2008

LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

CORRECTIONS MANAGEMENT AMENDMENT BILL 2008

EXPLANATORY STATEMENT

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Corrections Management Amendment Bill 2008

Outline

The Corrections Management Amendment Bill 2008 introduces new sections 113 in to the *Corrections Management Act 2007* which expand the current power for the chief executive to direct ACT Corrective Services officers to strip search a detainee.

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.

The Bill introduces the term 'seizeable item' into the Dictionary.

The Bill also introduces the requirement for the chief executive to develop a corrections policy or operating procedures in relation to strip searches conducted under Division 9.4.3 of the *Corrections Management Act 2007*.

Following the Alexander Maconochie Centre Functional brief, and the enactment of the Corrections Management Act 2007, Corrective Services have been investigating the use of body scanning technologies that enables a search of a detainee to identify any contraband or prohibited items concealed on or in a person without requiring the person to remove their clothes or be touched by someone else.

The ACT Corrective Services undertook a trial of the SOTER X-ray body scanner at the Belconnen Remand Centre in late 2006 and early 2007 with the explicit permission of the ACT Radiation Council. Following the completion of this trial, Corrective Services submitted an application to the ACT Radiation Council to have the scanner registered for use in the Territory, and for the Council to grant a licence to use the scanner at the Alexander Maconochie Centre.

The ACT Radiation Council has a legal responsibility to discharge under the *Radiation Protection Act 2006*, and is currently considering the application from Corrective Services.

The Bill ensures the security of detainees, corrections officers and visitor at the Alexander Maconochie Centre in the period when it is not possible to operate the SOTER X-ray body scanner.

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Detail

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act is the *Corrections Management Amendment Act 2008.*

Clause 2 — Commencement

This clause enables the Act to commence the day after it is notified on the Legislation Register.

Clause 3 — Legislation amended

This is a technical clause that notes that this Act amends the *Corrections Management Act 2007*.

Clause 4 — Section 113

This Clause introduces a further authority to conduct strip searches under Division 9.4.3 of the *Corrections Management Act 2007*.

The new sections are still subject to the requirement of proportionality that is contained in section 108 of the *Corrections Management Act 2007*—that the exercise of the power to search 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.

New section 113 inserts the term seizeable item and defines a seizeable item in relation to strip searches conducted under Part 9.4.3 as anything that:

- is a prohibited thing; or
- may be used by the detainee in a way that may involve —
    - intimidating anyone else; or
    - an offence or disciplinary breach; or
    - a risk to the personal safety of anyone else; or
    - a risk to security or good order at a correctional centre.

New section 113A restates the former section 113 of the *Corrections Management Act 2007*. Section 113A prescribes that a strip search may only be conducted if the chief executive gives a direction to conduct a strip search in accordance with the requirements of Clause 113B and Clause 113C (see below).

New section 113A(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.

New section 113B empowers the chief executive to conduct a strip search if the chief executive suspects on reasonable grounds that the detainee has a seizeable item concealed on them. Section 113B restates the power of the

chief executive to direct a corrections officer to conduct a strip search of a detainee under Section 113(1) of the *Corrections Management Act 2007*.

New section 113C is informed by the substantial case law from the European Court of Human Rights on strip searches in custodial settings. In a number of cases, the Court has recognised the necessity for strip searches in the context of detention for criminal justice purposes.

While Article 3 of the European Convention on Human Rights 1950 provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment, the Court has found that "strip searches may be necessary on occasion to ensure prison security or to prevent disorder or crime", and they do not in themselves breach Article 3 (*Valasinas v Lithuania* (no.44558/98, 117 ECHR 2001-VIII)). The Court has found that strip searches must be conducted with due respect for human dignity and for a legitimate purpose (*Karakas and Yesilirmak v Turkey*, 43925/98, paras. 36–41)

The European Court of Human Rights has also found that Article 3 of the European Convention on Human Rights 1950 has been engaged where a strip search is carried out in a manner that significantly increase the inevitable humiliation of the strip search procedure. These occasions include:

- where a prisoner was obliged to strip in the presence of a female officer, his sexual organs and food touched with bare hands (*Valasinas v Lithuania* (no.44558/98, 117 ECHR 2001-VIII), § 117); and
- where a search was conducted before four guards who derided and verbally abused the prisoner (*Iwańczuk v Poland*, no. 25196/94, § 59, 15 November 2001).

Similarly, the court has found that issues may arise where strip searching a prisoner has no established connection with the preservation of prison security and prevention of crime or disorder:

- Where a prisoner was strip searched on a systematic and long term basis without a convincing security need to strip search the prisoners (*Van der Ven v the Netherlands*, no. 50901/99, §§ 61-62, ECHR 2003-II);
- Conducting a strip search on a 'model remand prisoner' who had not been charged with a violent crime and had no previous criminal record simply because he wished to exercise his right to vote (*Iwańczuk v Poland*, no. 25196/94, § 58-59, 15 November 2001); and
- where the search is carried out in a ''normal'' manner but is performed on a regular basis as a matter of practice which lacks clear justification in the particular case of the person and would be perceived as harassment (*Yankov v Bulgaria*, Judgment of 11 December 2003, ECHR 2203-XII, para. 110.)

The Court has also considered that a strip search of a prisoner may not violate Article 3 treatment, but may violate Article 8 of the Convention, which, inter alia, provides protection of physical and moral integrity under the respect for private life (*Costello-Roberts v the United Kingdom*, judgment of 25 March

1993, Series A no. 247-C, § 36; *Bensaid v the United Kingdom*, no. 44599/98, § 46, ECHR 2001-I). Indeed, in *Wainwright v The United Kingdom* (*no. 12350/04* §43) the Court stated that :

> There is no doubt that the requirement to submit to a strip-search will generally constitute an interference under the first paragraph of Article 8 and require to be justified in terms of the second paragraph, namely as being "in accordance with the law" and "necessary in a democratic society" for one or more of the legitimate aims listed therein. According to settled case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular that it is proportionate to the legitimate aim pursued (see e.g. *Olsson v Sweden*, judgment of 24 March 1988, Series A no. 130, § 67).

The exercise of any search power under Part 9.4 of the Act is subject to the principle of proportionality found under section 108 of the Act. Section 108 requires that in conducting a search, the officer must use the type of search that is commensurate with the circumstances, is the least restrictive in order to accomplish the object; and does not have a disproportionately severe effect on the person to whom it applies.

New section 113C(1) empowers the chief executive to direct a corrections officer to strip search a detainee where it is prudent to do so and the chief executive believes on reasonable grounds that the detainee has had an opportunity to obtain a seizeable item. This power to strip search a detainee is subject to the qualifications found under section 113C(1)(a)(i) and (ii), section 113C(1)(b) and section 113C(1)(c).

New section 113C(1)(a)(i) and (ii) authorises the chief executive to direct a corrections officer to strip search a detainee where the chief executive believes that it is prudent to do so because the detainee has not been under the control or immediate supervision or a corrections officer for a period, in which case the detainee may have had the opportunity to obtain a seizeable item. An example of this is where a detainee is returning to a correctional centre from a work place outside the correctional centre.

It should be noted that section 113C(1)(b) is both an exception to section 108 of the Act and a qualification on the power found under section 113C(1)(a) of the Bill. Section 113C(1)(b) sets out the circumstances in which it is not possible to conduct a least intrusive search in accordance with section 108 of the Act, as a least intrusive search is not likely to detect more than a limited range of possible seizeable items.

Section 113C(1)(b) sets out the circumstances in which a scanning search as prescribed under Division 9.4.2 of the *Corrections Management Act 2007*, may assist in detecting a seizeable item that a detainee has concealed:

- but the means of conducting a scanning search is not able to be used at the correctional centre because the machine used to conduct a scanning search is undergoing routine maintenance etc; or

- if the means of conducting the search is available — the scanning search is not likely to detect more than a limited range of seizeable items such as a seizeable item fashioned out of metal as opposed to a seizeable item fashioned out of plastic or some other substance; or
- if the means for conducting a scanning search is available, but a detainee has refused to participate in such a search and the use of force to conduct a scanning search is likely to make the result of a scanning search ineffectual.

Section 113C(1)(c) further qualifies the power of the chief executive to direct a corrections officer to strip search a detainee where section 113C(1)(a) and section 113C(1)(b) are satisfied and where a frisk search or ordinary search conducted under Division 9.4.2 is not likely to detect more than a limited range of seizeable items.

Section 113C(1) creates a test to use this power to search a detainee. This test is whether it is prudent to strip search a detainee, and is an objective test based on what is proportionate in the circumstances rather than a subjective test in relation to each and every individual. This test requires the chief executive to consider the circumstances rather than considering the individual.

In applying the above mentioned case law from the European Court of Human Rights to the context of the Australian Capital Territory, the following examples and circumstances in which a detainee many be strip searched are considered proportionate under section 113C of the *Corrections Management Act 2007:*

- returning from community service outside of the corrections centre;
- returning from police or court cells;
- following an unsupervised contact visit; and
- returning from leave granted under Chapter 12 of the Act.

In contrast, strip searching a detainee as part of a routine cell search is not considered proportionate and is not envisaged under section 113C(1).

Section 113C(2) directs the chief executive to make a corrections policy or operating procedure that sets out the detail of how strip searches are conducted under section 113C.

Clause 5 – Dictionary, new definition of *seizeable item*

This clause inserts the term and definition of a *seizeable item* into the Dictionary.