Your Ref:
Our Ref: 866

30 October 2020

Ginna Webster
Secretary
Department of Justice
Email: haveyoursay@justice.tas.gov.au

Dear Secretary

Re: Consultation Draft Youth Justice Amendment (Searches in Custody) Bill 2020

I refer to Director Brooke Craven's letter of 30 September 2020 enclosing a draft copy of the Youth Justice Amendment (Searches in Custody) Bill 2020 for my consideration and feedback.

I appreciate the opportunity to provide comment on the proposed amendments and am grateful for the extension of time granted for me to respond.

In Ms Craven's letter she notes the following:

- The amendments proposed to the *Youth Justice Act 1997* (YJA) are part of the Government's response to my Memorandum of Advice (advice) in relation to the searches of children and young people in custody in custodial facilities dated May 2019.
- The draft Bill proposes to:
  - Create a consolidated discretionary power for an authorised officer to search a youth in custody in custodial facilities or in transit between custodial facilities.
  - Expressly provide that the amendments do not authorise the carrying out of a body cavity search that is not specially authorised under a provision of an Act or instrument of an Act. As such, these type of searches remain within the existing legal frameworks and the relevant authority and protections.
  - Provide that the search is to be conducted when there are reasonable grounds that the search is necessary for a defined purpose.
  - Provide that the search is, as far as practicable:
    - the least intrusive search that is necessary and reasonable to achieve the purposes of the search;
    - conducted in the least intrusive way that is necessary and reasonable to achieve the purposes of the search; and
    - carried out in circumstances that accord reasonable privacy to the youth.
  - Provide that the search is conducted, where reasonable and practicable, by an officer of the same gender of the youth or where the youth presents as, or informs that they are, transsexual, transgender or intersex by an officer of the gender requested.

L1 – 119 Macquarie Street
Hobart TAS 7000
+61 (0)3 6166 1366
childcomm@childcomm.tas.gov.au
www.childcomm.com.au

- Provide that force may be used that is reasonable and necessary in the circumstances to conduct the search.
- Provide that regulations may prescribe requirements in relation to the establishment and maintenance of search registers.

Role of the Commissioner for Children and Young People

The statutory office of Commissioner for Children and Young People is established under the *Commissioner for Children and Young People Act 2016* (CCYP Act). The Commissioner's functions, which are set out in s8(1) of the CCYP Act, include:

- advocating for all children and young people in the State generally;
- researching, investigating and influencing policy development into matters relating to children and young people generally;
- promoting, monitoring and reviewing the wellbeing of children and young people generally;
- promoting and empowering the participation of children and young people in the making of decisions, or the expressing of opinions on matters, that may affect their lives; and
- assisting in ensuring the State satisfies its national and international obligations in respect of children and young people generally.

In performing these and other functions under the CCYP Act, the Commissioner is required to do so according to the principle that the wellbeing and best interests of children and young people are paramount and must observe any relevant provisions of the United Nations *Convention on the Rights of the Child*.[1]

The Commissioner is required to give special regard to the needs of children and young people who are vulnerable or disadvantaged for any reason. The Commissioner's work must also be performed according to the principle that the views of children on all matters affecting them should be given serious consideration and taken into account and that children are entitled to live in a caring and nurturing environment and to be protected from harm and exploitation.[2]

Legislation, policy and procedures relating to the searches of children and young people in custody have the capacity to affect the rights and wellbeing of children and young people in Tasmania generally.

Background

In May 2019, I provided advice to the Tasmanian Government aimed at assisting government agencies to better promote and protect the wellbeing and best interests of children and young people in their custody in custodial facilities, by ensuring relevant legislation, policies and procedures regarding searches, particularly strip searches, are in line with well-established human rights standards and principles and contemporary best practice. In that advice, I called for an end to the routine strip searching of children and young people in custody and proposed an alternative approach based on fundamental human rights standards.

[1] CCYP Act, s3(1)
[2] CCYP Act, s3(2). "Vulnerable", in relation to a child or young person, is defined in s4 of the CCYP Act to include a child or young person who is the subject of proceedings under the *Youth Justice Act 1997*.

The recommendations I made in that advice are as follows:

Recommendation 1:

a. The practice of *routine* strip searching of children and young people in custody cannot be justified and should cease.

b. Legislation authorising searches of children and young people in custody in all custodial premises in Tasmania should reflect the fundamental human right standard that searches of children and young people in custody should be conducted only *when reasonable, necessary and proportionate to a legitimate aim.*

Recommendation 2:

The legislative bases for all searches of children and young people in custody in Tasmania should be clarified and consolidated to provide a single, unambiguous point of reference.

Recommendation 3:

Consideration should be given to introducing in legislation applicable to all searches of children and young people in custody:

- a statement as to guiding principles;
- a clearly stepped out hierarchy of searches; and
- clear criteria to guide a determination of which type of search is permissible and justified in particular circumstances.

The principles, hierarchy of searches and criteria to guide decision making should reflect fundamental human rights standards and principles, including that searches of children and young people in custody should be conducted only *when reasonable, necessary and proportionate to a legitimate aim* and should be developed by agencies in consultation with stakeholders.

Recommendation 4:

Consideration should be given to investing in alternative security strategies or technologies such as body scanners which would further minimise reliance on more invasive searches such as strip searches.

Recommendation 5:

Having regard to relevant human rights standards, and no matter the type of search conducted, the use of force should be limited to circumstances of last resort and, if force is required, there should be clear lines of authorisation.

Recommendation 6:

Regulations should clearly outline the way in which searches of children and young people in custody are to be conducted so as to promote the dignity and self-respect of the child or young person concerned and to minimise any associated trauma, distress or other harm.

Recommendation 7:

The key elements of the legislative and regulatory framework governing searches of children and young people in custody should be provided to children and young people in an accessible format before a search is conducted. This information should explain their right to make a complaint and the process for doing so.

Recommendation 8:

All searches of children and young people in custody in custodial settings should be recorded on a search register. Search registers should be available for inspection or review by independent statutory officers with relevant monitoring or inspectorate functions.

My advice and the Tasmanian Government's response to my recommendations are available on the Commissioner for Children and Young People website:

- https://www.childcomm.tas.gov.au/wp-content/uploads/2019-05-06-FINAL-Advice-to-Ministers-Searches-of-children-and-young-people-in-custody-in-custodial-facilities.pdf

- https://www.childcomm.tas.gov.au/wp-content/uploads/Letter-from-Government-in-Response-to-CCYP-Memorandum-of-Advice-Personal-Searches.pdf

I acknowledge the work already undertaken at an operational level by Tasmania Police, the Department of Communities Tasmania and the Tasmania Prison Service to address the concerns raised in my advice. As indicated in the Government's response to my recommendations, these agencies have reviewed their operational procedures governing searches of children in custody in custodial facilities. As I noted in my 30 September 2020 media release welcoming the release of the draft Bill for consultation, based on information provided to me by the Government, the rate of strip searches of children across both reception prisons in Tasmania is now down to around 10-15 per cent. This represents a very different approach to the one taken before 1 July 2019 when all children admitted to reception prisons were subject to strip searches regardless of the level of risk present. I will continue to monitor data relating the conduct of searches, particularly strip searches, of children and young people in custody in custodial facilities.

Comment

At the outset, I wish to acknowledge that the draft Bill represents the implementation by the Tasmanian Government of its acceptance of my recommendation that the law governing the searches of children and young people in custody in custodial facilities should be clarified and consolidated in one piece of legislation.

As I said in my advice, the current situation in which the legislation, policies, and practice applicable to searches of children and young people in custody varies across custodial settings is confusing and unacceptable. I therefore commend the collaborative work undertaken by relevant Government agencies to enable the drafting of a Bill which would create a consolidated discretionary power in the YJA for an authorised officer to search a youth in custody in custodial facilities or in transit between those facilities.

My comments below aim to build on this excellent progress to date and are intended to contribute to the development of new laws which reflect best practice, and which unquestionably uphold the human rights principles upon which my advice was based.

Further, I should point out that my comments are not necessarily exhaustive, noting there may be technical drafting issues that I have not identified. I have not repeated in detail the contents of my advice or the rationale for my recommendations.

Definitions

Youth

Based on discussions held at officer level, I am advised that the policy intent of the draft Bill is for the proposed consolidated discretionary power to apply to the searches of *all* children and young people in custody in custodial facilities irrespective of the basis upon which they are held in custody.

The draft Bill adopts a framework in which an authorised officer may conduct a search of a youth in custody in a custodial facility or in transit between custodial facilities.

The term *youth* is defined by the YJA (s3) as follows:

> ***youth*** *means a person who is 10 or more years old but less than 18 years old at the time when the offence the person has committed, or is suspected of having committed, occurred.*

Further, I note that the term *offence* is defined by the YJA (s3) to exclude a *prescribed offence.*

Because of the existing definitions in YJA, it is not clear to me whether the amendments as currently drafted would in fact apply to the searches of *all* children in custody in custodial facilities irrespective of the basis upon which they are in custody. This may be a drafting issue, noting the Government has accepted Recommendation 2 in my advice.

Authorised officer

The term *authorised officer* is defined in proposed s25A(1) as follows:

> ***authorised officer*** *means –*
>
> *(a) a police officer; and*
>
> *(b) a correctional officer; and*
>
> *(c) a detention centre manager; and*
>
> *(d) a person who carries out a search under subsection (3) that the detention centre manager causes under subsection (4) to be carried out;*

The draft Bill suggests that a person listed above may conduct a search based on that person's belief on reasonable grounds that the search is necessary for one or more of the purposes outlined in proposed s25A(5).

> *25A(5) A search of a youth to which this section applies may only be conducted if the authorised officer carrying out the search believes on reasonable grounds that the search is necessary for one or more of the following:*
>
> *(a) to obtain evidence relating to the commission of an offence or to prevent the loss or destruction of evidence in relation to the commission of an offence;*
>
> *(b) to ensure security or good order of the custodial facility in which the search is being conducted or of a vehicle in which the youth is in transit;*
>
> *(c) to ensure the safety of the youth or other persons;*
>
> *(d) to remove into safe keeping any articles belonging to, or in possession of, the youth;*

(e) to ascertain if there is concealed on the youth, in or beneath that youth's clothing, a weapon or other article capable of being used as a weapon, to inflict injury or to assist that youth to escape from custody;

(f) to ascertain if there is concealed, on or in the youth, drugs or any other things which the youth is prohibited by law from taking into, or having possession of, in the custodial facility in which the youth is situated or one of the custodial facilities between which the youth is in transit;

(g) the purposes, specified in the Act under which the search is carried out, for which the search may be carried out.

Pursuant to proposed s25A(6), it would appear that once an authorised officer believes on reasonable grounds that the search is necessary, they alone are responsible for ensuring, as far as practicable, that the search -

(a) is the least intrusive kind of search that is necessary and reasonable to achieve the purposes of the search; and

(b) is conducted in the least intrusive way that is necessary and reasonable to achieve the purposes of the search; and

(c) is carried out in circumstances that accord reasonable privacy to the youth being searched.

Further, the draft Bill provides in proposed s25A(8) that an authorised officer conducting a search to which this section applies may use the force that is reasonable and necessary in the circumstances to conduct the search.

The proposed provisions would therefore appear to enable an authorised officer to self-authorise a search and/or the use of force to conduct a search.

As there is no guide to decision-making or hierarchy of searches included in the proposed amendments, it is my view that a self-authorising framework is not consistent with my advice (see in particular Recommendation 3 of my advice).

Further, consistent with Recommendation 5 of my advice, a decision to use force should in my opinion require authorisation from a senior officer. See also my comments below regarding limiting the use of force to circumstances of last resort.

Searches of children and young people in custody should be conducted only when reasonable, necessary and proportionate to a legitimate aim

Paragraphs (a), (b) and (c) of proposed s25A(6) set out, at a high level, requirements which I consider to be generally reflective of the fundamental human right standard that searches of children and young people in custody should be conducted only when reasonable, necessary and proportionate to a legitimate aim:

25A(6) An authorised officer conducting a search to which this section applies must ensure, as far as practicable, that the search –

(a) is the least intrusive kind of search that is necessary and reasonable to achieve the purposes of the search; and

(b) is conducted in the least intrusive way that is necessary and reasonable to achieve the purposes of the search; and

(c) *is carried out in circumstances that accord reasonable privacy to the youth being searched.*

I consider these requirements to be generally consistent with the following recommendation made in my advice:

Recommendation 1:

a. The practice of *routine* strip searching of children and young people in custody cannot be justified and should cease.

b. Legislation authorising searches of children and young people in custody in all custodial premises in Tasmania should reflect the fundamental human right standard that searches of children and young people in custody should be conducted only *when reasonable, necessary and proportionate to a legitimate aim.*

However, in my advice, I also recommended that consideration be given to including in legislation other principles, criteria and requirements to assist decision-makers and to reflect and operationalise the overarching principles outlined in Recommendation 1:

Recommendation 3:

Consideration should be given to introducing in legislation applicable to all searches of children and young people in custody:

- a statement as to guiding principles;
- a clearly stepped out hierarchy of searches; and
- clear criteria to guide a determination of which type of search is permissible and justified in particular circumstances.

The principles, hierarchy of searches and criteria to guide decision making should reflect fundamental human rights standards and principles, including that searches of children and young people in custody should be conducted only when reasonable, necessary and proportionate to a legitimate aim and should be developed by agencies in consultation with stakeholders.

The Tasmanian Government has accepted this recommendation in principle and has advised that these matters will be implemented primarily through policy and operational procedures and that it intends to establish a set of guiding principles to inform legislative reform, policy and operational procedures.

I acknowledge that it may be challenging to include in the draft Bill a uniform hierarchy of searches and criteria applicable to decision-making for searches across all custodial facilities where children may be held in custody. However, it is my preference that the draft Bill does include a clearly stepped out hierarchy of searches and criteria to guide decision-making about the type of search that is reasonable and necessary in particular circumstances. For example, if a hierarchy was included in the draft Bill there could be a clause to the effect that the proposed s25A(6) does not permit a search involving the removal of clothes unless specified circumstances exist. See for example s161 of the *Youth Justice Act 2006* (NT) which restricts the use of a personal search to circumstances where a pat down search has already been used, and the personal search is necessary to prevent a risk of harm to the detainee or another person.

A provision such as this would make it very clear that use of intrusive searches like strip searches must be clearly justified and cannot occur routinely or as a matter of course.

Including in the Bill a clearly stepped out hierarchy of searches and criteria to guide decision-making would better promote transparency and accountability, and consistency across the various custodial facilities.

However if, as a result of this process, the outcome is that the matters I referred to in Recommendation 3 are operationalised only through policies and procedures, then in the interests of promoting transparency and accountability, the review of these policies and procedures must be the subject of a public consultation process and they should be publicly available. Implementation of Recommendation 7 in my advice is dependent on the public availability of information operationalising and governing the circumstances in which and how searches of children are conducted.

Unless this level of detail is publicly available, there is no way for a member of the public to know whether relevant rules and procedures are properly reflective of the legislation. Additionally, it is very difficult to explain to children what their rights are, pursuant to current Tasmanian law, and if and how they might complain.

Use of Force

The draft Bill provides in proposed s25A(8) that an authorised officer may use the force that is reasonable and necessary in the circumstances to conduct a search.

> *25A Search of youths in, or in transit between, custodial facilities*
>
> *…*
>
> *(8) An authorised officer conducting a search to which this section applies may use the force that is reasonable and necessary in the circumstances to conduct the search.*

In Recommendation 5 of my advice, I recommended that having regard to relevant human rights standards, and no matter the type of search conducted, the use of force should be limited to circumstances of last resort and, if force is required, there should be clear lines of authorisation. The Tasmanian Government has accepted this recommendation.

I understand that the proposed s25A sets out the only circumstances where force may be used when searching youths in custody in custodial facilities. It is nevertheless my strong view that the draft Bill should include a clear statement to the effect that the use of force is not permitted in the conduct of searches of children and young people except in circumstances of last resort (or words to that effect). I note that the *Corrections Act 1997* (Tas) includes a requirement that the Director of Corrections must ensure, as far as practicable that the use of force in relation to the management of prisoners and detainees is always a last resort (s34A). There is, however, no similar requirement in the YJA, which creates a degree of confusion.

See also the *Children and Young People Act 2008* (ACT) which provides that, as far as practicable, force is only to be used as a last resort (s223).

Further, s161(4) of the *Youth Justice Act 2005* (NT) provides that:

> *(4) Force may not be used to conduct a personal search unless the person conducting the search believes on reasonable grounds that the use of force is necessary to prevent a serious and imminent risk to the safety of the detainee or another person.*

I reiterate the comments I have made above regarding authorisation.

Search registers

The draft Bill provides, in proposed s25B, that regulations may prescribe requirements in relation to the establishment and maintenance of search registers:

> ***25B. Matters related to searches of youths under section 25A***
>
> *(1) The regulations may prescribe requirements in relation to the establishment and maintenance of registers in which details of the conduct of some or all of the searches to which s25A applies are to be recorded*.

In Recommendation 8 of my advice, I recommended that all searches of children and young people in custody in custodial settings should be recorded on a search register and that search registers should be available for inspection or review by independent statutory officers with relevant monitoring or inspectorate functions. The Tasmanian Government accepted this recommendation.

While I understand that searches are being recorded by custodial facilities at an operational level, the draft Bill should include provisions to the effect that:

- all custodial facilities are required to establish and maintain a search register; and
- all searches to which the proposed amendments apply must be recorded on the search register; and
- search registers should be available for inspection or review by independent statutory officers with relevant monitoring or inspectorate functions.

Clearly, regulations could then prescribe more detailed requirements in relation to the establishment, maintenance and inspection of the registers.

Additional matter

Section 19 of the *Youth Justice (Miscellaneous Amendments) Act 2013*, which has never commenced, would insert a new section 25A into the YJ Act to provide for additional requirements regarding searches of youths in custody in custodial premises (defined as a prison, detention centre, police station or watch-house) to be prescribed by regulation. To avoid any confusion, it may be prudent to consider including an amendment in the draft Bill to repeal s19.

Conclusion

Thank you for the opportunity to comment on the draft Bill. I would be very pleased to discuss my comments in more detail if this would be of assistance.

Yours sincerely

Leanne McLean
Commissioner for Children and Young People

cc *The Hon Elise Archer MP, Attorney General, Minister for Justice*
The Hon Roger Jaensch MP, Minister for Human Services
The Hon Mark Shelton MP, Minister for Police, Fire and Emergency Management