

CHILDREN (DETENTION CENTRES) REGULATION 2015

**LEGAL AID NSW SUBMISSION
TO THE DEPARTMENT OF JUSTICE**

JULY 2015

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation through in-house and private legal practitioners.

The Legal Aid NSW criminal law practice provides legal assistance and representation in each jurisdictional level including proceedings the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Legal Aid NSW Children's Legal Service (CLS) advises and represents children and young people involved in criminal cases in the Children's Court, including young people appearing before the Children's Court for parole matters. CLS lawyers also visit juvenile justice centres and give free advice and assistance to young people in custody.

Overview

Legal Aid NSW welcomes the opportunity to provide comments to the Department of Justice concerning the proposed *Children (Detention Centres) Regulation 2015* (NSW) (CDC Regulation 2015) and associated Regulation Impact Statement (RIS). The proposed CDC Regulation 2015 is intended to replace the *Children (Detention Centres) Regulation 2010* (NSW) (CDC Regulation 2010) which will be repealed on 1 September 2015.

Legal Aid NSW provides comments on proposed clauses 40, 66 and 67 of the CDC Regulation 2015. Legal Aid NSW does not support the amendments proposed in clauses 40 (inspection of mail and parcels) and 67 (testing for alcohol or drugs) of the CDC Regulation 2015. Legal Aid NSW supports the proposed clause 66 (reports on use of force).

Should you require any further information, please contact Alex Curnick, Solicitor, Strategic Policy and Planning – Legal Aid NSW, 02 9219 5909 or alex.curnick@legalaid.nsw.gov.au.

[4.3.6] Inspection of mail and parcels (clause 40)

Clause 40(1)

Clause 40(1) currently provides:

A letter or parcel (other than a letter to or from an exempt body or exempt person) for delivery to or dispatch from a detainee may be opened and inspected by the centre manager or a juvenile justice officer authorised by the centre manager to do so 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.** [emphasis added]

The proposed clause 40(1) provides:

A centre manager or a juvenile justice officer authorised by the centre manager **may open, inspect and read a letter or parcel sent to or by a detainee** and, if it contains **prohibited goods**, may confiscate the letter or parcel and its contents and deal with them in accordance with the directions of the Secretary.

Legal Aid NSW notes that the RIS states that the purpose of amending clause 40 is 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.** [emphasis added]

The RIS further states:

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.¹ [emphasis added]

The proposed clause 40(1) omits the precondition to the inspection of mail that the staff member is 'of the opinion' that 'the security, safety or good order of the detention centre' is likely to be affected by the mail item.

Legal Aid NSW considers that it is difficult to conceive of a situation where there is a 'suspicion' that does not 'meet the standards that are currently in place.' Legal Aid NSW notes that the current clause does not impose a high threshold. It does not require a 'suspicion.' It merely requires that an 'opinion' is held that 'the security, safety or good order of the detention centre is likely to be adversely affected by the delivery or dispatch.' Legal Aid NSW considers that the current clause provides adequate powers to juvenile justice staff to conduct 'targeted searches'.

In addition, The RIS does not identify the existence of any systematic issues as to why the power to conduct 'random searches' of mail is necessary.

Legal Aid NSW opposes the amendment to clause 40(1).

If clause 40(1) is to be amended, Legal Aid NSW considers that the proposed clause 40(1) should be amended so that the power to open and inspect mail is predicated upon the officer having a 'suspicion' that the 'letter or parcel':

¹ Regulatory Impact Statement, p 8.

- is likely to affect the 'security, safety or good order' of the centre, or, in the alternative,
- 'contains prohibited goods'.

To avoid uncertainty with interpretation of the clause, if the term 'prohibited goods' is to be used, it should be defined.²

Clauses 40(3) and 40(5)

Clause 40(2) currently provides:

The centre manager may take possession of any letter or parcel and its contents and may deal with them in accordance with any directions given specifically or generally by the Director-General if, following opening and inspection, the letter or parcel is found to contain 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.

The proposed clause 40(3) provides:

A centre manager may direct that any written or pictorial matter [...] **be copied** before the letter or parcel containing the matter is delivered to the addressee. [emphasis added]

The proposed clause 40(5) reproduces the current clause 40(3) unamended. It provides:

If the centre manager takes possession of a letter or parcel or its contents, the centre manager must ensure that the detainee to whom the letter or parcel is addressed is **notified of that fact**. [emphasis added]

The CDC Regulation 2015 does not contain specific provisions concerning the use and retention of copied or confiscated information. It is not clear that the provisions under relevant privacy legislation would be applicable in all circumstances.

Legal Aid NSW considers that the proposed clause 40(5) should be amended to:

- expressly provide that detainees are informed about the nature of the material confiscated or copied, and
- records are kept concerning the information confiscated or copied.

This would enable the detainee to raise any concerns about the access, use and retention of the material by DJJ, including compliance with privacy legislation.

² See for e.g. definition of 'prohibited goods' in *Crimes (Administration of Sentences) Regulation 2014* (NSW), cl 3, above nError! Bookmark not defined..

[4.3.8] Reports on use of force (clause 66)

The proposed amendment to clause 66 removes the requirement for use of force reports to be co-signed by each officer involved.³ The RIS states the following justification for the amendment:

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

Legal Aid NSW supports the proposed amendment to clause 66.

Use of force reports may be relevant to criminal proceedings, for example, an allegation that a young person assaulted a juvenile justice officer. Given the importance of these documents, Legal Aid NSW considers that there should be a regulatory requirement for the officer making the report to:

- make a declaration as to the truth and contents of the report, and
- have their signature witnessed by an independent third party.

[4.3.9] Testing for alcohol or drugs (clause 67)

Clause 67 currently provides:

On forming a suspicion that a detainee has recently consumed or is under the influence of alcohol or any other intoxicating substance, a juvenile justice officer or other person having supervision of the detainee may require the detainee to undergo a breath test.

The proposed clause 67 provides:

(1) A juvenile justice officer or other person having supervision of a detainee may direct the detainee to undergo a breath test for the purpose of testing for the presence of alcohol or another intoxicating substance.

(2) A detainee may be directed to undergo a breath test under this clause even though the detainee concerned may not be reasonably suspected of being under the influence of alcohol or another intoxicating substance.

The current clause 67 is essentially in the same terms as clause 157(1) of the *Crimes (Administration of Sentences) Regulation 2014* (NSW).

The RIS states that the purpose of the amendment is to allow for random breath testing of detainees and to act as a deterrent to detainees consuming alcohol and other drugs.⁵ The RIS further states that it will 'allow more effective monitoring' of detainees who have previously been found under the influence of alcohol.⁶

The proposed clause 67 contains no limit on how often, where, and at what times of day, a detainee may be required to undergo a breath test. Further, the RIS does not identify that there are any systematic issues concerning alcohol and other drug use within DJJ centres.

³ c.f. *Children (Detention Centres) Regulation 2010* (NSW) cl 66(2)(e).

⁴ Regulatory Impact Statement, p 9.

⁵ See Regulatory Impact Statement, p 9.

⁶ Ibid.

Legal Aid NSW considers that the current clause 67 provides an important safeguard against unnecessary and unreasonable breath testing of detainees.

Legal Aid NSW opposes the amendment to clause 67.