

Youth Justice Amendment Regulation 2020

Human Rights Certificate

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

In accordance with section 41 of the *Human Rights Act 2019*, I, Di Farmer, Minister for Child Safety, Youth and Women and Minister for the Prevention of Domestic and Family Violence provide this human rights certificate with respect to the *Youth Justice Amendment Regulation 2020* (the Amendment Regulation) made under the *Youth Justice Act 1992*.

In my opinion, the Amendment Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

Construction of the new West Moreton Youth Detention Centre is underway, with stage one due for completion in late 2020.

Section 262 of the *Youth Justice Act 1992* provides that the Governor in Council may establish detention centres by regulation. The Amendment Regulation amends the *Youth Justice Regulation 2016* (the YJ Regulation) to establish the West Moreton Youth Detention Centre.

There is no change to any provision about when or how a child may be remanded in custody or sentenced to a period of detention.

The Amendment Regulation also amends the YJ Regulation in relation to the power of a detention centre executive director to approve the separation of a child in a locked room at a youth detention centre for over two hours.

The executive director's approval is required if the separation is for a purpose specified in YJ Regulation section 21(1)(d) or (e) (for the child's protection or the protection of another person or property, or to restore order in the detention centre). Currently, this function cannot be delegated.

The Amendment Regulation allows the delegation of this function to an appropriately qualified public service employee.

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion, the human rights relevant to the delegation of the power to approve separation longer than two hours (clause 3) are:

- Protection from torture and cruel, inhuman or degrading treatment (section 17);
- Protection of families and children (section 26);

- Humane treatment when deprived of liberty (section 30); and
- Children in the criminal process (section 33).

Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)

(a) the nature of the rights

Protection from torture and cruel, inhuman or degrading treatment:

Section 17 of the *Human Rights Act 2019* provides that a person must not be subjected to torture or treated or punished in a cruel, inhuman or degrading way.

Torture is an act that intentionally inflicts severe physical or mental pain or suffering. Cruel, inhuman or degrading treatment or punishment is broader, including for example abuse or humiliation. It does not necessarily have to be intentionally inflicted or physical pain. It can include acts that cause mental suffering, debase a person, cause fear, anguish, humiliation or a sense of inferiority. This could include being separated in a locked room without sufficient reason, or being harmed by a person when the harm could have been prevented by continuing the separation of the perpetrator.

Protection of families and children:

Section 26(2) provides that every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child. This recognises that children are entitled to special protection. It recognises that children are more vulnerable because of their age. Making a decision about separation that did not take into account issues directly related to the child's age (e.g. stage of cognitive development) could be incompatible with this right.

Humane treatment when deprived of liberty:

Section 30 provides that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person, and that an accused person who is detained must be treated in a way that is appropriate for a person who has not been convicted.

This right has a lower threshold – that is, it is engaged by less serious mistreatment – than the right to protection from torture and cruel, inhumane and degrading treatment. Separation of a child in a locked room without sufficient reason would be incompatible with this right, as would being harmed by a person when the harm could have been prevented by continuing the separation of the perpetrator.

Children in the criminal process:

Section 33 provides that a child who has been convicted of an offence must be treated in a way that is appropriate for the child's age. Making a decision about separation that did not take into account issues directly related to the child's age (e.g. stage of cognitive development) could be incompatible with this right.

The Amendment Regulation allows the delegation by a detention centre executive director of his or her power to approve a separation of longer than two hours, meaning an approval could be given by an employee who, although appropriately qualified to make the decision, is less experienced than the executive director. This could amount to a limitation on each of the human rights engaged by the Amendment Regulation because the complex task of balancing the relevant considerations to arrive at the right decision may not be performed as effectively. To mitigate this risk, the policy and procedure that informs decision making about separation will be adjusted to strengthen human rights considerations and limit the circumstances in which a delegate may exercise the power.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

A decision to extend a separation beyond two hours should not be made until the closing stages of the two hours, because circumstances can change quickly in matters involving vulnerable children. There is therefore a brief window of time within which these decisions should be made. Detention centre executive directors are on call 24 hours a day, seven days a week, but it cannot be expected that they will always be available to make these decisions at exactly the right time.

The purpose of the amendment is to ensure that even when the detention centre's executive director is not available, a decision to extend a separation beyond two hours can always be made at the appropriate time, taking into account all relevant factors to ensure the safety of the child, other children, and staff at the centre.

The limitation is necessary because the alternatives could lead to greater limitations on human rights. If the executive director is forced to make the decision too early, because of an anticipated unavoidable unavailability, relevant factors may not have emerged and would not be taken into account. This would be incompatible with each of the rights mentioned above. If staff cannot contact the executive director because of an unanticipated unavailability, a decision may not be made at all and the separation would have to end, even if ending the separation would be dangerous. This could be incompatible with the human rights of the child, other children, and staff at the centre, such as the protection of children and the right to life, liberty and security. Therefore, the purpose of the amendments is to promote these rights.

Ensuring a safe environment for children and staff in detention is consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

It would not be possible to achieve the purpose in any way other than to provide for other people to make the decision. The limitation directly helps to achieve its purpose.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

This the least restrictive way to achieve the purpose. The delegation may only be to an appropriately qualified public service employee, and the executive director retains the obligation to ensure that the power is properly exercised (*Acts Interpretation Act 1954, s.27A*).

Executive directors will ensure they only delegate to persons having the qualifications, experience or standing appropriate to perform the function or exercise the power.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

The purpose of the amendment is to protect the human rights of the child under separation, and of others who may have their rights impacted by the current provision as described above. The nature and extent of the limitation are relatively narrow. On balance, the benefits gained by achieving the purpose outweigh the limitation.

(f) any other relevant factors

Nil.

Conclusion

I consider that the *Youth Justice Amendment Regulation 2020* is compatible with the *Human Rights Act 2019* because while it does limit, restrict or interfere with a human right, that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Di Farmer MP
Minister for Child Safety, Youth and Women
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