

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

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 Education and Minister for Youth Justice provide this human rights certificate with respect to the *Youth Justice (Conduct of Searches and Other Matters) Amendment Regulation 2024* (the Amendment Regulation) made under the *Youth Justice Act 1992* (YJ Act).

In my opinion, with the exception of the provisions establishing Wacol Youth Remand Centre, the Amendment Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019* (the HR Act). I base my opinion on the reasons outlined in this statement.

The provisions establishing Wacol Youth Remand Centre will deliver an option that is significantly less incompatible with human rights than the status quo, and the least incompatible option achievable in the circumstances. Children will receive the same fundamental services as at other YDCs. The incompatibilities are minimised and temporary, but it is acknowledged that those provisions are not compatible with some human rights protected by the HR Act. The nature and the extent of the incompatibility are outlined in this certificate.

Overview of the Subordinate Legislation

The Amendment Regulation will amend the *Youth Justice Regulation 2016* (the 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); and
- establish a new youth remand centre in Wacol.

Gender of persons who will conduct searches or provide health services

Since 2016, the YJ Regulation has required the chief executive to 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.¹

¹ s.24(2) & 25(2)

There are no exceptions to these 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.

The Amendment Regulation updates these provisions to meet contemporary expectations, and ensure compatibility with the *Births, Deaths and Marriages Registration Act 2023*. They also extend the right to nominate the gender of persons conducting searches or providing health services to all children, not just transgender and intersex. This is in line with contemporary, trauma-informed best practice and represents an enhancement to the human rights of children in youth detention centres.

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

Imaging searches

The Amendment Regulation also provides for imaging searches in YDCs, with appropriate safeguards, reducing the need for unclothed searches, protecting the dignity of children in custody and reducing trauma. This reform also represents an enhancement to the human rights of children in youth detention centres.

Establishing a new youth remand centre

The provisions establishing a new remand centre are the best option achievable in the circumstances, and are only temporary until purpose-built fully compatible infrastructure is developed. However, it is acknowledged that they are not fully compatible with some human rights. The provisions have effect, despite being incompatible, pursuant to YJ Act section 262(2); but pursuant to subsection 262(4) I have had regard to human rights, and all practicable measures have been taken to minimise incompatibility.

The limitations of these provisions are discussed in the remainder of this human rights certificate.

Human Rights Issues

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

Section 262 of the YJ Act provides for the establishment of YDCs by regulation, and includes temporary provisions allowing the establishment of detention centres that are not compatible with human rights under the HR Act. However, the temporary provisions still require the Minister recommending the regulation to have regard to human rights.

YDCs in Queensland are currently operating at full capacity, with children being held in watchhouses awaiting YDC beds. The Government is addressing this issue in a way that is fully compatible with human rights by commissioning new, purpose-built YDC infrastructure in Woodford and Cairns as quickly as practicable, but this takes time.

A rapidly developed remand centre can provide custody infrastructure for children in the interim that is significantly less incompatible with human rights than watchhouses. The provisions of the Amendment Regulation establishing Wacol Youth Remand Centre (WYRC) limit the following rights:

- protection from torture and cruel, inhuman or degrading treatment (section 17);
- right of children to protection in their best interests (section 26(2));
- humane treatment when deprived of liberty (section 30); and
- The rights of 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.

Right of children to protection in their best interests:

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.

The concept of the best interests of the child is informed by the United Nations Convention on the Rights of the Child (UNCRC), of which article 40(1) provides that a child defendant is 'to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others.'

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.

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. Article 37(c) of the UNCRC provides that every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so...'

(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

The purpose of detaining children generally in the criminal justice system is to keep the community safe and to ensure the efficient administration of justice, should an appropriate decision-maker (a court, or for very short periods, police) determine there is an unacceptable risk that the child will endanger the community, fail to attend court, or obstruct the course of justice if granted bail; or to achieve whichever sentencing principles are relevant in the circumstances, should a court sentence the child to a period of detention for an offence.

A child held in custody should be accommodated in circumstances – including both the built environment and available programs and services – conducive to their rehabilitation.

YDCs in Queensland are currently operating at full capacity, with children being held in watchhouses awaiting YDC beds. The Government is addressing this issue in a way that is fully compatible with human rights by commissioning new, purpose-built YDC infrastructure in Woodford and Cairns as quickly as practicable, but this takes time.

The purpose of the limitation is to establish custody infrastructure for children in the interim that is the least incompatible with human rights practicable. WYRC will be significantly less incompatible with human rights than existing watchhouses. No adults will be housed or transition through the facility; specialist staff, health practitioners, teachers, programs and recreational activities will be available to a greater extent than realisable in any existing watchhouse; and being immediately adjacent to the existing Brisbane and West Moreton YDCs will have a range of benefits for the young people being detained.

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

The limitation directly helps to achieve the purpose.

While WYRC will not meet all contemporary best practice standards for youth detention centres, it will be closer to those standards than current watchhouses. It will have larger cell sizes, two open air external exercise yards that are over 50m² in total, and internal exercise yards with natural lighting over 400m² in total. There will be consultation rooms for Child and Youth Forensic Mental Health Services (CYMHS) and other Queensland Health (QH) services, and a large visits centre to accommodate family, legal, youth justice caseworker, and external agency interactions, including four video conferencing suites to support courts, casework, medical and legal professional video sessions. There will also be a dedicated classroom.

Children will receive the same fundamental services as at other YDCs, including but not limited to:

- 48 weeks of school per year, delivered by the Department of Education
- primary and mental health care and assessment from QH and CYMHS
- case planning, assessments and interventions
- visits and phone calls with family, kin, Elders, peers and other significant supports
- sport and fitness programs, and
- behavioural change programs.

WYRC will be operated by Department of Youth Justice (DYJ) with DYJ staff, who will receive site-specific training in behaviour management, trauma informed practice, and evidence-based interventions to address the heightened vulnerabilities of young people coming from watchhouses.

Being a dedicated youth remand centre, no adults will be detained in or transit through the centre (with the exception of detainees over 18 but detained on child charges, who will be less than 18 years and 6 months old).

The WYRC will be subject to the same oversight protocols as current YDCs, such as weekly visits from the Office of the Public Guardian's Community Visitors, inspections by the Inspector of Detention Services and other internal and external oversight bodies.

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

This is the least restrictive way to achieve the purpose. There is no other secure facility available that is less incompatible with human rights, and there will not be until the fully compatible new YDCs are established in Woodford and Cairns.

(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 human rights of children in detention are of critical importance. While the establishment of WYRC is incompatible with those human rights, the purpose of the limitation – to establish custody infrastructure for children that is the least incompatible with human rights as practicable, until fully compatible YDCs are operational – is achieved.

(f) any other relevant factors

Nil.

Conclusion

I consider that the provisions of the *Youth Justice (Conduct of Searches and Other Matters) Amendment Regulation 2024* relating to the conduct of searches, the provision of health services and imaging searches are compatible with the *Human Rights Act 2019*.

I have had regard to whether the establishment of WYRC would be compatible with human rights, as required by YJ Act s.262(4). I consider that while WYRC will not be compatible with human rights, it is the least incompatible option available in the circumstances.

DI FARMER MP
MINISTER FOR EDUCATION and
MINISTER FOR YOUTH JUSTICE

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