



DEPARTMENT OF JUSTICE

Regulatory Impact Statement

Crimes (Administration of Sentences) Regulation 2014

July 2014

TITLE OF REGULATORY PROPOSAL: *Crimes (Administration of Sentences) Regulation 2014*

PROPONENT: Department of Justice

RESPONSIBLE MINISTER: The Hon Brad Hazzard MP, Minister for Justice

RELEVANT ACT: *Crimes (Administration of Sentences) Act 1999*

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Attachment: Proposed *Crimes (Administration of Sentences) Regulation 2014*

1. INTRODUCTION

This document is a Regulatory Impact Statement (RIS) in respect of the proposed *Crimes (Administration of Sentences) Regulation 2014* (the proposed Regulation), and has been prepared in accordance with the requirements of Part 2 of the *Subordinate Legislation Act 1989*. The proposed Regulation, if made, is to replace the *Crimes (Administration of Sentences) Regulation 2008* (the existing Regulation).

The *Subordinate Legislation Act 1989* provides for regulations to have limited operative duration. In most cases, regulations are automatically repealed five years after they are made. The Governor of New South Wales, however, may make an order, from time to time, that the date on which a regulation is to be repealed is to be postponed by one year. The repeal of a regulation cannot be postponed on more than five occasions.

The repeal of the existing Regulation has been postponed on one occasion. The postponement was sought because, at the time of the proposed repeal, the Department of Attorney General and Justice (as it was then) had recently conducted a significant and comprehensive review of the Regulation and was in the process of making amendments to it.

It is proposed to remake, with changes, the provisions of the existing Regulation, which is due for repeal on 1 September 2014.

This RIS first provides a brief background to the *Crimes (Administration of Sentences) Act 1999* and the existing Regulation. The RIS then considers the objectives of the proposed Regulation, the options for achieving these objectives and an assessment of the costs and benefits of the alternative options. The four options comprise of allowing the Regulation to lapse, making Commissioner's Instructions in lieu of the Regulation, remaking the existing regulation without amendments and the preferred option of remaking the Regulation with amendments (the proposed Regulation).

2. HOW TO MAKE A SUBMISSION

Submissions about the proposed Regulation can be made to:

By mail: Director, Justice Policy
Department of Justice
GPO Box 31
SYDNEY 2001

By email: justice.policy@agd.nsw.gov.au

If you would like to provide comments in an alternative format, please call (02) 8346 1438. If you are hearing or speech impaired, please contact us via the National Relay Service on 133 677.

All submissions will be treated as public and may be published, unless the submission indicates that it is to be treated as confidential.

Closing date for submissions: **Thursday, 31 July 2014**

3. BACKGROUND

The *Crimes (Administration of Sentences) Act 1999* (the Act) was proclaimed to commence on 3 April 2000. This Act consolidated the following Acts, all of which were repealed on 3 April 2000:

- *Correctional Centres Act 1952*
- *Community Service Orders Act 1979*
- *Home Detention Act 1996*
- *Periodic Detention of Prisoners Act 1981*
- parts of the *Sentencing Act 1989*.

The following Regulations had previously been made under these Acts:

- *Correctional Centres (General) Regulation 1995*
- *Correctional Centres (Administration) Regulation 1995*
- *Community Service Orders Regulation 1995*
- *Home Detention Regulation 1997*
- *Periodic Detention of Prisoners Regulation 1995*
- *Sentencing (General) Regulation 1996*.

On 3 April 2000, three of these Regulations were re-named and amended, and three of these Regulations were repealed, as follows:

OLD NAME OF REGULATION	NEW NAME OF REGULATION
<i>Correctional Centres (Administration) Regulation 1995</i>	<i>Crimes (Administration of Sentences) (Correctional Centre Administration) Regulation 1995</i>
<i>Correctional Centres (General) Regulation 1995</i>	<i>Crimes (Administration of Sentences) (Correctional Centre Routine) Regulation 1995</i>

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<i>Periodic Detention of Prisoners Regulation 1995</i>	<i>Crimes (Administration of Sentences) (Periodic Detention, Home Detention, Community Service Work and Parole) Regulation 1995</i>
<i>Community Service Orders Regulation 1995</i>	Repealed
<i>Home Detention Regulation 1997</i>	Repealed
<i>Sentencing (General) Regulation 1996</i>	Repealed

Some of the clauses of the three repealed Regulations were still required. These clauses were inserted into the *Crimes (Administration of Sentences) (Periodic Detention, Home Detention, Community Service Work and Parole) Regulation 1995*.

The three re-named Regulations referred to above were due for staged repeal on 1 September 2000 but this was postponed for one year until 1 September 2001. On 1 September 2001, the *Crimes (Administration of Sentences) Regulation 2001* commenced. The Regulation re-made, in accordance with the requirements of the *Subordinate Legislation Act 1989*, the three renamed Regulations. In re-making these Regulations, the *Crimes (Administration of Sentences) Regulation 2001* made many amendments to make previous provisions easier to understand.

On 1 September 2008 the existing Regulation replaced the *Crimes (Administration of Sentences) Regulation 2001* with minor amendments. The Regulation deals with certain matters relating to the administration of sentences, including full-time imprisonment, home detention, intensive correction orders, community service work, parole and aspects of the administration of Corrective Services NSW (CSNSW).

3. OBJECTIVES OF THE PROPOSED REGULATION

The objectives of the proposed Regulation are set out below.

Objective 1: To replace the existing Regulation relating to the administration of sentences

The Act consolidated six Acts relating to the administration of sentences into one Act. The consolidation of those Acts has meant that officers of CSNSW now have the majority of the statute law relating to their jobs in one place. CSNSW staff has found that one Act is easier to use than six Acts. It is likely that legal practitioners, offenders, and the general public also share this experience.

The consolidation process was completed with the making of the *Crimes (Administration of Sentences) Regulation 2001*. The Regulation produced benefits for staff, legal practitioners, offenders and the general public by gathering the majority of regulations relating to administration of sentences in one place. The benefits of the consolidated Regulation continued when it was replaced by the existing Regulation. The object of the proposed Regulation is to extend these benefits by remaking, with minor amendments, the provisions of the existing Regulation.

Objective 2: To make laws on matters of detail relating to the administration of sentences

As mentioned above, much of the statute law relating to the administration of sentences is contained in the Act.

A major part of CSNSW's role is to deprive certain people of their liberty and to curtail the liberty of some other people (for example, a person on home detention or a person on parole). Accordingly, the Department of Justice considers that many of CSNSW's procedures flowing from the principal Act should be in the form of regulations rather than in the form of administrative directives. This is because a Regulation is more transparent, easier to work with, and ensures that the same rules apply to everyone. It ensures that everyone can find and understand their obligations. Importantly, it also provides a safeguard as a Regulation can be disallowed by Parliament.

The proposed Regulation is in line with the NSW 2021 goals of the Government to prevent and reduce the level of re-offending, and improve community confidence in the justice system [*NSW 2021: A Plan to Make NSW Number One*].

The proposed Regulation directly affects the following groups of people:

- offenders serving sentences of full-time imprisonment and others who are required to be held in correctional centres [inmates and juvenile inmates];
- offenders serving sentences of full-time imprisonment by way of home detention [home detainees];
- offenders the subject of intensive corrections orders;
- offenders the subject of community service orders;
- offenders the subject of good behaviour bonds where supervision is required;
- offenders on supervised bail;
- offenders on parole;
- families of persons listed above;
- visitors to inmates;
- persons entering correctional centres other than to visit inmates;
- staff of CSNSW;
- staff of Justice Health & Forensic Mental Health Network; and
- persons wishing to carry out research in the correctional system.

To gain an appreciation of the matters covered by the proposed Regulation, it is best to read through the Regulation's contents pages.

So far as has been possible, the proposed Regulation follows the progression of a person from the time the person enters the correctional system to the time the person leaves the correctional system. It is acknowledged that not all persons start their contact with the correctional system in full-time custody. The Regulation, however, begins this way, as full-time imprisonment is the most severe sentence imposed by a court. It also largely mirrors the structure of the Act.

4. OPTIONS TO ACHIEVE OBJECTIVES

This Regulatory Impact Statement examines four options relating to the remaking of the existing Regulation:

- a) Do nothing and allow the Regulation to lapse
- b) Make Commissioner's Instructions in lieu of the Regulation
- c) Re-make the Regulation without amendments
- d) Re-make the Regulation with amendments (the proposed Regulation)

4.1 Option 1: Do nothing

If the proposed Regulation is not made, the existing Regulation will lapse on 1 September 2014.

Costs

If the Regulation lapses, offenders, staff and the general public will not have access to clear legislative rules under which CSNSW administers sentences. As mentioned earlier, CSNSW is conscious of the fact that a major part of its role is to deprive certain people of their liberty and curtail the liberty of others. In the absence of explicit regulation, many of the procedures, requirements and obligations imposed by the Regulation could not be replaced by way of a Commissioner's Instruction (see Part 4.2 below) or other non-legislative mechanism. This means these procedures requirements and obligations would no longer apply, making the administration of the correctional system extremely difficult, inefficient, unfair and cumbersome. It is important that CSNSW and its staff, offenders and the general public know what should and should not be done in the administration of sentences, and this option does not allow for this.

Benefits

There do not appear to be any readily identifiable benefits in allowing the existing Regulation to lapse. Offenders, staff and the general public would not be able to point to an authoritative document setting out what CSNSW should and should not do in various situations.

Conclusion

It is proposed that this option *not* be adopted.

4.2 Option 2: Make Commissioner's Instructions

Section 235B of the Act states:

The Commissioner may issue (and from time to time amend or revoke) instructions, not inconsistent with this Act or the regulations, or with the Public Sector Management Act 1988 or the regulations made under that Act, to the staff of Corrective Services NSW (including correctional officers) with respect to the management and control of Corrective Services NSW.

Costs

It could be argued that some of the clauses contained in the existing Regulation could be deleted and replaced by Commissioner's Instructions. However, some of the clauses in the Regulation are simply not susceptible to being replaced by Commissioner's Instructions. For example, clauses 293 to 300 of the existing Regulation relate to Justice Health and Forensic Mental Health Network, which is a statutory health corporation under the *Health Services Act 1997*. Justice Health and Forensic Mental Health Network provides a range of health services to inmates and is not answerable to the Commissioner of CSNSW. As a result, significant health procedures and obligations required to effectively operate the correctional system would no longer apply.

Furthermore, Commissioner's Instructions do not provide the same public and parliamentary scrutiny and safeguards as the making of a Regulation. Whereas the Commissioner has the power to amend a Commissioner's Instruction at any time, the Commissioner is not able to unilaterally change provisions in the Regulation. Some of the clauses of the proposed Regulation are of such importance that they should involve parliamentary and public consultation. For example, Part 3 of the proposed Regulation relates to case management and classification, which are of fundamental importance to the way in which inmates are managed while in full-time imprisonment. Although instructions could be made readily accessible by the general public by placing them (with the possible exception of some instructions dealing with sensitive security matters) on the CSNSW website, this is still unlikely to be as transparent as a Regulation made by Parliament. Further, the general public would not have the same opportunity to influence the content of Commissioner's Instructions as it would the content of a Regulation.

Commissioner's Instructions would be likely to impose similar costs and limits as imposed by the proposed Regulation and outlined in Part 4.4 below. For instance, limits on visits and on mail, and requiring inmates to contribute towards the costs incurred by CSNSW for additional items and services.

Benefits

The only benefit of making Commissioner's Instructions, in lieu of a Regulation, is that it would provide CSNSW with greater flexibility when it wished to amend its procedures. However, any potential benefit to CSNSW would be significantly outweighed by the disadvantages it would raise in terms of transparency, the lack of public consultation, and the inability of Commissioner's Instructions to provide for certain matters.

Conclusion

It is proposed that this option *not* be adopted.

4.3 Option 3: Remake the existing Regulation without amendments

Costs

By remaking the existing Regulation without amendments, a number of identified issues and restrictions would not be addressed, impeding on the efficiency of the correctional system. For instance, the existing Regulation does not provide for the large advent in technology that has occurred over the last 6 years, nor does it improve recognised operational restrictions. Part 4.4 below outlines the issues requiring rectification in detail.

Remaking the existing Regulation without amendments would impose on various groups essentially the same costs and limits as imposed by the proposed Regulation, outlined in Part 4.4. It is noted that the addition of clause 177 in the proposed Regulation, requiring inmates to pay for additional items that they want, would not apply. However, it should be noted that under the existing Regulation, CSNSW is not required to provide an inmate with additional items that they want and do not need.

Benefits

The existing Regulation has successfully operated with the Act since 2008, providing the necessary procedural and administrative details for the effective administration of sentences. However, as detailed below, amendments are required to the existing Regulation to improve and continue its effective operation. The only benefit of remaking the Regulation without change would be in providing consistency between the existing Regulation and the new Regulation.

Conclusion

It is proposed that this option *not* be adopted.

4.4 Option 4: Re-make the existing Regulation with amendment

As outlined in Part 3, the existing Regulation provides the necessary administrative and procedural detail to enable the Act to operate in an effective and efficient way in the administration of sentences.

In the process of considering the remake of the Regulation, CSNSW identified a number of operational issues and outdated terminology in the existing Regulation that should be rectified.

To improve its operation in relation to the administration of sentences, the proposed Regulation makes changes to the existing Regulation as follows:

a) Searching of visitors

Clause 90 of the existing Regulation states that an authorised officer has the power to require a visitor to submit to an inspection and search of personal possessions. There are no express provisions in the existing Regulation for authorised officers to specifically search visitors' outer garments, including hats, gloves, jacket or shoes.

The *Summary Offences Act 1988* makes it clear that correctional officers may direct that these items be removed for the purposes of a search under the provisions of that Act. Clause 95 of the proposed Regulation makes it clear that a person can be required to remove these items for the purposes of a search under clause 90.

b) General power to prevent visits

Clause 100 of the existing Regulation allows the General Manager of a centre to refuse entry to a visitor if of the opinion that the visit would prejudice the good order and security of the centre. The existing provision has proven to be operationally restrictive as, due to the clustering of correctional centres, a General Manager may not always be on site at a relevant time. This means that the General Manager may not be readily available to assess the situation and make a determination. Clause 106 of the proposed Regulation addresses this restriction by enabling an officer of senior rank to make a determination under this clause. The proposed Regulation extends the power to officers of the rank of Assistant Superintendent or above, or equivalent rank for privately run centres.

Clause 101 of the existing Regulation presently allows for an authorised officer to refuse a person to visit a correctional centre or an inmate if of the opinion that the

person is under the influence of alcohol or a drug. No change is proposed to this power, which is contained in clause 107 of the proposed Regulation.

c) Confiscation of items

Clause 45 of the existing Regulation provides that books, newspaper, magazines, records, cassettes, CDs or DVDs may be confiscated if particular criteria are met, for example, if the item contains threatening, offensive, indecent, obscene or abusive written or pictorial matter. Since 2008, when the Regulation was last remade, there has been an advent of digital technology. The proposed Regulation expands the confiscation power in proposed clause 48 to allow for the confiscation of digital devices if they come into the possession of an inmate and the relevant criteria for confiscation are met.

d) Drug testing of inmates and offenders

Division 4 of the existing Regulation provides for the urine testing of inmates. Clause 143 of the Regulation provides for an associated offence of failing a urine test. Clauses 216 and 242 of the existing Regulation provide for the drug testing of offenders undertaking community service work and during home detention assessment. The existing provisions limit testing to urinalysis only. A number of other drug testing methods are now available to screen for illicit substances. The proposed Regulation amends these clauses to reflect changes in drug testing technology and methodology by allowing for testing by means of breath, urine and oral fluid. The necessary threshold before such a test can be required has not changed.

e) Approved laboratory and government analyst

Clauses 265, 274 and 275 of the existing Regulation refer to test samples being sent to an approved laboratory for testing by an analyst. Currently, an approved laboratory is defined to mean a laboratory accredited by the NSW Department of Health and approved for the purposes of Part 9.2 by the Commissioner. The accrediting of laboratories is no longer undertaken by a NSW authority. To reflect this change, the proposed Regulation adopts the term 'accredited analytical laboratory', defining the term in Part 1 as a laboratory that 'is accredited as an analytical laboratory by an entity authorised by the Commonwealth to accredit analytical laboratories' and 'is approved for the purposes of this Regulation by the Commissioner'.

The existing Regulation uses the term 'analyst' and 'government analyst' in different Parts. There is limited utility in using different terms and definitions for what is essentially the same role. The proposed Regulation uses one consistent term.

f) Purchasing and renting goods

Clauses 45 and 49 of the existing Regulation enable inmates to purchase food and other items. However, inmates have been requesting the provision of additional items not provided for in the Regulation, such as boots, additional toiletries, stationery, and electrical goods such as electric kettles. There is no obligation for CSNSW to provide these additional items where necessity cannot be demonstrated. Where, however, CSNSW can provide the item and is prepared to do so, inmates should be required to pay for the item. Clause 177 of the proposed Regulation provides an express provision enabling CSNSW to require an inmate to pay an amount that is the cost of purchasing or renting goods that the Commissioner is not required to provide.

g) Terminology changes

The proposed Regulation makes some terminology changes as a result of the commencement of the *Government Sector Employment Act 2013* and the repeal of the *Public Sector Employment and Management Act 2002*. Examples can be found at clauses 242, 254, and 256 of the proposed Regulation.

Costs

The proposed Regulation enables NSW to impose financial and non-financial “costs” on inmates, and to make many decisions which place indirect and non-financial costs on various groups. Some of these costs are already incurred under the existing Regulation. The proposed Regulation does not impose any financial costs on business or the general community. The proposed Regulation does not impose indirect costs on business.

An example of the costs and limits imposed on various groups include the following:

a) Inmates

Clause 120(1) of the proposed Regulation states that the cost of making a telephone call or sending a facsimile message is to be paid by the inmate making the call or sending the message. Clause 120(2) lists some common exceptions to this requirement, such as the making of a weekly local call. Clause 120(1) is reasonable, having regard to the fact that most inmates are able to work while in custody and thereby earn a small income to pay for telephone calls and other privileges. If an inmate is unable to work for a genuine reason, for instance, due to lack of work, age or disability, the inmate receives a small weekly allowance.

Clause 120(3) of the proposed Regulation states that an inmate must pay an amount per page, to be determined by the Commissioner, for any facsimile message sent to,

and accepted by, the inmate. This requirement is also reasonable, for the same reasons as those relating to the recovery of some of the costs incurred by telephone calls.

Clause 9 of the proposed Regulation enables a General Manager of a correctional centre to dispose of the personal property of an inmate if the inmate has not made arrangements for surplus property to be collected.

Various clauses of the proposed Regulation place costs, by way of penalties, on inmates who commit correctional centre offences.

b) Families of inmates

Part 3 of the proposed Regulation requires the Commissioner of CSNSW to ensure that a determination is made regarding an inmate's classification, the correctional centre in which the inmate is to be placed, and that a case plan is established for the inmate. If the inmate is to be placed in a correctional centre which is remote from the inmate's family, indirect costs are thereby placed on the family, in the form of increased travel costs whenever the family visits the inmate. It should be mentioned that, in placing inmates, it is not always possible to place an inmate in a correctional centre located near to where the family of the inmate resides; nor may it necessarily be the most appropriate placement for that inmate, having regard to the nature of the offence/s, and types of services and programs available in a particular correctional centre.

c) Visitors to inmates

The proposed Regulation places various restrictions on visits to inmates. For example, clause 93 enables an 'authorised officer' (as defined in the proposed Regulation) to refuse to allow a visit to proceed where a visitor fails to produce evidence, satisfactory to the authorised officer, of the person's name and address, or of the purpose of the visit.

d) Persons who write to inmates

Clause 112 of the proposed Regulation enables certain officers to open, inspect and read a letter or parcel sent to, or by an inmate, unless the letter or parcel is addressed to, or received from, an exempt body or person, for example, the Ombudsman. This clause imposes a non-financial cost on the sender of the letter, and on the inmate.

e) Researchers

Clause 182 of the proposed Regulation establishes an Ethics Committee. Clause 183 sets out the functions of the Ethics Committee. This committee requires

researchers to provide certain information to the committee in order for the committee to consider a research application and make recommendations to the Commissioner. The committee may recommend, and the Commissioner may decide, not to permit certain research to proceed. In other cases, while research may be approved to proceed, it may be that the approval will not be as broad as the researcher may have wished.

Benefits

The proposed Regulation bestows on offenders, staff and the general public the benefit of setting out, in one place, all of the important procedures which CSNSW follows when dealing with such matters as: inmate property; case management of inmates; institutional routine; visits to inmates; visits to correctional centres; correctional centre discipline; home detention; community service work; parole; requirements placed on staff; and the use of firearms.

The proposed amendments to the existing Regulation address operational restrictions, technological advancement issues, and outdated terminology that have been raised in the process of considering the remake of the Regulation. The amendments rectify these issues and allow CSNSW to efficiently administer the correctional system.

Conclusion

It is proposed that this option be adopted.

6. ASSESSMENT OF THE VARIOUS OPTIONS

In relation to the options above, the Department of Justice considers that the best option, by far, for both CSNSW and the general public, is to remake the Regulation with amendments. This option provides the essential administrative details to enable the most effective and efficient operation of the *Crimes (Administration of Sentences) Act 1999* and has the greatest benefit to the community.

The proposed *Crimes (Administration of Sentences) Regulation 2014* is attached at the end of this document.

7. CONSULTATION

Comments and submissions are now sought on the proposed Regulation and RIS. Targeted stakeholders will be invited to provide comments. Information about the proposed Regulation and how to make a submission will be published in the *Government Gazette*, in the Government Notices section of the *Sydney Morning Herald* and the *Daily Telegraph* and on the Department of Justice website.

The following organisations have also been provided with this RIS:

- Aboriginal Affairs
- Aboriginal Legal Service NSW/ACT Ltd
- Catholic Prison Ministry
- Commissioned Officers Vocational Branch (COVB)
- Community Legal Centres NSW
- Community Relations Commission
- Community Restorative Centre Inc
- Council for Civil Liberties NSW
- District Court of NSW
- Enough is Enough Anti Violence Movement
- Health, NSW Ministry of
- Homicide Survivors Support After Murder Group Inc
- Homicide Victims Support Group
- Indigenous Social Justice Association
- Inspector of Custodial Services
- Justice Action
- Justice Health and Forensic Mental Health Network
- Law and Justice Foundation of NSW
- Law Society of NSW
- Legal Aid NSW
- Local Court of NSW
- Police and Emergency Services, Ministry of
- NSW Bar Association
- NSW Police Force
- Office of the State Coroner
- Ombudsman, NSW
- Prison Officers Vocational Branch (POVB)
- Prisoners' Aid Association of NSW Inc
- Probation and Parole Officers' Association Incorporated
- Public Defenders Office
- Public Interest Advocacy Centre Ltd
- Salvation Army Court and Prison Services
- Serious Offenders Review Council
- SHINE for Kids Co-operative

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- State Parole Authority, NSW
- Supreme Court of NSW
- Victims of Crime Assistance League (VOCAL).