

Corrective Services (Promoting Safety) and Other Legislation Amendment Bill 2024

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Queensland
Human Rights
Commission

Corrective Services (Promoting Safety) and Other Legislation Amendment Bill 2024

Submission to Community Safety and Legal Affairs Committee

29 February 2024

About the Commission

1. The Queensland Human Rights Commission (QHRC) is a statutory body established under the Queensland *Anti-Discrimination Act 1991* (AD Act).
2. The QHRC deals with complaints of discrimination, sexual harassment, vilification, and other objectionable conduct under the AD Act, and with human rights complaints under the *Human Rights Act 2019* (HR Act).
3. The QHRC also has functions under the AD Act and the HR Act to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights.
4. This submission focuses on two discrete issues in the Corrective Services (Promoting Safety) and Other Legislation Amendment Bill (the Bill):
 - Prescribing search requirements to accommodate diverse prisoners needs (Clauses 36 – 39); and
 - Authorised prisoner communications. (Clause 41, new section 52E).

Recommendations

5. The QHRC recommends that the Bill is amended to:
 - remove the omission of same-sex search safeguards from the *Corrective Services Act 2006*; and
 - include an additional provision that addresses searches of trans or gender diverse prisoners; and
 - add the Queensland Human Rights Commission to a list of oversight bodies listed under new section 52E to enable prisoners to freely contact the QHRC without their communications being subject to recording or monitoring.

Prisoner searches

Background

6. In September 2023, the QHRC released the report of a comprehensive human rights review of the practice of strip searching women in Queensland prisons.¹

¹ Referred to as ‘Searches requiring the removal of clothing’ in the *Corrective Services Act 2006* ss 35 – 38.

This review was conducted as the result of a recommendation by the Women's Safety and Justice Taskforce that the QHRC exercise its functions,

to review policies, procedures and practices relating to the use of strip searches on women in Queensland correctional facilities in relation to their compatibility with human rights and provide advice to Queensland Corrective Services about how compatibility could be improved.

7. The taskforce also recommended that Queensland Corrective Services introduce non-invasive screening technology to end the practice of strip searching in all women's correctional facilities.² The review report, *Stripped of our dignity*,³ concluded that strip searches fail to achieve improved prison safety while unreasonably limiting the human rights of prisoners, their children and families, and prison staff.
8. The report outlines the severe psychological, emotional, and physical consequences of strip searches for female prisoners. Many incarcerated women have experienced trauma, and strip searches often trigger distressing memories. The process leads to vulnerability, shame and discomfort, erodes bodily autonomy, and perpetuates power imbalances. This in turn hinders rehabilitation efforts and undermines the confidence and self-esteem of female prisoners.
9. *Stripped of our dignity* highlights the intersectional nature of the impact of strip searches on prisoners with experiences of marginalisation. Aboriginal and Torres Strait Islander women, prisoners with disabilities, religious minorities, pregnant women, prisoners with children residing with them in custody, and transgender or gender diverse prisoners experience additional challenges and trauma during strip searches. In the report, the QHRC called for specific, sensitive approaches to address the needs of these groups.
10. At the time of writing, the QHRC is waiting for a formal response to the *Stripped of our dignity* report and implementation of its advice and recommendations. The Explanatory Notes to the Corrective Services (Promoting Safety) and Other Legislation Amendment Bill 2024 refers to the QHRC's report, and in particular, recommendation 17.1 'Search trans or gender diverse prisoners based on their preference'.⁴

² Women's Safety and Justice Taskforce, *Hear her Voice Report 2: Women and Girls' Experiences of the Criminal Justice System* (Volume 1, 2022) 31–32, Recommendations 136 and 137.

³ Queensland Human Rights Commission, *Stripped of our dignity: A human rights review of policies, procedures, and practices in relation to strip searches of women in Queensland prisons* (Report, September 2023).

⁴ Explanatory Notes, Corrective Services (Promoting Safety) and Other Legislation Amendment Bill (Qld) 5–6.

Flexibility in searching prisoners

11. Insofar as the Bill seeks to implement aspects of the *Stripped of our dignity* report, the QHRC supports the policy intention of the changes proposed by the Bill to:

...provide more flexibility in how searches are conducted for women, taking into account the diverse needs of women, including in relation to being pregnant, breastfeeding, having a disability or wearing religious clothing.⁵
12. The QHRC recognises and endorses the need for urgent updates to ensure greater flexibility in conducting searches involving trans and gender diverse prisoners, particularly in light of the passage of the *Births, Deaths and Marriages Registration Act 2023*. The negative impacts on trans and gender diverse prisoners of an ongoing failure to accommodate their particular needs is discussed at some length in the *Stripped of our dignity* report.⁶
13. However, the QHRC does not support the approach to searches based on sex/gender as proposed by the Bill. The Bill removes existing safeguards in primary legislation for searches to be conducted by the same sex/gender⁷ as the prisoner, with the intention of shifting these requirements to subordinate legislation, yet to be drafted.
14. The requirement for the searching officer to be of the same sex/gender as the prisoner is one of several safeguards in the *Corrective Services Act 2006* designed to protect the 'prisoner's dignity' considering the 'intrusive and potentially embarrassing nature of a search requiring the removal of a prisoner's clothing'.⁸
15. The requirement to be searched by persons of the same sex/gender is firmly entrenched in corrections legislation in Queensland and in other similar jurisdictions. The QHRC maintains that this safeguard is of fundamental importance in promoting the human rights and dignity of prisoners, and in particular female prisoners. Analogous provisions can be found in other legislation, such as the *Mental Health Act 2016* (Qld) section 399 (which refers to 'gender' rather than 'sex').
16. As emphasised in the *Stripped of our dignity* report, strip searches cause psychological harm and degradation to women. Women reported instances in

⁵ Explanatory Notes, Corrective Services (Promoting Safety) and Other Legislation Amendment Bill (Qld) 6.

⁶ Queensland Human Rights Commission, *Stripped of our dignity: A human rights review of policies, procedures, and practices in relation to strip searches of women in Queensland prisons* (Report, September 2023) 107.

⁷ Although the wording of the Act uses the term 'same sex', the Explanatory Notes use the terms 'same gender' and 'same sex' interchangeably, indicating that the drafters did not consider there to be any difference between these terms.

⁸ Explanatory notes, Corrective Services Bill 2006 (Qld) 58, 61,

which men were present during strip searches, or where men were observed in close proximity to searches and this exacerbated feelings of distress and humiliation.

17. The Statement of Compatibility prepared for the Bill acknowledges a limitation on the right to humane treatment when deprived of liberty:⁹

only to the extent that the Bill lowers the level of legislative protection for prisoners to be searched by an officer of the same sex by removing the binary requirements from the Act and providing for more flexible requirements to be prescribed in the subordinate legislation.¹⁰

The Statement of Compatibility seeks to justify this reduction in legislative protection by referring to the flexibility that can be achieved through making changes by regulation following improvements in practice.¹¹

18. In the QHRC's view, the benefit of increasing flexibility is outweighed by the reduced level of legislative protection and the opportunity for input into the regulations.
19. The QHRC has not at this stage been consulted on the wording of a new regulation under section 39A. While there may be an intention to consult with stakeholders while developing the regulation in the first instance, removing the principle of conducting searches based on sex/gender from the primary legislation diminishes the opportunity for community input and parliamentary scrutiny of these issues. In the QHRC's experience, amendments to regulations are rarely the subject of consultation by departments.
20. Amendments made at the legislative level provide an opportunity for the QHRC and other stakeholders to actively contribute to the oversight process provided by parliamentary committees. Retaining this protection at the legislative level means that any subsequent changes in future years would need to be thoroughly justified by the Minister before being presented to a parliamentary committee, including through the requirement to demonstrate human rights compatibility in a detailed Statement of Compatibility. Although a Human Rights Certificate must be completed for subordinate legislation, the human rights analysis and parliamentary scrutiny is perfunctory.

⁹ The QHRC notes that this is only one of the human rights under the *Human Rights Act 2019* relevant to prisoner searches, the others being recognition and equality before the law (section 15), protection from torture, cruel, inhuman or degrading treatment (section 17) and the right to privacy (section 25). See also, Queensland Human Rights Commission, *Stripped of our dignity: A human rights review of policies, procedures, and practices in relation to strip searches of women in Queensland prisons* (Report, September 2023) 34–35 for an analysis of the human rights issues involved with prisoner searches.

¹⁰ Statement of Compatibility, Corrective Services (Promoting Safety) and Other Legislation Amendment Bill (Qld) 35.

¹¹ Statement of Compatibility, Corrective Services (Promoting Safety) and Other Legislation Amendment Bill (Qld) 35.

21. In summary, the current law lacks clarity as well as consistency in how trans and gender diverse people are to be searched, and should be promptly and clearly addressed in the primary legislation.
22. The Bill should be amended to include provisions that state that searches involving trans or gender diverse prisoners should be carried out by a person of the gender that the prisoner requests, and that the prisoner may request officers of different genders to carry out searches on the top and bottom halves of their bodies.

Authorised prisoner communications

23. The Bill proposes new provisions in relation to personal calls made by prisoners and clarifies the types of calls that can be monitored or recorded. The QHRC recommends a minor amendment to the Bill to add the Queensland Human Rights Commission on the list of oversight bodies included in new section 52E.
24. A prisoner has the right to confidentiality when they are speaking with the QHRC on sensitive matters involving potential limitations of their human rights. Often prisoners call the Commission on the enquiry line about current complaints that are already subject to confidentiality under the *Human Rights Act 2019* or *Anti-Discrimination Act 1991*. Preservation of confidentiality in circumstances where Queensland Corrective Services is a respondent to a new or an ongoing complaint matter should be assured. The potential for calls to be monitored or recorded may deter prisoners from accessing the Commission's services and seeking to uphold their human rights.