

Corrective Services (Searches and Testing) Amendment Regulation 2024

Human Rights Certificate

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019* (HR Act), I, Nikki Boyd, Minister for Fire and Disaster Recovery and Minister for Corrective Services, provide this human rights certificate with respect to the Corrective Services (Searches and Testing) Amendment Regulation 2024 (the Regulation) made under the *Corrective Services Act 2006* (the CSA).

In my opinion, the Regulation as tabled in the Legislative Assembly, is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

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 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 in Queensland 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. However, 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 better accommodate the diverse needs of prisoners and offenders during searches and testing, promote offenders' dignity and maintain the safety of everyone involved in these practices.

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, ensure essential gendered protections for female prisoners, and safeguard privacy.

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 HR Act)

In relation to the Regulation, I consider the following human rights to be relevant:

- right to recognition and equality before the law (section 15(1)),
- right to life (section 16),
- right to freedom of thought, conscience, religion and belief (section 20),
- right to privacy (section 25(a)),
- right to cultural rights generally (section 27),
- right to security of person (section 29(1)), and
- right to humane treatment when deprived of liberty (section 30(1)).

Right to recognition and equality before the law (section 15(1))

The right to recognition and equality before the law provides that every person has the right to recognition as a person before the law and the right to enjoy their human rights without discrimination. This right reflects the essence of human rights: that every person holds the same human rights by virtue of being human and not because of some particular characteristic or membership of a particular social group.

The right to recognition as a person before the law is both an absolute and non-derogable right at international law and is modelled on Article 16(1) of the *International Covenant on Civil and Political Rights* (ICCPR). It places certain obligations on the state for the right to recognition and equality before the law to be fulfilled.

The term 'discrimination' includes direct and indirect discrimination as defined in section 7 of the *Anti-Discrimination Act 1991* (AD Act). The AD Act lists characteristics (or attributes) that are protected from discrimination, such as age, impairment, political belief or activity, race, religious belief or religious activity, sex and sexuality. In the HR Act, 'discrimination' is defined in a non-exhaustive way.

Right to life (section 16)

The right to life has been described at international law as 'the supreme right from which no derogation is permitted, even in time of public emergency which threatens the life of the nation'.¹

The right to life places both negative and positive obligations on the state. A negative obligation to refrain from conduct that causes an arbitrary deprivation of life and a positive obligation to

¹ Human Rights Committee, *General Comment No 36: the right to life (Article 6 of the International Covenant on Civil and Political Rights)*, 124th sess, UN Doc CCPR/GC/36 (30 October 2018) [3].

take steps to prevent the arbitrary deprivation of life by public entities and others.² This positive obligation includes a requirement that public authorities protect the lives of people in their care, including from harm they do to themselves.³

Right to freedom of thought, conscience, religion and belief (section 20(1))

Read in conjunction with the right to equality at section 15, the right to freedom of thought, conscience, religion and belief places an obligation on the state to protect the practices of all religions or beliefs from infringement and to protect their followers from discrimination.

Section 20(1)(a) protects the freedom to have or adopt a religion or belief: this includes the freedom to choose, replace, or retain that belief, or to adopt atheistic views.⁴ The right includes the freedom to change a religion or belief. At international law, this is both an absolute and non-derogable right.⁵ Section 20(1)(b) protects the freedom to demonstrate the person's religion or belief.

Right to privacy (section 25(a))

The right to privacy protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The right to privacy manifests the underlying value of human beings as autonomous individuals with power over their actions.⁶

The scope of the right to privacy is very broad. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally. The right protects individuals' rights against interference with physical and mental integrity, freedom of thought and conscience, legal personality, sexuality, family and home and individual identity (including appearance, clothing and gender).

The scope of this right is limited by an internal limitation that a person has the right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. This can be understood as an internal limitation, which means that it is relevant to whether a limitation on a right can be justified.

Right to cultural rights generally (section 27)

Cultural rights are directed towards ensuring the survival and continued development of the cultural, religious and social identity of minorities. Section 27 affirms the right of all persons to enjoy their culture, to practise or declare their religion and to use their language, either alone or with others who share their background. It is a negative right which protects a person from being denied the right to enjoy their culture, religion or language. A person may have been denied the right in this section if their enjoyment of the right is substantially restricted.

² Alistair Point and Kylie Evan, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 88-89.

³ *Keenan v United Kingdom* (European Court of Human Rights, Application 27229/92, 4 March 2001) ECTHR 2001.

⁴ Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [5].

⁵ *Christian Youth Camps Ltd v Cobaw Community Health Services* (2014) 50 VR 256; [2014] VSCA 75 [537].

⁶ William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P the right to recognition and equality before the law (section 15(1) of the HR Act).

. Engel, Publisher, 3rd rev ed, 2019) 459.

Right to security of person (section 29)

The right to security means that all reasonable steps must be taken to ensure the physical safety of those who are in danger of physical harm. The right to security applies independently of the right to liberty and applies whether or not the individual is detained. It includes bodily and mental integrity, or freedom from injury to the body and mind. The Human Rights Committee has said that the right to security of person is intended to protect persons against intentional infliction of bodily and mental injury, regardless of whether the person is arrested or detained.

Right to humane treatment when deprived of liberty (section 30(1))

The right to humane treatment recognises the particular vulnerability of persons in detention and intends to ensure that they are treated humanely. The underlying value of the right to humane treatment is respect of the inherent dignity that people should be afforded as human beings. The right to humane treatment when deprived of liberty is concerned with protecting people in detention and avoiding unreasonable interference with other rights. The right places a positive obligation on the State to ensure persons deprived of liberty are treated with dignity and humanity.

People deprived of their liberty will inevitably have other rights limited because of their detention. The right to humane treatment means that individuals who are detained should not be subject to any hardship or constraint that is in addition to those inevitable constraints resulting from the deprivation of their liberty (that is, a person who is detained should retain all their human rights subject only to the restrictions that are unavoidable in a closed environment).⁷ The right also places an obligation on the State to ensure all detention facilities are sufficiently resourced and kept to an appropriate standard.

Usual procedure and modifications

The amendments create a ‘usual procedure’ for prisoners in custody subject to removal of clothing, personal or body searches and urinalysis testing. 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*. The usual procedure aims to maintain a baseline level of gendered safeguards for the conduct of invasive searches and urinalysis testing.

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 on how searches and testing will be performed while they are detained to account for their individual needs. This includes modifications to the usual procedure.

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 HR Act)

The amendments to create a usual procedure and ability for the prisoner to request a modification to the usual procedure promotes the following human rights:

- the right to recognition and equality before the law (section 15(1) of the HR Act),

⁷ Human Rights Committee, *General Comment No 21: Humane treatment of persons deprived of their liberty* (Article 10 of the *International Covenant on Civil and Political Rights*), 44th sess (10 April 1992) [3]. See also *Alistair Pound and Kylie Evans*, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 200.

- the right to freedom of thought, conscience, religion or belief (section 20 of the HR Act),
- the right to privacy (section 25(a) of the HR Act),
- the right to cultural rights generally (section 27 of the HR Act),
- the right to security of person (section 29(1) of the HR Act), and
- the right to humane treatment (section 30(1) of the HR Act).

Right to recognition and equality before the law (section 15(1) of the HR Act)

The new framework ensures searches and testing practices account for all individual and diverse needs, including by recognising all gender identities, which promotes the right to recognition and equality before the law. A prisoner being detained should not prevent them from being recognised and treated in accordance with their gender identity, including where they may identify as a gender other than male or female. The new framework ensures the needs of all prisoners are able to be equally considered, in promotion of this right.

Right to freedom of thought, conscience, religion or belief (section 20 of the HR Act)

The ability for prisoners to request modifications and for the chief executive to accept modifications which account for the special and diverse needs of prisoners, such as the prisoners' religious beliefs surrounding religious headdress, promotes the right to freedom of thought, conscience, religion or belief. This is because the amendment allows modifications to be accepted which support the prisoner's beliefs, for example that only *female corrective services officers* be present for the removing of a female prisoner's hijab.

Right to privacy (section 25(a) of the HR Act)

The creation of the usual procedure promotes the right to privacy as it removes the requirement for both the corrective services officer and prisoner to disclose their gender identity at the time of each search or test. Having to disclose one's gender identity on a recurrent basis could reasonably cause a prisoner or officer to feel their privacy is continually being invaded. It may also cause a prisoner or officer to feel forced into identifying as a gender, when they may in fact not identify with any gender at that point in time.

Right to cultural rights generally (section 27 of the HR Act)

The ability for prisoners to request modifications and for the chief executive to accept modifications which account for the special and diverse needs of prisoners, such as the prisoners' cultural beliefs, promotes the right to cultural rights generally by ensuring the cultural practices or beliefs of prisoners are able to be accommodated by way of modifications where safe and appropriate.

Right to security of person (section 29(1) of the HR Act)

The usual procedure creates a safeguard from female prisoners being searched or tested by male corrective services officers (unless they consent). This promotes the right to security of person as it provides female prisoners with a safeguard from male corrective services officers viewing them in a state of undress during invasive practices. This is based on the consideration that it is generally considered safer for a female prisoner to be searched by a female officer.

Right to humane treatment when deprived of liberty (section 30(1) of the HR Act)

The usual procedure promotes the right to humane treatment while deprived of liberty by providing a legislative safeguard that protects against female prisoners being searched or tested

by male officers. It is generally considered to be safer and more humane for these processes to be conducted by an officer of a gender that is aligned to the person being searched or tested.

The ability for prisoners to request modifications also promotes the right to humane treatment as it provides a pathway for prisoners to be searched and tested in a way which accommodates their diverse and special needs, upholding their dignity as human beings. As these processes may involve observation of the prisoner while they are in a state of undress, or removing their clothing, maintaining the person's dignity through this process is essential to ensure the practice is compatible with human rights. The ability to make unique accommodations for a prisoner recognises that, while all human beings share the right to be treated humanely, the way to do that may differ between individuals.

Consideration of reasonable limitations on human rights (section 13 HR Act)

As human rights are not considered to be limited by the amendments to create a usual procedure and ability for the prisoner to request a modification to the usual procedure, further analysis of the factors set out in section 13 of the HR Act is not required.

Not accommodating a request for a modification

The amendments prescribe that 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. To ensure accountability in decision making, there is a requirement for the chief executive to record the reasons for their decision.

The chief executive may only reject a modification request where they reasonably believe the request is for an improper purpose, is not associated with the genuine needs of the prisoner, or accommodating the request would be impracticable or pose an unacceptable risk to the safety or welfare of corrective services officers or other persons.

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.

To ensure ongoing flexibility, the amendments ensure prisoners can make a subsequent request to change or withdraw an earlier request made at the time of admission, within reasonable limits. To the same extent, the amendments prescribe that the chief executive may withdraw an earlier accepted request at the request of the prisoner, or because the chief executive subsequently forms the opinion that the modification would not now be accepted if it were requested.

The amendments also provide the chief executive with the ability to refuse to accommodate a previously accepted modification at the time of a search or test, where the chief executive reasonably believes accommodating the modification at that point in time would pose an unacceptable risk to the security or good order of the place in which the search is being carried out, or to the safety or welfare of the prisoner, a corrective services officer or other person, or would not be practicable.

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 HR Act)

The amendment to provide discretion for the chief executive to not accept a prisoner's request to modify the procedure for a removal of clothing or personal search engages the following human rights:

- right to recognition and equality before the law (section 15(1) of the HR Act),
- right to freedom of thought, conscience, religion or belief (section 20 of the HR Act),
- right to privacy (section 25(a) of the HR Act),
- right to cultural rights generally (section 27 of the HR Act),
- right to security of person (section 29(1) of the HR Act), and
- right to humane treatment (section 30(1) of the HR Act).

These rights are only engaged to the extent that a search or test is then conducted in a way that does not accommodate for a prisoner's genuine request as follows. The nature of the limitation of rights would depend on the nature of the request that is not accommodated.

Consideration of reasonable limitations on human rights (section 13 HR Act)

Right to recognition and equality before the law (section 15(1) of the HR Act)

The ability for the chief executive to reject a modification request limits a prisoner's right to recognition and equality before the law in circumstances where a prisoner is searched or tested in a way that conflicts with the prisoner's genuine gender identity.

Right to freedom of thought, conscience, religion or belief (section 20 of the HR Act)

The amendments limit a prisoner's right to freedom of thought, conscience, religion or belief in circumstances where a prisoner is denied the opportunity to be searched or tested in a way that would accommodate the prisoner's religion or belief.

Right to privacy (section 25(a) of the HR Act)

The amendments interfere with a prisoner's right to privacy where a search or test is conducted in a way that does not make an accommodation requested by the prisoner to promote their privacy. For example, where the prisoner has requested the search or test is conducted contrary to the usual procedure and this is not accommodated, the prisoner's privacy may be impacted by being observed by an officer not of the category requested.

The right to privacy includes internal limitations. The right to privacy is only limited if the interference is unlawful or arbitrary. The Regulation ensures the lawfulness of the interference with privacy. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate to the aim sought.

Because questions of proportionality arise when considering justification of limits on human rights under section 13 of the HR Act, it is convenient to consider these questions below before making a determination as to whether any limitation on the right to privacy will be arbitrary.

Right to cultural rights generally (section 27 of the HR Act)

The amendment limits the right to cultural rights where a prisoner is searched in a way that does not accommodate for a requested practice that has regard to the prisoner's culture, if the failure to adopt the accommodation denies the prisoner from participation in their culture.

Right to humane treatment while deprived of liberty (section 30(1) of the HR Act)

The amendment limits this right to the extent that a search or test is conducted in a way that does not accommodate a prisoner's request for adjustment where the adjustment would have promoted the dignity of the prisoner if it was accommodated. The nature of this limitation will vary depending on the nature of the modification request which was rejected. An example is where a prisoner accommodated at a *men's corrective services facility* requests to be searched

by a *female corrective services officer*, and this request is denied. This limits the right to humane treatment because a search or test may involve a prisoner being in a state of undress and vulnerability and there is a reasonable expectation that a prisoner may be more comfortable with an officer of a particular gender.

Consideration of reasonable limitations on human rights (section 13 HR Act)

(a) the nature of the right

The right to recognition and equality before the law is about ensuring that all laws and policies are applied equally, and do not have a discriminatory effect. It also requires that laws provide equal protection for everyone.

The right to freedom of thought, conscience, religion or belief places an obligation on the state to protect the practices of all religions or beliefs from infringement and to protect their followers from discrimination.

The right to privacy protects individuals from arbitrary interference with their privacy, family, home or correspondence, particularly with respect to the inherent dignity of the human person.

The right to cultural rights generally is directed towards ensuring the survival and continued development of the cultural, religious and social identity of minorities.

The right to humane treatment recognises the particular vulnerability of persons in detention and intends to ensure that they are treated humanely. The underlying value of the right to humane treatment is respect of the inherent dignity that people should be afforded as human beings.

(b) the nature of the purpose of the limitation to be imposed by the amendments if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of limiting a prisoner's rights by conducting the search in a way that does not accommodate their request is to ensure searches and testing can be conducted safely and effectively to support the safety and security of corrective services facilities. This purpose in turn promotes corrective services officers' and other prisoners' rights to security of person by protecting their safety, including psychological safety and wellbeing.

This purpose is consistent with a free and democratic society which acknowledges the importance of maintaining the safety and security of corrective services facilities for both corrective services officers and the prisoner cohort.

(c) the relationship between the limitation to be imposed by the amendment if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The ability for the chief executive not to accept a modification request for specific reasons helps to achieve the purpose by enabling the chief executive to refuse a request where doing so would compromise the safety, efficiency or integrity of the search or test. For example, where accepting a prisoner's request for a female corrective services officer, even where associated with the prisoner's genuine needs, would pose a risk to the corrective services officer's safety because of the prisoner's offending history or behaviour in custody.

This approach ensures that the search or test can still be conducted to support the detection of contraband which presents risks to the broader safety and security of corrective services facilities.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the amendments

A number of safeguards have been built into the amendment to ensure that the limits on human rights are the least necessary to achieve the purpose of ensuring the safe and efficient conduct of searches and testing. These safeguards include:

- the default position is that the request must be accepted unless the threshold to refuse a request is met,
- the decision not to accommodate a request must be made based on an assessment of human rights,
- the inclusion of specific and limited threshold criteria which must be met for a request to be refused or not accommodation,
- the criteria are clearly linked to the purpose for limiting human rights,
- the chief executive must make a decision as soon as practicable after the request is made,
- the chief executive must record the decision and the reasons for the decision, and
- the decision is reviewable under the *Judicial Review Act 1991*.

There is no less restrictive, but equally effective, way to achieve the purposes of ensuring the safe and efficient conduct of searches and testing. Accordingly, the limit imposed on the right to humane treatment by rejecting a modification request is necessary to achieve the purposes.

Consideration was given to instead requiring a prisoner's preference to be accommodated, so long as the request was genuine and not made for an improper purpose. However, this would not be as effective because there would be no ability to ensure that despite a prisoner's preference, the search could not otherwise be done in a way that ensures the officer's safety. This also would not allow for circumstances where making the accommodation would not be practicable.

(e) the balance between the importance of the purpose of the amendments, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On one side of the scales, it is accepted that rejecting a prisoner's request for modification to how they are searched or tested could result in a prisoner being searched or tested in a way that does not accommodate their individual or diverse needs, thereby limiting their human rights. Searching and testing of a prisoner involves the prisoner being in a state of undress and vulnerability, therefore not accommodating a modification request may impact the prisoner's rights to recognition and equality, humane treatment, privacy, cultural rights and freedom of thought, religion, conscience or belief. Any such limitation must therefore be strongly justified.

On the other side, ensuring the safe and efficient conduct of searches and testing is important to ensure the safety and security of corrective services facilities, prisoners and the safety and welfare of corrective services officers conducting these practices. Providing the chief executive with the discretion to not accept modification requests in limited circumstances means safety and welfare can be prioritised. It is vital in protecting the safety and welfare of corrective services officers and the wider correctional environment that the chief executive has the power to accept or reject requests as necessary. Not providing this discretion could result in prisoners determining how searches and testing will occur, which leaves a critical gap in safety and security.

For these reasons, the limitation on a prisoner's rights is considered justified.

(f) any other relevant factors

N/A

Monitoring of an electronic recording device during removal of clothing searches

Consistent with existing requirements, the amendments ensure that the viewing of an electronic recording which monitors an area in which a removal of clothing search is being undertaken is done in accordance with the usual procedure. However, the amendments insert the ability for the chief executive to authorise an officer, regardless of whether that officer is a male or *female corrective services officer*, to monitor the electronic recording in circumstances of imminent risk to the life or safety of the prisoner or officers conducting the search.

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 HR Act)

The amendment to provide discretion for the chief executive to authorise the monitoring of electronic recording of a removal of clothing search in circumstances of imminent risk to life or safety engages the following human rights:

- right to privacy (section 25(a) of the HR Act), and
- right to humane treatment while deprived of liberty (section 30(1) of the HR Act).

Right to privacy (section 25(a) of the HR Act)

The amendment to allow for any available officer to monitor an electronic recording which monitors an area where a removal of clothing search is being conducted in a situation of imminent risk interferes with the prisoner's right to privacy. This occurs where having a particular officer approved to monitor the area is inconsistent with the usual procedure. This interferes with the prisoner's right to privacy because the search involves the prisoner being in a state of undress and there is a reasonable expectation in a female facility that the footage would not be able to be viewed by a *male corrective services officer* and vice versa.

The right to privacy includes internal limitations. The right to privacy is only limited if the interference is unlawful or arbitrary. The Regulation ensures the lawfulness of the interference with privacy. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate to the aim sought.

Because questions of proportionality arise when considering justification of limits on human rights under section 13 of the HR Act, it is convenient to consider these questions below before making a determination as to whether any limitation on the right to privacy will be arbitrary.

Right to humane treatment while deprived of liberty (section 30(1) of the HR Act)

The amendment to allow for any available officer to monitor an electronic recording which monitors an area where a removal of clothing search is being conducted also interferes with the prisoner's right to humane treatment. This limitation would only occur where having a particular officer approved to be viewing the search is inconsistent with the usual procedure. This interferes with the prisoner's right to humane treatment while deprived of liberty because the search involves the prisoner being in a state of undress and extreme vulnerability. Generally, there should be an expectation that the same level of gendered safeguards for viewing the search via electronic recording should apply.

Consideration of reasonable limitations on human rights (section 13 HR Act)

(a) the nature of the right

The right to privacy protects individuals from arbitrary interference with their privacy, family, home or correspondence, particularly with respect to the inherent dignity of the human person.

The right to humane treatment recognises the particular vulnerability of persons in detention and intends to ensure that they are treated humanely. The underlying value of the right to humane treatment is respect of the inherent dignity that people should be afforded as human beings.

(b) the nature of the purpose of the limitation to be imposed by the amendments if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of ensuring that the search can be viewed in a situation of imminent risk, regardless of whether the officer is a male or *female corrective services officer* is to protect the life and safety of those involved in a removal of clothing search in instances where an imminent threat has been identified. This includes protecting the safety of the corrective services officers conducting the search in instances the prisoner may be considered at risk of harming the officers, as well as protecting the prisoner from potential self-harm attempts where such a risk has been identified. This promotes the right to life (section 16) and the right to security (section 29(2)) for those involved.

(c) the relationship between the limitation to be imposed by the amendments if enacted, and its purpose including whether the limitation helps to achieve the purpose

There are some instances where there are heightened risks to the safety of those involved in removal of clothing searches. Risks can escalate extremely quickly in situations where a prisoner has a blade secreted, for example. Having someone monitoring the search live ensures that if the risk does escalate, additional support can be deployed immediately to mitigate the situation. If someone was not able to monitor the screen, there is a risk that additional support may be too late to prevent harm.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the amendments

A number of safeguards have been built into the amendments to ensure that the limits on human rights are the least necessary to achieve the purpose of ensuring safety during high-risk removal of clothing searches. These safeguards include:

- the threshold for authorisation is high, permitting the exception only in circumstances of imminent risk to life and safety of those involved in the search,
- the decision must be made based on an assessment of human rights, and
- the decision maker must be first satisfied that there is no suitable officer available.

Consideration was given to a number of alternatives. However, none would limit human rights to a lesser extent while still achieving the purpose of the amendment, including:

- removing the ability for a corrective services officer to monitor an electronic recording of a removal of clothing search altogether would pose a risk to the life and safety of those involved in the search as it would remove the ability for an officer to monitor the search live for any elevation in risk which requires additional support to be immediately requested, and

- delaying a search until a suitable corrective services officer is available to monitor the recording may cause a risk to the life and safety of the prisoner being searched in instances where there are concerns the prisoner has a weapon concealed and may attempt to self-harm quickly.
- (e) the balance between the importance of the purpose of the amendments, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On one side of the scales, it is accepted that allowing an officer to monitor an electronic recording of a removal of clothing search against the requirements of the usual procedure may affect a prisoner's right to privacy and right to humane treatment. As the search involves the prisoner in a state of undress and vulnerability, it is essential that any such interferences are strongly justified.

On the other side of the scales, the ability for this authorisation to occur is limited to circumstances where there is an imminent threat to the life or safety of those involved in the search and is considered necessary to ensure the safety of the individuals involved. The legislation includes safeguards to minimise the instances where this occurs, in particular, by including a high threshold to deviate from the usual procedure.

For these reasons, the impact on a person's right to privacy presented by this amendment is considered to not be arbitrary, so it is considered that this amendment does not limit the right to privacy. However, even if the right is considered limited, the limitation is considered justified for the above reasons. Furthermore, the limitation on a prisoner's right to humane treatment is considered justified. Any limitations on other human rights are also considered justified.

- (f) any other relevant factors

N/A

Body searches in emergencies

The amendments include an exception in relation to body searches which prescribes the usual procedure and/or accepted modifications need not be complied with for a body search if there is an emergency relating to the prisoner and the search is urgently required. This maintains the existing exception currently prescribed in the CSA in relation to body searches.

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 HR Act)

The discretion for a body search to occur regardless of the usual procedure and/or accepted modifications engages the following human rights:

- right to privacy (section 25(a) of the HR Act), and
- right to humane treatment (section 30(1) of the HR Act).

Right to privacy (section 25(a))

The amendment engages the right to privacy to the extent an exception is granted, as this may result in a prisoner being body searched against the usual procedure. This interferes with a prisoner's right to privacy because the search involves the prisoner being in a state of undress and may also include the prisoner's internal cavities being examined. There is therefore a reasonable expectation that a female prisoner would be body searched by a female health practitioner.

The right to privacy includes internal limitations. The right to privacy is only limited if the interference is unlawful or arbitrary. The Regulation ensures the lawfulness of the interference with privacy. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate to the aim sought.

Because questions of proportionality arise when considering justification of limits on human rights under section 13 of the HR Act, it is convenient to consider these questions below before making a determination as to whether any limitation on the right to privacy will be arbitrary.

Right to humane treatment (section 30(1) of the HR Act)

The amendment limits prisoners' rights to humane treatment to the extent an exception is granted, as this may result in a prisoner being body searched against their preference/against usual procedure which could impact on the dignity of the prisoner. This is because a body search is a highly invasive practice which may involve the prisoner being in a state of undress and may also involve examining the prisoner's internal cavities. There is therefore a reasonable expectation that the body search be conducted in a way which minimises any impact on the prisoner's dignity, including accommodating the prisoner's modification requests.

Consideration of reasonable limitations on human rights (section 13 HR Act)

(a) the nature of the right

The right to privacy protects individuals from arbitrary interference with their privacy, family, home or correspondence, particularly with respect to the inherent dignity of the human person.

The right to humane treatment when deprived of liberty recognises the particular vulnerability of persons in detention and intends to ensure that they are treated humanely. The underlying value of the right to humane treatment is respect of the inherent dignity that people should be afforded as human beings

(b) the nature of the purpose of the limitation to be imposed by the amendments if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of allowing for a search to be conducted despite the usual procedure being met is to ensure the health and safety of the prisoner being searched. This in turn promotes the right to life and right to security for the prisoner.

(c) the relationship between the limitation to be imposed by the amendments if enacted, and its purpose including whether the limitation helps to achieve the purpose

It is necessary to limit a prisoner's privacy and dignity in an emergency relating to the prisoner, to ensure a body search can be conducted without delay where necessary. For example, a prisoner may have secreted a package of illicit substances which is causing the prisoner to have a medical episode and there is an urgent need to conduct a body search to remove the package to mitigate the risk to the prisoner's life. The amendment ensures body searches can occur immediately where a prisoner's life or health is at risk. For example, the amendment prevents the delay of an urgently required body search in the instance of an emergency where a suitable health practitioner is not readily available.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the amendments

A number of safeguards have been built into the amendments to ensure that the limits on human rights are the least necessary to achieve the purpose of ensuring body searches are able to occur without delay in situations of risk to the prisoner's life or safety. These safeguards include:

- the delegation for making a designation will sit with the health practitioner who is appropriately placed to determine if a search is urgently required for the health or safety of the prisoner,
- a qualified health practitioner will be responsible for conducting the search, and
- the threshold for authorisation is narrow, permitting the exception only in an emergency.

No alternative options were identified which would limit human rights to a lesser extent while still achieving the purpose of the amendment as effectively.

(e) the balance between the importance of the purpose of the amendments, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On one side of the scales, it is accepted that conducting a body search of a prisoner is a highly invasive practice which may be exacerbated by conducting the search against usual procedure or their accepted modification request. It is therefore a reasonable expectation that the usual procedure is followed during a body search to minimise impacts on the prisoner's dignity and privacy. As the search includes the prisoner being in a state of undress and may include the examining of the prisoner's internal cavities, it is essential that any interferences with the prisoner's right to humane treatment and privacy be strongly justified.

On the other side of the scales, the purpose of the provision is to ensure a body search can occur regardless of which health practitioner is available in circumstances where the search is urgently required to protect the life and safety of the prisoner. The purpose of the provision is to protect the life and safety of the prisoner in emergency situations.

For these reasons, the impact on a person's right to privacy presented by this amendment is considered to not be arbitrary, so it is considered that this amendment does not limit the right to privacy. For the same reasons, the limitation on a prisoner's right to humane treatment is considered justified. Any limitations on other human rights are also considered justified.

(f) any other relevant factors

The ability for the chief executive to make an exception maintains the existing exception currently prescribed in the CSA in relation to body searches.

Urinalysis testing in custody

The amendments provide for urinalysis testing in custody to be observed in accordance with the usual procedure. Amendments for the prisoner to request an accommodation, including in relation to whether the test is observed by a male or female corrective services officer also apply to these tests. Similarly, the chief executive may refuse to accommodate an accepted modification for a test on an individual occasion where it would be unsafe or impracticable to do so. The amendments also clarify that for prisoners detained, observed testing is mandatory. Whereas for offenders not detained, observed testing is discretionary. This is consistent with current practice.

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 HR Act)

Previous human rights analysis in this statement in relation to the usual procedure, accommodation of requests and ability for the chief executive to refuse to accommodate a request apply for urinalysis testing in custody. Further analysis of these aspects of the framework for urinalysis testing in custody is not required.

The amendments to clarify that urinalysis tests in custody which clarify the requirement for all tests in custody to be observed, engage the following human rights:

- the right to privacy (section 25(a) of the HR Act), and
- the right to humane treatment while deprived of liberty (section 30(1) of the HR Act).

The right to privacy (s25(a) of the HR Act)

The amendments interfere with the right to privacy as the prisoner must be observed providing the sample of urine. This is an activity which would usually be done in private.

The right to privacy includes internal limitations. The right to privacy is only limited if the interference is unlawful or arbitrary. The Regulation maintains the lawfulness of the interference with privacy, consistent with current regulation. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate to the aim sought.

Because questions of proportionality arise when considering justification of limits on human rights under section 13 of the HR Act, it is convenient to consider these questions below before making a determination as to whether any limitation on the right to privacy will be arbitrary.

The right to humane treatment (section 30(1))

The amendments limit the right to humane treatment as the dignity of a prisoner may be impacted by being observed producing a urine sample by an officer. This is because while a prisoner is providing a urinalysis sample, their genitals are within the view of the observing officer to confirm the sample is not tampered with. Having the requirement that all tests in custody be observed further impacts prisoners' dignity by requiring this invasive practice to occur each time the prisoner is subject to a test.

(a) the nature of the right

The right to privacy protects individuals from arbitrary interference with their privacy, family, home or correspondence, particularly with respect to the inherent dignity of the human person.

The right to humane treatment recognises the particular vulnerability of persons in detention and intends to ensure that they are treated humanely. The underlying value of the right to humane treatment is respect of the inherent dignity that people should be afforded as human beings.

(b) the nature of the purpose of the limitation to be imposed by the amendments if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of requiring all tests in custody to be observed is to protect the safety and security of corrective services facilities and all prisoners, corrective services officers and others at facilities. This in turn promotes the right to security for those persons and is a purpose that is consistent with a free and democratic society.

(c) the relationship between the limitation to be imposed by the amendments if enacted, and its purpose including whether the limitation helps to achieve the purpose

The amendments which clarify that all tests in custody must be observed recognises the risks associated with substance use in a corrective services facility and ensures such use can be identified and addressed. Substance use in a corrective service facility poses a risk to the security and good order of the facility and the safety of staff, visitors and the prisoner engaging in substance use. It is also counterproductive to the prisoner's rehabilitation. Having practices in place to identify substance use in custody promotes the right to life and the right to security of those within the corrective services facility as it ensures substance use can be detected and addressed.

The mandatory observing of tests in custody ensures practices are in place to prevent prisoners from attempting to skew samples, and any substance use can be identified. Having a strict process for detecting substance use in custody is important in deterring prisoners from engaging in substance use which could subsequently pose a risk to the safety and good order of the facility, to other prisoners and staff and to the prisoner engaging in use.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the amendments

A number of safeguards have been built into the amendments to ensure that the limits on human rights are the least necessary to achieve the purpose of ensuring substance use in custody can be detected to ensure safety. These safeguards include:

- testing is done in accordance with the usual procedure, ensuring that prisoners at a women's facility are observed by female officers and vice versa,
- prisoners may request modifications, including in relation to the usual procedure for how they are tested,
- testing may only be conducted by qualified corrective services officers,
- only the observing officer may be able to observe the prisoner providing the sample, and
- the officer not observing the sample must still be able to observe the observing officer.

There is no less restrictive, but equally effective way to achieve the purpose of ensuring substance use in custody can be detected to ensure safety and in a way which accommodates gender diversity.

Consideration was given to removing the requirement for all tests in custody to be observed which would reduce the impact on prisoners' rights to privacy and rights to humane treatment, as the prisoners would no longer be required to enter into a state of undress or have their genitals viewable by a corrective services officer on every occasion they are tested in custody. However, this would create an increased risk of undetected substance use within the correctional environment which would pose an unacceptable risk to the safety of other prisoners, corrective services officers and visitors and an unacceptable risk to the security and good order of the corrective services facility.

(e) the balance between the importance of the purpose of the amendments, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On one side of the scales, it is accepted that observing a prisoner producing a urine sample is an invasive practice that is likely to cause discomfort for all involved, but particularly so for

female offenders. This is because of the ability for a corrective services officer to view a prisoner's genitals while they produce a sample of urine. The requirement for this private action to be observed each time therefore must be strongly justified.

On the other side of the scales, the requirement of all tests of detained prisoners to be supervised also assists with the detection and prevention of substance use in custody which poses a threat to the safety of everyone within the facility.

For these reasons, the impact on a person's right to privacy presented by this amendment is considered to not be arbitrary, so it is considered that this amendment does not limit the right to privacy. For the same reasons, the prisoner's right to humane treatment is also not considered to be limited. However, even if these rights are considered limited, the limitation is considered justified for the above reasons. Any limitations on other human rights are also considered justified.

(f) Any other relevant factors

The amendments relating to the requirement for all tests in custody to be observed are clarifying in nature only, and do not create a new requirement.

Urinalysis testing in the community

The amendments do not change existing practices for how an observed urinalysis test is to be conducted for a prisoner who is not detained. However, the amendments provide offenders an opportunity to request either a male or *female corrective services officer* to observe them producing a urinalysis sample.

The amendments provide that that preference for male or female officer to observe the test must be accepted unless the request was made for an improper purpose, accommodating the request would pose an unacceptable risk to the safety or welfare of the observer or accommodating the request is not practicable.

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 HR Act)

The amendments which provide offenders an opportunity to request either a male or female corrective services officer to observe them producing a urinalysis sample, and for that preference to be refused engage the following human rights:

- Right to privacy (section 25(a) of the HR Act).

Right to privacy (section 25(a) of the HR Act)

The amendments interfere with a prisoner's privacy only to the extent that a decision is made to observe the test with an officer that is not in line with the offender's genuine preference.

This is because the observing of an offender undertaking a urinalysis test involves the offender's genitals being viewable by the observing officer. A general principle that the actions should be viewed by an officer whose gender or sex aligns with the offender's is an important safeguard to uphold the offender's dignity while their privacy is being interfered with.

It is not accepted that a refusal to accommodate the offender's preference where it is decided that the preference was made for an improper purpose limits the offender's human rights.

The right to privacy includes internal limitations. The right to privacy is only limited if the interference is unlawful or arbitrary. The Regulation ensures the lawfulness of the interference

with privacy. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate to the aim sought.

Because questions of proportionality arise when considering justification of limits on human rights under section 13 of the HR Act, it is convenient to consider these questions below before making a determination as to whether any limitation on the right to privacy will be arbitrary.

(a) the nature of the right

The right to privacy protects individuals from arbitrary interference with their privacy, family, home or correspondence, particularly with respect to the inherent dignity of the human person.

(b) the nature of the purpose of the limitation to be imposed by the amendments if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The ability for an officer that is not of the offender's preference to still observe the test aims to ensure the safety and wellbeing of the offender and the observing officer. This in turn promotes the right to security for those involved in the test.

(c) the relationship between the limitation to be imposed by the amendments if enacted, and its purpose including whether the limitation helps to achieve the purpose

Urinalysis testing in the community is conducted to identify risk factors for the offender including drug use. Where a test needs to be observed, this ensures the accurate detection of those risks. The ability to refuse to accommodate the preference for a male or female officer ensures that the test can still occur to identify risk factors for the offender. It also ensures that the safety and wellbeing of the officer observing is not compromised, such as where the offender may pose specific risks to an officer of that type. This approach also enables the officer's wellbeing and psychological safety to be considered, including where there are concerns about the officers being exposed to genitals at variance to their own.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the amendments

A number of safeguards have been built into the amendments to ensure that the impacts on human rights are the least necessary to achieve the purpose of ensuring the safety of the offender and observing officer. These safeguards include:

- not all tests are required to be observed,
- every offender is able to nominate a preference for who can observe the test,
- the default position prescribed is that the offender's request must be accepted,
- as a high threshold, the chief executive may only reject a request where they reasonably believe accepting the request is made for an improper purpose or accommodating the request would pose an unacceptable risk to the safety or welfare of the observer or is not practicable,
- testing may only be conducted by qualified corrective services officers,
- only the observing officer may be able to observe the offender providing the sample, and
- the officer not observing the sample must still be able to observe the observing officer.

The alternative of requiring the test to be observed by an officer of the offender's preference was considered. However, this would not offer the ability to ensure the safety of the observing officer by providing the opportunity to protect that officer from harm. This was therefore considered to not be as effective at achieving the objective.

- (e) the balance between the importance of the purpose of the amendments, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On one side of the scales, it is accepted that observing an offender producing a urine sample impacts the privacy of the offender as the process is an invasive practice which includes the officer being able to view the offender's genitals and the offender passing urine. This process is likely to cause discomfort for all involved, but particularly so if the observing officer is not a male or female officer in line with the offender's preference. It is therefore necessary for any interference with the right to privacy to be strongly justified.

On the other side of the scales, there is a need to ensure the test can be conducted effectively to promote the safety of the offender and the safety of the observing officer. The ability to refuse to accommodate the offender's preference for a male or female officer to conduct the test helps to achieve this purpose by giving the chief executive discretion to ensure the safety of all involved. There are also safeguards in place to minimise the impacts.

For these reasons, the impact on a person's right to privacy presented by this amendment is considered to not be arbitrary, so it is considered that this amendment does not limit the right to privacy. However, even if this right is considered limited, the limitation is considered justified for the above reasons.

- (f) Any other relevant factors

N/A

Definition of male and female corrective services officer

Amendments to the search and testing framework include the insertion of definitions for men's and women's corrective services facilities and male and female corrective services officers.

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 HR Act)

Creating a definition of male and female corrective services officer engages the following human rights:

- The right to privacy (section 25(a) of the HR Act)

Right to privacy (section 25(a) of the HR Act)

The dialogue model created by the definition provisions engages the right to privacy as it may place an obligation on corrective services officers to have a conversation with the chief executive about their gender for the purpose of searches and testing. This may cause an officer to feel like they must disclose their gender identity, something which they may consider to be a private matter. It may also cause an officer to feel as though they must identify as a gender despite them being gender fluid. The provision further engages the right to privacy as it could lead to corrective services officers incorrectly being assumed to be in one category. Assuming which cohort of prisoners an officer is to search may cause an officer to feel obliged to search that cohort of prisoner or may cause the officer to feel they have been wrongly assigned a gender identity which does not align with their sense of self.

The right to privacy includes internal limitations. The right to privacy is only limited if the interference is unlawful or arbitrary. The Regulation ensures the lawfulness of the interference with privacy. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate to the aim sought.

Because questions of proportionality arise when considering justification of limits on human rights under section 13 of the HR Act, it is convenient to consider these questions below before making a determination as to whether any limitation on the right to privacy will be arbitrary.

Consideration of reasonable limitations on human rights (section 13 HR Act)

(a) The nature of the right

The right to privacy protects individuals from arbitrary interference with their privacy, family, home or correspondence, particularly with respect to the inherent dignity of the human person.

(b) the nature of the purpose of the limitation to be imposed by the amendments if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the definitions is to ensure protections are in place for invasive practices and to create structure for how these practices will be conducted. This ensures the new search and testing framework can be effectively implemented and maintains essential gendered safeguards for female prisoners and officers.

The definition of male and female corrective services officer is not intended to define or rely on a definition of what male or female means generally.

(c) the relationship between the limitation to be imposed by the amendments if enacted, and its purpose including whether the limitation helps to achieve the purpose

The ability for officers to access a dialogue model with the chief executive to discuss which designation would be more appropriate for their individual circumstances, ensures all officers are able to undertake searches and testing regardless of their gender identity. The designation process also provides officers with assurance as to their approval to conduct searches and testing.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the amendments

A number of safeguards have been built into the amendments to ensure that the limits on human rights are the least necessary to achieve the purpose of ensuring protections and structures are in place for invasive practices. These safeguards include:

- the wording of the definitions is clear in that being designated to either category is not intended to assign a corrective services officer a gender,
- the delegation for determining whether a person is designated as a *female corrective services officer, female health practitioner or female helper* and or in addition to a *male corrective services officer, male health practitioner or male helper* will sit with the chief executive, and
- the provision allows for a dialogue model where appropriate.

Consideration was given to a number of alternatives. However, none would limit human rights to a lesser extent while still achieving the purpose of the amendment, including:

- omitting any definition of male or female corrective services officer would impact on corrective services officers' privacy to a lesser extent. However, this would erode essential gendered protections for female prisoners, as a lack of structure in this regard could result in a male corrective services officer searching or testing a female prisoner without the prisoner's consent, and

- requiring all corrective services officers to be proactively designated would require officers to disclose their gender identity which would impact on an offender's right to privacy to a heavier extent than the amendments.
- (e) the balance between the importance of the purpose of the amendments, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On one side of the scales, it is accepted that creating a definition of male and female corrective services officer for the purpose of searches and testing limits the rights of corrective services officers in instances where that officer may not identify as male or female or does not wish to discuss their gender identity with the chief executive. A person's gender identity relates to their private sense of self and may not be something they wish to disclose to others and any impact on a corrective services officer's privacy in this regard must be justified.

On the other side of the scales, ensuring essential gendered safeguards for women in custody is an important safeguard which must be maintained. Prisoners being searched and tested are in a state of undress and vulnerability and it is important steps are taken to ensure any impact on a prisoner's rights during these invasive practices are as minimal as possible. It is therefore necessary to create structure for how invasive practices will be conducted as the gender identification framework evolves.

For these reasons, the impact on a person's right to privacy presented by this amendment is considered to not be arbitrary, so it is considered that this amendment does not limit the right to privacy. However, even if the right is considered limited, the limitation is considered justified for the above reasons. Any limitations on other human rights are also considered justified.

- (f) any other relevant factors

N/A

Conclusion

I consider that the regulation is compatible with human rights under the HR Act because it limits human rights only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

THE HONOURABLE NIKKI BOYD MP
Minister for Fire and Disaster Recovery and
Minister for Corrective Services