



New South Wales

# Crimes (Administration of Sentences) Amendment (Testing of Correctional Staff) Regulation 2004

under the

Crimes (Administration of Sentences) Act 1999

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Crimes (Administration of Sentences) Act 1999*.

JOHN HATZISTERGOS, M.L.C.,

Minister for Justice

## Explanatory note

The object of this Regulation is to amend the *Crimes (Administration of Sentences) Regulation 2001* by inserting proposed Part 1A in Chapter 8 to provide for the mandatory testing (both random and targeted) of correctional officers and other persons employed in the Department of Corrective Services (*members of correctional staff*) for alcohol and prohibited drugs, consequent on the commencement of Schedule 1 [14] to the *Crimes (Administration of Sentences) Further Amendment Act 2002*.

This Regulation makes provision for the following:

- (a) certain preliminary matters (Division 1 of proposed Part 1A),
- (b) the obligation of a member of correctional staff not to have the prescribed concentration of alcohol in his or her blood or a prohibited drug in his or her biological material when presenting for duty or while on duty (Division 2 of proposed Part 1A),
- (c) the conduct of testing of members of correctional staff and the procedure for the handling and analysis of samples (Division 3 of proposed Part 1A),
- (d) the evidentiary value and use of certificates relating to the analysis of a sample and the authorisation of persons (Division 4 of proposed Part 1A),
- (e) the disciplinary consequences for members of correctional staff who test positive for alcohol or a prohibited drug and for other conduct (Division 5 of proposed Part 1A),

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- (f) offences relating to interference with test results or the testing procedure (Division 6 of proposed Part 1A).

This Regulation also makes a statute law revision amendment.

This Regulation is made under the *Crimes (Administration of Sentences) Act 1999*, including sections 236E, 236F, 236G, 236I and 271 (the general regulation-making power).

## **Crimes (Administration of Sentences) Amendment (Testing of Correctional Staff) Regulation 2004**

under the

Crimes (Administration of Sentences) Act 1999

### **1 Name of Regulation**

This Regulation is the *Crimes (Administration of Sentences) Amendment (Testing of Correctional Staff) Regulation 2004*.

### **2 Commencement**

This Regulation commences on 2 August 2004.

### **3 Amendment of Crimes (Administration of Sentences) Regulation 2001**

The *Crimes (Administration of Sentences) Regulation 2001* is amended as set out in Schedule 1.

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### Schedule 1 Amendments

(Clause 3)

[1] **Clause 242 Officers to be fit for duty**

Omit the clause.

[2] **Clause 248**

Omit the clause. Insert instead:

**248 Certain contraventions to be dealt with as misconduct**

A correctional officer, Departmental officer or casual employee who contravenes a provision of this Regulation is not guilty of an offence but any such contravention may be dealt with as misconduct, under Part 2.7 of the *Public Sector Employment and Management Act 2002*, or any other applicable provision of that Act.

**Note.** The services of a temporary employee or a casual employee may be dispensed with at any time under section 30 or 39 of the *Public Sector Employment and Management Act 2002*.

[3] **Chapter 8, Part 1A**

Insert after Part 1:

**Part 1A Conduct of members of correctional staff regarding alcohol and prohibited drugs**

**Division 1 Preliminary**

**249A Interpretation**

(1) In this Part:

*analyst* means:

- (a) an analyst within the meaning of the *Road Transport (Safety and Traffic Management) Act 1999*, or
- (b) a person employed by the owner or operator of an approved laboratory as an analyst.

*approved counsellor* means a counsellor approved for the purposes of this Part by the Commissioner.

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***approved laboratory*** means a laboratory accredited by the New South Wales Department of Health and approved for the purposes of this Part by the Commissioner.

***ASNZ 4308*** means Australian/New Zealand Standard AS/NZS 4308:2001, *Procedures for the collection, detection and quantitation of drugs of abuse in urine* as in force on the commencement of this Part.

***disciplinary matter*** means any procedure of a disciplinary nature or other related proceedings relating to a contravention of a provision of this Part and includes, but is not limited to, a disciplinary matter referred to in Part 2.7 of the *Public Sector Employment and Management Act 2002*.

***member of correctional staff*** has the same meaning as it has in Division 5 of Part 11 of the Act.

***prescribed concentration of alcohol*** means a concentration of 0.02 grammes or more of alcohol in 100 millilitres of blood.

***sample***, in relation to a non-invasive sample, includes, if the sample is divided into portions, a portion of the sample.

- (2) In this Part, a member of correctional staff ***presents for duty*** when the member of staff is present at the staff member's place of work and about to go on duty.
- (3) In this Part, a member of correctional staff ***tests positive for alcohol*** if a test conducted under Division 5 of Part 11 of the Act indicates that the staff member had the prescribed concentration of alcohol in his or her blood:
  - (a) when the staff member presented for duty, or
  - (b) while the staff member was on duty.
- (4) In this Part, a member of correctional staff ***tests positive for prohibited drugs*** if a test conducted under Division 5 of Part 11 of the Act indicates that the staff member had a prohibited drug present in any of his or her biological material:
  - (a) when the staff member presented for duty, or
  - (b) while the staff member was on duty.
- (5) In this Part, a reference to a non-invasive sample does not include a reference to a sample of breath taken by breath test or breath analysis.

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### 249B Appointment of authorised persons

- (1) The Commissioner may, by instrument in writing, appoint any person to be an authorised person for the purposes of Division 5 of Part 11 of the Act.
- (2) The Commissioner may appoint as an authorised person:
  - (a) a person by name, or
  - (b) a person holding office or acting in a particular rank or office, from time to time, by reference to the title of the rank or office concerned.
- (3) The Commissioner must furnish persons appointed under subclause (2) (a) with certificates of their appointment as authorised persons.
- (4) An authorised person appointed under subclause (2) (a) must, if requested to do so, produce the certificate of appointment to any member of correctional staff required by the authorised person to do any thing under Division 5 of Part 11 of the Act.
- (5) The Commissioner must maintain a list of the titles of the ranks or offices referred to in subclause (2) (b).
- (6) An authorised person appointed under subclause (2) (b) must, if requested to do so, furnish proof that the person holds, or is acting in, the relevant rank or office to any member of correctional staff required by the authorised person to do any thing under Division 5 of Part 11 of the Act. Such proof may include, but is not limited to, a Departmental identification card.

### 249C Hospitals

For the purposes of Division 5 of Part 11 of the Act, the following premises, institutions or establishments are prescribed as a hospital:

- (a) any clinic or other premises operated by Justice Health,
- (b) any premises, institution or establishment that is a hospital for the purposes of section 19 of the *Road Transport (Safety and Traffic Management) Act 1999*.

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**Division 2      Obligations of members of correctional staff****249D      Correctional staff must not have prescribed concentration of alcohol in blood**

A member of correctional staff must not have the prescribed concentration of alcohol in his or her blood:

- (a) when the staff member presents for duty, or
- (b) while the staff member is on duty.

**249E      Correctional staff must not have prohibited drug present in biological material**

A member of correctional staff must not have a prohibited drug present in any of his or her biological material:

- (a) when the staff member presents for duty, or
- (b) while the staff member is on duty.

**Division 3      Testing of members of correctional staff****249F      Testing correctional staff**

- (1) A member of correctional staff may be tested under Division 5 of Part 11 of the Act whether or not there is any suspicion that the staff member has recently consumed alcohol or used a prohibited drug.
- (2) The result of any such test may be used for the purposes of any disciplinary matter.

**249G      General rules for the provision or taking of certain samples**

- (1) In this clause, a reference to a non-invasive sample includes a reference to a sample of breath taken by breath test or breath analysis.
- (2) An authorised person who requires a member of correctional staff to provide, or enable to be taken, a non-invasive sample from the staff member under Division 5 of Part 11 of the Act must specify the type of non-invasive sample to be provided or taken.
- (3) The non-invasive sample so provided or taken must be of the type of non-invasive sample required by the authorised person.

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- (4) The staff member may not elect which type of non-invasive sample is provided, or enabled to be taken.
- (5) A non-invasive sample provided by or taken from a member of correctional staff under Division 5 of Part 11 of the Act:
  - (a) must be provided or taken in circumstances affording reasonable privacy to the staff member, except as permitted (expressly or impliedly) by any other provision of the Act or this Regulation, and
  - (b) must not be provided or taken in the presence or view of a person whose presence is not necessary for the purposes of the provision or taking of the non-invasive sample or required or permitted by another provision of the Act or this Regulation, and
  - (c) must not involve the removal of more clothing than is necessary for providing or taking the non-invasive sample, and
  - (d) must not involve more visual inspection than is necessary for providing or taking the non-invasive sample.
- (6) All non-invasive samples provided by or taken from a member of correctional staff under Division 5 of Part 11 of the Act are to be provided or taken in a manner consistent with appropriate medical or other relevant professional standards, with due regard to the dignity and self-respect of the staff member and in as seemly a manner as is consistent with the effective provision or taking of the non-invasive sample.
- (7) An authorised person is authorised to take a sample of hair of a member of correctional staff by removing the root of the hair only if:
  - (a) the authorised person takes only so much hair as the person believes is necessary for analysis of the sample to be carried out for the purposes of Division 5 of Part 11 of the Act, and
  - (b) strands of hair are taken using the least painful technique known and available to the authorised person.



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**249H Breath testing and breath analysis of members of correctional staff**

- (1) As soon as practicable after a member of correctional staff has undergone a breath test under Division 5 of Part 11 of the Act the authorised person who conducted the breath test must deliver to the staff member a statement in writing signed by the authorised person specifying:
  - (a) the concentration of alcohol determined by the breath test to be present in the staff member's blood and expressed in grammes of alcohol in 100 millilitres of blood, and
  - (b) the day on which and time of the day at which the breath test was completed.
- (2) An authorised person may require a member of correctional staff to submit to a breath analysis in accordance with the directions of the authorised person, if:
  - (a) it appears to the authorised person as a result of a breath test under Division 5 of Part 11 of the Act that the prescribed concentration of alcohol may be present in the staff member's blood, or
  - (b) the staff member refuses or fails to undergo a breath test under Division 5 of Part 11 of the Act in accordance with the directions of the authorised person when requested to do so by the authorised person.
- (3) As soon as practicable after a member of correctional staff has submitted to a breath analysis the authorised person operating the breath analysing instrument must deliver to the staff member a statement in writing signed by the authorised person specifying:
  - (a) the concentration of alcohol determined by the analysis to be present in the staff member's blood and expressed in grammes of alcohol in 100 millilitres of blood, and
  - (b) the day on which and time of the day at which the breath analysis was completed.
- (4) A member of correctional staff who is required to undergo a breath test or submit to a breath analysis may request the authorised person making the requisition to arrange for the

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taking (in the presence of an authorised person) of a sample of the staff member's blood for analysis, at the staff member's own expense, by:

- (a) a medical practitioner nominated by the staff member, or
  - (b) a medical practitioner nominated by the authorised person at the staff member's request.
- (5) The making of any such request or the taking of a sample of a member of correctional staff's blood does not absolve the staff member from the obligation imposed on the staff member to undergo a breath test or submit to a breath analysis in accordance with this clause.

### **249I Restrictions on requiring breath test, breath analysis or non-invasive sample**

An authorised person must not require a member of correctional staff to undergo a test under Division 5 of Part 11 of the Act:

- (a) if the staff member has been admitted to a hospital for medical treatment, unless the medical practitioner who attends the staff member at the hospital (or, if no medical practitioner is present to attend the staff member, a registered nurse who is accredited by a hospital as competent to perform the sampling procedures) has been notified of the intention to make the requisition and the medical practitioner or registered nurse does not object on the ground that compliance would be prejudicial to the proper care or treatment of the staff member, or
- (b) if it appears to the authorised person that it would (because of injuries sustained by the staff member) be dangerous to the staff member's medical condition if the staff member complied with the requisition, or
- (c) in the case of a requirement for a test for the purpose of testing for the presence or concentration of alcohol—at any time after the expiration of 3 hours from the latest of the time the staff member last presented for duty, the staff member was last involved in an incident referred to in section 236F (3) of the Act (if such an incident occurred) or the staff member last ceased to be on duty, or

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- (d) in the case of a requirement for a test for the purpose of testing for the presence of a prohibited drug—at any time after the expiration of 24 hours from the latest of the time the staff member last presented for duty, the staff member was last involved in an incident referred to in section 236F (3) of the Act (if such an incident occurred) or the staff member last ceased to be on duty, or
  - (e) at the staff member's home.

**249J Action to be taken with respect to blood samples**

- (1) A medical practitioner or registered nurse by whom a sample of a member of correctional staff's blood is taken under Division 5 of Part 11 of the Act must:
  - (a) if the staff member requests a part of the sample or if the staff member is not capable of requesting a part of the sample—divide the sample into 2 approximately equal portions, and
  - (b) place the sample or each portion of the sample into a separate container, and
  - (c) fasten and seal each container, and
  - (d) mark or label each container for future identification.
- (2) Of the sealed containers:
  - (a) one container must, as soon as reasonably practicable thereafter, be transported to an approved laboratory for analysis by an analyst in accordance with subclause (4), and must be stored at that laboratory on behalf of the Commissioner, and
  - (b) the other container must:
    - (i) if the staff member has requested a part of the sample—be given to the staff member, or
    - (ii) if the staff member is not capable of requesting a part of the sample as referred to in subclause (1)—as soon as reasonably practicable thereafter, be transported to the approved laboratory to which the container referred to in paragraph (a) was sent and must be stored at that laboratory on behalf of the Commissioner.

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- (3) If a staff member was not capable of requesting a part of the sample as referred to in subclause (1), the staff member may, within 12 months after the taking of the sample, apply to the laboratory referred to in subclause (2) for the container referred to in subclause (2) (b) (ii) to be sent, for analysis (at the staff member's own expense) of the portion of the sample in that container, to a medical practitioner or laboratory nominated by the staff member.
- (4) The authorised person may arrange for the analyst to:
  - (a) determine whether the sample contains alcohol, and if so, the concentration of alcohol, or
  - (b) determine whether the sample contains a prohibited drug, or
  - (c) determine whether the sample contains alcohol, and if so, the concentration of alcohol and determine whether the sample also contains a prohibited drug.

### **249K Action to be taken with respect to non-invasive samples**

- (1) A person who is provided with a non-invasive sample under Division 5 of Part 11 of the Act from a member of correctional staff or who takes a non-invasive sample from a member of correctional staff must:
  - (a) if the staff member requests a part of the sample or if the staff member is not capable of requesting a part of the sample—divide the sample into 2 approximately equal portions or, if the sample cannot be so divided, immediately require and immediately be provided with or take, a further sample of the same type of biological material, and
  - (b) place each portion (or if 2 samples of the same type of biological material were provided or taken, each sample) into a container, and
  - (c) fasten and seal each container, and
  - (d) mark or label each container for future identification.
- (2) Of the sealed containers:
  - (a) one container must, as soon as reasonably practicable thereafter, be transported to an approved laboratory for analysis by an analyst in accordance with subclause (4),

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and must be stored at that laboratory on behalf of the Commissioner, and

- (b) the other container must:
- (i) if the staff member has requested a part of the sample, be given to the staff member, or
  - (ii) if the staff member is not capable of requesting a part of the sample, as soon as reasonably practicable thereafter, be transported to the approved laboratory to which the container referred to in paragraph (a) was sent and must be stored at that laboratory on behalf of the Commissioner.
- (3) If a staff member was not capable of requesting a part of the sample as referred to in subclause (1), the staff member may, within 12 months after the taking of the sample, apply to the laboratory referred to in subclause (2) for the container referred to in subclause (2) (b) (ii) to be sent, for analysis (at the staff member's own expense) of the sample, or the portion of the sample, in that container, to a medical practitioner or laboratory nominated by the staff member.
- (4) The authorised person may arrange for the analyst:
- (a) if the non-invasive sample was provided or taken under section 236G of the Act—to determine whether the sample indicates that the blood of the staff member, by whom the sample was provided or from whom the sample was taken, contained alcohol, and if so, the concentration of alcohol in the blood of the staff member or determine whether the sample contains a prohibited drug, or
  - (b) if the non-invasive sample was provided or taken under section 236F of the Act—to determine whether the sample contains a prohibited drug.
- (5) In the case of samples of urine, any sealed containers referred to in subclause (2) must be handled in accordance with the procedure set out in ASNZ 4308 or any other procedure approved by the Commissioner in that regard.

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### 249L Analysis of samples

- (1) An analyst to whom a portion of a sample of blood or a non-invasive sample is submitted for analysis under clause 249J or 249K may carry out an analysis in accordance with the arrangement made by the authorised person under clause 249J (4) or clause 249K (4), as the case may be.
- (2) The analysis must be carried out, and a report provided, in accordance with:
  - (a) ASNZ 4308, except as provided by paragraph (b), or
  - (b) such other procedure as may be directed by the Commissioner.

## Division 4 Evidence

### 249M Certificate evidence of concentration of alcohol in blood determined by breath test or breath analysis

- (1) For the purposes of any disciplinary matter involving a contravention of clause 249D, a certificate purporting to be signed by an authorised person and certifying that:
  - (a) the authorised person is a duly appointed authorised person, and
  - (b) the person named in the certificate underwent a breath test, and
  - (c) the breath test was carried out on the person's breath by means of a device (not being a breath analysing instrument) of a type approved by the Governor for the conduct of breath tests under the *Road Transport (Safety and Traffic Management) Act 1999*, and
  - (d) the breath test was carried out on the day and completed at the time stated in the certificate, and
  - (e) a concentration of alcohol (determined by that breath test and expressed in grammes of alcohol in 100 millilitres of blood) was present in the blood of that person on the day and at the time stated in the certificate, and
  - (f) a statement in writing required by clause 249H (1) was delivered in accordance with that subclause,

is prima facie evidence of the particulars certified in and by the certificate.

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- (2) For the purposes of any disciplinary matter involving a contravention of clause 249D, a certificate purporting to be signed by an authorised person and certifying that:
- (a) the authorised person is a duly appointed authorised person, and
  - (b) the person named in the certificate submitted to a breath analysis, and
  - (c) the breath analysis was carried out by a breath analysing instrument within the meaning of Division 5 of Part 11 of the Act, and
  - (d) the analysis was made on the day and completed at the time stated in the certificate, and
  - (e) a concentration of alcohol (determined by that breath analysing instrument and expressed in grammes of alcohol in 100 millilitres of blood) was present in the blood of that person on the day and at the time stated in the certificate, and
  - (f) a statement in writing required by clause 249H (3) was delivered in accordance with that subclause,
- is prima facie evidence of the particulars certified in and by the certificate.
- (3) For the purposes of any disciplinary matter involving a contravention of clause 249D, evidence of the condition of a device by means of which a breath test was carried out or of a breath analysing instrument or the manner in which the device or instrument was operated is not to be required unless evidence that the device or instrument was not in proper condition or was not properly operated has been adduced.
- (4) For the purposes of any disciplinary matter involving a contravention of clause 249D, evidence may be given of the concentration of alcohol present in the blood of the staff member, as determined by a device by which a breath test was carried out or by a breath analysing instrument operated by an authorised person.
- (5) The concentration of alcohol so determined is taken to be the concentration of alcohol in the blood of the staff member when the staff member presented for duty if the breath analysis was made within 3 hours of the staff member presenting for duty on the particular day, unless the staff

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member proves that the concentration of alcohol in the staff member's blood at that time was less than 0.02 grammes of alcohol in 100 millilitres of blood.

- (6) The concentration of alcohol so determined is taken to be the concentration of alcohol in the blood of the staff member while the staff member was on duty if the breath analysis was made within 3 hours of the staff member ceasing to be on duty on the particular day, unless the staff member proves that the concentration of alcohol in the staff member's blood at that time was less than 0.02 grammes of alcohol in 100 millilitres of blood.

### **249N Certificate evidence of concentration of alcohol in blood other than in relation to a breath test or breath analysis**

- (1) For the purposes of any disciplinary matter involving a contravention of clause 249D, a certificate purporting to be signed by a medical practitioner or registered nurse and certifying any one or more of the following matters:
- (a) that the practitioner or nurse was a medical practitioner or registered nurse who attended a specified person at a hospital,
  - (b) that the practitioner or nurse took a sample of the person's blood or took from, or was provided with, a non-invasive sample in accordance with Division 5 of Part 11 of the Act on the day and at the time stated in the certificate,
  - (c) that the practitioner or nurse dealt with the sample in accordance with Division 5 of Part 11 of the Act and this Part,
  - (d) that the practitioner or nurse used equipment of a specified description in so taking and dealing with the sample,
  - (e) that the container into which the sample was placed was sealed, and marked or labelled, in a specified manner,
- is prima facie evidence of the particulars certified in and by the certificate.
- (2) For the purposes of any disciplinary matter involving a contravention of clause 249D, a certificate purporting to be signed by an authorised person and certifying any one or more of the following matters:



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- (a) that the authorised person received a portion of a sample of a specified person's blood or a non-invasive sample provided by or taken from the specified person and taken in accordance with Division 5 of Part 11 of the Act and this Part,
- (b) that the authorised person arranged for the portion to be submitted for analysis by an analyst to determine whether the sample indicated that the blood of the staff member by whom the sample was provided or from whom the sample was taken contained alcohol, and if so, the concentration of alcohol in the blood of the staff member,
- (c) that the container into which the sample was placed was sealed, and marked or labelled, in a specified manner,
- is prima facie evidence of the particulars certified in and by the certificate.
- (3) For the purposes of any disciplinary matter involving a contravention of clause 249D, a certificate purporting to be signed by an analyst and certifying any one or more of the following matters:
- (a) that the analyst received, on a specified day, a portion of a sample of a specified person's blood or a non-invasive sample provided by or taken from the specified person in a container submitted for analysis under Division 5 of Part 11 of the Act and this Part,
- (b) that the container, as received by the analyst, was sealed, and marked or labelled, in a specified manner,
- (c) that, on receipt by the analyst of the container, the seal was unbroken,
- (d) that the analyst carried out an analysis of the portion to determine whether the sample indicated that the blood of the staff member by whom the sample was provided or from whom the sample was taken contained alcohol, and if so, the concentration of alcohol in the blood of the staff member,
- (e) that the concentration of alcohol in the blood of the staff member determined pursuant to the analysis and expressed in grammes of alcohol in 100 millilitres of blood was present in that sample,

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- (f) that the analyst was, at the time of the analysis, an analyst within the meaning of this Part,  
is prima facie evidence of the matters set out in subclause (4).
- (4) A certificate under subclause (3) is prima facie evidence:
  - (a) of the particulars certified in and by the certificate, and
  - (b) that the sample was a portion of the sample of the blood of that specified person or a non-invasive sample provided by or taken from the specified person, and
  - (c) that the portion had not been tampered with before it was received by the analyst.
- (5) For the purposes of any disciplinary matter involving a contravention of clause 249D, evidence may be given of the concentration of alcohol present in the blood or other biological material of the staff member, as determined by an analysis under Division 5 of Part 11 of the Act of a portion of a sample of the staff member's blood or a non-invasive sample provided by or taken from the staff member, as the case may be.
- (6) The concentration of alcohol so determined is taken to be the concentration of alcohol in the blood of the staff member when the staff member presented for duty if that sample of blood or non-invasive sample was taken within 3 hours of the the staff member presenting for duty, unless the staff member proves that the concentration of alcohol in the staff member's blood at that time was less than 0.02 grammes of alcohol in 100 millilitres of blood.
- (7) The concentration of alcohol so determined is taken to be the concentration of alcohol in the blood of the staff member while the staff member was on duty if that sample of blood or non-invasive sample was taken while the staff member was on duty or within 3 hours of the staff member ceasing to be on duty on the particular day, unless the staff member proves that the concentration of alcohol in the staff member's blood at that time was less than 0.02 grammes of alcohol in 100 millilitres of blood.

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**2490 Certificate evidence of presence of a prohibited drug**

- (1) For the purposes of any disciplinary matter involving a contravention of clause 249E, a certificate purporting to be signed by a medical practitioner or registered nurse and certifying any one or more of the following matters:
- (a) that the practitioner or nurse was a medical practitioner or registered nurse who attended a specified person at a hospital,
  - (b) that the practitioner or nurse took a sample of the staff member's blood or was provided with or took a non-invasive sample from the staff member in accordance with Division 5 of Part 11 of the Act and this Part on the day and at the time stated in the certificate,
  - (c) that the practitioner or nurse dealt with the sample in accordance with clause 249J or 249K,

is prima facie evidence of the particulars certified in and by the certificate.

- (2) For the purposes of any disciplinary matter involving a contravention of clause 249E, a certificate purporting to be signed by a person and certifying any one or more of the following matters:
- (a) that the person was provided with or took a non-invasive sample from a specified person in accordance with Division 5 of Part 11 of the Act and this Part on the day and at the time stated in the certificate,
  - (b) that the person dealt with the sample in accordance with clause 249L,

is prima facie evidence of the particulars certified in and by the certificate.

- (3) For the purposes of any disciplinary matter involving a contravention of clause 249E, a certificate purporting to be signed by an analyst and certifying any one or more of the following matters:
- (a) that the analyst received, on a specified day, a portion of a sample of a specified person's blood or a non-invasive sample provided by or taken from a specified person in a container submitted for analysis under Division 5 of Part 11 of the Act and this Part,

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- (b) that the container, as received by the analyst, was sealed, and marked or labelled, in a specified manner,
- (c) that, on receipt by the analyst of the container, the seal was unbroken,
- (d) that the analyst carried out an analysis of the portion to determine whether any prohibited drug was present in the sample,
- (e) that a specified prohibited drug ascertained pursuant to the analysis was present in that portion,
- (f) that the analyst was, at the time of the analysis, an analyst within the meaning of this Part,

is prima facie evidence of the matters set out in subclause (4).

- (4) A certificate under subclause (3) is prima facie evidence:
  - (a) of the particulars certified in and by the certificate, and
  - (b) that the portion was a portion of the sample of that specified person's blood or a non-invasive sample provided by, or taken from, that specified person, and
  - (c) that the portion had not been tampered with before it was received by the analyst.
- (5) For the purposes of any disciplinary matter involving a contravention of clause 249E, evidence may be given of the presence of a prohibited drug in the blood or other biological material of the staff member, as determined pursuant to an analysis under Division 5 of Part 11 of the Act of a portion of a sample of the person's blood or a non-invasive sample provided by or taken from the staff member.
- (6) The prohibited drug the presence of which is so determined, is taken to have been present in the blood or other biological material of the staff member when the staff member presented for duty, if the sample was taken or provided within 24 hours of the time the staff member last presented for duty, unless the staff member proves the absence, at that time, of the drug.
- (7) The prohibited drug the presence of which is so determined, is taken to have been present in the blood or other biological material of the staff member while the staff member was on duty if the sample was taken or provided within 24 hours of the later of the time the staff member last was involved in an incident referred to in section 236F (3) of the Act (if such an

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incident occurred) or the staff member last ceased to be on duty, unless the staff member proves the absence, at that time, of the drug.

**249P Certificate evidence of appointment of authorised person**

For the purposes of any disciplinary matter involving a contravention of a provision of this Part or in proceedings for an offence under this Part, a certificate purporting to be signed by the Commissioner and certifying that the person named in the certificate was an authorised person at a particular time is prima facie evidence of the particulars certified in and by the certificate.

**Division 5 Consequences**

**249Q Disciplinary action**

Nothing in this Part limits any disciplinary action that may be taken under the *Public Sector Employment and Management Act 2002* in respect of a member of correctional staff.

**249R Refusing to comply with a requirement under Division 5 of Part 11 of the Act**

- (1) A member of correctional staff must not refuse:
  - (a) to undergo a breath test, or
  - (b) to submit to a breath analysis, or
  - (c) to provide, or enable to be taken, a non-invasive sample from the staff member, or
  - (d) to comply with any other requirement of or under Division 5 of Part 11 of the Act,  
in accordance with a direction given under Division 5 of Part 11 of the Act by an authorised person.
- (2) This clause does not prevent a member of correctional staff so refusing if the staff member is unable on medical grounds to do otherwise.

**249S Double jeopardy**

A member of correctional staff is not liable to be punished or disciplined under this Division for both:

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- (a) testing positive for alcohol or testing positive for a prohibited drug, and
- (b) contravening clause 249R (1).

### **249T Immediate action: staff member relieved from duty**

- (1) If a member of correctional staff tests positive for alcohol or a member of correctional staff tests positive for a prohibited drug, the staff member, if the staff member remains on duty, is to be immediately relieved of duty and is not to carry out any duty for the duration of the staff member's shift.
- (2) The Commissioner may decide that a member of correctional staff who is relieved from duty because of the operation of this clause is not entitled to be paid (whether in wages or salary, paid sick leave or any other type of payment) for that part of the relevant shift that the staff member did not work.

### **249U Consequences for staff members having prescribed concentration of alcohol in blood**

- (1) This clause applies if:
  - (a) a member of correctional staff (other than a staff member appointed on probation, a temporary employee or a casual employee) tests positive for alcohol, and
  - (b) the staff member has not tested positive for alcohol in the 3 years immediately preceding the test referred to in paragraph (a).
- (2) In such a case, the Commissioner may ask the staff member to elect to undergo counselling and rehabilitation or to elect not to undergo counselling and rehabilitation and face the possibility that the Commissioner may deal with the matter of the staff member testing positive for alcohol as an allegation that the staff member contravened clause 249D and deal with the matter under Part 2.7 of the *Public Sector Employment and Management Act 2002*.
- (3) If the staff member elects to undergo counselling and rehabilitation, the Commissioner may direct the staff member:
  - (a) to attend any interview organised with a person nominated by the Commissioner, and

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- (b) to attend an interview with an approved counsellor for assessment, and
    - (c) to participate in any rehabilitation program recommended by that counsellor.
  - (4) If the staff member:
    - (a) elects not to undergo counselling or rehabilitation, or
    - (b) without reasonable excuse, fails to attend an interview or counselling session after electing to do so, or
    - (c) without reasonable excuse, fails to participate in a rehabilitation program recommended by the approved counsellor referred to in subclause (3) (b),the Commissioner may deal with the matter in accordance with subclause (5).
  - (5) In respect of a staff member who engages in conduct referred to in subclause (4) (a)–(c), the Commissioner may:
    - (a) deal with the matter of the staff member testing positive for alcohol as an allegation that the staff member contravened clause 249D and deal with the matter under Part 2.7 of the *Public Sector Employment and Management Act 2002*, and
    - (b) deal with the conduct referred to in subclause (4) (b) or (c) as an allegation of misconduct and deal with the matter under Part 2.7 of the *Public Sector Employment and Management Act 2002*.
  - (6) The Commissioner is not required to ask the staff member to elect to undergo counselling and rehabilitation or to elect not to undergo counselling and rehabilitation if the Commissioner, having regard to all the circumstances, considers that it would be more appropriate to deal with the matter of the staff member testing positive for alcohol as an allegation that the staff member contravened clause 249D and deal with the matter under Part 2.7 of the *Public Sector Employment and Management Act 2002*.

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### **249V Consequences for staff members testing positive at least twice in 3 years**

- (1) This clause applies if:
  - (a) a member of correctional staff (other than a staff member appointed on probation, a temporary employee or a casual employee) tests positive for alcohol, and
  - (b) the staff member has tested positive for alcohol in the 3 years immediately preceding the test referred to in paragraph (a).
- (2) In such a case, the Commissioner may deal with the matter of the staff member testing positive for alcohol as an allegation that the staff member contravened clause 249D and deal with the matter under Part 2.7 of the *Public Sector Employment and Management Act 2002*.
- (3) The Commissioner may refer the staff member to a medical practitioner for the purpose of the medical practitioner determining the staff member's fitness to remain a staff member.
- (4) The Commissioner is to have regard to any report made by the medical practitioner in relation to such a staff member.

### **249W Consequences for staff members testing positive for prohibited drugs**

- (1) This clause applies if:
  - (a) a member of correctional staff (other than a staff member appointed on probation, a temporary employee or a casual employee) tests positive for a prohibited drug, and
  - (b) the staff member has not tested positive for a prohibited drug in the 3 years immediately preceding the test referred to in paragraph (a).
- (2) In such a case, the Commissioner may ask the staff member to elect to undergo counselling and rehabilitation with an approved counsellor or to elect not to undergo counselling and rehabilitation and face the possibility that the Commissioner may deal with the matter of the staff member



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testing positive for a prohibited drug as an allegation that the staff member contravened clause 249E and deal with the matter under Part 2.7 of the *Public Sector Employment and Management Act 2002*.

- (3) If the staff member elects to undergo counselling and rehabilitation, the Commissioner may direct the staff member:
- (a) to attend any interview organised with a person nominated by the Commissioner, and
  - (b) to attend an interview with an approved counsellor for assessment, and
  - (c) to participate in any rehabilitation program recommended by that counsellor.
- (4) If the staff member:
- (a) elects not to undergo counselling or rehabilitation, or
  - (b) without reasonable excuse, fails to attend an interview or counselling session after electing to do so, or
  - (c) without reasonable excuse, fails to participate in a rehabilitation program recommended by the approved counsellor referred to in subclause (3) (c),
- the Commissioner may deal with the matter in accordance with subclause (5).
- (5) In respect of a staff member who engages in conduct referred to in subclause (4) (a)–(c), the Commissioner may:
- (a) deal with the matter of the staff member testing positive for a prohibited drug as an allegation that the staff member contravened clause 249E and deal with the matter under Part 2.7 of the *Public Sector Employment and Management Act 2002*, and
  - (b) deal with conduct referred to in subclause (4) (b) or (c) as an allegation of misconduct and deal with the matter under Part 2.7 of the *Public Sector Employment and Management Act 2002*.
- (6) The Commissioner is not required to ask the staff member to elect to undergo counselling and rehabilitation or to elect not to undergo counselling and rehabilitation if the Commissioner, having regard to all the circumstances, considers that it would be more appropriate to deal with the

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matter of the staff member testing positive for a prohibited drug as an allegation that the staff member contravened clause 249E and deal with the matter under Part 2.7 of the *Public Sector Employment and Management Act 2002*.

### **249X Consequences for staff members testing positive for a prohibited drug at least twice within 3 years**

- (1) This clause applies if:
  - (a) a member of correctional staff (other than a staff member appointed on probation, a temporary employee or a casual employee) tests positive for a prohibited drug, and
  - (b) the staff member has tested positive for a prohibited drug in the 3 years immediately preceding the test referred to in paragraph (a).
- (2) In such a case, the Commissioner may deal with the matter of the staff member testing positive for a prohibited drug as an allegation that the staff member contravened clause 249E and deal with the matter under Part 2.7 of the *Public Sector Employment and Management Act 2002*.
- (3) The Commissioner may refer the staff member to a medical practitioner for the purpose of the medical practitioner determining the staff member's fitness to remain a staff member.
- (4) The Commissioner is to have regard to any report made by the medical practitioner in relation to such a staff member.

### **249Y Probationary staff members**

- (1) If a member of correctional staff appointed on probation tests positive for alcohol or tests positive for a prohibited drug, the Commissioner may:
  - (a) direct the staff member to attend an interview with an approved counsellor for assessment and to participate in any rehabilitation program recommended by that counsellor, or
  - (b) annul his or her appointment under section 23 of the *Public Sector Employment and Management Act 2002*.

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- (2) If such a staff member fails, without reasonable excuse, to attend an interview or counselling session after being directed to do so or, without reasonable excuse, fails to participate in any rehabilitation program recommended by an approved counsellor referred to in subclause (1) (a), the Commissioner may annul his or her appointment under section 23 of the *Public Sector Employment and Management Act 2002*.
  - (3) The Commissioner may at any time refer the staff member to a medical practitioner for the purpose of the medical practitioner determining the staff member's fitness for duty.
  - (4) The Commissioner is to have regard to any report made by the medical practitioner in relation to such a staff member.

**249Z Temporary or casual staff members**

- (1) If a member of correctional staff who is a temporary employee or a casual employee tests positive for alcohol or tests positive for a prohibited drug, the Commissioner may:
  - (a) direct the staff member to attend an interview with an approved counsellor for assessment and to participate in any rehabilitation program recommended by that counsellor, or
  - (b) dispense with his or her services under section 30 or 39 of the *Public Sector Employment and Management Act 2002*, as the case may be.
- (2) If such a staff member fails, without reasonable excuse, to attend an interview or counselling session after being directed to do so or, without reasonable excuse, fails to participate in any rehabilitation program recommended by an approved counsellor referred to in subclause (1) (a), the Commissioner may dispense with his or her services under section 30 or 39 of the *Public Sector Employment and Management Act 2002*, as the case may be.
- (3) The Commissioner may at any time refer the staff member to a medical practitioner for the purpose of the medical practitioner determining the staff member's fitness for duty.
- (4) The Commissioner is to have regard to any report made by the medical practitioner in relation to such a staff member.

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### **Division 6      Offences**

#### **249AA    Interfering with results of test**

A person who does anything to introduce, or alter the concentration of, alcohol or any prohibited drug in a member of correctional staff's blood or other biological material, before the staff member undergoes a test under Division 5 of Part 11 of the Act, is guilty of an offence if the person does so for the purpose of preventing or restricting the use of the results of the test in any disciplinary matter involving a contravention of this Part.

Maximum penalty: 20 penalty units.

#### **249AB    Interfering or tampering with, or destroying, samples**

A person must not interfere or tamper with, or destroy, a sample of blood or a non-invasive sample provided by or taken from a member of correctional staff under Division 5 of Part 11 of the Act unless the sample is destroyed:

- (a) by or at the direction of an analyst in the course of or on completion of analysis, or
- (b) in the case of a sample handed to a person on behalf of a member of correctional staff, by or at the direction of the person, or
- (c) after the expiration of 12 months commencing on the day on which the sample was taken or provided, or a longer period (being no more than 5 years) as directed by the Commissioner in respect of the sample in a direction made before such an expiration.

Maximum penalty: 20 penalty units.

BY AUTHORITY

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