



Justice

Regulatory Impact Statement

Children (Detention Centres) Regulation 2015

July 2015

TITLE OF PROPOSED REGULATION

Children (Detention Centres) Regulation 2015

RESPONSIBLE MINISTER

The Hon David Elliott MP
Minister for Corrections

RESPONSIBLE DEPARTMENT

Department of Justice

RELEVANT ACT

Children (Detention Centres) Act 1987

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Attachment: Proposed *Children (Detention Centres) Regulation 2015*

1. INTRODUCTION

The *Children (Detention Centres) Regulation 2010 (CDC Regulation)* provides for the administration of juvenile detention centres, including:

- (a) rules associated with persons visiting detainees and detention centres;
- (b) the sending of parcels or letters to or by detainees;
- (c) the making of complaints in relation to a detention centre;
- (d) the granting of day leave or overnight leave;
- (e) the maintenance of order in detention centres;
- (f) prescribing conduct to be treated as misbehaviour and the procedure for dealing with allegations of misbehaviour against detainees;
- (g) parole orders in relation to detainees;
- (h) forms for notice of revocation of parole orders, arrest warrants and warrants of commitment.

Regulations are automatically repealed 5 years after they are made, pursuant to s.10(2) of the *Subordinate Legislation Act 1989 (SL Act)*. The current CDC Regulation will be repealed on 1 September 2015 and it is proposed the Regulation is remade.

In order for the CDC Regulation to be remade, the SL Act must be complied with. Section 5 of the SL Act provides for the completion of a Regulatory Impact Statement (RIS) with Schedule 2 of the SL Act outlining details to be included in a RIS. This includes seeking public comment in relation to the proposed Regulation.

2. HOW TO MAKE A SUBMISSION

Submissions about the proposed Regulation can be made:

By email: justice.policy@agd.nsw.gov.au

By mail: Director, Offender Strategy
Justice Strategy and Policy Branch
Department of Justice
GPO Box 31
SYDNEY 2001

All submissions will be treated as public and may be published, unless the submission indicates that it is to be treated as confidential.

Closing date for submissions: **29 July 2015**

3. OBJECTIVE OF THE REGULATION

The *Children (Detention Centres) Act 1987 (the Act)* provides the framework for the administration of custodial sentences for juvenile offenders. The Act also provides for a broad range of matters to be dealt with by Regulation. The objective of the CDC Regulation is to provide for matters in relation to the management, control, administration, supervision and inspection of detention centres and detainees, which are not specified in the Act.

The major function of the Act is to deprive certain juvenile offenders of their liberty. Accordingly, the Department of Justice considers that many of the Juvenile Justice NSW obligations and procedures flowing from the Act should be in the form of Regulations rather than administrative directives. This is because a Regulation is more transparent, easier to work with, and ensures that the same rules apply to everyone. It ensures that everyone involved in the juvenile justice system can find and understand their obligations. Importantly, it also provides a safeguard as a Regulation can be disallowed by Parliament.

4. OPTIONS TO ACHIEVE OBJECTIVE

This Regulatory Impact Statement examines three options relating to the remaking of the existing Regulation:

- 1) Do nothing and let the Regulation lapse
- 2) Remake the Regulation without amendments
- 3) Remake the Regulation with amendments (the proposed Regulation).

4.1 Option 1: Do nothing

If the proposed Regulation is not made, the existing Regulation will lapse on 1 September 2015.

Costs

As previously stated, the objective of the CDC Regulation is to provide for matters in relation to the management, control, administration, supervision and inspection of detention centres and detainees, which are not specified in the Act. Therefore if the Regulation lapses, detainees, staff and the general public will not have access to clear legislative rules pertaining to these crucial matters.

The Government has a responsibility to young offenders to ensure that detention centres are administered in accordance with the Act, while considering the welfare and interests of a young person in custody. As the Act relies on the Regulation to provide specific detail on the procedures, obligations and rights in relation to detention centres, the absence of the Regulation would require juvenile justice staff

to use their discretion. This could lead to inequity for young people in custody as provisions in the Act are not specific enough to ensure control and order is maintained in a consistent manner in each detention centre in the state.

Benefits

There are no readily identifiable benefits in allowing the existing Regulation to lapse. This option is not proposed.

4.2 Option 2: Remake the Regulation without amendments

Costs

By remaking the existing Regulation without amendments, a number of identified issues and restrictions would not be addressed, impeding on the efficiency of the operation of detention centres. For example it is proposed to add the Inspector of Custodial Services to clause 29 of the Regulation. This will enable a detainee to be visited by the Inspector of Custodial Services at any time, as is the case for the Official Visitor of the centre and officers from the NSW Ombudsman. This would not be the case if the Regulation is remade without amendments. Further, technical amendments that update terminology used or references to organisations that have changed names would not occur either.

Benefits

The existing Regulation has successfully operated since it was last remade in 2010, providing the necessary procedural and administrative details for the effective administration of detention centres. Although it is unlikely remaking the Regulation without amendments would have a detrimental effect on any stakeholders, amendments are required to improve and continue the effective operation of the Regulation. This option is not proposed.

4.3 Option 3: Remake the Regulation with amendments

The Regulation is required to provide for matters in relation to the management, control, administration, supervision and inspection of detention centres and detainees, which are not specified in the Act.

In the process of considering the remake of the Regulation, the Department of Justice identified a number of operational issues and out dated terminology in the existing Regulation that should be rectified. The following amendments are proposed:

4.3.1 Segregation of detainees for protection

Clause 10(2)(b) requires that a centre manager ensures that segregation is carried out in accordance with a plan that is subject to monitoring by a psychologist. It is

proposed to amend this provision to include the ‘Assistant Manager, Client Services’ because this position is the supervisor of psychologists and is also responsible for monitoring a plan.

Clause 10(2)(d) requires juvenile justice officers to check on a detainee at intervals of no more than 10 minutes if advised by a psychologist or Justice Health officer that the detainee is at risk of self-harm. It is proposed to clarify that a juvenile justice officer must check on a detainee more frequently than every ten minutes, for example every four minutes, if this is recommended by a psychologist or Justice Health officer.

4.3.2 Radios and other electronic equipment

It is proposed to delete clause 14(1)(b) as the reference to ‘other electronic equipment’ in clause 14(1)(a) covers the type of equipment that is described in clause 14(1)(b).

4.3.3 Access to programs

Clause 19(2) requires a centre manager to establish and implement an incentive scheme to encourage detainees to participate in programs that are offered at the centre. Clause 19(3) requires an incentive scheme to comply with any directions issued by the Director-General about incentive schemes.

It is proposed to amend this clause to require centre managers to implement the incentive scheme issued by the Secretary. This will ensure that each centre is operating the same incentive scheme. The change of terminology regarding the Director-General and Secretary is explained at 4.3.12.

4.3.4 Contents of case plan

Clause 22 provides that a detainee’s case plan may deal with any matter relating to the management of the detainee. This clause also provides some examples of matters that may be included in a case plan. The proposed amendment will add some legislative requirements to be included in a detainee’s case plan. A case plan will be required to set out:

- the proposed actions to be taken to address the needs of the detainee in relation to the detainee’s offending behaviour
- the time allocated to achieve the proposed actions
- the roles of those participating in the proposed actions.

This amendment will ensure that all case plans work to address the offending behaviour of detainees, and all those involved in the administration of case plans are aware of the timeframes and their specific roles. This will ensure a consistent approach to the rehabilitation of detainees across the state.

4.3.5 Visits by Official Visitor and Ombudsman

Clause 29 allows the Official Visitor for the detention centre and officers from the NSW Ombudsman to visit a detainee at any time. The amendment will clarify that the Inspector of Custodial Services can also visit a detainee at any time.

4.3.6 Inspection of mail and parcels

Clause 40 provides that a letter or parcel sent to or from a detainee may be opened and inspected by the centre manager or an authorised officer if, in the opinion of the centre manager, the security, safety or good order of the detention centre is likely to be adversely affected by the delivery or dispatch of the letter or parcel. This does not apply to letters to or from and exempt body.

After a letter or parcel is opened, the centre manager can take possession of the letter or parcel, and its contents, if it contains contraband or any item or matter that, in the opinion of the centre manager, is likely to adversely affect the security, safety or good order of the detention centre. A detainee must be informed of this.

It is proposed to amend this provision to allow a centre manager or authorised officer to open, inspect and read a letter or parcel sent to or from a detainee at any time. A centre manager would not have to be of the opinion that the security, safety or good order of the detention centre is likely to be adversely affected by the delivery or dispatch of the letter or parcel. If the letter or parcel contained prohibited goods, the centre manager could confiscate the letter and its contents and deal with them in accordance with any directions from the Secretary.

Further, the amendment will allow a centre manager to direct that any written or pictorial matter contained in a letter or parcel that has been opened be copied before the letter/parcel is sent to the addressee. This could only occur if the centre manager or a juvenile justice officer is of the opinion that the matter to be copied contains anything likely to prejudice the good order and security of the centre, or is threatening, offensive, indecent, obscene or abusive. This does not apply to letters to or from and exempt body.

The proposed amendment will enable juvenile justice staff to conduct targeted searches of mail where there is a suspicion that mail may contain a prohibited item, but where that suspicion would not necessarily meet the standards that are currently in place to allow the opening of mail. It will also allow random searches of incoming and outgoing mail to be undertaken. A high standard of suspicion is still required to enable written or pictorial matters to be copied before being sent to the addressee.

The proposed amendment is based on current practice in adult correctional centres and is based on clause 112 of the *Crimes (Administration of Sentences) Regulation 2014*.

4.3.7 Complaints registers

Clause 55(3) provides that the complaints register kept by a centre manager must be available for inspection by the Official Visitor of the centre to which the register relates. It is proposed to also make complaints registers kept by centre managers available for inspection by the Inspector of Custodial Services.

4.3.8 Use of dogs to assist in drug detection

Clause 64 allows a juvenile justice officer to use a dog to assist in the detection of drugs in a detention centre. It is proposed to change the reference to 'drugs' to 'contraband'. There was some confusion as to whether the term 'drugs' only referred to illegal drugs or could also extend to legal drugs, such as tobacco. Using the term contraband clarifies this.

4.3.8 Reports on use of force

Clause 66 requires each juvenile justice officer involved in a use of force to provide a report to the centre manager. Clause 66(2)(e) requires a report on the use of force to be signed by each officer involved in the use of force.

It is proposed to amend this provision to only require the officer making the report to sign it. As each officer involved in a use of force has to submit their own report, it is not necessary for them to sign other officers' reports.

4.3.9 Testing for alcohol or drugs

Clause 67 provides that a juvenile justice officer, or another person having supervision of a detainee, may require a detainee to undergo a breath test if they suspect that the detainee has recently consumed or is under the influence of alcohol or another intoxicating substance.

It is proposed to amend this provision to allow a juvenile justice officer, or another person having supervision of a detainee, to direct a detainee to undergo a breath test for the purpose of testing for the presence of alcohol or another intoxicating substance. Suspicion that a detainee is under the influence of alcohol will not be required.

This amendment will allow for the random breath testing of detainees. This will be a significant deterrent for detainees ingesting alcohol or other intoxicating substances. This will also allow more effective monitoring of detainees who have been found to be under the influence of alcohol previously.

4.3.10 Visits by prescribed persons

Clause 76 prescribes classes of persons for the purposes of s.21(3)(a) of the Act (punishment must not interfere with visit from legal practitioner or prescribed class of persons). The amendment will add the Inspector of Custodial Services.

4.3.12 Terminology amendments

The proposed Regulation makes some changes to terminology as a result of the commencement of the *Government Sector Employment Act 2013*, the renaming of certain positions within Juvenile Justice NSW and for the purposes of clarification.

All references to the 'Director-General' have been replaced with 'Secretary'. Other references to specific job titles within Juvenile Justice NSW have been updated. Finally, references to 'staff member' have been replaced with 'juvenile justice officer'.

Costs

The proposed amendments to the Regulation will not have an impact on the economic costs associated with the administration of, and adherence to, the Regulation.

In relation to non-financial costs, the proposed amendments will have some impact on detainees. Currently before a letter or parcel sent to or by an inmate can be opened and inspected by juvenile justice staff, a centre manager must be of the opinion that the security, safety or good order of the detention centre is likely to be adversely affected by the delivery or dispatch. The amendment will remove the requirement for a manager to form such an opinion before a letter or parcel is inspected.

This will mean that letters and parcels sent to or by a detainee will be able to be opened at the discretion of authorised juvenile justice officers. This will allow for targeted searches of letters or parcels where the level of suspicion might not necessarily reach the standard currently required. It will also allow for the random inspection of mail. This does not include letters and parcels to or from an exempt body or person.

Inspection of mail and parcels

It could be argued that this amendment impinges on the privacy of a detainee. For example, a letter to or from a family member would be able to be opened and read by an authorised juvenile justice officer. Such a letter may include personal subject matter that the detainee would not otherwise divulge to a juvenile justice officer. However, the *Privacy and Personal Information Protection Act 1998* will prevent the unlawful collection or disclosure of any personal information.

Testing for alcohol or drugs

The amendments will also give juvenile justice officers and other people who are supervising detainees the power to randomly breath test detainees for alcohol or other intoxicating substances. Currently an officer or other person must suspect that a detainee is under the influence of alcohol or an intoxicating substance before a breath test is permitted. It could be argued that this amendment removes a safeguard that prevents the abuse of the authority to breath test detainees.

Benefits

Remaking the CDC Regulation would primarily benefit:

- young offenders in custody by ensuring their welfare, protecting their rights and clarifying their duties;
- the community, by maintaining an efficient and appropriate mechanism for the management of young offenders;
- the government, by assisting it to fulfil its social responsibilities to young offenders, their families/carers and the broader community.

The proposed amendments will improve the operation of detention centres as well as ensuring terminology used in the Regulation is up-to-date.

Inspection of mail and parcels

One of the key challenges in managing detention centres is keeping contraband out. This includes drugs, alcohol and weapons. One of the methods used to try and smuggle contraband into detention centres is through the post. The post can also be used for other illicit purposes such as sending offensive material, for example pornography, or harassing victims of crime.

The proposed amendment will enable authorised juvenile justice staff to conduct targeted searches of mail where there is a suspicion that mail may contain a prohibited item, but where that suspicion would not necessarily meet the standards that are currently in place to allow the opening of mail. It will also allow random searches of incoming and outgoing mail to be undertaken. The Department of Justice believes that this will be a significant deterrent for detainees to use the post for illicit purposes. Further, an efficient searching regime should lead to a reduction in contraband being introduced to detention centres through the post. This will improve the safety and wellbeing of detainees and staff.

Testing for alcohol or drugs

The amendment to allow for the random breath testing of detainees will act as a significant deterrent for detainees consuming alcohol or other intoxicating substances. Currently before a breath test is carried out on a detainee an officer must form a suspicion that the detainee has recently consumed or is under the influence of alcohol.

This suspicion could be formed a number of ways but it would primarily be done through observing the behaviour of a detainee. Some detainees would likely be able to mask the effects of alcohol enough so as to not arouse suspicion. If they know they are less likely to arouse suspicion they might be more likely to consume alcohol because they would be aware of the current restrictions in place regarding breath testing. Removing these restrictions will enable random breath tests to be carried out. This may lead to an increase in the detection of detainees under the influence of alcohol. An increase in detection would likely lead to a decrease in offending behaviour. This would improve the health and safety of detainees, and aid in rehabilitation while in detention.

Contents of case plan

The proposed amendment relating to case plans will add some legislative requirements to be included in a detainee's case plan. This will ensure that all case plans work to address the offending behaviour of detainees, and all those involved in the administration of case plans are aware of the timeframes and their specific roles. This will also ensure a consistent approach to the rehabilitation of detainees across the state.

5. RECOMMENDATION

The Department of Justice recommends that Option 3- remake the Regulation with the proposed amendments be adopted. The Department believes that the benefits of this option far outweigh the costs outlined above.

6. CONSULTATION

Comments are now sought from interested parties on the proposed Regulation and RIS. Information about the proposed Regulation will be published in the NSW Government Gazette, in the Sydney Morning Herald and the Daily Telegraph and on the Department of Justice website: www.justice.nsw.gov.au.

A copy of the Regulation and RIS has been sent to the following organisations:

- Aboriginal Affairs
- Aboriginal Legal Service NSW/ACT Ltd
- Council of Social Service of NSW (NCOSS)
- Children's Court of NSW
- Department of Education and Communities
- Department of Premier and Cabinet
- Indigenous Social Justice Association
- Inspector of Custodial Services
- Justice Health and Forensic Mental Health Network
- Law and Justice Foundation of NSW
- Law Society of NSW
- Legal Aid NSW
- NSW Advocate for Children and Young People
- NSW Bar Association
- NSW Ombudsman

- NSW Police Force
- Office of the Director of Public Prosecutions
- SHINE for Kids Co-operative
- Youth Justice Coalition