COMMUNITY
LEGAL CENTRES
TASMANIA

28 October 2020

Department of Justice
Office of the Secretary
GPO Box 825
Hobart TAS 7001

via email: haveyoursay@justice.tas.gov.au

To the Department of Justice,
Re: *Youth Justice Amendment (Searches in Custody) Bill 2020*

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the *Youth Justice Amendment (Searches in Custody) Bill 2020* ('the Bill').[1]

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

The failure of the Tasmanian Statute Book to clearly and concisely define the powers of police, correctional and authorised officers when conducting searches of children and young people means that unlawful searches may be carried out. In our opinion, the requirements that apply to the strip searching of children under other Acts of Parliament[2] should be the same as those that apply in the *Youth Justice Amendment (Searches in Custody) Bill 2020.* Nevertheless, we strongly support the intent of the Bill which will establish a more consistent approach to the search of youth in custodial facilities.

Searches and compliance with Human Rights

There are a large number of human rights instruments concerned with the search of children and young people. These include the United Nations *Convention on the Rights of the Child*, the United Nations *Rules for the Protection of Juveniles Deprived of their Liberty* (the Havana Rules), the United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules) and the United Nations *Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules).

[1] CLC Tas would like to acknowledge Katherine Sproule who assisted in the preparation of this response.

[2] See, for example, *Misuse of Drugs Act 2001* (Tas); *Poisons Act 1971* (Tas); *Search Warrants Act 1997* (Tas) and; *Public Powers (Public Safety) Act 2005* (Tas).

For example, pursuant to rule 1 of the United Nations *Standard Minimum Rules for the Treatment of Prisoners*, all prisoners shall be treated with respect due to their inherent dignity and value as human beings. Whilst rule 52 expressly provides:

> *Intrusive searches, including strip and body cavity searches, should be undertaken only if absolutely necessary. Prison administrations shall be encouraged to develop and use appropriate alternatives to intrusive searches...*

After reviewing all of the relevant human rights standards, the Australian Children's Commissioners and Guardians concluded "searches of a child or young person in youth justice detention should be conducted only when reasonable, necessary and proportionate to a legitimate aim".[3] These principles are particularly important when it is acknowledged that in Tasmania 203 children and young people were strip searched at the Ashley Detention Centre in 2018 but no contraband was found.[4] Or, that the same data found that a disproportionate 55 per cent of all children and young people strip searched were indigenous[5] despite the Aboriginal and Torres Strait Islander population making up only 4.6 per cent of the broader Tasmanian community.[6]

- ***Support for less intrusive search methods***

We strongly support the proposed section 25A(6)(a)-(c) and its emphasis on least intrusive search methods and ensuring the privacy of the youth being searched. Many youth in custodial facilities have suffered from past physical or sexual abuse and/or trauma.[7] The experience of being strip-searched can be humiliating, frightening and embarrassing, and may lead to re-traumatising of children who have experienced prior abuse. Providing reasonable privacy and limiting instances of intrusiveness ensures that young people in custody can still maintain a sense of dignity, autonomy and power.

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[3] Commissioner for Children and Young People, *Searches of children and young people in correctional facilities in Tasmania - Memorandum of Advice* (7 May 2019) at 17. As found at 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 (Accessed 27 October 2020).

[4] Department of Communities Tasmania, Right to Information Decision – Public Disclosure Log Right to Information No.: RTI201718-020-CT (21 February 2019) at 15. As found at https://www.dhhs.tas.gov.au/__data/assets/pdf_file/0008/366299/RTI201819-020-CT.pdf (Accessed 27 October 2020).

[5] Commissioner for Children and Young People, *Searches of children and young people in correctional facilities in Tasmania - Memorandum of Advice* (7 May 2019) at 15.

[6] Australian Bureau of Statistics, *2071.0 Aboriginal and Torres Strait Islander Population – Tasmania*. As found at https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20Population%20-%20Tasmania~10006 (Accessed 27 October 2020).

[7] Commissioner for Children and Young People, *Searches of children and young people in correctional facilities in Tasmania - Memorandum of Advice* (7 May 2019) at 18.

- ***Recognition that searches be undertaken by members of same gender***

We also strongly support the proposed section 25A(7)(a) and its requirement that authorised officers be the same gender as the youth they intend to search. This is an importance protective measure for youth who may have experienced past sexual assault and to prevent additional traumas. We also welcome the inclusiveness of the Bill and its express recognition in subsection 25A(7)(b) of the rights of transsexual, transgender and intersex persons. This inclusiveness promotes self-autonomy and can assist in providing and upholding feelings of comfort and dignity of the child or young person being searched.

- ***The use of force***

To ensure compliance with international human rights standards, we strongly believe that the use of force should be prohibited except when necessary to prevent an imminent and serious threat of injury to the child or others, and only when all other means of control have been exhausted.[8] In short, the use of force should be limited to circumstances of last resort.

As it currently reads, the proposed section 25A(8) makes clear that the use of force "may be reasonable and necessary in the circumstances". In our opinion, this is inconsistent with our obligations under human rights law that the use of force be of last resort. It is also inconsistent with the treatment of prisoners and detainees pursuant to the *Corrections Act 1997* (Tas) which mandates that the use of force must be of last resort.[9] We therefore recommend that the use of force in subsection (8) of the Bill be reasonable and necessary but also make clear that it is of last resort. Finally, we believe that the use of force should be mandatory rather than discretionary. We therefore prefer the use of the words 'is to' in place of 'may':[10]

> (8) An authorised officer conducting a search to which this section applies ~~may~~ is to use the force that is reasonable and necessary and limited to ~~in the~~ circumstances of last resort to conduct the search.

- ***Greater Transparency***

It is of concern that the proposed subsection 25B(1) provides that regulations 'may' prescribe requirements for the establishment and maintenance of registers in which details of the conduct of some or all of the searches to which section 25A applies are to be recorded. Again, we strongly recommend that the discretionary 'may' is replaced with 'is to' to ensure greater transparency of the circumstances in which searches take place.

We would also note that some regulations relevant to searches are not publicly available. For example, the Director of Corrective Services' Standing Orders (DSOs) in

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[8] Australian Children's Commissioners and Guardians, *Statement on Conditions and Treatment in Youth Justice Detention*, November 2017 at 18. As found at https://www.humanrights.gov.au/sites/default/files/document/publication/ACCG_YouthJustice PositionStatement_24Nov2017.pdf (Accessed 27 October 2020).

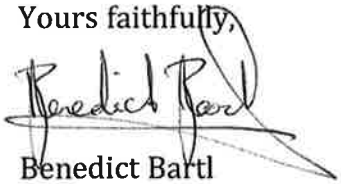
[9] Section 34A(a) of the *Corrections Act 1997* (Tas).

[10] Section 10A of the *Acts Interpretation Act 1931* (Tas) provides that the words 'is to' and 'are to' "are to be construed as being directory" whereas 'may' "is to be construed as being discretionary or enabling".

relation to searches in custodial settings are not publicly available.[11] The failure to publicise the circumstances in which searches may take place is likely to result in an inconsistency of practice across custodial settings and therefore more likely to lead to misuse of search powers. A lack of transparency also means that in some situations, complainants will be unable to ascertain whether there has been a misuse of search powers. In our opinion, subsections 25A(8)-(9) and the requirement that authorised officers act with authorisation "under a provision of an Act or an instrument made under an Act" is meaningless if we do not have access to a complete and consolidated set of search powers.

In summary, although there is no good policy reason for limiting legislative search powers to the *Youth Justices Act 1997* (Tas), we support the intent of the Bill to make searches in a custodial setting more transparent and accountable.

Yours faithfully,



Benedict Bartl
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[11] Department of Justice, Prison Service, Director's Standing Orders. As found at https://www.justice.tas.gov.au/prisonservice/Policies_and_Procedures (Accessed 27 October 2020).