2015

LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

CORRECTIONS MANAGEMENT AMENDMENT BILL 2015

EXPLANATORY STATEMENT

Presented by
Shane Rattenbury MLA
Minister for Justice

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CORRECTIONS MANAGEMENT AMENDMENT BILL 2015

Outline

This explanatory statement relates to the *Corrections Management Amendment Bill 2015* (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly. The statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the Courts.

The Bill will amend the *Corrections Management Act 2007* (CMA) and the *Children and Young People Act 2008* (CYP).

In summary the Bill makes amendments to:

a) reform provisions relating to random drug testing of detainees held in corrections centres; and
b) clarify that an interstate leave permit under the CMA and CYP can be renewed for seven day periods for 28 days before its renewal is drawn to the attention of the Director-General

A discussion of human rights engagement in relation to particular amendments is in the detail section of this explanatory statement, below.

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DETAIL

Clause 1 – Name of the Act
This is a technical clause that names the short title of the Act. The name of the Act would be the *Corrections Management Amendment Act 2015*.

Clause 2 – Commencement
This clause provides that sections 6 and 8 commence on the day after the Bill is notified. The remaining provisions commence six weeks after the Act's notification day.

Clause 3— Legislation amended
This clause identifies the legislation amended by the Act.

Clause 4 – Alcohol and drug testing of detainees, section 134(1)

Section 221 of the *Corrections Management Act 2007* (the CMA) currently provides that random drug testing be used for statistical purposes only and that no record of the donor be kept. The purpose of the provision when it was originally enacted was to obtain statistics about the prevalence of drug use within the prison that could be used to facilitate research papers or inform operational policy.

This Bill repeals section 221 (discussed in clause 7), and this clause amends section 134 to provide that the Director-General can direct a detainee or a number of randomly selected detainees at a correctional facility to provide a test sample.

This will mean that the Director-General may have regard to the positive test sample in making any decision in relation to the management of the detainee(s) under the CMA. This could include discipline and/or referral for appropriate treatment and programs. The amendment does not mandate that an alleged disciplinary report should be made for a detainee returning a positive sample; rather it is another possible tool to use for detainee management including informing how therapeutic interventions should be focussed in ACT correctional centres.

Currently a number of programs are run at the Alexander Maconochie Centre (AMC) to address substance addiction and abuse, and these include:

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- *Self Management and Recovery Training (SMART) Program* – assists people to recover from their addictions, regardless of the type of addiction. ACT Corrective Services deliver this program using a co-facilitation model with Directions ACT staff;
- *First Steps – Relapse Prevention Program* – aims to support participants as they go through the challenges faced when ceasing or reducing substance use;
- *Harm Minimisation AOD Program* – a two hour information session for all detainees. The program involves identification and discussion of ways in which to minimise the risks associated with alcohol and other drug use;
- *Therapeutic Community Program* (or 'Solaris TC') - is a rehabilitative treatment placement within the AMC in which the community itself, through self-help and mutual support, is the principal means for promoting personal change in relation to alcohol and other drug use. This program is delivered in partnership with Karralika Programs Inc;
- *Cognitive Self Change Program* - takes participants through a series of four steps designed to facilitate their skill development in areas such as, objectivity, recognition of their own risky thinking, and attitudes and beliefs that lead them to harmful behaviour. The aim is to replace criminogenic thinking while maintaining self esteem. Learning is not just restricted to group work, the skills must be performed in real life situations and evidence of this must be presented in each group; and one on one counselling provided under contract by ACT Health and Directions ACT.

The delivery of programs is dependent on a number of factors including, but not limited to, the availability of places in the program, resourcing, the number of detainees available to undertake the program, length of sentence, and a detainee's willingness to participate.

In line with this amendment ACT Corrective Services (ACTCS) will also modify policy and operational procedure requiring officers to consider referral of detainees who return a positive targeted or random drug test for appropriate health and/or medical treatment and consider commencing the disciplinary process. These changes will recognise that drug testing is an operational response focused on safety and

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detainee management and that it also provides an opportunity to improve therapeutic responses.

A human rights analysis of the proposed amendment principally involves two questions – what are the relevant rights engaged by the proposed legislation and is that engagement proportionate under section 28 of the Human Rights Act.

The amendment to random drug testing may limit the following human rights recognised by the Human Rights Act:

- privacy and reputation (s 12); and
- humane treatment when deprived of liberty (s 19).

Courts in the United States have long considered a detainee's right to privacy and dignity when considering their fourth amendment right, which provides that the Government shall not subject individuals to unwarranted and unreasonable searches of their personal privacy and dignity of the individual from governmental intrusion.

Within the prison context, a unanimous United States Supreme Court has held that individuals are not stripped of all constitutional protections on incarceration.[1] However in the 1984 case of *Hudson v. Palmer*[2], the Court severely limited the protection available to detainees under the fourth amendment.

A theme that has emerged in international case law is that, for a prison to ensure that random testing is lawful and reasonable, the randomness of the test must be truly random. US courts have set forth the basic contours of a reasonable urinalysis search based primarily on the factors which indicate reasonableness that arose from the case of *Schmerber v California*[3]*.* The *Schmerber* considerations most important to the reasonableness of urinalysis testing include the extent of the intrusion on the individual's personal privacy and bodily integrity, the manner of the urine testing, and the effectiveness of the test performed.'

The New York Federal District Court in *Storms v Coughlin*[4] concluded that drug problems prevalent among prisoners could generally justify wholly random urine testing if conducted in a reasonable manner. On this basis the Court in *Storms*

[1] *Wolff v. McDonnell,* 418 U.S. 539, 555 (1974)
[2] *Hudson v. Palmer,* 468 U.S. 517 (1984)
[3] *Schmerber v. California,* 384 U.S. 757, 765 (1966)
[4] *Storms v. Coughlin*, 600 F. Supp. 1214, 1216-17 (S.D.N.Y. 1984)

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concluded that the prison's urinalysis program was unreasonable because the prison could not demonstrate that its procedure was truly random.

In the UK High Court case of *Russell*[5] a detainee refused to undergo a random mandatory drug test on the grounds that the order to do so was unlawful as the prison could not prove that the selection was made on a truly random basis. Justice Lightman ruled that randomness is an essential pre-requisite of submission to a random mandatory drug test and that the Corrections Service must provide sufficient information on randomness in advance of the test to allow detainees to make an informed judgment on the lawfulness of the order.

ACTCS will advise detainees of changes to random drug testing provisions through the appropriate mechanisms within the AMC; this typically includes written notification and discussion with the detainee delegates. The detainee handbook and induction process will also be updated, as appropriate, to reflect the policy and legislative change. Advice to detainees will be delivered in a manner that ensures they understand their rights and obligations under the random drug testing regime.

If a positive result is returned from a random drug test and disciplinary proceeding follows, a detainee may request the decision of the presiding officer be internally reviewed under the CMA. Following this an external review mechanism is available in the CMA.

The rationale behind the amendment is that allowing random drug testing to be used for drug interdiction or offender management will enhance ACTCS capacity to meet duty of care obligations to detainees. The amendment supports:

- more targeted case management including support for rehabilitation and referral of detainees to treatment within a correctional facility and on release;
- the integrity of rehabilitation and related programs and increased compliance with conditions imposed on certain programs including transitional release through approved leave from a correctional facility;
- enhanced intelligence-led decision making in prison operations and detainee management; and

[5] *R v Secretary of State for the Home Department ex parte Russell* (2000) WL 976013

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- assist in the reduction of illicit substances in the prison, which supports detainee safety and health.

A number of these operational imperatives are prohibited by the current inability to identify random drug testing sample donors. ACTCS has a duty of care to uphold to people who are suffering from a drug addiction but also to other detainees who do not want to be exposed to drugs or the side effects of drug misuse.

The misuse of drugs in prison can have a number of adverse affects on the prison system – this includes disorder, violence and crime as well as risks to the health, including risk of overdose and potential death of detainees and the undermining of the rights of detainees who wish to avoid drugs.

In some circumstances it will be appropriate to immediately refer a detainee who returns a positive test result from random testing to the disciplinary process, and in other cases it will be more appropriate to refer a detainee to rehabilitation focused programs. As an example, in the circumstances of consistent and undeterred drug use or where a detainee is undertaking a drug and alcohol program where participation is dependent on effort on the part of the detainee to abstain from drug use, it may be appropriate that the detainee is managed through the disciplinary process.

In the ACT the drug testing regime is not only carried out in accordance with legislation but also in accordance with the processes and policies of ACTCS, which work to ensure that a response to drug misuse is proportionate to the harm caused, circumstances of the individual detainee and the maintenance of safety, security and good order.

In particular the *Corrections Management (Drug Testing) Policy 2011* and the *Corrections Management (Drug Testing) Procedure 2011* will be amended to support the change to ensure any limitation on detainees' rights is reasonable and proportionate. If a detainee is to be subject to a disciplinary process resulting in sanctions from a positive a random drug test result, the current detainee discipline processes available under the CMA will be used.

Any limitation of these rights is justified and proportionate to ensure the effective operation of the corrections system, respond to detainees' health and safety needs, and maintain good order.

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Clause 5 - new section 134(6)

This clause provides a definition for ‘randomly selected’. The definition accords with the current definition of ‘randomly selected’ in section 221, which is to be repealed.

Clause 6 - interstate leave permits, new section 208 (2A) to (2C)

Currently section 208 provides that a detainee may be given interstate leave for up to seven days. The legislation is silent on whether or not a leave permit may be renewed for further seven-day periods. The Bill amends section 208 to clarify that an interstate leave permit can be renewed for seven day periods to ensure appropriate mechanisms are in place to allow a detainee to stay interstate for a genuine purpose for a period longer than seven days.

For example, a detainee may require a health service that cannot be provided in the ACT, or it may be appropriate for the detainee to receive treatment outside of the ACT that may require leave for treatment interstate for a period longer than seven days.

A renewal of an interstate leave permit will be subject to the same safeguards that already exist in part 12.2 of the CMA. In particular, under section 208(4) the Director-General can subject an interstate leave permit to any condition, they believe on reasonable grounds, to be necessary and reasonable. This may include that an escort officer(s) accompany the detainee.

When considering making an interstate leave permit or renewing an interstate leave permit, the decision-maker is bound by the principles of administrative decision making, which includes making a decision based on the information and facts available, and obtaining further information or advice if necessary before making or renewing a permit. For example, when renewing a permit for health reasons the decision-maker may have regard to the opinions and reports of the medical treating team.

If a detainee does not agree with the decision-maker or opposes a condition of the permit, they may apply to have the decision reviewed by the decision-maker. Further appeal mechanisms are available under the *Administrative Decisions (Judicial Review) Act 1989.*

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The *Mental Health Act 2015,* to commence on 12 November 2015, will provide a mechanism for the transfer of detainees to approved mental health facilities including to interstate facilities if they are on a mental health order or a forensic mental health order. The transfer will be subject to the safeguards contained in the Mental Health Act. A transfer to an interstate facility under the Mental Health Act may only be authorised by an order made by the ACAT.

A detainee who is not on mental health or forensic mental health order, who is considered a correctional patient under the Mental Health Act and requires short term care at an interstate mental health facility, will not fall under the Mental Health Act and will still need to use the interstate leave permit in order to receive interstate medical treatment.

Furthermore, the amendment provides if the power under section 208 is delegated, the Director-General must be notified of the renewal of a leave permit for the fourth and subsequent renewals. This means that a leave permit can only be in place for 28 days before its renewal is drawn to the attention of the Director-General (if the Director-General is not already aware) but ACTCS still retains the flexibility required to manage detainees

The amendment will not affect the Director-General's power to transfer custody to NSW under section 26 of the *Crimes (Sentence Administration) Act 2005*. The Director-General's decision as to whether to transfer custody or use a leave permit, and extend as necessary, will be made on a case-by-case basis taking into consideration all of the circumstances relevant to a particular detainee.

For example, if it is clear from the outset that medical treatment outside of the ACT will be required for months rather than days or a couple of weeks the Director-General may consider the options to request transfer of custody to NSW or, in the event that a detainee's treatment period interstate is initially undetermined, the Director-General may issue an interstate leave permit cognisant that it may require one or more extensions.

Amendments to section 205 are not required given the operation of the Legislation Act, section 145 which allows for the interpretation of a local leave permit to be read as more than one 'local leave permit.' It remains desirable to amend section 208 as

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its interstate application, including in relation to a second or subsequent interstate leave permit, should be left beyond any doubt.

Clause 7 - random testing of detainees – statistical purposes, section 221

As discussed at clause 4, section 221 is omitted from the Act to allow ACTCS to utilise the disciplinary process and refer for appropriate treatment and programs detainees who test positive as a result of random drug testing.

Clause 8 - Children and Young People Act 2008, new section 242 (3A) to (3C)

Section 242 of the CYP is drafted in similar terms to the CMA in that the legislation is silent on whether interstate leave permits can be renewed for young detainees. The Bill makes consequential amendments to the CYP to allow a child's interstate leave permit to be renewed.

A renewal of an interstate permit under the CYP will be subject to the same safeguards that are currently available under division 6.8.2 of the CYP, which relate to the best interests of the child being considered. Furthermore, the amendment provides if the power under section 242 is delegated the Director-General must be notified of the renewal of a leave permit for the fourth and subsequent times.

The amendment does not affect the power contained in part 5.2 of the CYP Act to transfer custody of the young offender to another jurisdiction.

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