21 May 2019

The Hon Corey Wingard MP
Minister for Correctional Services
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By email: allison.mildren@sa.gov.au

Dear Minister

Correctional Services (Accountability and Other Measures) Amendment Bill 2019

1. I refer to our meeting of 20 May 2019 in relation to the Correctional Services (Accountability and Other Measures Bill) 2019 ("the Bill").

2. The Society is grateful to have had the opportunity to discuss its concerns with respect to the Bill, noting it is essentially a reiteration of the Correctional Services (Miscellaneous) Amendment Bill 2017. The Society provided a submission to your predecessor in relation to this Bill; this submission has been enclosed for your information.

3. The Society notes below for your reference some of the key issues discussed at our meeting as well as the Society’s views as to the new offences introduced in the Bill.

Police prisons

4. The Society is pleased to note that the proposed deletion of section 22(3) of the Correctional Services Act 1982 (SA) ("the Act") has been abandoned, as confirmed by the Chief Executive, David Brown at our meeting. As discussed, the Society had serious concerns with this proposed amendment and strongly opposed it in our 2017 submission. The facilities provided in a police prison/holding cell are very limited and not appropriate for use beyond 15 days.

Proceedings before the Parole Board

5. The Society’s concerns with the proposed amendment to allow a prisoner’s application for release on parole to be dealt with in the prisoner’s absence were noted at our meeting. The Society’s concerns with respect to a number of amendments involving the Parole Board are detailed in its 2017 submission.

6. To deny a person the ability to be present and heard at their own hearing is a breach of procedural fairness. A hearing should only be permitted to go ahead in the absence of the prisoner if he or she consents to that course, or the prisoner decides not to attend. The Society strongly opposes removing prisoners from the decision-making process.
7. It was noted by the Chief Executive that the provisions are intended to provide greater flexibility and discretion to the Parole Board and to provide for appearances by prisoners using audio-visual link. On that basis, perhaps section 77(3) could instead be amended so that the Board may receive evidence from a prisoner by audio or audio-visual link if they cannot be physically present.

*Prisoners mail*

8. As noted in our 2017 submission, the Society has a number of concerns around the proposed amendments to allow a corrections officer to open prisoner mail sent by a legal practitioner unless the legal practitioner is ‘nominated’ by the prisoner in writing. As discussed at meeting, the proposed amendment is problematic for the following reasons:

8.1 The Bill does not take into account that many prisoners are illiterate and so may not be able to provide a nomination ‘in writing’.

8.2 The Bill does not take into account that there are many prisoners who are subject to Part 8A of the *Criminal Law Consolidation Act 1935* (SA) relating to mental health provisions, whereby counsel have independent discretion to act in their clients best wishes. This may lead to prisoners not wishing to nominate their lawyer as they do not agree with the action they are taking. This could potentially lead to corrections officers having access to highly sensitive, confidential information (i.e. psychiatric reports).

8.3 There are occasions where prisoners change lawyers, this change could occur at a crucial time, i.e. when a trial is about to start. If the paper work concerning the nomination of a legal practitioner is not done promptly this may result in a corrections officer reading mail from a prisoner’s legal mail.

8.4 The Chief Executive is provided with an unfettered power to prohibit material via the regulations.

8.5 Noting the limited ability to meet with a client and obtain instructions directly and verbally, this measure could substantially interfere with a legal practitioner’s ability to obtain proper instructions from a client.

9. The Society’s critical concern with this amendment is the potential disclosure of information that is the subject of legal professional privilege. Legal privilege protects confidential communications and confidential documents between a lawyer and a client made for the dominant purpose of the lawyer providing legal advice or professional legal services to the client for use in current or anticipated litigation. Client legal privilege is a fundamental protection of the Australian legal system. The proper administration of justice means that clients must be able to communicate freely with their lawyer, who can then provide full and frank advice regarding legal rights and responsibilities. These concerns also relate to the proposed amendment to section 35A of the Act with respect to the power to monitor or record prisoner communication and is further detailed in the 2017 submission.

10. The Society notes the Chief Executive’s concerns that prohibited and illegal items are being sent into correctional institutions under the guise of “legal mail” and the amendment is intended to address this issue. The Society suggests that alternate methods could be considered to address this issue without compromising legal professional privilege, such as the stamping/marking of legal correspondence. Furthermore, consideration could be given to the use of scanning technology to ensure mail does not contain illegal items.
Official visitors

11. The Society welcomes the creation of an official prisoner advocacy role. As suggested at our meeting, the Offenders Aid and Rehabilitation Services of South Australia and the Aboriginal Prisoners and Offenders Support Services are two organisations who are well placed to provide feedback with respect to the role and functions of official visitors.

12. The Society noted the Inspector of Custodial Services Act 2003 (WA) as benchmark with respect to independent prison inspections. The legislation is prescriptive as to the role of prison inspectors and provides that Inspectors may be appointed for a term of 7 years.

13. The Bill differs to the Western Australian legislation in that under the Bill an official visitor may be appointed for a period not exceeding 3 years, on conditions determined by the Governor. Those conditions are not outlined in the legislation. The Society has concerns that this may compromise the independence of official visitors.

14. It was noted by the Chief Executive at our meeting that the intention behind the tenure of an official visitor is 3 years so that they remain critically objective. It was further noted that the role of official visitor is not a full-time role. Official visitors will be allocated typically to one correctional institution but could be allocated to more than one.

15. The Society questioned at the meeting the extent that official visitors will coordinate and collaborate as to issues that are systemic in nature. The Society further notes the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) (ratified by the Australian Government in 2017), which encourages a systemic approach to monitoring of treatment in detention.

16. The Society’s 2017 submission outlines a number of issues with respect to official visitors. As discussed at our meeting, the Society considers that it is important that official inspectors consult with, and have regard to, any submissions made by a prisoner’s legal representative. A suggested amendment is contained on page 3 of our 2017 submission.

Disruption security or order

17. The Society notes that the Bill contains a new offence of disrupting security or order, if three or more prisoners assemble together in a correctional institution and an officer or employee of the Department believes or apprehends on reasonable grounds -

17.1 that an activity prohibited by the regulations has been, or is about to be carried out;

17.2 that security or good order within the correction institution is being, or is about to be disrupted; or

17.3 that the group are challenging or about to challenge authority under the Act; or the safety or welfare of a prisoner or other person in the correctional institution is in danger.

18. If the offence involved one or more of the prisoners using or threatening the use of violence, the maximum penalty is imprisonment for 10 years. In any other case, the maximum penalty is two years.
19. The Society is concerned that the offence is based on the officer’s suspicion that an offence *may be* committed. As such, it is subject to an officer’s subjective opinion and not based on the commission of an actual offence. This is contrary to the fundamental principles of the criminal law that a crime be constituted of an overt act or omission and not merely a suspicion that one may occur, or has occurred.

I trust these comments and those contained in our submission of 2017 are of assistance. We would be please to provide further comment or assistance.

Yours sincerely

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Encl: Submission re Correctional Services (Miscellaneous) Amendment Bill 2017

cc: David Brown