of an offence or a disciplinary breach.

An example for (3) would be the use of legally privileged material to conduct gambling. Also the use of legally privileged material to transmit messages to other prisoners, criminal associates etc.

Clause 123(4) enables a search of legally privileged material only if urgent circumstances exist to do so.

Clause 123(5) requires any exercise of 123(4) to be recorded in the register of detainees.

Division 9.4.6 — Searches — miscellaneous

Clause 124 — Searches — use of corrections dogs

Clause 124 enables specially trained dogs to be used during any searches authorised by this part of the Bill.

Trained dogs have great acuity for smelling and identifying particular substances, such as drugs or explosives. Enabling dogs to be used for searches will reduce the time taken for searches and the level of intrusiveness required for the search.

Clause 125 — Searches — use of force

Clause 125 explicitly authorises the use of force to carry out a search or secure anything seized, or that needs to be seized, in a search.

The use of force must be proportionate and reasonable to achieve the purpose. The provisions governing any use of force under the Bill are set out in part 9.7 below.

Part 9.5 — Seizing property

Part 9.5 provides the powers and procedures for seizing property.

Clause 126 — Seizing mail etc

Clause 126(1) authorises the chief executive to seize prohibited things in a detainee's protected mail, or any other thing in the mail that may harm someone.

Clause 80 enables the chief executive to declare things, or classes of things, to be prohibited. For example, if scissors were prohibited then all types of scissors would be prohibited.

An example of something that may be suspected of causing harm is a substance that is or resembles explosive material, biological agents or poisons.

Clause 126(2) empowers the chief executive to seize a detainee's ordinary mail if the chief executive believes that doing so would stop the transmission of: a prohibited thing; an item that may pose a risk to the security or good order of the centre; or may be used to commit an offence or disciplinary breach.

126(2) also empowers the chief executive to seize mail if the correspondence itself will cause harm of any nature or is a means of making an unauthorised purchase.

Clause 126(3) prohibits the chief executive from seizing a document that affords legal professional privilege, provided that the chief executive can reasonably ascertain from the document that it is privileged.

Clause 127 — Seizing property — general

Clause 127 empowers the chief executive to seize a detainee's property if the chief executive believes that the property would jeopardise the security or good order of the centre; or the safety of anyone at a centre.

This clause also empowers the chief executive to seize property that is intended for the commission of an offence or a disciplinary breach.

Any prohibited thing found during a search may also be seized unless written approval exists for the detainee to possess the thing.

Clause 127(3) prohibits the chief executive from seizing a document that affords legal professional privilege, provided that the chief executive can reasonably ascertain from the document that it is privileged.

Clause 128 — Receipt of seizure

Clause 100 requires the chief executive to provide the detainee with a receipt of anything seized.

The owner, or the person in possession of the thing, must be given a receipt within 7 days.

Clause 128(3) sets out what must be in the receipt.

Clause 128(4) clarifies that an item seized may yet to be possessed by a detainee. For example, something mailed to a detainee that would have been a gift.

Clause 129 — Forfeiture of things seized

Clause 129 is an explicit power for things seized to be forfeited to the Territory.

If an item is allowed to be possessed by a detainee but the owner cannot be found, or the thing cannot be returned to the owner, the item may be forfeited the Territory.

If an item is prohibited, or may be used to commit an offence, or is unsafe, the item may be forfeited to the Territory.

Clause 126(2) authorises the chief executive to make a decision about what to do with the forfeited item. Weapons or drugs may be passed on to the police for destruction; other items may be passed to the public trustee for sale; other items may be kept for the general use of the prison.

Clause 126(3) clarifies that an order made under section 250 of the *Crimes Act 1900* supersedes the chief executive's discretion.

Clause 130 — Return of things seized but not forfeited

If an item is allowed to be possessed by a detainee but the item is evidence of a breach or offence, the item must be returned at the end of six months or at the end of the relevant proceedings, including appeals.

If an item is allowed to be possessed by a detainee and it has not evidence it must be returned immediately to the detainee.

Part 9.6 — Alcohol and drug testing

Alexander Maconochie Centre Functional Brief notes that:

> Illicit drugs pose one of the most serious problems in prisons. Drug use can cause death or serious illness (through overdosing), spread blood borne viruses and diseases such as AIDS/HIV and Hepatitis B and C (through shared use of dirty needles), react badly with prescribed drugs, cause violent behaviour, jeopardise rehabilitation, and impact negatively on families.
>
> The AMC will have in place policies and procedures to deal specifically with drugs in prison. Prison drug and alcohol policies will be an integral part of Centre management, addressing health care, rehabilitation and reintegration, and administration and discipline. Drug use, particularly injecting drug use behaviour, presents as an OH&S risk to staff, other prisoners and visitors. [2005, page 49]

Part 7.6 provides the requisite powers to test detainees and corrections officers for drugs and alcohol. Testing for drugs and alcohol, and taking action on positive tests, are critical ways of neutralising any drug market within a prison and managing detainees with drug and alcohol problems.

Division 9.6.1 — General

Clause 131 — Definitions — drug and test sample

Clause 131 defines 'drug' in a way that captures illicit drugs and excludes drugs that are authorised to be taken by a detainee.

Clause 131 defines 'test sample' as including a range of tissues or excreta from the body.

Clause 132 — When test sample positive

Clause 132 defines what a 'positive' test sample means.

A detainee who refuses to provide a sample, or intentionally fails to provide a sample, is deemed to have provided a positive test sample. Likewise, substitution or masking of a sample is also deemed to be a positive test sample. A definition of 'invalid' is provided, contemplating tampering and substitution.

For full-time detainees a test sample that results in a positive presence of drugs or alcohol is a 'positive' test sample.

For periodic detainees a 'positive' test sample is a sample that results in a positive presence of drugs, or a level of blood-alcohol concentration above the prescribed limit. The prescribed limit is 0.02g of alcohol per 100mL of blood. However, the Bill provides the Executive with a power to make a regulation that prescribes another limit.

Clause 132(2) ensures that failing to provide a sample does not extend to detainees who have a reasonable excuse for not being able to provide a sample.

Clause 132(3) enables the chief executive to decide a drug should be exempt from being a prohibited drug under this part of the Bill. Any exemptions must be notified.

The powers and procedures to test for alcohol and drugs set out in this part are foreshadowed for use under the *Crimes (Sentence Administration) Act 2005*. This enables one set of testing procedures to be used for all supervision of sentences, custodial and non-custodial.

Division 9.6.2 — Alcohol and drug testing — detainees

Clause 133 — Alcohol and drug testing of detainees

Clause 133(1) empowers the chief executive to direct a detainee to provide a test sample, and state what type of sample is required.

Clause 133(2) authorises the chief executive or non-therapeutic doctor or nurse to direct how the detainee must provide the sample. For example, the detainee may be required to blow into a device; or use a buccal swab kit to take a sample of saliva from their mouth; or to urinate into a container.

Clause 133(3) ensures that any sampling method must be taken in accordance with any operating procedures made by the chief executive. However, only non-therapeutic doctors and nurses can take blood.

133(4) requires samples to be given to corrections officers for identification and recording, prior to analysis. In 133(5) after analysis the chief executive must notify the detainee of the results as soon as practicable.

Clause 134 — Effect of positive test sample from detainee

A positive test sample is evidence of a disciplinary breach, set out in chapter 10 below.

A positive test sample may also require the chief executive to revisit decisions such as security classification, health care arrangements and other matters relevant to case management.

Division 9.6.3 — Alcohol and drug testing — corrections officers

Clause 135 — Alcohol and drug testing of corrections officers

Clause 135 authorises the Executive to make regulations to establish a scheme of drug and alcohol testing of corrections officers and other people involved in the running of a corrections centre.

Part 9.7 — Use of force

The deprivation of liberty and other stressors as a consequence of detention increase the potential for detainees to engage in violence. Alternatively, the same factors may contribute to the potential of detainees refusing to follow direction.

Rule 54 of the *Standard Minimum Rules for the Treatment of Prisoners* (1957) states that:

> Officers of the institutions 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. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.
>
> Prison officers shall be given special physical training to enable them to restrain aggressive prisoners.
>
> Except in special circumstances, staff performing duties which bring them into direct contact with prisoners should not be armed. Furthermore, staff should in no circumstances be provided with arms unless they have been trained in their use.

Part 9.7 authorises the use of force and prescribes for the proportionate use of force.

Clause 136 — Managing the use of force

Clause 136 obliges the chief executive to use force as a last resort; and when force is needed, only to use the necessary force required.

The chief executive must make a policy or operating procedure that sets out the detail of the circumstances where particular types of force may be used, who may use particular types of force and the nature of the force involved.

Clause 137 — Authorised to use force

Clause 137 empowers corrections officers to use necessary and reasonable force to achieve the purposes set out in (a) to (h).

Force may only be used if no other means would achieve the purpose.

Clause 138 — Application of force

Clause 138 sets out how force may be used, when force is required.

Clause 138(1) requires corrections officers to give a warning that they will use force and a reasonable time for the detainee to heed the warning and defer to the officer. Corrections officers must only use force that is necessary and reasonable in the circumstances. Corrections officers must attempt to use force in a manner that reduces the risk of death or permanent injury.

Clause 138(2) under urgent circumstances the corrections officer is not obliged to engage in the decision-making and warning required by 138(1)(a) and (b). Even in urgent circumstances a corrections officer must attempt to use only the force necessary to achieve the purpose and in a manner that reduces the risk of death or permanent injury.

Clause 139 — Use of restraints or weapons

Clause 139(1) clarifies that the use of force authorises the use of restraints and weapons listed in (6), subject to the restrictions in this clause.

Clause 139(2) must ensure that any use of a weapon or restraint is proportionate to the circumstances informing the use of force. The kind of weapon or restraint must be appropriate for the circumstances and the weapon or restraint must be used appropriately.

Consistent with the *Standard Minimum Rules for the Treatment of Prisoner*s (1957) and the *European Standard Prison Rules* (2006) any officer using a restraint or weapon must be trained to use the equipment. Any weapon or restraint must be used in accord with any policy or operating procedure.

Clause 139(4) authorises a health professional who is appointed to carry out non-therapeutic functions to administer drugs as a restraint, or direct the use of a particular form of restraint. This power contemplates situations where a detainee's state of mind and behaviour may require the administration of a sedative or similar drug. The power could be used if a person is violently psychotic but yet to be adequately diagnosed — particularly in relation to transporting the detainee.

Clause 139(5) limits any use of firearms to circumstances that involves a threat to life or a detainee offers armed resistance to officers [Part IV, *International Prison Policy Development Instrument,* Canada, 2001].

Clause 139(6) lists the restraints or weapons a corrections officer is authorised to use when using force. The clause enables the Executive to make regulations listing further weapons and restraints.

Clause 140 — Medical examination after the use of force

Any detainee injured by the use of force under this chapter must be examined, and if necessary treated, by a doctor appointed to carry out therapeutic tasks.

Clause 141 — Reporting — use of lethal force

Clause 141 requires a record to be made of any use of force that causes injury or death. The record must set out: the details of the incident leading up to the use of force; the decision to use force; and the nature of the force used.

The record must be available for inspection by the inspection entities contemplated in chapter 7.

Part 9.8 — Access to correctional centres

As discussed earlier, positive changes in prisoners behaviour will be greatly influenced by relationships with family and friends. Maintaining these relationships during detention is an important factor in successful rehabilitation and release of prisoners.

Part 9.8 provides for visitors to correctional centres.

Clause 142 — Visiting conditions

Clause 142 empowers the chief executive to declare conditions that apply to visitors and visits at a corrections centre.

The declaration must be tabled at the Legislative Assembly to allow Assembly members to consider if they wish to move a motion of disallowance. If the declaration is allowed, it must also be notified before becoming enforceable.

Clause 143 — Notice of visiting conditions

The chief executive must make reasonable efforts to alert visitors to any conditions in force. A notice must be put up and copies of the conditions made available.

Clause 144 — Taking prohibited things etc into correctional centre

Clause 144 creates an offence for taking, giving or removing a prohibited thing from a correctional centre.

A defence to the offence is the giving, taking or removing of a prohibited thing that is approved by the chief executive.

‘Prohibited things’ are those things declared and notified by the chief executive to be prohibited, as discussed at clause 80. Prohibited thing in clause 144 is extended to include an element or component that would make a prohibited thing. For example, if mobile phones are prohibited things, then a mobile phone battery would also be prohibited.

Clause 145 — Directions to visitors

Clause 145 authorises the chief executive to give visitors directions to ensure the visitor complies with any conditions in force or to uphold the security or good order of a centre.

Clause 145(2) and (3) creates a strict liability offence for a visitor failing to comply with a direction.

The government is of the view that a strict liability offence is warranted. The physical element of the offence, a failure to comply, is the critical feature of the offence. Providing for mental elements of the offence would diminish the regulating purpose of the offence.

The offence extends the existing statutory defences in the *Criminal Code 2002* by including a defence that the person took reasonable steps to comply with the direction.

Clause 146 — Searches of visitors

Clause 146 authorises the chief executive to conduct frisk search, scanning search or ordinary search of a visitor if the person is suspected of carrying something that is prohibited or a threat to the centre. These kind of searches engage in minimal intrusiveness upon a person's body, and are defined at clause 106.

The search procedures in part 9.4, and the powers and procedures to seize property in part 9.5 apply.

Clause 146(3) stipulates that corrections officers cannot use force to search a visitor.

Clause 147 — Directions to leave correctional centres

Clause 147 empowers the chief executive to refuse a person entry to a centre and to direct a person to leave a centre.

The power may be exercised if the chief executive believes the person is drunk, under the influence of drugs, has a prohibited thing, is a risk to the security and order of the centre, or the person contravenes a lawful direction.

Clause 147(3) and (4) creates a strict liability offence for a visitor failing to comply with a direction to leave or attempting to enter a correctional centre.

The government is of the view that a strict liability offence is warranted. The physical element of the offence, a failure to comply, is the critical feature of the offence that needs to be upheld. Providing for mental elements of the offence would diminish the regulating purpose of the offence.

The offence extends the existing statutory defences in the *Criminal Code 2002* by including a defence that the person took reasonable steps to comply with the direction.

Clause 148 — Removing people from correctional centre

Clause 148 authorises the use of force to remove a person from a centre, or prevent a person entering a centre. The use of force must be commensurate to the need.

Chapter 10 — Discipline

In *Flynn v King* (1949) 79 CLR 1 the then Justice Dixon said "if prisoners could resort to legal remedies to enforce gaol regulations, responsibility for the discipline and control of prisoners in gaol would be in some measure transferred to the courts administering justice". [at 8.] In that era, Justice Dixon regarded that proposition as bad policy.

As discussed earlier the judicial position turned around in the late 1970s and early 1980s with *R v Board of Visitors of Hull Prison; ex parte St Germain (No.1)* [1979] QB 425, being the case usually identified as deciding that administrative decisions relevant to discipline could be reviewed for lawfulness by a court with appropriate jurisdiction.

That change obliged corrections authorities to apply administrative law principles to disciplinary proceedings, and conversely required disciplinary proceedings to be judicially reviewed for appropriate standards. Consequently, the disciplinary proceedings fall within the ambit of administrative decisions that require procedural fairness, as discussed by Justice Mason in *Kioa v West* (1985) 159 CLR 550:

> The law has now developed to a point where it may be accepted there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention . . . [at 598]

It is now orthodox for Australian courts to review disciplinary proceedings on the basis of a breach of procedural fairness, namely the right to a fair hearing, the right to an unbiased hearing and a decision based on logically probative material. For examples *Henderson v Beltracchi & ors* (1999) 105 A Crim R 578 and *Kuczynski v R* (1994) 72 A Crim R 568.

Given this history, it is important that the discipline process assists procedural fairness.

Along with Australian law, section 31 of the *Human Rights Act 2004* authorises the consideration and application of international case law in the ACT. Human rights case law requires a clear distinction between criminal proceedings and administrative proceedings. The procedural fairness required for administrative proceedings is of a lower threshold than a trial procedure required for criminal proceeding. As a result, administrative proceedings cannot be used to impose a criminal sanction.

The disciplinary process developed aims to keep criminal proceedings separate from administrative proceedings. It also enables the corrections agency to involve the police and the Director of Public Prosecutions at an early stage to ensure that crimes committed in the prison or remand centre are investigated and prosecuted as any other crime would.

Part 10.1 — General

Clause 149 — Application of chapter 10

Chapter 10 applies to disciplinary breaches and allegations of disciplinary breaches.

Clause 150 — Definitions for chapter 10

Clause 150 sets out the particular short-hand definitions for words used in chapter 10.

The terms ‘administrator’ and ‘investigator’ are used to denote the collection of functions delegated to the specific corrections officers by the chief executive. The use of these terms is intended to clarify the relationship between the officers carrying out these functions. It is not intended that the officers would hold a statutory office.

Clause 151 — Meaning of disciplinary breach

Clause 151 lists the disciplinary breaches that may be alleged and proven under this chapter.

The list of breaches is derived from the International Centre for Criminal Law Reform and Criminal Justice Policy, *International Prison Policy Development Instrument, 2001*, part VI, ‘Discipline’.

Other breaches relevant to the Bill are also included, such as providing a positive alcohol or drug test; smoking in a non-smoking area, and threats.

The breaches are purposely not constructed as criminal offences. They are intended to be addressed as administrative matters. However, some of the breaches may also be substantially the same as a criminal offence, such as assault or theft. Following an incident the corrections authority may ask the police to investigate a matter if the nature of the incident or the evidence available warrants a criminal investigation.

Clause 154, below, sets out the relationship between disciplinary proceedings and criminal proceedings.

Clause 152 — Meaning of investigator

Clause 152 stipulates that the terms ‘investigator’ denotes the functions associated with the investigation of disciplinary breaches that are assigned to a corrections officer, or another person, by the chief executive.

Clause 152(2) enables a person other than a corrections officer to be engaged to investigate disciplinary breaches. Should a major incident occur within a remand centre or prison it may be necessary to engage an external person to conduct investigations to either manage the work load or ensure objectivity.

The use of the term investigator in this part of the Bill is intended to clarify the relationship between the officers carrying out these functions. It is not intended that the officers would hold a statutory office.

Clause 153 — Meaning of privilege

As discussed under chapter 6 above, a line is drawn between the minimum conditions that are regarded as entitlements and conditions that may be considered to be privileges. The distinction between entitlements and privileges is important to enable the discipline process to work and to ensure that segregation for reasons other than discipline are fairly applied.

Clause 153 clarifies that a 'privilege' is any benefit a detainee may have, material or otherwise, beyond the minimum entitlements set out in chapter 6.

The clause gives examples.

Clause 154 — Overlapping disciplinary breaches and criminal offences

In *Engel v Netherlands* (1979–80) 1 EHRR 647 it was decided that the procedure required to be consistent with human rights would depend upon whether a charge and its consequences could be characterised as criminal or administrative. The criteria for characterisation were:

- the classification of the offence in domestic law;
- the nature of the offence; and
- the severity of the punishment.

This precedent was followed in *Ezeh and Connors v United Kingdom* (2004) 39 EHRR 1, where the court characterised the power of the prison authority to add days to a sentence without further reference to a court as a criminal matter, not an administrative one.

The case of *Campbell and Fell v United Kingdom* (1985) 7 EHRR 165, also followed the criteria in Engel, and noted when discussing whether the character of charges laid were criminal in nature that:

> . . . certain conduct which constitutes an offence under the [prison] Rules may also amount to an offence under the criminal law . . . It also has to be remembered that, theoretically at least, there is nothing to prevent conduct of this kind being the subject of both criminal and disciplinary proceedings. [at paragraph 71]

Clause 154 sets out the rules for when a disciplinary process must stop, or may continue, if a criminal process is in progress. The clause contemplates the potential for both a criminal and disciplinary process being commenced because of one and the same behaviour, incident or act.

Clause 154(2) stipulates that a criminal prosecution cannot commence or continue if disciplinary action has been taken to address the behaviour, incident or act.

Clause 154(3) stipulates that a disciplinary process cannot commence or continue if a criminal prosecution has commenced.

Clause 154(4) states that disciplinary action cannot be imposed upon a detainee if the detainee has been convicted or found guilty of a criminal offence relating to the same behaviour, incident or act. If a criminal prosecution acquits a detainee on a criminal

charge, a disciplinary process may begin or continue for the same behaviour, incident or act (following *Campbell* above).

This clause foreshadows the decisions available to corrections officers, investigators, administrators and the adjudicator to refer matters to the police or the Director of Public Prosecutions.

Part 10.2 — Disciplinary investigations

Division 10.2.1 — Investigation of disciplinary breaches

Clause 155 — Report etc by corrections officer

Clause 155 contains two powers: one power for the correction officer to take immediate, informal action that does not involve a sanction; and a second power to report an alleged breach of discipline to an investigating officer.

Alexander Maconochie Centre Functional Brief, states that:

> The Operating Model of the Centre will be located on a continuum from indirect supervision to direct supervision. The major features of the former are a heavy reliance on distant electronic surveillance and the confinement of officers to secure stations. In contrast, the direct supervision model of the AMC is based on extensive staff (as role models) and prisoner contact, the development of positive relationships with attendant improved surveillance and security and institutional "climate". [2005, page 9]

Clause 155(2)(a) to (c) empowers corrections officers to speak to detainees about behaviour that is unacceptable. The corrections officer can do this in the form of counselling the detainee, warning the detainee or reprimanding the detainee.

This power enables corrections officers to deal with incidents as they happen without having to resort to a formal disciplinary process for every infraction.

Clause 155(2)(d) and (e) authorise corrections officers to report breaches of discipline and segregate detainees when an alleged breach occurs that warrants more than a serious discussion.

If a corrections officer has reported a detainee for a breach, clause 155(3) sets out what the report must contain, including any segregation directed by the corrections officer. This provides the investigating officer with a starting point and alerts the investigating officer to the fact that detainees have been segregated for the purpose of investigating a breach.

Clause 156 — Report etc by investigator

The powers in clause 156 are triggered if an investigator is given a report about an alleged breach.

Clause 156(2) empowers the investigator to investigate the breach having considered the original report. Once the investigating officer has done this the officer can (a) do nothing, (b), (c), (d) discuss the behaviour with the detainee in the form of

counselling, warning or reprimand, (e) refer the matter to the police, or (f) and (g) order the detainee to be segregated and report the alleged breach to the administrator.

It should be noted that the investigator is not obliged to segregate detainees.

If an investigator officer decides to report a detainee for a breach, clause 156(3) requires the investigator to provide a report to the administrator, and details of any segregation directed by the investigator. Likewise, the investigator must tell the administrator of any referral to the chief police officer.

Clause 156(5) prohibits a corrections officer being the same officer who reports a breach and investigates a breach: these tasks must be done by different officers in relation to the incident in question.

Clause 157 — Action by administrator

If an administrator receives a report of a disciplinary breach from an investigator, the administrator may exercise the powers set out in this clause.

Clause 157(2) empowers the administrator to conduct further investigations around the breach having considered the investigator's report. Once satisfied with the information gathered, the administrator can (a) do nothing, (b), (c), (d) discuss the behaviour with the detainee in the form of counselling, warning or reprimand, (e) refer the matter to the police or the Director of Public Prosecutions, or (f) and (g) charge the detainee with a breach and order the detainee to be segregated.

It should be noted that the administrator is not obliged to segregate detainees.

Clause 157(3) clarifies that referrals to the police or prosecutors must be in writing and include the investigator's report.

Clause 157(4) prohibits a corrections officer from exercising two or more roles in the disciplinary process: these tasks must be done by different officers in relation to the incident in question. For example, for one incident the person exercising the administrator's powers cannot also be the same person who investigated the alleged breach.

Clause 158 — Disciplinary charge

Clause 158 stipulates that a detainee must be informed in writing of a disciplinary breach. The administrator must include the actual charge; a statement of the conduct that gave rise to the charge; the option of accepting the charge and consenting to a sanction proposed by the administrator in relation to the charge; and listing the sanction the administrator considers appropriate to account for the breach.

The obligation upon the administrator to provide a written charge with the details listed ensures that the detainee knows what the accusation is, and the potential sanction warranted by the breach.

It is envisaged that the written notice would be a document that would also incorporate a space for the detainee to elect to accept the charge and the proposed sanction, as enabled by division 10.3.1 discussed below.

A single form setting out the charge and election to accept the charge would provide the administrator and the detainee with a common record.

Division 10.2.2 — Investigative segregation

An incident that raises allegations of disciplinary breaches is a time of increased risk for further breakdown in discipline and good order. This is particularly the case if the incident involves violence or a risk of a prisoner being charged with criminal offences.

The Bill provides corrections officers with the power to segregate detainees to protect anyone from reprisals, threats, intimidation or any form of physical or emotional violence. The purpose of this power is to enable the temporary separation of detainees during an investigation to ensure that witnesses and victims of any breach are protected and the reliability of the investigation is upheld.

Clause 159 — Chief executive directions — investigative segregation

Clause 159 provides the chief executive with the power to segregate detainees for the purposes of investigation of a disciplinary breach.

Clause 159(2) clarifies that the power of the officers reporting, investigating and laying charges to segregate detainees is additional to the chief executive's power in this clause.

Clause 160 — Grounds for investigative segregation

Clause 160 sets out the grounds for investigative segregation. The power may only be used for investigative segregation. Any power to segregate in the Bill must be used for the purpose for which it is related.

Clause 160(2) ensures that a decision to segregate cannot be made arbitrarily.

Clause 160(3) lists the grounds that authorise a relevant officer to direct investigative segregation. The officer must reasonably believe that segregation from one or more detainees will prevent harm to the detainee in question, or harm inflicted by the detainee in question; or prevent an investigation of the incident from being perverted; or prevent further risk to the security or order of the correctional centre.

Clause 161 — Notice of investigative segregation

Clause 161 requires relevant officers to give a detainee notice of a decision to segregate the detainee in question. The notice must state why the decision was made, when it starts, what triggers the finish of a segregation order and how the decision is reviewed.

Clause 162 — Duration of investigative segregation

Clause 162(1) obliges the chief executive to revoke a direction to segregate a detainee if the chief executive believes the risk for investigative segregation no longer exists.

The powers in this clause enable decisions made by a corrections officer, investigator or administrator to be reviewed by the chief executive.

Clause 162(2) stipulates when the chief executive must review investigative segregation decisions. The chief executive must review when asked by a detainee or upon the chief executive's own initiative. The chief executive must review prior to any transfer to another ACT correctional centre. The chief executive must review at least once every seven days.

The chief executive may continue the direction, make a further direction or revoke the direction.

Clause 162(4) enables subsequent segregation directions to be made in relation to one investigation. This also contemplates situations where the risk changes during an investigation and the type of segregation may change accordingly.

Clause 162(5) limits the length of each segregation decision to 7 days. This ensures that a decision about segregation is reviewed at least every 7 days and the risk that informs the segregation is always considered.

Clause 162(5)(b) stipulates that a segregation decision ends once the administrator makes a decision whether to charge the detainee or not — unless the administrator themself orders further investigative segregation.

Clause 163 — Application for review of investigative segregation directions

Clause 163 enables a detainee who is subject to investigative segregation to ask an adjudicator to review of that decision.

The application for review must be made within seven days of the notice of segregation.

Clause 163(3) clarifies that the segregation continues during the adjudicators deliberations, and only ceases if the adjudicator decides so.

Clause 164 — Review of investigative segregation directions

Clause 164 empowers an adjudicator to review an investigative segregation direction or refuse to review a direction.

Clause 164(2) stipulates that the adjudicator must use the process set out in chapter 11 to review an investigative segregation decision. The clauses authorises the Executive to make regulations modifying the process.

Clause 164(3) empowers the adjudicator to confirm the original decision; vary the direction; set aside the direction; or set aside the direction and make a new direction.

Clause 164(4) the adjudicator must notify the detainee of the decision in writing.

Clause 164(5) stipulates that if the adjudicator refuses to review the direction then the adjudicator must state the reasons for doing so.

The adjudicators decision is subject to review under the *Administrative Decisions (Judicial Review) Act 1989.*

Part 10.3 — Disciplinary action and review

Division 10.3.1 — Disciplinary action with accused's consent

Division 10.3.1 enables a detainee to accept the disciplinary charges laid by the administrator and the disciplinary sanctions proposed by the administrator.

Clause 165 — Meaning of presiding officer for division 10.3.1

The term 'presiding officer' is used in this division and division 10.3.2. Although the term is the same, the powers allocated are those set out in each division. So the 'presiding officer' in this division is the person who is delegated to exercise the powers in clause 167.

It should be noted that a person can be a presiding officer for both this division and division 10.3.2.

Clause 166 — Disciplinary breach admitted by accused

Clause 166 enables an accused detainee to accept a disciplinary charge laid by an administrator and to accept the disciplinary action proposed by the administrator as the sanction for the charge.

Division 10.3.5 stipulates what disciplinary action may be taken.

Clause 166(1) also contemplates a written notice of charges and proposed sanction that would also incorporate a space for the detainee to elect to accept the charge and the proposed sanction. This form would provide a common record for both the administrator and the detainee.

Clause 166(2) requires the detainee to make the election within 48 hours of receiving the notice of charges. So if the detainee receives the notice of charges on Tuesday, the detainee must make the election and return the form to the administrator by the end of Wednesday.

However, 166(2)(b) and 166(3) enables the time for election to be extended if the administrator believes it reasonable to do so, whether the detainee requests it or not.

Any decision to extend the time for election must be notified.

Clause 167 — Presiding officer's powers — breach admitted by accused

Clause 167 sets out the presiding officer's powers if a detainee has accepted disciplinary charges and the corresponding sanction.

The presiding officer can exercise any action under division 10.3.5. This means the presiding officer may counsel the detainee, or direct the detainee to make reparation. In relation to sanctions, the presiding officer may only impose the administrative penalty that was written along with the original charge.

The detainee must be informed in writing of the imposition of disciplinary action that is to be taken against the detainee.

Division 10.3.2 — Internal disciplinary inquiry

Clause 168 — Meaning of presiding officer for division 10.3.2

The term 'presiding officer' is used in this division and division 10.3.1. Although the term is the same, the powers allocated are those set out in each division. So the 'presiding officer' in this division is the person who is assigned to exercise the powers in clauses 169 and 170.

It should be noted that a person can be a presiding officer for both this division and division 10.3.1.

Clause 169 — Disciplinary inquiry into charge

If a detainee has been notified of a disciplinary charge and has not elected to accept the charge and corresponding sanction, the clause empowers the presiding officer to conduct an inquiry.

Clause 169(2) obliges the presiding officer to conduct an inquiry into disciplinary charges.

Clause 169(3) prohibits a corrections officer from exercising two or more roles in the disciplinary process: these tasks must be done by different officers in relation to the incident in question. For example, for one incident the person exercising the administrator's powers cannot also be the same person who investigated the alleged breach. Alternatively, for one incident the presiding officer cannot also be the same officer who laid the charges.

The inquiry process in chapter 11 must be used by the presiding officer to conduct inquiries.

Clause 170 — Presiding officer's powers after internal inquiry

Clause 170 empowers the presiding officer to impose disciplinary action if an inquiry into a charge is complete.

Clause 170(2) authorises the presiding officer to determine whether charges are proven or not proven on the balance of probabilities. If the charges are proven, then the presiding officer may impose disciplinary action set out in division 10.3.5.

The balance of probabilities is a standard of proof associated with civil and administrative proceedings. This standard has a lower threshold than the criminal standard of beyond reasonable doubt. Proving a fact on the standard of the balance of probabilities means that the existence of the fact is more probable than not, or the fact is established by a preponderance of probability.

Clause 170(3) stipulates that the presiding officer must dismiss the charge if the evidence does not prove the detainee committed a breach on the basis of the balance

of probabilities. Alternatively, if there are other reasonable grounds to dismiss the charge, and it would be appropriate to do so, the presiding officer must dismiss the charges.

Clause 170(4) enables the presiding officer to refer a matter to the chief police officer or the director of public prosecutions if the presiding officer believes that the evidence revealed at an inquiry warrants criminal proceedings.

The detainee must be informed in writing of the presiding officer's decision to impose disciplinary action or the decision to refer the matter to criminal justice agencies. The notice must include reasons for the decision and information about the availability of a review of the decision.

Division 10.3.3 — Internal review of inquiry decision

This division enables a detainee to seek an internal review of a disciplinary decision.

Clause 171 — Meaning of review officer for division 10.3.3

The term 'review officer' in used in this division exclusively. The 'review officer' is the person assigned to exercise the powers in clauses 174 and 175.

Clause 172 — Application for review of inquiry decision

Clause 172 allows a detainee who has had charges proven by a presiding officer in division 10.3.2 to apply for a review of the decision to the chief executive — or a delegate of the chief executive.

It is envisaged that any form used for the notification of the presiding officer's decision in clause 170 could also contain a part which the detainee could use to apply for a review.

Clause 172(2) stipulates that the application must be made within 7 days after the detainee is notified by the presiding officer of any disciplinary action in clause 170.

Clause 172(3) clarifies that the disciplinary action determined by the presiding officer continues during the review of the decision, and only ceases if the review officer decides so.

Clause 173 — Chief executive to assign review officer

Clause 173(1) empowers the chief executive to assign one review officer, to two or more review officers, to review a disciplinary decision. This provides the chief executive with the flexibility to assign an appropriate number of officers commensurate with the gravity of the review in question.

Clause 173(2) prohibits a corrections officer from exercising two or more roles in the disciplinary process: these tasks must be done by different officers in relation to the incident in question. For example, for one incident the person exercising the administrator's powers cannot also be the same person who reviews a presiding officer's decision.

Clause 174 — Review of inquiry decision

The review officer must conduct an inquiry when reviewing a presiding officer's decision. The review officer must use the procedures in chapter 11 of the Bill, discussed below.

Clause 175 — Review officer's powers after further inquiry

Clause 175 empowers the review officer to confirm the original decision; vary the direction; or set aside the decision and make a new decision.

In this sense, the review officer is authorised to act as if they were the presiding officer. The presiding officer is authorised to determine whether charges are proven or not proven on the balance of probabilities. And, if the charges are proven, then the presiding officer may impose disciplinary action set out in division 10.3.5.

The detainee must be informed in writing of the review officers' decision following the review. The notice must include reasons for the decision and information about the availability of a review of the decision.

Division 10.3.4 — External review of inquiry decision

Division 10.3.4 provides for the creation of an independent authority to review particular decisions that would be authorised by the Bill.

Being a small jurisdiction the ACT is not in a position to establish a whole new entity to review disciplinary decisions or segregation decisions. However, the government is of the view that an independent authority, particularly with judicial experience, provides a greater protection against arbitrary and unlawful decisions. To achieve this goal the government chose to create the function of 'adjudicator', which will be fulfilled by magistrates appointed from the ACT Magistrates Court.

Adjudicators will have the authority to review disciplinary decisions and segregation decisions on their merits and, if necessary, substitute those decisions with their own.

Magistrates acting in the capacity of adjudicators are conferred powers by the Bill as a designated person. Following the cases of *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 and *Hilton v Wells* [1985] 157 CLR 57, the arrangement in the Bill does not confer Executive functions upon the Magistrates Court but authorises appointees, who are also magistrates, to perform the quasi-judicial functions set out in the Bill.

Decisions made by adjudicators will be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1989.*

Clause 176 — Appointment of adjudicator

Clause 176 empowers the Minister to appoint adjudicators. Nominees for appointment must be magistrates. The *Legislation Act 2001* defines magistrate as a Magistrate under the *Magistrates Court Act 1930.*

Given ACT Magistrates already have standing in relation to the authority of the Legislative Assembly, the provisions of the *Legislation Act 2001* requiring consultation with the Assembly are set aside.

Clause 177 — Application for review by adjudicator

Clause 177 allows a detainee, who has had charges proven by a presiding officer in division 10.3.2 and the decision reviewed by a review officer in division 10.3.3, to apply to the adjudicator for an external review of the decision.

It is envisaged that any form used for the notification of the reviewing officer's decision in clause 157 could also contain a part which the detainee could use to apply for a review by the adjudicator.

Clause 177(2) stipulates that the application must be made within 7 days after the detainee is notified by the reviewing officer of any disciplinary action in clause 175.

Clause 177(3) clarifies that the disciplinary action affirmed, or decided by the reviewing officer continues during the adjudicator's review of the decision, and only ceases if the adjudicator decides so.

Clause 178 — Review by adjudicator

Clause 178 empowers an adjudicator to review a disciplinary decision or refuse to review the decision.

The adjudicator must use the process set out in chapter 11 to review a disciplinary decision.

Clause 178(2) requires the adjudicator to inform the detainee in writing if the adjudicator refuses to review the disciplinary decision and set out the reasons why the application was refused. The notice must include information about the detainee's right to seek judicial review of the adjudicator's decision.

Decisions made by adjudicators will be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1989.*

Clause 179 — Adjudicator's powers after review

Clause 179 empowers the adjudicator to confirm the decision; vary the direction; or set aside the decision and make a new decision.

In this sense, the adjudicator is authorised to act as if they were the presiding officer. The presiding officer is authorised to determine whether charges are proven or not proven on the balance of probabilities. And, if the charges are proven, the presiding officer may impose disciplinary action set out in division 10.3.5.

The detainee must be informed in writing of the adjudicators' decision following the review. The notice must include reasons for the decision and information about the detainee's right to seek judicial review of the adjudicator's decision.

Decisions made by adjudicators will be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1989.*

Division 10.3.5 — Disciplinary action

This division provides the action that can be taken if a disciplinary charge is proven. The action includes a series of penalties. The government considers these penalties to be consistent with the administrative nature of the discipline process and are consistent with current human rights jurisprudence.

Clause 180 — Application

Clause 180 clarifies that disciplinary action only applies to detainees who were charged with a disciplinary breach and the charge was proven.

Clause 181 — Definitions for division 10.3.5

Clause 181 ensures that all of the decision-makers in the disciplinary process who can impose sanctions are contemplated by this part. The definition labels any presiding officer, review officer or adjudicator as the 'relevant presiding officer'.

Clause 182 — Disciplinary action by relevant presiding officer

Any officer who has the authority to impose disciplinary action may take any of the actions in (a) to (d), or any combination of actions in (a) to (d).

If the breach does not warrant a penalty, the officer may simply warn or reprimand the detainee by way of (a) and (b).

The officer may also impose any administrative penalty or combination of penalties by way of (c) and clause 183 discussed below.

The officer may also direct the detainee to make reparation, by way of (d) and clause 184 discussed below.

Clause 182(2) requires the officer to exercise disciplinary action proportionately. This invokes the human rights concept of proportionality in relation to discipline. Proportionality requires that the exercise must be: necessary and rationally connected to the objective; the least restrictive in order to accomplish the object; and not have a disproportionately severe effect on the person to whom it applies.

The chief executive must make a corrections policy that sets out the factors that must be taken into account by the presiding officer when assessing the proportionality of a penalty.

Clause 183 — Administrative penalties

Clause 183 lists the penalties that can be imposed upon a detainee who has proven to have breached discipline.

The maximum fine that can be imposed is $500 as the majority of prisoners will not be in a position to earn, or retain, large sums of money.

Chapter six draws a line between the minimum conditions that are regarded as entitlements and conditions that may be considered to be privileges. The first note in chapter six explains that any withdrawal of privileges as a consequence of disciplinary action does not affect any entitlement set out under chapter six. Conversely, any condition in chapter six that is not prescribed to be an entitlement can be regarded as a privilege.

A 'privilege' is defined in clause 153 as any benefit a detainee may have, material or otherwise, beyond the minimum entitlements set out in chapter 6.

Clause 183(b) enables the withdrawal of privileges for up to 180 days.

As discussed above, the Executive would be authorised to make regulations about work that may be done by detainees at correctional centres. It is envisaged that detainees would be assigned tasks within correctional centres and that some prisoners would engage in community service while under guard.

Clause 183(c) authorises the relevant presiding officer to assign the detainee with extra work duties as an administrative penalty. The assignment of extra work must be consistent with the minimum conditions in chapter 6.

Clause 183(d) enables separate confinement of 3 days, 7 days or 28 days. The intent of having three measures of separate confinement is to simplify the association of the seriousness of the breach with the penalty. Rather than creating a situation where there may be detailed argument between what breach would warrant 7 days or 8 days, the three fixed measures aim to abbreviate the match between the seriousness of the breach and the penalty warranted.

Clause 183(e) authorises the Executive to make regulations that would create further administrative penalties.

Clause 184 — Reparation

Clause 184 enables a relevant presiding officer to direct that reparation should be made if a disciplinary breach is proven and a person suffered a loss as a consequence of the incident. Reparation does not have to be money.

Clause 184(3) limits the reparation that can be directed to a maximum of $100. However, clause 184(3)(b) authorises the Executive to make a regulation that would increase this amount. The limit is set at $100 given the fact that prisoners would not be in a position to earn, or retain, large sums of money as part of their prison account.

Clause 184(4) authorises any reparation to be deducted from the detainee's trust account, discussed at clause 83.

Clause 184(5) clarifies that the clause uses the term 'loss' from the *Criminal Code 2002*, section 300:

> ***loss*** means a loss in property, whether temporary or permanent, and includes not getting what one might get.

The meaning of loss is extended to include out of pocket or other expenses.

Clause 185 — Maximum administrative penalties

Clause 185 sets a limit on the maximum penalties that can be imposed for one incident. If the same conduct leads to two or more charges being proven, the relevant presiding officer cannot impose a penalty beyond the maximum that can be imposed for one breach.

For example, for three charges proven based upon the same conduct a presiding officer cannot impose three sets of withdrawal of privileges of 120 days each. This would amount to a loss of privileges for 360 days, twice the amount permitted under 183(b).

Conversely, for three charges proven based upon the same conduct a presiding officer could impose three sets of withdrawal of privileges of 60 days each. This would amount to a loss of privileges for 180 days, the maximum permitted under 183(b).

Clause 185 — Separate confinement conditions

Separate confinement is not solitary confinement. Solitary confinement is the complete isolation from other people and may be compounded by forms of sensory deprivation imposed, such as reduced light or visibility.

Separate confinement will involve the detainee being moved to a separate disciplinary cell. Although the detainee will sleep alone in the cell and separated from the prison population the detainee will not be isolated from people. The detainee will have regular visits, and normal interaction with corrections officers and other prison staff. The minimum conditions, including phone calls, mail, access to daylight and exercise etc, set out in chapter 6 will still apply.

Clause 186(2) obliges the chief executive to organise a medical examination of a detainee in separate confinement as soon as the confinement commences or finishes. A corrections officer must also be assigned to monitor the condition of the detainee daily.

Clause 187 — Privileges and entitlements — impact of discipline

Clause 187 ensures that investigative segregation and disciplinary action do not oust any minimum condition set out in chapter 6.

Chapter 6 draws a line between the minimum conditions that are regarded as entitlements and conditions that may be considered to be privileges. The first note in chapter 6 explains that any withdrawal of privileges as a consequence of disciplinary action does not affect any entitlement set out under chapter six. Conversely, any condition in chapter six that is not prescribed to be an entitlement can be regarded as a privilege.

A ‘privilege’ is defined in clause 153 as any benefit a detainee may have, material or otherwise, beyond the minimum entitlements set out in chapter 6.

Clause 188 — Record of disciplinary action

Clause 188 obliges the chief executive to keep a record of disciplinary action taken against a detainee.

The record must include: the detainee's name; the breach in question; a statement about the conduct giving rise to the breach and when it happened; and the action taken when the breach was proven.

Clause 188(2)(e) authorises the Executive to make regulations listing further matters that must be recorded following disciplinary action.

Clause 188(3) contemplates a charge proven but no disciplinary action taken. This provision ensures that a record is made of a charge proven.

Clause 188(4) enables inspection of these records by the officials authorised to inspect corrections facilities in chapter 7 above.

Chapter 11 — Conduct of disciplinary inquiries

As discussed at the beginning of chapter ten above, the late 1970s saw a change in how courts regarded judicial review of disciplinary proceedings. Following *R v Board of Visitors of Hull Prison; ex parte St Germain (No.1)* [1979] QB 425, courts considered prison disciplinary procedures as administrative decisions that could be reviewed for lawfulness by a court with appropriate jurisdiction.

That change obliged corrections authorities to apply administrative law principles to disciplinary proceedings, and conversely required disciplinary proceedings to be judicially reviewed for appropriate standards. Consequently, the disciplinary proceedings fall within the ambit of administrative decisions that require procedural fairness.

It is now orthodox for Australian courts to review disciplinary proceedings on the basis of a breach of procedural fairness, namely the right to a fair hearing, the right to an unbiased hearing and a decision based on logically probative material. For examples *Henderson v Beltracchi & ors* (1999) 105 A Crim R 578 and *Kuczynski v R* (1994) 72 A Crim R 568.

Given this history, it is important that the discipline process assists procedural fairness. Chapter 11 intends to provide for a procedure which is fair and prompt.

While the process in chapter 11 is envisaged to be used predominantly for disciplinary purposes, the process is also suitable for inquiries and hearings conducted to review other prescribed decisions in this Bill. Review of segregation in chapter nine and review of disciplinary segregation in division 10.2.2 also use the inquiry and hearing procedures in chapter 11.

Part 11.1 — Conduct of disciplinary inquiries — general

Clause 189 — Application of chapter 11

Clause 189 clarifies that the chapter applies to inquiries mentioned in the divisions listed.

Clause 190 — Meaning of presiding officer

Clause 190 provides a short-hand definition for all of the decision-makers in the disciplinary process who can impose sanctions. The definition labels any presiding officer, review officer or adjudicator as the ‘presiding officer’.

Part 11.2 — Disciplinary inquiry procedures

Clause 191 — Nature of disciplinary inquiries

Clause 191(1) explicitly stipulates that disciplinary inquiries are administrative procedures.

Clause 191(2)(a) affirms that the common law principle of natural justice applies.

Clause 191(2)(b) clarifies that being a quasi-judicial process, but not a judicial process, the statute law and common law on evidence relevant to court hearings do not apply to these proceedings. It should be noted, however, that consistent with the principles of natural justice, a decision cannot be based upon no evidence, nor speculation or suspicion: there must be logically probative material informing the decision.

Akin to the above sub-clause, clause 191(2)(c) clarifies that the procedure for deciding if a disciplinary breach has occurred is not a court proceeding. Consequently, evidence on oath or affidavit is not appropriate.

Clause 191(2)(d) stipulates that when deciding if a charge is proven, or not proven, the relevant officer must apply a standard of balance of probabilities. The balance of probabilities is a standard of proof associated with civil and administrative proceedings. This standard has a lower threshold than the criminal standard of beyond reasonable doubt. Proving a fact on the standard of the balance of probabilities means that the existence of the fact is more probable than not, or the fact is established by a preponderance of probability.

Clause 192 — Application of Criminal Code chapter 7

Clause 192 clarifies that the proceedings to determine disciplinary breaches are not interpreted to be legal proceedings for the purposes of the offences set out in chapter 7 of the *Criminal Code 2002.*

Clause 193 — Notice of disciplinary inquiry etc

Clause 193 requires that a presiding officer notify a detainee of an inquiry. The detainee should already be informed of charges laid, and already have had the opportunity to elect to consent to the charges as a consequence of division 10.3.1 above.

Clause 193(2) lists the matters that must be in the notice.

Clause 193(3) enables the detainee to make submissions to the presiding officer for the inquiry.

Clause 193(4) obliges the presiding officer to consider submissions made by the detainee prior to any deadline set in the notice of the inquiry.

Clause 194 — Conduct of disciplinary inquiries

Clause 194 allows inquiries to be conducted prudently and expediently. The provision enables the procedure to be exercised in a manner commensurate to the circumstances.

Clause 194(2) enables the presiding officer to hold a hearing if natural justice should be served. 194(3) requires the procedure in part 11.3 to be used for hearings. In some cases a hearing may be unnecessary if, for example, the detainee makes a submission to the effect that they concede the breach.

Clause 194(4) stipulates that inquiries are not open to the public unless the presiding officer decides positively that the inquiry should be open.

Clause 194(5) ensures that a decision is not rendered inoperable because of a lack of form rather than substance. For example, if a notice in clause 193 does not have a deadline for submissions, yet a submission is made, any decision made as a consequence is not invalid. However, if no notice was given at all and the detainee had no opportunity to make submissions, this would be a matter of substance and the decision may be invalid.

Clause 195 — Presiding officer may require official reports

Clause 195 authorises the presiding officer to seek reports from the chief executive, the NSW corrections authority, the Director of Public Prosecutions, another corrections officer or a public servant of the ACT. The person asked for a report must provide a report.

Clause 196 — Presiding officer may require information and documents

Clause 196 authorises the presiding officer to seek information from people with a relevant connection to the alleged disciplinary breach being decided.

The clause enables the presiding officer to ask for particular information or particular documents.

Clause 196(2) provides an exception to the provision of information or documents if the Minister certifies that disclosing the document or information may endanger someone or is not in the public interest.

The power in clause 196 does not oust a person’s privilege against self-incrimination nor exposure to civil penalty. The clause also retains client legal privilege.

Clause 197 — Possession of inquiry documents etc

Clause 197 enables the presiding officer to have possession of documents, or other things obtained, for the duration of the inquiry. However, the presiding officer may return the documents, or things, prior to the completion of the inquiry.

Clause 198 — Record of inquiry

The presiding officer is obliged to keep a record of the inquiry.

Part 11.3 — Disciplinary hearing procedures

Clause 199 — Notice of disciplinary hearing

Clause 199 requires the presiding officer to notify the accused detainee of a hearing and the chief executive. The detainee should already be informed of charges laid, and already have had the opportunity to elect to consent to the charges as a consequence of division 10.3.1 above.

Clause 199(2) stipulates that the notice must say when and where the hearing will take place and state the detainee's rights and obligations in clauses 200 and 201.

Clause 199(3) clarifies that the hearing may be held at a correctional centre. It is envisaged that most hearings will take place at the correctional centre where the detainee is detained.

Clause 200 — Appearance at disciplinary hearing

Clause 200(1) entitles the detainee accused of breaching discipline to be present at the hearing.

Clause 200(2) authorises the presiding officer to direct witnesses to attend the hearing to answer questions or produce relevant documents or things for the hearing.

Clause 200(3) clarifies that compliance with providing documents or other things is achieved if they are provided before the deadline in the notice issued by the presiding officer.

Clause 200(4) provides the presiding officer with explicit authority to require an accused detainee or a witness to answer questions, produce documents, or produce other things.

Clause 200(5) enables the presiding officer to disallow questions that are unfair, prejudicial, vexatious or are an attempt to abuse the inquiry procedure.

Clause 200(6) gives the presiding officer the power to allow corrections officers and other people to be heard at a hearing.

The power in clause 200 does not oust a person's privilege against self-incrimination nor exposure to civil penalty. The clause also retains client legal privilege.

Clause 201 — Rights of accused at disciplinary hearing

Clause 201(1)(a) establishes a detainee's right to be heard, to examine witnesses, to cross-examine witnesses and to make submissions to an inquiry.

As discussed above, a disciplinary hearing is an administrative process not a judicial process. Consequently, clause 201(1)(b) establishes that a detainee does not have a right to legal representation at a disciplinary hearing. However, legal representation may be permitted by the presiding officer.

Clause 201(2) lists the matters that must be considered by a presiding officer if a detainee asks for legal representation.

Clause 201(3) empowers the presiding officer to exclude a detainee from a hearing if the detainee is disruptive or contravenes a direction made by the presiding officer.

Clause 201(4) clarifies that the detainee's presence is not inherently required for the presiding officer to determine if a charge is proven. However, this sub-clause does not set aside the presiding officer's obligation to see that natural justice is applied. The presiding officer should consider why the detainee failed to attend and consider whether making a decision in the detainee's absence would not offend natural justice.

For example, if the detainee's refused to attend, the detainee may have waived their detainee's right to question witnesses etc. However, if the detainee was physically unable to attend due to circumstances out of the detainee's control, the presiding officer may consider whether a hearing should be re-convened.

Clause 202 — Appearance at disciplinary hearing by audiovisual or audio link

Clause 202 enables the use of technology to conduct hearings. This clause enables appearances by relevant parties and witnesses to take place via audiovisual or audio links. The individuals do not have to be physically before the presiding officer.

The clause draws upon relevant provisions of the *Evidence (Miscellaneous Provisions) Act 1991*. A presiding officer will be authorised to draw upon these powers by a consequential amendment to the *Evidence (Miscellaneous Provisions) Act 1991* including the presiding officer as a quasi-judicial entity.

Chapter 12 — Full-time detainees — leave

Part 12.1 — Local leave

Clause 203 — Local leave directions

Clause 203 enables the chief executive to direct a detainee to leave a centre for a relevant, official purpose.

A chief executive may issue a permit to notify any relevant officers of the chief executive's decision.

Clause 203(2) empowers the Executive to make regulations that are conditions on leave directed by the chief executive.

In making decision under this power, the chief executive may also set condition upon the leave.

Clause 204 — Local leave permits

Clause 204 authorises the chief executive to allow a detainee to leave a correctional centre for a relevant purpose.

Clause 204(2) requires the permit to state the purpose of the leave. Leave cannot be granted for longer than seven days. The permit must state the period of the leave approved.

Clause 204(3) empowers the Executive to make regulations that are conditions on leave authorised by the chief executive.

In making decision under this power, the chief executive may also set conditions upon the leave.

Part 12.2 — Interstate leave

Part 8.2 remakes existing provisions for interstate leave currently provided by the *Prisoners Interstate Leave Act 1997.*

Part 12.2.1 — General

Clause 205 — Definitions for part 12.2

Clause 205 provides definitions used for this part.

Clause 206 — Declaration of corresponding leave laws

Clause 206 enables the Minister to declare the law of another State or Territory to be a corresponding leave law. In this way this Bill will recognise the laws that substantially give effect to the same purpose as this part of the Bill. Likewise, States or Territories that declare the Bill to be corresponding will recognise the substance of this Bill.

A declaration must be notified on the Legislation Register.

Division 12.2.2 — ACT Permits for interstate leave

Clause 207 — Interstate leave permits

Clause 207 authorises the chief executive to grant a detainee leave to travel to a State or Territory with a corresponding law and stay in that State or Territory.

A permit issued under this power must include the destination state, the purpose of the leave and the period of leave approved. Interstate leave is limited to less than 7 days.

Clause 207(3) qualifies the authority to grant leave. If a detainee has a high security classification the leave may only granted on the grounds of health or compassion. The chief executive may also grant a permit in this case if the chief executive determines it is appropriate.

Clause 207(4) empowers the Executive to make regulations that are conditions on leave authorised by the chief executive.

In making decision under this power, the chief executive may also set conditions upon the leave.

Clause 208 — Effect of ACT permit for interstate leave

Clause 208 stipulates that a prisoner with a leave permit is authorised to leave a correctional centre, escorted or unescorted.

If an escort is required as a condition of the leave, the escort is authorised to carry out their duty in the relevant State.

Clause 209 — Notice to participating States

Clause 209 requires the chief executive to give relevant officers notice that the prisoner is authorised to travel to their State, or through their state.

Clause 210 — Powers of escort officers

Clause 210 empowers an escort officer to give the prisoner on interstate leave directions and to use force, when necessary, to prevent escape.

Clause 210(2) also authorises an escort officer to conduct a scanning, frisk or ordinary search of the detainee. These searches are defined at clause 106, discussed above.

Consequently, parts 9.4 dealing with searches and part 9.5 dealing with the seizing of property also apply.

Clause 211 — Liability for damage etc

Clause 211(1) clarifies that the ACT is liable for damage or loss caused by a Territory detainee on leave in another State or Territory.

Clause 211(2) clarifies that the Territory retains the right of an action against an escort officer or detainee if warranted.

Part 12.2.3 — Interstate leave under corresponding leave laws

This part enables detainees and escorts from other States and Territories to visit the ACT or travel through the ACT. The authority to do so is dependent upon the other State being recognised as corresponding law, and a permit for leave issued by that State.

Clause 212 — Effect in ACT of interstate leave permit under corresponding leave law

Clause 212 authorises interstate escort officers to carry out their duties in the ACT while escorting an interstate detainee in the ACT.

Clause 213 — Powers of interstate escort officers

Clause 213 authorises interstate escort officers to use force to keep the detainee on leave in their custody, or to arrest the detainee on leave who is unlawfully out of custody.

The use of force is only permitted if the home jurisdiction of the officer also permits the use of force.

Clause 214 — Escape of interstate detainee

Clause 214 authorises the arrest without warrant of an interstate detainee unlawfully out of custody by an ACT police officer or the detainee's interstate escort officer.

Clause 214(3) enables an arresting police officer to pass the interstate detainee into the custody of the interstate escort officer.

Clause 215 — Return of escaped interstate detainee

Clause 215 contemplates what can happen after an escape or an attempted escape. The interstate detainee can be taken before a Magistrate to over-ride the interstate leave permit.

The Magistrate can issue a return warrant and to order the return of the interstate detainee and to have the police or the interstate officer hold the detainee in custody.

The Territory can hold the detainee for 14 days to facilitate the return of the interstate detainee to their home jurisdiction.

Chapter 13 — Miscellaneous

Clause 216 — Lawful temporary absence from correctional centre

Clause 216 clarifies that any detainee who is lawfully absent from a correctional centre is still in the legal custody of the chief executive. If the detainee is being escorted by the escort officer the detainee is also in the custody of the escort.

Clause 217 — Detainee's work — no employment contract

In *Pullen v Prison Commissioners* [1957] 3 All ER 470, Lord Goddard, Chief Justice of the Queen's Bench Court of the United Kingdom, determined that a prison workshop was not a factory for the purposes of the *Factories Act 1937*. The *Factories Act 1937* was an antecedent to modern workers compensation legislation.

Lord Goddard, stated that the *Factories Act 1937* was designed to place obligations upon employers of labour in factories and other places of people working under contract and not to prisoners employed on labour as part of penal discipline.

The Chief Justice noted that the relationship was not an employment relationship. Prisoners were obliged to work as a consequence of their sentence. A prison was also not a workplace for people imprisoned there.

Morgan v Attorney-General [1965] NZLR 134 followed *Pullen*. The plaintiff was a prisoner who requested work outside of the prison and was injured while working on

a Sunday. Prisoners were not compelled to work on a Sunday but were permitted to do so and were paid prison wages. The court found Morgan not to be an employee of the prisons department.

In *Zappia v Department of Correctional Services* (SA) (1993) WCATR 30, the Workers Compensation Appeal Tribunal said:

> In our respectful view . . . the fact that the prisoner is consulted as to the type of work he is to do, is requested to do work rather than directed to do so and that prison authorities may not choose to use the range of disciplinary powers available in the event of a refusal to work does not alter the position that as a matter of law a prisoner is required to work and is subject to punishment if he refuses to do so. By operation of law a refusal to carry out an assigned task or its wilful or careless mismanagement by a prisoner may result in the punishments we have outlined earlier. The reasoned and more sensitive approach taken by prison management in order to get the prisoner working cannot alter the underlying legal requirements and convert the arrangements made between prison management and prisoners into a contract of service.

The line of these cases was followed by Campbell CJ in *Helmers v Dept of Corrective Services* (1997) 14 NSWCCR 256 and *Calin v Dept of Corrective Services* (1997) 14 NSWCCR 559 involving an unconvicted detainee.

Clause 217 is an affirmation of the common law that a detainee working in, or for, a correctional centre, is not in a contract of employment or a contract for services in what ever form.

Clause 218 — Detainee's work — occupational health and safety

Clause 218 obliges the chief executive to comply with the *Occupational Health and Safety Act 1989* where a detainee is carrying out work.

The clause requires the chief executive to protect the health and safety of detainees engaged in work and others near any workplace.

Clause 218(3) authorises the Executive to make regulations that invoke the specific application of parts of the *Occupational Health and Safety Act 1989* to detainees and to modify the application.

Clause 219 — Personal injury management — detainee's etc

Clause 219 provides a means to manage any injuries sustained by detainees in the course of detention, and if necessary compensate detainees for permanent injury and their families for death.

Clause 219(1) enables the scheme to apply to detainees or other offenders directed to do community service work.

Clause 219(2) authorises the Executive to make regulations to manage injuries, enable vocational rehabilitation where necessary, establish a system for compensation for a permanent injury, and payments of death benefits.

It is envisaged that the scheme will set out scheduled amounts for levels of permanent impairment endured by injured detainees and a standard payment for a death caused by injury as a consequence of an injury arising because of detention or community service.

Clause 220 — Random testing of detainees — statistical purposes

Alexander Maconochie Centre Functional Brief states that:

> Illicit drugs pose one of the most serious problems in prisons. Drug use can cause death or serious illness (through overdosing), spread blood borne viruses and diseases such as AIDS/HIV and Hepatitis B and C (through shared use of dirty needles), react badly with prescribed drugs, cause violent behaviour, jeopardise rehabilitation, and impact negatively on families. [2005, page 49]

Clause 220 enables testing of randomly selected detainees for the presence of drugs or alcohol. This power enables corrections centres to check for the presence of illicit drugs in the centre. The power also enables the corrections service to make records of random testing for statistical purposes and facilitate research projects.

Clause 220(2) prevents a record of the identity of the detainee from being made and ensures that the results are only used for statistical purposes.

Clause 221 — Confidentiality

Clause 221 ensures that any information a person has access to, because of their employment or professional involvement, under the terms of the Bill remains confidential. The information may only be exchanged or shared for professional purposes.

Clause 221(2) creates an offence if a person makes a private record about confidential information. It also creates an offence if a person divulges confidential information in a private capacity.

Clause 221(3) clarifies that records made by a person because of their duties under the Act, or in their professional capacity are not offences. Exchanges of information with other criminal justice agencies, consistent with section 136 of the *Crimes (Sentencing) Act 2005* are also permitted. Any exchange or disclosure by a law enforcement agency or any person or agency exercising another lawful function is permitted. Clause 221(3)(f) authorises the Executive to make regulations that list other entities entitled to exchange information gleaned under the Bill.

Clause 221(4) clarifies that information may also be divulged if a detainee consents to the sharing of the information, the chief executive authorises the divulgence, the information is simply stating that a detainee is held in a particular correctional centre or the divulgence is authorised by regulations.

Clause 221(5) authorises the chief executive to divulge information if it is necessary to protect the life or safety of someone, or is in the public interest.

Clause 222 — Protection from liability

Clause 222 protects persons in the exercise of a function under the Act from incurring personal liability, as long as the function was performed honestly and without recklessness. If the function is not one under the Act, a person may still be protected if they held a reasonable belief that the act or omission was in the exercise of a function under the Act.

Any civil liability that would attach to a person attaches instead to the Territory.

Clause 223 — Corrections dogs

Clause 223 authorises the Executive to make regulations about the use, training and management of corrections dogs.

Clause 224 — Declaration of corresponding corrections laws

Clause 224 enables the Minister to declare corresponding law for the purpose of provisions in the Bill that contemplate, or coordinate with, the laws of other jurisdictions.

Clause 225 — Evidentiary certificates

Clause 225 enables the chief executive to issue an evidentiary certificate addressing any of the matters in 225(2)(a) to (e). The certificate is taken to be evidence of the matters stated in the certificate.

Clause 225(5) enables a certificate setting out the results of an analysis performed for the purposes of this Bill and signed by an analyst to be taken as evidence of the analysis and the facts drawn from the analysis. For example, the results of a drug test.

Clause 225(6) obliges a court to accept these certificates as proof of the facts stated, unless there is contrary evidence.

Clause 225(7) creates an imperative for evidentiary certificates to be provided to detainees affected by the evidentiary effect of the certificate.

Clause 225(8) enables the chief executive to appoint analysts for drug testing and other relevant tasks under this Bill. The instrument of appointment is a notifiable instrument.

Clause 226 — Determination of fees

Clause 226 authorises the Minister to set any fees for the administration of the foreshadowed Act. Any instrument setting a fee must be tabled at the Legislative Assembly to allow Assembly members to consider if they wish to move a motion of disallowance. If the declaration is allowed, it must be also be notified before becoming enforceable.

Clause 227 — Approved forms

Clause 227 enables the Minister to approve forms for use under the foreshadowed Act. Once made, the approved form must be used. Any form approved must be notified on the legislation register.

Clause 228 — Regulation making power

Clause 228 lists the items for which the Executive would be authorised to make regulations.

The existence of a regulation making power does not oblige the Executive to make regulations about the matter.

Any regulations made must be consistent with any provisions of the foreshadowed Act. Regulations are intended to provide for more detailed rules and operation of an Act where necessary.

As a means of expediently dealing with laws of different jurisdictions that may apply to this Bill, such as Commonwealth law, clause 228(5) enables other laws to be incorporated into regulations for this Bill.

Clause 228(6) authorises the Executive to impose penalties in regulations up to 20 penalty units. Penalty units are defined at section 133 of the *Legislation Act 2001* and at the time of this Bill equal $100 per unit for an individual and $500 per unit for a corporation.

Clause 229 — Legislation amended — schedule 1

Clause 229 is a technical clause that flags substantial and consequential amendments to other Territory Acts in schedule one to this Bill.

Chapter 50 — Transitional

The transitional chapter provides rules for identifying the correct law at the relevant time the law needs to be applied. The chapter number and the clause numbers are inflated to facilitate simple re-numbering when the Bill or foreshadowed Act is republished by Parliamentary Counsel.

Clause 500 — Meaning of commencement day for chapter 50

Clause 500 provides a short-hand definition of ‘commencement day’ for this chapter. Commencement day means the day that chapter 50 commences by way of clause 2 discussed above.

Clause 501 — Application of Act to transitional detainees

Clause 501 refers to the sections of the *Crimes (Sentence Administration) Act 2005* that deal with transitional arrangements. These sections determine that in relation to detention, those people detained before the commencement of the *Crimes (Sentence Administration) Act 2005* are covered by the *Crimes (Sentence Administration) Act 2005* after it commences.

Consequently, clause 501 stipulates that those detainees would also covered by this foreshadowed Act after it commences. The result is that all detainees would be covered by this Bill once commenced as an Act.

Clause 502 — Application of Act to transitional interstate leave permits

Clause 502 deems any interstate leave permits in force before this foreshadowed Act commences to be a permit made under the terms of the foreshadowed Act. In essence, the new Act would apply to existing leave permits.

Clause 502(4) refers to the retention of the *Prisoners Interstate Leave Act 1997* via chapter 17 of the *Crimes (Sentence Administration) Act 2005.* See clause 506 below.

Clause 503 — Application of Act to certain transitional remandees

Any local release or hospital release under the *Remand Centres Act 1976* is taken to be authorised by this foreshadowed Act after commencement and the relevant new provisions would apply.

Any complaints to the Official Visitor that are not complete before commencement day are deemed to be complaints under the new Act.

Clause 504 — Transitional arrangements with NSW — Rehabilitation of Offenders (Interim) Act 2001, s 94

Section 94 of the *Rehabiltiation of Offenders (Interim) Act 2001* (*ROOI Act*) authorised the Chief Minister of the ACT Government to make arrangements with the NSW Government about the use of NSW officers in relation to ACT prisoners. This included the provision of reports about ACT prisoners serving their sentence in NSW gaols.

The effect of section 94 was retained by the transitional provisions in chapter 17 of the *Crimes (Sentence Administration) Act 2005.*

This clause transfers any agreements made under the authority of section 94 of the *ROOI Act* to the authority of clause 25 in this Bill. This transitional clause retains the effect of any agreement in force prior to the commencement of this Act.

As the power is facilitative, the section is prescribed to expire in two years after commencement.

Clause 504(5) refers to the retention of the *ROOI Act* via chapter 17 of the *Crimes (Sentence Administration) Act 2005.* See clause 506 below.

Clause 505 — Construction of outdated references

Clause 505 enables commonsense to prevail when dealing with any relevant Acts, instruments, documents, forms etc that refer to the repealed Acts, or repealed parts of Acts, and are to be treated as references, instruments, documents, forms etc under the new Corrections Management Act.

For example, if the Remand Centre uses a form that refers to remand under the *Remand Centres Act 1976*, this transitional provision enables the form to be used for remand matters under this Act, as it is relevant to the subject matter.

Alternatively, if another Act makes reference to the *Remand Centres Act 1976*, then that reference can be interpreted to be a reference to the substance of the matter under this Act.

Clause 505(3) clarifies that the transitional principle also applies to any relevant Act, instruments, documents, forms etc that have been repealed because of the *Sentencing Legislation Amendment Act 2006.*

Clause 505(4) clarifies that section 88 of the *Legislation Act 2001* applies. Section 88 ensures that any transitional laws that have been made and are later repealed, can still be used in circumstances relevant to the transitional laws.

(5) expires the section after 10 years.

Clause 505(6) lists the legislation that make up the meaning of earlier law.

Clause 506 — Crimes (Sentence Administration) Act, ch 17 (Transitional — interim custody arrangements) — definition of Corrections Management Act 2006

Chapter 17 of the *Crimes (Sentence Administration) Act 2005* provides transitional arrangements to enable existing custodial laws to apply until the Corrections Management Act commences. The *Crimes (Sentencing) Act 2005,* the *Crimes (Sentence Administration) Act 2005* and the Corrections Management Bill 2006 have been drafted using common terms, methods and connections. The three are designed to work together and make sense of a sentence from sentencing to the completion of a prison term.

To ensure the ACT's custodial laws continue to operate in harmony with the new Sentencing Acts until the Corrections Management Bill 2006 is enacted, chapter 17 provides transitional methods and powers to resolve any legal conflicts should they arise.

The transitional provisions are linked to the commencement of this Bill.

This clause stipulates that it is this Bill that is referred to in section 603 of the transitional provisions in the *Crimes (Sentence Administration) Act 2005.*

Clause 506(3) clarifies that section 88 of the *Legislation Act 2001* applies. Section 88 ensures that any transitional laws that have been made and are later repealed, can still be used in circumstances relevant to the transitional laws.

(4) expires the section one year after commencement.

Clause 507 — Transitional regulations

Clause 507 authorises the Executive to make regulations to address unforeseen transitional matters following the commencement of the foreshadowed Act.

This power is limited to two years after commencement.

Schedule 1 — Amendment of other legislation

Part 1.1 — Crimes Act 1900

This clause omits an outdated definition of corrections officer from the *Crimes Act 1900*.

Part 1.2 — Crimes (Sentencing) Act 2005

Part 1.2 remakes the pre-sentence report provisions of the *Crimes (Sentencing) Act 2005* in a simpler form.

The provisions enable the court to adjourn proceedings and order the chief executive, of the relevant department to prepare a pre-sentence report. Part 19.4 of the *Legislation Act 2001* enables the chief executive to delegate this function as a matter of course. References to the chief executive may be taken to include a person delegated by the chief executive to exercise the power or carry out the function.

Section 41(2) requires the court to order presentence reports for the dispositions listed. Periodic detention, community service and rehabilitation programs, all have eligibility and suitability criteria that must be addressed in a report and considered by the court before the court can proceed to impose them. In the case of rehabilitation programs, the court is not obliged to seek a report if there is already relevant information before the court that satisfies the court's needs.

New section 41(3) enables the court to pick the matters from the list of pre-sentence report matters the court wishes the report to address. It also authorises the court to ask the assessor to report on any other matter the court wishes to have addressed in the report.

It is envisaged that a form would be developed to facilitate the order.

New section 42 requires assessors to address each pre-sentence matter requested by the court. The section also authorises the assessor to address other matters if the assessor forms a view that it is relevant. For example, if the assessor discovers that the offender has a problem with drug addiction.

Section 42 makes reference to the relevant criteria for suitability for each of the dispositions that make a presentence report mandatory.

Clauses 1.3 to 1.10

Clauses 1.3 to 1.10 provide consequential amendments as a result of clause 1.2, with the exception of clause 1.7 which corrects a mistaken reference to (3) and replaces it with the correct reference to (4).

Part 1.3 — Crimes (Sentence Administration) Act 2005

Clause 1.11 recasts section 9(4) in a clearer form. The effect of the section remains the same.

Section 9(4) requires the *Crimes (Sentence Administration) Act 2005* to apply to other detainees as being a full-time detainee. The section enables the Executive to make

regulations where the law authorising the detention, and how that detention is to be exercised, conflicts with the Act. The aim of the clause is to authorise necessary modifications to reconcile the conflicting laws. For example, a Commonwealth law may be more restrictive than the Act. In this instance there may be a conflict with the Act. Generally, where an ACT law is found to be inconsistent with Commonwealth law, Commonwealth law has the right of way. Under these circumstances the ACT Executive may make regulations to resolve the inconsistency.

Clause 1.12 follows changes to the *Magistrates Court Act 1930* and recent case law that requires judicial functions exercised by a registrar to be delegated by a Magistrate or Judge. Consequently, this clause simplifies section 10(2).

Clause 1.13 corrects a mistake made during the drafting of the *Sentencing Legislation Amendment Act 2006*. An update to references to correctional centre accidentally omitted the correct reference in section 36(2)(a) to a NSW correctional centre. This clause corrects the error.

Clause 1.14 updates section 36(3)(b) by specifying that clause 93(2)(a) of this Bill would apply to segregated detainees moved to NSW.

Clause 1.15 amends section 61(2)(e) by including Sentence Administration Board powers to manage periodic detention. The effect of the amendment would be to enable automatic adjustment of combination sentences if any decisions are made that affect the timing of periodic detention, or that refer a periodic detention matter back to the sentencing court.

Clauses 1.16, 1.17 and 1.18 provides a means for the Sentence Administration Board to grant an extended period of leave, or refer a matter back to the sentencing court, if a periodic detainee cannot serve periodic detention due to exceptional circumstances or serious health reasons.

The sentencing court can decide to continue to impose the sentence as originally made or re-sentence the offender.

Clause 1.19 complements the correction discussed in clause 1.13. The amendment ensures that the interim custody period contemplates detainees transferred to NSW.

Clause 1.20 relates to section 506 of the Bill. Chapter 17 of the *Crimes (Sentence Administration) Act 2005* provides transitional arrangements to enable existing custodial laws to apply until the Corrections Management Act commences. The *Crimes (Sentencing) Act 2005*, the *Crimes (Sentence Administration) Act 2005* and the Corrections Management Bill 2006 have been drafted using common terms, methods and connections. The three are designed to work together and make sense of a sentence from sentencing to the completion of a prison term.

To ensure the ACT's custodial laws continue to operate in harmony with the new Sentencing Acts until the Corrections Management Bill 2006 is enacted, chapter 17 provides transitional methods and powers to resolve any legal conflicts should they arise.

The transitional provisions are linked to the commencement of this Bill.

This amendment links the expiry of chapter 17 to the expiry of clause 506. In effect it aligns the expiry of the interim custody provisions.

Clauses 1.21 to 1.23 update relevant definitions.

Part 1.4 — Evidence (Miscellaneous Provisions) Act 1991

Clause 1.24 gives effect to clause 202 which enables the use of technology to conduct hearings. It enables appearances by relevant parties and witnesses to take place via audiovisual or audio links. The individuals do not have to be physically before the presiding officer.

Part 1.5 — Listening Devices Act 1992

Clause 1.25 amends the *Listening Devices Act 1992* to clarify that the Act does not apply to the monitoring provisions set out in chapter 9 of this Bill.

Part 1.6 — Magistrates Court Act 2005

Clause 1.26 follows recent case law and assigns the function to a court rather than the registrar.

Clause 1.27 simplifies this section.

Part 1.7 — Security Industry Regulation 2003

Clause 1.28 updates a reference in the Security Industry Regulation.

Dictionary

The Bill includes a dictionary which draws upon the dictionary of the *Legislation Act 2001* and provides definitions for this Bill.