



Queensland
**Human Rights
Commission**

Corrective Services and Other Legislation Amendment Bill 2020

**Submission
to
Legal Affairs and Community Safety Committee,
Queensland Parliament**

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Introduction

1. Thank you for the opportunity to make a submission to the Committee's consideration of the Corrective Services and Other Legislation Amendment Bill 2020.
2. The Queensland Human Rights Commission (**the Commission**) has functions under the *Anti-Discrimination Act 1991* and the *Human Rights Act 2019* to promote understanding, acceptance and discussion of human rights in Queensland, and to provide information and education about human rights.
3. In making these submissions, the Commission does not propose to consider each provision and its compatibility with human rights, but rather to provide broad analysis and draw the Committee's attention to human rights of particular relevance.
4. The Commission notes that many of the proposed amendments in the Bill arise from the Crime and Corruption Commission's *Taskforce Flaxton: An examination of corruption risks and corruption in Queensland's prisons*. The elimination of corruption in prisons is an important goal and one that enhances public confidence in the justice system and enhances human rights compliance.
5. The Commission particularly welcomes clause 50, which repeals s 319F of the *Corrective Services Act 2006* as this reflects previous recommendations of the Commission. In our 2019 *Women in Prisons* report the Commission noted an area where prisoners are denied the same human rights as other people in Queensland is their ability to make a complaint of discrimination under the *Anti-Discrimination Act 1991*. Prisoners must currently satisfy a series of pre-conditions before they are entitled to make a discrimination complaint against correctional centre staff or the State. This is a significant hurdle for prisoners, and inhibits and delays the independent oversight of such complaints.
6. Under s 319E, a prisoner must first make a written complaint about the matter to the chief executive at the corrective services facility where they are detained, and wait four months. Secondly, under s 319F, they must make a written complaint to an official visitor about the alleged contravention and wait a further one month. The Commission is aware of several cases in which a prisoner complainant says they have complied with these pre-conditions, but the respondent State says they cannot locate the relevant paperwork. On some occasions, the respondent State has conceded that forms may have been lost or misfiled.

7. In our report, the Commission recommended Queensland Corrective Services and the Queensland Government review Part 12A of the *Corrective Services Act 2006* with a view to repealing those sections. While ideally both s 319E and s 319F would be repealed, any simplification of the current system is welcome.
8. Nonetheless, the Commission has concerns with some other amendments proposed in the Bill, particularly in relation to:
 - Restriction on certain offenders to be accommodated in low custody facilities;
 - Alcohol and Drug Testing of Staff; and
 - Emergency powers.

Restriction on eligibility for transfer to low custody facility

9. Proposed new s 68A of the *Corrective Services Act 2006* would restrict certain types of offenders from being transferred to low custody facilities even if they were otherwise entitled, on the basis they are a prisoner who:
 - (a) has been convicted of a sexual offence; or
 - (b) has been convicted of murder; or
 - (c) is serving a life sentence.
10. The Statement of Compatibility notes several rights under the *Human Rights Act 2019 (HRA)* are engaged by these amendments including recognition and equality before the law (section 15) and humane treatment when deprived of liberty (section 30). The Statement of Compatibility further notes that 'the amendment does not impose any further restriction on liberty or movement distinct from the prisoner's existing imprisonment'. The Commission submits that the right to liberty is engaged by this amendment, as this amendment could result in prisoners otherwise eligible for less restrictive custody remaining in higher security environments.
11. The Statement of Compatibility acknowledges that the proposed sections may limit these rights given the 'potentially arbitrary' nature of the restriction. The Commission shares this concern, particularly as the Statement goes on to note that currently, without this amendment, prison authorities can consider several relevant factors in determining the best placement of a prisoner:

A prisoner is not entitled to be placed in a low custody facility. Rather, low custody facilities may be used by QCS as a management tool to reward positive behaviour and support reintegration in the community. Decisions as to a prisoner's suitability for placement in a low custody facility are based on a number of factors, including but not limited to the nature of the prisoner's offence, the prisoner's risk of escape, the risk of the prisoner committing a further offence, the impact the further offence is likely to

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have on the community and the risk the prisoner poses to other prisoners, staff, the security of the facility and themselves.

The amendment is intended to provide a balance between ensuring a prisoner is provided with rehabilitative and reintegration opportunities and ensuring the ongoing safety and security of the community.

12. With respect, the Commission submits that the amendment actually fails to provide any such balance, as the particular rehabilitation and reintegration opportunities of individual prisoners are ignored by the blanket inability for such prisoners to be accommodated in lower custody areas. The Statement of Compatibility seeks to justify the change by suggesting that it will enhance public confidence in the system.
13. Section 13(2) of the HRA sets out factors for deciding whether a limit on a right is reasonable and justified including whether there are any less restrictive and reasonably available ways to achieve the purpose. The Statement of Compatibility does not consider any alternative options, or articulate in detail how the current system diminishes public confidence. The Statement further notes that the restriction applies even if the prisoner is currently detained for a different offence (but was previously imprisoned for one of the restricted offences).
14. The Statement also refers to this being a legislative change arising from the government's response to recommendation 38 of the Parole System Review. The government did not agree to that recommendation, noting that the policy was introduced following the escape of a convicted murderer, and the possibility of an escape by prisoners convicted of sexual offences or subject to life imprisonment has high potential to undermine public confidence in the low security program. Nonetheless, the original recommendation of the Parole System Review was:

The government should review the policy restricting placement of sexual offenders and those prisoners convicted for murder or those with a serious violent offence declaration with a view to reintroducing appropriate candidates to low security facilities.

15. The Commission made a similar recommendation in its 2019 Women in Prisons Report, noting that the change sought via these amendments was being implemented via policy. The Commission was particularly concerned about the impact on women who had been sentenced to life imprisonment. The Commission report noted that a number of Queensland Corrective Services' (**QCS**) staff expressed the view that suitable 'lifers' should be placed in low security prisons, as they assist with stability, culture, and grounding the population. The Report found keeping all low security women 'lifers' in the secure Brisbane Women's Corrections Centre or Townsville Women's Correctional Centre for their whole sentence did not

assist their reintegration into the community, nor was it an appropriate administrative decision. It also noted the disproportionate impact on women life sentenced detainees who are a low risk.

16. The Commission appreciates public confidence in the prison system is an important goal. However, decisions about the placement of prisoners ought to be based on a case by case basis, and not upon blanket criteria that fails to weigh up all relevant considerations appropriate to each case. As the explanatory material accompanying the Bill identifies, this amendment is potentially arbitrary, as it does not require decision makers to apply criteria based on risk of escape or other security risk. It could result in the lowest risk detainees, for example women and prisoners who are infirm, being held in higher security areas.
17. Such inflexibility in our prison environment when the risk of COVID-19 is at its highest, diminishes the ability of QCS being able to move prisoners appropriately to deal with quarantining and other mitigation efforts. The Commission suggests the proposed amendment be reconsidered, and that the government provide further justification for how this change will not be an arbitrary interference with rights, particularly for female or infirm detainees.

Alcohol and drug testing of Staff

18. Proposed Part 9A would provide the Chief Executive with the power to request a corrective services officer or corrective services recruit submit to an alcohol or drug test. The Statement of Compatibility includes a detailed discussion of the rights engaged, including right to privacy and reputation (section 25) and liberty and security of person (section 29).
19. The proportionality of these provisions is enhanced by safeguards such as limiting the admissibility of positive tests to specific non-criminal legal proceedings.
20. The Commission appreciates that alcohol and drug testing addresses risks of corruption. However, these proposals represent a significant infringement on the rights of staff and it is difficult to fully consider the compatibility with human rights as some aspects are to be included in regulation. The Statement of Compatibility notes that the amendments may engage protection from torture and cruel, inhuman or degrading treatment (section 17) and freedom of thought, conscience, religion and belief (section 20) because tests will be performed potentially without consent, and may involve an invasive blood test.
21. The Commission acknowledges that placing procedures in regulations allows testing regimes to take advantage of less-invasive new

technologies as they are developed. During the recent public briefing to the Committee, government representatives also suggested that placing this process in regulation would allow further consultation with staff, unions and other stakeholders, which the Commission welcomes. Nonetheless, the Explanatory Note refers to broad consultation already undertaken on the Bill including with the union and the CCC. If the views of unions and staff to such issues resulted in the legislation being framed in a particular way, this should be reflected in the justification. If unions and staff were opposed to these measures, how their concerns were considered may also be relevant.

22. Presumably any further feedback received during the consultation process for the regulations will also be too late to influence the primary legislation amended through this Bill. For example, through the passage of this Bill, the Chief Executive will have the power to undertake invasive testing involving blood and other samples.
23. The commitment during the public briefing that QCS would generally not use invasive tests such as blood tests unless absolutely necessary is consistent with its obligations as a Public Entity under the Human Rights Act.
24. Nonetheless, the inclusion of invasive testing powers may be a disproportionate response to the issue. Safe Work Queensland's 'Framework for Alcohol and Drug Management in the Workplace' states:

Any form of testing should be the least invasive and provide timely results. Breath testing for alcohol and oral fluid testing for drugs are recommended as the preferred methods of testing as they are non-invasive, discreet and quick to administer.
25. The Commission submits that the legislation remove the ability for invasive testing or explicitly require that it is only used as a last resort when no other testing methods are possible and only by a suitably qualified person. If there is a justification for the legislation permitting invasive tests, further information should be provided including consideration of how other human rights jurisdictions have approached these issues.
26. The refusal to give a sample being considered a positive sample may also engage the right to equality in relation to staff with disabilities, who may be unable to provide a sample in the manner set out in the regulations (for example provide a urine sample on demand).
27. A further safeguard would be to include a clear review process for staff who dispute a positive test, particularly those who may have a medical need to take a targeted substance and may dispute that the drug 'impairs their capacity to perform their duties without danger to the person or

someone else'.¹ Various options are available to the Chief Executive to respond to a positive test, and many may include review procedures (e.g. those under the Public Service Act). Nonetheless, consistent with the right to fair hearing, a clear review mechanism should be present for staff to challenge any response to a positive test. While during the public briefing to the Committee, government officials referred to the first step in a positive test process being a discussion with the employee, which would include for example a consideration of a medical requirement to take a targeted substance, this safeguard does not appear to have been included in the Bill.

28. Other safeguards that might also be considered include restricting the release of samples and information about a positive test to third parties and providing details on how samples will be stored, retained and destroyed.

Increased penalties for assault

29. Section 340 of the Corrective Services Act currently provides a maximum penalty of 7 years if a prisoner assaults a prisoner officer. The Bill seeks to increase the penalty to 14 years in certain circumstances
30. The Commission notes that the Queensland Sentencing Advisory Council is currently reviewing these provisions and others involving assaults on public officers. In our submission to that review, the Commission noted that increased penalties engage the right to liberty and security of the person (which had been identified in the compatibility analysis of similar legislation in the ACT). However, the limitation on the right to liberty is not discussed in the Statement of Compatibility.
31. While the Commission supports measures to protect corrections staff from assault, it is perhaps premature for the government to legislate increased penalties prior to the outcome of that review in the context of penalties for assaults on other workers. Also, the review may find that increased maximum penalties are not necessarily effective in reducing such assaults.

Emergency Declaration powers

32. The Bill amends s 268 of the *Corrective Service Act 2006* to expand the existing powers for a Chief Executive to declare an emergency at a prison for up to 3 days (which can be extended) if there is a situation at the prison

¹ Proposed s 306I requires that a corrective services person lawfully taking a targeted substance must not perform during in or involving an operational capacity or critical role if the substance impairs the person's capacity to perform the duties without danger to the person or someone else.

that the Chief Executive reasonably believes will threaten or is likely to threaten— (a) the security or good order of a prison; or (b) the safety of a prisoner or another person in a prison. These amendments allow the Chief Executive to set up a temporary corrective services facility to accommodate detainees during the emergency.

33. The Statement of Compatibility cites several rights are engaged by these changes and provides a justification for why this is reasonable.
34. The Commission notes that the existing power under s 268 has been used recently by QCS to respond to the COVID-19 pandemic including instituting prison lockdowns and quarantine procedures. The Commission is grateful for QCS' engagement with the Commission and the broader community in communicating these changes.
35. Nonetheless, unlike the recently passed powers of the Chief Health Officer, declarations made under s 268 are not required to be gazetted or otherwise communicated publicly via the QCS website. As these are significant powers, which the Statement of Compatibility notes engage several human rights, s 268 should be amended to include an obligation to publish these directions when they are made. This would provide greater transparency for the community about the use of this power.²

Conclusion

36. In summary, the Commission is generally supportive of the proposed amendments but makes the following suggestions to ensure human rights are appropriately considered:
 - a. Removing the blanket prohibition on people convicted of certain offences of ever being accommodated in low custody facilities;
 - b. Amending the provisions regarding alcohol and drug testing of staff to ensure they are the least invasive, or provide greater justification for these changes including consideration of how other human rights jurisdictions have addressed the issue;
 - c. Provide further justification for why penalties for assaulting staff should be increased now before the QSAC releases its report into the issue; and
 - d. Amend the *Corrective Services Act 2006* so that that emergency directions made under s 268 must be published online and/or via gazettal.

² See for example s 362B of the *Public Health Act 2005*, which obliges the CHO to publish directions on the department's website or in the gazette.