

TASMANIA

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**YOUTH JUSTICE AMENDMENT (SEARCHES IN  
CUSTODY) BILL 2022**

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# **YOUTH JUSTICE AMENDMENT (SEARCHES IN CUSTODY) BILL 2022**

*(Brought in by the Minister for Justice, the Honourable Elise Nicole Archer)*

## **A BILL FOR**

**An Act to amend the *Youth Justice Act 1997* and to repeal section 19 of the *Youth Justice (Miscellaneous Amendments) Act 2013***

Be it enacted by Her Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

## **PART 1 – PRELIMINARY**

### **1. Short title**

This Act may be cited as the *Youth Justice Amendment (Searches in Custody) Act 2022*.

### **2. Commencement**

The provisions of this Act commence on a day or days to be proclaimed.

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**PART 2 – YOUTH JUSTICE ACT 1997 AMENDED**

**3. Principal Act**

In this Part, the *Youth Justice Act 1997\** is referred to as the Principal Act.

**4. Part 3, Division 1: Heading inserted**

Part 3 of the Principal Act is amended by inserting the following heading before section 23:

*Division 1 – Application*

**5. Part 3, Division 2: Heading inserted**

Part 3 of the Principal Act is amended by inserting the following heading after section 23:

*Division 2 – Power of arrest and bail*

**6. Part 3, Division 3 inserted**

After section 25 of the Principal Act, the following Division is inserted in Part 3:

*Division 3 – Searches*

**25A. Interpretation of Division 3**

In this Division –

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***body cavity search***, in relation to a youth, means a search of the rectum or vagina of the youth, but does not include a search of the youth by a scanning device that does not touch the youth;

***clothed search***, in relation to a youth, means a search (other than a body cavity search) of the youth that is not an unclothed search;

***commissioned police officer*** has the same meaning as in the *Police Service Act 2003*;

***correctional officer*** has the same meaning as in the *Corrections Act 1997*;

***custodial facility*** means –

- (a) a detention centre; and
- (b) a prison; and
- (c) a reception prison watch-house; and
- (d) a police watch-house;

***custody officer***, in relation to a police watch-house, means the person who is, under section 14 of the *Criminal Law (Detention and Interrogation) Act 1995*, the

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custody officer in relation to the watch-house;

**Director** means the Director of Corrective Services appointed under section 5 of the *Corrections Act 1997*;

**offence** means any offence, including a prescribed offence;

**person in charge**, in relation to a custodial facility, means –

- (a) if the custodial facility is a detention centre – the detention centre manager of the detention centre; or
- (b) if the custodial facility is a prison – the Director; or
- (c) if the custodial facility is a reception prison watch-house – the Director; or
- (d) if the custodial facility is a police watch-house – the custody officer in relation to the police watch-house;

**police watch-house** means a watch-house within the meaning of paragraph (a) of the definition of *watch-house* in section 3(1) of the *Youth Justice Act 1997*;

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***reception prison watch-house*** means a watch-house within the meaning of paragraph (b) of the definition of *watch-house* in section 3(1) of the *Youth Justice Act 1997*;

***relevant authorising officer***, in relation to a custodial facility, means –

- (a) if the custodial facility is a detention centre – the Secretary or the detention centre manager of the detention centre; or
- (b) if the custodial facility is a prison – the Director; or
- (c) if the custodial facility is a reception prison watch-house – the Director; or
- (d) if the custodial facility is a police watch-house – a commissioned police officer or the custody officer in relation to the watch-house;

***relevant instruction***, in relation to a custodial facility, means –

- (a) if the custodial facility is a detention centre – instructions issued by the

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Secretary under  
section 124(2); and

- (b) if the custodial facility is a prison – standing orders made by the Director under section 6(3) of the *Corrections Act 1997*; and
- (c) if the custodial facility is a reception prison watch-house – standing orders made by the Director under section 6(3) of the *Corrections Act 1997*; and
- (d) if the custodial facility is a police watch-house – orders, directions, procedures and instructions issued by the Commissioner of Police under section 7(3) of the *Police Service Act 2003*;

***relevant search purpose*** – see section 25F;

***scanning device*** means –

- (a) a hand-held electronic device that detects or displays the presence of an article on or in the body of a person; and



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- (b) an electronic device, between or under the components of which a person stands, that detects or displays an article on or in the body of the person;

*search officer* means a person who may, under section 25C, conduct a search of a youth;

*transgender* has the same meaning as in the *Anti-Discrimination Act 1998*;

*transsexual* has the same meaning as in the *Anti-Discrimination Act 1998*;

*unclothed search*, in relation to a youth, means a search of the youth that requires the youth's torso or genitals to be exposed to view or the youth's torso or genitals, clothed only in underwear, to be exposed to view.

**25B. Searches to which this Division applies**

- (1) This Division applies only to a clothed search, or an unclothed search, of a youth who is in custody, that is conducted in a custodial facility.

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- (2) This Division does not apply to a search under the *Terrorism (Preventative Detention) Act 2005*.
- (3) This Division does not apply to, or in relation to, a body cavity search.
- (4) Nothing in this Division, including subsection (5), is to be taken to authorise the carrying out of a body cavity search by a person.
- (5) In the event of an inconsistency between the application of a provision of this Division and the application, to a search, of a provision of –
  - (a) another Act; or
  - (b) an instrument made under an Act –

the provision of this Division applies to the extent of the inconsistency.

**25C. Persons who may conduct searches of youths**

- (1) A search of a youth may only be conducted by the following persons:
  - (a) the Director;
  - (b) a correctional officer who is within a class of officers that is specified, in standing orders, made by the Director under section 6(3) of the *Corrections*

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*Act 1997*, to be authorised to conduct such a search;

- (c) a correctional officer who is ordered by the Director to conduct the search;
  - (d) the Secretary;
  - (e) a detention centre manager;
  - (f) a person who is within a class of persons that is specified, in instructions issued under section 124(2), to be authorised to conduct such a search;
  - (g) a person who is ordered by the Secretary, or a detention centre manager, to conduct the search;
  - (h) a police officer.
- (2) A search of a youth must be conducted in accordance with –
- (a) this Division; and
  - (b) the requirements, if any, of the relevant instruction in relation to the custodial facility in which the search is conducted, except to the extent that those requirements are inconsistent with the requirements of this Division.

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**25D. Requirements as to gender of search officer conducting search, &c.**

(1) In this section –

*person of the required gender*, in relation to a youth, means –

- (a) if the youth is male or female and paragraph (b) does not apply to the youth, a person who is male or female, respectively; or
  - (b) if the youth is transsexual, transgender or intersex –
    - (i) a person of the gender that the youth requests; or
    - (ii) if a person of the gender requested is not immediately available, a person who is, at the further request of the youth, male or female.
- (2) A search of a youth that does not involve the removal of any clothing being worn by the youth or the touching of the youth is to be conducted as far as is reasonable and practicable by a search officer who is a person of the required gender in relation to the youth.
- (3) A search of a youth that involves the removal of any clothing being worn by the youth or the touching of the youth –

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- (a) is to be conducted by a search officer who is a person of the required gender in relation to the youth; and
  - (b) is, if the search is an unclothed search and is conducted in the presence of persons other than the youth and the search officer – to be conducted in the presence only of other persons who are persons of the required gender in relation to the youth.
- (4) Subsection (3) does not apply in relation to a youth if the person in charge of the custodial facility in which the search is conducted believes on reasonable grounds that it is not reasonable or practicable for that subsection to apply in relation to the youth because of the urgency with which the search is required in order to address the risk of harm or trauma to the youth or another person.

**25E. Conduct of searches**

- (1) A search officer must not conduct a search of a youth unless the search officer believes on reasonable grounds that –
  - (a) the search is necessary for a relevant search purpose; and

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- (b) the type of search, and the manner of search, are proportionate to the circumstances.
- (2) A search officer conducting a search of a youth must ensure, as far as practicable, that –
  - (a) the search is conducted in a manner that –
    - (i) is, to the extent possible, consistent with retaining the youth’s dignity and self-respect; and
    - (ii) minimises any trauma, distress or harm that may be caused to the youth by the conduct of the search; and
  - (b) the search is the least intrusive type of search that is necessary and reasonable to achieve a relevant search purpose for which the search is conducted; and
  - (c) the search is conducted in the least intrusive manner that is necessary and reasonable to achieve a relevant search purpose for which the search is conducted; and

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- (d) the search is completed as quickly as is reasonably possible, consistent with achieving a relevant search purpose for which the search is conducted; and
  - (e) the search is conducted in circumstances that accord reasonable privacy to the youth being searched; and
  - (f) the search officer does not remove, or require the youth to remove, more clothing than is necessary and reasonable to achieve a relevant search purpose for which the search is conducted; and
  - (g) if clothing of the youth is seized during the conduct of a search of the youth, the youth is, after the search is completed, left with, or provided with, adequate clothing to wear.
- (3) In determining for the purposes of subsection (2)(a) the manner in which a search is to be conducted, the search officer conducting the search must consider –
- (a) any information that is provided to the search officer by the youth (including as to the search that the youth would prefer) and that

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- is relevant to the determination of the matters referred to in subsection (2)(a)(i) or (ii); and
- (b) any information that the search officer has, or that is, on reasonable inquiry by the officer, available to the officer, as to the youth's age, intellectual maturity, sex, sexual or gender identity, religion, disabilities and history.
- (4) A search officer conducting a search of a youth –
- (a) may, subject to this subsection and subsection (2), use force to conduct the search; and
  - (b) must not use force to conduct the search unless using force is the only means, in the circumstances, by which the search can reasonably be conducted; and
  - (c) must ensure, as far as practicable, that if force is used, it is the least amount of force that is reasonable and necessary to enable the search to be conducted.
- (5) A search officer must not conduct an unclothed search of a youth in a custodial facility unless the relevant authorising officer in relation to the custodial facility has authorised under subsection (6) the search to be conducted and the search is



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conducted in accordance with the conditions, if any, specified in the authorisation.

- (6) A relevant authorising officer in relation to a custodial facility may, orally or in writing, authorise a search officer to conduct an unclothed search of a youth on the conditions, if any, specified in the authorisation.
- (7) A relevant authorising officer must not authorise an unclothed search of a youth to be conducted unless the relevant authorising officer believes on reasonable grounds that –
- (a) the search is necessary for a relevant search purpose; and
  - (b) the type of search, and the manner of search, are proportionate to the circumstances; and
  - (c) an unclothed search of the youth, despite being the most intrusive type of search, is necessary and reasonable to achieve a relevant search purpose for which the search is to be conducted; and
  - (d) the search is to be conducted in the least intrusive manner that is necessary and reasonable to achieve a relevant search purpose

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for which the search is to be conducted.

- (8) The surrender by a youth of an article before a search of the youth is conducted must be taken into account in determining whether the search may be conducted under this section.

**25F. Relevant search purposes**

For the purposes of this Division, a *relevant search purpose* is a search of a youth for one or more of the following purposes:

- (a) to ensure the safety of the youth or other persons;
- (b) 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;
- (c) to ascertain whether the youth has possession of a concealed weapon, or other article capable of being used as a weapon, to inflict injury or to assist the youth, or another youth, to escape from custody;
- (d) to ascertain whether the youth has possession of drugs or any other things which the youth is

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prohibited by law from taking into, or having possession of, in the custodial facility in which the youth is situated;

- (e) if the search is a clothed search – to remove into safe keeping any articles belonging to, or in the possession of, the youth.

**25G. Determination of least intrusive type and manner of search**

- (1) For the purposes of this Division, the degree of intrusiveness of the following types of searches is taken to increase in the following order:
  - (a) a search (which may be a search by way of a scanning device) that involves no touching of a youth or clothing being worn by a youth;
  - (b) a search that includes minimal touching of a youth or of clothing being worn by a youth;
  - (c) a search that includes the removal of some clothing being worn by a youth but that is not an unclothed search;
  - (d) a search that includes touching, that is more than minimal

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touching, of a youth or of  
clothing being worn by a youth;

(e) an unclothed search of a youth.

(2) In determining for the purposes of this Division whether a search of a youth is, or is to be, conducted in the least intrusive manner that is necessary and reasonable to achieve a relevant search purpose for which the search is being, or is to be, conducted, the search officer, or relevant authorising officer, making the determination must have regard to –

(a) the health and safety of the youth;  
and

(b) any information that the search officer, or the relevant authorising officer, respectively, has, or that is, on reasonable inquiry by the officer, available to the officer, as to –

(i) the youth's age, intellectual maturity, sex, sexual or gender identity, religion, disabilities and history; and

(ii) any other matter that is relevant to the determination.

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**25H. Information to be given to youth before search conducted**

Before a search of a youth is conducted by a search officer, the search officer must –

- (a) inform the youth that a search is to be conducted; and
- (b) if the search is to be an unclothed search – inform the youth that an unclothed search of the youth is to be conducted; and
- (c) inform the youth that the youth may, before the search of the youth occurs, surrender an article that is on the person of the youth; and
- (d) give the youth an opportunity, before the search of the youth occurs, to surrender, in circumstances that afford reasonable privacy to the youth, an article that is on the person of the youth.

**25I. Seizure of articles found during searches**

A search officer who conducts a search of a youth may seize an article found during the search –

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- (a) that may be evidence relating to the commission of an offence; or
- (b) that may prejudice the safety of any person or the safety or good order of a custodial facility; or
- (c) to remove the article into safekeeping.

**25J. Reporting of use of force**

- (1) A search officer who has conducted a search of a youth in a custodial facility must, if force used during the conduct of the search is reportable force, provide to the person in charge of the facility a report containing the information, in relation to the search, that is specified, in the relevant instruction in relation to the custodial facility, to be required to be included in such a report.
- (2) A person conducting a search of a youth must provide under subsection (1) the report in relation to the search as soon as practicable after the search is conducted but in any case within 7 days after the search is conducted.
- (3) For the purposes of this section, ***reportable force***, in relation to a youth, is –
  - (a) force used in the course of a search of the youth; and

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- (b) force used, before the search is conducted, to enable the search to be conducted –

but does not include excluded force in relation to the youth.

- (4) For the purposes of this section, each of the following is excluded force in relation to a youth:

- (a) touching of the youth that is not for the purpose of restraining the youth so as to enable the search to occur and that is incidental to the conduct of the search;

- (b) force, including the application and use of handcuffs or physical restraint, used to ensure that the youth –

- (i) remains in custody; or

- (ii) moves to a place where the search is to commence, remains in a place where the search has commenced or moves to a place after the search has been conducted –

unless the touching or force is such that the person conducting the search had reasonable grounds to believe, or ought reasonably to have been aware, that the

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touching or force has caused or may cause an injury to the youth.

- (5) Nothing in this section is to be taken to limit a provision of another Act that requires a person to provide a report in relation to a search that is specified in or under another Act.

**25K. Register of searches**

- (1) In this section –

*relevant information*, in relation to a search, means –

- (a) the information prescribed for the purposes of this section; and
- (b) details as to the degree of intrusiveness of the search, as determined under section 25G; and
- (c) details of reportable force, within the meaning of section 25J, used in the conduct of the search.
- (2) The Secretary, Director or Commissioner of Police must establish and maintain a register (a *search register*) in relation to each custodial facility for which the Secretary, Director or Commissioner of Police, respectively, is responsible.
- (3) The search register in relation to a custodial facility must contain the



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relevant information in relation to each search of a youth that is conducted in the custodial facility.

- (4) The Secretary, Director or Commissioner of Police must ensure that a register that the Secretary, Director or the Commissioner of Police, respectively, is required under this section to establish and maintain is available for inspection by any of the following persons:
- (a) the Custodial Inspector;
  - (b) the Ombudsman;
  - (c) a person approved by the person in charge of the custodial facility;
  - (d) a prescribed person or body.

**25L. Provision of information**

- (1) The person in charge of a custodial facility must ensure that there is made available, for viewing by a youth who is in custody in the custodial facility, leaflets, posters, or other documents, that set out the obligations of the person in charge of the custodial facility under the other provisions of this section.
- (2) The person in charge of a custodial facility must ensure that –
- (a) on the request of a youth who is in custody in the facility, the

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- required information in relation to searches, of youths in custody, conducted in the custodial facility is made available to the youth; and
- (b) on the request of a person who is representing a youth who is in custody in the facility, the required information in relation to searches, of youths in custody, conducted in the custodial facility is made available to the person; and
- (c) the required information in relation to searches, of youths in custody, conducted in a custodial facility is available for viewing by members of the public on a website in relation to the custodial facility.
- (3) For the purposes of this section, the required information in relation to searches, of youths in custody, conducted in a custodial facility is –
- (a) information as to the circumstances and manner in which a search of a youth is authorised to be conducted in the custodial facility; and
- (b) information as to –

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- (i) the rights of a youth who is in custody to make a complaint in relation to any search of the youth that is conducted in the custodial facility, if the youth believes the search was not authorised by, or conducted in accordance with, this Division or any other law; and
  - (ii) the person to whom such a complaint is to be directed; and
  - (c) provisions, relating to searches, that are contained in relevant instructions that apply in relation to searches of youths in custody that are conducted in the custodial facility, as those provisions are redacted, if at all, as necessary to ensure the security and good order of the custodial facility.

**7. Section 131 amended (Search of facility and possessions of detainee)**

Section 131 of the Principal Act is amended as follows:

- (a) by inserting the following definition before the definition of *thing* in subsection (1):

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*prohibited articles* means weapons, metal articles, alcohol, articles capable of being used as weapons, drugs or any other things which the regulations prohibit from being taken into a detention centre;

- (b) by omitting paragraph (a) from subsection (2);
- (c) by omitting from subsection (2)(b) “and the examination of the detainee and of” and substituting “of, and the examination of,”;
- (d) by omitting from subsection (2)(c)(i) “of a kind referred to in paragraph (a)(ii)” and substituting “a prohibited article”;
- (e) by omitting from subsection (3) “of a kind referred to in subsection (2)(a)(ii)” and substituting “a prohibited article”.

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**PART 3 – YOUTH JUSTICE (MISCELLANEOUS  
AMENDMENTS) ACT 2013 AMENDED**

**8. Principal Act**

In this Part, the *Youth Justice (Miscellaneous Amendments) Act 2013*\* is referred to as the Principal Act.

**9. Section 19 repealed**

Section 19 of the Principal Act is repealed.

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Part 4 – Concluding Provision

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**PART 4 – CONCLUDING PROVISION**

**10. Repeal of Act**

This Act is repealed on the first anniversary of the day on which the last uncommenced provision of this Act commenced.