

CHILDREN AND YOUNG PEOPLE (PLACES OF DETENTION) ABORIGINAL AND TORRES STRAIT ISLANDER RESIDENTS STANDING ORDER 2007 (No 1)

Disallowable Instrument DI 2007-3

made under the

Children and Young People Act 1999, Chapter 14, Standards and Standing Orders –
Section 403 (Standing Order-Making Power).

EXPLANATORY STATEMENT STANDING ORDER – ABORIGINAL AND TORRES STRAIT ISLANDER RESIDENTS

1. INTRODUCTION

The Children and Young People Places of Detention Standing Orders comprise 13 individual Standing Orders, 11 of which are notified as part of this suite of Disallowable Instruments. The Searches and Behaviour Management Strategies Standing Orders, notified in DI2005-167, are yet to be revised and remain in force, subject to DI2007-1.

The Standing Orders set out minimum standards to be met by all staff when carrying out their duties in an Institution. They provide a specific set of directions to enable all staff to implement the provisions of the *Children and Young People Act 1999* (the Act), *Human Rights Act 2004* (the HR Act) and the *Public Sector Management Act 1994*. All staff must apply these Standing Orders when carrying out their duties within an Institution. Some Standing Orders also specify requirements of other people in their dealings with a resident or an Institution.

2. CHANGES IN STANDING ORDERS

New Standing Orders

The new Standing Orders are:

- Standing Order – Provision of Information, Review of Decisions and Complaints
- Standing Order – Records and Reporting
- Standing Order – Aboriginal and Torres Strait Islander Residents
- Standing Order – Admission and Classification
- Standing Order – Health and Wellbeing
- Standing Order – Visits, Phone Calls and Correspondence
- Standing Order – Safety and Security
- Standing Order – Use of a Safe Room
- Standing Order – Use of Force
- Standing Order – Police Interviews
- Standing Order – Death in Custody.

3. NEED FOR NEW STANDING ORDERS

In 2005, the *Children and Young People Act 1999* (the Act) was amended to provide that the Minister may make Standing Orders relating to a place of detention, by way of a Disallowable Instrument (s 403). Quamby Youth Detention Centre (Quamby) is a place of detention and is the main location at, or in relation to which, these Standing Orders relate.

27 Standing Orders were made under this provision in 2005.

The need for new Standing Orders has arisen out of statutory compliance work being undertaken by the Office for Children, Youth and Family Support in the Department of Disability, Housing and Community Services, and as part of a range of improvements to service delivery in youth justice, that include alignment of practice with human rights requirements.

In early April 2005, the Human Rights Commissioner agreed to audit Quamby and its compliance with the *Human Rights Act 2004 (HR Act)*. The new Standing Orders address the recommendations made by the Human Rights Commissioner in her 2005 audit.

4. CONTEXT AND DESCRIPTION OF KEY TERMS

The term "Institution" is used throughout the Standing Orders. For the purpose of the Standing Orders, an Institution is a place that has been declared an Institution under the Act; and a place that has been declared a shelter under the Act, if the place has also been declared as an institution under the Act. The use of this term with this definition allows the Standing Orders to apply to Quamby and any other place that meets the criteria of the definition. This means that, for example, if Quamby is evacuated in an emergency, and residents moved to another place that meets the definition of Institution, the Standing Orders will continue to apply. The definition also provides that the Standing Orders do not apply at a place that is declared a shelter under the Act, but not also an Institution.

Quamby is the only permanent place in the ACT that meets the above definition for Institution. Quamby accommodates male and female children and young people aged 10 or older who have been refused bail, have been remanded to a shelter or sentenced to an institution by ACT Courts. A young person aged above 18 may remain at Quamby to complete a sentence imposed on the young person as a juvenile.

The term 'resident' has been used in the Standing Orders to refer to children and young people detained in an Institution to avoid any confusion about which children and young people are referred to.

Staff of an Institution must provide services to maximise rehabilitation of residents and their reintegration into the community upon release. Staff of an Institution must ensure residents are detained in a safe and secure environment, with living conditions that meet the minimum requirements specified through the Standing Orders. These include a requirement to consider the specific individual characteristics, strengths and needs of each resident, including their vulnerability as a child or young person, perceived maturity, sex, abilities, and cultural identity.

The Standing Orders recognise that children and young people who offend may be particularly vulnerable due to a wide range of risk factors and may have already experienced significant early trauma and/or adversity. Children and young people who come into contact with the

justice system may have specific difficulties in inter-personal functioning, understanding and impulse control issues. The Standing Orders seek to reduce any further psychological harm while a child or young person is resident in an Institution; they therefore stress the rehabilitative and therapeutic role of all staff working in the Institution.

The Institution also provides residents with a range of programs and services including educational, vocational and health services, that are not specified in or governed by the Standing Orders. This is reflected in individualised care plans, which are developed as part of the case management process.

The Institution manages residents in such a way that acknowledges their needs and will provide the opportunity to develop in socially responsible ways. Consideration has been given to the particular needs of Aboriginal or Torres Strait Islander children and young people and to the recommendations of the Royal Commission into Aboriginal Deaths in Custody. The Department is committed to supporting the needs and special considerations for Aboriginal and/or Torres Strait Islander children and young people.

5. ENGAGEMENT WITH HUMAN RIGHTS

Given the nature of an Institution as a place of detention for children and young people, the Standing Orders inevitably engage with a number of civil and political rights set out in Part 3 of the *Human Rights Act 2004* (HR Act).

Although all rights in the HR Act are universal and fundamental in nature, some rights are absolute for example, s.10 (Protection from Torture and Cruel, Inhuman or Degrading Treatment). This right is not subject to any limitation, and all of the Standing Orders reflect this.

The Standing Orders have been written to ensure that, where they engage with human rights, the engagement meets the requirements of section 28 of the HR Act, including satisfying the requirement that intrusions on human rights are the least intrusive and are proportional to the objective they seek to achieve.

The following human rights are engaged with to some extent by all the Standing Orders.

S.9 (Right to Life). All Standing Orders engage this section regarding the positive duty to protect the life of someone in the care or custody of the state. For example, the safe operation of an Institution requires that the staff protect any resident from causing harm to themselves.

S.11 (Protection of the Family and Children). All children or young people are entitled to protection which takes into account their vulnerability because of their age. Protection of a child or young person with high and complex needs in a detention setting may require the balancing of considerations when making decisions, particularly regarding protection from harmful influences and risk situations. When it is determined that action needs to be taken to protect a child or young person, staff must ensure that they comply with the directions outlined in the Standing Order.

S.12 (Privacy and Reputation). All Standing Orders engage this section because of the nature of an Institution. There may be a duty of care requirement or a safety and security requirement to engage with this principle; for example, high level monitoring by way of visual

observations and video and audio surveillance. The circumstances that give rise to this are when a resident is, or is at imminent risk of being, extremely agitated, such that the resident's behaviour is causing or is likely to cause physical harm. In these incidents, constant observations/ monitoring are appropriate to ensure the resident's wellbeing. It is noted that staff members must be respectful of the dignity of the resident.

S.13 (Freedom of Movement). All Standing Orders engage this section because of the nature of an Institution. Freedom of movement within an Institution is dictated by the nature of a closed environment. Safety and security of both individuals and an Institution are paramount considerations. Prevention of escape and the maintenance of the good order of an Institution are also key requirements. However, the Standing Orders require staff always to use the least intrusive methods to achieve these objectives.

S.15 (Freedom of Association). Given the nature of an Institution, there will be times when freedom of association of individuals within an Institution and with visitors to an Institution may require balancing with the requirements to ensure safety and security and provide therapeutic interventions to residents.

S.16 (Freedom of Expression). All Standing Orders reinforce that all residents, family, visitors, those with parental responsibility and staff have the right to seek and receive information. As part of the rehabilitation and therapeutic process, there is a positive duty to encourage full participation by all members of these groups in decisions that affect them.

S.19 (Humane Treatment when Deprived of Liberty). All Standing Orders engage this section. Limitations will be based on the need to balance considerations when decisions are being made rather than paramountcy for particular principles. For example, given the small population of young people in an Institution in the ACT, considerations of separating convicted from non-convicted residents will be balanced with considerations taking account of the residents' needs and special requirements according to their age, personality, sex, type of offence, mental and physical health and the safety and security aspects.

S.20 (Children in the Criminal Process). All Standing Orders engage this section as all children and young people at an Institution are involved in a criminal process. The Standing Orders reflect that there is a positive duty to treat children and young people appropriately and as normally as possible within an Institution.

Engagement with other specific human rights, or particularly strong engagement with the above-mentioned human rights (that are engaged to some extent by all Standing Orders) by this Standing Order is discussed in Section 6 below.

6. STANDING ORDER - ABORIGINAL AND TORRES STRAIT ISLANDER RESIDENTS

The objective of this Standing Order is to recognise the additional culturally specific needs of Aboriginal and Torres Strait Islander (ATSI) residents taken into custody and to provide staff of an Institution with guidance on how these needs may be met.

This Standing Order has been written in recognition of the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system and the history of significant disadvantage experienced by Aboriginal and Torres Strait Islander people.

The Senior Manager will be responsible for the implementation of staff training to support the direction and guidance provided in this Standing Order to enable staff to develop an understanding of the history of Aboriginal and Torres Strait Islander people and the issues currently faced by these communities. The training will include (but not be limited to) relevant information from both '*Bringing Them Home: The Stolen Children Report*' and '*Royal Commission into Aboriginal Deaths in Custody*'.

This Standing Order recognises that ATSI residents do not come from a static and/or homogeneous culture and that the services required to meet the needs of each ATSI resident will be drawn from all sectors and services within the broader community. Service delivery decisions will be undertaken in consultation with each resident and, where relevant, his/her support network. In addition, staff will be guided by the principles of the *Children and Young People Act 1999*.

Summary of Sections

Section 1. Working with and Understanding Aboriginal and Torres Strait Islander Residents

This section is a guide for staff in their therapeutic and rehabilitative roles in working with Aboriginal and Torres Strait Islander (ATSI) residents. It explains the role of staff as part of a collective effort across the service system to address the over-representation of ATSI people in custody. It describes the complex underlying issues that need to be taken into consideration.

This section also provides a summary of the major principles that need to be embraced by staff to address the additional needs of ATSI residents. Staff are directed to consider the health needs specific to ATSI residents, the importance of kin and extended family relationships and the obligations that devolve from them, as well as the particular impact that detention and separation has on Indigenous residents and their families. The placement of Indigenous residents in conjoining rooms, where possible, is also recommended, regardless of the other factors influencing placement, for example, age or legal status.

This section particularly identifies to staff that Indigenous culture is a living culture and continues to develop and that there are, therefore, a diverse range of views and opinions held within the Indigenous community. As a result, staff are directed to seek the views of residents, their families and communities about their needs, not stereotype or make assumptions about cultural matters.

Examples provided in this section are not exhaustive and are not intended to limit the way a consideration or principle is applied. Rather, the use of examples aims to encourage thinking in an operational perspective against the principles discussed.

Section 2. Application of this Standing Order

This section seeks to widen the scope of programs made available to ATSI residents to include culturally-specific programs and services and directs staff of an Institution to work in a supportive way to encourage ATSI residents to engage in these programs and services.

This section recognises that many ATSI residents can benefit from positively engaging with the Indigenous community and accepts that the Institution's Senior Manager and staff have a responsibility to arrange and promote culturally-appropriate events and undertake training to improve their own understanding of the ATSI culture.

This section also acknowledges that all staff are responsible for forming and maintaining positive relationships with all residents through regular contact, liaison with families, carers and cultural agencies and ensuring that the resident's spiritual or cultural needs are met through the case management process.

Section 3. Identification

This section directs staff not to make assumptions about the nationality or cultural background of any resident, based on observation or local knowledge. It requires that each resident is asked to self identify his/her nationality or cultural background. This section further requires that staff of an Institution will confirm the nationality or cultural background of any resident transferred to the Institution and that all information on residents' nationality or cultural background will be stored appropriately and used to ensure that, while at an Institution, residents will be managed with respect to their cultural needs and receive appropriate support.

Section 4. Notification and Access to Case Management Unit

This section outlines the requirement for staff to notify the Case Management Unit within a specified time frame, whenever there is a new ATSI resident admitted to an Institution. This section stresses the importance of staff keeping the resident informed of the progress of the referral and to offer any additional support required. The importance of obtaining the informed consent and protection of a resident's right to privacy is reflected in this section.

Section 5. Provision of Information, Review of Decisions and Complaints

This section outlines to staff their role in facilitating the provision of information, review of decisions and complaints according to the Standing Order. This section requires staff to deal with these issues in a respectful manner giving as much information and assistance as required.

Section 6. Records and Reporting

All reports should be placed on a confidential individual file, which is updated regularly and accessible only to authorised persons. The requirements are set out in Standing Order – Records and Reporting and are compliant with the requirements of the DHCS Records Management Plan (*Territory Records Act 2002*). This section outlines the requirement for staff to complete fully all required reports before the completion of their shift, unless otherwise approved by the Manager.

Engagement of *Human Rights Act 2004*

This Standing Order engages the following sections of the *Human Rights Act 2004*: s.8(3) Recognition of equality before the law, and s.27 Rights of minorities.

Under s.8(3) of the HR Act, all residents should be provided equal treatment and not be discriminated against in any way. The Standing Order provides for differing treatment for residents who have identified as Aboriginal and/or Torres Strait Islander persons, allowing programs and services to be tailored to the individual needs of residents and encompassing culturally-appropriate services. These provisions are designed to recognise and address particular needs of Aboriginal and Torres Strait Islander persons, such as their poorer health status than non-Aboriginal and Torres Strait Islander persons, and particular cultural and kinship considerations. In addition, provisions of this Standing Order allow staff to tailor service delivery to Aboriginal and Torres Strait Islander residents in a manner that is consistent with the requirements of s.27 of the HR Act.

This Standing Order, along with the staff handbook and training, are written with consideration of the National Framework of Principles for Delivering Services to Indigenous Australians, an overview of *Bringing Them Home: The Stolen Children Report* and the recommendations of the *Royal Commission into Aboriginal Deaths in Custody*. This will provide staff with a better understanding of the issues faced by Aboriginal and Torres Strait Islander families. With this understanding, staff will be better informed and in a more appropriate position to actively support the application of s.27 of the HR Act.