



Discussion Paper:

Review of the *Crimes (Administration of Sentences) Amendment Act 2002* and the *Summary Offences Amendment (Places of Detention) Act 2002*.

March 2005

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Any correspondence relating to this review should be sent to:

Crimes (Administration of Sentences) Amendment Act Review  
NSW Ombudsman  
Level 24, 580 George Street  
Sydney NSW 2000

General enquiries: (02) 9286 1000  
Toll free (outside Sydney Metro Area): 1800 451 524  
Facsimile: (02) 9283 2911  
Telephone typewriter: (02) 9264 8050  
Website: [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)  
Email [nswombo@ombo.nsw.gov.au](mailto:nswombo@ombo.nsw.gov.au)

ISBN number 0 7313 1319 4

NSW Government Publication

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## Foreword

Since 1998 my office has monitored and reviewed the operation of several new pieces of legislation. The NSW Parliament decides which laws we will review, and the length of the review.

Two pieces of legislation my office is currently reviewing are the *Crimes (Administration of Sentences) Amendment Act 2002* and the *Summary Offences Amendment (Places of Detention) Act 2002*. These Acts commenced on 21 February 2003, and together:

- Increased the powers of correctional officers to stop, search and detain people or vehicles that are 'in or in the immediate vicinity of' a place of detention. This was aimed at reducing the amount of prohibited items (eg. drugs, weapons, syringes and mobile phones) entering correctional facilities.
- Provided victims of serious offences with the right to make an oral submission to the Parole Board when the Board is considering whether to release an offender on parole.
- Changed the procedures that correctional officers and police officers must follow when an escaped inmate is arrested. Previously inmates were to be conveyed to the nearest appropriate correctional centre. However, the new laws require inmates who have escaped from custody to be taken by correctional officers to a police officer, or before an authorised justice to be dealt with according to law.

Since this legislation commenced in February 2003, my office has been conducting research to determine whether the laws are being applied properly, fairly and effectively. For example, we have examined a range of material from relevant departments, observed several search operations at correctional facilities, attended a number of Parole Board hearings, and interviewed and surveyed a range of stakeholders.

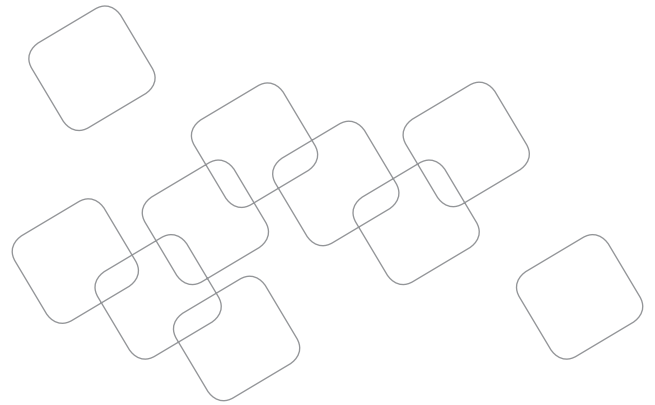
As part of the review process we have also decided to release this discussion paper. The purpose of the paper is to provide some background about the legislation, explain the legislative provisions, and outline a number of issues that we have been made aware of throughout the review process so far.

We are hoping that, in response to this paper, a range of people and organisations will contact us to provide their views and experiences about the operation and effect of the legislation (whether good or bad). We particularly welcome submissions from people who have had direct experience of the legislation in action, such as people who visit correctional facilities, correctional officers, police and victims of crime.



Bruce Barbour  
**Ombudsman**



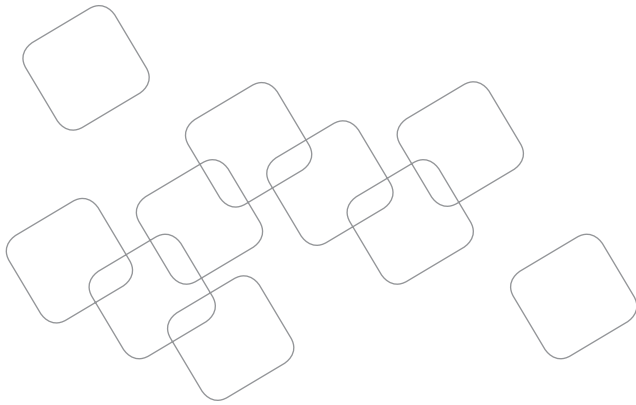


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# Introduction



The *Crimes (Administration of Sentences) Amendment Act 2002* and the *Summary Offences Amendment (Places of Detention) Act 2002* both commenced on 21 February 2003.

This legislation:

- increases the powers of correctional officers to stop, search and detain people or vehicles that are 'in or in the immediate vicinity of' a place of detention
- authorises correctional officers to use dogs, and reasonable force, when stopping, searching and detaining people and their vehicles
- creates new penalties for not complying with a direction given by a correctional officer in relation to the stop, search and detention powers, and for failing to produce anything detected in a search when requested to do so by a correctional officer
- permits the seizure and destruction of property brought unlawfully into a correctional centre
- gives victims of serious offences the right to make an oral submission to the Parole Board when the Board is considering whether to release the offender on parole, and
- changes the procedures that correctional officers and police officers must follow when an escaped inmate is arrested.

Section 4 of the *Crimes (Administration of Sentences) Amendment Act 2002* requires the NSW Ombudsman to keep under scrutiny the operation of the legislation for a period of two years, beginning February 2003. The Ombudsman is then required to prepare a report on the operation and effects of the legislation, including making recommendations about amendments that might appropriately be made to the legislation. The report is to be tabled in the New South Wales Parliament.

This discussion paper is one element of a research project that has been developed to allow effective monitoring of the operation of the legislation. The purpose of the discussion paper is to:

- provide some background to the legislation
- identify issues which have arisen to date, and
- invite submissions from interested parties about the operation of the legislation.

This discussion paper is written in three parts. This is because the changes to the legislation deal with three distinct aspects of criminal justice administration.

1. The powers of the correctional officers to stop contraband entering correctional centres.
2. The role of victims in the process of determining whether parole will be granted to serious offenders.
3. The procedures to be followed by correctional officers and police officers following the arrest of an inmate absent from lawful custody.

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This paper invites comment on a number of questions. If your comment is in response to a particular question, please note which question you are responding to. However, you are welcome to write to us about any aspects of the legislation and its implementation. Information from submissions will be used in our report. We will aim to ensure that our report does not identify individual correctional officers, inmates or members of the public by name or details that might otherwise identify them. Please let us know if you have any concerns about confidentiality or if you do not want some or all of your submission to be attributed to you or your organisation.

**Any submissions or correspondence relating to this review should be sent to:**

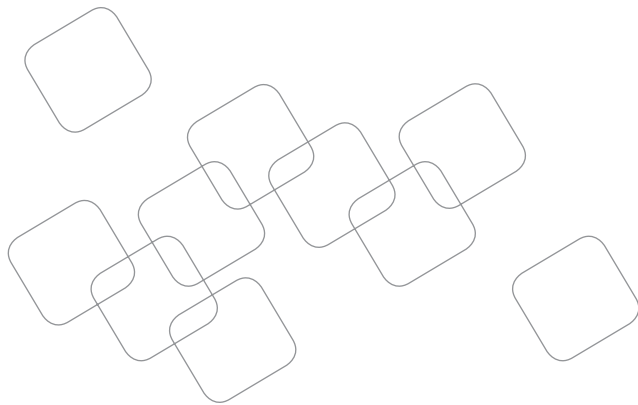
Crimes (Administration of Sentences) Amendment Act Review  
NSW Ombudsman  
Level 24, 580 George Street  
Sydney NSW 2000

Inquiries about this review should be directed to Ms Kate Merryweather, Researcher, on (02) 9265 0425 or by email [kmerryweather@ombo.nsw.gov.au](mailto:kmerryweather@ombo.nsw.gov.au).

**Due date for submissions 22 April 2005**



# Background



The Department of Corrective Services (DCS or the department), is responsible for managing almost all correctional facilities in NSW, where inmates are housed. The department manages 29 correctional centres, 11 periodic detention centres and two transitional centres for female inmates.<sup>1</sup> Some of these institutions are situated separately; others are co-located on the grounds of a correctional complex. In some circumstances, the department is also responsible for offenders in court cells and police cells.

There is also one privately managed correctional centre in NSW. The GEO Group Australia Pty Ltd (the GEO Group) is responsible for the security, supervision, custody and welfare of inmates of the Junee Correctional Centre. The management of Junee Correctional Centre is subject to the same legal requirements as correctional facilities managed by DCS. For the purposes of this paper the terms 'correctional facility' and 'place of detention' will be used interchangeably to describe the institutions run by the GEO Group and DCS to house inmates (whether on a full-time or periodic basis).

The *Crimes (Administration of Sentences) Act 1999* and the *Crimes (Administration of Sentences) Regulation 2001* are the primary pieces of legislation governing the administration of correctional facilities in NSW. The Act specifies that a Commissioner is responsible for the care, direction, control and management of all places of detention throughout NSW. Governors are responsible for the day-to-day management of correctional facilities, and are subject to the direction and control of the Commissioner.

Both correctional and non-correctional staff are employed at each correctional facility. Correctional staff are responsible for custodial duties, such as feeding, supervising, searching and escorting inmates, as well as controlling access to the centre, and processing, and searching visitors. Non-correctional officers include administration staff, psychologists, welfare officers, nurses and teachers.

There are approximately 9,000 people currently incarcerated in places of detention throughout NSW. While the actual number of inmates in custody changes on a daily basis a snapshot of the offender population for the week ending 13 February 2005 provides a hint of the variety and complexity of the population. At the end of this week there were 8,331 males in full-time custody. Of these, 5,884 were sentenced, 503 were appellants (people appealing their conviction or sentence) and 1,944 were on remand (unsentenced).<sup>2</sup> Of the 641 female inmates in full-time custody, 388 were sentenced, 42 were appellants and 211 were on remand. Indigenous inmates made up 19.1% of the male inmate population (1,588 males) and 29.8% of the female inmate population (191 females).<sup>3</sup> There were also 765 offenders attending periodic detention centres, or housed in transitional centres, police cells and court cells.<sup>4</sup>

<sup>1</sup> This includes Kariiong Juvenile Correctional Centre, a centre which was managed by the Department of Juvenile Justice until 5 November 2004.

<sup>2</sup> *Offender Population Report*, DCS Corporate Research, Evaluation and Statistics Unit, week ending 13 February 2005.

<sup>3</sup> *Ibid.*, These figures include inmates housed in correctional centres only, and do not include inmates housed in transitional centres, police/court cells or periodic detention centres.

<sup>4</sup> *Ibid.*, This figure does not include the 125 people with a periodic detention order, who were not attending periodic detention.

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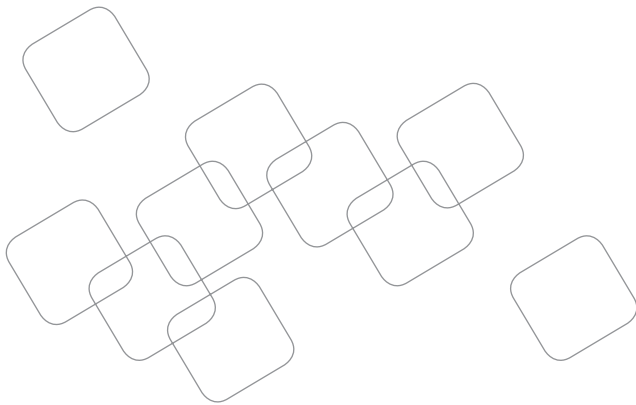
Some offenders who are sentenced to a period of imprisonment are able to apply for parole before the end of their sentence. If parole is granted, the offender will spend the remainder of his or her sentence in the community, under supervision. The NSW Parole Board is the independent body that determines whether or not to release offenders from custody, on parole, and what conditions to impose on offenders who are granted parole.<sup>5</sup>

While on parole, offenders are monitored by the DCS Probation and Parole Service to ensure that any conditions of the offender's parole order are met. If an offender breaches the conditions of his or her parole order, this will be reported to the NSW Parole Board which may decide to revoke the parole order and return the offender to custody for the remainder of his or her sentence.

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<sup>5</sup> The *Crimes (Administration of Sentences) Amendment (Parole) Act 2004* will, when proclaimed, re-constitute the Parole Board as the State Parole Authority, and make a number of changes to the parole process.

# Chapter 1. Increased powers of correctional officers to stop, search and detain people and vehicles



There are strict limitations on the amount and type of property inmates may possess while they are in custody. There are also regulations about how this property is to be received, transferred and disposed of. The prohibition and restriction of certain items is directly related to the security of the institution, the safety of staff, inmates and people visiting the centre, and the orderly operation of the centre. Disharmony and violence can occur when inmates fight over property or when inmates 'stand over' other inmates demanding, on threat of violence, money or goods.

The dangers of having items such as knives, firearms, batons or explosives brought into a correctional centre are obvious. Such weapons could be used to threaten, kill or injure anyone within the correctional centre, or to assist in an escape attempt. Risks are also posed if alcohol, drugs or syringes are brought into a correctional centre as inmates under the influence of drugs or alcohol may behave in a violent or anti-social manner. In addition, diseases such as HIV or Hepatitis C can be transmitted through the use of shared equipment, and needle stick injuries can occur.

An article in *The Australian* illustrated some of the risks that can arise when inmates have access to unauthorised mobile phones within a correctional centre:

*Chief among them is that inmates could potentially conduct criminal activities by phone, plan escapes or even orchestrate terrorist acts. Overseas, it has already happened. In Israel, a suicide bombing was arranged using a mobile phone from inside a prison. In South America, inmates communicating on mobile phones arranged for four prisons to riot simultaneously. And in France, an inmate co-ordinated a helicopter escape using a mobile phone.<sup>6</sup>*

The demand for contraband items in correctional facilities is high. It is not surprising that drugs and alcohol are highly sought given that 84% of female inmates and 80% of male inmates surveyed in the 2001 New South Wales Inmate Health Survey reported lifetime use of illicit drugs, and over 60% of male and female inmates surveyed were under the influence of drugs or alcohol at the time of offending.<sup>7</sup> Factors such as isolation, boredom, loneliness, fear or frustration that are likely to be experienced by offenders while incarcerated may actually increase an inmate's desire for these prohibited substances.

<sup>6</sup> R. Fitzgerald, "Mobile message loud and clear" *The Australian*, 6 May 2004.

<sup>7</sup> T. Butler, & L. Milner, *The 2001 New South Wales Inmate Health Survey*, Corrections Health Service, 2003, pp. 119, 123.

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Other contraband items are also in high demand by inmates. Mobile phones allow inmates less restricted communication with the outside world and weapons can be used to threaten or attack other people, or be used in self-defence. These, and other items of unauthorised property can also be used as currency within the correctional system.

There are many ways that inmates can come to possess prohibited goods. Inmates can modify items they are permitted, they can sell, swap or steal authorised items and contraband items can be smuggled into correctional centres. For example, contraband can be:

- concealed by inmates coming into the centre
- passed to inmates during personal or professional visits
- thrown over the fence of a place of detention
- left at a location for inmates who work inside or outside the centre to collect
- introduced into a centre by staff or contractors
- posted to an inmate
- delivered to the centre through inmate meal deliveries or 'buy-ups'.

People who assist inmates to obtain contraband items are likely to do so for different reasons. These include:

- not knowing that a particular item should not be brought into a place of detention
- inadvertently bringing an item onto correctional centre property (for example, forgetting that a prohibited item is in a vehicle or bag)
- providing unauthorised goods to an inmate family member or friend as a favour
- providing unauthorised goods to an inmate family member or friend because the inmate has threatened harm if the goods are not produced
- providing unauthorised goods to an inmate family member or friend because of fear that the inmate will be harmed by other inmates if the goods are not produced
- trafficking of prohibited goods for profit.

DCS uses a wide range of tools to detect and prevent contraband entering correctional centres. Some common practices to prevent the entry and use of contraband items include:

- regular searching of inmates (which may include strip searches)
- frequent searches of correctional centre premises, sometimes using drug detection dogs
- monitoring of inmate phone calls and mail
- the collection and distribution of intelligence information obtained from a variety of sources
- the analysis of inmates' urine to detect illicit drug use.

In addition, correctional officers regularly stop, search and detain visitors to correctional centres and their vehicles in order to detect items that should not be brought onto correctional centre property.

## 1.1. Clarity of rules concerning entry of items into correctional facilities

Sections 27B – 27E of the *Summary Offences Act 1988* contain various offences relating to places of detention. These offences include:

- bringing any liquor, prohibited drugs, prohibited plants or other specified substances into a place of detention
- bringing a syringe into a place of detention, without permission, or supplying a syringe to an inmate
- unlawfully possessing an offensive weapon or instrument in a place of detention
- unlawfully loitering about any place of detention, entering a place of detention, or communicating with an inmate
- unlawfully delivering anything to an inmate, or bringing anything into a place of detention
- unlawfully receiving anything for conveyance out of a place of detention, or secreting or leaving anything for the purpose of its being found by an inmate.

Departmental policies supplement the laws about what may and may not be brought onto correctional centre property. Some DCS policies apply state wide, others are specific to individual correctional facilities. Rules about what items can be taken into a correctional facility also vary depending on who is bringing them in. For example, police officers and legal representatives may take computer laptops and audio and video recording equipment into a visit with an inmate but people making a personal visit to an inmate may not.<sup>8</sup>

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<sup>8</sup> DCS Assistant Commissioner's Order 2003/055, *Use of computer, laptops, audio & video recording equipment by the police and legal representatives during interviews with inmates*, 3 September 2003.

Correctional officers routinely try to detect whether people entering correctional centres have in their possession goods which are not permitted to be brought onto correctional centre property. In order to do this fairly and effectively the rules about exactly which items are not permitted should be clear and unambiguous. During the review period we have identified a number of possible issues of concern about the clarity of the rules concerning prohibition of certain items from correctional centres.

## Poisons and drugs

It is common for people to carry medications with them in their vehicle or bag, and people sometimes have medication with them when they enter a correctional centre. It is often easy for correctional officers to verify the type of drug the person is carrying and determine whether the medication is permitted to be brought onto the centre grounds. However, sometimes correctional officers have difficulty verifying the type of medication. On one occasion an observer from our office noted:

*A middle aged couple had been hanging around their vehicle for quite a while. The man could speak very little English and the woman was interpreting for him.*

*From what I could tell, the man had a container of pills in his car that he had not declared during the search. There were a number of different types of pills in the container. The man claimed they were prescription medication but there was no label on the container, and he had no prescriptions on him. A police officer identified some of the pills as [type of drug], but couldn't identify any of the others.*

*Police and correctional officers seemed very unsure what to do. They wanted to take the pills off the man, but he said he needed to have the tablets twice a day for his heart so they were concerned that he would become ill without them. The OIC [officer in charge of the operation], Mr [name] was consulted. He decided to give the man a warning, but to allow the visit.<sup>9</sup>*

## Mobile phones and recording devices

Section 27E(2)(b) of the *Summary Offences Act* prohibits people from bringing or attempting to bring 'anything' into a place of detention, without lawful authority.

The Commissioner of Corrective Services is responsible for the care, direction, control and management of all places of detention in NSW.<sup>10</sup> In light of this statutory responsibility, the Commissioner has determined that it is his role to decide which items people do not have the lawful authority to bring onto the grounds of correctional facilities. This is demonstrated by an 'order' entitled *Banning of mobile telephones from correctional centres* that was issued by the Commissioner in 2002. The order says, in part:

*The Commissioner of Corrective Services has approved that, for the purposes of section 27E(2)(b) of the Summary Offences Act, persons have lawful authority to bring a mobile phone into a correctional centre or periodic detention centre, provided that they either have it securely locked in their vehicle or inform a correctional officer upon arrival at the centre that they possess a mobile phone and wish to place it in a locker for safekeeping.*

...

*However, persons do not have lawful authority to deliver or attempt to deliver a mobile phone to an inmate in any circumstances. Nor do persons have lawful authority to secrete or leave a mobile phone anywhere inside or outside a place of detention for the purpose of its being found or received by an inmate.<sup>11</sup>*

It has become extremely common for people to carry mobile phones over recent years, and usually people carry their phone with them wherever they go. As outlined above, DCS policy specifies that people are permitted to bring mobile phones onto correctional centre property, provided that the phone is securely locked in a vehicle, or that on arrival at the centre the person advises a correctional officer that they possess a mobile phone and wish to place it in a locker for safekeeping. This is a state-wide policy and is intended to apply at each correctional centre.

Despite this, we have become aware that at some correctional centres people visiting inmates are being told they are not permitted to bring a phone onto correctional centre property at all, or that phones must be stored in vehicles. Instructions for people to leave their phones in their vehicle are problematic for people who are given a lift to the centre, or who arrive on foot or by public transport.

<sup>9</sup> Observation record 2, September 2003.

<sup>10</sup> *Crimes (Administration of Sentences) Act 1999*, section 232(1)(a).

<sup>11</sup> The *Summary Offences Act 1988*, section 27DA and the *Crimes (Administration of Sentences) Regulation 2001*, clause 113B, provide that inmates are prohibited from possessing mobile phones, mobile phone SIM cards, and mobile phone chargers (or any part of these items).

At one regional correctional centre we were told that people sometimes try to hide their phone on the grounds of the correctional centre for the duration of their visit, as they do not want to be reprimanded for carrying it. This is problematic because, if officers detect a person hiding a phone, the person may be charged with secreting the phone for the purpose of being found by an inmate. In addition, there is the possibility that an inmate could find the phone, even if it was not left for that purpose, and smuggle it into a secure part of the centre.

It has also become increasingly common in recent times for people to carry 'camera phones' capable of taking photographs and recording and transmitting video and audio material almost instantly. Unsurprisingly these devices are of great security concern as photos of inmates, officers or the layout of the centre can be transmitted quickly to remote locations.

The legislation is clear that visitors are not permitted to take photographs of, or operate video or audio recording equipment at a correctional centre without the prior approval of the governor.<sup>12</sup> However, there is nothing in the legislation that specifically prohibits people (other than inmates)<sup>13</sup> bringing cameras or other recording devices onto correctional centre property.

In mid 2003 the Commissioner of Corrective Services issued an order to supplement the 2002 order *Banning of mobile telephones from correctional centres*. This was issued because of the security concerns posed by camera phones and similar recording devices. It says:

*After consultations, and in conjunction with ... [the order Banning of mobile telephones from correctional centres] which addresses the issue of mobile telephones and the consequences of taking such an item into a correctional centre, all digital devices ... and recording devices that have the capacity to be used for communication purposes, are considered contraband in correctional centres.*<sup>14</sup>

This does not clearly indicate whether people are permitted to store camera phones and other such items in lockers or vehicles, or whether they cannot be brought onto any part of the correctional centre. If people are prohibited from bringing these items onto all correctional centre property it is unclear what people are supposed to do with their phone if they arrive at the centre and inadvertently have a camera phone or other recording device in their possession.

On occasions where we have observed correctional officers detect people carrying camera phones onto a place of detention, the people are usually told that it is an offence to bring a recording device onto the centre property, and to keep such items at home. However, the information and instructions given to people are not always consistent with this approach.

### Questions for consideration

1. Are the rules regarding which items cannot lawfully be brought into places of detention sufficiently clear? Why or why not?
2. The *Summary Offences Act* prohibits people from bringing in, or taking out of a place of detention 'anything' without lawful authority. What are the advantages and/or disadvantages of this broad approach?

## 1.2. Provision of information for people entering places of detention

Due to the complexity of the rules for people entering correctional centres, and the fact that people may visit a number of different centres, it is important that the rules concerning conditions of entry to each correctional centre are easily accessible as well as comprehensible to visitors. This is especially important given the diversity of people regularly entering correctional centres, some of whom do not speak English as their first language, and also because people who contravene the rules may be prohibited from visiting correctional centres or charged with a criminal offence.

There are a number of ways that visitors to correctional centres can currently access information about the rules relating to visiting inmates. Visitors can make telephone inquiries by contacting the individual correctional centre they intend to visit. In addition, the DCS' website has limited information about the visiting times and conditions of most of the centres.

Some centres publish information brochures about the centre's visiting conditions. These are usually freely available in the visits reception area of the centre and may be posted to visitors on request. Some centres, however, do not publish information brochures for visitors. It is understood that DCS is currently developing a general information brochure for people who intend to visit any of the correctional centres in NSW, as well as brochures providing specific information about each particular centre. We have been advised that the brochures are likely to contain basic information in a number of languages.<sup>15</sup>

<sup>12</sup> *Crimes (Administration of Sentences) Regulation 2001*, clause 96.

<sup>13</sup> *The Crimes (Administration of Sentences) Regulation 2001*, clause 113A provides that it is a correctional centre offence for an inmate to have a camera, or video or audio recording equipment, or a charger for any such equipment, in his or her possession.

<sup>14</sup> Assistant Commissioner's Order 2003/029, *Prohibited possession of Casio wristwatch and camera, and similar digital devices in correctional centres*, 12 June 2003.

<sup>15</sup> Senior staff from Office of the Commissioner, DCS, Interview record 40, 17 June 2004.

Standard signs located at or near the entry of correctional centres also provide information about what items should not be brought onto centre property. However,

- the signs only contain information about laws, and not departmental policies
- the signs at some correctional centres are not located at the entry to the correctional centre
- at some centres, the location of the signs, and the size of the print makes it virtually impossible to read the sign, unless you are entering the facility on foot.

Despite efforts by DCS to inform visitors of the rules concerning entry to a place of detention, it is not uncommon for people who visit correctional centres to seem surprised when correctional officers point out that they are carrying items which are not permitted on the property of correctional centres. This is illustrated by the following comments noted by observers from our office:

*[After a dog made a positive indication to a woman, she admitted to carrying her day's prescription of methadone.]*

*Officer to woman: "Next time, if possible, pick up your methadone on the way back from the centre."*

*Woman: "OK. I didn't know. Next time I will, I understand that now."*

*Officer: "OK" Then I think he explained that under the Act it is still illegal to bring prescription drugs into the centre.*

*Woman: "Next time I'll know. Thanks for telling me and being nice."<sup>16</sup>*

*A woman aged approx in her 40s or early 50s was subjected to a PAD [passive alert dog] search. A dog was then used to search her vehicle. Officers then searched her car.*

*During the vehicle search a small pocket knife was found in the glove box.*

*Officer: "You know you can't bring a knife into a correctional centre."*

*Female POI [person of interest]: "Not in a car I didn't. ..."<sup>17</sup>*

### Questions for consideration

3. Are you aware of any cases where a person has had difficulty obtaining information about what they can or cannot bring into a correctional centre, or where a person has received incorrect information about this issue? If so, please provide details.
4. Could the provision of information for people entering places of detention be improved? If so, how?

## 1.3. Powers of correctional officers to stop, search and detain people and vehicles

Correctional officers routinely search visitors to correctional centres and their vehicles, and have done so for a number of years. The *Crimes (Administration of Sentences) Regulation 2001* was the first piece of legislation that explicitly granted them the power to do so. Clause 93(1) of the Regulation states:

*An authorised officer or the principal security officer may require a visitor:*

- (a) to submit to an inspection and search of personal possessions, to scanning by means of an electronic scanning device and to being sniffed by a dog, and*
- (b) to empty the pockets of the visitor's clothing, and*
- (c) to make available for inspection and search any vehicle under the visitor's control that is on the premises of a correctional centre.*

The Regulation also provides that correctional officers and departmental officers who are on the premises of a correctional facility, may also be subject to such searches.<sup>18</sup>

In 2002 the NSW Parliament agreed to provide correctional officers with greater powers to detect and prevent contraband being introduced into correctional centres by people other than inmates. In his Second Reading speech the then Minister for Corrective Services, outlined the limitations of the existing legislation that the new laws were expected to overcome:

<sup>16</sup> Observation record 9, April 2003.

<sup>17</sup> Observation record 2, September 2003.

<sup>18</sup> Clause 240.

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*The Summary Offences Act does not give a correctional officer the power to stop, detain and search a person who may be attempting to smuggle contraband into a correctional centre. Only police officers currently have that power. Authorised correctional officers can scan visitors with a scanning device, such as a walk-through metal detector. They can require visitors to empty the contents of their pockets and personal possessions, such as bags, and they can require a visitor to submit to screening by a drug detector dog. If a person refuses to comply, or if the drug detector dog gives a positive reaction, the officer may refuse to allow the person to enter the correctional centre. However, the officer cannot force the visitor to remain until a police officer is called to conduct a search. Yet sometimes grounds for arrest may only arise after a search.<sup>19</sup>*

On 21 February 2003 the following provisions in the *Summary Offences Act* commenced:

*Section 27F Powers of correctional officers*

(1) *Power to stop, detain and search persons*

*A correctional officer may stop, detain and search a person, and anything in the possession of or under the control of a person, if:*

- (a) *the person is in or in the immediate vicinity of a place of detention, and*
- (b) *the correctional officer suspects on reasonable grounds that the person has in his or her possession or under his or her control anything that has been used, is being used or is intended to be used in or in connection with the commission of an offence under this Part.*

(2) *Power to stop, detain and search vehicles*

*A correctional officer may stop, detain and search a vehicle that is in or in the immediate vicinity of a place of detention if the correctional officer suspects on reasonable grounds that:*

- (a) *the vehicle contains anything that has been used, is being used or is intended to be used in or in connection with the commission of an offence under this Part, or*
- (b) *the vehicle has been used, is being used or is intended to be used in or in connection with the commission of an offence under this Part.*

The new powers conferred on correctional officers were intended to supplement the powers outlined in the Regulation.<sup>20</sup> However, there are a number of differences between the provisions of the *Crimes (Administration of Sentences) Regulation* and the *Summary Offences Act* which might lead to confusion for correctional officers or visitors about their rights and responsibilities in relation to searches. For example, there are differences in the two pieces of legislation about:

- where searches can lawfully be conducted
- how searches are to be conducted
- the safeguards that must be adopted during searches.

In some respects, section 27F of the *Summary Offences Act* grants correctional officers broader powers than those outlined in clause 93 of the *Crimes (Administration of Sentences) Regulation*. For example people can be asked to remove any hat, gloves, coat, jacket or shoes; and reasonable force can be used to stop, search and detain them. However, in other respects, the powers conferred under section 27 are more limited than those under clause 93. For example, where practicable searches should be conducted by officers of the same sex as the person being searched; searches must be conducted with due regard to dignity and self-respect; and there are special provisions to be followed when children and mentally incapacitated persons<sup>21</sup> are searched.

In addition, unlike searches conducted under clause 93, searches performed under section 27F can only be conducted when a correctional officer "suspects on reasonable grounds" that the person has an item that has been or may be used in connection with certain offences.

It appears that under the current legislative framework random searches of visitors entering correctional facilities are to be conducted in accordance with the provisions of the *Crimes (Administration of Sentences) Regulation*, and targeted searches (those conducted because of suspicion that an offence has occurred or may occur) are to comply with the provisions of the *Summary Offences Act*. However, our observations indicate that in practice, there are no practical differences between random and targeted searches.

In addition, some correctional officers we have spoken to appear to be of the view that following the commencement of section 27 of the *Summary Offences Act*, all searches of people (other than inmates) and vehicles fall under these new provisions.

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<sup>19</sup> The Hon Richard Amery MP, Legislative Assembly, 8 May 2002.

<sup>20</sup> *Summary Offences Act 1988*, section 27L.

<sup>21</sup> The term 'mentally incapacitated person' is defined in the *Summary Offences Act 1988*, section 27A as "a person who is incapable of managing his or her affairs."



### Questions for consideration

5. What are the benefits and/or disadvantages of having two separate pieces of legislation governing how searches of people (other than inmates) and vehicles are to be conducted by correctional officers?

#### 1.3.1 Definition of 'in or in the immediate vicinity of a place of detention'

In order for a correctional officer to lawfully stop, search and detain a person or vehicle under the *Summary Offences Act* two requirements must be present. First, the person must be 'in a place of detention' or 'in the immediate vicinity of a place of detention.' These are not simple concepts. For example, it should be a straightforward matter for a person to know whether or not they are in a place of detention, but this is not always the case. While the boundaries of each correctional centre and correctional complex are clearly defined in the Government Gazette, it is not always apparent to people at or near the site. This is because fences, walls, signage and other markers that appear to indicate the perimeter of a centre or complex are sometimes located well within the legal perimeter.

At Goulburn Correctional Centre, for example, there is a sign attached to the perimeter fence explaining offences related to bringing unauthorised items into a correctional centre. As the visitors' car park is located outside the perimeter fence, on correctional centre property it is possible that people could leave items in their car, but not know firstly, that their car is parked on correctional centre property, and secondly, that by having certain items (such as alcohol or syringes) in their parked car they are committing a criminal offence. This situation is not unique to Goulburn. For example, there are no signs located at the entry points of Long Bay Correctional Complex, Parramatta Correctional Centre or the Metropolitan Remand and Reception Centre, Silverwater.

The term 'in the immediate vicinity' of a place of detention is an even more difficult concept. People have very different views about how this term should be defined, and therefore, how far the powers of correctional officers extend outside places of detention. One correctional officer suggested to us the term "needs to be clearly defined so you don't get a gung-ho officer running through Woolworths down the street."<sup>22</sup> Others feel the term should be defined as:

- "the distance where people might park their cars and then walk to the centre."<sup>23</sup>
- "where a tennis ball could be thrown by a person into the centre"<sup>24</sup>
- "[the entire] ... precinct, for example the city limits"<sup>25</sup>
- "within communicating distance to inmates."<sup>26</sup>

If the term 'in the immediate vicinity' is interpreted broadly, and correctional officers believe they can use their powers, for example, throughout a whole town in which a correctional centre is located, there may be a greater chance that people not intending to visit the correctional centre will be subject to the powers of correctional officers. This concern was raised in Parliament when the legislation was being debated, with one member commenting:

*The Opposition is concerned about the words "in the immediate vicinity of", which are not defined in the legislation. This might lead to a prison officer stopping a vehicle some kilometres from a country gaol, for example, and searching the vehicle even though the vehicle might not be going to attend the gaol.*<sup>27</sup>

In August 2004, the DCS Operations Procedures Manual was amended to acknowledge the new stop, search and detention powers of correctional officers. These guidelines state:

*"in the immediate vicinity of" a place of detention means in close proximity to a place of detention, e.g. on a road or street immediately adjacent to a place of detention.*<sup>28</sup>

<sup>22</sup> Observation record 7, February 2004.

<sup>23</sup> Correctional officer, observation record 17, June 2004.

<sup>24</sup> Senior correctional officer, DCS Security and Investigations Branch, Interview record 16, October 2003.

<sup>25</sup> Governor, regional correctional centre, Interview record 17, November 2003.

<sup>26</sup> Correctional officer, DCS Specialised Training Unit, Interview record 31, July 2004.

<sup>27</sup> Mr Michael Richardson MP, Legislative Assembly, 9 May 2002 .

<sup>28</sup> DCS Operations Procedure Manual, section 12.10.

### Questions for consideration

6. Is there enough guidance provided to correctional officers about how the term 'in the immediate vicinity of a place of detention' should be interpreted?
7. Are you aware of any occasions where a person who has been stopped, searched or detained by a correctional officer even though the person had no intention of visiting the correctional centre? If so, please provide details.
8. Are you aware of any occasions where a person who has been stopped, searched and detained by a correctional officer was in an area you think might not be within the immediate vicinity of a place of detention? If so, please provide details.

## 1.3.2 Reasonable suspicion

The second factor that must be present for a correctional officer to lawfully stop, search and detain a person in or in the immediate vicinity of a place of detention in accordance with section 27F of the *Summary Offences Act*, is that the officer "suspects on reasonable grounds" that the person has in his or her possession or control items associated with certain offences (offences predominantly relating to the introduction of prohibited items into a place of detention). Similarly, a vehicle can only be stopped, searched and detained if it is reasonably suspected that the vehicle contains items used, or intended to be used in connection with the commission of such an offence.

As discussed above, correctional officers have the power under the *Crimes (Administration of Sentences) Regulation* to conduct searches of peoples' personal possessions and vehicles, to ask people to empty their pockets, and to scan visitors with an electronic device, or a dog. Reasonable suspicion is not required for such searches to be conducted.

This means that reasonable suspicion only needs to be present in order for correctional officers to conduct certain types of searches:

- searches of people or vehicles outside the boundaries of a correctional facility
- searches where correctional officers direct people to remove outer garments of clothing.

The NSW Court of Criminal Appeal has explained the meaning of 'reasonable suspicion' in the following terms:

*A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs covered by [the legislation]. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.*

*Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown . . .*

*What is important is the information in the mind of the . . . officer stopping the person . . . at the time he did so. Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the . . . officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole surrounding circumstances.<sup>29</sup>*

DCS guidelines give the following guidance to correctional officers:

*"[suspects on] reasonable grounds means that on the basis of known facts, evidence, observations and circumstances there is sufficient reason to suspect that an offence has been, is being, or will be committed, and that a reasonable person in possession of the same information would reach the same conclusion."<sup>30</sup>*

### Questions for consideration

9. Reasonable suspicion is required before some types of searches can lawfully be conducted, but is not required in order for other types of searches to be lawfully conducted. What are the advantages and/or disadvantages of this approach?
10. What types of factors could lead a correctional officer to reasonably suspect that offences under section 27 of the *Summary Offences Act* have been, or may be, committed?

<sup>29</sup> *R v Rondo* [2001] NSWCCA 540.

<sup>30</sup> Section 12.10 of DCS Operations Procedures Manual.

### 1.3.3. Conduct of searches

Section 27G of the *Summary Offences Act* specifies how searches performed under section 27F are to be conducted:

- (1) *A correctional officer, in conducting a search under section 27F, may direct a person to do any or all of the following:*
  - (a) *to submit to scanning by means of an electronic scanning device,*
  - (b) *to empty the pockets of the person's clothing,*
  - (c) *to remove any hat, gloves, coat, jacket or shoes worn by the person,*
  - (d) *to empty the contents of any bag or other thing, or to open any thing, that the person has with him or her, or has left in a vehicle,*
  - (e) *in the case of a visitor to the place of detention—to make available for inspection and search any item stored in a storage facility allocated to the visitor,*
  - (f) *in the case of a correctional officer or a non-correctional member of staff—to make available for inspection and search any room or locker that is under the officer's or member of staff's control at the place of detention,*
  - (g) *in the case of an adult accompanying a child or a mentally incapacitated person—to assist the child or mentally incapacitated person to co-operate with a search.*

...
- (3) *In conducting a search of a person under section 27F, a correctional officer:*
  - (b) *must conduct the search with due regard to dignity and self-respect and in as seemly a manner as is consistent with the conduct of an effective search, and*
  - (c) *must not direct a person to remove any item of clothing being worn by the person, other than a hat, gloves, coat, jacket or shoes, and*
  - (d) *must not search a person by running the officer's hands over the person's clothing.*
- (4) *A search of a person conducted by a correctional officer under section 27F must, if practicable, be conducted by a correctional officer of the same sex as the person being searched or by a person of the same sex (being a non-correctional member of staff) under the direction of the correctional officer concerned.*
- (5) *A search of a child or of a mentally incapacitated person must be conducted in the presence of:*
  - (a) *an adult who accompanied the child or the mentally incapacitated person to the place of detention (or its immediate vicinity), or*
  - (b) *if there is no such adult—a search observation member of staff.*
- (6) *Regulations may be made for or with respect to the manner in which correctional officers are to conduct searches under section 27F.*

Most personal and property searches conducted by correctional officers, that we have witnessed, have largely complied with the requirements set out in section 27G of the *Summary Offences Act*. We have, however, seen, or been told about, certain searches that do not appear to strictly comply with the legislative provisions. The following are issues that we have been made aware of to date.

#### 1.3.3.1. Sex of searching officers

Section 27G(4) of the *Summary Offences Act* stipulates that where practicable, a search is to be conducted by a correctional officer of the same sex as the person being searched, or by a non-correctional member of staff who is of the same sex as the person being searched. Searches by non-correctional members of staff are to be conducted under the direction of a correctional officer.

In practice, female visitors are regularly searched by male correctional officers, and male visitors are sometimes searched by female correctional officers. There are significantly more male correctional officers than female officers which may in part explain this.<sup>31</sup> However, even when both male and female officers are on duty when visitor searches are being conducted, from our observations it is not usual practice for female officers to concentrate on searching females and male officers to concentrate on searching males. Gender issues generally do not appear to be considered at all, with searches usually conducted by the nearest available officer, or an officer specifically assigned to conducting searches.

<sup>31</sup> Females accounted for 35% of staff at DCS at 30 June 2004 (excluding casual staff). Note, this statistic refers to all departmental staff, not just correctional officers and the ratio of male to female correctional officers is probably higher. DCS *Annual Report 2003-04*, p.119

Despite the fact that correctional officers are not complying with the legislative requirements in regard to same-sex searching we have not witnessed anyone complaining about being searched by an officer of the opposite sex. This could be for a number of reasons, including that people visiting correctional centres:

- have no objection to being searched by an officer of the opposite sex given that the searches do not involve the officer touching the person, or the person being required to remove clothing other than outer garments
- may not be aware of the provisions
- are not willing to challenge correctional officers when searches are conducted in a way that do not comply with legislative requirements.

It is possible that people's views on this issue may differ according to variables such as age, ethnicity, or background.

We have not yet observed any occasions where a non-correctional staff member (for example, a teacher, welfare officer or administration officer) has conducted a search of a visitor to a correctional centre, under the supervision of a correctional officer (or been requested to conduct such a search) in accordance with section 27G(4) of the *Summary Offences Act*. As outlined above, correctional officers usually conduct searches of visitors themselves, regardless of whether the searching officer and the person being searched are the same sex.

One possible reason why non-correctional members of staff are not being used to search visitors is that these members of staff are often not on duty when visits to inmates are most likely to occur, that is, on weekends and public holidays. Another possible reason is the fact that it appears there has been no training by DCS of non-correctional members of staff about how to conduct searches. When we contacted the Offender Services and Programs Manager at six correctional centres, four had never heard of the provisions about non-correctional members of staff searching people, and two had only vague recollections about the provisions. None of the six managers had received, or was aware of, any training for non-correctional members of staff about searching people or supervising searches.<sup>32</sup>

In our experience, however, correctional officers simply do not seek the assistance of non-correctional members of staff when searches are being conducted, and it is likely that this is the primary reason they are not being utilised.

### Questions for consideration

11. Apart from compliance with legislative provisions, is it reasonable for correctional officers to search people of the opposite sex?
12. What issues arise from the possibility of having non-correctional members of staff conducting searches of people visiting correctional centres?

#### 1.3.3.2 Strip searching

Section 27G(3)(b) of the *Summary Offences Act* says that when searching a person under section 27F of the Act, a correctional officer must not direct a person to remove any item of clothing being worn by the person, other than a hat, gloves, coat, jacket or shoes.

If a correctional officer suspects that a person may be concealing a contraband item, and the contraband item will only be revealed by the removal of clothing other than outer garments, our observations indicate that on most occasions the police will be called and requested to conduct a strip search of the person.<sup>33</sup> If the police are unable to attend the centre the person will usually be denied entry to the centre, and asked to leave the premises.

In 2001, the Commissioner of Corrective Services issued an order that states:

*Correctional officers are reminded that they have no lawful authority to strip-search visitors to a correctional centre. Correctional officers may act as observers if requested by police, but under no circumstances are they to participate regardless of whether or not the visitor consents to the strip-search.*<sup>34</sup>

<sup>32</sup> A telephone survey of six Offender Services and Programs Managers was conducted during August 2004.

<sup>33</sup> Under section 357E(a) of the *Crimes Act 1900* a member of the police service may stop, search and detain any person whom he or she reasonably suspects of having or conveying any thing stolen or otherwise unlawfully obtained or any thing used or intended to be used in the commission of an indictable offence. Section 37(4)(a) of the *Drug Misuse and Trafficking Act 1985* also allows a member of the police service to stop, search and detain any person in whose possession or under whose control the member reasonably suspects there is, in contravention of the Act, any prohibited plant or prohibited drug.

<sup>34</sup> DCS Assistant Commissioner's Order 2001/011, 27 February 2001.

Despite this, we were present at one search operation being conducted by correctional staff and NSW Police where a drug detection dog indicated the scent of a narcotic drug on two females intending to visit an inmate. As there were no female correctional or police officers involved in the operation, two female correctional officers working in the correctional centre, were asked to conduct a strip search of the two visitors. A strip search was conducted, with no contraband items found. The females were permitted to proceed with their visit.<sup>35</sup>

We have also been told that officers who suspect contraband is being trafficked into a centre in a baby's nappy sometimes ask the adult accompanying the baby to remove the baby's nappy in view of correctional officers.<sup>36</sup>

Most correctional officers we have spoken to appear to be aware that they cannot lawfully strip search visitors to correctional facilities. However, some correctional officers have told us that they would like to have this power. This is because:

- police are sometimes not available to attend a correctional facility to conduct the strip search, or take several hours to arrive
- correctional officers are required to supervise the person being detained until the police arrive, which ties up resources
- if correctional officers could conduct a strip search immediately there would be less opportunity for the person to consume, move or discard any contraband that is on their person or property.

### Questions for consideration

13. Are you aware of any occasions where correctional officers have conducted a strip search of a person other than an inmate? If yes, please provide details.

14. Are there circumstances under which correctional officers should be permitted to strip search people other than inmates? If yes, what procedures and/or safeguards should govern such searches?

#### 1.3.3.3 Searching of head dresses

A number of correctional officers have told us that when searching visitors they sometimes direct people wearing head dresses (for example, Muslim women) to remove the item of clothing to ensure it is not being used to conceal contraband items.<sup>37</sup> A female officer advised us that, while there is no 'hard and fast rule' on this issue, if officers want a Muslim woman, for example, to remove her head scarf for the purpose of being searched, the woman would usually be taken, by a female correctional officer, into a private location, such as a bathroom, while the search is conducted.<sup>38</sup> Despite this, some male officers have told us that they too conduct searches of head scarves worn by Muslim women<sup>39</sup> and we have been told that sometimes such searches are conducted in view of other staff and visitors.<sup>40</sup>

DCS currently has no state-wide policy on the issue of searching head dresses worn for cultural or religious purposes by people other than inmates. Decisions about when searches will be conducted, who will conduct the searches, and the location of searches are made on a case-by-case basis.<sup>41</sup>

Unless a head scarf falls within the definition of a hat it is unlikely that correctional officers have the power to direct people to remove these items of clothing. This is because section 27G(3)(b) of the *Summary Offences Act* says that when conducting a search of a person under section 27F, a correctional officer "must not direct a person to remove any item of clothing being worn by the person, other than a hat, gloves, coat, jacket or shoes."

It is also possible that directing people to remove a head dress worn for religious or cultural purposes may not comply with the requirement that searches must be conducted "with due regard to dignity and self-respect",<sup>42</sup> particularly if the person is directed to remove the item in public.

<sup>35</sup> Observation record 24, September 2004.

<sup>36</sup> Telephone conversation with DCS officer, Interview record 41, July 2004.

<sup>37</sup> Observation record 13, May 2004.

<sup>38</sup> Observation record 20, July 2004.

<sup>39</sup> Observation record 13, May 2004 and Observation record 20, July 2004.

<sup>40</sup> Observation record 25, September 2004.

<sup>41</sup> Telephone conversation with DCS officer, Interview record 42, August 2004.

<sup>42</sup> *Summary Offences Act 1988*, section 27G(3)(a).

### Questions for consideration

15. Is it appropriate for correctional officers to direct a person wearing a head dress for cultural or religious purposes to remove it during a personal search? If yes, under what circumstances?
16. Would it be beneficial for guidelines or policies to be developed concerning searches of people's head dresses or other cultural or religious items? If yes, what issues should be considered when developing such guidelines?

#### 1.3.3.4 Searching of children and mentally incapacitated persons

The *Summary Offences Act* specifies that searches of children (people under 18 years) and people who are mentally incapacitated must be conducted in the presence of an adult who accompanied the child or mentally incapacitated person, or a search observation member of staff.<sup>43</sup>

The *Summary Offences Regulation 2000* was amended in February 2003 to include the following definition of search observation staff members:

*The following persons are prescribed for the purposes of the definition of **search observation staff member** in section 27A of the Act:*

- (a) *if available at the place of detention or its immediate vicinity where the relevant search is to be conducted – a welfare officer, psychologist, clerk or alcohol and other drug worker (being a person who is a non-correctional member of staff),*
- (b) *if a person referred to in paragraph (a) is not so available—any other non-correctional member of staff.*<sup>44</sup>

The vast majority of children who enter correctional centres, do so in the company of an adult. The major exceptions to this are:

- children under the age of 16 who are permitted to visit their inmate mothers at Mulawa Correctional Centre, between 10 am and 2 pm on Tuesdays,<sup>45</sup> and
- children who provide written evidence to DCS, of a direct relationship with an inmate, and who receive approval to visit the inmate without an accompanying adult.<sup>46</sup>

We have not yet observed an occasion where a correctional officer has requested that a non-correctional member of staff observe the search of a minor. When we visited Mulawa Correctional Centre to observe searches of children entering the centre to visit their mother during a child/parent visits day, no searches of children were conducted. We were told that this was because of staff shortages.<sup>47</sup>

During regular visits days at correctional facilities, it is often difficult for us to determine the age of young people being searched. However, in all instances where we have observed a person who was clearly under eighteen years old being asked by correctional officers to remove outer garments, such as jackets and hats, or to empty their pockets or bags, an adult accompanying the child has been present. Occasionally the child's possessions are searched at the same time as the adult's possessions, which makes it difficult for the adult to watch both searches. However, in such cases, the adult is usually standing within a metre or two of the child and would be readily available if the child became distressed, or an item of contraband was detected by searching officers.

It is also a legislative requirement that mentally incapacitated persons who visit a correctional centre are to be searched in the presence of an adult who is accompanying them or a search observation member of staff. In the legislation a mentally incapacitated person is defined as "a person who is incapable of managing his or her affairs."<sup>48</sup> This definition is potentially problematic as it may be very difficult for a correctional officer to determine whether a person is mentally incapacitated or not. A person is not necessarily 'incapable' simply because he or she has, for example, an intellectual disability, a brain injury or a mental illness.

In addition, it is possible that there are other vulnerable people who would benefit from always having an adult, or search observation member of staff present while being searched by correctional officers. For example, it may be appropriate to extend this safeguard to people with other forms of mental, intellectual or physical disabilities. If this were the case, however, it may be difficult for correctional officers to determine in a sensitive manner whether or not searches of certain people should be subject to this requirement.

<sup>43</sup> *Summary Offences Act 1988*, section 27G(5).

<sup>44</sup> Clause 14B.

<sup>45</sup> DCS intranet site.

<sup>46</sup> DCS Operations Procedure Manual, section 15.5(10).

<sup>47</sup> Observation record 25, September 2004.

<sup>48</sup> *Summary Offences Act 1988*, section 27A.

Records are not kept about how many people with a disability visit correctional centres, or whether these people are usually accompanied by an adult when they visit. It is therefore unclear how many people this legislative requirement is likely to affect. In none of the observations we have conducted has there arisen an occasion when a person suspected of being mentally incapacitated has been searched by correctional officers, so we are unable to comment at this stage about how such searches are conducted.

During August 2004 we contacted the Offender Services and Programs Manager at six correctional centres to determine whether they were aware that they could be called upon to observe searches of people entering correctional centres. Five of the six were unaware of these provisions, and none had received any training or information in relation to observing searches. The Offender Services and Programs Manager at one regional correctional centre noted that while he is not, in principle, concerned with non-correctional members of staff observing searches, in order for this to be effective staff would need to know why they were observing the search, and what the correct searching procedures are.<sup>49</sup>

### Questions for consideration

17. Are you aware of any occasions where a child or mentally incapacitated person has been searched without an adult or a search observation member of staff being present? If yes, please provide details.
18. Are the provisions concerning searches of children and mentally incapacitated persons appropriate? Why or why not?
19. Are there alternative or additional procedures that should be followed when children, mentally incapacitated persons, or other vulnerable people, visiting a correctional centre are searched? If yes, please provide details.

#### 1.3.3.5 Consent

Occasionally we observe, or are told about, searches of people that involve the person being asked or directed to do something which is not specifically provided for in the legislation. By complying with the request or direction the person is considered to be consenting to the search. For example:

- On one occasion we observed a correctional officer ask a young woman to open her mouth for inspection.<sup>50</sup> The woman complied, and nothing was detected.
- We have observed males being asked to lift up their shirts, and expose the waist- band of their trousers. These requests are generally made, and complied with, in clear view of other visitors to the correctional centre.<sup>51</sup>

### Questions for consideration

20. Is it appropriate for correctional officers to conduct searches of people and/or vehicles outside the terms of section 27G of the *Summary Offences Act* if they do so by consent? What are the advantages and/or disadvantages of this type of searching?

#### 1.3.4 Use of dogs

DCS uses drug detection dogs as a tool to reduce the amount of drugs illegally entering correctional facilities. Dogs are used to detect drugs being carried by people entering centres, drugs that have been left on departmental property, and drugs in the possession of inmates at or returning to a place of detention. The department uses dogs of various breeds, including German Shepherds, Labrador Retrievers, Border Collies and Springer Spaniels.

The German Shepherds are primarily used within the correctional centres to assist officers search cells and perimeters for drugs. They are also used for security purposes, such as in riots, to escort inmates, and to assist in recapturing escaped inmates. The German Shepherds are trained to bite and attack people in certain circumstances and are not used to search visitors to correctional centres. They are sometimes used to search vehicles.

<sup>49</sup> Interview record 33, August 2004.

<sup>50</sup> Observation record 8, March 2004.

<sup>51</sup> Observation record 8, March 2004.

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The other dogs are used exclusively as drug detection dogs. They are sometimes called 'passive alert dogs' because they are trained to remain passive, and to indicate the presence of drugs in a non-aggressive way. These dogs are routinely used to search visitors to correctional centres and their vehicles.

The DCS Drug Detector Dog Unit (DDDU) commonly conducts operations to detect visitors introducing drugs into correctional centres. Often these operations involve only one or two dog and handler teams. However, sometimes the DDDU conducts joint operations with NSW Police and the DCS regional security units and specialist units.

During an operation where drug detection dogs are being used a number of fairly standard procedures are followed. Usually the search operation is set up at a designated location on correctional centre property, for example, in a car park. When visitors arrive at the designated location they are asked to line-up and stand still while a drug detection dog screens them. People are usually asked to place their bags by their side, stand with their hands in front of them, and refrain from talking to or touching the dog. If there are young children in the group, adults are usually told they may pick up the children while the dog is working.

After cautioning people that it is an offence to introduce certain items into a place of detention, and asking whether anyone has any prohibited items that they wish to declare, a dog handler will usually lead his or her dog around the line-up of people twice. If the dog handler advises other correctional officers that the dog has indicated the scent of a narcotic odour on a person in the line, the person will usually be asked to step aside for an informal interview with correctional officers. Correctional officers may also decide to conduct a search of the person's locker or vehicle, and may contact NSW Police to request a further search of the person, (police may decide to conduct a strip search of the person).

#### 1.3.4.1 Legislation relating to use of dogs

There are a number of different legislative provisions that enable correctional officers to use dogs to assist them with their duties. Section 78 of the *Crimes (Administration of Sentences) Act* states:

- (1) *With the approval of the governor of a correctional centre, a correctional officer may use a dog to assist in maintaining the good order and security of the correctional centre and any correctional complex of which the correctional centre forms part.*

The *Crimes (Administration of Sentences) Regulation* provides that authorised officers or a principal security officer may require visitors to places of detention to be sniffed by a dog.<sup>52</sup> In addition, section 27H of the *Summary Offences Act* says:

- (1) *A correctional officer is authorised to use a dog to conduct any search under section 27F [of the Summary Offences Act].*
- (2) *A correctional officer using a dog to conduct such a search is to take all reasonable precautions to prevent the dog touching a person.*
- (3) *A correctional officer is required to keep a dog under control when the officer is using the dog to conduct such a search.*

The *Summary Offences Act* is the only legislation that requires dogs to be kept under control, and precautions to be taken by correctional officers to prevent a dog from touching a person.

#### 1.3.4.2 Reactions to the dogs

Many people who see the dogs being used by correctional officers comment on them. We frequently hear people making positive comments to officers, or their companions, about one or more of the dogs. For example, "Oh they're beautiful. I love these dogs" and "Isn't he cute, he's gorgeous."<sup>53</sup> Some people, however, are clearly scared by the dogs. In our experience, the DCS dog handlers try to make people feel as comfortable as possible with the dogs, and in particular, encourage people to carry and reassure small children. For example, we have observed the following exchanges between officers and visitors when dogs are being used to screen visitors:

*C/O [correctional officer]: "Are the kids OK with dogs?"*  
*Young woman: "This one's a bit scared."*  
*C/O: "You can pick her up."<sup>54</sup>*

*Woman: "He won't bite me will he?"*  
*[Name of officer]: "No, no – he'll just sniff."*  
*Woman: "Good, I'm terrified of dogs."<sup>55</sup>*

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<sup>52</sup> Clause 93(1)(a).

<sup>53</sup> Observation record 8, March 2004.

<sup>54</sup> Observation record 13, May 2004.

<sup>55</sup> Observation record 8, March 2004.



It is not uncommon for people who walk or drive onto a correctional centre to turn and leave when they see that visitor searches are being conducted with the assistance of drug detection dogs. Correctional officers commonly pursue such people, on the assumption that they are leaving the complex to avoid being detected with drugs or other contraband. It is likely that some people do turn around and leave the centre for this reason. It is also possible, however, that people do so because they are genuinely fearful of coming into close contact with a dog. It is also possible that some people may decide not to visit a correctional centre at all because of their fear of dogs.

### Questions for consideration

21. Are you aware of anyone who chooses not to visit correctional centres, or visits correctional centres less often than they otherwise would, because of fear of the drug detection dogs?

#### 1.3.4.3 Keeping dogs under control

Correctional officers using dogs to search under the *Summary Offences Act* are required to keep the dogs under control, and to take reasonable precautions to prevent the dogs from touching people. We have never observed any of the DCS passive alert dogs acting in an aggressive manner. However, some of the dogs appear very boisterous before or during the screening process, and it is not uncommon for dogs to bark loudly prior to, or during visitor searches.

This may be because when the dogs are working they are rewarded with play, and to keep their dogs motivated, handlers aim to make the work fun for the dogs. Sometimes when the dogs are barking during the screening process the handler will tell people that the dog is simply excited, and will not hurt anyone. It is, however, possible that people who are not familiar with dogs, or who are fearful of them, would find the dog's barking disconcerting, or misinterpret it as a sign of aggression.

When the dogs are screening people entering correctional centres they generally walk very close to the line-up of people. This is necessary so the dog can distinguish where a scent originates, as people usually stand very close together while being screened. Sometimes during the screening process dogs will nudge or bump people with their nose. If the dog sniffs too closely, or spends more than a few seconds sniffing a particular person, the handler will usually pull it away. We have occasionally overheard people comment about being touched by the dogs, but this usually appears to be in an amused rather than distressed manner. For example, one observer from our office noted:

*I think the dog nudged the back of the girl's neck [girl aged approx 3 years].*

*Girl: "Doggy got me, doggy got me." She was chatty and playful rather than upset or distressed.<sup>56</sup>*

### Questions for consideration

22. Is it reasonable that dogs sometimes bark and act boisterously prior to, or during, visitor screenings? Why or why not?
23. Is it reasonable that dogs sometimes nose or nudge people when screening visitors to a correctional centre? Why or why not?

#### 1.3.4.4 Clarity of indications

During training the DCS dogs are taught to sit when they detect the scent of a drug. However, handlers have advised us that over time dogs will sometimes indicate the scent of a drug by engaging in some other form of behaviour. For example, members of the DDDU have advised us that a handler may become aware that a dog has detected the scent of a drug because it is "wagging its tail" in a particular way, or "doing a dance" or "looking for its toy".<sup>57</sup> DDDU officers have told us that each handler learns over time and through experience when and how their dog will make an indication to the scent of a drug.<sup>58</sup>

Often while observing the dogs working, it has been very difficult for us to tell whether a dog has indicated to its handler that it can detect the scent of a drug on a person or not. Sometimes it appears that the dog is making a positive indication, by sitting next to a person, or spending a lot of time sniffing them, and the handler advises that the dog has not detected the scent of a drug. Other times it seems that the dog has shown little interest in a person, and we presume the dog has not detected the scent of drugs, when the handler advises that the dog has detected the scent of a drug on the person, and that the person should be taken for a further search.

<sup>56</sup> Observation record 11, April 2004.

<sup>57</sup> Interview record 12, August 2003, Observation record 21, July 2004.

<sup>58</sup> Interview record 12, August 2003.

This lack of clarity for bystanders about whether a dog has made an indication or not, may not be important given that a drug detection dog is a tool used by a trained officer to assist with the officer's duties. Given that dogs are often used to determine whether there is reasonable suspicion to conduct a further search of a person, possibly a strip search by police, or to deny the person entry to the centre, it may be beneficial for the dogs to be trained so that their indications are clearer and less ambiguous. This is particularly the case as staff from our office have overheard dog handlers telling members of the public that when the dogs make an indication they do so by sitting. Following a day observing visitor searches at a metropolitan correctional centre a staff member from our office noted:

*During the day I heard two visitors ask correctional offices what the dog would do if it detected drugs. Both times the correctional officers said that the dog would sit. However, during the day, despite numerous claims that the dog was making an indication, I never once saw a dog sit.<sup>59</sup>*

### Questions for consideration

24. What difficulties and/or advantages arise when only a dog's handler can determine whether a dog is making a positive indication to the scent of a drug?

#### 1.3.4.5 Accuracy of dogs

Our observations indicate that the vast majority of people entering correctional facilities who are screened by a drug detection dog are permitted to proceed on the basis that the dog has not indicated the scent of a prohibited drug (unless contraband is detected during a subsequent random personal, property or vehicle search).

On occasions when a dog indicates to its handler that the scent of a narcotic odour originates from a particular person, a search of the person and his or her property is usually conducted, sometimes involving a strip search by police officers. During such searches non-drug related contraband items are sometimes detected by officers. In addition searches can result in:

- prohibited drugs (or drug paraphernalia)<sup>60</sup> being detected on the person or property
- permitted drugs (or drug paraphernalia) being detected on the person or property
- no drugs (or related paraphernalia) being detected and no admission by the person about the possible source of the drug scent
- no drugs (or related paraphernalia) being detected, but an admission by the person about the possible source of the drug scent.

Staff from our office have observed each of the above scenarios. For example, we have been present when searches of people and their possessions conducted following the positive indication of a drug detection dog have resulted in officers finding prohibited drugs located in items such as a tennis ball,<sup>61</sup> a packet of baby wipes,<sup>62</sup> and a visitor's shoe.<sup>63</sup> We have also been present when a dog has indicated the scent of a narcotic substance on a person, which officers subsequently determined emanated from medication the person was permitted to consume or carry.<sup>64</sup> According to one dog handler the dogs do sometimes make false positive indications.<sup>65</sup>

Our observations indicate, however, that most personal and property searches conducted following a positive indication by a dog do not result in drugs, or drug paraphernalia, being found. A senior officer in the DCS Security and Investigations Branch also advised us "most indications turn out to be just that – indications".<sup>66</sup>

<sup>59</sup> Observation record 17, June 2004.

<sup>60</sup> Such as syringes, needles, bongs and balloons.

<sup>61</sup> Observation record 2, September 2003.

<sup>62</sup> Observation record 13, May 2004.

<sup>63</sup> Observation record 11, April 2004.

<sup>64</sup> Observation record 17, June 2004.

<sup>65</sup> Interview record 18, August 2004.

<sup>66</sup> Interview record 11, August 2003.

There are several possible reasons for this. First, the person that the dog indicated may be carrying drugs which the correctional or police officers have failed to detect. Second, the person may have consumed or handled drugs, or (knowingly or unknowingly) been around people consuming or handling drugs. Third, the person may not have been in contact with drugs at all. Unless the person makes an admission, such as "I live with a bloke that smokes pot"<sup>67</sup> or "I had a smoke this morning, before I came"<sup>68</sup> this will generally be impossible to determine. It is also usually not possible for officers to verify whether admissions made by a person are truthful. Given these variables it is extremely difficult to determine the accuracy of the dogs at detecting the scent of prohibited drugs.

The difficulty of measuring the accuracy of the dogs is exacerbated because, unlike NSW Police, DCS does not currently collate information about the performance of the dogs when working in the field. NSW Police records indicate that during the 12 month period commencing 22 February 2002 almost three-quarters of indications by NSW Police dogs did not lead to police locating drugs on a person. However, police records indicate that 61% of all incidents in which no drugs were found, the person searched made some kind of admission that they had used cannabis, or been in the presence of cannabis smokers.<sup>69</sup>

DCS has recently started collecting records about each occasion a particular dog and handler team conduct a search.<sup>70</sup> However, comprehensive records are not collected about:

- whether or not the dog indicates the scent of a drug during each search
- whether drugs or drug related contraband is detected by officers after a dog has made a positive indication during a search
- whether a person indicated by the dog during a search subsequently admits to recently using or being in contact with drugs.

### Questions for consideration

25. What would be the benefits and/or difficulties involved in DCS keeping more detailed records about the performance of its drug detection dogs during search operations?
26. Correctional officers do not seem to locate drugs in the majority of searches conducted as a result of a drug dog indication. On this basis, is it reasonable to suspect that a person is carrying illegal drugs solely on the basis of an indication by a drug detection dog? Why or why not?

## 1.3.5 Safeguards

As well as requiring certain procedures to be followed when children and mentally incapacitated people are stopped, searched and detained under section 27F of the *Summary Offences Act*, the legislation also includes some general provisions aimed at ensuring people stopped, searched and detained are treated fairly and reasonably.

### *27J Safeguards*

...

- (2) A correctional officer must, before exercising a power to detain, search or arrest a person under section 27F, or as soon as is reasonably practicable after exercising the power, provide the person subject to the exercise of the power with the following:
  - (a) evidence that the correctional officer is a correctional officer (unless the correctional officer is in uniform),
  - (b) the name of the correctional officer,
  - (c) the reason for the exercise of the power,
  - (d) a warning that failure or refusal to comply with a request or direction of the correctional officer, in the exercise of the power, is an offence.
- (3) Subsection (2) extends to a direction given by a correctional officer to a person in the exercise of a power to stop, detain and search a vehicle.
- (4) A correctional officer is not required to comply with subsection (2) if the correctional officer believes on reasonable grounds that:
  - (a) the circumstances are of such urgency that complying with subsection (2) would render a search ineffective, or
  - (b) it is not reasonably possible to comply with subsection (2).

<sup>67</sup> Observation record 11, April 2004.

<sup>68</sup> Observation record 2, September 2003.

<sup>69</sup> NSW Ombudsman, Discussion Paper *Review of the Police Powers (Drug Detection Dogs) Act*, June 2004, p. 23.

<sup>70</sup> Telephone conversation with senior officer, DDDU, Interview record 43, July 2004.

When correctional officers conduct routine searches of people other than inmates on correctional centre property (searches under the *Crimes (Administration of Sentences) Regulation*) they are not required to comply with these safeguards.

We have noted that generally correctional officers do not comply with some of the safeguards listed above, regardless of whether they stop, search and detain people during routine security checks, or because an officer suspects that an offence may be committed (or may have been committed). In particular, we have noted that correctional officers often fail to give their name prior to conducting a search of a person entering a correctional centre, or giving a direction to such a person. Sometimes officers introduce themselves in terms such as "I'd like to inform you, we're officers from the security unit",<sup>71</sup> but at other times correctional officers do not introduce themselves at all.

Prior to being searched, people visiting a correctional facility are sometimes told that introducing certain items into a place of detention is an offence, and correctional officers may also inform them "[y]ou're all about to be searched by a drug detector dog"<sup>72</sup> or "[we're] just doing a visitor search operation today."<sup>73</sup> However, there does not appear to be any standard phrase used by correctional officers to explain to people that they are going to have their property, person or vehicle searched, and the reasons for the search. Nor do correctional officers routinely warn people that failure or refusal to comply with a request or direction of the correctional officer, in the exercise of the power, is an offence.

### Questions for consideration

27. Are there any circumstances in which it is appropriate for correctional officers to disregard the safeguards listed in section 27J of the *Summary Offences Act* when stopping, searching and detaining people?
28. Are the safeguards listed in section 27J appropriate? For example, are they sufficient or alternatively too onerous?
29. What would be the benefits and/or disadvantages of requiring correctional officers to comply with safeguards such as those listed in section 27J of the *Summary Offences Act* when conducting routine searches of people entering correctional facilities (that is, those people searched under the *Crimes (Administration of Sentences) Regulation*)?

### 1.3.6 Failure to comply with search, and use of force

Section 27G(2) of the *Summary Offences Act* says:

- (2) A correctional officer, in conducting a search under section 27F, may direct a person to produce:
  - (a) anything that the correctional officer has detected or seen during the search on or with the person, or in a vehicle in which the person is or was present, and has reasonable grounds to suspect may provide evidence of the commission of an offence under this Part, or
  - (b) anything detected during the search by an electronic detection device, or
  - (c) anything indicated by a dog reacting positively to its presence.

The legislation also specifies that people can be fined up to 10 penalty units (\$1,100) if they:

- (a) fail or refuse to comply with a request made, or a direction given, by a correctional officer . . . , or
- (b) fail or refuse to produce anything detected or seen on or with the person, or in a vehicle in which the person was present at the time the thing was detected or seen, in a search when requested to do so by a correctional officer, or
- (c) resist or impede a search of a person or vehicle ...<sup>74</sup>

Records obtained from NSW Police indicate that only two people were charged under this section in the year following commencement of the legislation. Both were charged in November 2003 with failing or refusing to comply with a request made, or a direction given by a correctional officer. The police record of one event at a metropolitan correctional complex noted:

<sup>71</sup> Observation record 21, July 2004.

<sup>72</sup> Observation record 9, April 2004.

<sup>73</sup> Observation record 21, July 2004.

<sup>74</sup> *Summary Offences Act 1988*, section 27K.

*The defendant ... was approached by Corrective services officers and asked to submit to a search. When asked to provide his wallet... the defendant refused, when Corrective services officer [name] attempted to remove the wallet from the defendants [sic] hand the defendant resisted strongly and refused to submit the wallet. The defendant was restrained in the process exhibiting a violent struggle. The defendant was eventually searched with no find of any drug paraphernalia or the like.<sup>75</sup>*

The defendant was convicted and fined \$300 and ordered to pay court costs of \$61.

The second event involved a male visiting a correctional centre in the northern region. The male refused to provide identification to a correctional officer when requested, and refused to submit to a search. According to the police record of events the visitor also swore at officers and charged at a correctional officer, whereby a "violent struggle ensued."<sup>76</sup> The male was fined \$400 for failing or refusing to comply with a search request, and fined \$600 and placed on a twelve month good behaviour bond for assaulting a law officer other than a police officer.

When a correctional officer stops, searches and detains a person in accordance with section 27F of the *Summary Offences Act*, the officer "may use such force as is reasonably necessary to exercise the function."<sup>77</sup> As far as we are aware, this is the first piece of legislation in NSW that has specifically granted correctional officers the power to use force on people other than inmates. DCS has recently finalised a policy concerning the use of force by correctional officers towards people other than inmates. This states:

*The use of force should only occur in extreme circumstances and as an option of last resort. The standard of justification for the use of force on a visitor is far greater than for an inmate. Immediately after the use of force, a person on whom force was used must be asked if they require medical assistance (whether they appear injured or not), and if the person requests medical assistance or is obviously injured, then appropriate medical assistance must be called.<sup>78</sup>*

Staff from our office have never observed a correctional officer using force against a visitor. When we asked officers in charge of correctional facilities across NSW whether staff based at their centre had used force on a visitor between February 2003 and May 2004, 27 out of 28 (96%) said that to the best of their knowledge, staff had not used force against a visitor in this time period. The one governor who reported use of force, by centre-based staff members, toward a visitor during this period, said that force had been used on approximately three occasions.

Some officers from the DCS security units have advised us that they do on occasion use force on visitors. We are currently waiting for information about how often, and the circumstances surrounding uses of force by officers working for the security units.

### Questions for consideration

30. Are you aware of any occasions where correctional officers have unreasonably used force against a person other than an inmate, or where the force used may have been excessive? If yes, please provide details, including the approximate date of the occurrence, the centre or location where force was used, whether injuries were sustained during the incident, and whether medical assistance was offered and/or provided.

## 1.3.7 Detention of people and vehicles

Section 27F(3) of the *Summary Offences Act* states:

(3) **Power to detain for purpose of search by police**

*A correctional officer who stops and detains a person or a vehicle under this section (whether or not the correctional officer searches the person or vehicle) may request a police officer to conduct a search or a further search of the person or vehicle, and may detain the person or vehicle while waiting for the arrival of a police officer at the place where the person or vehicle is being detained for the police officer to conduct the search.*

(4) **Request to police to be made as soon as practicable**

*A request to a police officer under subsection (3) must be made as soon as practicable after the correctional officer stops and detains the person or vehicle, or searches the person or vehicle.*

<sup>75</sup> Police event record 1.

<sup>76</sup> Police event record 2.

<sup>77</sup> *Summary Offences Act 1988*, section 271.

<sup>78</sup> DCS Operations Procedures Manual, section 12.10.2.

Police officers are sometimes present at a place of detention when a correctional officer suspects that a person on or near a correctional facility is concealing a contraband item, or if a correctional officer detects such an item in the possession of a person. On these occasions, the police will usually take the person to a private room and conduct a more thorough search than correctional officers are permitted to undertake (for example, a 'frisk' or pat-down search, or a strip search).

If a correctional officer suspects that a person is concealing contraband, or a contraband item has been detected, and police are not present, the person will be requested or directed to remain at the correctional centre until the police arrive. Section 27J(1) of the *Summary Offences Act* says that correctional officers who detain a person so that the police can conduct a search, or additional search, of the person, "must not detain the person any longer than is reasonably necessary for the purpose, and in any event for no longer than 4 hours." The legislation does not grant correctional officers the right to detain people for reasons other than a search by police, nor does it specify limits on the amount of time a correctional officer may lawfully detain a vehicle.

DCS does not have a state-wide policy outlining where people are to be detained, or how they must be treated during the period they are detained pending the arrival of police. This is despite the fact that it is not uncommon for people to be detained (eleven of the 28 governors of correctional facilities (39%) have advised us that between February 2003 and May 2004, visitors to the correctional facility under their command have been detained while waiting for police to arrive at the centre). When we asked governors where visitors are usually detained (or would be likely to be detained) while waiting for the police to arrive at the centre, and how they are usually (or would likely be) supervised, a range of responses were received, including:

*Visitors are seated in an office in the administration building with two officers present, one of which is the same gender as the person detained.*

*In the staff meal room adjacent to the Deputy Governor's Office where suitable amenities are available away from inmates. Supervised by a correctional officer at all times.*

*Visitors held in an open area until police arrive then taken to a private area.*

*Can be locked in gym area. Coke machine's there too.*

Officers from the DCS security units also detain people entering correctional facilities. This usually occurs during operations conducted to detect visitors introducing contraband into the centre. Our observations indicate that when people are detained during visitor interdiction operations they are sometimes taken into a room to be detained. On other occasions, however, people are requested or directed to remain at the site of the operation (usually a car park). This allows the supervising officers to continue to actively participate in the operation. We have also been told that detaining people at or near the site of the operation helps to ensure that the detainee has fewer opportunities to consume or tamper with contraband they may be concealing, or discard it.

While a decision to detain a person or group of people near the operation is understandable, we have observed people, including young children, being directed to sit on a gutter, or on the ground in unsheltered areas. Rarely are these people offered a drink, and sometimes they are denied access to toilets.

### Questions for consideration

31. Should guidelines be developed about the treatment of people and/or vehicles detained by correctional officers? If yes, what issues should be considered in developing such guidelines?

### 1.3.8 Seizure of goods

A correctional officer can lawfully seize an item found as a result of a search conducted under section 27F of the *Summary Offences Act* if the officer suspects on reasonable grounds that the item may provide evidence of the commission of certain offences.<sup>79</sup>

When the legislation was being debated, the then Minister for Corrective Services stated:

<sup>79</sup> *Summary Offences Act 1988*, section 27F(5).

... if a person consistently tried to bring a camera into a correctional centre, officers would ultimately be able to seize and destroy the camera. Disposal of the camera would deter future attempts to bring a camera into a correctional centre without authority.

... Correctional officers would not unnecessarily seize or dispose of a camera or other property inadvertently brought into a correctional centre. But where a person persistently tried to bring a camera into a correctional centre knowing that it was against the law, and one day actually succeeded, then mere confiscation of the film and banning the person from future visits would not be a sufficient deterrent.<sup>80</sup>

In response, another Member of Parliament commented:

*I was mildly encouraged to hear the Minister say in his second reading speech that correctional officers would not unnecessarily seize or dispose of a camera or other property inadvertently brought into a correctional centre. But there is a world of difference between the Minister's words and what might happen in practice.*<sup>81</sup>

DCS has been unable to provide us with comprehensive records about items confiscated and seized across the correctional system since the commencement of this legislation. The DCS Security and Investigations Branch keeps records about items seized by its officers, and we have been informed that in the period 21 February 2003 to 31 March 2004 the following items were seized from visitors to correctional facilities, by officers from this branch. It is unclear which correctional facility people were visiting when these items were seized:

*9 x Cones, 8 x Bongos, 1 x Nunchakus, 2 x Deal Bags with GVM [green vegetable matter] residue, 1 x Deal Bag, 3 x Bowls with GVM residue, 336 x Drug Implements, 1 x Sword, 1 x Box Cutters, 6 x Scissors, 5 x Chargers, 45 x Knives, 1 x Screwdriver, 1 x Jet lighter, 1 x Laser Pointer, 1 x Sling shot, 1 x Drum Kit, 2 x metal Rods, 1 x Club, Qty Fireworks, Metal Bar, 1 x Baseball bat, 2 x Phone Cards, 10 x Weapons, 2 x Pipes with cones, Peerless style cuffs, 2 x Hash pipes, 1 x Knuckledusters, 1 x steel pole, 2 x sim cards, 1 x needle, 2 x Water Balloons, Plastic spoon with white powder residue, 1 x Fork, 1 x Bow, 5 x Arrows, 42 x Weapons, Qty Drug paraphernalia, 512 rounds of ammunition, 1 x Wooden Baton, Lighter with Flick Knife, 1 x House breaking implement, Fake ID, 10 x mobile phones.*<sup>82</sup>

We have been advised that in July 2004 DCS began recording information about all searches conducted on departmental property and all contraband found.<sup>83</sup> Entries made in the new database should indicate details about seizure of all items.<sup>84</sup>

### Questions for consideration

32. Are you aware of any occasions where a correctional officer has unreasonably seized an item from a visitor to a correctional centre? If yes, please provide details.

### 1.3.9 Searching of staff and authorised visitors

A number of recent widely publicised cases illustrate that some DCS employees are willing to break the law by trafficking prohibited items into correctional facilities. The Independent Commission of Corruption (ICAC) released two reports in 2004 about trafficking of contraband into correctional centres by correctional officers. Both correctional officers the subject of investigation admitted to the ICAC that they trafficked contraband items into inmates. The first was paid \$4,000 for providing an inmate with four mobile phones, six SIM cards, a mobile phone charger, a miniature digital camera and a miniature ratchet device.<sup>85</sup> The second officer received \$6,000 for providing an inmate with food, steroid tablets, cocaine, marijuana, a Game Boy, audio tapes and five or six mobile phones.<sup>86</sup>

<sup>80</sup> The Hon Richard Amery MP, Legislative Assembly, 8 May 2002.

<sup>81</sup> Mr Michael Richardson MP, Legislative Assembly, 28 May 2002.

<sup>82</sup> Information provided by DCS on 2 June 2004.

<sup>83</sup> Telephone conversation with officer from Taskforce Con-Targ, Interview record 44, July 2004.

<sup>84</sup> Taskforce Con-Targ User Guide: Use of Search Operations Database, June 2003.

<sup>85</sup> Independent Commission Against Corruption, *Report on investigation into the introduction of contraband into the High Risk Management Unit at Goulburn Correctional Centre*, February 2004, p. 21.

<sup>86</sup> Independent Commission Against Corruption, *Report on investigation into the introduction of contraband into the Metropolitan Remand and Reception Centre, Silverwater*, September 2004, p. 18.

In recognition that DCS employees might introduce contraband items into a place of detention, the *Crimes (Administration of Sentences) Regulation* provides:

*The governor of a correctional centre or the principal security officer may require a correctional officer or Departmental officer who is on the premises of the centre:*

- (a) to submit to an inspection and search of personal possessions, to scanning by means of an electronic scanning device and to being sniffed by a dog, and*
- (b) to empty the pockets of the officer's clothing, and*
- (c) to make available for inspection and search any room, locker or vehicle that is under the officer's control at the centre.<sup>87</sup>*

In addition, if it is reasonably suspected that a DCS employee has or might introduce contraband into a correctional facility the employee may be stopped, searched and detained in or in the immediate vicinity of the place of detention, in accordance with the provisions of the *Summary Offences Act*.<sup>88</sup>

Notwithstanding these legislative provisions, DCS has not yet developed a comprehensive and consistent state-wide staff search policy. In February 2004, the ICAC stated:

*The challenge for any search procedure is maintaining the deterrent effect; that is, maintaining an ongoing staff perception that they are likely to be searched and that any contraband will be discovered. In this regard, the DCS has had ongoing negotiations with the unions involved. However, due to the complexity of the issues and the varying circumstances in different correctional centres the matter is still largely unresolved, at least at the systems level.<sup>89</sup>*

When we contacted governors of correctional facilities in May 2004 to determine the practices used at each centre to search staff, contractors and authorised visitors, we were advised that at some correctional facilities all staff and contractors entering the centre are subject to some form of personal search, such as being asked to remove a hat, gloves, coat, jacket or shoes, and/or to empty the contents of his or her pockets or a bag. At other centres staff and contractors are rarely or never searched. In addition, only some centres keep records about the number of searches conducted of staff, contractors and official visitors, and who is searched.

We were also advised that all members of staff at 14 correctional facilities (50%) are required to carry any personal items they take into a secure area of the centre, in a clear plastic bag. This policy is aimed at making it easier for nominated staff to view the personal possessions being carried by staff. Staff at 12 correctional facilities (43%) are not required to carry their personal items in clear plastic bags, and two centres (7%) have a policy whereby some staff, but not others, are required to use a clear bag for carrying personal items. These figures do not include the Mid North Coast Correctional Centre, Dillwynia Correctional Centre or Kariang Juvenile Correctional Centre, which were not operational (or operated by DCS) in May 2004.

In order to better address the issues of staff corruption and serious misconduct, and introduction of contraband into correctional facilities, the Commissioner of Corrective Services established two taskforces in February 2004. One of these, Taskforce Con-Targ is focusing on targeting contraband within the correctional system and is responsible for:

- co-ordinating and conducting operations to detect contraband being introduced by staff, authorised visitors, contractors and visitors to centres
- collecting and collating all intelligence concerning contraband
- developing and maintaining a database into which all information concerning searches conducted and contraband found on DCS property can be entered
- developing systems to prevent the entry of contraband into places of detention.<sup>90</sup>

In recent months Taskforce Con-Targ has started conducting searches of staff and authorised visitors at correctional facilities. Most searches are conducted on a random basis, although Taskforce Con-Targ can also target particular people to search if there is reason to believe they may be introducing contraband. Random and targeted searches are conducted the same way. After cautioning staff that it is an offence to bring unauthorised items into a correctional centre the staff member will be screened by a drug detection dog and by a hand held metal detector. The staff member will then be requested to observe a search of their personal possessions.<sup>91</sup>

<sup>87</sup> Clause 240.

<sup>88</sup> *Summary Offences Act 1988*, section 27F(8) specifies that "Nothing in this section prevents the powers that may be exercised in relation to a person from being exercised in relation to a correctional officer".

<sup>89</sup> The Independent Commission Against Corruption, *Report on investigation into the introduction of contraband into the High Risk Management Unit at Goulburn Correctional Centre*, February 2004, p. 26.

<sup>90</sup> Interview record 28, May 2004.

<sup>91</sup> Taskforce Con-Targ Standard Operating Procedures – *Searching Employees and Authorised Visitors at Entry and Exit Points of Departmental Premises*, 20 May 2004.



The approach taken during these searches is somewhat different from searches of visitors entering correctional facilities. In particular:

- staff and authorised visitors are searched individually in a private room
- if a drug detection dog indicates the scent of a narcotic odour on a member of staff or an authorised visitor, a second dog will be used to screen the person to confirm the accuracy of the initial indication
- only in rare circumstances will the locker or vehicle of a staff member or authorised visitor be searched
- staff or authorised visitors who are indicated by a drug detection dog or found with contraband may be treated more leniently than visitors. For example, following an indication by a drug detection dog, our observations indicate they will be more likely to be permitted to remain in the centre, and they are more likely to have unauthorised items returned to them.<sup>92</sup>

Conducting staff searches, particularly with a drug detection dog, is a new approach in the NSW correctional system, and it will take time before staff being searched are comfortable with this approach. For this reason, we have been advised that Taskforce Con-Targ is aiming to be friendly rather than firm when conducting staff searches.<sup>93</sup>

It is also likely to take time before correctional officers conducting searches of other officers are comfortable doing so. In particular, several officers who have been, or may be, involved in searching staff have indicated to us that they are worried about the ramifications of searching fellow officers:

*All due respect to the system, they've managed to bring the riots down by segregating parts of the gaol, but if someone's determined to kill you, they will kill you if you don't have that backup, and we rely on the goodwill of the officers to watch our backs ... There's good officers and there's hopeless officers, but I'm telling you, I might just be barking up the wrong tree here, but I seriously don't want to search other officers. But people like [Name] has stuffed it up for us big time. I've got to try and see it from the hierarchy's point of view as well, but the hierarchy does not have to live with the fact that, I don't just have to rely on the guys that work in this gaol. I have to rely on five or six gaols worth of officers that will look after me. Now they're asking me to search them.<sup>94</sup>*

### Questions for consideration

33. Is it reasonable that searches of staff and authorised visitors are conducted differently from searches of people visiting correctional facilities? Why or why not?
34. Is there any evidence to suggest that the safety of officers who conduct staff searches may be compromised within the correctional system because of hostility from other staff members?

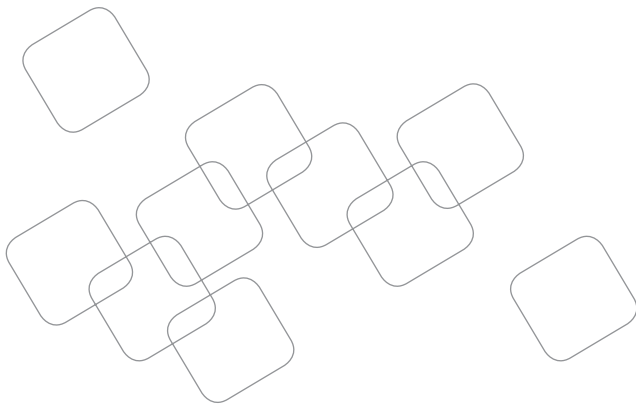
<sup>92</sup> Observation record 23, September 2004.

<sup>93</sup> Telephone conversation with officer from Taskforce Con-Targ, Interview record 45, August 2004.

<sup>94</sup> Interview record 39, August 2004.



# Chapter 2. The right of certain victims to make oral submissions at parole hearings



When a court sentences an offender to a period of imprisonment, the court may impose a sentence with a non-parole period. The non-parole period is the minimum time the offender must serve in custody, after which the offender may be released to serve the rest of his or her sentence in the community on parole. In making a decision whether to release an offender on parole, the Parole Board is required to take into account a number of issues, including comments made by the sentencing judge, the offender's conduct while serving his or her sentence, the availability to the offender of family, community or government support and the likelihood that the offender will be able to adapt to normal lawful community life.<sup>95</sup> In addition, the Parole Board must consider the likely effect on any victim of the offender, and on any such victim's family.<sup>96</sup>

The notion that victims of crime are key stakeholders in the criminal justice system has been increasingly recognised and acknowledged in recent years. In response to this, there have been a number of legislative changes in NSW during the last decade that acknowledge the rights of victims and facilitate their involvement in the criminal justice system. For example, the *Victims Rights Act 1996* established a Victims of Crime Bureau, a Victims Advisory Board and a Charter of Victims Rights.

The Charter of Victims Rights specifies how NSW government agencies are to treat victims of crime.<sup>97</sup> It covers a range of areas, including victims' access to information, victim impact statements, victims' compensation, and return of property to a victim. The Charter also states:

*A victim should, on request, be provided with the opportunity to make submissions concerning the granting of parole to a serious offender or any change in security classification that would result in a serious offender being eligible for unescorted absence from custody.*<sup>98</sup>

<sup>95</sup> *Crimes (Administration of Sentences) Act 1999*, section 135(2).

<sup>96</sup> *Crimes (Administration of Sentences) Act 1999*, section 135(2)(c).

<sup>97</sup> The definition of victim of crime for the purposes of the Act is outlined in section 5.

<sup>98</sup> *Victims Rights Act 1996*, section 6.16.

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The term serious offender is defined in the legislation,<sup>99</sup> and refers to offenders serving a life sentence, offenders who have had a life sentence redetermined into a number of years,<sup>100</sup> offenders serving a non-parole period of twelve years or more, and offenders serving a sentence of any length for murder.

Legislation passed by the NSW Government in 1996 required the establishment of a victims register so that contact details of victims who wished to be notified of an offender's eligibility for release on parole could be recorded.<sup>101</sup> In his Second Reading speech, the then Minister for Corrective Services stated:

*A victims register is essential so that the Parole Board can be confident that all victims who wish to make submissions have been duly notified of impending parole consideration. Similarly, a victims register is essential so that the board will not inadvertently contact those victims who have made it clear that they would rather have nothing more to do with the matter.*<sup>102</sup>

The legislation also stated that victims could present written submissions to the Parole Board either in advance of the hearing, or at the hearing, or that victims could make oral submissions at the hearing, but only with the approval of the Parole Board.<sup>103</sup> During the Parliamentary debates about the legislation, the then Minister for Corrective Services stated:

*There are two major reasons for giving the board discretion as to whether it will entertain oral submissions from a victim of crime or, in the case of a deceased, incapacitated or child victim, from a relative of a victim. One is, regrettably, that in the experience of the board disputes occur from time to time within the families of victims, exacerbated no doubt by the tragedy they have experienced. The estranged husband of a murdered woman may wish to give evidence to the board; the dead woman's mother may not wish any submissions to be made. The situation becomes still more complicated, for example, in the case of some ethnic communities where the wishes of the extended family need to be taken into account. The board needs to have discretion to balance the competing interests of the various members of the family and, if necessary, decline to allow oral submissions from a particular person.*

*The other major reason for giving the board discretion to decline oral submissions from victims is that the parole hearing is not a retrial of the circumstances of the offence. From time to time victims will seek to introduce extraneous information about the history of various persons which runs the risk of reducing the hearing to an adversarial process.*<sup>104</sup>

In June 2002 Parliament agreed to allow victims of serious offenders the right to make an oral submission about the possible release of an offender on parole, without requiring the prior approval of the Parole Board. During the Parliamentary debates about the proposed legislative change, the then Minister for Corrective Services said:

*This is an important change that will benefit the victims of serious offenders. ... I believe that victims will welcome this change. Often, victims prefer to make a personal approach at a parole hearing to explain their personal circumstances and concerns. Making a personal approach can often demonstrate a victim's concerns far more clearly than a written submission.*<sup>105</sup>

This legislative provision commenced on 21 February 2003.

## 2.1. Informing victims about their rights

The fact that victims of crime now have an automatic right to make an oral submission at a parole hearing of a serious offender is only meaningful if victims are informed about this right, and given information to assist them in choosing whether or not to exercise it. In order for victims to place their details on the register they must be aware that the register exists, and know how to contact Victims Register staff.

DCS has published a brochure containing information about the Victims Register. There are a number of ways that victims or family members of victims can obtain copies of the brochure, or receive advice about the Victims Register. For example:

- the Office of the Director of Public Prosecutions provides victims with information about the register when they appear as witnesses during criminal trials at the Supreme or District Courts

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<sup>99</sup> *Crimes (Administration of Sentences) Act 1999*, section 3 (1).

<sup>100</sup> Provisions relating to the redetermination of sentences are set out in Schedule 1 of the *Crimes (Sentencing Procedure) Act 1999*.

<sup>101</sup> *Sentencing Amendment (Parole) Act 1996*, section 22 M. This provision is now outlined in the *Crimes (Administration of Sentences) Act 1999*, section 256.

<sup>102</sup> The Hon Robert Debus MP, Legislative Assembly, 30 October 1996.

<sup>103</sup> *Crimes (Administration of Sentences) Act 1999*, sections 147 (3)(a) and (b).

<sup>104</sup> The Hon Robert Debus MP, Legislative Assembly, 30 October 1996.

<sup>105</sup> The Hon Richard Amery MP, Legislative Assembly, 8 May 2002.

- people may learn about the register by contacting a group which has been established to provide support, advice and information to victims of crime
- the Victims Services Division of the NSW Attorney-General's Department provides information and advice to victims of crime across a range of areas, with a 24-hour telephone information, support and referral service for victims of crime that is operated by the Victims of Crime Bureau in partnership with Mission Australia
- information can be obtained electronically via the DCS website or the Attorney General's Department website.

Each victim of a serious offence who places his or her details on the Victims Register, will be sent an information package by the register between four and six weeks before the Parole Board commences considering whether the offender should be released on parole.<sup>106</sup> The aim of the package is to explain the roles of DCS and the Parole Board, and educate victims about relevant processes. It also advises victims of serious offences about their right to make a victim submission.<sup>107</sup>

Despite information being sent from the Victims Register about the parole process, members of the Parole Board and representatives of victims support groups have advised us that many victims who make a submission to the Parole Board do not understand the parole process. According to Howard Brown, Victims of Crime Assistance League:

*a lot of people don't understand the parole process. In fact a majority of people don't. And unless they come to a decent group to provide them with that advice, the majority of them look to the Parole Board to increase the prisoner's sentence, which is just, they are not capable of doing that. ... So you've got to actually explain to people what the function of the Parole Board is.*<sup>108</sup>

### Questions for consideration

35. Would people's ability to make a victim submission be enhanced by improving information provided about the Victims Register, information provided by the Victims Register, or by improving the dissemination of such information? If so, how?

Once the Parole Board has indicated an initial intention to release a serious offender on parole, it is required to write to any registered victims to notify them of this intention.<sup>109</sup> Victims must be given at least 14 days to advise the Parole Board if they wish to make submissions about the initial intention to release the offender.<sup>110</sup> The Parole Board must also write to registered victims and invite them to make submissions if an initial intention has been made to refuse parole to a serious offender, and the offender has expressed a desire to make a submission.<sup>111</sup>

If either a victim or offender advise that they wish to make a submission about the possible release of the offender on parole, the Parole Board must set a date on which it will conduct a hearing for the purpose of receiving and considering both offender and victim submissions.<sup>112</sup>

Martha Jabour, Homicide Victims Support Group, advised us that giving victims more than four to six weeks notice of an upcoming parole hearing would be likely to be beneficial to victims as it would provide them with more time to understand the parole process, come to terms with the fact that the offender may be released, and decide whether or not they wish to make a victim submission:

*So you're at home, you're going along quite nicely, then all of a sudden you get a letter that you've got six weeks to make a submission for a parole board hearing. So that's an incredibly long time I think for victims to be doing their own thing, then all of a sudden to be thrown into a very unusual situation. So I think perhaps the preparation of the family members being done six months, twelve months beforehand.*<sup>113</sup>

<sup>106</sup> Victims of Crime Bureau and DCS, *Submissions Concerning Offenders in Custody*, January 2001.

<sup>107</sup> The current information package pre-dates the legislative amendments and informs victims of serious offences that if they wish to make an oral submission at a parole hearing, they will need to obtain the prior approval of the Parole Board.

<sup>108</sup> Interview record 25, March 2004.

<sup>109</sup> The *Crimes (Administration of Sentences) Regulation 2001*, section 22 2 (1)(b) permits contact to be made by telephone if only a telephone number has been recorded in the Victims Register, or if the Parole Board has reason to believe that any telephone number that has been so recorded is more up to date than the last postal address so recorded.

<sup>110</sup> *Crimes (Administration of Sentences) Act 1999*, sections 145(1) and (2).

<sup>111</sup> *Crimes (Administration of Sentences) Act 1999*, section 146(3).

<sup>112</sup> *Crimes (Administration of Sentences) Act 1999*, sections 145(3)(b) and 146(3)(b).

<sup>113</sup> Interview record 23, March 2004.

### Questions for consideration

36. Should victims who are entitled to make a victim submission be given information about the parole process and their right to make a submission more than four to six weeks before the Parole Board commences consideration about whether the offender should be released on parole? Why or why not?
37. What difficulties might there be in providing such information at an earlier time?

## 2.2. Victims who are entitled to make a submission

This definition of a victim, for the purposes of the Victims Register is:

- (a) *a victim of an offence for which the offender has been sentenced or of any offence taken into account [during sentencing] or*
- (b) *a family representative of such a victim (if the victim is dead or under any incapacity or in such circumstances as may be prescribed by the regulations),*

*and includes a person who suffers actual physical bodily harm, mental illness or nervous shock, or whose property is deliberately taken, destroyed or damaged, as a direct result of an act committed, or apparently committed, by the offender in the course of a criminal offence.*<sup>114</sup>

This definition may prevent some people who believe they are legitimate victims of the offender from presenting a victim submission at the offender's parole hearing. For example, the following people do not fall within the definition of victim and therefore are not entitled to make a victim submission: a friend of a murder victim; a spouse of an assault victim where the assault victim is not incapacitated; and a person who was a victim of a crime previously committed by the offender.

The provision relating to a family representative of a victim is also potentially problematic because:

- There is currently no guidance about who may claim to be a family representative of a victim for the purpose of the Victims Register.<sup>115</sup>
- The legislation provides that only one family member of a victim is to be listed on the Victims Register. However, in some cases more than one family member may wish to be registered. For example, if a person dies during the commission of an offence, and the victim's parents are separated, both may wish to be placed on the register so that they can be informed of the movements of the offender and notified when the offender is eligible for parole.

We have been advised that discretion is used by the Victims Register to determine which family members are eligible to be listed on the register, and whether to allow more than one family member to register. On some occasions the Parole Board will allow victims of non-serious offences to make an oral submission during a parole hearing. In addition, on at least one occasion, a friend of a murder victim was permitted by the Board to make an oral submission, although he was not eligible to be listed on the Victims Register.<sup>116</sup>

### Questions for consideration

38. Is the current definition of 'victim of offender' for the purposes of the Victims Register appropriate? If not, how could it be improved?
39. What are the advantages and/or disadvantages of allowing more than one family member to be listed on the register, and allowing people not on the Victims Register to make a victim submission?

<sup>114</sup> *Crimes (Administration of Sentences) Act 1999*, section 256(5).

<sup>115</sup> *Crimes (Administration of Sentences) Act 1999*, section 256(4)(c)(i) specifies that regulations may be made about the determination of people who are family representatives of victims, however, the regulations are currently silent on this issue.

<sup>116</sup> Interview with officer from Parole Board Secretariat, Interview record 15, September 2003.

Not all victims who are entitled to present a submission to the Parole Board choose to do so. The Parole Board does not currently keep records about how many victims make submissions, or the characteristics of victims who do make a submission.<sup>117</sup> When we asked members of the Parole Board about their perceptions of victims who make submissions we were advised:

- the most common offences for which people make a victim submission are murder, and sex offences, particularly sex offences against children
- males and females make roughly the same number of submissions, with males possibly choosing to make oral submissions more often than females
- it is uncommon for people from a non English speaking background to make a victim submission and it is even rarer for Aboriginal or Torres Strait Islander people to make submissions
- people who live in rural areas are as likely, or more likely, than people who live in urban areas to make victim submissions.<sup>118</sup>

It is unclear whether people who do not to make a victim submission are:

- choosing to exclude themselves from the process because they would prefer not to be involved
- deciding not to make a submission because they are nervous or fearful about the process
- unaware that they are entitled to participate in the parole process.

### Questions for consideration

40. Why might people from particular backgrounds be failing to participate in the parole process? Should this issue be addressed? If so, how?

## 2.3. The role of victim submissions

The *Crimes (Administration of Sentences) Act* and *Crimes (Administration of Sentences) Regulation* do not explain the purpose of victim submissions, how much weight the Parole Board ought to give to submissions, or advise what content should be included in submissions. In addition, there are currently no guidelines for Parole Board members about how to deal with victim submissions.<sup>119</sup> Without clear guidance about these issues there is the possibility that stakeholders will be confused about the role of victim submissions, the content of submissions may vary significantly and submissions may be used inconsistently. This in turn may lead to victims of crime being disillusioned, angry or upset with their involvement in the parole process and offenders being treated in a disparate manner.

In NSW there is no legislative requirement that states the Parole Board must consider a victim submission that is presented to it. However, the Parole Board is required to have regard to the likely effect on any victim, and on any victim's family, of the offender being released on parole.<sup>120</sup> A victim submission can assist the Parole Board in this regard. Parole Board members we have spoken to expressed slightly different views about the purpose of victim submissions. However, several themes emerged, with members noting that submissions:

- allow victims to express their feelings and have input into the parole process
- allow the Board to see the impact of the crime on the victim at the current time
- help the Board understand any fears the victim has about the release of the offender
- enable the Board to place appropriate conditions on the offender, if parole is granted.

Staff members of the Victims Register have advised that

*A key element in our discussions with victims is not to raise their expectations and not to give them the impression that the hearing or their statements are designed to stop the offender from being released to parole. We encourage victims to make written submissions and oral statements if it will assist them to "move on".<sup>121</sup>*

<sup>117</sup> Interview with officer from Parole Board and officer from Parole Board Secretariat, Interview record 24, March 2004.

<sup>118</sup> Nine Parole Board members were contacted during May and June 2004 and asked to participate in a telephone survey about victim submissions. Seven members of the Parole Board agreed to participate, with four being community members, one a judicial member, one a representative of the NSW Police, and one a representative of the DCS Probation and Parole Service.

<sup>119</sup> Interview with officer from Parole Board Secretariat, Interview record 15, September 2003.

<sup>120</sup> *Crimes (Administration of Sentences) Act 1999* section 135 (2)(c).

<sup>121</sup> Information provided by DCS Victims Register, 3 July 2003.

The issue of how much weight a victim submission should receive is quite contentious. In May 2002, when Parliament was debating whether or not to introduce an automatic right for victims of serious offenders to make oral submissions at parole hearings, one Member of Parliament stated that victims sometimes feel the Parole Board does not “listen” to their submission, and that “if an oral statement carries no weight whatsoever with the Parole Board, this legislation is just window dressing and will not provide a real benefit to victims of crime.”<sup>122</sup> Alternatively, the Australian Institute of Criminology has expressed concerns about victim submissions being given too much weight in parole proceedings:

*If victim submissions are likely to have a large impact on parole decisions, disparity may arise between offenders whose victims make submissions and those whose victims do not. The mere presence of a victim submission seems small justification for treating an offender more harshly.*<sup>123</sup>

Results obtained in a United States study appear to demonstrate that this concern is a valid one:

*The study found that parole was refused in 43 per cent of the victim impact statement cases and seven per cent of the non-statement cases. This contrasted with the board’s own decision-making guidelines that suggested parole should have been denied to 10 per cent of the victim impact statement cases and seven per cent of the non-statement cases.*

*In summary, the presence of a victim impact statement had a significant impact on the parole outcome across all types of offence, offender and victim.*

*Apparently, the mere presence of a victim impact statement predisposed the board towards denying parole.*<sup>124</sup>

As statistics are not kept in NSW about how often victims make submissions, or the outcome of parole hearings when victim submissions are presented, it is difficult for any systematic evaluation of the influence of victim submissions in NSW to be carried out.

The Parole Board has advised that following an upgrade of the DCS Offender Management System database, it hopes to improve the way it collects and records data about parole hearings, including the role of victims at these hearings.<sup>125</sup>

### Questions for consideration

41. What do you think is the purpose of a victim submission?
42. Should policies be developed about the purpose of victim submissions and how much weight they ought to be given when considered by the Parole Board? If so, what issues should be considered when developing such guidelines?

## 2.4. The content of victim submissions

In 1996 a NSW Law Reform Commission discussion paper proposed examples of information that could legitimately be included in victim submissions presented at parole hearings, including:

*threats made to harm the victim, the victim’s family, witnesses or any other person; the victim’s fears relating to the offender’s behaviour on release; evidence of the circumstances of the offence which has come to light since, or was not revealed at, the trial; and evidence of the offender’s behaviour during the time in custody.*<sup>126</sup>

These suggestions predominantly refer to the victim submission presenting the Parole Board with new evidence. However, the information package provided to victims by the Victims Register encourages people not to introduce new evidence as part of their submission. This is because the purpose of the parole hearing “is not to rehear the original trial, but to make a decision regarding parole”.<sup>127</sup> The information package states:

<sup>122</sup> Mr Michael Richardson MP, Legislative Assembly, 28 May 2002.

<sup>123</sup> M. Black, “Victim Submissions to Parole Boards: The Agenda for Research” The Australian Institute of Criminology Trends & Issues paper, May 2003, p. 3.

<sup>124</sup> W.H Parsonage, F.P Bernat, & J Helfgott, 1992, “Victim impact testimony and Pennsylvania’s parole decision-making process: A pilot study”, *Criminal Justice Policy Review*, vol. 6, cited *Ibid.*, p. 2.

<sup>125</sup> Interview with member of the Parole Board and officer from Parole Board Secretariat, Interview record 24, March 2004.

<sup>126</sup> Law Reform Commission NSW Discussion Paper 33 (1996) *Sentencing*, chapter 11.66 (electronic version accessed at [www.lawlink.nsw.gov.au/lrc.nsw/pages/DP33CHP11](http://www.lawlink.nsw.gov.au/lrc.nsw/pages/DP33CHP11) on 13 December 2004).

<sup>127</sup> *Submissions Concerning Offenders in Custody*, Information Package jointly produced by Victims of Crime Bureau and DCS, January 2001, p. 5.



*The submission should state how you, the victim, feel about the impending release of the offender. The submission should not include any additional evidence. It is important to understand that the purpose of the submission is to give the Parole Board information for its consideration. Any submission should be brief and to the point. The submission should reflect your own feelings.*

While the brochure notes that no new evidence should be submitted within the victim submission, it also states that:

*If the submission contains evidence, the person making the submission will be sworn in and placed on the witness stand. This would only occur if the victim wanted to make an allegation, for example, allegations of continuing harassment by the offender or significant events concerning the offender that may have happened since the conviction.*

*A victim who only wanted to express how they felt about the pending release of the offender would not normally give evidence, and therefore would not be open to cross examination.<sup>128</sup>*

With the exception of this advice there are no detailed guidelines about what information should be included in a victim submission.

### Questions for consideration

43. What information should be included (or not included) in victim submissions?
44. Should there be more detailed guidelines for victims about what information their victim submissions should contain? If so, what sort of information should these guidelines contain?

## 2.5. Assistance for victims who make a submission

In NSW victims are encouraged to prepare their own victim submissions. If victims are unclear about what information their submission to the Parole Board should contain, they can contact staff of the Victims Register for advice. Alternatively, victims' support groups can provide victims of crime with information about this issue, as well as assistance in preparing a submission.

The Victims Register acknowledges that making a victim submission can be a difficult experience for people, and employees are willing to provide assistance to victims prior to the parole hearing. One employee has advised us:

*We invite the registered victims to contact us to discuss the matter if they wish, and if they intend to make a submission. If they do contact us we 'walk them through' the parole consideration process and the Review (Public) Hearing process if that applies. If a public hearing is to be held, and the victim indicates they wish to attend, we can arrange to [g]o with them to Court 17 (Parole Board's court) on a day other than their actual hearing day to familiarise them with the court.<sup>129</sup>*

Victims who wish to make an oral submission at a parole hearing in NSW are encouraged to present the submission themselves rather than through a support person or legal representative. The information package provided to victims states:

*You can ask permission from the Parole Board to have another person speak on your behalf. However, the submission to the Board is about your feelings as a victim of crime and if you decide you want to make an oral submission to the Board, you should consider the merits of making this submission yourself.<sup>130</sup>*

The information package also states that "[i]t is important to know that as a general rule a submission made by the victim personally is likely to have more impact than one made by a lawyer."<sup>131</sup> Despite this, Howard Brown, Victims of Crime Assistance League, has advised that in practice the Parole Board usually allows a support person to provide direct assistance to a victim during the presentation of an oral submission if the victim is having difficulties:

<sup>128</sup> Ibid. p.5.

<sup>129</sup> Material provided by Community Liaison Officer, Victims Register, DCS, 3 July 2003.

<sup>130</sup> *Submissions Concerning Offenders in Custody*, Information Package jointly produced by Victims of Crime Bureau and DCS, January 2001, p. 4.

<sup>131</sup> Ibid., p. 5

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*if during the middle of their oral submission they get a little tongue-tied we find the Parole Board excellent. ... One of the things we do appreciate about the Parole Board, is that if a victim does become flummoxed half way through the process there is no difficulty with me standing up, going to them and speaking to them – I excuse myself to the Board – and refocus ... and redirect them. On one occasion [the victim] said to the Board 'I can't continue, can my advocate?' And they said 'yeh, sure, no problem' and then we just carried on.<sup>132</sup>*

Victims who would like to make a submission, or attend the parole hearing and who do not speak English as their first language, or whose speech or hearing is impaired may ask for an officially accredited interpreter to be available. An interpreter can also be used to translate written submissions.<sup>133</sup> The Chair of the Parole Board has advised that while it would not be a problem if a victim wished to use an interpreter during a parole hearing he is not aware of any occasions where this has actually occurred.<sup>134</sup>

### Questions for consideration

45. Is the assistance provided to victims who make submissions appropriate and sufficient? If not, how could it be improved?

### Proposed legislative change

Please note that the Crimes (Administration of Sentences) Amendment (Parole) Bill 2004 was assented to by Parliament on 15 December 2004. When proclaimed, the Act will make a number of changes to the administration of the Parole Board, and the procedures followed throughout the parole process. For example, it will:

- reconstitute the Parole Board as the State Parole Authority (the Parole Authority), and restate its functions
- ensure at least one member of the Parole Authority is a person who, in the opinion of the Minister, has an appreciation or understanding of the interests of victims of crime
- restate the matters to which the Parole Authority should give consideration when deciding whether to release an offender on parole
- restate a number of procedures to be followed by the Parole Authority when determining whether an inmate should be released on parole
- permit victims of serious offenders to have access to certain documents held by the Parole Authority in relation to the offender.

For further information about the provisions of the Bill, or its status, visit the NSW Parliament's website: [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au).

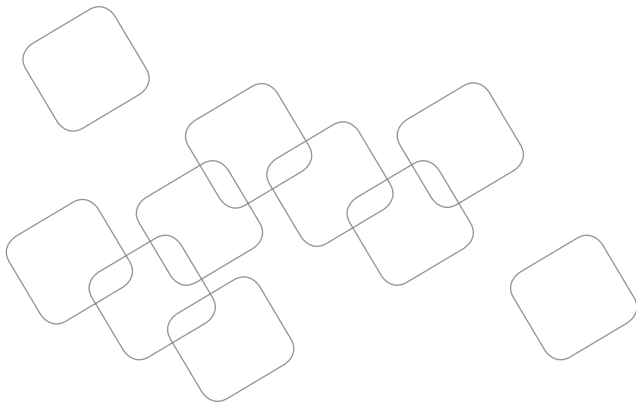
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<sup>132</sup> Interview record 25, March 2004.

<sup>133</sup> *Submissions Concerning Offenders in Custody*, Information Package jointly produced by Victims of Crime Bureau and DCS, January 2001, p. 4.

<sup>134</sup> Interview with officer from Parole Board and officer from Parole Board Secretariat, Interview record 24, March 2004.

# Chapter 3. Recapture of escaped inmates



The *Crimes Act 1900* says that any inmate who escapes or attempts to escape from lawful custody, or who fails to return to lawful custody having been temporarily released, is guilty of an offence and may be imprisoned for up to ten years.<sup>135</sup> An inmate is a person who is serving a full-time sentence in a correctional centre, and includes inmates on remand (those not yet convicted and/or sentenced).<sup>136</sup> This offence does not apply to people serving a sentence of periodic detention or home detention, or people detained in a juvenile justice centre.<sup>137</sup>

DCS has detailed policies and procedures that are to be followed in the event of an inmate escaping. In particular, the police are to be notified of the escape, and provided with all relevant information.<sup>138</sup>

Section 39 of the *Crimes (Administration of Sentences) Act* says that:

- (1) *A police officer or correctional officer may, with or without a warrant, arrest an inmate:*
- (a) *who has contravened, or has manifested an intention to contravene, a condition of a local leave order, local leave permit or interstate leave permit, or*
  - (b) *whose local leave order, local leave permit or interstate leave permit has been revoked, or*
  - (c) *who has not returned to a correctional centre at the expiry of the period specified in a local leave order, local leave permit or interstate leave permit, or*
  - (d) *who has escaped from custody.*

Before February 2003 the *Crimes (Administration of Sentences) Act* required a police officer or a correctional officer who arrested an inmate for being absent from lawful custody to return the inmate to the nearest appropriate correctional centre.<sup>139</sup> This provision was considered to have contributed to an escaped inmate failing to be charged with the offence of escaping from lawful custody, following his recapture.

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<sup>135</sup> Section 310D.

<sup>136</sup> *Crimes (Administration of Sentences) Act 1999*, section 4.

<sup>137</sup> *Crimes Act 1900*, section 310H.

<sup>138</sup> DCS Operations Procedure Manual, chapter 13.7.

<sup>139</sup> Old section 39(2).

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### 3.1. A seminal incident

In March 2001 a man was remanded in DCS custody charged with shooting offences, 'wound with intent to murder' and 'shoot with intent to cause grievous bodily harm'. He appeared before a local court in respect of these charges a number of times throughout 2001. Each time, the court refused him bail and issued a warrant requiring him to remain in the custody of DCS.

On 15 November 2001 the man appeared before Central Local Court in relation to the shooting offences. Before the magistrate could adjourn the matter, and refuse bail,<sup>140</sup> the man escaped from the courtroom. He was recaptured later that day and taken to hospital before being returned to a correctional centre, by police, in accordance with the (then) provisions of the *Crimes (Administration of Sentences) Act*.<sup>141</sup>

He had not, however, been charged with escaping lawful custody. In addition, there had been no warrant issued requiring him to remain in DCS custody in relation to the shooting offences, because before the court issued such a warrant he had escaped, and it could not be issued in his absence.<sup>142</sup> As a result DCS had no authority to lawfully detain the man in relation to the shooting offences. His detention by DCS was lawful because he was also serving a custodial sentence for an unrelated driving offence. His release date was 21 December 2001.

In late November, NSW Police re-commenced the charges against the man in relation to the shooting offences. However, the man was not ordered to appear in court in relation to this matter, and as he did not appear in court, a bail determination was not made. Subsequently the court issued a section 77 order requiring him to appear in court on 21 December in relation to the shooting offences.<sup>143</sup> Such an order does not give DCS lawful authority to detain a person. In December 2001 it was usual practice for DCS to advise an inmate, before discharging them, of when he or she was required to attend court in relation to an outstanding section 77 order.

Accordingly, the man was released from custody on 21 December 2001, but he did not attend court as ordered. He remained at large until 23 January 2002, when NSW Police arrested and conveyed him to Penrith Police Station where he was charged with a number of offences, including escaping from lawful custody.<sup>144</sup>

In relation to the release of this man, the Commissioner of Corrective Services stated "...it would appear that this unfortunate incident was caused by a combination of deficient procedures concerning the release of inmates and human error."<sup>145</sup> Relevant factors include:

- The man escaped before the court proceedings were concluded so the court was unable to issue a further warrant in relation to this matter until the police went through the process of laying information before the court and securing the offender's attendance.
- When the man was recaptured he was not charged with escaping lawful custody.
- When re-commencing the proceedings in relation to the shooting offences, the prosecution did not seek a court order requiring the man's attendance at court.
- There was a lack of communication between DCS and court staff prior to the man's release.

### 3.2. Relevant legislative provisions

Following the problematic release of this man, the administrative policies and practices concerning the release of inmates from DCS custody were reviewed and amended.<sup>146</sup> In addition, in mid 2002, Parliament decided to amend the *Crimes (Administration of Sentences) Act* so that following recapture, escaped inmates were no longer to be conveyed to a correctional centre. Section 39 now provides:

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<sup>140</sup> Bail had been refused on 10 previous appearances before Central Local Court in respect of the charges. DCS Submission to Minister, 10 January 2002.

<sup>141</sup> Section 39(2).

<sup>142</sup> *The Bail Act 1978*, section 23, says that a magistrate or authorised justice may "grant bail to a person brought or appearing before the magistrate or authorised justice and accused of an offence".

<sup>143</sup> An order under section 77 of the *Crimes (Administration of Sentences) Act* requires an inmate to appear before a court on a future date, usually to answer charges or give evidence as a witness.

<sup>144</sup> Police event record 3.

<sup>145</sup> DCS Submission to Minister, 10 January 2002.

<sup>146</sup> *Ibid.*

- (2) A police officer who arrests an inmate ...
- (a) in the case of an inmate who has escaped from custody—is to take the inmate before an authorised justice to be dealt with according to law, or
  - (b) in any other case—is to convey the inmate to the nearest appropriate correctional centre.
- (3) A correctional officer who arrests an inmate ...
- (a) in the case of an inmate who has escaped from custody—is to take the inmate to a police officer, or before an authorised justice to be dealt with according to law, or
  - (b) in any other case—is to convey the inmate to the nearest appropriate correctional centre.

An authorised justice, for the purpose of this legislation is:

- (a) a Magistrate, or
- (b) a registrar of a Local Court or the registrar of the Drug Court, or
- (c) a person who is employed in the Attorney General's Department and who is declared (whether by name or by reference to the holder of a particular office), by the Minister administering this Act by instrument in writing or by order published in the Gazette, to be an authorised justice for the purposes of this Act.<sup>147</sup>

The primary purpose of the legislative change was to ensure that inmates who escape from custody are charged under the criminal law before being returned to custody, while inmates who commit the lesser offence of breaching a leave order or permit are returned to the correctional centre to be disciplined.

Documents provided by DCS advise that the legislation was also changed to ensure consistency between provisions about recapturing people in the *Crimes (Administration of Sentences) Act* and the *Crimes Act*.<sup>148</sup> However, close reading of these two pieces of legislation illustrates that tensions remain between them.

Section 352AA of the *Crimes Act* states:

- (1) Any constable may, with or without warrant, apprehend any person whom the constable, with reasonable cause, suspects of being a prisoner unlawfully at large and take the person before an authorised Justice ...
- (2) A reference in subsection (1) to a prisoner unlawfully at large is a reference to a person who is at large **(otherwise than by reason of having escaped from lawful custody)** at a time when the person is required by law to be in custody in prison.<sup>149</sup>

This means that the *Crimes (Administration of Sentences) Act* requires a police officer who arrests an inmate for being unlawfully at large, but who is not an escapee,<sup>150</sup> to return the inmate to the nearest appropriate correctional centre. The *Crimes Act*, however, requires a police officer to take such an inmate before an authorised justice.

### Questions for consideration

46. Are the laws regarding the processes to be followed after inmates unlawfully at large are recaptured unclear and/or ambiguous? If so, how could they be improved?

<sup>147</sup> *Search Warrants Act 1985*, section 3.

<sup>148</sup> Information provided by DCS, 15 April 2003.

<sup>149</sup> Emphasis added.

<sup>150</sup> For example, a person whose parole order has been revoked but who has not yet been taken into custody, or an inmate late returning to a correctional centre from work release or day release, because of traffic congestion.

### 3.3. The processes followed after an inmate is recaptured

According to information provided by DCS twenty inmates escaped during the 13 months following commencement of the legislative changes. In June 2004, DCS provided the following information about these escapees.

**Table 1: Number of escapes by classification of escapee and recapture status**

	Recapture status		Total
	At large	Recaptured <sup>#</sup>	
Minimum security	1	5	6
Supervised work party	1	3	4
Escort eg. Hospital/transfer	1	1	2
Day/weekend leave	0	1	1
Other unescorted leave	0	1	1
Periodic detention	1	1	2
Court complex	0	4	4
<b>Total</b>	<b>4</b>	<b>16</b>	<b>20</b>

<sup>#</sup> DCS records as "recaptured" only those inmates returned to DCS custody.

In October 2004 we examined police records in relation to the escape and recapture of these inmates.<sup>151</sup> An analysis of these records indicates that most escaped inmates who were recaptured were taken to a police station to be charged before being returned to a correctional centre, in particular:

- Ten inmates were taken to a police station following their recapture and were charged with escaping lawful custody.
- Four inmates handed themselves in to police, three of whom were subsequently charged with escaping lawful custody.
- One inmate who escaped from a court complex was returned to DCS custody in the court complex and was spoken to by police. He was then charged with escaping lawful custody
- It is unclear whether two inmates, who were recaptured by police, were taken to a police station following recapture. However, both were charged by police with escaping lawful custody either at the time of recapture or later.
- One inmate was recaptured in Victoria and remanded at the Melbourne Custody Centre. It is unclear whether this inmate was charged with escaping lawful custody.

It is unclear from police records whether or not one inmate has been recaptured, and we have been unable to locate police records in relation to another inmate.

We have analysed police and DCS records and spoken to a number of relevant DCS staff concerning the provisions requiring escaped inmates to be taken to a police station or authorised justice following their recapture. No significant problems or issues of concern have become apparent through this research. However, we are yet to interview police officers about these provisions.

#### Questions for consideration

47. Are you aware of any problems or issues that have occurred, or are likely to occur, because of the requirement for recaptured escaped inmates to be taken to a police officer or an authorised justice? If so, please provide details.

<sup>151</sup> Police event records 4 – 22.

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## Questions for consideration: a summary

### Chapter 1

1. Are the rules regarding which items cannot lawfully be brought into places of detention sufficiently clear? Why or why not?
2. The *Summary Offences Act* prohibits people from bringing in, or taking out of a place of detention 'anything' without lawful authority. What are the advantages and/or disadvantages of this broad approach?
3. Are you aware of any cases where a person has had difficulty obtaining information about what they can or cannot bring into a correctional centre, or where a person has received incorrect information about this issue? If so, please provide details.
4. Could the provision of information for people entering places of detention be improved? If so, how?
5. What are the benefits and/or disadvantages of having two separate pieces of legislation governing how searches of people (other than inmates) and vehicles are to be conducted by correctional officers?
6. Is there enough guidance provided to correctional officers about how the term 'in the immediate vicinity of a place of detention' should be interpreted?
7. Are you aware of any occasions where a person who has been stopped, searched or detained by a correctional officer even though the person had no intention of visiting the correctional centre? If so, please provide details.
8. Are you aware of any occasions where a person who has been stopped, searched and detained by a correctional officer was in an area you think might not be within the immediate vicinity of a place of detention? If so, please provide details.
9. Reasonable suspicion is required before some types of searches can lawfully be conducted, but is not required in order for other types of searches to be lawfully conducted. What are the advantages and/or disadvantages of this approach?
10. What types of factors could lead a correctional officer to reasonably suspect that offences under section 27 of the *Summary Offences Act* have been, or may be, committed?
11. Apart from compliance with legislative provisions, is it reasonable for correctional officers to search people of the opposite sex?
12. What issues arise from the possibility of having non-correctional members of staff conducting searches of people visiting correctional centres?
13. Are you aware of any occasions where correctional officers have conducted a strip search of a person other than an inmate? If yes, please provide details.
14. Are there circumstances under which correctional officers should be permitted to strip search people other than inmates? If yes, what procedures and/or safeguards should govern such searches?
15. Is it appropriate for correctional officers to direct a person wearing a head dress for cultural or religious purposes to remove it during a personal search? If yes, under what circumstances?
16. Would it be beneficial for guidelines or policies to be developed concerning searches of people's head dresses or other cultural or religious items? If yes, what issues should be considered when developing such guidelines?
17. Are you aware of any occasions where a child or mentally incapacitated person has been searched without an adult or a search observation member of staff being present? If yes, please provide details.
18. Are the provisions concerning searches of children and mentally incapacitated persons appropriate? Why or why not?
19. Are there alternative or additional procedures that should be followed when children, mentally incapacitated persons, or other vulnerable people, visiting a correctional centre are searched? If yes, please provide details.
20. Is it appropriate for correctional officers to conduct searches of people and/or vehicles outside the terms of section 27G of the *Summary Offences Act* if they do so by consent? What are the advantages and/or disadvantages of this type of searching?
21. Are you aware of anyone who chooses not to visit correctional centres, or visits correctional centres less often than they otherwise would, because of fear of the drug detection dogs?
22. Is it reasonable that dogs sometimes bark and act boisterously prior to, or during, visitor screenings? Why or why not?
23. Is it reasonable that dogs sometimes nose or nudge people when screening visitors to a correctional centre? Why or why not?
24. What difficulties and/or advantages arise when only a dog's handler can determine whether a dog is making a positive indication to the scent of a drug?
25. What would be the benefits and/or difficulties involved in DCS keeping more detailed records about the performance of its drug detection dogs during search operations?

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26. Correctional officers do not seem to locate drugs in the majority of searches conducted as a result of a drug dog indication. On this basis, is it reasonable to suspect that a person is carrying illegal drugs solely on the basis of an indication by a drug detection dog? Why or why not?
  27. Are there any circumstances in which it is appropriate for correctional officers to disregard the safeguards listed in section 27J of the *Summary Offences Act* when stopping, searching and detaining people?
  28. Are the safeguards listed in section 27J appropriate? For example, are they sufficient or alternatively too onerous?
  29. What would be the benefits and/or disadvantages of requiring correctional officers to comply with safeguards such as those listed in section 27J of the *Summary Offences Act* when conducting routine searches of people entering correctional facilities (that is, those people searched under the *Crimes (Administration of Sentences) Regulation*)?
  30. Are you aware of any occasions where correctional officers have unreasonably used force against a person other than an inmate, or where the force used may have been excessive? If yes, please provide details, including the approximate date of the occurrence, the centre or location where force was used, whether injuries were sustained during the incident, and whether medical assistance was offered and/or provided.
  31. Should guidelines be developed about the treatment of people and/or vehicles detained by correctional officers? If yes, what issues should be considered in developing such guidelines?
  32. Are you aware of any occasions where a correctional officer has unreasonably seized an item from a visitor to a correctional centre? If yes, please provide details.
  33. Is it reasonable that searches of staff and authorised visitors are conducted differently from searches of people visiting correctional facilities? Why or why not?
  34. Is there any evidence to suggest that the safety of officers who conduct staff searches may be compromised within the correctional system because of hostility from other staff members?

## Chapter 2

35. Would people's ability to make a victim submission be enhanced by improving information provided about the Victims Register, information provided by the Victims Register, or by improving the dissemination of such information? If so, how?
36. Should victims who are entitled to make a victim submission be given information about the parole process and their right to make a submission more than four to six weeks before the Parole Board commences consideration about whether the offender should be released on parole? Why or why not?
37. What difficulties might there be in providing information (referred to in question 36) at an earlier time?
38. Is the current definition of 'victim of offender' for the purposes of the Victims Register appropriate? If not, how could it be improved?
39. What are the advantages and/or disadvantages of allowing more than one family member to be listed on the register, and allowing people not on the Victims Register to make a victim submission?
40. Why might people from particular backgrounds be failing to participate in the parole process? Should this issue be addressed? If so, how?
41. What do you think is the purpose of a victim submission?
42. Should policies be developed about the purpose of victim submissions and how much weight they ought to be given when considered by the Parole Board? If so, what issues should be considered when developing such guidelines?
43. What information should be included (or not included) in victim submissions?
44. Should there be more detailed guidelines for victims about what information their victim submissions should contain? If so, what sort of information should these guidelines contain?
45. Is the assistance provided to victims who make submissions appropriate and sufficient? If not, how could it be improved?

## Chapter 3

46. Are the laws regarding the processes to be followed after inmates unlawfully at large are recaptured unclear and/or ambiguous? If so, how could they be improved?
47. Are you aware of any problems or issues that have occurred, or are likely to occur, because of the requirement for recaptured escaped inmates to be taken to a police officer or an authorised justice? If so, please provide details.