

# **CORRECTIVE SERVICES LEGISLATION AMENDMENT BILL 1997**

## **EXPLANATORY NOTES**

### **GENERAL OUTLINE**

#### **Objectives of the Legislation**

The main objects of this Bill are:-

1. To insert a new division in the *Corrective Services (Administration) Act 1988* (the Administration Act) to provide:
  - (a) for the outsourcing of corrective services in whole or in part by the Queensland Corrective Services Commission (the Commission) with the proviso that only a GOC may manage juvenile detainees on the Commission's behalf;
  - (b) that an entity engaged by the Commission to perform corrective services may be authorised to exercise specified powers and functions of the Commission or its officers which it may delegate to the entity's own employees;
  - (c) that in the exercise of authorised powers and functions, the engaged entity may be taken to be the Commission and that its employee delegates may be taken to be officers or defined officers of the Commission;
  - (d) that a GOC engaged to conduct the Commission's juvenile justice operations is subject to directions from the Commission in this regard and must comply with such directions;
  - (e) that while the Commission may engage an entity to discharge its responsibilities in respect of juvenile detainees, prisoners and offenders in the community, it retains corrective service responsibilities.
2. To amend provisions in the Administration Act deeming the

Commission to be the owner of property used for corrective services and clarify that some contracting entities may presently own such property or may have such property assigned to them in the future.

3. To declare the validity of instruments of authorisation and delegation given to employees of entities engaged by the Commission prior to commencement of this legislation and declare that any act that could lawfully have been done by Commission officers or employees was lawfully done by employees of the entities.

### **Reasons for the objectives and how they will be achieved**

The Government has announced that it will corporatise the service delivery elements of the Commission. This means that the management of all prisons and community corrections centres currently operated by the Commission, all community corrections services and facilities and all juvenile detention centres will be contracted to the government owned corporation to be known as QCORR. However, while private entities may compete with QCORR for the management of adult corrective services, the Commission may engage only a government owned corporation to manage juvenile detainees. The legal framework which gives contracting entities and their employees access to Commission powers and functions has been identified as inadequate. It does not allow contracting entities to delegate fundamental correctional powers to their employees. Employees of contractors have insufficient authority to exercise the full range of powers of Commission officers even though they must often perform identical duties to their Commission counterparts. This has led to uncertainty and lack of flexibility and is inconsistent with the intention to outsource the entirety of the Commission's operations to external providers. The main objects of this Bill will be achieved by the insertion of a new division in the Administration Act setting out a scheme for the devolution of corrective service powers and functions to contractors and their employees. To ensure the quality of services, the Commission may devise limitations to qualify the exercise of powers and functions contained in instruments of authorisation and delegation.

**Administrative cost to Government of implementation**

There are no anticipated costs to Government consequent to the passage of this Bill. The Commission delegates its powers and functions to its own officers. Since contracting entities have no power at law to sub-delegate, the Commission has issued delegations to the employees of those entities needing to exercise Commission powers. It also authorises employees of private providers to exercise the powers and functions that the law gives to officers of the Commission. This has resulted in a complex “paper trail” and an inefficient use of resources.

With the implementation of the legislation, administrative arrangements for devolving powers will be simplified. Authorisations to each contracting entity will set down powers and functions which the entity may itself use or may delegate. Limitations on the exercise of delegated powers will be conveyed in authorisations issued by the Commission.

Individual delegation of powers and functions to each employee of a person or body engaged by the Commission will be the responsibility of that person or body which must also bear the accompanying costs.

There are no administrative costs associated with the assignment of property to public contracting entities such as a government owned corporation. The cost of valuation and administration of property assignment will be offset against required savings to produce a budget neutral outcome. Any assigned property remains a Government asset.

Declaratory provisions in the Bill will not produce administrative costs. On the contrary, they will remove potential legal challenges by validating the legal position of contracting entities and their employees in respect of past acts. Given that the cost of any legal challenges would essentially be borne by Government, the cost savings could prove significant.

**Fundamental legislative principles**

1. Section 4(3) of the *Legislative Standards Act 1992* (“LSA”) sets down criteria for determining whether a Bill has sufficient regard to the rights and liberties of individuals. One of these criteria is that the Bill allows the delegation of administrative power only in appropriate cases and to appropriate persons. This criterion is repeated in section 4(4) of the *LSA* as one means of determining whether a Bill has sufficient regard for the institution of

Parliament.

The new section 23C of the Bill outlines the scheme for devolving Commission powers and the powers of Commission officers to contractors and their employees. Section 23C(6) provides that contractors authorised by the Commission to exercise specific corrections powers or functions, may also be permitted to delegate such powers to their employees. It may be perceived that this scheme allows administrative powers to be distributed to contractors and their employees inappropriately or indiscriminately and without the necessary safeguards. A further objection could be that the Commission cannot supervise the delegation of its powers by a contractor and thus cannot be certain that the contractor's delegates will properly exercise sensitive administrative powers in the corrections context.

In response, it must be argued that authorisations may be made subject to any conditions imposed by the Commission which has ultimate responsibility for the security, safe custody and welfare of prisoners. Delegation of powers by authorised entities may be made only to employees who are "appropriately qualified". This expression is defined to include the holding of "qualifications, experience or standing appropriate to exercise the power." Authorisations to contractors may be subject to any conditions that the Commission chooses to impose. For example, the new section 23C(4) makes it clear that particular powers may be delegated only to particular employees. The Commission can stipulate that only properly accredited employees of a contractor may exercise specific delegated authority. Further, subsection (4)(b) ensures that particular obligations to be observed by a contractor's employees may be inserted as a condition of the delegation.

In addition, the contractor (as delegator) is bound to observe section 27A of the *Acts Interpretation Act 1954*. Employee delegates must also adhere to the statutory duties imposed by this provision.

2. One of the criteria in section 4(3) of the *LSA* is that legislation is not to adversely affect rights and liberties or impose obligations retrospectively. The Administration Act allows an authorised person or body of persons engaged by the Commission to

exercise powers and functions of Commission officers and to exercise delegated authority in respect of Commission powers. It does not expressly allow employees of a person or body to exercise the same powers. Employees of entities engaged currently and in the past by the Commission have been issued with authorisations and delegations while not personally engaged by the Commission. One of the objects of the Bill is to declare that any such instruments are taken to have been validly given. Further, any act by the entity or an employee of the entity in providing a corrective service is taken to have been done lawfully if it could have been done by the Commission or a Commission officer exercising the same power. It may be argued that such validation affects prisoner rights and liberties retrospectively. However, there is no evidence that any prisoner or ex-prisoner is adversely affected by validation of these acts. Altered provisions will merely reflect the prevailing policy and intent at all times. Exercise of powers followed the assumption by all relevant parties that what was thought to be the law was in fact the law. There is considerable public interest in having the legislation corrected and the actions of relevant parties validated.

### **Consultation**

The content of this Bill has been discussed with officers in the Department of Justice including the office of the Acting Crown Solicitor, Queensland Treasury, the Department of Training and Industrial Relations, the Queensland Police Service, the Department of the Premier and Cabinet, the Office of the Public Service and the Audit Commission Implementation Office have also been consulted.

## **NOTES ON PROVISIONS**

### **PART 1—PRELIMINARY**

*Clause 1* sets out the short title of the Act.

**PART 2—AMENDMENT OF THE*****CORRECTIVE SERVICES (ADMINISTRATION) ACT*  
1988**

*Clause 2* provides that the *Corrective Services (Administration) Act 1988* is amended by this part.

*Clause 3* inserts a new section 7 (References to various officers and the commission) to provide that a reference to a community correctional officer, a custodial correctional officer, a general manager of a prison or an officer or employee of the commission in any Act is a reference, not only to a person appointed in that capacity by the Queensland Corrective Services Commission (the Commission) but also to a person taken to be such an officer or employee under the new section 23C. Further, the new section 7(5) provides that a reference to the Commission in any Act is a reference not only to the Queensland Corrective Services Commission constituted under section 9 of the Administration Act but can also refer to a person or body taken to be the Commission under the new section 23C(5).

*Clause 4* amends section 19 (Powers of Commission) by making the Commission's engagement power subject to section 23B(2). Thus the Commission may only engage a GOC to carry out its juvenile justice operations. Clause 4 also inserts a reference to the *Penalties and Sentences Act 1992*. This ensures that the Commission's operations under that Act are operations which the Commission may engage a person or body to conduct on its behalf.

This clause also omits subsections (3) and (4) of section 19. The content of these provisions is included and enlarged upon in the new section 23C.

*Clause 5* amends "Commission's officers" to "detention centre officers" to allow the Commission to make rules for the conduct of persons working in detention centres who are employees of a GOC rather than Commission employees.

*Clause 6* amends section 21 by inserting a new heading to clarify that this provision deals with delegations by the Commission within that agency only. Section 21(c) is omitted as the Commission will not in future delegate its powers directly to a person or body it engages to conduct its operations

on its behalf. A new subsection is inserted in section 21 to ensure that a person or body of persons taken to be the Commission under the new section 23C(5) will not have the power to delegate under section 21.

*Clause 7* inserts a new division 2A making significant changes to the way powers are distributed to persons or bodies engaged by the Commission under section 19(2)(f).

New section 23A defines “juvenile justice operations” to mean any “involvement” of the Commission under any provision of the *Juvenile Justice Act* 1992. When the latter Act was amended in 1996, it gave specific powers, functions and responsibilities to the Commission in respect of juvenile detainees. The Administration Act gives the Commission broad powers in respect of juvenile detention centres, detainees and persons working in detention centres. The nature of the Commission's involvement is contained in the *Juvenile Justice Act*.

New section 23A also defines “offenders” widely. It will extend to include all children and adults in the Commission's custody, persons on parole orders and persons subject to community-based orders from a Court.

New section 23B provides that the Commission's power to engage a person or body to perform its operations on its behalf extends to the outsourcing of all or any corrective services for all or any offenders. However, the Commission may only engage a GOC to carry out its juvenile justice operations.

New section 23C creates a structure for the authorisation and delegation of the Commission's powers to a person or body it engages. It involves a two-step process. In the first step, the Commission may authorise the engaged person or body to exercise the powers and functions of a “commission entity” under any Act. A “commission entity” is defined under section 23C(12) to mean the commission, a defined office holder or an officer or employee of the commission. In the second step, the engaged body may be permitted to delegate its authorised powers to its employees providing they are appropriately qualified. Subsections (3) and (4) clarify that any authorisation of a power to an engaged body may be subject to conditions including a requirement that delegation of the power may be to particular employees only and that particular obligations are to be observed by employees in exercising their delegated powers. Section 23C(7) states that section 27A of the *Acts Interpretation Act* 1954 applies to delegations given to employees of an engaged body. The full text of this provision is

attached.

(It should be noted that section 27A contains the standard set of provisions that apply to delegations under Queensland legislation generally. The section provides for delegation of powers but not delegation of functions. It deals with what is effectively delegation of a function by enabling delegation of a power to include “doing an act or making a decision for performing a function”. (See section 27A(1A).) For this reason the new section 23C, while providing for the authorisation of powers and functions, expresses the implementation of the authorisation in delegations as a delegation of powers only.)

Employees of entities contracting with the Commission will derive corrective service powers and functions pursuant to subsections (6) and (8) of section 23C. Subsection (6) allows an engaged body to delegate Commission powers, which it is authorised to exercise, to its employees. Subsection (8) provides that where an employee is delegated the powers and functions of Commission officer under an Act (as distinct from the Commission's powers), the employee is taken to be the officer named in that Act for the purpose of the power.

Subsections (5) and (8) of section 23C deal with what happens when an engaged body exercises the powers or functions of the Commission under an Act or an employee of the body exercises the powers and functions of an officer of the Commission under an Act. The respective provisions ensure that, in the exercise of such powers, the engaged body may be taken to be the Commission for the purposes of the power and the employee of the engaged body may be taken to be the relevant officer or employee of the Commission, for the purposes of the power.

The new section 23C(10) is intended to deal with particular provisions which allow a commission entity and any person or body deemed or taken to be a commission entity to delegate the powers the entity itself receives by delegation. The provision ensures that the relationship created by exercise of the sub-delegation power is not intended to be affected by the new provisions.

New section 23D provides that the Commission may give appropriate directions relevant to its juvenile justice operations to the GOC engaged to manage the Commission's juvenile detention centres. The GOC must comply with any direction and it is binding on an employee or person engaged by the GOC or any person detained in or visiting the detention



centre. Non compliance with a specified direction by an officer of a GOC can attract a monetary penalty of up to 50 penalty units (see new section 71(2)(d)).

New section 23E acknowledges that while the Commission may cease for practical purposes to be custodian of offenders in custody or in day to day control of offenders in the community, it nevertheless retains responsibilities for all offenders and that similar responsibilities are assumed by the person or body engaged to perform its corrective service operations.

New section 23F establishes that any act done under an engagement, authorisation or delegation or a copy thereof may be evidenced by a document in that regard which is evidence that the act was done lawfully.

*Clause 8* amends section 63 (commission deemed to be the owner of property) by providing that (for the purpose of any proceedings), the Commission is deemed to be the owner of each prison, detention centre and community corrections centre unless such an institution is owned by a body other than the State. A new paragraph is inserted to clarify that the Commission is not taken to own property incidental to an order administered by a body it engages to supervise community based orders. A new subsection (1B) is inserted to clarify that the Commission is not taken in any proceedings to be the owner of property which it has assigned by law (for example, in the schedule to a regulation under the *Government Owned Corporations Act 1993*) to a body it engages to perform corrective services. The new subsection (3) clarifies that reference to the Commission cannot include a person or body taken to be the Commission in this section.

*Clause 9* amends section 71 by inserting a new heading “Regulation-making power” and omitting that part of section 71(2)(b) referring to persons authorised under section 19(3) which is now omitted. A new subsection (2)(d) allows the making of a regulation imposing a penalty of not more than 50 penalty units for contravention of a specified direction under section 23D.

*Clause 10* omits the heading of part 5A which is relocated as division 2 of part 6.

*Clause 11* effects renumbering of sections 72A and 72B as sections 75 and 76.

*Clause 12* inserts a new part 6 division heading.

*Clause 13* amends part 6 (transitional provisions) by inserting Division 3 dealing with transitional and declaratory provisions.

New section 77(1) provides that authorisations or delegations given or purportedly given prior to the commencement of this provision to an employee of an entity engaged to perform Commission operations are taken to have been validly given.

Subsections (2) and (3) provide that where an act done by an engaged entity or by that entity's employees in the course of their employment, for the purpose of providing a corrective service, would have been lawful if the entity were the Commission or an officer or employee of the Commission—the act is taken to have been done lawfully notwithstanding that the relevant authorisation or delegation was defective or non-existent.

Subsection (4) states the names of the four entities whose employees are affected by this provision.

*Clause 14* amends the Dictionary provisions by inserting the titles of three defined officers of the Commission and referring to the new section 7 where references to these officers are given an enlarged meaning. The expression “detention centre officer” is also defined. The definition of “function” in relation to a Commission entity clarifies that a function includes a responsibility and anything that the Commission entity may or must do.

### **PART 3—AMENDMENT OF THE *CORRECTIVE SERVICES ACT 1988***

*Clause 15* provides that the *Corrective Services Act 1988* is amended by this part.

*Clause 16* omits the definitions of “director of community corrections” and “director of custodial corrections” in Section 10 as these positions will no longer be necessary with proposed corporatisation of corrective services. The clause also omits the titles of defined officers and inserts new definitions referring to the new section 7 of the Administration Act where references to these officers are given an enlarged meaning. The clause omits part of the existing definition of “commission” to reflect the enlarged

meaning of “commission” in the new section 7 of the Administration Act.

*Clause 17* omits reference to the director of custodial corrections in section 14.

*Clause 18* omits reference to the director of custodial corrections in section 18.

*Clause 19* omits reference to the director of custodial corrections and the director of community corrections and inserts the titles of those officers whose powers may be conferred on an inspector appointed by the Commission.

*Clause 20* omits reference to the director of custodial corrections in section 45.

*Clause 21* amends section 109 by omitting reference to an authorised person or body engaged by the commission under the Administration Act as this reference is no longer necessary. The new section 23C of the Administration Act will capture this function.

*Clause 22* omits reference to the director of custodial corrections and the director of community corrections in section 136(2). The position “officer of the commission” is inserted as the appropriate officer to perform the function described in this provision.

*Clause 23* omits reference to the director of custodial corrections and the director of community corrections in section 207(a).

## **PART 4—AMENDMENT OF THE *PENALTIES AND SENTENCES ACT 1992***

*Clause 24* provides that the *Penalties and Sentences Act 1992* is amended by this part.

*Clause 25* omits the definition of an “authorised commission officer” which is now defined in section 4A.

*Clause 26* inserts a new section 4A to define the meaning of an “authorised commission officer”. This is now defined as either an officer or employee of the Commission or an employee of a person or body

engaged under section 19(2)(f) of the Administration Act. In either case, the employee must be authorised by the Commission which does not include a person or body taken to be the Commission under section 23C(5) of the Administration Act.

### ***ACTS INTERPRETATION ACT***

27A.(1A) Authority to delegate a person's or body's powers includes authority to delegate doing an act or making a decision for performing a function of the person or body.

- (1) If an Act authorises a person or body to delegate a power, the person or body may, in accordance with the Act and any other applicable law, delegate the power to—
  - (a) a person or body by name; or
  - (b) a specified officer, or the holder of a specified office, by

the reference to the title of the office concerned.

- (2) The delegation may be—
  - (a) general or limited; and
  - (b) made from time to time; and
  - (c) revoked, wholly or partly, by the delegator.
- (3) The delegation, or a revocation of the delegation, must be in, or evidenced by, writing signed by the delegator or, if the delegator is a body, by a person authorised by the body for the purpose.
- (3A) If the delegator is a body, the delegation may be made or revoked by a resolution of the body.
- (3B) All conditions and preliminary steps required for the exercise of a delegation are presumed to have been satisfied and performed unless the contrary is established.
- (3C) Laws apply to the delegate in the exercise of a delegated power as if the delegate were the delegator.
- (4) A delegated power may be exercised only in accordance with any conditions to which the delegation is subject.
- (5) The delegate may, in the exercise of a delegated power, do anything that is incidental to the delegated power.
- (6) A delegated power that purports to have exercised by the delegate is taken to have been properly exercised by the delegate unless the contrary is proved.
- (7) A delegated power that is properly exercised by the delegate is taken to have been exercised by the delegator.
- (8) If, when exercised by the delegator, a power is dependent on the delegator's opinion, belief or state of mind, then, when exercised by the delegate, the power is dependent on the delegate's opinion, belief or state of mind.
- (8A) If—
  - (a) the delegator is a specified officer or the holder of a specified office; and

- (b) the person who was the specified officer or holder of the specified office when the delegation was made ceases to be the officer or holder of the office;

then—

- (c) the delegation continues in force; and
- (d) the person for the time being occupying or acting in the office concerned is taken to be the delegator for the purposes of this section.

(8B)If—

- (a) the delegator is a body; and
- (b) there is a change in the membership of the body;

then—

- (c) the delegation continues in force; and
- (d) the body as constituted for the time being is taken to be the delegator for the purposes of this section.

(9) If a power is delegated to a specified officer or the holder of a specified office—

- (a) the delegation does not cease to have effect merely because the person who was the specified officer or the holder of a specified office when the power was delegated ceases to be the officer or the holder of the office; and

- (b) the power may be exercised by the person for the time being occupying or acting in the office concerned.

(10) A power that has been delegated may, despite the delegation, be exercised by the delegator.

(10A)The delegation of a power does not relieve the delegator of the delegator's obligation to ensure that the power is properly exercised.

(11) Subject to subsection (12), this section applies to a subdelegation of a power in the same way as it applies to a delegation of a power.

(12) If an Act authorises the delegation of a power, the power

may be subdelegated only if the Act expressly authorises the power to be subdelegated.

- (13) Writing purporting to be, or to contain, a delegation, or the revocation of a delegation, is evidence of the delegation or revocation.
- (14) A certification signed by the delegator (or, if the delegator is a body, by a person authorised by the body for the purpose) stating anything in relation to a delegation is evidence of the thing.
- (15) A document purporting to be a certificate mentioned in subsection (14) is taken to be the certificate, and to have been properly given, unless the contrary is established.
- (16) In this section—  
“power” includes doing an act or making a decision for the purpose of performing a function.