



Criminal Lawyers Association of the Northern Territory (CLANT)

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Commissioner Ken Middlebrook
Office of the Commissioner of Correctional Services
Old Admiralty Towers
68 The Esplanade DARWIN NT 0870

Dear Commissioner Middlebrook

Correctional Services Bill (V19)

Thank you for providing the Criminal Lawyers Association of the Northern Territory (CLANT) with an opportunity to comment on the draft *Correctional Services Bill (V19)*.

This is significant legislative reform which provides an opportunity for the Northern Territory government to implement a framework for a safe, humane and modern correctional system, and to clearly articulate its commitment to the rehabilitation of prisoners.

Unfortunately, we are concerned that the proposed legislation does not sufficiently achieve this objective or reflect these values. Rather, the legislation fails to protect the basic rights of prisoners and, in some instances, lacks sufficient safeguards around the use of power by the Commissioner, the General Manager, delegates and officers in a correctional setting. We are also concerned by the restrictions in relation to lawyer/client access and communications.

Rehabilitation and the protection of the basic rights of prisoners

Inclusion of an objects clause

We are disappointed that the objects of the legislation set out in previous versions of the Bill have been removed. We are unsure of the rationale for removing the objects clause. However, in our view, including an objects clause in this significant legislation is critically important for two reasons. First, it allows the government to clearly articulate its vision for correctional services in the Northern Territory, including its commitment to rehabilitating prisoners and providing a secure, safe and humane corrections environment. Secondly, it provides an aid to construction in determining the scope and nature of powers, functions and duties conferred on the Commissioner, the General Manager and correctional officers under the legislation.¹ Given the breadth of some of these powers, the underlying purpose of the conferral of these powers should be explicitly stated in the legislation.

¹ Pearce and Geddes. (2011). *Principles of Statutory Interpretation*, 7th ed., [4.49].

Statutory protection of basic rights

We are also concerned by the absence of any provisions explicitly outlining the basic rights and entitlements of prisoners. Indeed, provisions under the current *Prisons (Correctional Services) Act* providing for the statutory protection of prisoners' right to adequate food and exercise,² and providing that a prisoner is to be informed of his or her rights and responsibilities, have not been included in the proposed legislation.³ At present, there is no mention of the rehabilitation of prisoners in the entire Bill. We strongly urge the Government to include provisions protecting the basic rights of prisoners. This will provide a clear indication of the government's commitment to providing modern, safe and humane correctional services, and will assist in ensuring that the management of correctional settings occurs in a manner consistent with this intention.

Facilitating the rehabilitation of prisoners

Clause 63, read with the power to charge fees under cl. 161 for services and to recover costs, confers broad discretion on the Commissioner to determine whether to organise the repatriation of a prisoner, to determine where the prisoner will be returned to, and to determine whether the Department of Correctional Services or the prisoner will pay for the cost of transport. There is no positive obligation imposed on the Commissioner to arrange transport for vulnerable prisoners, such as women with children or youth in detention. This signals a move away from the current practice of paid repatriations.

If the government is committed to reducing recidivism rates, the government must commit to supporting the reintegration of prisoners into the community post-release. Prisoners are at a particularly high risk of reoffending immediately following release (whether from a correctional centre at the end of their term of imprisonment or from the court cells) if they do not receive support to return to their community safely. Thus, it would be a false economy to seek to save money by limiting the practice of paid repatriation.

Safeguards around the exercise of power in correctional settings

There are a number of significant powers set out under the Act which are broad in scope and lack statutory safeguards. In particular, we consider that tighter statutory safeguards (including by way of a basic rights provision and an objects clause) need to apply to the following powers:

- *Cl. 41- The General Manager's power to separate a prisoner from other prisoners.* The General Manager has broad power to segregate prisoners. There are no checks on this power, nor are there any statutory protections of a segregated prisoner's basic rights;
- *Cl. 54 - The Commissioner's power to direct a prisoner to work.* We consider that the power to direct a prisoner to work is too broad. In its current form, s. 54 could enable the Commissioner to establish a system of forced labour. In contrast to the existing legislation, the provision does not set out exemptions for prisoners who do not have the capacity to work, whether because of illness, age or other reason. These issues are left entirely to the Commissioner's discretion. Given the vulnerability of many of the prisoners in the Northern Territory's prisons, we consider this to be inappropriate.

² *Prisons (Correctional Services) Act*, ss. 88 and 89.

³ *Prisons (Correctional Services) Act*, s. 91.

- *Cl. 84 - The power to request health information.* This power is unjustifiably broad and may result in the unnecessary disclosure of sensitive health information. We agree that it is necessary to confer power on Correctional Services to obtain relevant health information about a prisoner for safety and security reasons and to ensure that the prisoner's health needs are met, but we consider that a health assessment and report on request model is more appropriate.
- *Cl. 161 - The power to charge a fee for services or to recover costs.* This power is too broad; the types of fees that might be charged and the circumstances in which they will be incurred remain unclear. Whilst we appreciate that the Commissioner's intention is to only charge for non-essential services, this must be explicitly stated in the legislation. We are pleased to see that this version of the Bill clearly provides that prisoners will not be released with a debt to Correctional Services as any debt will be written off.

Protecting prisoners' access to legal representatives and services

The provisions concerning lawyer/client visits and communications are an improvement on earlier versions of the Bill, but we still hold some concerns in relation to the restrictions put in place on lawyer/client visits, and the powers to intercept mail from or to a lawyer. The 'reasonableness' requirement in cl. 96 applied to legal visits should be sufficient; there should be no further requirement to make an appointment with the General Manager. There may be circumstances in which there is an urgent need to discuss a legal matter with a prisoner, but there is no time for the prisoner's lawyer to make an appointment for a visit through the General Manager. The request to visit the prisoner in such circumstances may be reasonable, but may be precluded because an appointment has not been made. Thus, we consider that the words 'by appointment with the General Manager' should be removed from cl. 96.

In relation to legal mail, only items purported to be 'legal items' are protected by the procedure set out in Division 2 of Part 3.5. The definition of a 'legal item' is too narrow. The requirement that an item be 'subject to client legal privilege' to constitute a 'legal item' for the purposes of the Division is problematic. Correctional Officers charged with assessing whether an item purports to be a legal item are in no position to determine whether an item purports to be subject to client legal privilege. It is proposed instead that the term 'legal item' be defined as an item that has been, is being, or is intended to be, given by a prisoner to the prison's legal practitioner or to the prisoner by the prisoner's legal practitioner in the course of the lawyer/client relationship. Guidelines must also be put in place in relation to the exercise of powers under this Division to assist in ensuring that the process for dealing with mail to or from a legal practitioner is transparent, and is protected from abuse.

We also note that broad offence provisions, such as cl. 175 which provides that nothing is to pass to or from a prisoner (except if the thing falls within the narrow definition of a 'legal item'), could potentially create problems for services delivering legal education and throughcare services to a prisoner.

Other issues

Misconduct proceedings

We are pleased to see the inclusion of a provision in the current version of the Bill explicitly stating that the rules of natural justice apply to the conduct of misconduct proceedings. However, given the potentially significant consequences of a finding of misconduct, we are concerned that the standard of proof has been reduced from 'beyond reasonable doubt' (s. 33 of the current Act) to 'on the balance of probabilities' under cl. 73(1)(a). In these quasi-criminal proceedings which can result in the imposition of quasi-criminal penalties, the criminal standard of proof should be retained to ensure that prisoners are only penalised when there is a strong case against them.

Clause 80, which provides for the restitution for damage caused by prison misconduct, is unnecessary. The right to recover costs for damage to correctional services under cl. 196 is sufficient. If cl. 80 is retained, we consider that it is framed too broadly in its current form. There should, at the very least, be a requirement that the prisoner's capacity to pay be factored into the decision to order restitution following a finding of misconduct.

Interpreters

Prisoners should be entitled to an interpreter, not only in misconduct proceedings, but also to communicate with health practitioners and other services. Whilst this might be dealt with by way of guidelines, we submit that it should be included in the legislative framework (as is currently the case in relation to misconduct proceedings), given the significant barriers many prisoners experience as a result of their limited English.

Conclusion

Once again, we thank the government for providing CLANT with an opportunity to consider this important legislative reform. We are pleased to offer our constructive feedback to improve the legislative framework for the delivery of correctional services in the Northern Territory. CLANT hopes that our comments will be duly considered by the government, and that the principle of rehabilitation will be clearly articulated and the protection of prisoners' rights will be enhanced in the next version of the Bill.

Yours sincerely



Russell Goldflam

President

Criminal Lawyers Association of the Northern Territory