

Youth Justice Amendment (Searches in Custody) Bill 2020

Submission to the Office of Strategic Legislation and
Policy, Department of Justice

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to comment on the Youth Justice Amendment (Searches in Custody) Bill 2020 (the Bill).
2. Due to the humiliation and indignity caused, the ALA submits that the power to use body cavity and strip searches should only be exercised in extreme circumstances and in close compliance with international human rights obligations and policy safeguards. Accordingly, the ALA submits that the Bill should be redrafted to reflect this and should not be presented in its current form.

Body cavity and strip searches – definitions

3. A body cavity search comes under the legal definition of a ‘forensic procedure.’ Tasmanian legislation defines a body cavity search as an ‘internal examination of a body cavity other than the mouth’.² This means a physical or visual inspection of the rectum or vagina. By their nature, these types of searches are highly invasive and traumatising for children, particularly those who have a history of sexual abuse. Although a strip search has a separate legal definition and does not involve an inspection of the rectum or vagina, the two types of personal searches are used interchangeably in this submission due to the similar traumatic effect they have on children as well as the indistinct use of both in practice.

Misuse of personal search powers

4. Laws allowing police to conduct personal searches in Tasmania are the *Police Offences Act 1935*, the *Misuse of Drugs Act 2001*, the *Poisons Act 1971*, the *Firearms Act 1996* and the *Family Violence Act 2004*. Under Tasmanian law, where a suspect or person charged with an offence is 15 years or older cavity searches can only be mandated by informed consent or by the order of a magistrate.³
5. While legislation establishes the varying degrees of invasiveness allowed for personal searches and the circumstances in which they must be undertaken, as has been the case in

² *Tasmanian Forensic Procedures Act 2000*, 3(1).

³ *Ibid* 8(1) and (2).

other jurisdictions the clear limits of search powers are less well-defined. Under s30(1) of the *Misuse of Drugs Act 2010*, the definition of a 'strip search' is a search other than a cavity search, which requires a person to remove most or all of his or her clothes.⁴ Research shows that police are using methods they believe to be in compliance with the legal definition of strip search (not requiring a court mandate) by asking persons to remove all clothing and to 'squat and cough' in anticipation of discovering hidden items.⁵ Although in this situation officers avoid viewing or touching a person's cavity, this is not only unlawful but can also inflict psychological and physical harm on children who undergo these searches.

6. It is also suggested that police use personal search powers in situations that are not required or authorised by law. Without legal justification, strip and cavity searches are used by the police to intimidate and punish.⁶ Generally, legal guidance provides that police may undergo strip searches or other invasive personal searches when they hold a 'reasonable belief' that such a search is necessary in the circumstances and there may be a risk of imminent harm. It can be described that the intention of Parliament was to allow these powers as a 'last resort and in exceptional circumstances'.⁷ However, police data from NSW shows that strip searches are routinely used on persons in custody and in cases of suspected drug possession. It is unlikely that either of these are legal reason enough to justify this type of search.
7. The use of cavity and strip searches in a prison context is particularly problematic. Searches are proven to have a very low success rate in detecting contraband that is entering the prison and are used as a behavioural control technique for mental health and psychiatric illnesses.⁸ Children may be searched to the point where they fear leaving their cell or refrain from seeing visitors to avoid being subjected to searches. Outside prison, police officers must form a strong reasonable suspicion that a person is hiding drugs or other dangerous items before conducting a search. In prison, the fact that the person is there in the first place appears to

⁴ *Misuse of Drugs Act 2001*, 30(1).

⁵ Michael Grewcock and Dr Vicki Sentas, *Rethinking Strip Searches by NSW Police* (UNSW Sydney, August 2019).

⁶ *Ibid* 5.

⁷ *Ibid*.

⁸ Cathy Pereira, 'Strip Searching as Sexual Assault' (2001) 27(2) *Hecate* 187.

satisfy the test.⁹ Grewcock and Sentas comment that the current legal thresholds are not designed to protect children and the only protection given currently is that an independent adult must be present for searches of children under 10 years of age.¹⁰ Their comments are in reference to NSW legislation but can also be applied to other Australian jurisdictions: police powers authorising personal searches do not uphold child protection safeguards.

Adverse impacts on children

8. Children are particularly vulnerable to the adverse impacts of cavity and strip searches. The Human Rights Law Centre stated that the use of strip-searching practices for children is ‘traumatising and unjustifiable’.¹¹ Adverse impacts are especially seen when searches are carried out routinely in custody for security and safety. The sexually intimidating nature and repetitiveness of searches have severely negative consequences on detainees’ physical and mental health.¹² A Queensland review by the Anti-Discrimination Commissioner found that strip searching has a severe impact on prisoners’ self-esteem as human beings, emphasising feelings of vulnerability and worthlessness.¹³ Cavity and strip searches have even been described as a form of ‘visual rape’.¹⁴
9. It is suggested that children who are strip or cavity searched have the same experience as that of being sexually assaulted.¹⁵ Consequences are even more detrimental for children who have suffered sexual abuse and harassment outside of the prison, as strip searches can make a child relive past traumatising events. Juvenile Justice NSW found that children in custody are more at risk of having experienced sexual abuse and typically have poorer mental health than

⁹ Jude McCulloch and Amanda George, ‘Naked Power: Strip Searching in Women’s Prisons’ in *The Violence of Incarceration* (Routledge, 1st ed, 2009) 107, 112.

¹⁰ Grewcock and Sentas (n 5), 6.

¹¹ ‘Children in Prison Subject to 100s of Unnecessary Strip Searches’ (July 29, 2019) *Human Rights Law Centre*.

¹² McCulloch and George (n 9), 112.

¹³ *Ibid*.

¹⁴ ‘Visual Rape: A Look at the Dubious Legality of Strip Searches’ (1979) 273 *J. Marshall Law Review*.

¹⁵ *R v Golden* (2001) 3 SCR 90.

children in the community.¹⁶ In NSW youth justice centres it was estimated that half of the minor prison population had experienced a past traumatic event, with 68% having been abused and 83% diagnosed with a psychological illness.¹⁷

10. While substantive data is not publicly available in Tasmania for 2020, recent figures show that strip searching and other personal searches conducted on children are common in custody. Data from the Department of Justice in 2018 shows that 218 minors in Tasmanian custody were searched by prison staff during that year.¹⁸ Further data from the Department of Communities shows that a total of 203 unclothed searches were conducted on children at the Ashley Youth Detention Centre from June to November 2018, and out of these searches 113 children were Aboriginal and Torres Strait Islander.¹⁹ It appears that no contraband or other illegal items were discovered as a result of any of these searches.

11. The Tasmanian Commissioner for Children and Young People, Leanne McLean, recently said that where previously all young people were strip searched in custody, the number had dropped by February 2020 to about 35%.²⁰ However despite the decline in numbers, it still stands that children are experiencing these incredibly undignified and traumatising searches.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ 'Media Release: Commissioner for Children and Young People' (Hobart, Online, May 2019) <<https://www.childcomm.tas.gov.au/wp-content/uploads/Media-Release-Strip-Search-FINAL-0519.pdf>>.

¹⁹ Rhiana Whitson, 'Strip Searching of Young People "Routine", with Advocate Raising Human Rights Concerns', *ABC News* (Hobart, Online, May 2019) <<https://www.abc.net.au/news/2019-03-01/strip-searching-of-minors-in-custody-routine-in-tasmania/10859784>>.

²⁰ Ellen Coulter and Kate Ainsworth, 'Push to Ban Strip Searches in Custody for Children, Replaced with Body Scanning', *ABC News* (Hobart, Online, 20 June 2020) <<https://www.abc.net.au/news/2020-06-30/push-to-ban-strip-searches-in-custody-for-children/12407694>>.

Human rights and international law

12. The use of body cavity and strip searches for non-legal purposes is inconsistent with human rights protections under international law. The invasiveness and dehumanising nature of personal searches for children conflict with a number of rights protected in human rights treaties that Australia is party to. Particular rights that are affected include:

- Humane treatment in detention;
- Freedom from cruel, inhuman and degrading treatment or punishment;
- Non-interference with privacy, including bodily integrity;
- Protection of families and children;
- Equality.²¹

13. Additionally, the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) set out the international minimum standard for the treatment of prisoners. Rule 54 in particular provides that intrusive searches, including strip and body cavity searches should only be undertaken if absolutely necessary.²² Rule 54 also encourages prisons to adopt appropriate alternatives to personal searches and says that if they are undertaken they should be conducted in private with trained staff of the same sex.²³

14. Article 37 of the 1990 *Convention on the Rights of the Child* says that ‘no children shall be subjected to torture or other cruel, inhuman or degrading treatment’. Additional to these overarching protections, international case authority has found that strip searches are a distressing and dehumanising practice and established a high threshold for when they can be authorised.

²¹ The above rights are protected in the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *Convention on Elimination and All Forms of Discrimination Against Women*.

²² Rachel Ball and Adrienne Walters, *Total Control: Ending the Routine Strip Searching of Women in Victoria’s Prison* (Human Rights Law Centre, 2017), 18.

²³ United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), GA Res 70/175, 7th sess, Agenda Item 106, UN Doc A/ res/70/175 (8 January 2016); *Ibid*.

15. The leading Canadian Supreme Court decision of *R v Golden* [2001] 3 SCR 679 found strip searches to be inherently humiliating and degrading for those who experience them. The Court said that an unjustified strip search or one that was not properly conducted would constitute a violation of s8 of the *Canadian Charter of Rights and Freedoms*, protecting an individual's right to be secure against unreasonable searches or seizures.²⁴ The Court said that regardless of the remedies provided for an unjustified strip search, nothing could erase an arrestee's experience of embarrassment and humiliation.²⁵
16. In 2006 the European Court of Human Rights found that the right to privacy protects an individual's right not to be strip searched.²⁶ It was strongly stated that such searches were not to be carried out unless they were absolutely necessary and complied closely with safeguards and precautions to protect the dignity of individuals who were searched.²⁷
17. The high threshold for circumstances where searches may be undertaken has been given judicial recognition in a series of European authorities. The Court in *Frerot v France* found that strip searching was a measure that should only be used when there are serious reasons to suspect that a prisoner is hiding something dangerous in their body.²⁸ In this case, strip searching was also labelled 'inhuman' and 'degrading'.²⁹
18. In an earlier case, *Petty v United Kingdom*, it was commented that 'where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity and arouses feelings of fear, anguish or inferiority ...' it was likely to be prohibited by Article 3 of the *European Convention of Human Rights*.³⁰ Cases such as these show that overseas courts are not tolerant of invasive search practices and know them to be in conflict with human rights protections.

²⁴ *R v Golden* (n 15).

²⁵ *Ibid* 89.

²⁶ *Wainwright v United Kingdom* [2006] European Court of Human Rights Chamber Application No 12350/04.

²⁷ *Ibid*.

²⁸ *Frerot v France* [2007] European Court of Human Rights Chamber Application No 70204/01.

²⁹ *Ibid*.

³⁰ Article 3 of the *European Convention of Human Rights* says 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Proportionality of searches

19. There is overwhelming evidence that invasive searches are highly disproportionate to the aims they claim to achieve. The rationale behind personal searches is to control safety and security in prisons and stop drugs and weapons entering the premises.³¹ Countless sources have demonstrated the low success rate of finding prohibited items by using cavity and strip searches. The Human Rights Law Centre found last year that 403 strip searches were conducted on children in NSW youth prisons and only one item (a ping pong ball) was confiscated as a result.³² Additionally, there is no evidence that searches have a deterrent effect.³³
20. Having regard to the dehumanising and traumatising experience that these searches have on children and others, it is clear that they are disproportionate to the legislative intentions of Parliament. As searches are often being conducted contrary to policy and without acknowledgment of legal thresholds, these types of searches are clearly out of date and most likely illegal. The ALA notes that no prison staff are subject to any searches. This supports the argument that they are being used for non-legal purposes such as intimidation and humiliation.
21. The ALA submits that there are far less invasive methods, such as X-ray scanners, for regulating what enters prisons. These methods do not involve inmates being subject to the indignity of cavity and strip searches.³⁴

³¹ Ball and Walters (n 22), 2.

³² 'Children in Prison Subject to 100s of Unnecessary Strip Searches' (n 11).

³³ Ibid.

³⁴ Ball and Walters (n 22) 2.

Conclusion

22. The Australian Lawyers Alliance (ALA) welcomes the opportunity to comment on the Youth Justice Amendment (Searches in Custody) Bill 2020.

23. The ALA strongly submits that the power to use body cavity and strip searches should only be exercised in extreme circumstances and in close compliance with international human rights obligations and policy safeguards. Accordingly, the ALA submits that the Bill should be substantially redrafted to reflect this position.



Greg Barns SC

On behalf of the Australian Lawyers Alliance, Tasmanian Branch