

2019
LEGISLATIVE ASSEMBLY OF THE
NORTHERN TERRITORY
MINISTER FOR TERRITORY FAMILIES
Youth Justice Amendment Bill 2019
SERIAL NO. 84
EXPLANATORY STATEMENT

NOTES ON CLAUSES

This Bill amends the *Youth Justice Act 2005* to clarify key provisions relating to the use of force and the powers and function of the superintendent youth detention.

Clause 1. Short title

This is a formal clause which provides for the citation of the Bill. The Bill, when passed, may be cited as the *Youth Justice Amendment Act 2019*.

Clause 2. Commencement

This is a formal clause which provides when the Act will commence.

The Act will be taken to commence on 24 May 2018. This is the date that the *Youth Justice Amendment Act 2018* commenced. The purpose of the amendments is to remove any doubt about the meaning of the amendments made in the *Youth Justice Amendment Act 2018*.

Clause 3. Act amended

This is a formal clause that identifies that the legislation being amended is the *Youth Justice Amendment 2005*.

Clause 4. Section 5 amended

This clause inserts a new definition of 'emergency situation' to make it clear that it includes a situation where there is an imminent risk of a youth:

- inflicting self-harm; or,
- harm to another person; or,
- serious damage to property.

This definition is intended to be inclusive and is not exhaustive.

The definition of emergency situation is relevant to the general application for all uses of force under section 10 of the *Youth Justice Act 2005*.

In an emergency situation, the superintendent or any person authorised to use force on a youth under section 10 of the *Youth Justice Act 2005*, will not be required to follow all of the steps in subsection (1)(a) and (b)(i) and (ii). The superintendent or authorised person will not be required to attempt all other practicable measures to resolve the situation, or to give a clear warning about the use of force, and allow time for the warning to be observed by the youth. This recognises that in an emergency situation there may not be time to follow those steps. The superintendent or authorised person will still be required to comply with amended subsections (1)(b)(iii) and (iv) that the person uses no more force than is necessary and reasonable in the circumstances as perceived by the person, and the person holds a current qualification in physical intervention techniques on youths (see clause 5).

The definition of emergency situation includes the type of situations referred to when the use of force or restraints can be authorised under sections 154(1)(a) and 155(1)(a). The definition removes the ambiguity about whether the types of imminent risks in sections 154(1) and 155(1) are different to an emergency situation. There are no clear situations in which an imminent risk of a detainee inflicting self-harm or harming another person or causing serious damage to property would not be considered an emergency situation.

The definition of emergency situation is also relevant to understanding section 155A Separation of detainees (see clause 9).

Clause 5. Section 10 amended (Use of force generally)

Subclause (1) amends current subsection 10(1)(b)(iii) to clarify that if force is used under the *Youth Justice Act 2005*, the force used is no more than the person using the force considers to be necessary and reasonable in the circumstances as perceived by the person. This makes it clear that what is necessary and reasonable in the circumstances is to be determined by reference to the knowledge of the person using the force. This is similar to self-defence provisions in criminal statutes which usually specify that reasonable necessity is determined by reference to the circumstances known to the person using the force. For example see section 29(2)(b) of the *Criminal Code*.

Subclause (2) creates a new subsection 10(3) to provide the list of considerations that the person using force may have regard to in considering what is necessary and reasonable in the circumstances under subsection(1)(b)(ii). This list of considerations is the age, gender, physical and mental health, or background of the youth. This list provides guidance that might influence the type of response that would be appropriate for a youth, but the clarification in subclause (1) means that it will still be based on what the person using force actually knew in the circumstances.

These considerations were recommended by the Royal Commission into the Protection and Detention of Children for inclusion in amendments to the use of force (Recommendation 13.5).

Clause 6. Section 153 amended (Prohibited actions)

This clause removes the prohibition on the use of force or restraint for the purpose of maintaining the good order of a detention centre, which removes any doubt about the duty of the superintendent to maintain order and ensure the safe custody and protection of all persons who are within the precincts of the detention centre under section 151(3)(c) of the *Youth Justice Act 2005*.

This clarification is in line with a recent decision upheld by the Northern Territory Court of Appeal that the superintendent's duty under section 153(c) is to ensure the safe custody and protection of persons within the detention centre gave rise to a power under section 152(1) to use reasonable and necessary force (*JB & Ors v Northern Territory of Australia* [2019] NTCA 1).

The concept of 'prohibited actions' was introduced as a new section 153 of the *Youth Justice Act 2005* in the *Youth Justice Legislation Amendment Act 2018* to replace former section 153 'Discipline'. The purpose of the amendment was to ensure the use of force and restraints could not be used as punishment. This can still be achieved with the prohibition of the use of force or restraint to discipline a detainee and the prohibition of any type of force or restraint except in accordance with provisions of the *Youth Justice Act 2005*, in particular under sections 10, 154 and 155.

Clause 7. Section 154 amended (Use of force)

Subclause (1) amends section 154(1) to make it clear that there must be a belief on reasonable grounds by the superintendent or person authorised by the superintendent to use force that the force is necessary to prevent imminent risks mentioned in paragraph (a) of the detainee inflicting self-harm, harming another person or seriously damaging property. These criteria are the same criteria in the new definition of emergency situation at clause 5, section 5.

Subclauses (3) and (4) delete the former subsection (1)(b) that required all reasonable and therapeutic measures to resolve the situation being attempted and failed unless an emergency situation exists, and inserts two alternative circumstances when force may be used to prevent a detainee engaging in certain conduct that does not necessarily involve an imminent risk.

The limitation in section 154(1)(b) is not required in this section, because section 10(a) contains the same limitation on the use of force in the *Youth Justice Act 2005*. Section 10(2) confirms that in an emergency situation the requirement to attempt all other practicable measures to resolve the situation before force can be used, does not apply. The new definition of emergency situation inserted by clause 5 now clarifies that an emergency situation includes when there is an imminent risk of a youth inflicting self-harm, harming another person or seriously damaging property.

The new circumstances where force may be used have been included to allow for the use of force to prevent a detainee from engaging in conduct that would endanger the safety of any person who is within the precincts of the detention centre, including the detainee, or seriously threaten the security of the detention centre. These situations may not necessarily fall within the new definition of emergency situation and would be subject to the strict controls on how force can be used under section 10 of the *Youth Justice Act 2005*.

These new circumstances will cover the types of scenarios that have occurred in youth detention centres like detainees snatching keys from a staff member, or detainees climbing onto the roof of a youth detention centre. This will clarify that staff are permitted to use, as a last resort after attempting all other practicable and therapeutic measures, the minimum force necessary to prevent conduct that endangers the safety of people and security of the youth detention centre, which includes to prevent a detainee from escaping a youth detention centre.

This approach confirms the need for a continuum of responses to work in a complex environment in youth detention centres. Staff are being trained to use skilful verbal engagement, restorative processes and therapeutic approaches to resolve issues and need a clear framework to respond proportionately to the level of risk and threat to safety and security of detainees' behaviours.

Subclause (5) is a technical amendment to section 154(2) to make the wording consistent with the wording about the authorised person in section 154(1).

Clause 8. Section 155 amended (Use of restraint devices)

Subclause (1) replaces subsections 155(1) and (2) with a clearer process for the superintendent of a detention centre or a person authorised by the superintendent to appropriately use an approved restraint on a detainee. This can occur if the superintendent or authorised person believes on reasonable grounds that restraint is necessary to either prevent an imminent risk of the detainee inflicting self-harm, or harm to another person, or seriously damaging property. This can also occur to prevent the detainee from engaging in conduct that would endanger the safety and security of any person who is within the precincts of the detention centre, including the detainee, or seriously threaten the security of the detention centre. This is to be consistent with permissible use of force under amended section 154.

New subsection (2) provides that a superintendent or person authorised by the superintendent may appropriately use an approved restraint on a detainee if the superintendent or authorised person believes on reasonable grounds that the detainee is likely to attempt to escape the detention centre or is being escorted outside the detention centre and is likely to attempt an escape. This makes it clear that if there is a reasonable belief that a detainee is likely to try and escape inside or outside a youth detention centre, then restraint devices may be appropriately used.

Subclause (2) is a technical amendment to change the words from 'appropriate' under section 155(3) to the words 'appropriately use' to describe how a restraint to may be used in subsections (a)-(c).

Clause 9. Section 155A amended (Separation of detainees)

Subclause (1) inserts a new subsection before section 155A(1) to expressly exclude certain circumstances from being included in the strict provisions about when separation from other detainees is permitted under that section.

This new subsection clarifies that separation under section 155A does not include when a detainee is securely accommodated in the detainee's room overnight, during a reasonable and necessary lockdown period of the detention centre, when the detainee may be separated from all other detainees having regard to the age or gender of the detainee, during an emergency situation or any other circumstances, prescribed by the Regulations. Within youth detention centres and as a necessary adjunct to the superintendent's obligation to maintain order and ensure the safe custody and protection of all persons in a detention centre under section 151(3), there are situations in which a detainee may be 'separated' from one or more other detainees where the formal provisions around separation introduced in the *Youth Justice Legislation Amendment Act 2018* were not intended to apply.

Subclause (2)-(4) amend section 155A(3) to clarify the process for authorising separation under subsection (2)(c).

Subclause (3) deletes the reference to an 'emergency situation' in subsection (3)(a) and subclause (3) inserts a new subsection (3) after section 155A(3) to make a clear distinction how authorisation for separation works generally and specifically in an emergency situation.

Under subsection (3A) authorisation may only be given if no other course of action is reasonably practicable in an emergency situation or where a detainee is required to be separated other than in the detainee's room as mentioned in subsection (1AA)

Clause 10. Section 161 amended (Search of detainees)

Subclause (1) amends section 161(1) to add the words 'or a pat down search' to allow the superintendent or a member of the staff of a detention centre to direct a detainee to submit to a screening or pat down search in certain situations. These situations include when the detainee is admitted to the detention centre, when the detainee temporarily leaves and returns to a detention centre or when they are transferred to or from another detention centre. This important change is necessary to be able to detect potential weapons or drugs that are not identified during a screening search. This includes being able to detect wood, pens and pencils on detainees.

Subclause (2) amends subsection 161(2) by adding two paragraphs (a) and (b) that describe when a screening or pat down search may be necessary. The superintendent may direct the detainee to be searched if the superintendent believes on reasonable grounds that the search is necessary to ensure the safety of any person within the detention centre or to ensure the security of a detention centre. This makes it clear that a search can be conducted proactively to prevent a reasonably foreseeable risk of detainees attempting to conceal prohibited items for later use as a weapon or other harmful substances. These items would not be identified through a screening search. These searches should be available for staff to use to manage the safety and security of detainees and people in the detention centre.

Clause 11. Section 168A inserted

This clause inserts a new section 168A 'Transfer of detainee to another centre' to create an express power in the *Youth Justice Act 2005* for a detainee to be transferred from one detention centre to another. This express power is made in addition to the superintendent's powers under section 152(1).

Transfers between youth Detention Centres occur regularly due to overcrowding, concerns for safety and security of the detainee, to allow a detainee to be closer to family and other supports, and to move detainees in the event of an emergency.

Clause 12. Repeal of Act

This is a standard clause which provides that the *Youth Justice Amendment Act 2019* is repealed on the day after it commences.