



22 July 2011

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The Honourable Tom Koutsantonis MP
Minister for Correctional Services
Parliament House
North Terrace
ADELAIDE SA 5000

Dear Minister

Correctional Services (Miscellaneous) Amendment Bill 2011

I refer to an email from your Adviser, Mr Hidden, of 10 June 2011 and thank you for referring the above Bill to the Society for comment.

The Bill (along with the Second Reading Speech of the Minister for Correctional Services (8 June 2011), which provides significant detail about the proposed changes and their rationale) has been considered by the Society's Criminal Law Committee. We provide the following comments in relation to particular Sections of the Act.

Section 28(4) Generally

Our comments here relate to the existing provision which has been retained in the proposed amendment.

Firstly, we comment on the mandatory requirement to release the prisoner into the custody of the police on the request of the police. That request may be made on a mere suspicion.

There is no requirement for the suspicion to be based on reasonable grounds. We recommend, as a minimum, that the suspicion should be so based.

Secondly, on the same topic, there will be occasions when the police will be able to deal with the prisoner, as the sub-section provides, without the need for the prisoner to be released into police custody. In those instances, it would be unnecessary and inappropriate for the prisoner to be so released.

We recommend a legislative mechanism that safeguards the prisoner from unnecessary release into police custody. We suggest the objects and purposes of the proposed provision will be achieved if the Chief Executive or manager may make the prisoner available to the police and, **if considered necessary** by the Chief Executive or the manager, may release the prisoner into police custody.

Section 28(4)(b)(ii)

We do not support this provision. A citizen should not be in police custody unless certain pre-conditions are met. The existing law (applicable to all citizens) is that there must be a suspicion on reasonable grounds of the commission of an offence before a person may be detained by the police. The power to detain citizens is significant and, if unauthorised, amounts to an actionable trespass.

Prisoners are citizens and have rights. One of the rights is the right not to be detained unlawfully. This amending provision seeks to extend the already significant powers of police by permitting the detention of a prisoner who is not in any way suspected of the commission of a criminal offence. A person, whether they are a prisoner or otherwise, should not be detained by the police because of a belief or suspicion that they have knowledge or information of an offence or potential offence.

Section 31(5b):

This provision gives the Chief Executive the power to approve money being given to a prisoner by a former prisoner. The rationale for this is readily apparent. However, this can be subject to abuse or arbitrary or discriminatory approaches. The approval could be withheld for no good reason and notwithstanding the rationale for the amendment, we consider that there should be guidelines for the Chief Executive's exercise of the power.

Indeed guidelines should apply in respect of all of the powers, authorities and duties exercised by the Chief Executive or the management of correctional institutions. They need to be applied fairly, reasonably and with certainty. The process for the exercise of such powers ought to be transparent and there ought to be a mechanism of accountability.

Many of the provisions that have been introduced seek to give greater, broader, significant discretions and powers to the Chief Executive in the exercise of various prison management functions. There is a significant level of dispute or conflict or complaint within the prison system concerning the exercise of such powers. There are very limited mechanisms for review by a prisoner in respect of matters of complaint. The Ombudsman is one avenue of recourse but is poorly resourced. Prisoners do exercise their limited rights of complaint by reference to the Ombudsman for the purposes of pursuing concerns, complaints and disputes but the lack of resources at the Ombudsman's Office means that this avenue is fraught with complexity, delay or lack of resources or outcomes for prisoners' rights of redress. The Visiting Justice system appears to be either dormant, redundant or similarly does not have adequate criteria or mechanisms for accountability and reliability.

Other mechanisms need to be introduced to bring the correctional system in line with the usual dictates, requirements and standards for accountability. There is already a significant level of litigation in respect of minor issues concerning prisoners. Many unresolved issues fester and cause difficulty and conflict. Lack of resolution of disputes, as in any community, but particularly so in the prison system, leads to frustration and further conflict. Better, efficacious and modern mechanisms need to be considered and implemented. A Prison Inspectorate along the lines of the Western Australian model should be considered.

Section 34

This Section introduces a statutory criteria for restrictions for visits to a prisoner and again empowers the Chief Executive to refuse visits. This power should be exercised fairly in accordance with humane standards and there ought to be criteria by which such approvals are granted or refused.

Section 35A

This provision empowers the Chief Executive to monitor and record particular specified communications between a prisoner and another person. However, for s7 of the *Telecommunications (Interception and Access) Act 1979* not to be breached, the parties to the communication must be informed of the recording prior to the commencement of the communication. We therefore recommend that the proposed s35A(2) be amended by replacing the word "at" with "prior to".

Section 35A(3)(a)

The prohibition against monitoring conversations between a legal practitioner and a prisoner does not cover all scenarios in which conversations may occur. As presently drafted, it only applies to a legal practitioner "*who represents*" the prisoner. Legal practitioners will often speak to prisoners prior to receiving instructions to act. Most of these conversations could be with a view to determining whether the practitioner will act or for the provision of legal advice.

We recommend an amendment that extends the prohibition to all communications with a legal practitioner acting in that capacity.

Section 37AA(1a)(a)

In line with other provisions of this and other Acts, the threshold test before an intrusive action is undertaken on a citizen should be a suspicion on reasonable grounds. We therefore recommend this provision be amended by replacing "*reasonably suspects*" with "*suspects on reasonable grounds*".

Section 37AA(1a)(b)

We do not support this provision. It, in effect, authorises the Chief Executive to implement random drug testing in prisons. If that is Parliament's desire, it should legislate expressly in those terms.

Section 68(1)(b)(i)(A) and (ii)

We do not support this proposal in this form. The concept of a release probation/parole hostel, with electronic monitoring, is akin to home detention. If it is to be introduced, it should be part of the pre-release period (ie, part of the custodial sentence being served in the community). Otherwise, the effect of it is that the parolee is in custody after being released on parole.

In its present form, this provision has the effect of increasing a parolee's non-parole period. Only a court should be able to do that (and with cause).

Electronic monitoring, as a concept, is inimical to freedom and rehabilitation. There is good reason why its use is limited to home detention (ie, as part of a custodial sentence). A parolee has served the custodial part of his/her sentence. It is acknowledged that certain parolees must have conditions attached to their parole. In some cases, a breach of those conditions (eg alcohol use / access to children) may lead to further serious offending

Having said that, the State should only go so far to prevent further offending. Whilst devices such as electronic monitoring and other laws that restrict fundamental freedoms may have a beneficial effect on crime rates, they are and cannot be a feature of a society adhering to the rule of law and respecting the liberty of the citizen.

As tempting as it is to impose further restrictions on those convicted of serious offences upon their release from custody, we do not, in general terms, support the use of electronic monitoring post release from custody. If the concerns about a parolee's conduct whilst in our society are so grave he/she should not be released. This may sound like an oversimplification of the decision making process involved. In most cases, a potential parolee would much prefer to be released with electronic monitoring than to remain in custody. The desire of the potential parolee, however, is not determinative of whether he/she should be released at all.

In our view, if electronic monitoring is to be introduced in the parole process, it should be limited to the circumstance where it is as part of the custodial sentence (ie, home detention).

In extreme cases, following release on parole, it should only be imposed if authorised by the sentencing Court and only where, despite the parole board's decision to release, the Department or the Board considers there is a real risk that the parolee may not comply with a specified fundamental (or designated) condition. In that event an application to the Court must be made for the imposition of the electronic monitoring device. In such cases, the period during which the device is to be worn should, we suggest, be limited to a maximum of six months after which the Court must decide whether to extend its use to a further maximum of six months or to revoke the condition. It would be inappropriate, and against all the accepted jurisprudence on rehabilitation and reintegration, to have a parolee on electronic monitoring for the whole or a substantial portion of his/her head sentence. As indicated, if the doubts on the parolee are so grave then he/she should not be released.

Section 68(1aa)(b)

For the same reasons, we do not support this proposal. A parolee should only be subject to electronic monitoring when serving his/her sentence in the community.

Section 68(1a)(d)

This condition is a statutory condition. It is inflexible. It will have the effect of rendering all parolees placed in a situation where their existing employment is at risk or their prospects of employment are severely prejudiced. It is recognized that the rationale for this is a risk management tool and to provide protection to prospective employers and that is an appropriate matter in appropriate cases, in particular with child sex offenders. This refinement should be subject to the *Spent Convictions Act 2009*.

The Minister's explanatory remarks in Hansard refer to this provision as "*disclosure of offending as an optional condition of parole*". The wording of the proposed amendment does not establish that such disclosure is optional. It mandates disclosure. In our view, the Bill should be amended to reflect the Minister's intention that it be optional.

Whilst it is recognized that there is a need to strengthen a requirement for convicted child sex offenders to disclose their prior offending to prospective employers, this would seem to be largely redundant in light of current practices whereby most prospective employers require a police clearance certificate. If a person provides proof that a police clearance certificate has been provided to a prospective employer then that should be sufficient for the purposes of complying with the condition of parole. If the provision is designed to strengthen the requirement for convicted child sex offenders to make the disclosure, which is indeed appropriate, then the amendment to mandate this should be directed to that category of prisoners only.

Section 74(1) [clause 46]

We do not support this proposal. It appears to give no discretion to the Board other than between not acting and requiring the parolee to serve the balance of the unexpired term.

The Board should have the discretion to require the parolee to serve a portion of the unexpired term commensurate with the breach of condition. Parolees will breach conditions of parole. A large majority of those breaches will not justify the imposition of the balance of the unexpired term.

The less important conditions should not be elevated in importance to designated conditions. For the less important conditions, serving up to an extra six months imprisonment is a harsh enough consequence for breaching a condition not considered important enough to be a *designated* condition.

If any amendment is necessary, it could be along the lines of empowering the Parole Board to refer the matter to a court where the Parole Board is of the view that six months imprisonment is not sufficient for the breach.

Section 74(4)

We consider that there are considerable drafting difficulties with this Section. It appears to seek to deal with difficulties and complexities that have arisen. (See R v Bartels). It does not give credit for a person detained in custody who has not breached a condition but is alleged to have breached a condition. The provision in parentheses is ambiguous. Presumably this refers to the date on which the Parole Board directs a person serve in prison the balance of the sentence. The phrase should be amended to specify that. As it presently stands it does not refer to such a determination but rather refers to a date on which "the sentence" (and in that respect it could be some other sentence) imposed by a court or previously the subject of cancelled parole or otherwise.

Section 75(3)

This provision does not address the situation where a person is detained in custody or in prison after **allegedly** committing the offence but is found not guilty of the offence. The same concerns are expressed in respect of the phrase in parentheses.

Section 76

We accept the need for streamlining of processes for the issuing of a summons or a warrant in respect of a person suspected on reasonable grounds to be in breach of a parole condition. The section should confirm that time in custody on such a warrant is to be counted in respect of the sentence.

Section 76A

This provision contemplates a significant change in respect of warrants for parolees by empowering the Chief Executive to issue a warrant for the arrest of a person suspected on reasonable grounds to have been in breach of parole. This provision is not supported. The Chief Executive is an administrative official. The Chief Executive should not be empowered to issue a warrant for a number of reasons. The Chief Executive is not an independent person for the purposes of this power. Given that such a power can be exercised appropriately by the Board members as referred to in section 76 or by a police officer pursuant to section 76B; then the vesting of such a power in the Chief Executive does not appear to be necessary and gives rise to a potential conflict of interest. On the one hand the Chief Executive is carrying out the proper administrative functions and should not be making determinations of the nature

required for the purposes of issuing a warrant. This is so even recognising the review process in section 76A whereby a presiding member or deputy presiding member of the Board is to consider the report of the Chief Executive within 5 working days to determine whether to issue a fresh warrant or cancel the warrant issued by the Chief Executive.

Whilst accepting the importance of breaching a parole condition, it must be noted that the majority of breaches would not justify the issue of a warrant.

The current system for the issuing of warrants appears sufficient. If the matter is serious enough, a warrant (coupled with the amendments proposed with respect to the Board) can be issued with some urgency. If greater flexibility is required, it should consist of the power to apply to a magistrate for a warrant. Urgent warrant applications are routinely made at any hour of the day/week in other areas of practice and there is no reason why the same cannot be the case for serious suspected breaches of parole.

If this provision is implemented, the maximum time a parolee could be in custody without his/her matter being actioned is totally unacceptable. If there are no public holidays during the relevant period, the maximum is 18 days. That figure will increase if there are public holidays (because the timeframe within which to action the matter is measured by "*working days*").

It would be an outrage if someone was in custody for anything approaching that period only to have the Board decide to cancel the warrant. The maximum a person should be in custody should be no more than 48 hours.

The Society appreciates having been provided with the opportunity to consider this matter. Should you wish to discuss any aspect of this submission please do not hesitate to contact me.

Yours sincerely



Ralph Bönig
PRESIDENT

cc Mr Peter Severin