

CHILDREN AND YOUNG PEOPLE (PLACES OF DETENTION) POLICE INTERVIEWS STANDING ORDER 2007 (No 1)

Disallowable Instrument DI 2007–10

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 – POLICE INTERVIEWS

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*. 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 - POLICE INTERVIEWS

The *Children and Young People Act, 1999* and Division 3 of the *Crimes Act 1914* (Cwlth) specify requirements for the interviewing of children and young people by police in circumstances where police suspect or believe that the young person may have committed or be implicated in the commission of an offence.

The objective of this Standing Order is to establish a consistent operational framework for the interviews conducted by police within an Institution.

The principles underpinning the Standing Order are:

- acknowledgement of the psychological and emotional vulnerability of residents of an Institution,
- that staff of an Institution will support and assist the police in interviewing residents by providing an appropriate environment for this to take place and in accordance with the Standing Order,
- that staff of an Institution will provide all necessary support and assistance, including culturally-appropriate assistance, to allow residents to participate fully in an interview,
- that staff will respect and support residents' rights to make informed decisions about their participation in an interview, and
- that issues of security and good order are given priority in operational terms.

In this Standing Order the major role of an Institution is to assist in the facilitation of police interviews and the main engagement with the *Human Rights Act 2004* will occur with the police.

Summary of Sections

Section 1. Police Interviews of a Resident in an Institution – as a Suspect in a Criminal Investigation

This section describes how police may have access to residents in an Institution for the purposes of investigating a criminal offence, but may not remove the resident to another place (eg. a police station or crime scene) without first obtaining a court order or warrant to do so.

The section also sets a preference for police to conduct these interviews during normal business hours and with reasonable notification so as to ensure minimal disruption to the day-to-day activities of the resident or the functioning of an Institution.

Section 2. Police Interviews of a Resident at an Institution - as a Complainant or a Witness

This section outlines the process for police interviews for the purpose of receiving a complaint from a resident who has been a victim of an alleged criminal activity either at an Institution or outside, or who is a witness to alleged criminal activity within an Institution or in the community. It outlines the Manager's role in arranging the interview, ensuring that the resident is appropriately supported and providing any available evidence held at an Institution.

Section 3. Rights of Resident

This section details the Manager's role to ensure that a resident is given every assistance to participate fully in a police interview. This section of the Standing Order is written with the understanding that residents are particularly vulnerable and may lack the maturity, skills, experience and resources to protect their own interests and will need to be encouraged to participate in decision-making as far as they are able. It emphasises a resident's right to refuse to participate in a police interview and the responsibility of the staff of an Institution to ensure that the resident is supported and understands the process. Staff are requested to support a resident's decision not to continue with an interview and directs them to terminate the interview. The Manager must ensure a signed record of this decision is placed on the resident's file.

This section also requires staff to apply the appropriate sections of the *Children and Young People Act 1999* and the *Crimes Act 1914* (Cwlth). The Manager is responsible for ensuring that an appropriate support person or an 'Interview Friend' (as defined in the Crimes Act) is present during an interview and that such a person is acceptable to the resident and agrees to promote the best interests of the resident.

Section 4. Before Conducting an Interview

This section requests that police contact an Institution to request an interview of a resident and give maximum notice of when the interview will occur. The Manager will, on request by the police, ensure that an appropriate room is available that will grant an appropriate level of privacy for the duration of the interview. The scheduling of an interview will also take into account scheduling of lockdown periods or meals, etc, to ensure that an interview can continue for an appropriate amount of time without interruption. The Manager will ensure that if it is necessary a resident receives appropriate breaks for meals, rest, etc.

Section 5. Use of an Interview Friend

The objective of this section is to ensure that residents are aware of their right to be supported during the interview process and that there is an acknowledgement that the young persons do not feel unduly pressured to participate and that their privacy is respected.

This section of the Standing Order reflects the provisions of the *Crimes Act 1914* (Cwlth) s.23K Persons under 18, and the *Children and Young People Act*, which stipulate the requirements for a child or young person to be appropriately supported by an Interview Friend, as defined in the Crimes Act, during a police interview. If a resident is an Aboriginal or Torres Strait Island person, the Manager will further ensure that the resident is aware of his/her right to have access to an Interview Friend from an appropriate Aboriginal or Torres Strait Islander Legal Service or through the Public Advocate's Interview Friend program. The section also contains a requirement to ensure that staff allow an Interview Friend and a resident to have appropriate time to prepare prior to the conducting of interview.

The Manager of an Institution will ensure that training is available to interested staff so that, if they are called upon to act in this capacity, they have an understanding of the role they are to play.

Section 6. Interviews Without the Presence of an Interview Friend

This section acknowledges that police may, if there is a risk of death or serious injury to a person or serious damage to property, interview a resident without the presence of an Interview Friend. The Manager will ensure that, under these circumstances, a staff member will act as an observer during the interview. The staff member is encouraged to support the resident with an understanding of his/her vulnerability and to act to terminate an interview if the resident is unsafe or distressed.

This section emphasises a resident's right to refuse to participate in a police interview and the responsibility of the staff of an institution to ensure that the resident is supported and understands the process. The Manager will ensure that a signed record of this decision is placed on the resident's file.

Section 7. Police Firearms in an Institution

This section describes the requirements for the storage of police firearms when police enter an Institution to interview a resident. If a police officer refuses to comply with this request, the officer is to be refused access unless otherwise approved by the Manager.

Section 8. Counselling and Support

This section outlines the need to make appropriate support and assistance available to residents on request from the resident or Interview Friend. If a resident is showing signs of

distress during or following a police interview, or such a request for support is made, the Manager will ensure that an appropriate health professional or suitable support person is available to provide him/her with assistance. If it is appropriate, the Manager may request that the interview be postponed or delayed to allow this support person to be available to ensure the emotional/mental wellbeing of the resident.

Section 9. Records and Reporting

This section requires staff to comply with Standing Order – Records and Reporting, requiring the creation of records documenting the management of residents in compliance with *Territory Records Act 2002*. Staff are required to complete relevant reports prior to the completion of their shift, unless authorised otherwise by the Manager, to ensure as far as possible that an accurate a record of events is completed.

Section 10. Provision of Information, Review of Decision and Complaints

This section instructs staff in relation to the provision of information and review of decisions and complaints. It stresses the responsibility of all staff to facilitate this process in a respectful manner and ensure that the complainant is kept informed and receives a timely response. This section also refers staff to Standing Order – Provision of Information, Review of Decisions and Complaints.

Engagement with the *Human Rights Act 2004*

This Standing Order engages a number of rights under the *Human Rights Act 2004* including those covered by the following sections:

s.22 Rights in criminal process, which encompasses:

- the right to be informed promptly of any criminal charge against persons in a language they understand,
- the right to communicate with a legal representative of their own choosing,
- the right to be told about the right to legal representation of their own choosing,
- the right to the free assistance of an interpreter,
- the right to silence; that is, the right not to give evidence that is self-incriminating,
- the right for children to be dealt with in a manner that takes account of their age and which promotes their rehabilitation, and,

s27 Rights of minorities.

The Standing Order provides for staff to ensure that provisions are made for the adequate protection of privacy, provision of support and assistance to be available prior to an interview taking place. It also acknowledges that the police have a significant responsibility to ensure that appropriate support (eg, an Interview Friend) is available to a resident prior to the conducting of an interview. The Standing Order also provides that appropriate support, in the form of access to translators, culturally-specific or significant support persons, or other special needs considerations, are made available where appropriate or necessary.