

## **Privacy Commissioner's Submission to the Justice Select Committee on the Corrections Amendment Bill**

### **Introduction**

1. The Corrections Amendment Bill (the Bill) includes a suite of amendments to the Corrections Act 2004 designed to improve the ability of the Department of Corrections (the Department) to safely and humanely manage prisoners, improve prisoner discipline and safety, and ensure the fair treatment of prisoners.
2. My comments relate to clauses 21 and 22. Clause 21 replaces sections 91 and 92 with new sections 91 to 92B to enable the use of imaging technology for prisoners, staff, and prison visitors. This technology will operate alongside existing search options including scanner searches, x-ray searches, pat downs, metal detectors and strip searches. Clause 22 amends section 94 to allow for imaging technology search as an alternate to a strip search.
3. Imaging technology searches carried out with full-body scanners are personal searches that aim to locate items concealed under the clothing, and in some cases within the body, by displaying them on a screen. These searches have the potential to gather information of an extremely sensitive nature, including images of a person's naked body.
4. While the Department is permitted (and in some instances required) to search prisoners, staff and visitors to detect contraband, the collection and use of personal information through imaging technology searches should be proportional to the importance of the policy objective. As far as possible the search powers should include measures to protect this information against inappropriate use or disclosure.

### **Safeguards for scanner and imaging technology searches (sections 91 to 92B)**

5. I am pleased with the level and nature of engagement on the policy development that officials had with me prior to the introduction of the Bill. As a result of this consultation, sections 92A and 92B have been amended to include important legislative safeguards for the collection, use and retention of personal information gathered using imaging technology searches.
6. Section 92A(2) now provides restrictions on the types of image that may be displayed. It requires that an image produced as a result of an imaging technology search must, so far as practicable, avoid showing a clear image of the body beneath clothing, and obscure the genitals or make them not easily distinguishable.
7. An image of a person's naked body including genitals is extremely sensitive personal information. In the context of Corrections prisoner management, using imaging technology rather than a strip search is more effective at locating internally concealed contraband, is potentially less invasive of an individual's privacy, and may be less distressing for certain prisoners (such as those who have suffered sexual assault).

8. Section 92A(3) and (4) establish further restrictions on the use, retention and disclosure of imaging technology images. Section 92A(3) requires that an image must be retained only as long as is necessary to determine the presence of an unauthorised item. This will ensure that sensitive images are not retained longer than necessary, ensuring better compliance with Information Privacy Principle 9 of the Privacy Act 1993.
9. Section 92A(4) requires that a person conducting an imaging technology search must not photograph or copy the image or provide it to another person. Contravention of this section will be treated as an offence with a maximum fine of \$2000, consistent with other offences under section 146 of the Act.
10. I consider the restrictions in the Bill regarding the types of images that may be displayed when using imaging technology, and preventing inappropriate use, retention or disclosure of those images, to be generally appropriate given these circumstances.

### **Restrictions on the sex of persons carrying out searches (sections 92B and 94)**

11. The existing section 94 requires that a search (whether rub-down or strip search) must be carried out only by a person of the same sex as the person to be searched. Clause 22 amends section 94 to include imaging technology searches used as an alternative to a strip search. New section 92B also introduces a similar requirement that an image produced using imaging technology may be viewed only by an officer or constable of the same sex as the person who is searched. These requirements assume that same sex searches will be less intrusive to the person searched and better prevent embarrassment and loss of dignity.
12. I consider that a person's genuine preference as to the sex of the person carrying out a search should be a factor to be considered and accommodated where possible. This is a privacy enhancing approach as it allows individuals who may be uncomfortable with a person of the same sex searching them to express their preference. For example, a gay male prisoner may feel more comfortable with a female guard conducting a search.
13. I recognise that there may be situations where a prisoner may seek to abuse any provision allowing for their preferences to be taken into account. For example, a prisoner may express a preference for an opposite sex search, seeking to maliciously expose themselves to a guard of a specific sex via a strip or imaging technology search.
14. Sections 92B and 94 should be amended to balance the privacy enhancing feature of accommodating genuine personal preferences against the potential for abuse. To this end, I recommend that sections 92B and 94 should be redrafted as follows:

#### **21 Sections 91 and 92 replaced**

#### **92B Particular restrictions when imaging technology search used as alternative to strip search**

- (1) The restrictions in **section 92A(2)** do not apply where an image technology search is used as an alternative to a strip search under **section 98(9)**.
- (2) However, subject to (3), an image that is produced by imaging technology-

- (a) may be viewed only by an officer or a constable of the same sex as the person who is searched; and
  - (b) may not be viewed by another prisoner.
- (3) If the person to be searched expresses a genuine preference for the image produced using imaging technology to be viewed only by an officer or a constable of the opposite sex as the person to be searched, that preference is a factor to be considered and accommodated where reasonably possible.

## 22 Section 94 amended (Restrictions on searches)

(1) Replace section 94(1) with:

- (1) Subject to (1B), the following searches may be carried out only by a person of the same sex as the person to be searched:
  - (a) a rub-down search:
  - (b) a strip search:
  - (c) an imaging technology search that is used as an alternative to a strip search under **section 98(9)**.
- (1A) Subject to (1B), a strip search must not be carried out in view of any person who is not of the same sex as the person to be searched.
- (1B) If the person to be searched expresses a genuine preference for a search under (1) to be carried out by a person of the opposite sex to the person to be searched, that preference is a factor to be considered and accommodated where reasonably practicable.

## Conclusion

- 15. The restrictions in the Bill regarding the retention and disclosure of scanner and imaging technology searches are sufficient safeguards against inappropriate collection or dissemination of sensitive personal information.
- 16. I **recommend** that sections 92B and 94(1) should be amended to require that an individual's genuine preference as to the sex of the officer or constable carrying out and viewing the imaging technology search should be taken into account where that preference can be reasonably accommodated.
- 17. I would be pleased to speak to this submission should the Committee find that helpful in its consideration of this Bill.



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Privacy Commissioner