

Corrective Services (Searches and Testing) Amendment Regulation 2024

Explanatory notes for SL 2024 No. 187

Made under the

Corrective Services Act 2006

General Outline

Short Title

Corrective Services (Searches and Testing) Amendment Regulation 2024.

Authorising law

Sections 36 to 39A and 42 of the *Corrective Services Act 2006* (CSA).

Policy objectives and the reasons for them

The CSA provides for the humane containment, supervision and rehabilitation of almost 30,000 prisoners and offenders across Queensland.

The *Corrective Services (Promoting Safety) and Other Legislation Amendment Act 2024* (Promoting Safety Act) amended the CSA to repeal same sex search requirements for personal searches, removal of clothing searches and body searches by Queensland Corrective Services (QCS) and created a head of power for further requirements to be prescribed in regulation. The purpose of these amendments was to provide greater flexibility for prescribing protections and requirements around how invasive prisoner searches are conducted. These amendments to the CSA will automatically commence upon commencement of this regulation.

The amendments in the Promoting Safety Act were progressed in response to the new *Births Deaths and Marriages Registration Act 2023* (BDMRA) which commenced on 24 June 2024. The new BDMRA removed the requirement for a person to undergo sexual reassignment surgery in order to alter their record of sex and enables a person to nominate a sex descriptor of their choice, including non-binary descriptors. This new gender identification framework means conducting invasive practices on the basis of a 'same sex' requirement will no longer provide the same level of protections for staff and prisoners and will become operationally unworkable.

Currently, the *Corrective Services Regulation 2017* (CSR) also prescribes that observed urinalysis tests must be conducted by a corrective services officer of the same sex as the

prisoner. It has been recognised that requirements for searches and testing should evolve in line with best correctional practice and human rights.

Amendments to the CSR aim to better accommodate the diverse needs of prisoners and offenders during searches and urinalysis testing, promote offenders' dignity and maintain the safety of everyone involved in these practices.

The amendments aim to:

- ensure that invasive searches and testing processes can continue to be conducted in a way that ensures the safety of everyone involved,
- maintain a baseline level of gendered safeguards for invasive searches and urinalysis testing,
- ensure the needs of prisoners and offenders are considered in decisions made about how they are searched or tested,
- allow for an offender to request modifications for how search and urinalysis practices are conducted to accommodate their special or diverse needs,
- provide the chief executive the flexibility to accommodate these requests for modifications where safe, practical, and appropriate,
- ensure practices evolve to accommodate the new gender identification framework set out by the BDMRA, and
- remove outdated binary terminology in the CSR.

This approach is informed by Queensland Corrective Services' (QCS') vision to implement evidence-based best practice corrections management, including through ensuring QCS' compliance with the *Human Rights Act 2019* (HRA) and alignment with commitments outlined in *Corrections 2030*. These commitments include ensuring all prisoners and offenders feel emotionally, culturally and physically safe; providing humane containment, supervision and rehabilitation of prisoners and offenders; and delivering trauma-informed services.

The amendments have also been informed by the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Yogyakarta Principles). The Yogyakarta Principles address a broad range of international human rights standards and their application to sexual orientation and gender identity issues, including that an individual's gender identity should not further marginalise or place them at risk of violence, ill-treatment, or physical, mental or sexual abuse.

The approach has also been informed by findings from reviews which have explored women's experiences while detained, ways these experiences can be improved, and how the needs of women can be better supported through a trauma-informed approach.

The reviews include the Queensland Human Rights Commission's September 2023 report, *Stripped of our dignity: a human rights review of policies, procedures and practices in relation to strip searches of women in Queensland prisons* (Stripped of our dignity report) which found a large proportion of female prisoners have chronic health conditions and disabilities, and almost one in 50 females entering prison are pregnant. The Stripped of our dignity report also found some sex provisions in the CSA were a barrier to supporting more flexible treatment of trans and gender diverse prisoners.

Furthermore, the Women's Safety Justice Taskforce's Hear her voice – *Report Two – Women and girls' experiences across the criminal justice system* (WSJT report) found that 87 per cent

of women in prison have been victims of child abuse, other sexual or physical abuse or domestic violence. These findings highlight the specific vulnerabilities of women in custody, and the need for improved flexibility to accommodate their diverse needs while undertaking invasive actions, such as searches and urinalysis testing.

In response to the above reviews, the amendments ensure gendered protections for female offenders remain, while also ensuring flexibility to include prisoners in decisions about invasive practices to which they are subject and enabling QCS to modify these practices where safe, practicable and appropriate.

The amendments recognise the need to go further in accommodating a wider range of special and diverse needs of all cohorts of prisoners and offenders as well as the need to align with the new gender identification framework as set out in the BDMRA.

Achievement of policy objectives

Overview

The amendments replace Part 2, Division 4 (Searches of prisoners) and Division 5 (Test samples) of the CSR with a new framework for searches and urinalysis testing.

The amendments create a framework where prisoners detained in custody are searched and urinalysis tested in accordance with the type of corrective services facility in which they are accommodated (referred to hereafter as the ‘usual procedure’). This means, where a prisoner is accommodated at a *men’s corrective services facility*, they must be searched and tested by a *male corrective services officer* and where a prisoner is accommodated at a *women’s corrective services facility* they must be searched by a *female corrective services officer*.

However, the usual procedure will not apply where a prisoner has requested a modification for how they want to be searched or tested, and the chief executive has accepted that request.

The amendments define men’s and women’s corrective services facility as well as male and female corrective services officer to provide clarity for implementation of the new provisions in a way that can accommodate varied gender identities and safeguard privacy. The drafting of these provisions account for where prisoners are on escort, are accommodated at the Princess Alexandra Hospital Secure Unit or are transferred to a health or personal care facility under section 68 of the CSA.

Requests for modifications to searches and testing while in custody

The new framework ensures prisoners are afforded an additional protection by way of new section 8B (Modification of procedures to take account of needs of prisoner) which allows prisoners, upon admission to a corrective services facility, to request modifications to how searches and testing will be performed while they are detained to account for their individual needs. The provisions do not specify the form in which a request of this kind must be made, to allow for operational flexibility.

Examples are included at section 8B(1) which demonstrate some of the types of needs which may be taken into account such as gender diversity, sexual orientation, history of abuse, culture and disability. These provisions ensure the individual needs of all prisoners are able to be considered when conducting searches and testing in line with the policy objective.

As soon as practicable after a request for modification is made by a prisoner, the chief executive must accept or reject the request and inform the prisoner of the decision. This could include

the chief executive accepting only part of a modification request, including accepting the request for one procedure and not others as required. To ensure accountability in decision making, there is a requirement for the chief executive to record the reasons for their decision.

Section 8B(5) sets out that a modification request must be accepted unless the chief executive reasonably believes:

- the request is not associated with the genuine needs of the prisoner, or the request is made for an improper purpose. For example, where a prisoner's registered sex is male, they are in custody for sexual offending against women, and they request a female officer to conduct their searches and tests, or
- accommodating the request would reduce the effectiveness of the search in an unacceptable way. For example, where the prisoner requests their under garments never be checked during a removal of clothing search, or
- accommodating the request would pose an unacceptable risk to the safety or welfare of corrective services officers or other persons. For example, a prisoner accommodated at a *men's corrective services facility* who has a history of violent and offensive behaviour toward women, requests a modification to only be searched and tested by *female corrective services officers*, or
- accommodating the request would not be practicable. For example, a prisoner requests to be searched only by several named officers with whom the prisoner is familiar. This may not be practicable as those officers' shifts may not align with the searches.

Section 8B(6) also provides that the chief executive may withdraw acceptance at the request of the prisoner, or if the chief executive forms the opinion that the modification would not now be accepted if it was requested. For example, a prisoner accommodated at a *women's corrective services facility* has a previously accepted modification request to be searched and tested by *male corrective services officers* but has consistently demonstrated lewd behaviour toward male officers during searches and tests and the chief executive now reasonably believes the modification is for an improper purpose.

To ensure ongoing flexibility, the amendments ensure prisoners can make a subsequent request to change an earlier request made at the time of admission, within reasonable limits.

The provision specifies that where the modification relates to whether a female or male corrective services officer should conduct the search or test, the prisoner must request either a *male corrective services officer* or a *female corrective services officer* as defined for the purpose of the division. However, this can include that the prisoner be searched differently for the upper and lower body.

Requirements for carrying out personal searches and removal of clothing searches

New section 8C (Carrying out personal search or search requiring removal of clothing) prescribes that search practices for personal and removal of clothing searches must be carried out in accordance with administrative procedures made under section 265 of the CSA. Detailed policy guidance will be developed by QCS in relation to these provisions to ensure effective implementation and operationalisation of the provisions.

The provisions specify that prisoners will be searched in accordance with the usual procedure described above. However, new section 8C(4) specifies that the usual procedure must be modified to accommodate requests accepted under section 8B, unless accommodating the request at that point in time —

- Would pose a risk to:

- the security or good order of the place at which the search is carried out. For example, a prisoner has requested modifications to how they are to be searched; however, there is reason to believe the prisoner is concealing a weapon, therefore the search must be conducted urgently, and those modifications are unable to be met urgently, or
- the safety or welfare of the prisoner, a corrective services officer or other person, or
- Is not practicable. For example, an emergent search of a prisoner is required while the prisoner is on escort outside of a corrective services facility and the infrastructure is not available to accommodate the modification.

Recording of removal of clothing searches

Consistent with existing protections, the amendments ensure that where an electronic device such as a closed-circuit television (CCTV) camera is monitoring an area in which a removal of clothing search is conducted, the person viewing that footage must:

- be a female corrective services officer where the prisoner being searched is accommodated at a women's corrective services facility,
- be a male corrective services officer, where the search is being conducted at a men's corrective services facility.

Where this is not possible, steps must be taken to ensure the officer does not view the recording, for example, the officer turns away from viewing the recording.

However, these requirements will not apply if the chief executive (or delegate) reasonably believes—

- there is no suitable corrective services officer readily available to view the search through the electronic device that monitors the area in which the prisoner is being searched; and
- the search is being conducted in circumstances of imminent risk to the life or safety of the prisoner or corrective services officers.

For example, where a prisoner accommodated at a *women's corrective services facility* is being moved and there are concerns the prisoner is concealing a weapon which they may use to harm themselves or the officers conducting the search. Depending on the circumstances, a *male corrective services officer* may be stationed in the control room of the relevant unit and there may be no readily available *female corrective services officers* to take over the control room operations. There could be an identified risk of the prisoner self-harming if the search is delayed for a change in control room officers. Further, there is a risk to the officers conducting the search if the CCTV camera is not monitored. It may therefore be necessary for the chief executive to authorise the viewing of the CCTV by the *male corrective services officer* to ensure that the safety of those involved is monitored in real time.

Body searches

New section 10A (Conduct of body search) again prescribes that a prisoner will be body searched in accordance with the facility in which they are accommodated. The usual procedure must be modified to accommodate requests approved under new section 8B unless there is a medical emergency relating to the prisoner. For example, the prisoner has ingested a package or an item and the prisoner's health may be harmed unless the search is conducted immediately. This maintains the existing exception currently prescribed in the CSA in relation to body searches.

The amendments also require body searches to be conducted in line with administrative procedures, with the intention for detailed policy guidance to be provided.

Urinalysis testing

The amendments maintain general requirements for how urinalysis testing is to be conducted. These requirements include that only qualified officers may conduct tests; at least two qualified officers must be present; and where a test is to be observed (in that the offender must be directly observed while producing the sample), only one corrective services officer must be able to observe the sample and the other officer must be able to view the officer observing but not the sample being provided.

Testing where the prisoner is detained

To ensure the safety of corrective services facilities, the amendments clarify that where a prisoner is detained in a corrective services facility, at least one qualified corrective services officer must be able to observe the sample being provided. This is to ensure the sample provided by the prisoner is not skewed. The need to observe tests in custody recognises the risks associated with illicit substance use in custody, including the risk to the safety and good order of the facility, those in the facility and visitors.

Where a test is to be observed, the usual procedure in terms of a prisoner being tested according to the facility in which they are accommodated will apply. However, the usual procedure must be modified to accommodate requests accepted under section 8B, unless the chief executive believes it is not practicable to do so or accommodating the modification at that point in time would pose a risk to the safety or welfare of the observer.

Testing where an offender is not detained (Community Corrections)

Section 11(7)(a) provides that where the test is to be observed for an offender who is not detained, the offender must be given a reasonable opportunity to request that the observer be a *female corrective services officer* or a *male corrective services officer*.

This request must be accommodated unless the chief executive believes the request is made for an improper purpose, or accommodating the request would not be practicable or would pose an unacceptable risk to health or safety of the observer.

Meaning of terms used in division

New section 8A (Meaning of terms used in division) sets out definitions for the division.

A female corrective services officer, female health practitioner or female helper means a person who presents themselves in the relevant capacity as a female or is designated by the chief executive as a person who may exercise powers for which a female corrective services officer, female health practitioner or female helper is required.

A male corrective services officer, male health practitioner or male helper means a person who presents themselves in the relevant capacity as a male or is designated by the chief executive as a person who may exercise powers for which a male corrective services officer, male health practitioner or male helper is required.

These definitions are not intended to define or rely on a definition of what male or female means generally. Nor are the definitions intended to assign officers a gender for the purpose of searches and testing. The definitions are necessary to ensure protections are in place for invasive practices and to create structure for how these practices will be conducted. The use of

designations also provides officers with assurance as to which searches they are authorised to conduct where this is necessary.

As a result of the new gender identification framework established by the BDMRA, it will no longer always be possible in the correctional environment to conduct invasive practices on a ‘gender matching’ basis, as gender is no longer binary, may be fluid, and may or may not be registered with the Births, Deaths, and Marriages Register. However, in line with the Stripped of our dignity and WSJT reports on women’s experiences in custody, creating a definition of male and female corrective services officer for the purpose of searches and testing maintains essential gendered protections for female and vulnerable prisoners as the starting point for every procedure.

The definitions avoid the need for a corrective services officer, health practitioner or helper to be required to disclose their gender identity or registered sex for the purpose of searches and testing. For example, where a corrective services officer presents themselves or self-identifies themselves in their role as an officer suitable to perform the duties of a *female corrective services officer*, and the chief executive has no reason to reasonably assume otherwise, the officer will be taken to be suitable to perform duties related to searches and testing for which a *female corrective services officer* is required.

The definitions also include the ability for a dialogue model where the officer, health practitioner or helper wishes to raise a relevant matter with the chief executive (such as they are unsure or wish to seek clarity on which duties to perform). For example, an officer may receive their roster which indicates they have been rostered to conduct searches of prisoners at a female corrective services facility, but the officer does not believe that is an appropriate designation for them as they identify as male. The officer can access the dialogue model with the chief executive to discuss this further. Furthermore, where the chief executive believes it is necessary to discuss the designation with the officer, health practitioner or helper, the chief executive may raise this conversation with the officer. This process does not require the officer to disclose their gender identity or registered sex and is instead framed around the duties they are to perform in their role.

The relevant chief executive then has the discretion to appropriately designate that officer, health practitioner or helper to either a person who may exercise powers for which a *female corrective services officer*, *female health practitioner* or *female helper* is required and/or a person who may exercise powers for which a *male corrective services officer*, *male health practitioner* or *male helper* is required. This designation will be made in accordance with detailed policy guidance and will consider the safety and dignity of the corrective services officer, health practitioner or helper and the safety and dignity of prisoners. All decisions will also be made in line with a human rights assessment.

References to the chief executive in relation to a health practitioner are to the relevant chief executive per the administrative arrangements.

Consistency with policy objectives of authorising law

The amendments are consistent with the policy objectives of the CSA.

Inconsistency with policy objectives of other legislation

The amendments are specific to the State of Queensland and are not uniform with legislation of the Commonwealth or another state or territory. However, a jurisdictional scan of legislation for corrections in other jurisdictions, including nationally and internationally was conducted

when considering the most appropriate model for accommodating the diverse needs of prisoners with respect to search and testing requirements. Particular reference was drawn from the approach taken in the Victorian legislation. Section 45 of the *Corrections Act 1986* (Vic) provides the authority for searches, with the requirements for how invasive searches should occur prescribed in the *Corrections Regulations 2019* (Vic) at section 86.

Alternative ways of achieving policy objectives

There are no alternative and equally effective ways of achieving the policy objectives.

It is possible for QCS to prescribe further search and testing requirements wholly in policy, however, it was considered appropriate for the requirements to be prescribed in the regulation to provide a higher level of safeguards for these invasive practices.

Benefits and costs of implementation

The amendments will be delivered within the existing budget.

Consistency with fundamental legislative principles

The amendments are consistent with fundamental legislative principles under the *Legislative Standards Act 1992* (LSA).

The amendments which confer an administrative decision-making power on the chief executive to be able to accept or reject modification requests have been drafted to ensure consistency with rights and liberties of individuals (section 4(3)(a) of the LSA). The decision-making power is subject to prescribed criteria and sufficient safeguards are included to ensure the decision-making power is appropriately applied, including the requirement for the chief executive to record their decision and the reasons for the decision. Decisions under the provision are also subject to internal review, review by the Official Visitor and judicial review under the *Judicial Review Act 1991*.

Consultation

Government and public stakeholder consultation occurred on the amendments.

The following public stakeholders were provided with a consultation version of the amendments: Crime and Corruption Commission; Equality Australia; Intersex Human Rights Australia; Intersex Peer Support Australia; LGBTI Legal Service; Queensland Law Society; Pride in Law; Prisoners Legal Service; Queensland Human Rights Commission; Queensland Ombudsman; Sisters Inside Inc.; Together Union Queensland; and Transcend Australia Limited.

The Regulation is determined to be a proposal relating to police powers and administration, general criminal laws, the administration of courts and tribunals and corrective services, and not requiring further impact analysis. In accordance with the Queensland Government Better Regulation Policy, the Office of Best Practice Regulation was consulted in relation to the Regulation.