

# **Youth Justice (Conduct of Searches and Other Matters) Amendment Regulation 2024**

Explanatory notes for SL 2024 No 232

made under the

*Youth Justice Act 1992*

## **General Outline**

### **Short Title**

*Youth Justice (Conduct of Searches and Other Matters) Amendment Regulation 2024* (the Amendment Regulation)

### **Authorising law**

Sections 262 and 314(2) and schedule 2 of the *Youth Justice Act 1992*.

### **Policy objectives and the reasons for them**

The objectives of this regulation are to amend the *Youth Justice Regulation 2016* (YJ Regulation) to:

- update arrangements for determining the gender of persons who will conduct searches or provide health services, to reflect trauma-informed contemporary best practice;
- provide for x-ray imaging searches in youth detention centres (YDCs), to reduce the need for unclothed searches; and
- establish a new youth remand centre in Wacol.

### **Updates to search and health services provisions**

The YJ Regulation provides for a range of searches in youth detention centres, including:

- searches that involve touching, but not the removal of clothes;

- searches involving the removal of clothes, known as ‘partially clothed’ searches because the dignity of the child is preserved to the greatest extent practicable by searching the top and bottom halves of the child separately, allowing them to remain partially clothed at all times; and
- ‘body searches’, involving an examination of an orifice or cavity of the child’s body by a doctor.

From 1 July 2022 to 30 June 2023, 1,643 ‘partially clothed’ searches<sup>1</sup> were conducted, or 15.9 per 1,000 bed nights. For every 12 months (equivalent) a child spent in custody, there were an average of 5.8 partially clothed searches. These searches resulted in the detection of 353 contraband items, plus additional items that were voluntarily surrendered prior to searches.

No body searches are known to have ever been undertaken in Queensland youth detention centres.

The chief executive must ensure that searches involving touching, and partially clothed searches, are conducted:

- for a transgender or intersex child – by a detention centre employee of the sex requested by the child; or
- otherwise – by a detention centre employee of the same sex as the child.<sup>2</sup>

There are no exceptions to these current arrangements, which assume that transgender or intersex children will only request male or female employees, and that children who are not transgender or intersex can only be male or female.

If reasonably practicable, the doctor conducting a body search must be:

- for a transgender or intersex child – of the sex requested by the child; or
- otherwise – of the same sex as the child.<sup>3</sup>

The YJ Regulation also allows a child to request a health practitioner of the same sex as the child, and the chief executive must take reasonable steps to comply with that request.<sup>4</sup>

The *Births, Deaths and Marriages Registration Act 2023* (the BDMR Act) commenced on 24 June 2024. The BDMR Act allows persons to alter the record of their sex, nominating a sex descriptor of their choice that is most appropriate and meaningful to them. ‘Sex descriptor’ in this context is more commonly referred to as gender, or gender identity.

The *Corrective Services (Searches and Testing) Amendment Regulation 2024* commenced on 16 September 2024. It introduces arrangements for the adult custodial environment to better accommodate the diverse needs of prisoners during searches, promote their dignity, and maintain the safety of everyone involved.

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<sup>1</sup> searches involving removal of clothes under s.25. Commonly known as ‘strip searches’, but with the top and bottom halves of the young person’s body searched separately, to preserve their dignity as far as practicable.

<sup>2</sup> s.24(2) & 25(2)

<sup>3</sup> s.26(2)(a)

<sup>4</sup> s.35(2) & (3)

The Amendment Regulation updates these provisions to ensure that gendered search and medical provisions applying in YDCs are inclusive of gender diverse children, and that these provisions are also in line with contemporary, trauma-informed best practice for all children.

### **Imaging searches**

The objective of the imaging searches provisions is to enable searches in YDCs using electronic imaging, including by ionising radiation such as x-ray, with appropriate safeguards. Imaging searches improve the ability of the Department of Youth Justice (the Department) to detect contraband and prevent its introduction into a YDC, and significantly reduce the need for unclothed searches, protecting the dignity of children in custody and reducing trauma.

The new Wacol Youth Remand Centre is due to be operational by December 2024 (see below), and will include two x-ray imaging search machines. The Department is also intending to install the same machines in the new YDCs being developed at Woodford and Cairns, and in the existing YDCs at Wacol and Townsville.

### **Establishing Wacol Youth Remand Centre**

Existing YDCs are currently operating at full capacity. The Government is constructing a new facility in south east Queensland to be used as a remand centre for children until purpose-built YDC infrastructure is completed at Woodford and Cairns. The facility is to be known as Wacol Youth Remand Centre (WYRC).

Establishing WYRC as a YDC under the *Youth Justice Act 1992* (the YJ Act) will establish the powers, obligations, and safeguards necessary for the safe and efficient functioning of the facility.

## **Achievement of the Objectives**

### **Updates to search and health services provisions**

The Amendment Regulation enables all children in detention to nominate the ‘sex’ (gender) of persons and doctors who may search them. An opportunity to do this is to be provided by the end of the first business day after admission. In practice, this will be in conversation with the child’s caseworker. Caseworkers are human services graduates who receive ongoing professional supervision, and are best placed to have these conversations which could involve the disclosure by vulnerable young people of private information they have never disclosed to anyone before.

If the first nomination is not male or female, at least one further nomination may be given, and an order of preference.

The chief executive is required to consider the nominations and make a decision as soon as practicable, and to inform the detainee of the decision. The chief executive may reject a nomination if the chief executive reasonably believes that it is not associated with the genuine needs of the child, or that it is for an improper purpose.

It is anticipated that genuine needs may relate to, for example, gender identity, sexual orientation, or a history of abuse.

It will not be a requirement for a young person to have formally recorded their sex descriptor under the BDMR Act. This recognises the inherent vulnerability of children and that they may not have had the opportunity to take that action.

No child will be compelled to disclose any private details about themselves or their history if they do not wish to do so.

Following the acceptance of a nomination, a relevant search will be conducted or provided by a person of the nominated sex unless this is not reasonably practicable – that is, a staff member or health service provider known to be of that sex is not reasonably available (see below in relation to protections for staff). In that case, the second preference will apply; and if the chief executive has accepted a third or subsequent nomination, they will apply in order. If preferences are exhausted, the chief executive will nominate an appropriate person to conduct the search.

A child is able to change a nomination at any reasonable time, with the same decision-making process applying.

If a child declines to make a nomination, the default is that male detainees are searched by, and receive health services from, male persons, and female detainees by and from female persons.

If a search of a transgender, intersex, or otherwise neither male nor female child is conducted before a nomination is accepted by the chief executive, the child will be given the opportunity at the time of the search to request the sex of the staff member who conducts the search. If the first request is not reasonably practicable, at least one further opportunity must be given. If the second request is also not reasonably practicable, then the search may be conducted by a person the chief executive considers appropriate.

The requirement for the opportunity to be given to the child by the end of the business day following admission, in private conversation with a caseworker, will still apply.

When medical treatment or other health services are to be provided, the chief executive is to ensure the child has at least two opportunities to nominate the sex of the person to provide the treatment or services, and if neither is reasonably practicable, the treatment or services may be provided by a person the chief executive considers appropriate.

Employees' and health practitioners' right to privacy is protected by ensuring they cannot be directed to disclose their sex, or to conduct a search or provide health services in circumstances that would reveal their sex.

### **Imaging searches**

The Amendment Regulation establishes a new stand-alone imaging search, with the same threshold as a search involving removal of clothes, but its own safeguards.

An image produced by an imaging search is to be viewed only by a person for the conduct of the search, is not to be copied, and is to be destroyed as soon as practicable after the search has been completed. In practice, the machines will be programmed to permanently delete images once the search process is complete. If an item is detected, the child will be referred to health service providers for advice, who may conduct further scans as necessary.

Stakeholders identified a risk that staff may take a photograph of the image before it is deleted, but staff – with some exceptions, such as management – are not permitted to take phones or cameras into YDCs. Further, the *Queensland Community Safety Act 2024* inserted new section 279B into the YJ Act, establishing the offence of photographing a detainee or any part of a detention centre; and any disclosure of a photograph of a scanned image would be a separate offence under the confidentiality provisions in part 9 of the YJ Act.

The Amendment Regulation does not prescribe radiation exposure limits as these are prescribed in the *Radiation Safety Regulation 2021* (the RS Regulation). Schedule 5, part 3 of the RS Regulation limits the total effective dose for a member of the public – including a child in detention – to 1000 microsieverts ( $\mu\text{Sv}$ ) in any 12-month period. The Department will be responsible for compliance with the RS Regulation. X-ray imaging search machines typically deliver a dose of under  $10\mu\text{Sv}$  per scan. As noted above, for every 12 months (equivalent) a child spent in custody in 2022-23, there were an average of 5.8 partially clothed searches; if each of these had been an imaging search the average dosage per child would have been under  $58\mu\text{Sv}$  for the year.

Acknowledging the fact children are more sensitive to radiation than adults, an operational threshold will be set at a quarter of the legal limit,  $250\mu\text{Sv}$  in any 12-month period. Biometric tools such as facial recognition will enable cumulative radiation exposure to any individual across all machines operated by the Department to be tracked, to assist with compliance. To the extent that biometric data is ‘identifying information’ under the YJ Act, it will be protected by the Act’s confidentiality provisions.

### **Establishing Wacol Youth Remand Centre**

Section 262 of the YJ Act provides for detention centres to be established by regulation. The Amendment Regulation adds the WYRC to the YDCs already established by the YJ Regulation.

Establishing YDCs that are compatible with human rights takes time, both to design and construct. The Department is developing two purpose-built therapeutic facilities in Woodford and Cairns as quickly as practicable. Along with existing YDCs, these will be compatible with human rights. In order to mitigate current capacity issues in the meantime, construction of WYRC has been fast-tracked, but it is acknowledged that as a result, WYRC will not be fully compatible with the human rights of children detained there.

The Amendment Regulation does not include a declaration under paragraph 262(3)(b) of the YJ Act that subsection 262(2) does not apply. This means the *Human Rights Act 2019* does not apply to the establishment of the WYRC. However, pursuant to subsection 262(4), the Minister has had regard to human rights, and all practicable measures have been taken to minimise incompatibility. Further detail is provided in the human rights certificate for the Amendment Regulation.

Pursuant to YJ Act s.262(6) to (8), the establishment of WYRC as a YDC will expire at the end of 2026, with a possible extension for up to one year. The possible extension is in case of construction or other delays in the establishment of YDCs in Woodford and Cairns.

## **Consistency with policy objectives of authorising law**

The Amendment Regulation is consistent with the objectives of the *Youth Justice Act 1992*.

## **Inconsistency with policy objectives of other legislation**

There is no inconsistency with the policy objectives of other legislation.

## **Alternative Ways of Achieving Policy Objectives**

There are no alternative ways to achieve the policy objectives.

## **Benefits and costs of implementation**

### **Updates to search and health services provisions**

Departmental policies and procedures, in accordance with the youth justice principles in schedule 1 of the YJ Act and with the *Human Rights Act 2019*, already require YDC staff to be sensitive to the needs of all children in their care, including needs that may become acute in the context of unclothed searches or health services, such as gender diversity or a history of abuse. Ensuring these needs are met benefits the child and their rehabilitation, and therefore the community.

The Amendment Regulation codifies arrangements to ensure particular needs can be identified and, wherever practicable, met.

The costs of amending operational policies and training staff will be met from within existing resources.

### **Imaging searches**

The implementation of imaging searches across YDCs will enable the almost complete phasing out of searches involving the removal of clothes. These searches can be humiliating and traumatising, especially with a high proportion of young people in custody (compared to the general population) having been victims of sexual abuse. In September 2023, the Queensland Human Rights Commission released a report *Stripped of Our Dignity*<sup>5</sup>, capturing adult women's negative experiences of unclothed searches exacerbated by past trauma. Imaging technology allows the child to remain fully clothed, supporting their human rights, dignity, and privacy, and is generally preferred by stakeholders.

It also offers superior detection, including the ability to detect organic and inorganic items concealed externally or secreted internally.

Funding has already been allocated for the installation of the imaging devices at the planned WYRC and other centres under construction. Funding for the installation of imaging devices into existing centres will be sought through a separate process.

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<sup>5</sup> <https://www.qhrc.qld.gov.au/about-us/reviews/strip-searching>

## **Establishing Wacol Youth Remand Centre**

WYRC will be operated exclusively for children. No adults will be held at or transition through the facility – the only exception being detainees over 18, but held on child charges; these will generally be no older than 18 years and 6 months. Specialist staff and programs will be available, and the close proximity to the existing Brisbane and West Moreton YDCs will have a range of operational benefits.

The construction and operation of WYRC to the end of 2026 is already funded.

## **Consistency with Fundamental Legislative Principles**

The Amendment Regulation is consistent with fundamental legislative principles.

## **Consultation**

The following stakeholders were provided with consultation papers outlining the proposed arrangements for the gender of persons who would conduct searches or provide health services, and for imaging searches: Aboriginal and Torres Strait Islander Community Health Service Brisbane Ltd; the Aboriginal and Torres Strait Islander Legal Service; the Australian Workers' Union; the Bar Association of Queensland; Bob Atkinson AO APM; Brisbane Youth Service; The Hub Community Legal Centre; the Inspector of Detention Services; the Justice Reform Initiative; Legal Aid Queensland; LGBTI Legal Service; Life Without Barriers; the Local Government Association of Queensland; Father Michael Lowcock OAM; the National Retail Association; PeakCare; Pride in Law (Qld); the Privacy Commissioner; the Public Guardian; Queensland Aboriginal and Islander Health Council; Queensland Aboriginal and Torres Strait Islander Child Protection Peak; Queensland African Communities Council; Queensland Council of Social Services; Queensland Family and Child Commission; Queensland Human Rights Commission; Queensland Indigenous Family Violence Legal Service; Queensland Law Society; Queensland Youth Housing Coalition; Sisters Inside; Professor Susan Dennison; Together Queensland; YFS Legal; the Youth Advocacy Centre; and Youth Empowered Towards Independence.

The following stakeholders were provided with a consultation paper outlining the proposed arrangements for the gender of persons who would conduct searches or provide health services: Open Doors Youth Service; Queensland Children's Gender Services; Intersex Human Rights Australia Ltd; Transcend Australia Ltd; Equality Australia; Queensland Council for LGBTI Health; Rainbow Families Queensland; Australian Transgender Support Association of Queensland; and Dr Angela Dwyer, University of Tasmania.

In accordance with the Queensland Government Better Regulation Policy, the Office of Best Practice Regulation (OBPR) was notified of the regulatory proposal and a Summary Impact Analysis Statement (IAS) prepared. A copy of the approved Summary IAS will be published on the Department of Youth Justice website.