LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
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Submission Cover Sheet

Inquiry into the Corrections and Sentencing Legislation Amendment Bill 2022

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Standing Committee on Justice and Community Safety
Legislative Assembly for the ACT
GPO Box 1020
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By email: lacommitteejcs@parliament.act.gov.au

Dear Committee,

RE: Correction and Sentencing Legislation Amendment Bill 2022

Thank you for the opportunity to provide our comments on the *Corrections and Sentencing Legislation Amendment Bill 2022*, as presented 30 November 2022.

Legal Aid Commission ACT ('the Commission') provides legal services, including duty and representation services in criminal matters, to the most vulnerable and disadvantaged members of the ACT community.

The Commission broadly appreciates the principle of the amendments in the *Corrections and Sentencing Legislation Amendment Bill* but has made some specific recommendations in relation to several of the areas being reformed. Our submission for each of the proposed changes are explained below in detail.

Amendments to *Corrections Management Act 2007*

Non-smoking areas

As pointed out in the explanatory statement, the ACT is one of only two jurisdictions which are yet to prohibit smoking in all areas of correctional centres.[1] Smoking is widely accepted as causing serious health effects, including heart disease, strokes, and various types of cancers. These effects can also arise from second-hand or 'passive' smoking, affecting the health of nearby persons who are not active smokers.[2] The proposed amendment will allow for a reduction of the exposure of detainees to the health effects of second-hand smoking in their place of living, which is especially important given the sometimes-limited ability of those detainees to mitigate their exposure to second-hand smoking.

[1] Explanatory statement, Corrections and Sentencing Legislation Amendment Bill 2022 (ACT) 21.
[2] Encyclopedia of Public Health (2008) 'Passive Smoking' 1085.

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Tobacco use is also linked to other problems within the Alexander Maconochie Centre (AMC) including the use of lighters in detainee-lit fires and utilisation of tobacco as a currency.[3]

Under the amendments, smoking may only be prohibited in all areas of a correction facility if the director-general is reasonably satisfied that appropriate therapeutic support is available to detainees to stop smoking. As 90-95% of smokers who try to quit smoking on their own will resume smoking within a year, such therapeutic support will be an essential precondition to the general prohibition of smoking across the AMC.[4]

Currently, it is unclear the degree to which therapeutic support will realistically be made available to detainees, especially given the existing limitations on access to in-person programs due to staffing shortages and COVID measures. The difficulty in supporting attendance at such programs is further limited by the general separation of various cohorts at the AMC, which is noted to limit things such as recreation, booking of visiting times, and health centre waiting capacity.[5]

Given that 59% of AMC detainees identify themselves as being current tobacco smokers, the demand for access to therapeutic programs will be high, as will be the health and behavioural impacts where the program is inaccessible. Even where the therapeutic support is properly accessible to all detainees, health and behavioural impacts of nicotine withdrawal should be considered, given that the rate of successful smoking cessation following behavioural and pharmacological treatment has been indicated to be just 24%.[6]

As such, while the Commission supports a transition to a smoke-free AMC, we suggest that it may be appropriate to seek the creation of a strategic plan from ACT Corrective Services setting out the implementation of therapeutic support, prior to the commencement of this amendment.

Amendments to search provisions

Scanning searches of non-detainees by corrections officer of any sex

The current legislation provides that scanning searches of non-detainees must only be conducted by corrections officers of the same sex as the person being searched.

This rule faces issues with its assumption of gender binaries, and further is problematic in that it requires the presence of corrections officers of different sexes at the entrance of the Alexander Maconochie Centre (AMC). Where that is not possible, discriminatory and unfair consequences can arise wherein detainees may be prevented from seeing a visitor because, for

[3] ACT Justice and Community Safety Directorate *Blueprint for Change: A New Future for Custodial Services* (Report, March 2022) 29.

[4] Maki Komiyama et al, 'Support for Patients Who Have Difficulty Quitting Smoking: A Review' (2018) 58(3) *Internal Medicine* 317.

[5] ACT Inspector of Correctional Services *Healthy Prison Review of the Alexander Maconochie Centre 2022* (Report, November 2022) 154.

[6] Rafael Laniado-Laborín 'Smoking cessation intervention: an evidence-based approach' (2010) 122(2) *Postgraduate Medicine* 74, 80.

example, there is no female guard rostered to conduct a search, or because their gender identity is not properly recognised by the guards rostered on that day.

Allowing for scanning searches, and x-ray searches of the articles in a visitor or officer's possession, avoids the unfair outcomes currently being observed, and does not raise significant privacy concerns given the low level of invasiveness these searches represent.

Notwithstanding the s108 requirement that searches are conducted in the least invasive manner possible, and the more general consent provisions at s112B(4)-(6), the Commission submits that it would be appropriate to provide further emphasis upon the consent and privacy of the person being searched, where this search exceeds a simple scan, and is to be conducted by an officer of a different sex to the person being searched. This may be achieved by the insertion of a further subsection 112B(2)(b)(i) which stipulates that another corrections officer or visitor must not be searched under subsection (b) without the express consent of that person, and (ii) requires that such a search, where consented to, is to be conducted in a way that causes the minimum breach of privacy reasonable in the circumstances.

Hence, while the Commission generally supports allowing people of any sex to conduct non-intrusive scanning or ordinary x-ray searches, we submit that further emphasis should be given to explicit privacy and consent of non-detainees to the conduct of a further search by a differently sexed person.

Routine scans and ordinary searches of non-detainees

The Commission supports in principle an amendment authorising routine scans or ordinary searches of non-detainees but recommends that an additional provision be inserted to clarify the position of confidential and privileged information held by professionals who are visiting AMC.

The implementation of routine scans on entry will provide safety to all people at a correctional centre by allowing guards to detect suspicious items at the early stage of a visitor's entry, and hence avert potentially dangerous situations. We also appreciate the consideration in the new s112B for the consent of the person being searched.

Despite this, the Commission recommends that the amendment should be modified to provide an exception or clarification relating to professional visitors for whom some types of searches may breach confidentiality and privacy obligations. For instance, a lawyer should not be required by this amendment to provide access to documents containing information subject to client legal privilege (i.e., that which was prepared for the 'dominant purpose' of providing legal advice or services).[7]

Other professionals who visit the facility may also have ethical obligations to their client's confidentiality, including health practitioners, counsellors, and so on.

[7] *Esso Australia Resources Limited v Federal Commissioner of Taxation* (1999) 201 CLR 49; ss 118 and 119 *Evidence Act 1995* (Cth).

Even where confidential information would not be *routinely* exposed by this amendment, we submit it would be appropriate to implement a limitation which proactively prevents such privacy breaches. Such modification will serve to pre-empt cases where this issue may arise and prevent situations where a lawyer withdraws consent for a search (and is subsequently unable to visit their client) in order to protect the confidentiality of the documents they are carrying.

The safety of staff and detainees may instead be ensured by the satisfaction of a corrections officer that the lawyer is carrying a folder which contains only papers, or that they carry a laptop for the genuine purpose of providing legal services to their client. Scanning searches may assist in ensuring the safety of such items without breaching the confidentiality of the information they contain.

Frisk searches of non-detainees

The amendments separate the powers to frisk search detainees from non-detainees, removing the latter to the new s112C. The power of the director-general to order a search of a non-detainee has not changed, remaining applicable where there is a reasonable belief that it is prudent to protect (a) the safety of anyone at the correctional centre, or (b) security or good order.

This search is ordinarily required to be conducted by someone of the same sex as the non-detainee being searched, but may be conducted by a differently sexed person, with someone of the same sex present. Once again, this can lead to issues where, due to the employee demographics of AMC and rostering, individuals including women, transsexual and non-binary people are more likely to be subjected to an invasive search by a differently sexed person, or unable to have a person of their sex present for the search at all, and hence may be denied entry to AMC.

As above, the Commission submits that further emphasis should be given to explicit consent and privacy requirements where a frisk-search is to be conducted by a differently sexed corrections officer.

The Commission also again recommends further clarification be given in this amendment to the position of privileged or confidential information held by professionals visiting or working at a correctional centre.

Clearly authorising strip search on admission

The amendment to s70(2), and addition of a new note to s113A, clarifies that the requirements for making of an order under sections 113B or C does not apply to strip searches directed and conducted as part of an initial assessment upon admission to AMC. This amendment is intended to resolve a source of confusion in the current Act.

It does not make strip searches on admission a routine procedure – an order under s70 must still be made in order to authorise such a process. Other strip searches will continue to require the formation of a subjective belief outlined in sections 113B and C. All strip searches remain

subject to the requirement that searches must be conducted in the least intrusive way, and be the least intrusive kind of search, reasonable and necessary in the circumstances.[8]

The Commission supports this amendment for the clarity it provides to the Act.

Review of strip search on admission
This amendment will require the Minister to review operation of s70 (strip search on admission) 2 years after the commencement of the bill examined in this inquiry.

As strip searches are an intrusive procedure, which are currently considered an essential part of ensuring the safety of all people at the AMC, the Commission considers it appropriate to implement a review period. Such a review will assist in determining whether introducing another search or scan method may offer a less intrusive alternative (supporting compliance with the requirement at s108) while ensuring the safety of all people at the correctional centre.

Taking prohibited things into correctional centre
The amended s145 will make it an offence to send a prohibited thing into a correctional centre or to a detainee, including where the prohibited thing is not personally carried or given to a detainee. This makes it an offence to, for example, use a drone to drop a prohibited thing into a correctional centre, or to throw such an object in.

The Commission supports this amendment, recognising as above the importance of preventing introduction of contraband to AMC for the safety of detainees, staff, and visitors.

Amendments to *Crimes (Sentence Administration) Act 2005*

Board to provide notice of inquiry
Currently, where the Sentence Administration Board (SAB) conducts an inquiry into a breach of intensive correction order (ICO) obligations, notice of this inquiry must be provided by the director-general to the offender and the director of public prosecutions (DPP). The proposed amendments will have the SAB itself provide this notice, in line with other administrative processes conducted by that board, such as notices of hearings for parole management.

The SAB already undertakes administrative tasks relating to ICO inquiries, including scheduling dates and preparing agendas or paperwork for members of the board. This means that it is well equipped, and indeed best positioned, to provide notice of such inquiries.

The Commission supports this amendment for its facilitation of administrative efficiency.

Warnings for breach of good behaviour obligations
The Commission supports the amendment to s102, providing community corrections officers with the option of non-reporting alternatives for responding to breaches of good behaviour orders. Corrections officers will be granted the discretion to give an offender a warning in

[8] Corrections Management Act 2007 (ACT) s108

relation to an alleged breach of good behaviour conditions, where certain conditions (to be set out by regulation) are met.

Notwithstanding the framework for discretion to be prescribed by regulation, the amendment will only allow for warnings to be given where the reportable conduct could not be the subject of a criminal charge. Hence, serious breaches and further offences will be appropriately handled by a report to the sentencing court, while minor breaches are recorded as warnings.

Rather than requiring a Court appearance, the result of which is likely to be that the court either takes no further action or gives the offender a warning, such minor breaches will instead be dealt with by the corrections officer directly.[9] The Commission strongly supports this outcome, which reduces the significant impacts of breach actions, and also avoids the psychological cost of hearings which potentially open up trauma for victims and the defendant themselves.

A summary of breaches, including those for which a warning was given, will be available to the sentencing court in any future reports for breach of good behaviour obligations. This approach allows good behaviour orders to be administered in a way that promotes flexibility and reduces the number and cost of hearings required, while continuing to protect the interests of victims and the broader community.

Amendment of Good Behaviour Orders

Currently, s112 of the Crimes (Sentence Administration) Act allows the Court to amend an offender's good behaviour order by its own initiative, or on application of an interested person, including a community corrections officer.[10] In the experience of the Commission, this power is not commonly used by community corrections officers, who lodge a breach of a good behaviour order, but may not assist an offender by applying for an amendment of the order where appropriate. This is problematic, because a person may find a breach of good behaviour recorded in their history even where an application to amend would have avoided the breach, and no action was taken by the Court in response to the breach.[11]

The amended s102 will mitigate the impacts to offenders of underutilising s112 by replacing reported minor breaches with warnings and is supported by the Commission on that basis. However, the Commission also wishes to draw attention to the availability of s112. We suggest that additional training for community corrections officers may be beneficial for ensuring that this section is utilised where appropriate, and further that it may be appropriate to include it as a consideration provided by the guidelines for exercise of discretion in determining the appropriate action to be taken by an officer in response to a breach.

Guidelines for Good Behaviour Warnings

The amendment provides for creation of a notifiable instrument which sets out guidelines about when a corrections officer may warn an offender about a reportable breach.[12] The

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[9] See Crimes (Sentence Administration) Act 2005 s108(2).
[10] Crimes (Sentence Administration) Act 2005 s112(2)(b).
[11] Crimes (Sentence Administration) Act 2005 s108(2)(d).
[12] Corrections and Sentencing Legislation Amendment Bill 2022 (ACT) s18.

Commission submits that these guidelines should include consideration of the following factors, which we have observed to be relevant in actions for breach of good behaviour:

(a) specific emphasis on whether an application to amend subsequent to s112 of the Act has been considered;
(b) The nature and circumstances of the offence;
(c) The personal circumstances of the offender;
(d) The offender's history of compliance with the good behaviour order;
(e) The likelihood than any victim of the offender or their family will be subject to violence or harassment;
(f) The importance of protecting the community and rehabilitating the offender (section 7(c)-(d); and
(g) Action taken previously in response to earlier breaches of the order.

Assessment procedures for community-based sentence transfer

An amendment to insert new subsections 277(2A) and (2B) to the *Crimes (Sentence Administration) Act* allows for creation of assessment procedures to assist in the making of decisions about the registration of interstate community-based sentences. The scheme of interstate transfers is discussed further below, but in summary is strongly supported by the Commission.

The notifiable instrument setting out the assessment procedures must be consistent with the Act and will sit alongside the current registration criteria at s276, supporting a comprehensive scheme for registration of community-based sentences among all jurisdictions.

The Commission submits that creation of this notifiable instrument should be mindful of the following considerations, based on our experiences in proceedings relating to community-based sentences for interstate residents:

(a) The nature and circumstances of the offence;
(b) The personal circumstances of the offender;
(c) The offender's history of compliance with the good behaviour order;
(d) The likelihood than any victim of the offender or their family will be subject to violence or harassment;
(e) The importance of protecting the community and rehabilitating the offender (section 7(c)-(d).

Amendments to Crimes *(Sentence Administration Regulation) 2006*

Interstate community-based sentence transfer

The Commission supports and welcomes the implementation of a national system for transfers of community-based sentence (CBS) orders. This system will allow for registration of such orders in all Australian states and territories, supporting relocation of offenders. Where a CBS is registered interstate, it is made enforceable as if it were originally imposed in that new jurisdiction.

Currently, NSW is the only jurisdiction defined as a 'participating jurisdiction' for which CBS may formally be transferred to or from. This can lead to restrictive and discriminatory outcomes where residents wish to transfer their CBS between the ACT and most other Australian jurisdictions, and a restriction in the non-custodial sentencing options available to offenders residing outside the ACT.

The Commission considers this amendment to be very beneficial where offenders reside interstate or may need to relocate interstate for reasons including cutting ties to acquaintances in the Territory, escaping situations of domestic abuse, or accessing programs of rehabilitation not available in the ACT. For example, the Commission has observed that limited residential drug/alcohol rehabilitation services are available in the ACT, meaning some individuals needing to travel in order to attend programs in other states, particularly Queensland. The amendment will support the ability of offenders to participate in such rehabilitation schemes while maintaining compliance with orders which provide an alternative to incarceration.

Additionally, this amendment will ease the impacts of the current system to transient residents, who may move in and out of the ACT, and among other states, regularly. In the year to June 2022, the ACT had 21,782 interstate arrivals, and 25,100 interstate departures.[13] This cohort includes a number of Aboriginal and Torres Strait Islander people, who may need move for a variety of reasons, including "for location of kinfolk, traditional associations with land, and seasonal or short-term employment opportunities."[14] Currently, offenders in this cohort are forced to either relocate to and remain in the ACT, or serve a period of imprisonment where they are unable to remain within in the Territory. The amendment will assist in facilitating access to non-custodial sentencing, and allow for compliance under Court orders while acknowledging the reality of Canberra's transient population.

As such, this amendment is strongly supported by the Commission.

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[redacted]

[13] Australian Bureau of Statistics, 'Net interstate migration by state and territory' *National, state and territory population* <https://www.abs.gov.au/statistics/people/population/national-state-and-territory-population/latest-release>.

[14] John Taylor and Martin Bell, 'Population Mobility and Indigenous Peoples: the View from Australia' (1996) 2(2) *International Journal of Population Geography* 153-69.