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The Hon. Mark Ryan MP
Minister for Police and Corrective Services and
Minister for Fire and Emergency Services
PO Box 15195
CITY EAST QLD 4001
By email: QCSLegislation@corrections.qld.gov.au

Dear Minister,

RE: RESPONSE TO CONSULTATION ON PROPOSED LEGISLATIVE AMENDMENTS TO THE *CORRECTIVE SERVICES ACT 2006 (QLD)*

Thank you for the opportunity to provide comments on the Consultation Draft of the Corrective Services (Emerging Technologies and Security) Amendment Bill 2022 (**Bill**) which includes proposed amendments to the *Corrective Services Act 2006* (Qld) (**CSA**) and the *Corrective Services Regulation 2017* (**CSR**). While we do not oppose all of the proposed amendments in the Bill, there are several proposed amendments which, in our view, unreasonably limit the fundamental human rights of prisoners and, in particular, will negatively impact Aboriginal and Torres Strait Islander prisoners. Those proposed amendments, as will be outlined in this submission, are not supported.

Preliminary consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (**ATSILS**), is a community- based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander people across Queensland. The founding organisation was established in 1973. We now have 24 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander people.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland.

Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by nearly five decades of legal practise at the coalface of the justice arena and we, therefore, believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

Clause 4 – Amendment of section 12 (Prisoner security classification)

Additional power of chief executive to classify a prisoner into risk sub-categories

A notable feature of the proposed amendments to clause 12 of the CSA relates to the introduction of a new type of classification of a prisoner into one or more *risk sub-categories.* The effect of the proposed amendments is that in addition to the security classification that a chief executive must give a prisoner when the prisoner is admitted into a corrective services facility for detention[1], the chief executive may also classify the prisoner into one or more *risk sub-categories*. The risk sub-categories are proposed to be set out in a regulation.

Unfortunately, the package for review did not contain a consultation draft of the proposed regulation which will prescribe the risk sub-categories and, therefore, we have not had the opportunity to review the same in light of any potential concerns that we may have regarding the types of risk sub-categories, interpretation of risk sub-categories and human rights considerations.

We are aware from the proposed amendments to section 19 of the CSA in the Bill, that the chief executive may make different arrangements for the management of prisoners with different security classifications or risk sub-categories.

As it is difficult to assess the true impact of the proposed risk sub-category classification framework without seeing the risk sub-categories which are proposed, we would welcome the opportunity to review the proposed regulation before providing a position on the matter of risk sub-category classification such that we may make informed comments on this proposal.

Additional considerations that a chief executive must have regard to when deciding a prisoner's security classification

The Bill also proposes to make a number of amendments which, in our view, excessively widen the scope of matters that the chief executive can consider in making a determination as to the security classification or any risk sub-category allocated to a prisoner.

Two additional considerations are proposed to be inserted into section 12(2) of the CSA that the chief executive *must* have regard to when making a classification which are as follows:

[1] Section 12(1), CSA.

(e) the length of time remaining to be served by the prisoner under a sentence imposed by a court;

(f) information about the prisoner, if any, received from a law enforcement agency.

With respect to the proposed subparagraph (f) above, there is nothing in the proposed amendments which defines or sheds light on the type or quality of information which could be included in such a consideration and, therefore, the plain meaning of the term would denote that any type of information would be able to be considered. Furthermore, the term, *law enforcement agency*, is very broadly defined in the CSA. We are concerned that the broad drafting of proposed section 12(2)(f) coupled with the broadly drafted term, *law enforcement agency*, would allow into consideration by the chief executive a range of information that may be unfairly and unjustifiably prejudicial to a prisoner and, therefore, put them at risk of being placed into a security classification and/or risk sub-categories which may unfairly disadvantage them.

For example, it would appear that the following types of information would be able to be considered by the chief executive when classifying a prisoner under the proposed section 12(2)(f):

- information/evidence obtained from the Crime and Corruption Committee (**CCC**), noting such information/evidence is compelled evidence, i.e., evidence for which the right to self-incrimination cannot (except in limited circumstances) be exercised;
- information from any interstate police force about matters which may be unrelated or irrelevant to any assessment of actual or perceived risk posed by the prisoner;
- information from another other entity that has been, by regulation, declared to be law enforcement agency for the purposes of the CSA.

In addition to amendments which broaden the scope of what the chief executive *must* consider under section 12(2), the Bill goes even further to insert an additional consideration that the chief executive *may* consider as follows:

(3) Also, the chief executive may have regard to any matter that is relevant to the security and good management of a corrective services facility and to the safe custody and welfare of all prisoners.

Proposed section 12(3) is excessively broad and could extend to any manner of considerations. In our view, there is no legitimate justification for such broad scope of considerations when classifying a prisoner. If passed, a chief executive could have almost carte blanche ability to classify a prisoner without sufficient legislative safeguards for the prisoner. As classification of a prisoner is directly correlated with how the prisoner will be managed in the corrections facility (pursuant to section 19 of the CSA), the matters and information that a chief executive can consider when making such a determination is a critical issue.

For these reasons, we do not support proposed new sections 12(f) and 12(3).

Clause 5 – Amendment of section 13 (Reviewing prisoner's security classification)

We have significant concerns regarding the proposed amendments to the framework for reviewing a

prisoner's security and risk sub-category classification as they unreasonably infringe on the human rights of a prisoner.

Under the current CSA, a chief executive officer *must* review a prisoner's security classification at certain set intervals. The proposed amendments in the Bill seek to change this to make review of a prisoner's security classification discretionary, except in the case of prisoners who have been classified as *high* risk where the chief executive must review the prisoner's classification provided:

- the prisoner requested a review and the prisoner has not had a review in the last 12 months, or
- the prisoner has not had a review in the last 3 years.

For a prisoner to have to wait 12 months for a review of their security classification is, in our view, excessive and not in accordance with the principles of natural justice.

> Example - one of our clients in detention was not given his pain medication on time for two days in a row. In frustration, he threw a bottle of water, some of which splashed a guard. This individual was charged with serious assault, placed in the Detention Unit and then on essential lock down for two weeks which was to be further extended due to his re-classification as *high* risk. We were able to successfully remove him from that detention facility to another detention facility which reassessed the prisoner as *low* risk. This client was given a tokenistic penalty for the assault in court which was entirely subsumed by his existing sentence.

Additionally, it appears that under these proposed amendments, it will be crucial for a prisoner to take the initiative to request a review of their classification. However, what if the prisoner is not aware of their right to request a review of their security classification (notwithstanding the 12-month limitation), or if the prisoner suffers from mental illness, disability or has a cognitive deficiency or some sort that would compromise their ability to be an adequate advocate for themselves?

If, notwithstanding our concerns, the Queensland government intends to make the proposed amendments to section 13, we strongly recommend the insertion of an additional legislative provision into the CSA that requires corrective services officers to advise prisoners upon admission to the corrective services facility and at regular intervals during the prisoner's time in detention about:

- the security classification and risk sub-category classification framework;
- the fact that any classification/s that is/are given to a prisoner will affect how that prisoner will be managed in the corrective services facility; and
- the prisoner's right to request a review of their classification.

Clause 8 – Amendment of section 16 (Reconsidering decision to change prisoner's security classification)

Clause 8(3) appears to erroneously refer to section 15 rather than section 16.

Clause 9 – Amendment of section 17 (Application of *Judicial Review Act 1991* to decisions about prisoner security classification)

We are not in favour of the existing prohibition on judicial review on administrative decisions about a

prisoner's security classification. Accordingly, the proposed amendments which seek to extend the scope of the prohibition on judicial review to decisions about the classification of a prisoner into risk sub-categories is also opposed.

Clause 11 – Amendment of section 21 (Medical examination or treatment)

We hold significant concerns regarding the proposed omission of section 21(1) and (8) which currently provide that:

- a prisoner must submit to a medical examination or treatment by a doctor if the doctor considers the prisoner requires medical attention; and
- if a prisoner does not submit to an examination or treatment as required under section 21, the doctor and anyone acting at the doctor's direction may use the force that is reasonably necessary to carry out the examination or treatment.

Our objections regarding these proposed amendments, as will be outlined below, are subject to the overriding provisions in the *Voluntary Assisted Dying Act 2021* (Qld) specifically with respect to the rights of an individual to access voluntary assisted dying as an end-of-life choice.

Whilst these proposed amendments appear to be consistent with providing autonomy to prisoners with respect to matters relating to their health, sections 21(1) and (8) are very important in terms of contributing towards the provision of potentially life-saving diagnoses and medical treatments.

Section 37 of the *Human Rights Act 2019* (Qld) (***Human Rights Act***) states that:

- every person has the right to access health services without discrimination, and
- a person must not be refused emergency medical treatment that is immediately necessary to save the person's life or prevent serious impairment to the person.

As acknowledged by the Queensland Human Rights Commission, these fundamental human rights apply to prisoners and are especially relevant with respect to health services for particular groups, including Indigenous Australians and vulnerable and marginalised groups[2].

An Aboriginal and/or Torres Strait Islander person in a correctional facility is extremely vulnerable. Firstly, we know that Aboriginal and Torres Strait Islander peoples experience systemic racism including within the correctional context. Removal of these key provisions will allow more scope for Aboriginal and Torres Strait Islander prisoners to fall between the cracks, and this could result in serious illness and even death in custody. Secondly, due to entrenched social disadvantage caused by the legacy of colonialism, Aboriginal and Torres Strait Islander peoples have significantly poorer health than their non-indigenous counterparts. According to the National Aboriginal and Torres Strait Islander Health Survey conducted by the Australian Bureau of Statistics for the period of 2018-19, more than 1 in 4 Aboriginal and/or Torres Strait Islander people had at least one chronic condition that posed a significant health problem. These concerns are compounded when considering an Aboriginal and/or Torres Strait Islander persons' confinement in a correctional setting.

[2] Queensland Human Rights Commission, *Fact Sheet – Right to health services* (July 2019).

We are concerned that there may arise situations where a prisoner may not understand, or have been engaged with appropriately (i.e., in a culturally safe manner) to understand the seriousness of their medical problem/s. We are aware that there already exists significant deficiencies in the provision of adequate health care, or more specifically health care that meets the standard of section 37 in the *Human Rights Act,* for prisoners due to a range of factors including under-resourcing of health care staff in prisons and, compounding this, a significant lack if not total absence of appropriate cultural engagement with Aboriginal and Torres Strait Islander prisoners about issues relating to their health and medical treatment.

> Example - The recent Coronial Inquest into the death of Mr Vanelee Curtis Mitchell is relevant in this context. Mr Mitchell had complex and serious health conditions some of which were being managed by medications. Mr Mitchell died in his cell from a seizure which was being managed by his medications. Upon undergoing a health assessment in custody, Mr Mitchell had been classified as Category 3 with respect to his need for medical attention and placed on the visiting medical officer's waiting list. At that time, the waiting time for Mr Mitchell to be seen was between six and seven months. Although the *Findings of the inquest into the death of Vanelee Curtis Mitchell* delivered on 2 September 2022, found that Mr Mitchell's death was sudden and unexpected, the Coroner did find that "Mr Mitchell was not provided any additional cultural support with respect to his medications and medical treatment as this was non-existent during his incarceration". Furthermore, Mr Mitchell's medications were changed on more than one occasion leading up to his passing and due to a number of systemic deficiencies in this process including under-resourcing of health staff, it is not clear as to whether Mr Mitchell had been properly engaged with regarding the changes to his medications.
>
> Example - We are also aware of a current coronial inquest involving the recent death of a prisoner who initially refused medical treatment, however, became so unwell over a period of time that he was eventually taken to hospital. Two days later, he died on the operating table from multi-organ failure. It is possible that had the prisoner been compelled to obtain medical attention and treatment sooner, in accordance with intent of section 21(1) and (8), his death could have been avoided.

Removing the power to compel a prisoner to receive medical treatment could, quite literally, have dire consequences, especially in the case of Aboriginal and Torres Strait Islander prisoners who may already have poorer health when compared with non-indigenous prisoners.

We are also concerned that the proposed amendments could have negative flow-on effects on the quality of medical treatment received due to, for example:

- health professionals lowering their standard of care, on the basis that they no longer have a legislative obligation to require a prisoner to obtain medical attention or treatment;
- Aboriginal and Torres Strait Islander prisoners, in turn, developing lack of trust in the system of health professionals within the correctional context that are supposed to help manage their (sometimes complex) medical needs.

The proposed omission of section 21(1) and (8), in our view, unjustifiably and unreasonably limits a prisoner's human rights to health care as enshrined in section 37 of the *Human Rights Act.* Retaining these provisions can allow for the administration of potentially life-saving medical treatment and prevent avoidable deaths in custody.

Accordingly, we strongly oppose the proposed omission of section 21(1) and (8).

To the extent that the proposed amendments to section 21 remove the references to doctor with "health practitioner", we support those changes on the basis we are hopeful that it will, in future, pave the way for Aboriginal and/or Torres Strait Islander health practitioners to be able to deliver health services within correctional facilities.

Clause 18 – Amendment of section 124 (Other offences)

This proposed amendment seeks to insert two additional offences under section 124 relating to being in a restricted area or assisting another prisoner to access or remain in a restricted area without a reasonable excuse. The definition of *restricted area*, in our view, extends too far particularly with respect to subparagraph (c) which states that it includes "a part of the facility during a period when the prisoner is not permitted to be in that part". The examples provided in the definition include "another prisoner's cell" and "a kitchen". In our view, this behaviour does not warrant a criminal sanction (noting the maximum penalty for a breach of this offence provision is 2 years imprisonment) and is more appropriately dealt with by way of internal disciplinary conduct. To the extent that a prisoner is in a restricted area to undertake more damaging or dangerous behaviour, such as, attempting to escape or assaulting an inmate in their cell, then that conduct is already an offence under the CSA.

Additionally, we do not see the need for proposed section 124(2)(d) which extends the definition of *restricted area* further to allow for other parts of the facility to prescribed by regulation as restricted areas. We do not believe this is justified, particularly on the basis that prisoners need to be able to have a meaningful understanding of their obligations. The creation of additional restricted areas by regulation would create unnecessary complexity with respect to their understanding of where they can and can't be and when.

For these reasons, we do not support the insertion of proposed new sections 124(2)(c) and (d).

Clause 23 – Insertion of new chapter 4, part 3A – Electronic surveillance

We are concerned that the proposed amendments relating to electronic surveillance give the chief executive very broad powers, particularly given the considerations set out in subparagraph (3) are merely considerations that the chief executive *may* have regard to. Under the proposed amendments, there is nothing preventing the chief executive from disregarding all of the considerations listed in subparagraph (3) and authorise the use of a prescribed surveillance device at a corrective services facility on a whim. This could lead to an abuse of power.

Section 25 of the *Human Rights Act* enshrines the right to privacy. It provides that a person has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with. As acknowledged by the Queensland Human Rights Commission, a prisoner's right to privacy (including in relation to their correspondence) must not be interfered with "randomly or without good reason"[3]. In our view, on the proposed drafting, too much power is given to the chief executive without

[3] *Guide – Human rights in Prison* (January 2021) Queensland Human Rights Commission.

regard to a prisoner's right to privacy. In particular, it is not clear how the use of surveillance devices may interfere or compromise privileged communications (for example communications between a prisoner and their lawyer including phone calls from within the corrections facility).

Furthermore, we note that proposed section 173A(2) does not explicitly state that any authorisation under subsection (1) is limited to matters that are relevant to the purpose for which it may be authorised.

In light of the fact that there does not appear to be adequate legislative checks and balances for such an expansive power in the proposed drafting, we consider that the proposed limitation on the right to privacy of prisoners is not justified.

CONCLUSION

The disadvantages faced by Aboriginal and Torres Strait Islander peoples in prison are multi-faceted and include systemic racism within correctional facilities including with respect to the determination of their security classification under the CSA, poor administration of health care and a lack or total absence of culturally appropriate engagement with Aboriginal and Torres Strait Islander peoples regarding their health and medical treatment. In our view, this Bill contains many proposed amendments to the CSA which unreasonably widen the powers of the chief executive with respect to security classification of prisoners and unreasonably limit the human rights of prisoners' rights to health care and privacy. For the reasons outlined in this submission, these proposed amendments will unfairly further disadvantage Aboriginal and Torres Strait Islander prisoners and, therefore, are not supported.

We thank you for the opportunity to provide feedback on this proposed amendment.

Yours faithfully,

Shane Duffy

Chief Executive Officer