

Australian Capital Territory

Corrections Management (Detainee Disciplinary) Policy 2012

Notifiable instrument NI2012- 627

made under the

Corrections Management Act 2007, section 14(1) (Corrections policies and operating procedures)

1 Name of instrument

This instrument is the *Corrections Management (Detainee Disciplinary) Policy 2012*.

2 Commencement

This instrument commences on the day after its notification.

3 Policy

I make the

DETAINEE DISCIPLINARY POLICY

attached to this instrument, to facilitate the effective and efficient management of correctional services.

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ACT Corrective Services
13 December 2012



ACT
Government

Justice and Community Safety



ACT Corrective Services
All Facilities and Operations

DETAINEE DISCIPLINARY POLICY

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Purpose

To provide a policy framework and guidance for administering the disciplinary processes set out in Chapters 10 and 11 of the *Corrections Management Act 2007*. The disciplinary provisions and policy are directed at achieving detainee compliance with the provisions of legislation, centre operating rules and acceptable behavioural norms.

Authority

Corrections Management Act 2007, Chapters 10 and 11 and section 14.

Scope

The disciplinary provisions apply to detainees in the custody of ACT Corrective Services, whether on remand or sentenced.

Principles

The disciplinary policy is aimed at achieving detainee compliance with legislated requirements, correctional centre rules and accepted behavioural norms. Such compliance is essential in providing a safe and secure environment for detainees, staff and visitors to the centre and operational good order.

The disciplinary provisions operate in tandem with criminal law and are of an administrative nature. Double jeopardy provisions apply whereby a detainee cannot be subject to proceedings under both criminal law and the disciplinary provisions. The principles of natural justice and procedural fairness apply to the disciplinary process.

The guiding principle in achieving compliance with legislated requirements, centre rules and acceptable behavioural norms by detainees is to make effective use of the case management system and positive interaction between detainees and staff. When use is made of the disciplinary provision sanctions, the punishment is to be the minimum possible consistent with the objectives of correcting behaviour and general consistency.

Breaches of Discipline

Section 152 of the *Corrections Management Act 2007* (CMA) sets out, but not exhaustively, breaches of discipline that might be committed by a detainee.

The list covers the range of misbehaviours likely to be encountered in the custodial environment and some, particularly if serious consequences are involved, may amount to a criminal offence. In such cases, referral to police or prosecution authorities may be more appropriate than employing the disciplinary process.

As set out in s155 of the CMA, double jeopardy provisions preclude both criminal prosecution and the disciplinary provisions being employed for the same alleged act.

Reporting a breach of discipline

An officer of any rank, becoming aware of behaviour that is a breach of discipline, may choose to deal with a less serious and isolated instance within the context of case management by counselling, warning or reprimanding a detainee and making an appropriate case note.

However, for instances of more serious or repeated misbehaviour, it is appropriate to report the alleged breach of discipline with a view to it being dealt with under the detainee discipline provisions of the CMA.

Such a report should be put to the officer's immediate supervisor for urgent action. The supervisor must ensure that the report is raised with the Area Manager and/or a Deputy Superintendent.

Reporting alleged breaches of discipline to police

When it is considered that an alleged breach of discipline may be a criminal offence warranting being reported to police, the police should be consulted and their views sought. If the police investigate and charge the detainee in relation to the act the disciplinary procedures may no longer be employed due to double jeopardy provisions. If the police choose not to act, or to not charge the detainee following their investigation, the disciplinary provisions may be employed. It should be noted that the standard of criminal proof is significantly higher than that required under the disciplinary provisions.

Breaches typically warranting consultation with the police include acts that are criminal in the broader community, such as possession of illegal substances. Other possibly criminal matters that might usually be dealt with as breaches of discipline may, due to the seriousness of the breach or the gravity of the consequences, be referred to police. More serious assaults and possession of offensive weapons may fall into this category.

It is the responsibility of the reporting officer to raise the issue of reporting a matter to the police with the Area Manager. The Area Manager will discuss this issue with the Deputy Superintendent and Superintendent as required, and a final decision will be made by the Deputy Superintendent or Superintendent.

Reporting Officer's Responsibilities

It is the responsibility of the Reporting Officer to prepare a written report of the alleged breach and to gather and present relevant evidence, such as CCTV images, witness statements or physical evidence. Included in the report will be a narrative of the incident, including relevant events occurring before and after the alleged incident.

The report must contain all necessary proofs of offence to establish a *prima facie* case. A *prima facie* case is established when there is enough evidence to allow a Presiding Officer to determine, on the balance of probabilities, the detainee is guilty of the alleged breach.

The Reporting Officer will also include the detainee's 'antecedents' (see below) to assist in determining the most appropriate further course of action and what penalty might be appropriate under the circumstances. Antecedents will include relevant matters such as the length of sentence and period spent in custody; any outstanding disciplinary charges pending; counselling, warning or reprimands or previous administrative penalties imposed for breaches of discipline during the current sentence.

Investigative segregation

Under the provisions of s156 (2) (d) of the CMA, the Reporting Officer may direct a detainee to be segregated from other detainees for investigative purposes.

Investigative segregation is to be used to prevent harm or threatened harm to the detainee or other detainees, to prevent any perversion of threatened perversion of the

investigation or for security and good order purposes. Under no circumstances should it be used pre-emptively as a punishment.

While the Reporting Officer is empowered under the CMA to order investigative segregation, a Reporting Officer must consult with their Area Manager or the Night Senior before making such an order.

The officer who makes the decision to impose disciplinary segregation must complete the appropriate Segregation Form and case note the segregation.

The Superintendent is to be informed without delay, and no later than within 24 hours, when a detainee is segregated under this provision to facilitate immediate and ongoing review of the need for segregation.

Mandatory segregation review provisions apply to investigative segregation. The decision must be reviewed no later than 7 days from the initial order and once every 7 days while it remains in force.

The period spent in separate confinement under this provision should be taken into account when assessing any future penalty applied under the disciplinary provisions.

Responsibilities of the Presiding and Review Officers

The Presiding and Review Officers are responsible, under legislation, for determining what action, if any, is required following receipt of a report of an alleged disciplinary breach. See 'Appointing Presiding Officer and Review Officer' below.

The Presiding Officer may determine, after reviewing the report, to:

- take no further action; or
- counsel, warn or reprimand the detainee; or
- appoint an Investigator; or
- refer the matter to police or prosecution authorities; or
- serve a written charge notice on the detainee.

Referrals to police or prosecution authorities should not be made without the agreement of the Superintendent or Deputy Superintendent. The Presiding Officer must complete a case note of the outcome of the process.

In determining a charge or charges to be appropriate, the Presiding Officer must be satisfied there is enough proof of the offence to, on the balance of probabilities, establish a prima facie case. If such is not the case, the Presiding Officer may return the report to the Reporting Officer seeking additional information, or may determine that no further action be taken.

As required under legislation, a charge under the disciplinary provisions requires a written notice be served upon the detainee, together with the indicated administrative penalty proposed to be imposed should the detainee consent.

Conducting an Investigation

Where a prima facie case has been established but the Presiding Officer considers more information is required to make a decision, the Presiding Officer may appoint an investigator to gather that information.

An Investigator in most situations should be a supervisor unless otherwise specified by the Presiding Officer. If warranted, the Superintendent may allocate a person other than a Custodial Officer (e.g. a Business, Policy and Coordination officer) to act as Investigator.

The Investigator may interview witnesses to the alleged disciplinary breach, including officers, detainees and other persons who may have witnessed the incident. The Investigator can access CCTV footage, detainee records or other sources as appropriate. When interviewing officers, detainees or other witnesses, the Investigator should explain the process and the Investigator's role. Physical evidence should be secured and made available for a subsequent inquiry.

The Investigator must provide the Presiding Officer with a written report. The details of the investigation should be mentioned in the narrative of the Disciplinary Breach Investigator Report Form.

In the event that the Investigating Officer forms a view during an investigation that a criminal offence is disclosed that warrants being reported to police or prosecuting authorities, he or she should liaise with the Presiding Officer with a view to potentially terminating the investigation so that the police can be notified.

Discipline by Consent

In the event the detainee agrees in writing following receipt of a written notice of charge and indicated penalty to have the matter dealt with by consent, the Presiding Officer may determine disciplinary action as indicated in the notice of charge and penalty.

If the detainee does not elect to have the charge dealt with by consent the Presiding Officer is required to conduct an inquiry into the alleged disciplinary breach.

Holding a Disciplinary Inquiry

Disciplinary inquiry procedures

Section 192 of the CMA sets out that an inquiry is an administrative process in which the rules of natural justice apply; the laws of evidence do not apply; evidence must not be given on oath or by affidavit; and the question as to whether a detainee has committed a disciplinary breach must be decided on the balance of probabilities.

The detainee must be notified in writing of the time, date and location of the inquiry; details of the disciplinary charge or action to which the inquiry relates and the closing date to give the Presiding Officer a submission to the inquiry. The notice to the detainee must include the effect of s192 (how the inquiry operates), acceptable forms

of submission to the inquiry (examples include but are not necessarily limited to written and audio recording), and the need for any submission given to the Presiding Officer before the stated closing date to be considered.

Part 11.3 of the CMA sets out disciplinary hearing procedures for inquiries into disciplinary charges. The accused is entitled to be present at a hearing and the Presiding Officer may, by written notice, require the accused or anybody else to appear at the inquiry to answer questions and/or produce a stated document or anything else relevant to the inquiry.

The Presiding Officer may disallow a question put to a person if the question is considered unfair, unduly prejudicial, vexatious, or involves an abuse of the inquiry process. The Presiding Officer may allow a corrections officer or anyone else to be present and heard at an inquiry.

The Presiding Officer should note that a detainee has a right, under the provisions of the Legislation Act, to refuse to incriminate him or herself in questioning.

Rights of the accused at a disciplinary hearing

The rights of the accused are set out in section 202 of the CMA and include an entitlement to be heard, to examine and cross examine witnesses and make submissions to the inquiry. The accused is not entitled to be represented by a lawyer or anybody else without the consent of the Presiding Officer who, in making this determination, is required to have regard to the seriousness of the charge, the administrative penalty likely to be imposed, the likely procedural complexities, the capacity of the accused for self representation and the need for fair and prompt resolution of the charge.

The Presiding Officer may, by written order, exclude the accused from the hearing if the accused unreasonably interrupts, interferes with or obstructs the hearing or contravenes a reasonable direction by the Presiding Officer about the conduct of the hearing. If the accused fails to attend the inquiry the Presiding Officer may conduct the hearing and make a decision on the charge in the accused's absence. However, before doing so the Presiding Officer should be satisfied the accused has had a reasonable opportunity to attend.

Presiding Officer's powers after the internal inquiry

On completion of the inquiry, the Presiding Officer may determine disciplinary action against the accused detainee if satisfied, on the balance of probabilities, the charge has been proved. The Presiding Officer must dismiss the charge if he or she is not so satisfied or if, on reasonable grounds, it would be otherwise appropriate to do so (an example of which might be the charge is proved but it is a minor matter, a first offence and the detainee has a mild intellectual disability; there will also be other examples).

The Presiding Officer is exercising a statutory judicial function and is accountable via a review process for the quality, consistency and fairness of his or her decisions. It is not sufficient that an opinion be held that it is likely the detainee committed the

offence, or that it is consistent with his or her general behaviour and therefore believable. The proper proofs need to be established by deconstructing the breach into essential proof elements and each element must be supported by evidence.

If additional information has emerged during the inquiry, the matter may at this stage be referred to the police or the director of public prosecutions, together with a Presiding Officer report, should it be considered (in discussion with the Superintendent) necessary or desirable.

Review Processes

Under the CMA, there are a number of review options available in regard to disciplinary decisions.

‘Own motion’ internal review of the Presiding Officer determination

Section 175 (2) provides for an ‘own motion’ internal appeal to be instigated if considered warranted by the Reviewing officer.

To facilitate consideration of this power, Presiding Officer determinations (whether following detainee consent to a charge and penalty or the conduct of an inquiry) are subject to immediate review consideration by the Superintendent or other delegated senior officer.

Any sanction imposed from the Presiding Officer decision is not given effect until a determination is made confirming the Presiding Officer’s decision.

An exception may be made when a specific sanction is also necessary for security reasons which cannot necessarily await this confirmation. An example might be a pending visit that might need to be non-contact due to a security concern.

The accused detainee is then to be given prompt written notice of the confirmed Presiding Officer’s decision, including the reasons for the decision and the effect of the decision. The notice must inform the detainee of rights of review of the inquiry decision.

See review process below.

Provision for internal review of inquiry decision

Under the CMA, the prescribed period in which a detainee can lodge an internal appeal against a Presiding Officer determination does not commence until the detainee has been given notice in writing of the decision, together with the reasons for the decision and the effect of the decision. It is for this reason that it is essential the notice be provided without delay.

Sections 173, 174, 175 and 176 of the CMA provide for the accused detainee to apply for an internal review of an inquiry decision within seven days of receiving the inquiry decision notice; the appointment of a Review Officer (who has not previously participated in the case) and for the conduct of an inquiry. The Chapter 11 provisions of the CMA relating to the conduct of a disciplinary inquiry apply to an inquiry by an appointed Review Officer (see [Holding a Disciplinary Inquiry](#) above).

Following the inquiry the Review Officer may confirm or amend the decision, or set it aside and make a substitution for the decision set aside. The accused is to be given prompt written notice of the Review Officer decision stating the reasons for the decision and the effect of the decision.

Provision for external review of inquiry decision

The Minister may appoint an Adjudicator, who is a Territory Magistrate accepting the appointment in writing, to review disciplinary charge determinations (Division 10.3.4 of the CMA).

Within seven days of the receipt of the written notice from the Review Officer of the review determination, the accused detainee may apply to an Adjudicator for a review of the decision. Section 178 (3) states that subject to the decision by the Adjudicator following a review, making of the application does not affect the taking of disciplinary action that is subject to review.

The Adjudicator may conduct an inquiry to review the decision of the Review Officer or refuse to review the decision. Having conducted an inquiry, the Adjudicator may confirm or amend the decision under review or set it aside and make a decision in substitution for the one set aside.

Whether the Adjudicator makes a decision after an inquiry or refuses to review the decision, the Adjudicator is required to give the accused detainee a written statement of the reasons for the decision together with notice that they may apply for review of the decision under the provisions of the *Administrative Decisions (Judicial Review) Act, 1989*.

ACT Corrective Services will facilitate prompt notification to the accused detainee of the Adjudicator's decision.

Appointing Presiding Officers and Review Officers

The Presiding Officer and Review Officer are officers appointed under delegation from the Director General.

Under legislation neither the Presiding Officer nor the Review Officer may have previously participated in the matter under review as Reporting Officer, Investigative Officer or Presiding Officer.

A senior correctional officer oversighting a Presiding Officer determination is not precluded from acting as a Review Officer, either as a result of a review application by a detainee or an 'own motion' appeal under the provisions of Section 175 of the CMA, solely due to having previously acted to oversight the Presiding Officer determination in order to consider exercising delegated power under Section 175 (2) – an 'own motion' review.

Disciplinary Penalties

Division 10.3.5, sections 181-189 inclusive of the CMA set out the range of sanctions that may be applied to breaches of discipline. The detainee may be warned or

reprimanded; an administrative penalty applied; or an order given to pay reparation. The Presiding Officer is required to ensure the penalty is proportionate to the breach.

Administrative penalties include a financial penalty not exceeding \$500; withdrawal of privileges for not longer than 180 days; a requirement to perform extra work; separate confinement for periods of 3, 7 or 28 days and, in the case of loss as a direct result of a breach, financial reparation to a maximum of \$100 or a greater amount if specified by Regulation.

It should be noted that under the CMA, a detainee charged with two or more breaches arising from the same conduct cannot be given a total penalty that is greater than the maximum penalty applicable to any one of the breaches.

Administrative Penalties

In addition to warning, reprimand, monetary fine, financial reparation order, direction to undertake additional work and separate confinement for prescribed periods, a detainee may suffer loss of privileges. However, this may not extend to loss of minimum prescribed entitlements.

Section 154 of the CMA defines privilege as ‘any amenity, facility or opportunity the detainee may have for the benefit of the detainee.’ Privileges that may be employed in an administrative penalty include the following:

- Paid employment
- Participation in programs (not including those addressing criminogenic needs as part of a case plan unless approved by the Superintendent)
- Contact visits and visits in addition to the minimum entitlement
- Additional telephone calls and e-mail contact
- Access to recreation equipment and structured recreational activities
- Access to hobby and leisure activities
- Use of electronic devices including television and music players
- Buy-ups
- Private cash deposits to a detainee account to supplement institutional earnings

Determining the appropriate administrative penalty(s) to be applied

The aim in using the disciplinary provisions of the CMA is to correct individual misbehaviour and to provide general deterrence to the detainee population. Any sanctions applied should be the minimum appropriate to the circumstances and should be, as far as is possible, relevant to the misbehaviour. Use should be made of warnings and reprimands and suspended sanctions within the context of individual management plans when appropriate.

As a general principle, a detainee should not be subject to multiple losses of privileges (other than as might be aggregated for ‘general loss of privileges’) as the objective is to correct behaviour rather than exact retribution. Sanctions should be strategic in nature taking into account the circumstances of the individual and the particular breach that occurred. At the same time it is necessary to achieve an acceptable level of consistency with sanctions for them to be effective as a general deterrent and in the interests of perceptions of fairness. Guidance is available via the published *Schedule of Penalties Policy*.

Administrative penalties should not punish innocent parties such as a cell mate in a shared cell situation and consideration should be had to the impact upon family members through loss of visit or telephone privileges when choosing sanctions.

Considerations when selecting the appropriate administrative penalty are as follows:

1. The nature of the misbehaviour together with the probable intent of the detainee.
2. The consequences, real and potential, of the misbehaviour.
3. The previous disciplinary record of the detainee (including time periods).
4. The need for general consistency in punishments for reasons of fairness and effectiveness in achieving security, safety and good order in the centre.
5. Relevance in terms of the behaviour being sanctioned.
6. Appropriateness to the circumstances of the individual detainee.

Schedule of Penalties

A published schedule of penalties applicable to first, second and subsequent breaches of discipline is available to guide the Presiding Officer in their selection of appropriate disciplinary sanctions. The penalties determined will, on all occasions, be specific to the circumstances of the breach and the individual detainee but the use of the guide is intended to promote consistency that enhances perceptions of fairness and to maximise the deterrent effects of the disciplinary system through creating awareness of probable outcomes. However, when using the guide, officers should ensure that punishments are proportionate and appropriate to the circumstances of the offence and they may override suggested penalties if considered necessary.

Disciplinary process time constraints

In order to maximise the effectiveness of the disciplinary provisions in managing individual and collective behaviour in custody, it is important that the process be commenced within a very short period following the act in question and brought to a speedy resolution. To do otherwise will give the impression of tolerance of the behaviour involved and make a delayed punishment relatively meaningless in sanctioning the original act. For these reasons, unless there are sound operational reasons not to do so, the following time constraints should be met:

1. A report of an alleged breach of discipline is to be made to the Presiding Officer within 48 hours of the alleged incident. A reporting officer may seek an extension of time from the Presiding Officer within that time period and an extension of time may be granted by the Presiding Officer if circumstances warrant.
2. The Presiding Officer is to make a determination as to required action within 48 hours of receipt of a report of an alleged breach of discipline. Charge notice is to be served on the detainee within 48 hours of a determination to charge and the Superintendent advised if this constraint cannot be met.
3. The detainee is required to respond to the notice of charge by the day following service unless he or she is granted an extended period of time. Any such extension should be notified to the detainee in writing and should

generally be for only a short period in order to facilitate speedy resolution of the matter (e.g. no more than a further 24 hours).

4. When the detainee has been charged and provides written consent to the indicated penalty the documentation is to be referred immediately for review by the officer acting under delegation to perform that task. If an administrative penalty is involved it should be applied without undue delay following confirmation.
5. When the Presiding Officer is required to conduct an inquiry following a detainee being charged the inquiry should be conducted and completed as quickly as circumstances allow. The Superintendent should be advised in any instances where it is anticipated the inquiry cannot be conducted and completed within 7 days.
6. Following completion of a Presiding Officer inquiry, a written notification of the determination and the reasons for the determination are to be prepared and referred to the Superintendent, or other senior officer delegated to carry out oversight of the determination, without delay. If confirmed the notice should be served upon the detainee without delay and any sanction imposed.
7. If the Superintendent, or delegate, determines a review is warranted the review is to be carried out and the detainee notified in writing of the result and the reasons relied upon in arriving at the fresh determination without delay. Any sanction involved may be imposed.
8. Under legislation, a detainee may lodge a written notice of appeal to the Director General or their delegate (usually the Superintendent or Deputy Superintendent) within 7 days of being notified of the Presiding Officer confirmed determination or the Review Officer determination of an 'own motion' appeal.
9. A Review Officer appointed by the Director General will conduct an inquiry and provide the detainee with prompt written advice as to the decision; the reasons relied upon in making the decision and the effect of the decision.
10. Within 7 days of receipt of the Review Officer decision a detainee may apply for an external review by an Adjudicator who has been appointed by the Minister. Subject to any decision made by the Adjudicator the making of the application does not affect the taking of disciplinary action.

Forms and templates

Report of a Detainee Breach of Discipline

Investigator's Report

Charge Notice and Indicated Penalty

Presiding (or Review) Officer's Determination and Inquiry Outcome Notice

Notice of Disciplinary Inquiry

Review Officers Report

Investigative Segregation Detainee Notice

Investigative Segregation Form and Review

Separate Confinement Order

Related policies and procedures

Schedule of Penalties

Detainee Disciplinary Procedure