

CLAUSE NOTES

Youth Justice Amendment (Searches in Custody) Bill 2022

- Clause 1** **Short Title**
This specifies the name of the proposed Act.
- Clause 2** **Commencement**
This provides that the Act commences on proclamation.
- Clause 3** **Principal Act**
This provides that in Part 2, the *Youth Justice (Miscellaneous Amendments) Act 2013* is referred to as the Principal Act.
- Clause 4** **Section 19 repealed**
This clause repeals an uncommenced provision in the *Youth Justice (Miscellaneous Amendments) Act 2013* which related to searches of youths in custody. It was originally intended that regulations be made in accordance with this provision to govern the searches of youths. However, the section has not commenced and no such regulations were made. Instead, the development of the Bill means the provision in the 2013 Act is now redundant.
- Clause 5** **Principal Act**
This provides that in Part 3, the *Youth Justice Act 1997* is referred to as the Principal Act.
- Clause 6** **Part 3, Division 1: Heading inserted**
This provides that Part 3 of the Principal Act is amended by inserting, before section 23, the heading '*Division 1 – Application*'.
- Clause 7** **Part 3, Division 2: Heading inserted**
This provides that Part 3 of the Principal Act is amended by inserting, after section 23, the heading '*Division 2 – Power of arrest and bail*'. This is to separate relevant provisions for arrest and bail from the new Division relating to search.
- Clause 8** **Part 3, Division 3 inserted**

This clause provides that after section 25 of the Principal Act, “Division 3 – Searches” is inserted in Part 3. Division 3 relates to searches of a youth in custody.

Section 25A (Interpretation of Division 3)

This inserts new definitions to support the insertion of the new Division relating to searches.

Section 25B (Searches to which this Division applies)

This provides for searches to which Part 3, Division 3 applies. This includes a clothed search or an unclothed search of a youth in custody that is conducted in a custodial facility, but does not include or apply to a body cavity search or a search under the *Terrorism (Preventative Detention) Act 2005*.

The section also provides that in the event of an inconsistency between the application of a provision of the Division and a provision in or under another Act relating to a search, the provision of this Division applies to the extent of the inconsistency.

Section 25C (Persons who may conduct searches of youths) This provision defines the persons who can conduct a search.

The provision also provides that a search of a youth must be conducted in accordance with this Division; and the requirements, if any, of the ‘relevant instruction’, unless the relevant instruction is inconsistent with the Division.

Section 25A defines ‘relevant instruction’ by reference to the standing orders under the *Corrections Act 1997*; instructions issued by the Secretary under section 124(2) of the *Youth Justice Act 1997*; and orders, directions, procedures and instructions issued by the Commissioner of Police under section 7(3) of the *Police Service Act 2003*. This acknowledges that, subject to the overarching requirements applied by the Bill, the persons with statutory responsibility for these facilities have power to issue instructions that can provide for particular operational matters in those facilities.

Section 25D (Requirements as to gender of search officer conducting search, &c.)

This provides requirements as to the gender of the search officer conducting a search (and officers present for searches that involve unclothed searches) and contains a number of safeguards concerning the conduct of the searches in different circumstances.

The section has adapted a similar approach to that taken in the *Court Security Act 2017*.

Subsection 25E (Type of, and manner in which, searches to be conducted)

This provides the type of, and manner in which, searches are to be conducted. This provision introduces a principle based foundation to when and how a search can be undertaken, requiring that a search officer must not conduct a search of a youth unless the search officer believes on reasonable grounds that the search is necessary for a relevant search purpose; and the type of search, and the manner of search, are proportionate to the circumstances.

The section outlines how the search officer must, as far as practicable, conduct their search. For example, the search is conducted in a manner that is consistent with retaining the youth's dignity and self-respect; and minimises any trauma, distress or harm that may be caused to the youth by the conduct of the search. The search is also to be the least intrusive type and manner of search that is necessary and reasonable to achieve a relevant search purpose. The search is to be completed as quickly as possible, to afford reasonable privacy, to reduce the amount of any clothing that is required to be removed, and alternative clothing is provided for the youth if necessary.

For determining matters relevant to the youth's dignity and minimising trauma, the search officer conducting the search must consider any relevant information that is provided by the youth and any information that the search officer has, or could reasonably inquire into, on the youth's age, intellectual maturity, sex, sexual or gender identity, religion, disabilities and history. This ensures a trauma-informed approach.

The new section provides for the use of force, but provides the search officer must not use force unless it is the only means by which the search can be reasonably and necessarily conducted, and must be the least amount of force necessary. Use of force is also subject to other relevant requirements, such as considering information provided by the youth and reducing distress and trauma to the youth as far as practicable. This recognises that force (that is, contact between the search officer and the youth) is necessarily part of some searches, such as the touching of a youth during a 'frisk' of the youth. However, this framework effectively makes the use of significant force, such as forcible restraint of a youth, a last resort.

The section requires that an unclothed search must only occur where the relevant authorising officer has authorised the search, and sets out the matters that must be met before such an authorisation can be provided. The authorising officer can also provide conditions that the search officer must comply with when conducting the search.

Finally, 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.

Section 25F (Relevant search purposes)

This provides for 'relevant search purposes' under which searches are permitted. These include the safety of the youth or others, to obtain evidence, to ascertain whether the youth has possession of a concealed weapon or drugs, and, where the search is a clothed search, the removal of articles belonging to the youth.

Section 25G (Determination of least intrusive type and manner of search)

Section 25E imposes requirements relating to the least intrusive type and manner of search.

Section 25G provides for a hierarchy of intrusiveness of search types. The degree of intrusiveness of the listed types of searches increases in the order outlined. That is, a search that involves no touching of the youth (such as search by scanning device) is the least intrusive type of search. The next level of search refers to minimal touching – this would capture scenarios such as opening the jacket of a youth. The next level refers to the removal of some clothing from the youth, which is considered less intrusive than the next search type that requires more than minimal touching (such as a 'frisk' style of search). Finally, an unclothed search is the most intrusive type of search.

The provision also provides for the considerations the officer must consider when determining the type of search to be conducted. This includes giving regard to the health and safety of the youth; and any information that the search officer, or the relevant authorising officer, has or could on reasonable inquiry have, as to the youth's age, intellectual maturity, sex, sexual or gender identity, religion, disabilities and history; and any other matter that is relevant to the determination.

Section 25H (Information to be given to youth before search conducted)

This provides that information is to be given to the youth before a search is conducted. Section 25H ensures that the youth is given appropriate notice about the search, and provided an opportunity for the youth to undertake actions that may lead to a less intrusive search, or mean a search is no longer necessary.

Section 25I (Seizure of articles found during searches)

This provides for seizure of articles found during searches, for a number of specified purposes, including evidence relating to the commission of an offence, related to the safety or good order of a custodial facility, or to remove the article into safekeeping.

Section 25J (Reporting of use of force)

This provides for the reporting of use of force. The new section requires that 'reportable force' must be reported to the person in charge of the facility, as soon as practicable after the search is conducted but in any case within 7 days after the search is conducted.

The new section contains a meaning of 'reportable force' and 'excluded force'. Importantly, force that may or has caused injury is part of what must be reported.

The section does not limit any other reporting requirements that may be required in relation to a search, including the requirements to record searches in the register under Section 25K.

Section 25K (Register of searches)

This provides for a register of searches. The section also inserts a definition of *relevant information* that must be included in relation to each search of a youth that is conducted in the custodial facility. This includes information prescribed under regulations, details of the intrusiveness of searches, and reportable force.

The new section requires the Secretary, Director and the Commissioner of Police to establish and maintain a register (a **search register**) in relation to each custodial facility for which they are responsible; that the search register must contain the relevant information; and that search registers are available for inspection by the Custodial Inspector, the Ombudsman, a person approved by the person in charge of the custodial facility, a prescribed person or body.

Section 25L (Provision of information)

The section requires the person in charge of the facility to ensure that there is available, for viewing by a youth in custody, leaflets, posters, or other documents that set out the obligations of the person in charge of the custodial facility under this section. This is to ensure that youths are aware that they can ask for more information, such as information about search procedures and making complaints about searches believed to be non-compliant.

The section also requires that a person in charge of a custodial facility is to make available information as specified for viewing by a youth, or their representative, and on a website relating to the facility. This includes information about when searches are conducted, the ability to make a complaint and the 'relevant instructions' of the facility relating to searches with any necessary redaction for the security of the facility.

Clause 9

Section 131 amended (Search of facility and possessions of detainee)

This makes required amendments to account for the new search provisions, as section 131 will now provide for searches of the detention centre and things in the possession of detainees (and not provide for searching the youth detainees themselves). The provision also simplifies references through incorporating a definition of 'prohibited articles', drawing on the existing reference in the section.

Clause 10

Repeal of Act

This automatically repeals the amending legislation after the first anniversary of the last provision of this Act commencing, as the amendments will be incorporated into the Principal Act.